Manchester Journal of Transnational Islamic Law & Practice
Volume 18, Issue 2: 68-84, 2022

Dissolution as a Remedy for Breach of Contract in Islamic Law as Compared with the Contemporary Laws of Arab Countries and International Instruments

Nisreen Mahasneh*

Abstract: This article examines the dissolution of contract as a remedy for breach of contract in Islamic law in comparison with the contract laws of selected Arab countries (Qatar, Egypt and Jordan) and international instruments, namely, the United Nation Convention on Contracts for the Sale of Goods, 1980 (CISG)[1] and the International Institute for the Unification of Private Law (UNIDROIT) Principles, 2016.[2] The focus of this article is on non-rescindable contracts, i.e., contracts that are not rescindable by nature such as sale, lease, works, and employment contracts. The comparative analysis in this article reveals that the approach in Islamic law on dissolution of contract as a remedy for breach of contract is fundamentally different from that adopted by laws in these Arab countries and international instruments. The differences are mainly embodied within the classification of contracts under each in addition to each of them having unique ethical, legal, and economic rationales behind its position.

Keywords: Law of Contract; Dissolution; Breach; Specific Performance; Remedy

---

I. INTRODUCTION

This article examines the approach adopted by Islamic law towards the dissolution of contract due to a breach such as non-performance, delay or defective performance. In doing so, a comparative analysis with laws of selected Arab countries, mainly Qatari, Egyptian and Jordanian laws, is presented. Here, while Egyptian and Qatari civil laws appear to be much influenced by Latin legal system, the Jordanian civil law is largely influenced by the Islamic law, but with certain legal rules also being derived from the Latin legal system. Likewise, an international dimension has been brought into the comparative examination conducted in this article by analysing the relevant perspectives of the UNIDROIT Principles 2016 and the CISG 1980. Indeed, these international instruments are a blend of both common law and Latin legal systems.

---

* Professor of Private Law, Qatar University College of Law. Email: nmahasneh@qu.edu.qa.

[1] The United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG) is an international convention that regulates the international sale of goods, it has been drafted by the United Nations Commission On International Trade Law (UNCITRAL) and issued in 1980, but came into force in 1988. It has been ratified so far by 95 countries all around the world. The Convention borrowed its rules from the Latin and common law legal systems. For more information about the CISG, see <https://uncitral.un.org/en/texts/salegoods> accessed 27 November 2022.

[2] The UNIDROIT Principles are legal rules and detailed texts that are issued by the Institute for the Unification of Private Law. They relate to contracts in terms of their conclusion, obligations and remedies. They are considered equivalent to what is usually found in the civil code of any country. The Principles are non-binding law (soft law) that can be adopted by the parties to be the applicable law in international trade contracts, and thus it is not a treaty or an international agreement that requires countries to adopt and ratify. The Principles are issued by the (UNIDROIT), an independent intergovernmental organization headquartered in Rome. The first version of the Principles was issued in 1994, followed by the 2004 version, then 2010 and finally 2016. For more information, see <https://www.unidroit.org/> accessed 27 November 2022.

The importance of comparative examination conducted in this article emerges from the fact that Islamic law fundamentally stands as an independent legal system. As such, Islamic law represents an ancient independent legal school and provides valid basis for compassion with other legal systems without necessarily aiming to compete with them or replace them. Indeed, due to their post-colonial genesis or else, Islamic law is not the prime source of legislation in civil dealings even in many Muslim majority countries. Hence, regardless of agreement or disagreement with Islamic law in general, a comparative analysis conducted in this article satisfies the need to understand the respective philosophies, rationales and rules in civil dealings with a view to determine the existing similarities and differences. It is believed that this comparative examination is useful to understand the respective approaches in the compared legal systems to determine the ensuing consequences for contracting parties and possible reflection in the existing civil laws in Arab countries.

This article, therefore, primarily presents the way in which Islamic law tackles the matter of dissolution of contract due to a breach as compared with the laws of selected Arab countries and the relevant international instruments. This article argues that fundamental differences in this regard exist between the approach of Islamic law on the one hand, and that of other legal systems on the other hand. Firstly, it remains open for discussion whether a breach of contract leading to dissolution of contract as a remedy exists under Islamic law in the first place, and whether it is a primary or a secondary remedy. Secondly, assuming that this remedy is available under Islamic law, the theoretical foundations of the Islamic law position on this are similarly debatable. This article has used the classification of contracts under Islamic law to provide the working apparatus to debate for and against the existence of the remedy of dissolution of contract due to a fundamental breach such as non-performance, delay or defective performance.

This article argues that unlike other legal systems under consideration in this article, there is no such doctrine of contract dissolution under Islamic law. Instead, Islamic law provides different rules for different contracts, which led jurists in Islamic law to individually analyse each class of contract independently - considering its conclusion, performance, rights, duties and termination - to conclude how a contract can be dissolved. However, this does not imply that different rules apply to each class of contract, but it is a methodology that was followed by classical jurists. This supports the notion that Islamic law is more practical rather than theoretical, and always aims at working out detailed solutions for each problem. Whilst a general and beforehand worked out theoretical doctrine may limit the ability to work on the details of each contractual issue, Islamic law appears here to be active and open forever.[3] Having said that, nothing prevents the contemporary Islamic jurists from inferring a general framework out of these principles.

This comparative analysis conducted in this article is developed as follows: part II examines the classification of contracts, although detailed conceptual discussions in Islamic law of contract in this regard are deliberately avoided with a view of limiting the scope of this article to the breach of contract. Part III analyses the core ideas of performance and remedies for a breach of contract. Likewise, Part IV evaluates the underlying rational and philosophy of dissolution of contract from different perspectives including ethical, legal and modern economics. Part V concludes the article by summarising the main outcomes of this research.

[3] Esmat Abed Al Majeed Baker, *Naẓariyyat Al-ʿaqd fi al-Fiqh al-Islāmī, Dirāsah Muqārnah Maʿa al-Fiqh al-Islāmī wa al-Qawānīn al-muʿāṣirah* (in Arabic) [*The Theory of Contract under Islamic Law, a Comparative Study with Contemporary Laws*] (Beirut: Dār al-Kutub al-ʿIlmīyyah 2009) 5-6.

II. CLASSIFICATION OF CONTRACTS

Jurists in Islamic law have distinguished contracts with the help of different classifications. These classifications have led the jurists to develop specific rules for each class of contract. Understanding these classifications is important to comprehend the way Islamic law of contracts works in general and also the way it tackles the question of dissolution of contract as a form of remedy for breach of contract.

