

Commercial Contracts in *Muslim*
Countries of the Middle East:
A Comparison with the United States

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I. Introduction

Outside of the common law and civil law legal traditions, what is termed “Islamic law” is one of the world’s largest legal systems.¹ There are more than one billion Muslims world-wide.² As of 2005, the Gulf Cooperation Council (G.C.C.), comprised of Saudi Arabia, Kuwait, Bahrain, Qatar, Oman, and the United Arab Emirates, was the United States’ fifth largest trading partner.³ In this time of rapid globalization, it is imperative that an attorney from the United States, who works in international commerce, understands the commercial law of this influential region. As the emerging markets of the Middle East continue to grow, the ability to trade goods internationally will help to solidify these ever increasing economic ties. This paper attempts to explain the theories and thought processes surrounding contracts for the sale of goods in Muslim countries. My purpose is to address the important similarities and differences between commercial contracts in the United States and commercial contracts in Muslim countries of the Middle East. Hopefully, by forging ever stronger trade relationships between the United States and the Middle East, these two culturally rich regions will learn to tolerate each other’s differences while embracing each other’s similarities.

II. What is a Contract?

¹ John H. Donboli & Farnaz Kahsefi, *Doing Business in the Middle East: A Primer for U.S. Companies*, 38 CORNELL INT’L L.J. 413, 418 (2005).

² *Id.* at 417.

³ *Id.* at 415.

In face-to-face transactions, such as those which take place in a farmer's market, parties can exchange goods easily without the use of formal contracts.⁴ Formal contracting becomes important when the performance of the contract occurs over a period of time. Passage of time leads to uncertainty about what the counterparty will do.⁵ This is because circumstances may change as the performance unfolds.⁶ It is costly to incorporate all possible issues that could affect performance into a contract. Besides, foreseeing every hypothetical event that may affect the performance of the contract is impossible. Even if one was omniscient and able to foresee every possible outcome, to include each and every alternative would make the contract very long and very confusing. Ultimately, the inability to address every possibility leads to a theoretical incompleteness in every contract.⁷ Once circumstances change, or a hypothetical event becomes a reality, this incompleteness usually leads to disagreements between the parties. Sometimes, these disagreements will lead to a breach of the contract because the parties cannot agree on how to interpret the contract in light of the change in circumstances. The breach, or non-performance, of one party will cause the other party to seek the assistance of an outside party, normally a tribunal, to compel the breaching party to perform or to pay damages.⁸ The tribunal tries to determine what the parties would have bargained for and agreed upon had they anticipated the problem in advance.⁹ Tribunals in different countries use their unique cultural perspectives and societal goals (public policy) in coming to their ultimate determination. Legal theories, such as

⁴ Benjamin E. Hermalin, *Chapter on the Law and Economics of Contracts*, (June 5, 2006) Pg. 3

⁵ Richard A. Posner, *The Law and Economics of contract Interpretation*, pg. 3

⁶ *Id.* at 3.

⁷ Hermalin, *Chapter on the Law and Economics of Contracts* at 6.

⁸ *Id.* at 6.

⁹ *Id.* at 6.

corrective justice, liberal autonomy, social constructivism, or economic efficiency, are used by judges to fill in the gaps, usually in ways that fit into these cultural and societal goals.¹⁰

III. General Law of Muslim Countries of the Middle East

a. The Islamic Tradition

In Islam, law and religion are considered inseparable.¹¹ “Islamic law can be the mere reference to Islam in a legal setting or it can be a legal system identified with the classical body of [jurisprudence].”¹² Islamic law is not defined by one unified system. It is more closely related to the common law legal system than the civil law legal system in that it varies from region to region and country to country.¹³ Islam governs all aspects of *Muslim* life.¹⁴ What is referred to as Islamic law provides a *Muslim* with *Shari’a* (the path).¹⁵ The *Shari’a* provided by Islamic law governs all interactions and relationships between individuals.¹⁶ To determine what Islamic law is one must look to four sources. In order of importance they are: (1) the *Qur’an*; (2) the *Hadiths/Sunna*; (3) the *Ijma*; and (4) *Qyas*.¹⁷ The *Qur’an* is the holy book of Islam and

¹⁰ Hermalin, *Chapter on the Law and Economics of Contracts* at 10.

¹¹ Fatima Akaddaf, *Application of the United Nations Convention on Contracts for International Sale of Goods to Arab Islamic Countries: Is CISG Compatible with Islamic Law Principles?*, 13 PACE INTERNATIONAL LAW REVIEW 1, 16 (Spring 2001).

¹² Baudouin Dupret, *What Is Islamic Law?: A Praxiological Answer and an Egyptian Case*, THEORY CULTURE SOCIETY 24, 79 (2007).

¹³ Donboli & Kahsefi, *Doing Business in the Middle East: A Primer for U.S. Companies* at 418.

¹⁴ J. Michael Taylor, *Islamic Banking –The Feasibility of Establishing an Islamic Bank in the United States*, 40 AMERICAN BUSINESS LAW JOURNAL 385, 387 (2003).

¹⁵ Akkadaf, *Application of the United Nations Convention on Contracts for Internation Slae of Goods to Arab Islamic Countries: Is CISG Compatible with Islamic Law Principles?*, at 16.

¹⁶ *Id.* at 16.

¹⁷ Peter D. Sloane, *The Status of Islamic Law in the Modern Commercial World*, 22 INT’L LAW. 743 (Fall 1988).

the primary source of *Shari'a*.¹⁸ The *Qur'an* consists of 114 chapters, which are made up of the revelations made to the Prophet Muhammad by God, through the angel Gabriel.¹⁹ Eighty verses, out of approximately six thousand, specifically deal with law. Because so few verses set out legal principles, other sources are needed to supplement the *Qur'an*.²⁰ Second in importance, and also treated as a primary source is the *Sunna*. The *Sunna* consists of the conduct, teachings and traditions of the Prophet Mohammed.²¹ The *hadiths* are the oral traditions, regarding the sayings of the Prophet and the stories about him and his family, based upon anecdotal evidence that are used to create the *Sunna*. The *Ijma* is third in importance and is treated as a secondary source of law. This is the consensus of the principles established by Islamic scholars based upon the *Qur'an* and the *Sunna*.²² If the legal standard or rule is not found in the *Qur'an* or the *Sunna*, then the judge turns to the consensus (*Ijma*).²³ The legal rule created by the *Ijma* becomes permanent and binding.²⁴ Last in importance, and also treated as a secondary source, is the *Qyas*.²⁵ When a legal question is of such a novel nature that the rule is not found in the *Qur'an*, *Sunna*, or addressed by the *Ijma*, then the judge must use analogical reasoning to apply the issue

¹⁸ *Id.* at 743.

¹⁹ Akaddaf, *Application of the United Nations Convention on Contracts for International Sale of Goods to Arab Islamic Countries: Is CISG Compatible with Islamic Law Principles?*, at 17.

²⁰ Akaddaf, *Application of the United Nations Convention on Contracts for International Sale of Goods to Arab Islamic Countries: Is CISG Compatible with Islamic Law Principles?* at 17.

²¹ Donboli & Kahsefi, *Doing Business in the Middle East: A Primer for U.S. Companies* at 419.

²² Sloane, *The Status of Islamic Law in the Modern Commercial World* at 743.

