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Unfair Terms in Bank Contracts from the Perspective of Fiqh and Iranian Law

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Abstract: Bank contracts have unique significance in the law and in public. One of these contracts is bank loan allocation contract. Because scholars have always considered the terms of this contract as the cause of disputes between banks and customers in the present study the researcher attempted to use relevant fiqh and law resources to investigate into the issue of unfair terms in bank contracts. The legal status of unfair terms in bank contracts was analyzed by studying the legal nature of unfair terms in contracts and comparing them with some terms in bank contracts. Furthermore, the terms stipulated in loan contracts and requirements in bank contracts were also studies. The results indicated that there are unfair terms in bank loan contracts as an instance of bank contracts. Since the customer is cognizant of these terms not only are they valid but also they do not cause the contract to be void. The customer can declare his objection to the terms by referring to competent judicial authorities and by interpreting or modifying the disputed terms, the magistrate can resolve the dispute and force the bank and the customer to accept the explicit concept of the terms.

Key words: Unfair terms, unreasonable terms, stipulation, contract, bank

INTRODUCTION

Unfair terms are the ones that the strong part includes in the contract by misusing his superior position and the other party's state of emergency and these terms are extremely in favor of the misuser. Among the applications of unfair terms, one can refer to the terms of liability disclaimer, penalty clause and additional and standard contracts and contract aimed at getting away with debt and criteria to distinguish these terms. In English law, this legal entity is a known concept and numerous laws have been passed for it. However, in Iranian law that no rules respond to this problem, the solution needs to be searched in the general rules of contracts. Although, many solutions have been proposed to deal with these terms it seems that the best solution is the principle of justice and fairness because it can best establish justice in a way that none of the parties will be oppressed. According to the principle of justice and fairness in Ja'fari jurisprudence, this commitment can be utilized for the parties in all contracts. The principle of justice and fairness can be a solution to most legal issues. Tendency toward fairness can be seen in some court verdicts. However, the title and concept of unfair contracts in Iranian law do not have an old history while there is a history as old as Islamic law behind the issue of necessity of balance in bilateral exchange in contracts and supporting the party against him the balance has been disrupted. However, the new theory of unfairness of contracts in Iranian law dates back to 1964 when Iranian Maritime law was passed by the-then Iran's Parliament Joint Committee. In this law, by formally supporting the weak party of contracts in particular issues, the court's right to modify or cancel the contract was predicted.

No individual or authority, even the lawmaker does not deny or interfere in the principle of necessity and respect to adherence to contractual and private relationships and it is necessary to consider the individual's free will in contracts. However with advent of big economic powers like banks and sometimes the exclusive rights that are necessary for producers and suppliers of goods and services it is nowadays unrealistic and extremist to expect the effectiveness of the will of the parties in determining the limits and extent of the mutual commitments. The present study was aimed at investigating into the concept of unfair terms and their applications in bank contracts in order to understand whether such terms can be cancelled or not. By studying the existing domestic laws and examining fiqh laws of some countries, it was attempted to find appropriate responses and legal solutions for unfair terms in contracts, particularly in bank contract in Iranian law.

Up to now, no studies have focused on unfair terms in bank contracts; however, unfair terms in contracts have been reported in different studies including those carried out by Shiroudi (2002), Manafi (2003), Kavusi (2010) and Ghanavati (2011).

MATERIALS AND METHODS

Due to the novelty of thepresent study's topic and restrictions in access to the needed resources, the present study was merely carried out using a descriptive-analytical method and data collection was conducted by taking notes and searching library and online resources relevant to the topic. Since the number of the resources on the issue is limited, the researcher tried to investigate the legal pattern of unfair terms in bank contracts so that they will be completely practical and real.

The literal meaning of shart (Arabic word meaning term): Shart is an Arabic word that is defined in dictionaries as follow:

- Vested obligation and recognizance
- Obligation to object and recognizance of it during the closure of the sale or other contracts
- Possession of one object by another one (Manzur, 1988; Bandarrigi, 2005)
- Terminological meaning of shart in law and fiqh

In terms of fiqh and law, "shart" can have the following applications:

"Shart"is the basis for legal actions such that the validity of the contract depends on availability of its "shart" (Ghanavati *et al*., 2000). For instance, terms that are referred to in the Article 190 Civil Law where the same definition is provided for the term "shart".

