International Journal of `Umranic Studies
Jurnal Antarabangsa Kajian `Umran
المجلة العالمية للدراسات العمرانية
journal homepage: www.unissa.edu.bn/ijus

The Harmonisation of Shariah and Civil Law in the Area of Contract with Special Reference to the Remedies for Anticipatory Breach of Contract

Abdul Rahman Abdul Wahab Adunola
Ahmad Ibrahim Kulliyyah of Laws
International Islamic University Malaysia (IIUM)
adram76@gmail.com

Vol.2, Issue 1 | January 2019

KEYWORDS

Contract law, Contractual Obligations, Anticipatory Breach, Remedies

ABSTRACT

The paper revealed that the contract law at the conceptual level is substantially similar in common law, civil law and Sharīah to the extent that the writers of Islamic law of contract do not explore, especially in the area of remedies for anticipatory breach of contractual obligations, beyond the boundaries of common law and civil law systems. However, the differences can be found in the application of the remedies. Thus, this paper suggests a method which can be employed to harmonise the area of divergence among these systems of law. Similarly, in the aspect of remedies for breach of contractual obligations, the research recommends that, in a scenario whereby damages are the only remedy to remedy anticipatory breach of contractual obligations, it should be on the ground of non-commitment of the breaker and not on the ground of expectation interest of performing party. The qualitative research methodology is utilised and the data gathered from the valuable literature of the Muslim and western writers were employed to accomplish the study.

Introduction

From the very beginning, it is a distinct fact that contracts and commercial transactions are part and parcel of the civil law,[1] in that the civil law strives to ensure justice between a man and his fellow human beings by ordering them to fulfil their obligations towards one another. Indeed, contract is one of the sources of obligation since the era of revelation until this modern time; and it has its rules and regulations which obligate the person who ventures into a contract to abide by. These rules and regulations might emerge from the divine law or human legislation, and any violation against which will absolutely result in a liability. Unfortunately, the contractual obligations tend to become the victim of breach which draws the attention of jurists to the legislation of different legal remedies. Obviously, if there is no liability for the wrongful act or misconduct towards the contractual obligations, the business world and commercial activities would be

1 Civil law here means "the part of a country's set of laws which is concerned with the private affairs of citizens, for example marriage and property ownership, rather than with crime." It does not mean "any system of law based on the Roman system as distinguished from the common law and canon law." See (https://www.collinsdictionary.com/dictionary/english/civil-law), retrieved 26th March, 2019.

Please cite this article as: Abdul Wahab Adunola A.R. (2019). The Harmonisation of Shariah and Civil Law in the Area of Contract with Special Reference to the Remedies for Anticipatory Breach of Contract, *International Journal of `Umranic Studies*. Vol 2. Issue 1. Pp.11-18.

at stake. Indeed, writings are more than enough regarding the law of contract, breach of contractual obligations and remedies. Breach of contract can be remedied in various ways based on distinct purposes and different jurisdictions but "the primary remedy for breach of contract is an award of money, called damages, to compensate for the claimant's loss resulting from the defendant's breach of contract".[2] Furthermore, contractual obligation can be breached actually or anticipatorily. The actual breach occurs when a party to the contract declines to carry out his contractual obligation at the due date or after; unlike anticipatory breach which tends to happen when a contracting party repudiates before the due date for performance. In brief, this paper believes that remedies for anticipatory breach of contractual obligations in both the civil law and Shariah are not differing.

Definition of Shariah

The term "Shariah" literally means "the path or way to a watering hole." It also means "the straight path to be followed."[3] The Holy Quran has used the word 'Shariah' with this meaning in the following verse:

ثُمَّ جَعَلْنَٰكَ عَلَىٰ شَرِيعَةٍ مِّنَ ٱلْأَمْرِ فَٱتَّبِعْهَا وَلَا تَتَّبِعْ
أَهْوَآءَ ٱلَّذِينَ لَا يَعْلَمُونَ ﴿١٨﴾

Then we put Thee on the (right) way of religion: so follow Thou that (Way), and follow not the desires of those who know not.[4]

The word Shariah was technically defined by al-Qurtubi as the canon law of Islam, all the different commandments of Allah. Denis J. Wiechman, Jerry D. Kendall, and Mohammad K. Azarian defined Shariah and I quote:

> Islamic law is known as Shariah Law, and Shariah means the path to follow God's Law. Shar'iah Law is holistic or eclectic in its approach to guide the individual in most daily matters. Shariah Law controls, rules and regulates all public and private behaviour. It has regulations for personal hygiene, diet, sexual conduct, and elements of child rearing. It also prescribes specific rules for prayers, fasting, giving to the poor, and many other religious matters. Civil Law and Common Law primarily focus on public behaviour, but both do regulate some private matters.[5]

In short, Shariah has another meanings given by the scholars but the comprehensive meaning which can be deduced from their definitions is as follows: Shariah is "the sum total of Islamic teaching and system, which was revealed to Prophet Muhammad (s.a.w.) recorded in the holy Quran as well as deducible from the Prophet's divinely guided lifestyle called Sunnah."[6]

Definition of civil law

The meaning of civil law can be viewed from different angles. The well-known use of the term 'civil law' refers to the law of certain countries that practice civil law system (where the judicial decision on a particular action relies on the codes) such as Quebec, France and Germany. In another sense, civil law means the law enacted by the lawmakers in a state to regulate the conduct of individual towards his/her fellow nation-mate and to govern the relationship between the state government and the citizens. This meaning of civil law can be further understood from the following: Civil law is the:

> Body of law developed from Roman law and used in continental Europe and most former colonies of European nations, including the province of Quebec and the U.S. state of Louisiana. The most significant codifications of modern civil law were the French (Napoleonic Code) and the German (German Civil Code). The basis of law in civil-law jurisdictions is statute, not custom; civil law is thus to be distinguished from common law. In civil law, judges apply principles embodied in statutes, or law codes, rather than turning to case precedent. French civil law forms the basis of the legal systems of The Netherlands, Belgium, Luxembourg, Italy, Spain, most of France's former possessions overseas, and many Latin American countries. German civil law prevails in Austria, Switzerland, the Scandinavian countries, and certain countries outside Europe, such as Japan, that have westernized their legal systems. The term is also used to distinguish the law

2 Mindy Chen – Wishart, Contract law, New York: Oxford University Press, 2005, at 527.

3 Al-Qattan, Manna', Taareekhut-Tashreeil-Islaamiy, Al-Ma'aarif Publication, Riyadh, 1996, at 13.

4 Surah Al-Jathiyyah, verse 18. See Abdullah Yusuf Ali, The Meaning of the Holy Quran, Maryland: Amana Publication, 11 edn., 2006, at 1297.

5 Denis J. Wiechman, Jerry D. Kendall, & Mohammad K. Azarian, Shariah Islamic Law, available at http://www.shariah.net/shariah-islamic-law/, accessed November 10, 2009).

6 Mohamad Akram Laldin, Shari'ah & Islamic Jurisprudence, Kuala Lumpur: CERT Publication Sdn. Bhd., 2nd edn., 2008, at 3.

that applies to private rights from the law that applies to criminal matters.[7]

In brief, the meaning of civil law as a law governing the private rights of individuals is espoused in this paper. This encompasses both the law of civil and common law countries as long as it is the law made by human beings which makes it different from Shariah. Therefore, the study of remedies for anticipatory breach of contractual obligation shall be discussed based on this notion.

The difference between the Shariah law and the Civil law

In a broad sense, the distinct dissimilarity between the Shariah law and the civil law can be seen from the creed that Shariah law is originated from the revelation while the civil law is the work of human beings. Also, the distinction between the Shariah law and the civil law can be seen in the sources from which every jurisdiction draw its guiding principles. The sources of the Shariah law from which to draw its guiding principles are: 1) Quran, Hadith, Ijma', Qiyas (as the primary sources), and 2) istihsan (judicial preference), al-masalihu al-mursalah (public interest), istishab (presumption of existence or non-existence of facts) and others as the secondary sources of Shariah law. However, the civil law is based on either the doctrine of *stare decisis* as in the common law jurisdiction or *code civil* as in the civil law system.

In a narrow sense, with regard to the theme of this paper, the civil law and the Sharīah law have a similar approach as far as contractual obligations are concerned even though the areas of dissimilarity can still be ascertained. The claim that contractual obligations can be created by a promise or an agreement, as long as the requirements for legally binding contract are met, demonstrates the convergence of conceptualisation of the contract law in the three major legal systems; common law, civil law and Shariah. However, consideration as an inevitable requirement for a legally binding agreement signifies the divergent view between the common law and the others. Moreover, the civil law and the Sharīah law are closely related in the area of breach of contractual obligations and their remedies.