²³ Akaddaf, *Application of the United Nations Convention on Contracts for International Sale of Goods to Arab Islamic Countries: Is CISG Compatible with Islamic Law Principles* at 17.

²⁴ *Id.* at 18.

²⁵ Sloane, *The Status of Islamic Law in the Modern Commercial World* at 743.

to an already accepted legal principle.²⁶ This process of analogical reasoning is referred to as *Qyas*.

There are two major groups in Islam: the *Sunnis* and the *Shiites*. *Sunnis* follow the *Qur'an* and the *Sunna*. The *Shiites* follow religious leaders, called *Imams*, who interpret the *Qur'an* and *Sunna* for the people.²⁷ Within *Sunni* Islam, there are four schools of legal thought. These schools consist of the *Hanafi* school, the *Maliki* school, the *Shafi'i* school, and the *Hanbali* school. *Shiites* have only one school of legal thought, the *Jaafari* school.²⁸ The primary differences between these schools arise from disagreements over the use of supplemental law.²⁹ The *Maliki* school minimizes the role of opinion and instead focuses on the *Sunna*.³⁰ The *Hanafi* school stresses the importance of using analogy and the principle of equity.³¹ They rely heavily on reason and opinion.³² The founder of the *Shafi'i* school, Al Shafi'i, is known as the founder of Islamic jurisprudence.³³ This school attempts to reconcile and find a balanced between the *Maliki* and *Hanafi* schools.³⁴ The *Hanbali* school strictly adheres to the *Qur'an* and the *Sunna* in

²⁶ Akaddaf, *Application of the United Nations Convention on Contracts for International Sale of Goods to Arab Islamic Countries: Is CISG Compatible with Islamic Law Principles* at 18.

²⁷ Akaddaf, *Application of the United Nations Convention on Contracts for International Sale of Goods to Arab Islamic Countries: Is CISG Compatible with Islamic Law Principles*, at 19.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

hopes of avoiding the use of opinion.³⁵ It also uses analogy to equate novel issues to these primary sources of law.³⁶

Islamic jurisprudence is not found until one hundred years after the death of the Prophet Muhammad.³⁷ In the tenth century A.D., Islamic scholars were so highly esteemed that it was decided that further improvement or analysis was not needed. At this point, all further jurisprudential analysis and interpretation would not rise to the level of *Ijma* (consensus). This event has prevented the further evolution of *Shari'a* and is known as “the closing of the door of *ijtihad*.”³⁸ Furthermore, unlike the common law system, Islamic law is not bound by precedence.³⁹ Although judicial decisions are highly persuasive, there is no doctrine of *stare decisis*.

The government of a country governed under Islamic law, is permitted to implement statutes to supplement *Shari'a*; provided that they do not contradict *Shari'a*.⁴⁰ Each country under Islamic law is influenced by *Shari'a* differently. Some scholars suggest that Islamic countries can be divided into three categories based upon the extent to which *Shari'a* affects their legal system: (1) countries that primarily follow the Western system, where *Shari'a* plays a minor role; (2) countries with codified laws based primarily upon *Shari'a*; and (3) countries with westernized commercial codes, but legal interpretation and the legal system itself are based upon

³⁵ Id.

³⁶ Id.

³⁷ Patrick G. Grant, Esq., *Book Review*, 20 INT'L LAW. 442 (Winter 1986) (reviewing NOEL J. COULSON, GRAHAM & TROTMAN, *Commercial Law in the Gulf States: The Islamic Legal Tradition* (1984)).

³⁸ Sloane, *The Status of Islamic Law in the Modern Commercial World* at 743.

³⁹ H.S. Shaaban, Note, *Commercial Transaction in the Middle East: What Law Governs?*, 31 LAW & POL'Y INT'L BUS. 157 (1999).

⁴⁰ Sloane, *The Status of Islamic Law in the Modern Commercial World* at 743.

Shari'a.⁴¹ The countries that make up the first category are Lebanon, Syria, and Egypt; the second category consists of Saudi Arabia, Oman, and Yemen; the third category is made up of Iraq, Jordan and Libya.⁴²

b. The Civil Law Tradition

Due to their colonial past, many countries in the region known as the Middle East have been highly influenced by the Western European powers. France, in particular, colonized most of North Africa and the Middle East during reign of Napoleon. In many of these countries, the Code Napoleon (or French Code of 1804) was introduced by the French. Today, this influence can be seen in the modern commercial codes of the majority of *Muslim* countries in the Middle East and North Africa. Those countries who have most embraced the French civil tradition, have also adopted the United Nations Convention for the International Sale of Goods. Those countries who have adopted the Convention have greatly benefited because of the uniformity of laws between themselves and other contracting bodies, such as the United States.

IV. Contracts for the Sale of Goods in the United States

a. What is the Law?

The United States is a part of the common law system because of its roots as an English colony. Contract law is dealt with under state law and is, usually, not a federal law matter. In this section, I will briefly review the two legal bodies that make up the state law of contracts: the common law and the Uniform Commercial Code (U.C.C.). I will also briefly discuss the United

⁴¹ Id. at 157.

⁴² Sloane, *The Status of Islamic Law in the Modern Commercial World* at 157.

Nations Convention on Contracts for the International Sale of Goods (C.I.S.G.). This treaty is applicable to every state through federal legislation. Although each state is slightly different, I will focus on general principles that are applicable to all in order to facilitate a comparison between the United States and the *Muslim* countries of the Middle East.

i. Common Law Theory

There is no definitive theory of contract law, even within a given system there are great differences.⁴³ This can certainly be seen through the differences between the theories of contract law and various rules of the several states that make up the United States.⁴⁴ Usually, what scholars consider as contract theory can be grouped into three categories: commercial transactions between merchants, transactions between individuals, and familial contracts.⁴⁵ These categories can often be further subdivided into different types of contracts such as landlord-tenant, employment, charitable, prenuptial, employment, franchise, pension, and insurance contracts.⁴⁶ Another layer, in addition to the type of contract, is the form which it takes, such as contracts of adhesion and freely negotiated contracts. The form which the contract takes can lead to a different set of rules.⁴⁷ Rather than focus on the different types of contracts and the various rules associated with them, my primary focus will be on the commercial contracts that facilitate trade between merchants.

⁴³ Brian H. Bix, *Contract Law Theory*, LEGAL STUDIES RESEARCH PAPER SERIES, Research Paper No. 06-12, University of Minnesota Law School. pg. 30

⁴⁴ Id.

⁴⁵ Id.

⁴⁶ Id.

⁴⁷ Id.

In common law systems, the usual theories of contracts are promise, reliance, and efficiency.⁴⁸ The promise-based theory of contracts focuses on the moral obligation to perform and the intent of the parties to be legally bound to perform.⁴⁹ Usually, consideration is used to show that the agreement rises to the level of a legally enforceable contract instead of merely a promise or a gift.⁵⁰ Reliance-based theories deal with obligations that arise from one party's faith in a perceived promise from the other party.⁵¹ Efficiency-based or 'law and economics' theories treat the law as a way "to maximize the individual and social gains from trade."⁵² These theorists focus on the law of contracts as a means of maximizing wealth, maximizing welfare, or for achieving utilitarian purposes.⁵³

The distinguishing feature of common law contracts is that there is neither a code nor statutory provisions detailing the applicable laws and rules surrounding the creation, performance, breach, or remedies of a contract. Instead, to find the law of contracts one must look to case law. Because of the doctrine of *stare decisis*, the decisions of higher courts are binding on all the lower courts unless or until it is overruled. By sifting through prior judicial decisions, particularly those of an appellate nature, one can divine a rule. This is done by finding previous cases whose facts are similar to the facts in the situation currently under dispute. These cases are then synthesized together to create the legal rule. Once the legal rule is determined, one must analogize the facts of the current controversy to the facts of one of the earlier judicial

⁴⁸ Bix, *Contract Law Theory* at 9.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 10.