Term in the meaning of pending: Term is a contingent matter in which the contract parties make the provisions of their contract binding or pending in the future (completely or partially) (Langroodi and Jafari, 2001). The definition of pending contract in Article 189 Civil Law proves this meaning of "shart". "Shart" refers to stipulation (obligation and recognizance during the contract closure).

In this definition, "shart" refers to an agreement that has become a term to another contract due to the specific nature of the issue or mutual consent of the parties (Katouzian, 2001).

The concept and nature of unfair contractual terms

The term "unfairness" and consequently the contract and the contractual unfair terms are vague and inconclusive per se. An unfair contract is a contract in which the paid contractual price is more or less fair compared to market prices. This definition; however, has some flaws; for instance, in most cases, the contracts in the market are not closed between merchants and professionals and the parties are not equal in regard to awareness, experience, expertise, initial division of wealth and properties. On the other hand, in a contract that is closed in the market and the price which is agreed upon, it cannot be stated that the price is the real market price. It should be acknowledged that market price is meaningful if the parties know all facts and information about each issue of the contract. Moreover, the parties may be made obliged to the terms that they did not want or understand them or their legal significance.

In black dictionary, unfair contract is defined as "A contract or a term in a contract that is unfairly closed because of the superior trading power of one party is usually void due to its contrast with public discipline. In definition of unfair and unconscionable contracts, English law focuses more on contractual terms where one party misuses his superior trading power in a standard way and places heavy commitments on the other party. In addition, since one party may not have enough expertise, experience or knowledge about special standard contracts, the real meaning of the terms are not understandable for him and only after violation of the contract their real meaning will be known. In English law; therefore, due to the acceptance and capability of limited reference to the theory of unfair and unconscionable contractual terms in definition of unfair contracts, it should be pointed out that "A contract is considered unfair and unconscionable whose terms are against good will in trades and in which there is a remarkable difference between the commitments and rights of the parties which will lead to loss for one party and the consumer."

The nature of unfair terms from fiqh perspective

In Islam, the originality belongs to God's verdict, individuals' rights and authorities depend on His laws and provisions. God's rule, orders and prohibitions make a certain business permissible, obligatory, or forbidden. Therefore, "originality of God's rules and responsibilities form the basis for Islamic law and violation of the rules and regulations are considered to be exceptional. What is important is that converting the rules and laws (obligatory, forbidden, recommended, abominable and permissible) to one another is not legally permitted, i.e., obligatory things cannot be turned into recommended ones or vice versa or a right into a rule or into a non-transferable right, because it will be considered as violating God's rules and exceeding His authority" (Dastani, 1982). As a result the discussion of the purpose behind Islamic law system is considered in another way, "In other words in Islamic system the main legislator is God who is aware of all far and near affairs".

Islam is a perfect religion for human's prosperity and excellence. He is absolute perfection and His fundamental

principles are fixed an invariable. That how fixed and invariable principles can respond to human's different needs in different times and places can be attributed to some factors. In addition to Islam's fundamental principles, there are other rules and regulations monitoring the community's customs. Such customs are not only available in Islamic communities but also exist in all communities ranging from primitive and Arabic ones during the age of ignorance to today's societies. Meeting the basic needs of any community depends on their survival and progress. Customary phenomena include selling, renting, etc.

On the other hand, the interpretations proposed by Fuqaha (Islamic jurists) are effective in Islamic principles. In better words, this is the Islamic jurists and scholars that play a significant role in human's social and personal lives through the interpretations they select. Beside following their major goal, i.e., interpreting God's opinions and utilizing them in life, Fuqaha have also focused on the necessities and needs of communities of their time: such that although some contracts do not seem to be compatible with public contracts, they have been accepted based on the needs and requirements of the community (Katouzian, 1997). From this way of thinking, it can be concluded that the Islamic jurists have felt a kind of tendency toward interest and escape from evil in the nature of the principles and accepted them as God's goal. Particularly, the provision of some of the Quran's verses is clear enough that it cannot be ignored easily.