A. General Classification of Contracts

Under Islamic law, contracts are classified into four main groups: 1) valid; 2) void; 3) *fased* (tainted); and 4) suspended. A valid contract meets the main contract pillars and conditions, being: 1) consent; and 2) subject matter. Consent obviously prerequisites capacity, and the existence and lawfulness of subject matter are required at the time of contracting. If any of the said pillars or their conditions is missing, the contract becomes void. Avoidance means that the contract does not produce any legal consequences, and cannot be ratified.[4]

Fased or tainted contract is developed by the Hanafi school,[5] and is defined as: "A contract that includes a condition that is neither required by the contract nor appropriate to it, nor is it customary among people".[6] *Riba* (usuary), duress, and deceit can render a contract as *fased*;[7] the remedy available for *fased* contract is the right to seek dissolution of the contract, unless the reason of its invalidity is abated.

Suspended contract is originally a valid contract, however, it lacks the fulfilment of a condition, which in turn enables one party to validate or avoid it. Nevertheless, the contract remains pending until either choice is made. The classic example of suspended contract is when a minor is contracting. Such a contract remains suspended until either the guardian's approval or the minor's approval once he or she reaches the legal age.[8]

Therefore, dissolution is available in several contexts under Islamic law. It is allowed, for example, when the contract is classified as *fased*. Dissolution is also allowed in all valid contracts in the case of termination by parties' mutual agreement, which is called '*ekalah*' and is available whether there is breach of contract or not.[9] However, dissolution does not apply to void or suspended contracts because those contracts have their own rules, in the sense that void contract is born dead and does not need any action to terminate it. Likewise, suspended contract only gives one party the option to ratify or not to ratify.

On the other hand, Islamic law allows dissolution in some circumstances and under certain conditions for even a valid contract. For example, lease contract becomes subject to dissolution

---

[4] Mohammed Ahmed Seraj, *Naẓariyyat al-ʿAqd wa al-Taʿasūf fi īstīʿmāl al-ḥaq mīn wijhat al-Fiqh al-Islāmī* (in Arabic) [*The Doctrine of Contract and Abuse of use of Right under Islamic law*] (Alexandria: Dār al-Maṭbūʿāt al-Jāmiʿīyyah 1998) 163-165.

[5] Abdallah Yousef Ibrahim, *īnḥīlāl al-ʿaqd: asbābahu wa athārahu fi al-Fiqh al-Islāmī wa al-qānūn* (in Arabic) [*Dissolution of Contract: Reasons and Consequences under Islamic Law*] (Ph.D. Thesis, Um Dorman University 2013) 113.

[6] Abd Al Razaq Al-Sanhori, *maṣādir al-ḥaq fi al-Fiqh al-Islāmī* (in Arabic) [*Sources of Right under Islamic Law*] Part Three (2nd edn, Al Halabi Publishers 1998) 128.

[7] Seraj (n 4) 166.

[8] ibid 182-183.

[9] Ahmed Al Zarqa, *al-Fiqh al-Islāmī fi thawbihī al-jadīd, al-madkhal al-fiqhī al-ʿām* (in Arabic) [*Islamic Law in its New Dress, The General Introduction*] Part One (9th edn, no publisher 1968) 525.

when the benefit of the leased property is lost. Also in the so-called situation of accidental excuses,[10] which may include a situation where the lessee dies and the leased property is above the needs of its successors, or the case where a person rents a place for its business and then the people of the place abandoned the entire surrounding area rendering the premises unfit for business.[11] In a sale contract, dissolution of a valid contract may take place if a third party proves its right over the sold property, leading therefore to depriving the buyer the ownership right. Paradoxically, not paying the rent in a lease contract may allow dissolution, but it does not when the price in a sale contract is not paid.[12]

B. Classification of Valid Contracts

Valid contracts are classified into two types: 1) non-rescindable (*lazem*); and 2) rescindable (*ghair lazem*) contracts. The research in this article is concerned with only non-rescindable contracts. However, and by a way of explanation, rescindable contracts are primarily valid ones, but with the ability of one party or both parties to dissolve them even if the other party does not commit any breach of contract. In other words, no fault is required. Further, there is no need to go through litigation or to seek the consent of the other party to rescind the contract. Rescindable contracts are classified into two types: 1) rescindable by nature; and 2) rescindable due to an express or implied option to dissolve contained in the contract itself.[13]

Rescindable by nature contracts are exclusively provided for under Islamic law, including but not limited to an agency contract, volunteer bailment, and lending contract. In agency, the agent or the principal may terminate the agency contact anytime provided that no harm is caused to the other party or third parties. Likewise, a bailor may ask for recovery of the bailment at any time. In lending contracts, either lender or borrower can revoke the contract. That is because the nature of such contracts inherently or by their nature entitle either party, or both of the parties, for the right to dissolute even if there is no fault on the other side.[14]

On the other hand, a contract may be deemed rescindable when it contains an expressed or implied term giving the dissolution right to either party, or both parties. These terms are called 'options' and they are exclusive to the following: 1) the option to rescind or ratify, which must be defined by a time, after laps of which and the option is not used, the contract turns to a non-rescindable one;[15] and 2) the option to inspect, which is found when a party to contract has not seen the subject matter of contract before or at the time of conclusion of contract. The option to inspect is an implied option and does not require to be expressly included in the contract. It is available until the contractor sees the subject matter of the contract and rescinds the contract or gives consent;[16] 3) the option to designate, whereby parties agree that the subject matter of the contract may be one of two to three things. This is an express option that needs to be specified in the contract, as well as naming the party having this right and a timeframe of the

---

[10] Ibrahim (n 5) 116.
[11] Ali Al Obaidi, *al-ʿuqūd al-musamāt, al-bayʿ wa al-ījār* (in Arabic) [*Law of Contracts, Sale and Lease*] (Amman: Dār al-Thaqāfah 2006) 362.
[12] Al-Sanhori (n 6) 227-229.
[13] Seraj (n 4) 191.
[14] Abed Alameer Kathem Zahed, 'naẓariyat al-ʿaqd fi al-Fiqh al-Islāmī' (in Arabic) [*The Doctrine of Contract under Islamic Law*] (2011) 4 (7) Forum Yearbook for Human Studies, the National Forum for Research in Thought and Culture 56.
[15] Adnan Al Sarhan and Norri Khater, *nūrī, sharḥ al-Qānūn al-Madanī, Maṣādir al-ḥqwq al-shakhṣīyyah (al-iltizāmāt) dirāsah muqāranah* (in Arabic) [*The Explanation of Civil Law, Sources of Personal Rights (Obligations), A Comparative Study*] (Amman: Dār al-Thaqāfah 2005) 224.
[16] ibid 229.

same;[17] 4) the defect option, which is an implied one where a party to a contract is entitled for dissolution if the subject matter appears to be defective that negatively affects its value. However, it must be proved that such party was unaware of the defect at the time of contracting.[18]

Each option has specific rules, and they apply to all types of contracts but not to rescindable ones by nature. Indeed, this article does not aim to further explain rules of rescindable contracts by nature or options to rescind contracts, but a brief discussion by way of introduction is deemed necessary to explain the idea of non-rescindable contracts.