⁵² *Id.*

⁵³ *Id.* at 17.

decisions used to create the legal rule. Through analogy, each side will argue that the facts of their current contractual dispute warrant, or do not warrant, the application of a particular rule or decision by the judge.

ii. The Uniform Commercial Code

Although the United States adheres to the common law system, it does not abhor the idea of a codified system. To encourage trade, legal scholars, led by Carl Llewellyn, created a model code to cover commercial contracts. Although the Uniform Commercial Code (U.C.C.) is a model code, some version of it has been adopted in all of the states, with the exception of Louisiana. The U.C.C. covers the sale of all goods within the United States. However, vagaries and ambiguities in the language in parts of the Code, and in the contracts of parties, allow the common law to supplement and fill in any gaps.

Despite the fact that the specific law must be found in the U.C.C., it is still necessary to return to previous judicial decisions and the doctrine of *stare decisis*. Unlike civil law systems where the entire law is in the code, the courts using the U.C.C. require judicial decisions for proper statutory interpretation.

iii. The United Nations Convention on Contracts for the International Sale of Goods

The goal of the United Nations Convention on Contracts for the International Sale of Goods (C.I.S.G.) is to promote international trade on the basis of equality and good faith.⁵⁴ To develop international trade, the Convention takes “into account the different social, economic

⁵⁴ United Nations Convention on Contracts for the International Sale of Goods (C.I.S.G.), Preamble & art. 7.

and legal systems [to] contribute to the removal of legal barriers in international trade.”⁵⁵ C.I.S.G. was signed in Vienna in 1980 and became effective January 1, 1988.⁵⁶ It became United States law under the Supremacy Clause of the United States Constitution.⁵⁷ Therefore, the United States has two separate bodies of law that regulate the contracts for the sale of goods: Article 2 of the Uniform Commercial Code (U.C.C.) and C.I.S.G.⁵⁸ C.I.S.G. is very similar to the U.C.C.

The Convention only applies to the sale of goods between merchants who reside or have their principle place of business in different countries that are signatories to the Convention.⁵⁹ Furthermore, C.I.S.G. only governs the formation of the contract and the obligations that arise from a properly formed contract.⁶⁰ This means that the Convention does not address the actual validity of a contract.⁶¹ Contractual issues such as fraud, duress, unconscionability, capacity, and custom are left to the laws of the forum nation or state. Lastly, parties are free to contract in such a way as to make the Convention inapplicable or to make a particular law or custom binding to the contract.⁶²

⁵⁵ Id. at Preamble.

⁵⁶ Akaddaf, *Application of the United Nations Convention on Contracts for International Sale of Goods to Arab Islamic Countries: Is CISG Compatible with Islamic Law Principles*, at 6.

⁵⁷ United States Constitution, Art. VI, Sec. 1, Clause 2

⁵⁸ Fatima Akaddaf, *Application of the United Nations Convention on Contracts for International Sale of Goods to Arab Islamic Countries: Is CISG Compatible with Islamic Law Principles*, at 6.

⁵⁹ C.I.S.G., art. 1, sec. 1.

⁶⁰ Id. at art. 4.

⁶¹ Id. at art. 4(a).

⁶² Id. at art. 6 & art. 9.

b. Freedom of Contract

There are various limitations to the common law concepts of ‘freedom of contract’ and ‘freedom from contract.’ The most common of these limitations are unjust enrichment, restitution, and promissory estoppel.⁶³ The reason for these limitations is the idea of fairness and economic efficiency.⁶⁴ The concept of fairness is further seen in the common law notion of consent. For consent to be voluntarily given, notice is required.⁶⁵ The party giving consent needs to know all the facts and circumstances to allow him to make an informed decision. Without this knowledge, the consent was not voluntarily given.⁶⁶

In American contract law, strict liability is the standard, except in limited circumstances.⁶⁷ What this means is that one is either liable for a breach of contract or they are not. For the most part, a party who breaches cannot legally excuse his lack of performance. The only exception would be in the case of *force majeure* (act of God). However, this is a strict standard that is usually not met. What a U.S. attorney would term as a ‘defense’ to a breach of contract action would be to claim that there existed a mitigating factor that prevented the contract from being valid in the first place. In general, duress, fraud, unconscionability, and reasonable expectations can all serve remove the liability from a party who did not performance.⁶⁸ The essence of the argument is that the breaching party did not know, or something prevented him from knowing, all of the pertinent facts that are required for a reasonable person to make an

⁶³Bix, *Contract Law Theory*, at 2.

⁶⁴ Id. at 4.

⁶⁵ Id.

⁶⁶ Id. at 6.

⁶⁷ Id. at 19.

⁶⁸ Id. at 7.

informed decision. As discussed later, this is very similar to Islamic law where parties are excused from a contract for similar reasons. However, under *Shari'a*, these 'excuses' are defined in terms of equality and balance between parties, rather than fairness.

c. Interpreting a Contract

Contracts in the common law tradition are primarily used to allocate risk. Risk often arises because contracts, by their very nature, enable performance to occur over a period of time. The purpose of the contract is to prevent one party from being placed in an unequal bargaining position by the other party.⁶⁹ One of the most important aspects of contracts in the U.S. common law tradition is that the contract specifically states which party bears the risk at each stage of performance. For example, a contract may provide that the seller will purchase insurance to cover the goods in transit until delivery has been completed.⁷⁰ It is vital that each party be clearly aware of their share of the risk in order to make an informed decision and to be able to charge or pay a price that reflects that risk.⁷¹

Sometimes events occur, that result in the loss or damage of the bargained for item, that are not intentionally caused by either party. It is important that the contract anticipate these potential problems, such as delayed performance and defective goods, in order to address them before they create an impediment to the ultimate goal of the contract. Parties often add a force majeure clause to allow for the termination of a contract when unforeseeable events, such as a natural disaster, make the performance of the contract impossible. However, courts usually read

⁶⁹ Richard A. Posner, *The Law and Economics of contract Interpretation*, at 4.

⁷⁰ U.C.C. §2-509

⁷¹ U.C.C. §2-303

into a contract implied excuses found in the common law such as impossibility, impracticability, or frustration.⁷²

d. Liability and Remedies

Damages are another way that the common law system allocates risk. Holmes viewed American contract law as giving the parties to a valid contract the choice to either perform or to pay damages. Although he did not advocate efficient breaches, often his philosophy leads that result.⁷³ This is because a party would be encouraged to breach a contract if he was able to find either a buyer at a higher price or a seller at a lower price, so long as the price difference is large enough to cover the potential damages that must be paid to the original contracting party. Occasionally, parties may add a liquidation clause that goes into effect if one party does not perform. A liquidation clause is an amount decided by the parties in anticipation of one parties' non-performance.⁷⁴ It is important that the amount agreed upon be reasonable to both parties, under all the circumstances, or else it will not be upheld in court.⁷⁵ This makes providing a reliable and fair legal remedy for a breach of contract one of the most important functions of contract law.⁷⁶

⁷² Posner, *The Law and Economics of contract Interpretation*, at 4.