Ja'fari Fuqaha believe that God has focused all benefits and considered the present and the future. There are secondary rules for different issues aimed at harmonizing the law principles and social necessities and justice. As no-harm principle can modify most principles and distinguish the loss cases. However, apart from the secondary principles caused by loss and hardship, the jurist cannot base his Ijtihad (An Arabic word meaning diligence) on Istihsan (An Arabic word meaning preference) or accordingly extend or limit the scope of a principle. As a result, the necessity of adherence to social interests is one of the remarkable and effective factors in the implementation and interpretation phase of principles. Initial rules and principles that include all interests, losses and requirements of human's life were stipulated by God. In some circumstances; however, whenenforcing these principles and rules cause loss and hardship there are modifying rules that set the responsible parties free from the commitments and make the legislator's laws compatible with the necessities and requirements of life. No need to say it is clear that any law or custom than fails to adapt itself to the dynamic society and cannot provide solutions will soon be forgotten and faded away. The secret of Islam's immortality is that it adapts itself with the community's changes which are unavoidable and has principles and plans for all aspects of life. A religion that cannot change along with the needs and respond to life's requirements will cause sins among people.

The nature of unfair terms in civil law: According to Article 10, Civil Law, autonomy principle and provisions of contracts have been considered valid and all doubts about the penetration of uncertain contracts which is called initial terms have been resolved and in fact, permissibility of contracts has been accepted.This issue; however, does not mean indisputable obedience of civil laws from individualism school as believed by some jurists. In fact in this article the legislator is not authorized to mention the barriers of contractual freedom but can accept this initial principle that private contracts are particularly valid and pervasive. This article; however, should be put beside Articles 975 and 1295, the same law. Law and public discipline are considered as the barriers of contractual freedom. When we notice that the concept and scope of "public discipline" are not limited to the principles stipulated in the law but it has other resources other than law such as good behavior and public feelings, then we will understand that to what extent the necessity of compatibility among private contracts and moral principles and public feelings reduces the effect scope of private contracts, especially if the objection enforcement of contracts is against the moral principles and public feelings. On the other hand, laws as the barrier to the penetration of will are not limited to the general principles of civil law. Taking a quick glance at different laws on family relationships, relations between owner andtenant, insurer and insured-by and employer and employee and laws on sea and air transportation indicates that these individuals' freedom in closing contracts is limited to the fact that they put themselves in the frames pre-assigned by the legislator who has predicted all terms and consequences and hardly left any cases to be agreed upon by individuals. In better words in this draft of legal relations, the "legal organization" in which the individuals has placed determines his legal status and reference to his will or mutual profit have no place in interpreting the contract, its provisions and the commitment extent of the parties. Consequently, although the principle of the permissibility of contracts has been accepted, the legislation trend shows that social requirements and more importantly supporting the vulnerable stratum are among the most important policies and the legislator have modified the laws.

Stipulations in bank contracts: (Iran Newspaper, Special Issue on Islamic Banking. Retrieved on 14,09, 2015 from

http://motevalli.mihanblog.com). The issue of stipulation is one of the most important and widely used issues in the fiqh of contracts. Definition, rules and specification of types of such terms in bank contracts were exactly according to what is stipulated in fiqh and Islamic law. In bank contracts, the agreements between the parties can be stated as stipulations if they have valid circumstances. Cases such as the method of paying back the price, proxy, warranty and penalty clause are among the stipulations in bank contracts. These terms are usually stipulated explicitly in stipulation; therefore, in regard to the expression method they are considered as explicit terms. In contracts like installment sale, murabaha (Iran Newspaper, Special Issue on Islamic Banking. Retrieved on 14,09,2015 from http://motevalli.mihanblog.com) and Istisna(A contract of exchange with deferred delivery, applied to specified made-to-order items), it is possible that a special characteristic is assigned for the good as a term based on whichthe contract is closed. Now, if this term is not expressed explicitly in the contract, it will become an implied term, because the contract is based on the fact that the good has a specific characteristic.

Cases like the time and location of accomplishment of the commitment and health of the exchange items are enforceable if they are not stipulated other way. The notable point in implicit terms is that like explicit terms, they need to possess the validity of terms. Therefore, if a case misses the validity condition and is considered as the invalid term and is included in the contract implicitly, it will absolutely invalid. For instance, an invalid term like exploitation and asking for extra amounts in loan contracts is void whether it is mentioned explicitly or implicitly but the parties close the contract based on the delivery of the lent amount along with extra money. In this case, it seems that exploitation term is considered as constructive implicit term, so it is invalid. Furthermore, if in regard to the customs there is evidence indicating that the parties have closed the loan contract in a way that paying extra an amount is considered certain, it is implicit customary term which seems to be illegal. However, this term is not included in the contract but it is shown in the parties' behavior. In other words, customs verbally or practically distinguish whether the parties of loan contracts have decided extra amounts or not.