As for contemporary laws, some similar rules can be found. For example, within some laws that follow the Latin legal system, such as Qatari and Egyptian Civil laws, a right is given to the agent or the principal to terminate the agency contract at any time, albeit with some restrictions mainly with regards to not prejudicing the right of the other party or a third party.[19] Furthermore, such laws allow for the inclusion of a term in the contract for the effect of dissolution by one party, simply due to the fact that contracting is based on the free will of the parties.[20] Hidden defects in sale and lease contracts are similarly regulated by such laws.[21] Thus, it is safe to conclude that counterparts to the legal rules of Islamic law do exist in contemporary laws, although they substantially vary with regards to the details, rational, and objectives.

As for the non-rescindable contracts, which are the primary focus of this article, they are all contracts that are neither rescindable by nature nor rescindable by way of an option. Examples of these contracts are sale, lease, works, and employment contracts. Non-rescindable contracts can be subject to dissolution under certain circumstances. However, the focus of this article remains on the dissolution due to contractual breach of one party to a non-rescindable contract. Therefore, termination for, for example, *force majeure* and where dissolution takes place by law and due to special contract conditions are all outside the scope of this article.

In the pretext, the term 'dissolute' does not differ from 'rescind', as the legal consequence of both is to terminate the contract. However, the term 'rescind' is preferred in this article as it is the closest possible expression of the Arabic word *ghair lazem*. The next section of this article addresses the following questions: would the innocent party in a non-rescindable valid contract be able to invoke dissolution due to a breach of the other party?

III. REMEDIES FOR BREACH OF CONTRACT

The general rule under Islamic law is that the contract must not be dissolved if one party fails to fulfil its obligation.[22] Dissolution is available in exceptional cases, as explained in Part II of this article. Indeed, those exceptional cases are not always attributed to the notion of contractual fault, which is widely recognized by contemporary laws and which embrace the concept of

---

[17] Seraj (n 4) 196.
[18] ibid 206.
[19] See Articles (734-736) of the Qatari Civil Code No. 22 (2004), and Articles (714- 716) of the Egyptian Civil Code No 131 (1948).
[20] See Article 171 of the Qatari Civil Code. See also Article 213 of the Jordanian Civil Code) and Article 147/1 of the Egyptian Civil Code.
[21] See Articles (455-462) and Articles (603-605) of the Qatari Civil Code. Articles (447-454) and Articles (576-578) of the Egyptian Civil Code and Articles (512-521) and (686-689) of the Jordanian Civil Code.
[22] Baker (n 3) 377, see also Al-Sanhori (n 6) 230, see also Ibrahim (n 5) 112.

contractual liability. As a result, under contemporary laws, dissolution of the contract stands as a primary remedy for the innocent party.[23]

A. Dissolution Is a Secondary Remedy

The question arises that in situations where one party unlawfully refuses to fulfil its obligation, or renders a defective performance, what options would be available for the innocent party? In principle, failure of one party to perform entitles the innocent party to insist on performance, and not to seek dissolution of the contract. It is therefore a true assumption that dissolution is a secondary remedy under Islamic law.

Unlike the situation in contemporary laws, Islamic law does not follow the classification of contracts as binding to one party as opposed to binding to both parties. Instead, it adopts a different classification of rescindable *(ghair lazem)* and non-rescindable *(lazem)* contracts. Under contemporary laws, only contracts binding to both parties can be subject to dissolution. Whereas under Islamic law dissolution can apply to only rescindable contacts.[24]

To this extent, the criterion used in contemporary laws to distinguish contracts binding to one party from contracts binding to both parties is in defining the obligatory party. Under the Islamic law, however, the criterion used to distinguish between rescindable and non-rescindable contracts is the right to dissolve the contract. In a way of approach, the contracts binding to one party under contemporary laws are equivalent to rescindable contracts by their nature in Islamic law.[25]

To further explain, dissolution under contemporary laws is attached to contractual liability, i.e., fault, harm, and cause. For example, dissolution is not foreseen in agency contract, because either of the principal or the agent can terminate the contract without having to submit a proof of harm or even fault. This very same termination under Islamic law is called dissolution, which still takes place without reference to contractual liability pillars that are not in place under Islamic law.

Under contemporary laws, dissolution of contracts binding to both parties is based on the concept of the mutual obligations of both parties, whereby the obligation of each party constitutes the cause of the other party's obligation.[26] However, Islamic law does not adopt this concept. For example, the obligation of the seller to deliver the goods is independent from that of the buyer to pay the price. Yet, Islamic law recognizes the so-called monetary option, which indicates to the seller's ability to stipulate in the contract that it is entitled for dissolution if the

[23] See Article 183/1 of the Qatari Civil Code, which states: "1. In contracts binding on both parties and imposing reciprocal obligations, where one of the parties fails to perform his obligation, the other party may, upon formal notice to the former, demand performance of the contract or its rescission, and may claim any damages caused by such failure to perform". Similar provisions are included in laws of other Arab countries, see, e.g. Article 246 of the Jordanian Civil Code and Article 157/1 of the Egyptian Civil Code.

[24] Jabbar Kathem AL Mulla, 'al-ʿaqd mīn ḥayth al-Luzūm wa ʿadamuh fī al-Fiqh al-Islāmī (in Arabic) [Rescindable and non- Rescindable Contract under Islamic Law] (2015) 36 (10) Journal of Islamic College, Islamic University 349.

[25] ibid 348.

[26] Mohamed Hanoon Jaafer, 'fikrat tarābuṭ al-iltizāmāt al-muṭaqābilah wa atharuhā fī al-ʿuqūd al-mulzimah lil-jānibayn' (in Arabic) [The Idea of Mutual Obligations and its Impact on Binding Contracts to Both Parties] (2013) 2 (4, 7) Journal of the College of Legal and Political Sciences, University of Kirkuk 7.

buyer fails to pay the price following the lapse of a certain time.[27] It is interesting to mention that the old Roman law did recognize the very same rule.[28]

Furthermore, Islamic law does not recognize a doctrine for cause in the contract, instead the Islamic law follows the so-called concept of 'content of the contract'. Content of contract is decided by Sharia; it refers to the genuine intent of contracting and reflects the same concept in every type of contracts. For example, the genuine intent in all sale contracts must be ownership, and the utilization in all lease contracts.[29] However, under contemporary laws, cause refers to the underlying intention of the contracting parties. Clearly, the cause of the obligation for one party stands as the other party's obligation. Hence, dissolution becomes based on the mutual obligations of the parties and the cause, the concepts that are not found under Islamic law.