⁷³ Bix, *Contract Law Theory*, at 18.

⁷⁴ U.C.C. §2-718

⁷⁵ *Id.*

⁷⁶ Richard A. Posner, *The Law and Economics of contract Interpretation*, at 3.

V. Contracts for the Sale of Goods in Muslim Countries of the Middle East

a. What is the Law?

i. The Civil Law Tradition

Shari'a covers only specific areas of law, leaving the commercial law in most Middle Eastern countries to be heavily influenced by the Code Napoleon.⁷⁷ Egypt, in particular, has embraced the civil legal tradition of the West. In 1883, it adopted a civil and commercial code based on the Code Napoleon.⁷⁸ In 1948, the Code was updated to incorporate Islamic principles and Egyptian court decisions.⁷⁹ Continuing its tradition of Western influence, Egypt passed a new commercial code, in 1999, that strongly reflects the influence of the United Nations Convention on Contracts for the International Sale of Goods.⁸⁰ Other Western influenced countries have particularly embraced article 1134 of the French Civil Code of 1804, which states that all "agreements legally formed have the force of law between the parties."⁸¹ In developing nations, this has been interpreted to exclude contracts, not specifically addressed by name in the nation's code, as unenforceable because of their interpretation of the term "legally."⁸² However, the modern French Code states that if the terms of the contract are clear, then "the intentions of

⁷⁷ Akaddaf, *Application of the United Nations Convention on Contracts for International Sale of Goods to Arab Islamic Countries: Is CISG Compatible with Islamic Law Principles*, at 20.

⁷⁸ *Id.* at 21.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ French Code of 1804, art. 1134.

⁸² Boris Kozolchyk, *A roadmap to Economic Development*, at 10 (2006).

the parties [it] shall be adhered to literally.”⁸³ Therefore, in the countries influenced by the Civil law tradition, the intent of the parties is paramount.

ii. The Islamic Tradition

Because *Shari'a* reaches all facets of life, it necessarily extends to all transactions between individuals in *Muslim* society.⁸⁴ This includes commercial transactions and contracts. *Shari'a* does not provide a formal definition or general theory of contracts.⁸⁵ Certain commercial transactions are mentioned in the *Qur'an*.⁸⁶ As stated, “[y]ou who believe, be faithful to your contracts” and “[f]ulfill the covenant of God when you have entered into it, and break not your oaths after you have confirmed them.”⁸⁷ Furthermore, according to the *Sunna*, “*Moslems* are bound by their stipulations.”⁸⁸ Rather than provide a general theory of contracts, Islamic scholars defined and classified specific groups of contracts and the terms that naturally follow from them.⁸⁹ The four most common types of contracts are sale (*bay*), gift (*hiba*), hire

⁸³ (see, Mexican Civil Code, Book Four Obligations, art. 1851 –duplicate of French Civil Code, translated by Prof. Vargas).

⁸⁴ Taylor, *Islamic Banking –The Feasibility of Establishing an Islamic Bank in the United States*, at 387.

⁸⁵ Hussein Hassan, *Contracts In Islamic Law: The Principles of Commutative Justice and Liberality*, 13:3 JOURNAL OF ISLAMIC STUDIES, 257-97 (2002). (Oxford Centre for Islamic Studies)

⁸⁶ Qur'an 2:275, see, Hassan, *Contracts In Islamic Law: The Principles of Commutative Justice and Liberality*, at 284.

⁸⁷ Qur'an 16:91

⁸⁸ Akaddaf, *Application of the United Nations Convention on Contracts for International Sale of Goods to Arab Islamic Countries: Is CISG Compatible with Islamic Law Principles*, at 17.

⁸⁹ Hassan, *Contracts In Islamic Law: The Principles of Commutative Justice and Liberality*, at 284.

(*ija'ra*), and loan (*a'riya*).⁹⁰ The sales contract is the most important contracts in Islamic law and serves as the model for all other contracts.⁹¹

Commercial transactions are of great importance in Islam; Mohammed himself was originally a caravan merchant.⁹² But, for the most part, *Shari'a* does not greatly affect the sale of goods. As I have already mentioned, most countries that are governed by Islamic law usually have a commercial code. The commercial code regulates the contracts for the sale of goods and *Shari'a* is used as a supplement to fill in the gaps in the code.⁹³ *Shari'a* also plays a role in the court's interpretation of the language used in the commercial code and when interpreting the intentions of the parties to the disputed contract.

Additions that change the nature of the contract are void.⁹⁴ Therefore, the parties cannot add new terms or conditions to a contract, even if they both agree to these new additions, if the underlying purpose of the contract is affected.⁹⁵ For this reason, under *Shari'a* the parties cannot use one contract for multiple transactions because there must be one specific purpose underlying every contract. If there is more than one independent transaction between the parties, then a new contract is required. This is because multiple unrelated transactions can lead to uncertainty in interpreting the contract.⁹⁶ It is important that each party knows all of the terms

⁹⁰ Qur'an 4:33; see, Hassan, *Contracts In Islamic Law: The Principles of Commutative Justice and Liberality*, at n.6.

⁹¹ Hassan, *Contracts In Islamic Law: The Principles of Commutative Justice and Liberality*, at 27.

⁹² *Id.* at 30.

⁹³ Sloane, *The Status of Islamic Law in the Modern Commercial World*, at 743.

⁹⁴ *Id.* at 743.

⁹⁵ *Id.*

⁹⁶ *Id.*

and obligations involved in each individual transaction. To ensure proper consent, a separate contract for each independent transaction specifying the duties and obligations of each party is required.

1. Common Types of Commercial Contracts

The exception to the rule, that the property must pass immediately once the contract is validly agreed upon by the parties, is the Salam contract. This type of contract is valid because the Prophet Mohammed explicitly permitted it.⁹⁷ *Salam* is a forward looking contract. It allows for the current purchase of goods to be delivered at a specified date in the future.⁹⁸ At the conclusion of the contract, the price is immediately paid (or a partial payment followed by further installment payments made at specified times for the duration of the contract) or the contract is invalid. This type of contract would normally be invalid because of the rules against *riba* and *gharar*. However, commerce made it necessary and the Prophet Mohammed allowed it to be tolerated in order to facilitate trade.⁹⁹ The four schools of legal thought treat *Salam* differently due to their attempts to restrict *riba* and *gharar*.¹⁰⁰ There is enough general agreement to have a few basic rules that are consistent throughout Islamic law: (1) the price and the object being exchanged cannot both be currencies; (2) the objects being exchanged must be freely exchangeable or replaceable; and (3) the object of exchange must be measurable.¹⁰¹ In this way, it is hoped that risk, uncertainty, and fraud will be minimized.

⁹⁷ Hassan, *Contracts In Islamic Law: The Principles of Commutative Justice and Liberality*, at 287.