Because loan contract is considered as one of the tools to equip and allocate resources in banking system, it is important to take this issue into close consideration. According to banking regulations in using loan contract as one of the methods to allocate loans, active entities in the field of financing should avoidstipulating any type of extra amount or exploitation term whether implicitly or explicitly. For instance, the process of allocating benevolent loans may be in a way that the applicant should first lend a certain amount of money to the bank, so that the bank in return the bank lends him back double the amount. In this case, allocation of loan to individuals depends on the fact that they should first lend the bank some money. This procedure is termed as "loan in return for loan", i.e., the bank gives you a loan in return for the loan you gave it before. If something like this is explicitly included in the contract, it will sure be void because the term is usurious. Fuqaha have reached consensus on this matter. In this regard; however, one point is noteworthy: if the parties of a contract do not explicitly express such term but decide the contract by considering this term such that if the term is cancelled, the contract will consequently be cancelled. If an individual does not lend any money to the bank, the bank will not lend him, will this case be a constructive implicit term?

In the response to this question is yes, this term will be void because it is usurious although it is explicitly stated in the contract. Nevertheless, it seems that this issue requires more thinking because first the parties' real aim should be determined based on evidence like speech and behavior. Second, public customs should also have consensus on this issue that the parties have really closed the contract with the purpose of loan in return for loan and it is not just explicitly stated in the contract. In other words, deciding about this issue depends on how the bank and the customer have decided and their behavior is understood in the customs. In should be noted that some Fuqaha believe that if the procedure of allocating benevolent loans in return for investing is a banking rule but not as a term orally stated between the parties it is legally ok.

In this regard, Ayatollah Sobhani stated:

> "If the banks generally announce that they only gives loan to those who have some amount in their accounts for 6 months and the customer knowingly puts some money in his account and receives loan after some time, it is ok. But if such condition is set as a part of the contract, the contract will be usurious"

Ayatollah makarem shirazi pointed out:

> "If it is carried out as a contract between the individuals, it will be usurious. The only correct way is that the aim of the loan is totally benevolent but all parties morally adhere to the regulations of the bank without having religious or legal commitment"

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Moreover, in regard to the permission to receive compensation of delayed payment from the violating customers, implicit customary term can also be proposed as one of the fiqh and legal bases. It should be explained that if during the closure of bank contract it is stipulated that the customer compensate the losses for the bank if he fails to pay back his debts, despite of being financially capable, this term will be considered as the provision of the contract and the rule of "the believers in their terms" should be enforced. According to this term, the customer pledges to delivers a certain amount to the bank if he fails to pay back the loan on time. Therefore, banks can receive compensation only if it is stipulated during closure of the contract and if no term is stipulated between the bank and the customer, the violating customer cannot be asked for compensation. However, it seems that if this rule is accepted that the monetary value decreases due to reasons proposed by Fuqaha and if we take a more realistic look at the today's customs and refer to "implicit customary term", there is no need to stipulate any terms for reception of delay compensation. In fact without such term, bank can sue the violating individuals and ask for compensation, because these individuals have infracted to pay back the installments on the assigned date and caused losses to the bank which originates from failure to accomplish promises. As a result, the bank can ask for compensation by proving it was the one to assign the date. Therefore, if the debtor delays paying back hid debts and due to the remarkable increase in inflation rate, the bank will be faced with losses, the custom necessitates compensating for the loss and without compensation, the customs do not consider the debt payback actualized even if it is not stipulated in the contract. This is explicit customary stipulation which means legal and explicit stipulation accepted by the parties. In Article 522, Procedure Law, General and Revolutionary Courts (in civil affairs) which is discussed below asking for delay compensation does not depend on its stipulation in the contract. If the debtor fails to accomplish his commitment, despite of his financial capability, the creditor can ask for delay compensation given the remarkable decrease in monetary value based on the annual price index announced by the central bank. In this case, compensation of delayed payment does not even need proof or evidence and only delay in paying back and remarkable change in annual prices are enough to ask for compensation. Nevertheless, it is possible that the creditor has experienced not loss as a result of delay and in this case he can exempt the debtor from compensation. However; the Guardian Council on 18, 01, 1983 stated that receiving compensation of delayed payment in bank contracts is permitted only if it is stipulated in the contract as a term.