B. Specific Performance Is the Remedy

The primary remedy available for breach of non-rescindable contracts under Islamic law is specific performance.[30] Other legal systems have different views concerning this remedy. Latin legal system treats it as a primary remedy similar to Islamic law, however, common law considers it as a secondary remedy. That is to say, the court will not force the debtor to perform unless it is proven that damages are inadequate.[31] Following the Latin legal system, Arab laws offer the innocent party the choice of either asking of specific performance or dissolution.[32] This is different from Islamic law since dissolution is not an option in Islamic law and specific performance is the only remedy.

One of the important means offered by Islamic law to the creditor to force the debtor to perform is using the right of withholding.[33] Withholding right gives the creditor in a sale contract, for example, the chance to refrain from delivering the sold goods until it receives the price.[34] Islamic law expands the application of this withholding right to other obligations, whether contractual or not. Hence, it may be seen as the alternative to dissolution, as it suspends the contract until performance is made.[35] Withholding under Islamic law is not limited to only contract binding to both parties, which is because and as it was mentioned earlier Islamic law does not adopt the classification of contracts as being binding to one party or both parties. Alternatively, withholding is rationalized on the basis of equality of the parties. That is to say, in non- rescindable contracts, a party to a contract is not forced to perform its obligation although it is due, if the other party's obligation has become due first but still not performed.[36] Further, the withholding may apply to a non-contractual relationship, the traditional example given for this case is when someone finds a lost animal and gives it care, here the

[27] Al-Sanhori (n 6) 218 & 230.
[28] Ibrahim (n 5) 112.
[29] Wahba Al Zhaily, *Al-Fiqh al-Islāmī wa adilatuhu, al-juzʾ al-rābiʿ, al-naẓariyyāt al-fiqhīyyah wa al-ʿuqūd* (in Arabic) [Islamic Law and its Evidence, Doctrines and Contracts] (Damascus: Dār al-Fikr 1985) 182-184.
[30] Jaafer (n 26) 22.
[31] Burrows A. S., *Remedies for Torts and Breach of Contract* (London: Butterworths, 1987) 295.
[32] See Article 183 of the Qatari Civil Code that provides for dissolution and Article 245 that provides for specific performance. See also the Egyptian Civil Code, Articles 157/1 and 203.
[33] Jaafer (n 26) 2.
[34] Baker (n 3) 377.
[35] Al-Sanhori (n 6) 217-218.
[36] ibid 243.

withholder/creditor can refuse returning the animal back to its owner until all necessary expenses spent to save it are recovered.[37]

While withholding extends to contractual and non-contractual legal relationships, refraining from the performance is another concept that is attached only to mutual obligations and based on the distinction between contracts binding to one party and contracts binding to both parties. All Arab laws that follow the Latin legal system recognize the concept of refraining from performance in a contract binding to both parties. Some of them further provide for the right of withholding to cover non-contractual obligations.[38] In brief, the right of withholding under Islamic law is a reflection of its position towards the classification of contracts; it indeed appears to be far broader than the concept of refraining from the performance.

Withholding option can only be resorted to when the time of performance by the debtor is earlier than that of the creditor. Here lies the importance of the right of withholding in Islamic law by privileging the withholder over other creditors.[39] However, if the creditor has already performed and the debtor decides to refrain, the only option available to the creditor is to ask for specific performance, which may take more than one form depending on the nature of the subject matter of the contract. For example, if performance relates to money, the creditor can execute on the debtor's properties to recover money owed by its debtor. However, if it is an obligation to take an action, then the judge must force the debtor to render the contracted work.[40] According to Islamic law, a debtor deliberately refraining to perform in cases where he or she is solvent with an intension to harm the creditor is a criminal act justifying imprisonment until the debtor complies.[41]

Interestingly, the majority of Islamic jurists are in agreement that it is not possible to claim damages for non-performance or delay. According to Sharia, damages are linked only to the destruction of the subject matter. Hence, damages, unlike modern laws, relate to actual loss of the subject matter rather than harm. This is because damages for delay or for non- performance are considered *riba* (usuary) which is prohibited in Islam.[42] However, in all cases where the subject matter of the debtor's obligation is destroyed by its fault, damages are allowed.[43] In addition, the calculation of the amount of damages in this case is totally different in Islamic law from that used in contractual liability. It is based on the value of the destroyed item at the time of the breach, which is known as '*daman* of contract'.[44] Notwithstanding, damages are only allowed when the destroyed matter is a specific thing; where it is a non-specific item, the debtor is obligated to carry out performance since the item is replaceable.[45]

---

[37] Abed Alrahman Jomaa, *al-wajīz fi sharḥ al-qānūn al-madanī al-urdunī athār al-ḥaq al-shakhṣī, aḥkām al-iltizām* (in Arabic) [Explanation of Jordanian Civil Law, The Effects of Personal Right, Effect of Obligations] (Amman: Dār Wāel 2006) 210.
[38] Withholding is provided for in Articles (280-284) and refrain from performance is provided for under Article (191) of the Qatari Civil Code. See also the Jordanian Civil Code, Articles Article 387-392 on withholding and Article 203 on refrain from performance.
[39] Al-Sanhori (n 6) 218.
[40] Seraj (n 4) 254-255.
[41] Adel Taha, *athār al-ʿaqd fi al-Fiqh al-Islāmī wa al-qānūn (dirāsah muqārnah)* (in Arabic) [*The Effects of Contract Under Islamic Law and Law, a Comparative Study*] (Ph.D. Thesis, Omdurman University 2007) 508.
[42] Seraj (n 4) 254-255.
[43] ibid
[44] Ali Al Khafeef, *al- ḍamān fi al-Fiqh al-Islāmī* (in Arabic) [*Damages under Islamic Law*] (Cairo: Dār al-Fikr al-ʿArabī 2000) 19.
[45] Al-Sanhori (n 6) 168.

Therefore, contemporary laws substantially differ from Islamic law when they provide the creditor with the option to seek specific performance or dissolution as well as damages. In other words, the creditor can departure from specific performance and ask the court for dissolution. Here, the court will examine the existence of requirements for dissolution, namely, being a contract binding to both parties, fault, loss, and causality between fault and loss. Once they exist, the court will likely rule for dissolution. Under Islamic law, on the other hand, the creditor does not have the option but to seek specific performance. And even when the creditor is awarded *daman*, the contract remains undissolved. *Daman* is an alternative performance in the sense that it is not a compensation for termination.