Definition of contract

First and foremost, contract law lies at the heart of every system of law. It stands as the foundation of the society. Indeed, the society relies upon free transactional activities in the marketplace at all levels. Exchanges in the marketplace depend mostly on voluntary agreements between individuals. It is not an exaggeration to hold that such voluntary agreements can never work without a contract law. A contract law aims at making these agreements enforceable. Thus, one party to a contract would be allowed to obtain damages from the other party if the latter stands in breach of his obligation. This is because a contract, whether oral, implied, or written, is an exchange of valuable promises which must be fulfilled unless there is a proper excuse for the breach.[8]

Contract means "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognises as a duty."[9] According to the Oxford dictionary of law, contract is a legally binding agreement which arises as a result of proposal (offer) and acceptance.[10] In its more extensive sense, a contract can be meant to be "an agreement between two or more competent parties in which an offer is made and accepted, and each party benefits. The agreement can be formal, informal, written, oral or just plainly understood." [11] In concise, the term 'contract' encompasses every description of an 'agreement' and an 'obligation' by which one becomes bound to the other to do or not to do a certain act. With this regard, a contract can be meant to be an act which involves a perfect obligation. In its more confined sense, it is an agreement between two or more persons, in relation to something to be done, whereby these persons are bound to each other, or one is bound to the other.

Under Article 1101 of the Civil Code of France it is stated that *contrat* is a *convention* whereby one or several persons bind themselves towards another or several others, to give, to do, or not to do something. In this respect, *contrat* is made as a species of *convention* to denote an agreement by which an obligation is created. Thus, a contract and a convention are used nomenclaturally and even they are employed interchangeably in the Code to designate an agreement of the contracting parties to create, transfer, modify or extinguish an obligation.This aspect is one of the areas of

7 Britannica Concise Encyclopeadia, Civil Law, available on <http://www.answers.com/topic/civil-law>, accessed November 10, 2009.

8 William A. Markham, "An Overview of contract law," Maldonado & Markham, LLP, <http://www.maldonadomarkham.com/Contract-lawyer-San-Diego.htm> , accessed November 10, 2009.

9 Akin to the above definition, Pollock defined contract as a promise or a set of promises which the law will enforce. See generally, Atiyah, P. S., An Introduction to the Law of Contract, edited by Peter Cane, Tony Honoré, and Jane Stapleton, Oxford: Clarendon Press, 1995, at 37.

10 Matin And Jonathan, Oxford dictionary of law (6th edn), New York: Oxford University Press, 2006, 126.

11 "Legal Lexicon on Contract", The Lectric Law Library, <http://www.lectlaw.com/def/c123.htm>, accessed November 10, 2009.

harmonisation between the civil law and the Shariah law. Because the meanings of contract from the civil law perspectives does not make any difference from what a contract means under the Shariah law. However, the Arabic term for contract 'aqd' has other meanings other than promise and agreement.[12]

Contract from the Shariah law perspective

The definition of a contract cannot be deduced from the Islamic traditional law books. Because the Islamic traditional law literature focused more on the sale contract which is considered by the traditional jurists (especially Sunni schools of law) as the foundation for other nominate contracts. This is because nominate contracts are mostly referred to when examining contractual and commercial matters under the Islamic law.

This does not contradict the above mentioned point that a contract in the Islamic law encompasses a contract in the domestic or family context.[13]

According to Parviz Owsia (1994), there is no obvious definition of a contract in the Islamic law due to the absence of a general theory of contract though this has been carefully dealt with by the later Muslim jurist. Indeed, no clear-cut definition can be expressed, instead each specific contract is defined in terms of its particular incidents as it is mentioned before. However, the Shī'ah law defines and identifies '*aqd* in terms of offer and acceptance pertaining to each nominate contract. This is in the same line with the earlier mentioned view of Hidāyat who opines that nominate contracts are mostly referred to when examining contractual and commercial matters under the Islamic law.[14] In continuation, Wahbah Zuhaylī also agrees that the word *'aqd* has various meanings except that he emphasises the Muslim jurists have two definitions for *'aqd*: the first one is broad while the second is narrow. The broad meaning, which is well-known in the three schools of law of Mālikīs, Shāfi'īs and Hambalīs, is that a contract is whatever a person concluded to do whether with a unilateral will (*irādah munfaridah*), like, a *waqaf* contract or a bilateral, like, a sale contract. In this case '*aqd* means all obligations intended to be done by one person or more than one person.