⁹⁸ See, UAE Civil Code, art. 568

⁹⁹ Hassan, *Contracts In Islamic Law: The Principles of Commutative Justice and Liberality*, at 287.

¹⁰⁰ *Id.* at 288.

¹⁰¹ *Id.*

The description of an object in a *Salam* contract is very important and is treated differently by the different schools of legal thought. The *Hanafī* and *Maliki* schools believe that the object of exchange must be described sufficiently to allow the buyer to identify it. The *Shafi'i* and *Hanbali* schools believe that the items of exchange must be described in complete detail. This includes the color, place of origin, and all other characteristics that may have a bearing on the objects price and use. The purpose of these rules is to minimize risk and to ensure that the goods delivered are the goods actually bargained for.¹⁰² If the goods delivered do not match the goods that were bargained for, in the terms of the contract, then the contract will not be enforced. To do so would unfairly advantage one party over another, thus causing inequality (i.e. the change in the equilibrium of the contract).

Although I will not be discussing these final two important types of commercial contracts, I wanted to make the reader aware that they exist. The *juzaf* sale is a contract for an undetermined quantity of a particular good.¹⁰³ An example would be crops that have not yet been harvested or produce that has not yet ripened.¹⁰⁴ The *istisna* contract is for the sale of a good not yet in existence.¹⁰⁵ Here, an example would be a set of nails of unique dimensions that must be specially manufactured and, therefore, cannot yet exist.

¹⁰² Hassan, *Contracts In Islamic Law: The Principles of Commutative Justice and Liberality*, at 287.

¹⁰³ UAE Civil Code, art. 582

¹⁰⁴ Sloane, *The Status of Islamic Law in the Modern Commercial World*, at 743.

¹⁰⁵ See, UAE Civil Code, art. 586.

iii. The United Nations Convention on Contracts for the International Sale of Goods

The *Muslim* countries most influenced by the civil law system have adopted the United Nations Convention for the International Sale of Goods (C.I.S.G.). These four countries are Egypt, Mauritania, Syria, and Iraq.¹⁰⁶ These countries are heavily influenced by the French civil law tradition. The C.I.S.G. incorporates many principles from the French civil law tradition. For example, the Convention does not require consideration. Of especial importance is the fact that much of the case law interpreting the Convention come from the French *Cour de Cassation*. The Convention allows for prior interactions between the parties, trade usage, and custom in international trade to be implied into a contract unless specifically excluded.¹⁰⁷ *Shari'a* also allows for custom and usage to be considered when a court is interpreting a sales contract.¹⁰⁸

b. Freedom of Contract

All legal systems limit the freedom of an individual to contract in different ways. The Muslim Jurist Ibn Taimiya stated: “[M]en shall be permitted to make all the transactions they need, unless these transactions are forbidden by the Book or by the *Sunna*.”¹⁰⁹ Under *Shari'a*, there are prohibitions against *riba*, *gharar*, and *maysir*.¹¹⁰ Also, to create a valid contract, offer and acceptance are both required. However, unlike the common law system, consideration is not

¹⁰⁶ Akaddaf, *Application of the United Nations Convention on Contracts for International Sale of Goods to Arab Islamic Countries: Is CISG Compatible with Islamic Law Principles*, at 20.

¹⁰⁷ United Nations Convention for the International Sale of Goods, art. 9

¹⁰⁸ Akaddaf, *Application of the United Nations Convention on Contracts for International Sale of Goods to Arab Islamic Countries: Is CISG Compatible with Islamic Law Principles*, at 31.

¹⁰⁹ *Id.* at 26.

¹¹⁰ Hassan, *Contracts In Islamic Law: The Principles of Commutative Justice and Liberality*, at n.6.

necessary.¹¹¹ Furthermore, like C.I.S.G., it is not required that a contract be in writing.¹¹² This is different from the common law (statute of frauds) and the U.C.C., which requires a contract to be in writing if it involves an amount greater than \$5000.¹¹³ In the Islamic tradition, if a contract is in writing, then it must be witnessed by either two men or by one man and one woman.¹¹⁴ Lastly, there cannot be consent if something is unknown or uncertain because this would be *gharar*.¹¹⁵

Consent is necessary for a contract to be valid under *Shari'a*. Unfair exploitation vitiates consent. Unfair exploitation exists where the obligations assumed by the parties are disproportionate.¹¹⁶ Once again, the emphasis here is on the equality of the parties and creating equilibrium or balance in the contract. The different schools apply the principle of unfair exploitation differently.¹¹⁷ The *Maliki* and *Hanafi* schools believe a contract is void if one of the parties is inexperienced or innocent and there also needs to be misrepresentation or disproportionate obligations.¹¹⁸ In the *Shafi'i* and *Hanbali* schools, the obligations must be grossly disproportionate and there must also be fraud.¹¹⁹

¹¹¹ Akaddaf, *Application of the United Nations Convention on Contracts for International Sale of Goods to Arab Islamic Countries: Is CISG Compatible with Islamic Law Principles*, at 26.

¹¹² *Id.* at 25.

¹¹³ U.C.C. §2-201

¹¹⁴ Akaddaf, *Application of the United Nations Convention on Contracts for International Sale of Goods to Arab Islamic Countries: Is CISG Compatible with Islamic Law Principles*, at 28.

¹¹⁵ *Id.* at 26.

¹¹⁶ Hassan, *Contracts In Islamic Law: The Principles of Commutative Justice and Liberality*, at 288.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

Because of the importance of equality in Islamic contract law, parties have the right to avoid the contract even after it has been validly concluded.¹²⁰ With all of the principles guarding the parties from inequality (*riba*, *gharar*, consent, ect), if all of the rules have been met and there is still inequality, then there is a presumption that one party intended to benefit the other party at his own expense because of the virtue of liberality.¹²¹ Following the philosophy of Thomas Aquinas and Aristotle, *Muslim* scholars view liberality as a virtue of generosity and, by its nature, does not require equality.¹²²

1. Prohibition of *Riba*

Riba is similar to usury and is specifically prohibited by the *Qur'an*. It states that “God has made sale lawful and usury unlawful.”¹²³ The *Qur'an* goes on to say “that which you lay out for increase through the property of [other] people will have no increase with God; but that which you lay out for charity, seeking the countenance of God, will increase; it is these who get a recompense multiplies.”¹²⁴ Lastly, the *Qur'an* advises Muslims that: “You who believe, devour not usury, double and multiplied; but fear God that you may [really] prosper.”¹²⁵ This prohibition arises primarily because of the importance of equality. In pre-Islamic times, if one party was lent money by another party, then the lending party could demand repayment of the full amount. If the borrowing party was not able to pay the full amount borrowed, the debtor

¹²⁰ Hassan, *Contracts In Islamic Law: The Principles of Commutative Justice and Liberality* at 289.

¹²¹ *Id* at 289.

¹²² *Id*.

