TERMINATION FOR BREACH IN ARAB CONTRACT LAW

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INTRODUCTION

A contracting party might sometimes not receive the performance which was due to him because of the failure of the other contracting party to honour his side of the bargain. In such circumstances the aggrieved party might wish, for a variety of reasons, to put an end to the dishonoured contract. This course of action, which amounts to a remedy for breach, is available to the aggrieved party under many Western legal systems.2

This article attempts to outline the principles and rules relating to termination of contract (Faskh al-'Aqd) for breach in Arab contract law.3 The question whether traditional Islamic law knew of termination of contract as a form of remedy for breach is examined; there is a survey of the relevant modern statutory provisions; the main prerequisites for the remedy are identified; there is a discussion of the two procedures through which the right to invoke termination may be exercised and granted if due; and finally, the legal effects of the remedy of termination when granted are outlined.

ISLAMIC LAW

Under traditional Islamic law, the Shari'a, specific performance and/or the equivalent in monetary compensation (damages), were the only two remedies available for failure to perform a valid contract. Therefore, the general principle of termination as a consequence of breach, as recognised today, was not offered by this legal tradition.4 Some modern Muslim jurists argue, however, that the basic

1 Some of these reasons are that the innocent party may wish to discharge himself of his obligation, that he may seek the restoration of his own performance, or that termination will turn out to be the better of the available remedies.


3 The Arab legal systems mentioned in this article are the Egyptian, Syrian, Libyan, Iraqi, Algerian, Jordanian, Kuwaiti, United Arab Emirates, Omani and Sudanese systems.

4 The phrase "termination of a contract", however, is to be found in most of the early books of Islamic jurisprudence, but obviously with different legal effects and connotations. A contract is terminated in the context of Islamic law when it is a void or voidable contract, or when it is terminated by extraneous causes.
concept was not totally alien to traditional Islamic law. This proposition has been supported by assimilating the remedy of termination for breach to the classic Islamic law concept of *Khaiyyar al-Naqd* (payment option). This legal concept is to the effect that a seller and a buyer can agree on a certain period of time for payment, failing which the seller has the right to terminate the contract.

Furthermore, al-Zarqa, a prominent contemporary Islamic jurist, while affirming that termination for breach was not available in traditional Islamic law as a general principle, sees no reason why it should not be adopted as such. He points out that this principle can easily be deduced from the Islamic law ideals of justice and equity.

Nevertheless, it is still possible to find the occasional judicial pronouncement against admitting termination for breach when traditional Islamic law was held applicable.

Therefore, the question whether the remedy of termination of contract for breach has found its way into the *Shari'a* remains a moot point. What is certain, however, is that there is no mandatory rule of traditional Islamic law to be found against the adoption of this remedy by modern Arab contract law.

**Modern Arab Contract Law**

It is a general principle of Arab contract law that, if one party breaches his contractual promise, the aggrieved party thus injured is entitled to terminate the dishonoured contract. Termination of a contract in this context is regarded as one

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5 For a short survey of the cases where termination of a contract was resorted to in Islamic law, see al-Sanhuri, *Maṣādir al-Ḥaq fī al-Fiqh al-Islāmi*, vol. 6, pp.225-229.
6 This rule was included in *Maqālāt al-ʾAḫām al-ʾAdliyyah*. Article 313 reads: “Seller and buyer may validly conclude a bargain whereby payment of the price is to be made by a certain time and in the event of payment not being made, the sale is not to take place. This option is called an option as to payment.”
8 Thus, for example, the Federal Court of the United Arab Emirates ruled that “the fundamental principle of classical Islamic law is that contracts are to be performed specifically; and the court must enforce their terms. Islamic law did not allow termination for breach. The aggrieved party had no option but to request specific performance”.
9 Various theories have been put forward as to the possible juridical basis of termination for breach. According to one theory the right to effect termination for breach is based on the concept of “cause” (i.e. the cause of the obligation of one party is the obligation of the other party). Thus, termination due to breach results from the failure of the innocent party to receive what he bargained for in entering into the contract. Another school of thought asserts that termination is simply a remedy for breach like any other remedy, and that there is no need to look for any other underlying basis.
10 Some writers advocate the principle of equity as the origin of the remedy of termination for breach. The most widely held theory among writers is that of the interdependence of obligations; namely that contractual obligations are dependent on each other, and so the disappearance of one obligation should lead to the cancellation of the counter obligation as well. A further theory, which has gained occasional judicial approval, and which can probably be attributed to the influence of French civil law (Art. 1184 of the *Code Civil*), involves the notion of an implied resolutive condition, in other words, that every synallagmatic (reciprocal) contract has an implied terminating clause, which becomes operative when