Contractual commitment and compensation in bank contracts: Compensation of delayed payment will be assigned to the debtor if he is supposed to pay an amount of money on an assigned date (the initial pledge) and he has delayed repaying the debt (violation of pledge) and the pledge to compensate for the loss (secondary pledge) has been assigned to him according to the law or contract.

Otherwise, the debtor is not responsible for compensation. If the compensation payment responsibility (secondary pledge) is assigned by the law, it is called "legal compensation of delayed payment" which is traditionally dealt with in Iran's Procedure Law. However, in cases where the compensation payment commitment is stipulated based on a private contract, it is called "contractual compensation of delayed payment" which is focused in the present article and in Article 230, Civil Law is mentioned as "commitment pledge". It is true that contractual compensation of delayed payment is in fact the result of the contract and the parties' will; however, given the validity of the circumstances, its rule and force majeure have recognized, protected and implement this product of will.

In most writings related to the issue of "compensation of delayed payment", this compensation (which observes the legal compensation of delayed payment and is legal and fundamental), with terms (contractual compensation) or "commitment pledge" (whichobserves the contractual compensation of delayed payment and is contractual and fundamental) is violated and this violation causes the bases, nature, components, conditions and the effects of these two entities to not be separated from each other as it is expected which in some cases it causes more ambiguities. Therefore, since legal writings have not focused on separation and explanation of the validity terms of "contractual compensation of delayed payment" or the term of "commitment pledge", so it can be useful to deal with this issue. The significance of this issue will be doubled where the basis for asking for compensation of delayed payment in bank contracts is on the same contractual term; therefore, explain these components and validity terms is highly significant.

The necessity of compatibility between commitment pledge and public rules of contracts and terms: Jurists do not have reached a consensus on the response to the question whether in addition to the validity conditions of the terms (Articles 232 and 233 Civil Law), general conditions of the contract's validity (Article 190 Civil Law) should be enforced on not. With this argument that terms have no independence in contracts but they follow a contract closed during it and that the necessity of adhering to Article 190 of the same law is not referred to in Article 232 Civil Law, some jurists believe that adherence to the terms stipulated in Articles 232 and 233 Civil Law are sufficient for the validity of the terms and that there is no need for observing the terms mentioned in Article 190 Civil Law (Imami, 1989; Shahidi, 2007). On the contrary, it has been argued that its subordination has no effect on its original nature as a result Article 190 Civil Law covers all contracts and commitments, consequently, stipulation terms have no privilege over other commitments in order to be exceptional compared to the whole rule (Katouzian, 1989; Langroudi, 2007; Shabani, 2006).

It seems that the recent view is closer to oblation, because if in Article 190 Civil Law the legislator takes into account terms and rules for the validity of contracts due to some considerations, stipulation terms should be adhered to and accepted based on the same considerations. Otherwise, deception will become prevalent in the laws. Consequently, provided that the parties cannot include an agreement in the form of a contract due to the lack of one of the terms mentioned in Article 190 Civil Law, the same contract can be implemented as one of the attached terms to another contract and by escaping from Article 190 Civil Law, this rule will be bypassed and the law will be deceived. Therefore, the necessity of saving the considerations taken into account by the legislators necessitates that Article 190 Civil Law to be considered as total and covering rules for contracts and terms. As a result, the authority of Article 190 will be saved and for example, the parties cannot implement a contract that has an illegal orientation. Taking the same arguments, furthermore, it is necessary to adhere to Articles 10 and 975 Civil Law. Therefore, it seems that Articles 10, 190 and 975 Civil Law also govern all contracts and stipulation or attached terms and it should be stated that including some special terms in regard to stipulation terms (in Articles 232 and 233 Civil Law) violates the necessity of general terms mentioned in other legal articles.