¹²³ *Qur'an* 2:275

¹²⁴ *Qur'an* 30:39

¹²⁵ *Qur'an* 3:130

would have to pay double the amount borrowed the following year and if unable to pay the following year, then the amount would double again. Thus, the lending party had greater power than the borrowing party; this created inequality.¹²⁶

Although it is common knowledge that interest on loans is prohibited by the concept of *riba*, any unjustified profit may also qualify as *riba* and, thus, void a contract.¹²⁷ Islam allows for the accumulation of wealth; however, it must occur through means that are in accordance with Islam.¹²⁸ Simply stated, the prohibition against *riba* is a prohibition of unearned profits.¹²⁹ If a lender wants to profit, then he can receive a share of the profits (and losses) by becoming a partner in the venture. He cannot simply collect interest without incurring any personal risk or stake in the venture.¹³⁰

In Islam, the concept of a price is of great importance. To charge a party more than the “just price” is considered *riba* (usury), which is forbidden.¹³¹ When there is an actual sale or exchange of goods, the just price is determined by comparing the contract price to the price of similar goods in the same location, this is otherwise known as the market price.¹³² Like Aquinas, *Muslim* jurists, believe that unjust prices are the result of fraud.¹³³ “It is sinful to practice fraud for the express purpose of selling a thing for more than its just price, in as much as a man

¹²⁶ Hassan, *Contracts In Islamic Law: The Principles of Commutative Justice and Liberality*, at 290.

¹²⁷ Sloane, *The Status of Islamic Law in the Modern Commercial World*, at 743.

¹²⁸ Taylor, *Islamic Banking –The Feasibility of Establishing an Islamic Bank in the United States*, at 388.

¹²⁹ *Id.* at 391.

¹³⁰ Akaddaf, *Application of the United Nations Convention on Contracts for International Sale of Goods to Arab Islamic Countries: Is CISG Compatible with Islamic Law Principles*, at 49.

¹³¹ Hassan, *Contracts In Islamic Law: The Principles of Commutative Justice and Liberality*, at 278.

¹³² *Id.* at 279.

¹³³ *Id.* at 280.

deceives his neighbor to his loss.”¹³⁴ Absence of fraud, under the philosophy of both Aquinas and *Muslim* jurists, requires a competitive market free of monopolistic practices.¹³⁵

A significant disparity between the contracted price of a good and its equivalent in the market, with no evidence of fraud, is assumed to be the result of one party’s liberality.¹³⁶ The virtue of liberality is the action by one party to voluntarily enrich the other party.¹³⁷ Generosity is important in Arab culture. A gift is considered a contract in *Shari’a* and it is defined by the virtue of liberality. There are also hybrid contracts such as a contract for a life tenancy or the lending tangible goods.¹³⁸ A “just profit” is the normal profit earned in a market in a particular type of trade without harming others.¹³⁹ Profits are acceptable, but those deemed exploitative or abnormal, especially to the neediest members of society go against the practice of commutative justice, which plays an important role in Islamic law.¹⁴⁰

Many *Muslim* countries create legal fictions to bypass the prohibition of interest as *riba*.¹⁴¹ Egypt follows the French Civil Code and allows interest to accumulate for damages and for delay of payment.¹⁴² Iraq’s civil code is similar and has copied the portions of the Egyptian

¹³⁴ Thomas Aquinas, *Summa Theologica*, II, q.2, q.77, art. i.

¹³⁵ Hassan, *Contracts In Islamic Law: The Principles of Commutative Justice and Liberality* at 280.

¹³⁶ *Id* at 280.

¹³⁷ *Id*.

¹³⁸ *Id*. at 292.

¹³⁹ *Id*. at 281.

¹⁴⁰ *Id*. at 261.

¹⁴¹ *Id*. at 55.

¹⁴² Egypt Civil Code, Article 226

Civil Code dealing with interest almost verbatim.¹⁴³ Dubai's Court of *Cassation* ruled "a creditor may collect a 15% interest on a delayed payment pursuant to a contract for the sale of goods."¹⁴⁴ For countries that are more influenced by *Shari'a*, the prohibition against interest is a significant deterrent for joining the C.I.S.G. The Convention specifically entitles a harmed party to collect interest on any amount owed by a party who is in arrears.¹⁴⁵

2. Prohibition of *Gharar*

Gharar, risk or uncertainty, is also strictly forbidden. Although not addressed in great detail here, *maysir* (gambling), often overlaps with the prohibition against *gharar*. This prohibition came about due to the traditions and teachings of the Prophet Mohammed. He forbade individuals from meeting tribesmen on their way to the market and to buy their goods before they reached the marketplace. This practice occurred because buyers realized that they could purchase goods at a cheaper price because the sellers did not know the price of the good because they had not yet reached the marketplace.¹⁴⁶ The farmers (sellers) uncertainty about the demand for their goods, sold at a below market price. Remember that the "just price" is determined by the market price. The idea that individuals must be protected from themselves is found elsewhere in Islam such as the prohibition against hazardous games, games of chance, and consumption of alcohol or drugs.¹⁴⁷

¹⁴³ Akaddaf, *Application of the United Nations Convention on Contracts for International Sale of Goods to Arab Islamic Countries: Is CISG Compatible with Islamic Law Principles*, at 54.

¹⁴⁴ See, Richard Price & Essam Al Tamimi, *United Arab Emirates Court of Cassation Judgments: 1989-1997*, at 51-52 (1998).

¹⁴⁵ United Nations Convention for the International Sale of Goods, section III, art. 78.

¹⁴⁶ Hassan, *Contracts In Islamic Law: The Principles of Commutative Justice and Liberality*, at 291.

¹⁴⁷ *Id.*

Parties may not enter into speculative contracts because of this prohibition against *gharar*.¹⁴⁸ Parties need to have complete knowledge of the terms of the exchange for the contract to be sufficiently definite and, therefore, upheld.¹⁴⁹ *Gharar* can be prevented if the parties, terms, subject matter, the results, and the characteristics of the exchanged for objects are specified and sufficiently known.¹⁵⁰ If prices, dates, or other terms that may fluctuate or change over time, are left open, it will cause the contract to be void as *gharar*. This prohibition against fluctuating terms includes standards to determine price such as interest rates, market price, or currency values.¹⁵¹ This is different from the U.C.C., which states that a contract cannot fail for a lack of definiteness.¹⁵² The C.I.S.G., a bit stricter on this point than the U.C.C., allows fluctuating or uncertain terms so long as there is a way for the term to be determined.¹⁵³

Insurance is not permitted under *Shari'a* because of *gharar*.¹⁵⁴ Therefore, parties are not able to mitigate risk by insuring against it. This is one of the reasons why it is so vital to avoid risk and uncertainty in a contract. Insurance contracts are prohibited because the outcome of the contract is uncertain and is considered speculative. This causes it to fall into the category of *gharar* or gambling.¹⁵⁵ Recently, cooperative or mutual insurance has been permitted under *Shari'a*.¹⁵⁶

¹⁴⁸ Hassan, *Contracts In Islamic Law: The Principles of Commutative Justice and Liberality*, at 292.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 293.

¹⁵¹ Sloane, *The Status of Islamic Law in the Modern Commercial World*, at 743.

¹⁵² Uniform Commercial Code, 2-204(3).

¹⁵³ United Nations Convention for the International Sale of Goods, art. 55

¹⁵⁴ Sloane, *The Status of Islamic Law in the Modern Commercial World*, at 743.