However, in the narrow sense, *'aqd* in the eyes of jurists is the conjunction of an offer and acceptance on a legal matter and its effect shows on the subject matter.[15] This meaning is frequently used by the Muslim jurists when defining a contract as it can be seen in the many definitions above. The phrase "meeting of intentions or wills" or "combination or conjunction of sayings" refers to the conjunction of the offer by the offeror with the acceptance by the offeree. Therefore, we can hold that this second meaning of a contract in the eyes of the Muslim jurists is similar to the meaning given in the western concept as analyzed earlier, especially, the civil law.[16]

Contract under Malaysian Contract Act 1950

According to Malaysia law, "an offer in the context of the Contract Act 1950 is known as a 'proposal', which is defined in S. 2(a) of the Act and a contract is made when there is an acceptance, this had been stated in S. 2(b) the Act. When both offer and acceptance obtained, a promise had formed. According to S. 2(e) of the Act, every promise and every set of promises, forming the consideration for each other, is an agreement, and by referring to S. 2(h) of the Act, agreement enforcement by law is a contract. By referring to S. 10 of the Act, agreement are contracts if they are made by the free consent of the parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void."[17] This definition is, indeed, in conformity with the meaning of contract under the Shari'ah. It also entrenched in it the conditions upon which a contract is legally made in Shari;ah. Similarly, the law of contract in Brunei is detailed for that it provides a comprehensive meaning of contract. Like other common laws, Brunei contract law emphasizes on promise and agreement as well as conditions that constitute a valid and void contract.[18]

12 Parviz Owsia, Formation of contract: A comparative study under English, French, Islamic and Iranian law, London: Graham & Trotman Limited, 1994, at 157 - 161.

13 Ahmad Hidāyat Buang, Studies in the Islamic Law of Contracts: The prohibition of Gharar, Kuala Lumpur: International Law Book Services, 2000, 1-3.

14 Owsia, n. 10 at 160.

15 Under articles 103 and 104 of Majallatul Ahkām Al-'Adliyyah, the same definition is mentioned. The word "'aqd" is used in article 103 while "in'iqad" is used in article 104. See Palestinian National Authority, "Majallatul Ahkām Al-'Adliyyah," Ministry of Justice, <http://www.moj.ps/images/majallatalhkam.pdf> (accessed November 13, 2009).

16 Wahbah Az-Zuhayli, Al-Fiqh Al-Islamī wa 'Adillatuh, (Damascus: Dar Al-Fikr, 4th edn., Vol 4, 1997), 2917 – 2919. See also Yusuf Sani. Abubakr, Ahamad Faosiy Ogunbado,. & Abdullah Saidi Mpawenimana, "Doctrine of Good Faith in Contract: A Comparison between Conventional and Islamic Law". Indian Journal of Health Research and Development. Vol.9 November 11 Nov. 2018. Pp.1534-1540

17 'An offer under Malaysian Contract Act 1950' (Lawteacher.net, March 2019) <https://www.lawteacher.net/free-law-essays/contract-law/an-offer-under-malaysian-contract-act-1950-contract-law-essay.php?vref=1> accessed 25 March 2019

18 The Contracts Act, chapter 106, (http://www.agc.gov.bn/AGC%20Images/LOB/pdf/Chp. 106.pdf), retrieved 26th March, 2019. However, To sum up, contract is regarded one of the sources of obligation; it means a promise to undertake certain duties or to

Anticipatory breach of contractual obligations and remedies

An anticipatory repudiation is a breach which occurs before the date of performance stated in the contract. It may be expressed in words or implied from the conduct. In other words, an anticipatory repudiation can be inferred from the reaction of the party and from his clear-cut expression that the future obligation would not be executed. Before the adoption of this view, and the predominant approach espoused by the English courts concentrates on the intention of the party who is alleged to have committed an anticipatory repudiation. However, an anticipatory breach has been redefined in the view of the opponents of the above definition and the like. It has to be reminded that an actual breach is a present breach of an obligation which its performance has already fallen due while an anticipatory breach, on the contrary, is a future breach. However, the opponents of this meaning of an anticipatory breach have criticized that the anticipatory breach can also be termed as a present breach, like the actual breach, because it is embodied in one party's present words or conduct. [19]

