Breach of contract is generally described as the unjustifiable refusal or failure by one party to a lawful and enforceable contract to implement any of the express or implied duties incumbent on that party under the contract, normally by refusing to perform, failing to perform, performing late or performing badly. Breach of contract purports the existence of a "lawful and enforceable" contract, the existence of a "debtor" under that contract and a non-performance or a performance contrary to the one expected provided it is attributable to that debtor.

Under Positive law, a person injured by a breach of contract is entitled to damages for the loss he has suffered. The object of an award of damages for breach of contract is to place the plaintiff, so far as money can, in the same situation as if the contract had been performed. In certain circumstances the injured party may obtain an order for the specific performance of the contract, or an injunction to restrain its breach. Are there similar remedies and objectives under the Shari'a and Arab laws? Is the concept of daman al-'aqd (contractual warranty), one of these remedies or the one and single remedy for cases of breach of contract as one contemporary author seems to imply?

An investigation into the concept of daman al-'aqd will delineate its scope of application and will reveal its remedial capability. But first a few words ought to be said about contracts.

WHAT IS A CONTRACT?

Breach of contract whether under positive law or the teaching of the Shari'a presupposes the existence of a valid contract. What then is a contract? For fiqh (jurisprudence), a contract is the result of the conjunction of two or more concordant declarations of will which either has an immediate effect on the object related to their accord or generates one or more obligations whose discharge is deferred. It was not outrightly acknowledged that a contract is a potential generator of obligations. The reluctance to acknowledge that capability stems from two religiously rooted requisites.


1 Positive law is the law given by persons of authority, as distinct from moral and sacred law given by God or with God's guidance, such as the Islamic Shari'a in Muslims' eyes. Positive law also refers to Arab secular statutes borrowed or inspired from Western statutes.


with regard to secular transactions which are expected to be devoid of riba (unlawful advantage by way of excess or deferment), and gharar (uncertainty, risk, speculation). Whenever a transaction involves the exchange of two countervalues, that exchange, if it has to take place under conditions which could result in riba should be performed in equal countervalues and forthwith. It also means that such countervalues are in existence, in essence at least, and known to the contracting parties in order to elude the danger of gharar.

Under that system and in theory at least the focal points of a contract are its concrete elements, i.e., its subject-matter and the countervalue for that subject-matter, if any, rather than an obligation arising out of the contract. Nevertheless, practical exigencies and pragmatism eventually prevailed and it became widely accepted that a contract may generate obligation(s).

WHAT FORM FOR A CONTRACT?

On the face of Tradition the Prophet resorted to writing in his day-to-day transactions and the following epigram devised by a poet jeering at the apparently useless precautions taken by a Quraishi lender to secure re-payment is an amusing and witty illustration of a written practice as developed among sophisticated Quraishis:

Obeid [the lender's name] inscribed a [lending] note, witnessed and stamped; but what prolonged laments await Obeid.

On the other hand, not all Arabian townsettlers and certainly no Beduins enjoyed the relative sophistication of the inhabitants of the Hijazi cities; this explains in part why the Quranic directives (S. II, 282) with regard to writing down deferred transactions were treated not as mandatory injunctions but as a commendation left to the contracting parties' appreciation. The result was that writing down contracts remained largely ignored.

For both forms of agreement—written and that concluded by word of mouth—it is only the testimony of those who witnessed them which establish their existence. A written document was deemed as a kind of aide-mémoire with no probatory force of its own. This force stemmed from the witnessing of the accord of the contracting parties whether such an accord is verbal or in writing.

Nowadays, it is different; written evidence is deemed essential with regard to a growing number of transactions and contracts such as memoranda and articles of association, commercial agency contracts, contracts of rent, etc.

A creditor of a contractual obligation under a given contract will have simply to

---

4 Sarakhsi, al-Mabsut, vol. XXX, p. 167 (Cairo, 1331 AH).
5 Buhturi, Hamasa (ed. Cheikho), quoted by Lannens, La Mecque, p. 126 (Beirut, 1924).
6 E Tyan, Le Notariat, pp. 11 and 72 (Beirut, 1945).