

**Law Office
of
HOWARD L. STOVALL**
2131 North Racine Avenue
Chicago, Illinois 60614
Telephone (773) 248-8896
Facsimile (773) 248-8897
E-mail Howard@Stovall-Law.com

SILENCE AS ACCEPTANCE IN CONTRACT

-- A BRIEF SUMMARY OF ARAB MIDDLE EASTERN LAW

There are many instances in which a company may want to revise its contractual arrangements without incurring the time and expense to obtain a written agreement from the other party. For example:

- a supplier might wish to revise its general terms and conditions of sale, without seeking a formal amendment to each of its numerous international distributorship agreements; or
- an employer might wish to revise its stock option plan, without seeking formal agreement from each of its employees located around the world.

Under legal principles in effect in each of the countries in the Arab Middle East, a binding contract is generally created upon the exchange of a valid offer and an acceptance. In most instances, silence in the face of an offer is not sufficient to constitute such acceptance. However, there are some limited exceptions in which silence can be deemed acceptance, as briefly summarized in the following discussion.

1. Silence under Islamic Law.

In Islamic law, an agreement depends on the mutual assent of the parties. In general, silence is not considered an expression of affirmative will, and the general Islamic law rule is that "No statement is attributable to a silent person". In fact, it is usually more natural to assume that silence is an indication of rejection rather than acceptance. In some cases, however, silence may be accompanied by circumstances that indicate acceptance, for example, when a response is legally required. In those instances, if the silent person wanted to object, he would have spoken, but he remained silent when the need arose to speak.

Thus, a complementary rule under Islamic law is that "Silence when the need arises is itself a statement".

The Ottoman-era Majallah, a compendium of Islamic law rules drafted in the 19th Century, includes a number of general legal maxims. Article 67 of the Majallah addresses the question of silence as acceptance:

No statement is imputed to a man who keeps silence, but silence is tantamount to a statement where there is an absolute necessity for speech. That is to say, it may not be said that a person who keeps silence has made such and such a statement, but if he keeps silence where he ought to have made a statement, such silence is regarded as an admission and a statement.

Under the section of the Majallah concerning sales, Article 104 states that "The conclusion of a contract consists of connecting offer and acceptance together legally in such manner that the result may be perfectly clear". However, Article 175 of the Majallah emphasizes that "a sale may also be concluded by any conduct of the parties which is evidence of offer and acceptance. In general, this is called a sale by conduct of the parties.

For example, where a purchaser without bargaining and without making any statement gives money to a baker and the baker in exchange delivers bread to the purchaser, a contract of sale is deemed to have been concluded. Similarly, where a purchaser tenders money and takes a melon, while the fruit vendor remains silent, a contract of sale is deemed to have been concluded.

2. Silence under Arab Civil Codes.

The general Islamic law rules mentioned above were adopted in the Jordanian civil code, which replaced the Majallah in that country in 1976. Article 95(1) of the Jordanian civil code states that "A person who remains silent shall not be deemed to have made a statement, but silence in the face of a circumstance in which a statement is called for shall be regarded as an acceptance". In addition, Article 95(2) of the Jordanian civil code describes two specific circumstances in which silence will be deemed acceptance:

In particular, silence shall be deemed to be an acceptance if there has been prior dealings between the contracting parties and the offer is related to such dealings, or if the offer is solely of benefit to the offeree.

The United Arab Emirates federal civil code, which was heavily influenced by the Jordanian law, contains an identical provision (Article 135), as does the Iraqi civil code (Article 81), the Egyptian civil code (Article 98), the Libyan civil code (Article 98), the Syrian civil code (Article 99), the Kuwaiti civil code (Article 44), and the Qatari civil code (Article 73).

Note that the second of these two circumstances is quite narrow, as the offer must be solely to the benefit of the offeree.

Under the first of these two circumstances, we might imagine an example where a manufacturer customarily and regularly buys widgets from a certain dealer. The manufacturer then writes to the dealer, asking him to send a certain quantity of widgets in one month at the market price. If that dealer does not reply, the manufacturer is entitled to assume that the dealer has consented to the supply. Another example where agreement may be inferred from the parties' prior course of dealings: a manufacturer in business with a distributor sends the latter a consignment of goods like those that they had previously traded. The silence of the distributor in this case would amount to acceptance of the shipment.

We might also imagine a company wishing to unilaterally amend an employee stock option plan. Given that the employer and employee have had previous dealings with the plan, the employer might simply send a notice of amendment to each employee, and assume that the amendments are effective if an employee doesn't object. Given that employee stock option plans are primarily a matter of contract under the laws of most Arab Middle Eastern countries, an employer should be able to obtain an employee's 'silent' agreement in this manner. (One way to further reduce the risk would be for the employer to make a payment to each employee by check accompanied with a letter stating that if the employee cashes the check, he/she will be deemed to have agreed to the stock plan amendments.)

Article 81 of the Iraqi civil code contains the following additional circumstance in which silence is deemed acceptance:

[T]he silence of a purchaser after having taken delivery of the goods purchased will be an acceptance of the conditions contained in the price list.

(A similar provision is found in Article 44 of the Kuwaiti civil code and Article 73 of the Qatari civil code.) It seems that this rule would also apply to general terms and conditions of

sale, limited product warranties and similar provisions contained in a seller's invoice, bill of sale or the like. In fact, Article 180 of the Lebanese Code of Obligations and Contracts specifically states that "Silence of the buyer of goods, after their delivery, amounts to acceptance of the clauses contained in the invoice".

On this basis, a manufacturer could conceivably revise its general terms and conditions of sale, for the current and all future transactions, by placing the amendments in the price list or invoice for a particular sale, without needing a formal acceptance from the relevant distributor. The distributor's acceptance of the particular shipment, and payment of the relevant invoice, would serve as a 'silent' agreement to the amendments.

Finally, the Egyptian civil code contains another provision (apparently reflecting Swiss law) on the efficacy of silence: "In a case in which an offeror could not have anticipated a formal acceptance, by reason of the nature of the transaction, in accordance with commercial usage, or on account of other circumstances, the contract is deemed to have been concluded if the offer is not refused within a reasonable time." An identical provision is contained in the Libyan civil code (Article 98) and the Syrian civil code (Article 99).

* * * *

There are inevitable legal risks with an approach that deems silence as acceptance. In most instances, a party is well-advised to seek an express written agreement from the other contractual party. However, in limited circumstances, a company can take some comfort from the fact that Arab civil codes recognize exceptions permitting silence to be deemed acceptance.

This memorandum is intended to summarize some general legal principles of contract in the Arab Middle East, but not to provide legal advice on any specific question of law. Please let us know if you have any questions or comments regarding the background information in this summary, or if we might assist in connection with any Middle Eastern commercial law matter(s).