IV. RATIONAL AND EVALUATION

This section evaluates the approach taken by Islamic law in generally rejecting the remedy of dissolution, and always considering this remedy as a secondary one. In doing so, all underlying religious, ethical, legal, and economic justifications and considerations are evaluated, and compared with contemporary laws and international legal instruments, namely, the CISG Convention and the UNIDROIT Principles 2016, which are influenced by both Latin and common law systems.

A. Religious and Ethical Dimensions

The original remedy for breach of contract according to Islamic law is specific performance. Performance in this context constitutes a religious and ethical obligation. Several verses in the Holly Qur'an support this idea. For example:

> "And fulfil [every] commitment. Indeed, the commitment is ever [that about which one will be] questioned".[46]
>
> "And fulfil the covenant of Allāh when you have taken it, [O believers], and do not break oaths after their confirmation while you have made Allāh, over you, a security [i.e., witness]. Indeed, Allāh knows what you do".[47]
>
> "------[those who] fulfil their promise when they promise".[48]
>
> "O you who have believed, fulfil [all] contracts".[49]

Furthermore, Prophet Mohammed (May Pace and Blessings be Upon Him), assures the values of keeping promises, by saying that "Muslims are on their terms".[50] To this extent, performance becomes not a mere legal or ethical obligation, it is indeed part of religious belief.

According to Islamic law, rights and obligations emerging out of a contract are decided by Sharia and not the sole will of the parties. True that contracting parties create the contract with

[46] Qur'an: Surah Al-Isra, Verse 34.
[47] Qur'an: Surah An-Nahl, Verse 91.
[48] Qur'an: Surah Al-Baqarah, Verse 177.
[49] Qur'an: Surah Al-Ma'idah, Verse 1; Surah Al Muminoon, Verse 8, "And they who are to their trusts and their promises attentive"; and Surah Al-Ma'arij, Verse 32, "And those who are to their trusts and promises attentive".
[50] Khalid Ben Deef allah Alshalahi, *Kitāb al-Tibyān Fī takhrīj Wtwbyb Aḥādīth Bulūgh al-Marām* (in Arabic) [*The Book of Explanation in the Classification of Hadith*] Part 9 (Beirut: Dār al-Risālah al-ʿĀlamīyah 2012) 191.

their own will, and can decide whether to contract or not, and yes they agree on the content of their contract. However, performance as a consequence of such contract is a matter of Sharia. Hence, no party is entitled to escape performance. Performance by virtue of the Holy Qur'an represents the consequence of the contract. Consequently, dissolution claim is not acceptable. In case of non-compliance, specific performance is the only remedy.[51]

To further illustrate, Islamic law distinguishes between two concepts: 1) the effect of contract; and 2) the rights of contract. Effect of contract refers to its main purpose, i.e., transfer of property in a sale and utilization in the lease. Whereas rights of contract reflect the obligations it contains. Effect of contract takes place constructively at the time of its conclusion. Sharia defines this constructive effect, not the contracting parties. Hence, by merely accepting to contract, the effect of which is deemed to be impliedly accepted.[52] It remains that the parties must fulfil their obligations in order to enjoy the effect of their contract. Any failure to perform will result in preventing this effect to take place. This then explains why the appropriate remedy for a breach of contract in not dissolution but specific performance.

This is all in addition to other relevant principles, most important of which is the principle of 'contractual fairness' between the parties. Here, both parties must perform for the mutual benefits of each other. Failure by a party to perform places the party in breach in a better position compared to the other performing party. This is against contractual fairness. No party should be allowed to cause harm to the other party by merely escaping performance, leaving the innocent party thereby with no choice but to seek dissolution.[53]

B. Legal Dimension

Modern laws recognize the principle of 'binding power of contract',[54] which is the equivalent to the importance placed in Islamic law to keeping contractual promises. However, this principle becomes relative under contemporary laws when dissolution is deemed a primary remedy, whereas it is remains an absolute under Islamic law where specific performance is the only remedy for the breach of non-rescindable contracts.

It is submitted that keeping the contractual promises relates only to complete contracts. Realistically though, whatever attempt the parties make to reach to the highest level of sophistication while contracting, gaps will still appear making contracts incomplete. Indeed, the easiest way to remedy such gaps is to depart from performance to damages.[55] Again, this is not the view adopted by Islamic law.

In this sense, it is safe to argue that the principle of 'binding power of contract' under Islamic law is a complete one. Since dissolution is allowed only in specific and clear cases of rescindable contracts and not allowed in cases of non-rescindable. On the other hand,

---

[51] Mitwali Abed Almoumen, 'asās al-quwah al-mulzimah lil-ʿaqd mīn ḥayth mawḍūʿuh fi al-Fiqh al-Islāmī al-muqārin:dirāsah muqāranah fi ḍaw' al-madhāhib al-arbaʿah' (in Arabic) [The Base of the Binding Power of Contract under Islamic Law: A Comparative Study in the light of the Four Islamic Schools] (2018) 48 Journal of Legal and Economic Research, Menoufia University, Faculty of Law 50-52.

[52] Al Zhaily (n 29) 162.

[53] Abed Almoumen (n 51) 53.

[54] Article 171/1 of the Qatari Civil Code provides: "1. Pacta sunt servanda i.e., a contract duly and properly concluded between the parties must be kept, and non-fulfilment of the respective obligations is a breach of that contract---". See also the same content in Article 147/1 of the Egyptian Civil Code.

[55] Eric A. Posner, 'Economic Analysis of Contract Law after Three Decades: Success or Failure' (2003) 112 Yale Law Journal 829, 112 & 833.

contemporary laws consider the principle of 'binding power of contract' a restriction on the court's ability to require amendment or termination of the contract. Thus, it is noted that wherever the principle of 'binding power of contract' is referred to by the contemporary laws, such reference is always followed by the statement that 'except where the law allows' in order to allow for some situations,[56] among which is the dissolution of contract for a breach.[57] In other words, dissolution is an exception from the application of this principle. Clearly, Islamic law does not follow a similar position to a general rule with exceptions.