CONCLUSION

The problems involved in allocation of credits and loans can be discussed in some general aspects. The first one is related to and caused by the usury-free banking laws because in this law banks is used with the same conventional definition of capitalist economy and responsibilities and duties are assigned that it cannot tolerate or implement. The second problem involves the facts that banks are governmental, there is a governmental management over the banking system and there is a lack of competition among the banks which have caused the allocation of credits not to have sufficient efficiency. The governmental banking system has in fact caused the banks to be in service of the government as a treasure, whereby the government can resolve economic problems and finance budget deficit. By non-optimally allocating the credits, supporting inefficient governmental and non-governmental enterprises, determining the agenda and artificially keeping the interest rate low through the banking system, the government has caused a large volume of arrears in the banking system. All of these along with the obligatory characteristics of the allocated credits and specification of the banks' credit limits have created the grounds for more injustice. Another problem involved with credit allocation is related to financial repression which occurs when the interest rate paid to the customers by the bank or the amount of money that is received from the customers in return for paying the credits is lower than the inflation rate. In this case, an illogical and usurious profit will be created for credit receiver and using this surplus in other uses can bring him more profit. Therefore, this issue is a restrictive problem and barrier. Therefore, obligatory rates and differences will cause numerous problems. Another problem is related to the complexity of laws and regulations. In fact, terms and concepts are used in laws and contracts that lead to many problems because the bank authorities and customers are not well aware if them. Consequently, both customers and bank clerks need to be sufficiently aware of the content of the laws.

In regard to not paying bank profit as much as the current inflation by the banks, one can conclude that obligatory rates and ignorance of market prices will always lead to injustice. Therefore, it can be stated that injustice is resulted from this issue. At the present, the bank profit is not as much as inflation which creates the grounds for corruption and usury and adoption of illegal ways. Because as soon as one uses this privilege and usury, one can gain 10-15% windfall profit without any attempts. As a result, this issue cannot be justified in regard with economic and Islamic issues.

The entity of "compensation of delayed payment" is a compensation that is recognized by the legislator in order to protect the public discipline and compensate for the loss caused by violation of monetary commitments (delayed payment of debts caused by the contract or compulsory liability) and its amount and conditions are

determined by the legislator. In other words, the pledge caused by "legal compensation of delayed payment" is originated from law while the commitment resulted from "contractual compensation of delayed payment" is originated from contract and the parties' will. Therefore, there is no doubt that these two entities are different in terms of basis, nature, conditions and consequences as a result they cannot be violated. Consequently, the validity and correctness of the terms that govern these contracts are highly significant. Since stipulation term is the most important and the only possible way for the banks in guaranteeing the payback of the original amount along with the interest of the loans and the compensation of delayed payment, it is really important to pay special attention to the validity and correctness of the terms and if these terms and rules are neglected, banks will fail to ask for its rights. Due to different reasons, a lot of courts; however, vote for another way. Examining the judges' votes needs to be focused on in a separate study while the present study only focused on the point that paying attention to the validity and correction conditions governing "contractual compensation of delayed payment" will increase the banks' success in receiving their debts.

Bank loan allocation contract in usury-free banking system has a significant importance as the main basis for the contract between the bank and the customer. Bank loan allocation contract is among the contracts that is used to use bank loans and services while providing property bond by the customer. Since scholars have considered the stipulation terms of such contracts as the roots and differences between the bank and the customer, by investigatingthe nature of the stipulated terms of bank credit allocation contracts, comparing and contrasting them with a number of the terms mentioned in Articles 232-246 Civil Law and expressing the position of the terms, the legal terms were analyzed. Furthermore, the possibility of interpreting the contract terms according to available methods is investigated in Article 10 Civil Law and ultimately modification of these terms by the judge through the votes assigned by the courts and the role of magistrate in judiciary modification of these terms were examined in order to clarify the effect of modifying some of the terms on the rights and responsibilities of the bank and the customer during allocation of bank credits. The results of the present study indicated that this contract is a sample of the contracts dealt with in Article 10 Civil Law and if its stipulated terms that are mentioned as the action, result and rent in the contract are correctly used by the bank and the customer, they are not only valid but also do not cause the contract to become void and the customer can takes his complaint to each term to the judiciary authorities and the magistrate can to a large extent resolve the dispute by modifying the disputed terms and force the bank and the customer to accept the explicit concept of the terms.

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