¹⁵⁵ *Id.*

c. Interpreting a Contract

The prohibitions, against *riba* and *gharar*, have led jurists of Islamic law to focus on the objective elements of the contract, such as its implementation and its subject matter, instead of more subjective elements like intent.¹⁵⁷ Keeping this in mind, there are two rules: (1) property in the object of sale passes as soon as the contract is concluded (after offer and acceptance) and; (2) there cannot be unfair exploitation.¹⁵⁸

There must be an immediate transfer of ownership after the contract is validly agreed upon. This rule does not differentiate between real and tangible property. The seller has an affirmative duty to deliver the goods immediately to the buyer. The buyer has an affirmative duty to pay the agreed price to the seller. The goal of the transaction is an equal exchange. The seller should not receive the price while maintaining possession of the good and the buyer should not possess both the good and its price. Ideally, this exchange should occur instantly and simultaneously to prevent imbalance.¹⁵⁹

A contract is defined by its result and its terms are meant to lead to the specific agreed upon result. The terms are expected to flow naturally from the contract. If a party intended to enter into a particular type of contract, then he is deemed to have intended all of the obligations that flow from the nature of that contract. This is true even if the obligations were not subjectively foreseen by the party.¹⁶⁰ Natural terms are can be shown if the terms are fair and

¹⁵⁶ Sloane, *The Status of Islamic Law in the Modern Commercial World*, at 743.

¹⁵⁷ Hassan, *Contracts In Islamic Law: The Principles of Commutative Justice and Liberality* at 260.

¹⁵⁸ Id. at 285.

¹⁵⁹ Id. at 286.

¹⁶⁰ Id.

would lead to the end result that is in accordance with the intent of the parties. If the terms flow naturally from the contract, then whatever is exchanged between the parties will be of equal value.¹⁶¹ Because of this, any additional terms to a contract, even if agreed upon by both parties, that modify the nature of the contract, are void and could possibly destroy the original contract.¹⁶²

Commutative justice and liberality direct and stabilize commercial transactions in the Islamic world.¹⁶³ This is because Arab philosophers were greatly influenced by the works of many Greek and Roman philosophers, which they translated into Arabic. Among these works was *Nicomachean Ethics* by Aristotle.¹⁶⁴ Commutative justice is comprised of distributive justice and corrective justice. Aristotle differentiates between both of these. Distributive justice is the idea that those who have a share in contract must also have a share in the distributions resulting from that contract. Corrective justice is different. It requires that the parties to a contract or transaction maintain equality. Neither party can be richer or poorer than he was prior to the contract.¹⁶⁵ One cannot receive more than one has given. Thomas Aquinas, one of the most prominent commentators on Aristotle, believed that both parties in a transaction should bear an equal burden.¹⁶⁶ He believed that both distributive justice and corrective justice are bundled into his idea of commutative justice, which encompasses all transactions between

¹⁶¹ Hassan, *Contracts In Islamic Law: The Principles of Commutative Justice and Liberality* at 260.

¹⁶² Id.

¹⁶³ Id. at 262, n.6.

¹⁶⁴ Hassan, *Contracts In Islamic Law: The Principles of Commutative Justice and Liberality* at n.6.; see, Aristotle, *Nicomachean Ethics* V.

¹⁶⁵ Id.

¹⁶⁶ Thomas Aquinas, *Summa Theologica*.

individuals.¹⁶⁷ The principles of commutative justice to maintain a just distribution of wealth among all members of society is a primary concern in Islamic law.¹⁶⁸ To this end, commutative principles of justice are applied when evaluating the legitimacy of contracts.

The principle of good faith is required by the *Qur'an*. As stated: “Woe to the fraudulent dealers. . .”¹⁶⁹ The Moroccan Code specifically addresses this principle. It states that “good faith is always presumed as long as the contrary is not proven.”¹⁷⁰ The concept of good faith is considered especially important in both the common law tradition and the *lex mercatoria* (international customary law) and, as a result, was codified in the C.I.S.G.¹⁷¹ The U.C.C., similar to the Moroccan Code, specifically codifies the principle of good faith throughout the entire Code.¹⁷²

There is no rule barring extrinsic evidence in *Shari'a*. “Do not suppress evidence; one who suppresses evidence is a sinner at his heart; and God knows all that you do.”¹⁷³ Similarly, C.I.S.G. allows for “all relevant circumstances” to be considered.¹⁷⁴ This is different from the common law tradition and the U.C.C., which excludes extrinsic evidence under the Parole Evidence Rule and requires that an integrated contract, a contract that states that it is the final

¹⁶⁷ Hassan, *Contracts In Islamic Law: The Principles of Commutative Justice and Liberality*, at 262.

¹⁶⁸ *Id.* at 283.

¹⁶⁹ *Qur'an* LXXXIII: 1-5

¹⁷⁰ Code des Obligations et Contrats (Morocco), art. 477

¹⁷¹ United Nations Convention for the International Sale of Goods, Preamble.

¹⁷² Uniform Commercial Code, 2-103[j], 2-305(2), 3-306(1), 2-311(1), 2-328(4).

¹⁷³ *Qur'an* 2:283

¹⁷⁴ United Nations Convention for the International Sale of Goods, Art. 8(3)

and complete agreement of the parties, be the only evidence considered in a contractual dispute.¹⁷⁵

d. Liability

Under *Shari'a* there is no statute of limitations. “No right shall be affected by any lapse of time.”¹⁷⁶ However, the Ottoman Civil Code of 1877 did allow relief to be barred after a certain period of time.¹⁷⁷ In modern times, most *Muslim* countries do have statutes of limitation. The Moroccan Code of Obligations and Contracts bars an action from being brought if 15 years have passed.¹⁷⁸ The Iraqi Civil Code of 1951 has a statute of limitations that is almost a mirror image of the one found in the Moroccan Code.¹⁷⁹ Saudi Arabia, one of the countries least influenced by the French civil code, also has a statute of limitations.¹⁸⁰ However, the Iranian Code of Civil Procedure strictly follows *Shari'a* in providing no statute of limitations.¹⁸¹ But, parties may contract around this prohibition and provide a time in which an action must be brought. This is because of the Islamic rule that “the contract is the law of the contracting parties.”¹⁸²

¹⁷⁵ UCC 2-202

¹⁷⁶ Akaddaf, *Application of the United Nations Convention on Contracts for International Sale of Goods to Arab Islamic Countries: Is CISG Compatible with Islamic Law Principles*, at 44.

¹⁷⁷ Ottoman Civil Code of 1877, art. 1160-1075

¹⁷⁸ Moroccan Code of Obligations and Contracts of 1913, art. 387

¹⁷⁹ Akaddaf, *Application of the United Nations Convention on Contracts for International Sale of Goods to Arab Islamic Countries: Is CISG Compatible with Islamic Law Principles*, at 44.

¹⁸⁰ Saudi Arabian Companies Regulations of 1965, art. 13

¹⁸¹ Iranian Code of Civil Procedure of 1983 (not yet formally approved)

¹⁸² Akaddaf, *Application of the United Nations Convention on Contracts for International Sale of Goods to Arab Islamic Countries: Is CISG Compatible with Islamic Law Principles*, at 45.