Contemporary laws mostly allow the innocent party to seek dissolution even if specific performance is possible, but with the ability to change its claim to the remedy of specific performance at any time before the court issues its decision. Moreover, the court can refrain from awarding dissolution if the breach is minor and only award compensation.[58] Furthermore, if the party in breach offers performance, the court must dismiss the claim of dissolution.[59]

Likewise, common law treats specific performance as a secondary remedy on the basis of respecting the will and the freedom of the party in breach by not forcing it to perform.[60] Again, this is not the position of Islamic law. While the common law approach seems to meet human rights standards in terms of freedom, it falls short of protecting the interest of the innocent party. Generally, the specific performance remedy under common law is restricted to specific, un-replaceable or seldom goods, noting that un-specific goods are always replaceable. Alternatively, compensation is offered as the equitable remedy.[61] In short, the general rule in common law is that no award for specific performance as long as damages are adequate.

Furthermore, damages are deemed to be adequate in cases when the cost of performance itself, or its associated risks, are immense. In services contract, for example, where enforcement of performance is difficult, damages are also considered equitable. In contrast, damages are not adequate when goods are rare, and wherever the debtor is under financial problems rendering it unable to pay damages.[62] Although common law does not consider specific performance as a primary remedy, it does not also encourage avoiding the contract for a breach. It distinguishes between 'condition' and 'warranty'. Whenever the breach relates to a condition, it is to be then deemed a fundamental breach that justifies avoidance. However, minor breaches are considered breaches of warranties, and can always be remedied by compensation.[63]

---

[56] Examples of these cases include the exceptional events and arbitrary conditions in adhesion contracts.

[57] Article 171/1 of the Qatari Civil Code provides: "1. Pacta sunt servanda i.e., a contract duly and properly concluded between the parties must be kept, and non-fulfilment of the respective obligations is a breach of that contract. Such a contract may be revoked or altered only by mutual consent of the parties or for reasons provided for by law". See also same content in Article 147/1 of the Egyptian Civil Code.

[58] Ali Njeedah and Mohamed Al Baiat, *al-Naẓarīyah al-ʻammah lil-iltizāmāt fi al-qānūn al-madanī al-qatarī mʿqāranā bi-aḥkām al-sharīʿah al-islāmiyyah, al-juzʾ al-awwal, Maṣādir al-iltizām* (in Arabic) [*The General Doctrine of Obligations under Qatari Civil Law in Comparison with Islamic Sharia*] (Doha: Qatar University nd) 283-284.

[59] Abd Al Razaq Al-Sanhori, *al-wasīt fi sharḥ al-qānūn al-madanī al-jadīd, al-mujalad (2) naẓariyat al-iltizām bi wajh ʿām, maṣādir al-iltizām* (in Arabic) [*The Explanation of the New Civil Law, the Doctrine of Obligation, part two*] (Beirut: Al Halabi Publishers 2011) 761.

[60] Stephen A. Smith, 'Performance, Punishment and the nature of contractual obligation' (1997) 60 Modern Law Review 363.

[61] Paul M. Perell, 'Common Law Damages, Specific Performance and Equitable Compensation in an Abortive Contract for the Sale of Land: A Synopsis' (2011) 37 (408) Advocates' Quarterly 408, 414.

[62] Steven Shavell, 'Specific Performance versus Damages for Breach of Contract: An Economic Analysis' (2006) 84 Texas Law Reviw 831, 859.

[63] Hamzeh Haddad, *Remedies of the Unpaid Seller in International Sale of Goods under ULIS and 1980 UN Convention* (Amman: Law & Arbitration Centre 1985) 27.

To conclude, two ethical values seem to be at conflict here and competing one another, namely, honouring the promise versus freedom of parties. As explained, Islamic law priorities the value of keeping promises.

C. International Instruments

International legal instruments are a mixture of both Latin and common law systems. CISG adopts the remedy of specific performance as a primary remedy and the innocent party can choose this remedy with the only restriction being that it must not simultaneously resort to any other remedy that is inconsistent with it, mainly avoiding or reducing the price.[64] Unlike contemporary laws, CISG does not give a discretion to the court to uphold or refuse the claim for specific performance, and to award damages instead.[65] To the contrary, CISG expands the application of specific performance. It hence provides for other forms of specific performance, particularly in case of defective delivery, mainly the request to repair the goods or to ask for substitute ones.[66] This is in addition to the right of the seller itself to offer repair after defective delivery to preclude avoidance of the contract.[67]

It is believed that the CISG values specific performance as a remedy more than contemporary national laws, which makes the CISG's position closer to Islamic law. However, the CISG regulates avoidance of contract as a choice for the innocent party in the same way it allows such party the right to specific performance. Avoidance, on the other hand, is restricted in a way that largely limits its implementation. A first limitation here is the condition of having a fundamental breach, which is difficult to meet. Fundamental breach requires the existence of two elements with the first being material and the other is mental.

In essence, the breach must deprive the innocent party substantially from what it is entitled to expect under the contract. The detriment suffered represents the material element, yet it is not enough. Here, there must be a deprivation from the legitimate expectations; being the mental element. Fundamental breach is not found nonetheless if it appears that neither the party in breach actually foresaw the detriment that deprived the innocent party from its legitimate

---

[64] Article 46/1 of the CISG provides: "(1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement". The same right is granted to the seller under Article 62 of the Convention.

[65] Nisreen Mahasneh, *Iltizām al-bāeʿ bi- al-taslīm wa al-muṭābaqah, dirāsah fi al-qānūn al-anjlizī wa itifāqīyyat al-uʾmam al-mutaḥidah lil-bayʿ al-duwalī lil-baḍāiʿ 1980(itifāqīyyat fiyanā* (in Arabic) [*The Seller's Obligations of Delivery and Conformity: A Study in English Law and the CISG 1980*] (Amman: Dār al-Thaqāfah 2011) 274.

[66] See Article 46/2 which provides: "(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a -reasonable time thereafter". See also Article 46/3, which provides: "(3) If the goods do not conform with the contract, the buyer may -require the seller to remedy the lack of conformity by repair, unless this is -unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter".

[67] Article 48 of the CISG provides: "(1) Subject to article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer -unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. However, the buyer retains any right to claim -damages as provided for in this Convention".

expectations, nor a reasonable person would have foreseen such a result. In this case, a claim for avoidance will not be accepted.[68]

Articles 49 and 64 of the CISG provide for further limitations. Hence, the innocent party can seek avoidance in only pre-specified cases. These include fundamental breach, non-performance during the additional period, or declaring non-performance before the lapse of this period.[69] However, it is not within the objectives of this article to explain these restrictions, but to merely compare the CISG with Islamic law position. In this context, it is found that the CISG is relatively close to Islamic law in not referring to contractual liability, whereby fault is not a pre-condition to exercise any remedy.[70] Besides, the CISG does not facilitate ending the contractual relationship for a breach; such remedy is very limited, and restricted through detailed terms of conditions.

Contemporary Arab national laws do not recognize the concept of fundamental breach. True, the court has the discretion to approve or decline a claim for dissolution depending on the essentiality of the breach.[71] Yet, it is untrue to conclude that this theory is therefore adopted. Further, national laws vary from Islamic law as they further restrict specific performance, by requiring the same not to be burdensome on the breaching party. Here, the court seems to balance between the detriment suffered by the debtor if it is forced to perform, and the benefit gained by the creditor if specific performance is awarded. Hence, the court might find it more balanced to award damages instead of specific performance.[72] As explained earlier, this is not the position of Islamic law, which base specific performance on the principle of keeping promises and equity.

As for the UNIDROIT Principles 2016, they overlap with CISG in several areas. To start with, they provide for all remedies available to the innocent party once the requirements and conditions of each are met. In addition, avoidance under the Principles is regulated in the same way in which fundamental breach is regulated under the CISG.[73] Most importantly, the Principles and the CISG are similar in not requiring fault to invoke remedies.[74]

[68] Article 25 of the CISG provides: "A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result".

[69] Article 49 of the CISG provides: "(1) The buyer may declare the contract avoided: (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or (b) In case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed."

[70] Anna Kazimierska Warsaw, 'The Remedy of Avoidance under CISG Convention on international Sale of Goods' (1999) Pace Review of the Convention on Contracts for the International Sale of Goods 79-192.

[71] See Article 183/2 of the Qatari Civil Code, which provides: "2. The judge may, mutatis mutandis, determine a period of grace within which the obligor shall perform his obligation. The judge may also reject the application for rescission if the obligation not performed is insignificant compared with the obligations considered in their entirety." The same content is found in Article 157/2 of the Egyptian Civil Code.

[72] Article 245 of the Qatari Civil Code provides: "1. Upon the obligor being notified, the obligation shall be specifically enforced, as soon as possible. 2. However, where specific performance is extremely onerous to the obligor, the court may, at the request of the obligor, limit the right of the obligee to damages, provided that he suffers no serious prejudice thereby". See also the same content in Articles 203/2 of the Egyptian Civil Code and 355 of the Jordanian Civil Code.

[73] See Article 7.3.1 of the UNIDROIT Principles.

[74] Stefan Vogenauer and Jan Kleinheisterkamp (eds), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (2nd edn, Oxford: Oxford University Press 2016) 825-830.

However, the Principles vary from the CISG concerning specific performance by insisting that the party in breach must not be unreasonably burdened. Besides, the Principles set out a judicial penalty mechanism to pressurize the debtor to perform.[75] However, the Principles and the CISG do grant the aggravated party with the right to seek replacement or cure of defective performance. Indeed, this expands the scope of specific performance.[76]

Unlike the CISG, the concept of withholding performance is well known under the Principles, in cases where the obligations are simultaneous or consecutive.[77] Therefore, the ability to seek avoidance is minimized, as some alternative steps have been put first in place, thereby making avoidance the last option. Both the Principles and the CISG regulate in the same way the right of the party in breach to cure its defective performance, where the innocent party's ability to refuse such a cure is made rather limited.[78] In itself, this cure becomes indeed another alternative to avoidance.

Further, both these international law instruments provide for an extra period to be given to the party in breach before a claim for avoidance can be made. Such an additional period exists also under all national laws; albeit the right to give such a period is given to the court whether following a request from the party in breach, or without.[79] As indicated earlier, under international instruments the situation is different, namely, the party in breach cannot force the aggrieved party to accept such additional period because it is not within the court's discretion.[80] Interestingly, contemporary national laws deal with the issue of the additional period in the context of the claim of dissolution, in the sense that whenever the innocent party asks for dissolution because of the other party's breach, the court may delay dissolution by exercising its authority to grant the additional period.

Under Islamic law, the notion of 'Grace Period' is well recognized. Indeed, it is provided for in the Holly Qur'an, where it stated that: [81]

> "And if someone is in hardship, then [let there be] postponement until [a time of] ease".

Hence, it is submitted that granting such a period under Islamic law to the insolvent debtor until its financial status is improved is mandatory.[82] Moreover, this is an obligation on the court to do so, and not a mere discretion. Besides, this additional period has no time limit. Understandably, this approach is in line with the fact that dissolution is not a remedy for a breach of contract under Islamic law. In other words, the order of specific performance in the case of an insolvent debtor becomes useless for the aggrieved party, since there are no money or properties to execute on them.

---

[75] See Article 7.2.4 of the UNIDROIT Principles.
[76] See Article 7.2.3 of the UNIDROIT Principles.
[77] See Article 7.1.3 of the UNIDROIT Principles.
[78] See Article 7.1.4 of the UNIDROIT Principles, and Article 48 of the CISG.
[79] See, for example, Article 183/2 of the Qatari Civil Code, which provides: "2. The judge may, mutatis mutandis, determine a period of grace within which the obligor shall perform his obligation. The judge may also reject the application for rescission if the obligation not performed is insignificant compared with the obligations considered in their entirety". Same content is found in Article 157/2 of the Egyptian Civil Code, and Article 334/2 of the Jordanian Civil Code.
[80] See Article 7.1.5 of the UNIDROIT Principles, and Articles 47 and 63 of the CISG.
[81] Qur'an: Surah Al-Baqarah, Verse 280.
[82] Mohamed Albendari, 'naẓrah al-maysarah fi qānūn al-muʿāmalāt al-Imārātī: dirāsah muqārnah' (in Arabic) [Grace Period under the Emirates Dealings Law, a Comparative Study] (2002) 9 (2) Security and Law Journal, Dubai Police Academy 31.

However, a grace period is not linked with insolvency under contemporary laws. Instead, it linked with non-performance for temporary personal reasons.[83] Following the lapse of this additional period, the claim for avoidance can be accepted under contemporary national laws and international instruments, and potentially damages to be awarded. As discussed earlier, no damages can be awarded for the breach of contract under Islamic law.

Under both international legal instruments, dissolution is not generally prioritized. Yet, each suggests certain chances and alternatives. Again, these all alternatives, whether being withholding, additional period or cure request, are optional and require the consent of the aggrieved party. Islamic law in this context is stricter, namely, dissolution is not an option in the first place, whereby some solutions shall be considered such as withholding, a grace period for insolvent debtor, imprisonment under some particular conditions (solvent debtor declining repayment and intentional harm to the creditor), and specific performance.

D. Economic Dimension

Although the law is in essence a reflection of social and economic needs, it is yet more concerned with values and equity. This section explores the main economic considerations behind remedies of dissolution, specific performance and damages in an attempt to evaluate the position of Islamic law, contemporary Arab laws, and international instruments in relation to economic considerations, if any.