Force majeure is a valid way to avoid a contract in Islamic law. Unlike in western law, this concept is expanded to include any unforeseen conditions. Any unforeseen change in the circumstances of either party is grounds for voiding the contract. The idea behind this policy is to prevent unfair loss or damage to the party who is adversely affected.¹⁸³ This relates back to the concept of equality and equilibrium in the contract. The U.C.C. also allows a similar defense “for a performance made impracticable by the occurrence of a contingency.”¹⁸⁴ Similarly, C.I.S.G. allows for a party to be excused from performance if “he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.”¹⁸⁵

Shari’a naturally imposes the common law equivalent of a warranty of merchantability.¹⁸⁶ This warranty cannot be contracted around or waived. The burden is upon the seller to prove there was not a defect in the goods delivered.¹⁸⁷ The U.C.C. expressly provides for an implied warranty of merchantability, which requires that goods “are fit for the ordinary purposes for which goods of that description are used.”¹⁸⁸

¹⁸³ Sloane, *The Status of Islamic Law in the Modern Commercial World*, at 743.

¹⁸⁴ Uniform Commercial Code, 2-615(a).

¹⁸⁵ United Nations Convention for the International Sale of Goods, art. 79(1).

¹⁸⁶ Sloane, *The Status of Islamic Law in the Modern Commercial World*, at 743.

¹⁸⁷ *Id.*

¹⁸⁸ Uniform Commercial Code, 2-314(2)(c)

e. Remedies

There is no such thing as consequential damages in *Shari'a*. Damages never include lost profits because courts find this to be too speculative and, therefore, *gharar*.¹⁸⁹ This is very different from the C.I.S.G., which includes loss of profits as a damages remedy.¹⁹⁰ Also, both the U.C.C. and common law include consequential damages for breach of contract, so long as the damages are not too speculative.¹⁹¹

If the object of the contract is destroyed prior to delivery, then there is no duty for the buyer to pay the price. To do otherwise would create an imbalance and prevent equality. Likewise, the seller has no obligation to deliver a good if the buyer has not paid the agreed upon price. On the other hand, if the seller creates the situation where the buyer is dispossessed of the bargained for item, then the seller is under a duty to reimburse the buyer. The buyer has an obligation to pay the price if he is the reason for its destruction. This is because the buyer is deemed to have taken possession of the object by destroying it.¹⁹² The destruction of the object by a third party results in the buyer having the ability to revoke the contract. This makes the third party responsible to the seller for the price because the third party took possession by destroying the object. If the buyer does not revoke the contract and pays the seller, then the third party must reimburse the buyer for the price paid.¹⁹³

¹⁸⁹ Sloane, *The Status of Islamic Law in the Modern Commercial World*, at 743.

¹⁹⁰ United Nations Convention on the International Sale of Goods, art. 74.

¹⁹¹ Uniform Commercial Code, 2-715; 2-719(3).

¹⁹² Hassan, *Contracts In Islamic Law: The Principles of Commutative Justice and Liberality*, at 287.

¹⁹³ *Id.*

In *Shari'a*, all obligations must be specifically performed by the contracted parties.¹⁹⁴ Islamic countries that are influenced by the Code Napoleon address specific performance differently.¹⁹⁵ French courts will enforce performance. The French Civil Code allows the creditor to perform the debtor's obligation himself at the debtor's expense.¹⁹⁶ It also permits the "creditor" to request performance from a third party at the "debtor's" expense.¹⁹⁷ Under the French Civil Code, delay in performance, after a court has ordered performance, results in a monetary penalty for each day of delayed performance.¹⁹⁸ Under the Iranian Civil Code, specific performance is a secondary remedy left to the judge's discretion.¹⁹⁹ The Moroccan Code is similar. The breaching party has to perform. If he cannot, then he may perform through a third party.²⁰⁰ This is different because the determination of damages is ultimately left to be determined by the choice of the breaching party, not the injured party. All of the *Sunni* schools allow for civil imprisonment for breach of a contract.²⁰¹ However, in the *Shiite* school, civil imprisonment for breach of contract is not a remedy.²⁰² This is unlike the common law system, and the U.C.C., where the payment of damages is the primary remedy and specific performance

¹⁹⁴ Akaddaf, *Application of the United Nations Convention on Contracts for International Sale of Goods to Arab Islamic Countries: Is CISG Compatible with Islamic Law Principles*, at 35.

¹⁹⁵ *Id.* at 37.

¹⁹⁶ French Civil Code, Art. 1144

¹⁹⁷ *Id.*

¹⁹⁸ Akaddaf, *Application of the United Nations Convention on Contracts for International Sale of Goods to Arab Islamic Countries: Is CISG Compatible with Islamic Law Principles*, at 38.

¹⁹⁹ Iranian Civil Code, art. 268

²⁰⁰ Moroccan Code, art. 236

²⁰¹ See, Manuel de Procédere Civile 181 (Casablanca 1886)

²⁰² See, Commercial Law of Iran

(an equitable remedy) is only permitted in special situations.²⁰³ U.S. courts prefer monetary damages.²⁰⁴ In the common law tradition, specific performance is an equitable form of relief that is used when money damages are inadequate or not able to be accurately determined. This tradition is also continued in the U.C.C.²⁰⁵ Specific performance is also a primary remedy under the C.I.S.G.²⁰⁶

VI. Conclusion

Although not addressed previously, it is important that the reader realize that there is a fundamental difference between Islamic law and U.S. common law when it comes to the religious influences on their legal systems. Islam is by its very nature a religion of law.²⁰⁷ Christianity, the religion most affecting the common law tradition in the U.S., traditionally does not address commercial transactions. *Shari'a*, on the other hand, covers all aspects of Muslim life. Canon law, the law most associated with Christianity, covers only the church, church property, and marriage. Early in the common law tradition, ecclesiastical courts handled the narrow areas of Canon Law and the secular courts handled all other disputes, including commercial law.²⁰⁸ Therefore, in the common law system, commercial contracts have little or no influence from religion. By understanding our similarities and differences, hopefully these two

²⁰³ Uniform Commercial Code, art. 2-716

²⁰⁴ Akaddaf, *Application of the United Nations Convention on Contracts for International Sale of Goods to Arab Islamic Countries: Is CISG Compatible with Islamic Law Principles*, at 34.

²⁰⁵ UCC 2-716

²⁰⁶ United Nations Convention for the International Sale of Goods, art. 46 & 62

²⁰⁷ Daniel Klerman, *The Emergence of English Commercial Law: Analysis Inspired by the Ottoman Experience*, USC CENTER IN LAW, ECONOMICS AND ORGANIZATION RESEARCH PAPER NO. C08-19, University of Southern California Law School pg. 17

²⁰⁸ *Id.* at 17.

great legal traditions, regions, and religions can work together to promote the peace that prosperity through trade can bring.

Constitutions:

United States Constitution, Art. VI, Sec. 1, Clause 2

Religious Documents:

Qur'an LXXXIII: 1-5

Treaties:

United Nations Convention on Contracts for the International Sale of Goods (C.I.S.G.)

Statues:

Code des Obligations et Contrats (Morocco), art. 477

Commercial Law of Iran

Egypt Civil Code, Article 226

French Civil Code, Art. 1144

Iranian Civil Code, art. 268

Iranian Code of Civil Procedure of 1983 (not yet formally approved)

Manuel de Procedere Civile 181 (Casablanca 1886)

Moroccan Code of Obligations and Contracts of 1913, art. 387

Moroccan Code, art. 236

Ottoman Civil Code of 1877, art. 1160-1075

Saudi Arabian Companies Regulations of 1965, art. 13

U.A.E. Civil Code, art. 582

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