It is submitted that the principle of 'binding power of contact' is well capable of ensuring that each contracting party obtains the benefit it contracts for. Furthermore, adherence to contract by both parties encourages a continuing contractual relationship, thereby leading to boosting business trust, stability and reduce costs.[84] Hence, once the resort to dissolution becomes restricted, contracts tend to be more binding. The practical effect will indeed be that money and benefits are smoothly and widely circulated and exchanged throughout the society. Islamic law upholds and respects the will of the parties, by minimizing the use of dissolution due to a breach. True that other legal instruments respect the will of the parties, but in a relative way as dissolution and damages exist alongside the primary remedy of specific performance. The creditor is always entitled to choose either of the remedies once its conditions are met.

The CISG and the UNIDROIT Principles adopt more restricted criteria for avoidance, yet the remedy is still there. The purpose of the contract is that each party obtains what it contracts for. Hence, dissolution for a breach undermines the purpose behind contracting. Obviously, this purpose is well achieved if the remedy is to force performance instead of dissolving the contract itself, which is in accordance with the Islamic law approach.

Legal security is a fundamental requirement in contracting. Each party requires assurances that the exact benefit it contracted for will be obtained. This in turn encourages legal dealings and builds trust and efficiency among contractors. National and international market benefit as well

[83] ibid 23.

[84] Mohamed Erfan Alkateeb, 'Al-Taḥlīl al-iqtiṣādī li- Naẓarīyat al-'aqd min manẓūr qānūnī "al-mumkīn wa al-mustabʿad", dirāsah muqāranah mīn manẓūr al-madrasah al-lātīniyyah al-qānūn al-Madanī al-Faransī, namūdhajā lil-taḥlīl wa al-qānūn al-madanī al-kuwaytī namūdhajā lil -īsqāṭ' (in Arabic) [Economic Analysis of Contract Theory from a legal perspective "the possible and the unlikely", a Comparative Critical Study from the perspective of the Latin school. The French Civil law as a Model for Analysis, and the Kuwaiti Civil Law as a Model for Projection] (2019) 25 (1) Journal of Kuwait International Law School 136-137.

of this trust and efficiency. Only the remedy of specific performance as adopted by Islamic law is capable of serving this aim.

Admittedly, market and economic circumstances are changeable. Contracting parties take this into account prior to concluding a contract, and tend therefore to work out the relevant terms for that. If the contract is breached, damages may not always be the fair compensation for non-performance for the innocent party simply because market circumstances at the time of contracting might not be the same at the time of the breach. Practically, the innocent party may sometimes obtain damages which are actually less than the loss it incurred. In other occasions, the party in breach may pay more than the actual loss suffered by the aggrieved party depending on the equation used to calculate damages. In both cases, economic fairness is not achieved.

By administering of damages, the law aims to place the aggrieved party in the right position to which it would have reached, if the contract were not breached. Realistically, though damages would not completely achieve the target of making it whole, they do not make the innocent party whole. However, specific performance can achieve this target.[85]

Consequently, specific performance can be a safe remedy to be ordered by the court whenever it finds it difficult to exactly calculate the actual harm which contractual breach inflicts, and the value of such performance. Also, when all necessary information concerning the breach are unavailable, including for example the original value of the goods subject of the dispute. This all renders ambiguity on the amount of damages to be awarded.[86] Conversely, the pure business point of view requires the optimal remedy, whether it is performance or damages, on the mutual interests of the parties' risks and cost.[87]

Even when contemporary national laws deal with specific performance as a primary remedy, they still consider also damages a primary remedy but through different heading, namely, 'performance through compensation'. The underlying assumption here is that compensation itself is a type of performance that reflects the economic value of the contract.[88] Unlike Islamic law, the economic value of the contract here overrides the ethical value. Besides, remedies for a breach of contract under these laws are not stipulated in any specific order. The aggrieved party, has the right to choose any remedy it wishes, and can easily ignore specific performance and insist on compensation.

Additionally, specific performance offers a sufficient protection to innocent parties from non-*bona fide* debtors. If a creditor tends to deliberately decline performing the contract simply because another favourable transaction becomes available, with the expectations that the innocent party will seek dissolution and ask for yet affordable damages, the specific performance is the just and economical remedy and deterrence. From a business point of view, with dissolution as an openly available remedy, a party to a contract will likely deploy the rule of 'perform or pay'. It will then weigh the cost of performance in comparison to the cost of breach and value of damages. If it appears to it that performance is more costly and/or risky, it can easily choose not to perform knowing that the innocent party will get damages it has expected and accounted for.[89]

---

[85] Posner (n 55) 871.
[86] ibid 836. See also Rebecca Stone, 'Economic Analysis of Contract Law from the Internal Point of View' (2016) 116 Columbia Law Review 2005, 2031.
[87] Shavell (n 62) 869.
[88] Alkateeb (n 84) 145.
[89] Stone (n 86) 2027.

To some extent, it can be argued that the contemporary national laws consider the economic dimension by stipulating a condition that specific performance should not be burdensome on the party in breach. If so, the courts will likely depart from specific performance and prefer damages. To conclude, although contemporary Arab national laws and international instruments restrict dissolution in different ways and levels, Islamic law is stricter and more balanced when dealing with the concepts like freedom of contract and binding power of contract.

V. CONCLUSION

A main outcome of this study is that the remedy of dissolution under Islamic law is a secondary one, which is allowed in certain cases only that are not necessarily attached to contractual fault. Some concepts in contracts that are well known under contemporary national laws are not recognised at all in Islamic law; namely, the mutual contractual obligations of the parties and the doctrine of cause. Further, Islamic law does not recognise the notion of contractual liability. Other legal concepts are dealt with differently in Islamic law, such as the right of withholding, grace period and damages. A fact that results from the unique classification of contracts under Islamic law as rescindable versus non-rescindable as compared with the classification in contemporary laws as binding to both parties versus binding to one party.

Under contemporary laws and international instruments, the remedies for breach of contract are wide and varied including dissolution and damages. The aggrieved party has the discretion to request between such remedies provided that certain conditions are met. However, under Islamic law, the only remedy available for breach of contract is specific performance. Damages, on the other hand, are not allowed except in the case of wrongful destruction of the subject matter of the contract.

The justification of this unique position of Islamic law lies in the fact that keeping promises is a religious and ethical obligation. Hence, the principle of 'binding power of contract' is legally absolute. Furthermore, ethical values in contracting prevail over economic benefits. Specific performance, therefore, better achieves the objectives of trust, credibility and legal security in legal dealings, besides it places the innocent party in the position it had been, had the other party performed the contract. Damages, on the other hand, cannot serve these objectives to the fullest extent.

View publication stats