Anticipatory breach: An overview of its historical development

When narrating the story of an anticipatory breach in the common law, the leading case of *Hochster v De La Tour*[20] must be remembered as being one of the authorities to endorse the long-time existence of the doctrine of anticipatory breach. This is because Hochster is considered as the source from which the doctrine is derived even though it was not the first cited Anglo-American pronouncement to assert the anticipatory breach being immediately actionable.[21] The situation in Hochster was that in a contract dated April 12, 1852, De La Tour agreed to employ Hochster as a courier for a three-month period but before the due date De La Tour repudiated that he would not employ Hochster as first promised. As a result, Hochster sued De La Tour for the breach 10 days before he was bound to perform his promise on the ground that De La Tour's repudiation was a breach of contract. Notwithstanding, De La Tour argued that there could be no breach before the stipulated date but the court disagreed.

This is just a glimpse about the historical development of the doctrine of anticipatory breach. There are other cases which are often reported when dealing with the matter in question, such as, the case of *Masterton & Smith v Mayor of Brooklyn* (cited in the footnote). However, it was argued that such Masterton's case should not be cited as an instance for a true anticipatory breach because the City (the defendant) had manifested its intent not to perform as obligated in the future was accompanied by a present refusal to perform. Thus, it is divergent from

refrain from doing something. It is also an agreement which is voluntarily entered into and legally binding or enforceable by law. The two terms 'promise and agreement' are used in common law while convention is used in civil law. Contract is termed 'aqd in Islamic law albeit it has another meanings other than contract just like convention in civil law. Furthermore, the conceptualization of contract in civil and Islamic law is slightly similar but the Islamic law is more complicated in relation to characterization of contract. However, civil law is distinctly diverse from all as its conceptualization of contract relies on statutory provisions. See, Abdul Wahab, Abdul Rahman (2009), A Comparative Study of Contractual Obligations in Common Law, Civil Law and Shariah, MCL dissertation, IIUM.

19 This particular point creates big divergence amongst the jurists of the English common law system which leads to the emergence of two different approaches namely: 'renunciation approach' and 'fundamental breach approach.' Surprisingly, if these two different approaches applied to the same fact of an anticipatory breach case, the result will be different. The two approaches emerge from different decisions of the House of Lords in the two cases of Federal commerce and navigation Ltd v. Molena [1979] A.C. 757 in which the fundamental approach is applied and Woodar v. Winpey [1980] 1 W.L.R. 277 in which the renunciation approach is applied. In short, the issue that an anticipatory breach may occur with an indication in the conduct of the party is asserted to be uncertain, unpredictable and inconsistent area of the English common law. See Qiao Liu, "Inferring Future Breach: Towards a unifying test of anticipatory breach of contract", Cambridge Law Journal, 66(3), no. 07-21 (November 2007): 573–603.

20 [1853] 118 Eng. Rep. 922.

21 Hochster's case was not the first reported case in which a promisee is held have right to immediate action upon a promisor's anticipatory breach. Dean Hunter and Professor Jackson grant that honour upon the New York Supreme Court of Judicature's decision in Masterton & Smith v Mayor of Brooklyn [1845] 7 Hill 61. In this very case the Chief Judge Nelson held, on appeal, that M & S were entitled to recover any profits lost as a result of the City's refusal to perform fully as soon as the day of the City's repudiation. This step was acknowledged by Judge Beardsley who agreed to the motion that M & S's cause of action arose on the day the City anticipatorily breached. What matters here is not the decision of the court but to envisage the fact that there were cases before Hochster's in which immediate suit for the anticipatory breach was commenced. In addition, there are other relevant English cases that demonstrate the existence of the doctrine of anticipatory breach as far back as eighteen century such as Danube & Black Sea Railway & Kustendjie Harbour Co. v. Xenos [1861] 142 Eng. Rep. 753, Frost v. Knight [1872] 7 L.R. Ex. III, Johnstone v. Milling [1886] 16 Q. B. D. 460, and Synge v. Synge [1894] 1 Q. B. 466. See generally, Keith A. Rowley, "A brief history of anticipatory repudiation in American Contract Law", HeinOnline 69 U. Cin. L. Rev. (2000/2001): 572.

the more traditional anticipatory repudiation cases like the above mentioned case.

Notwithstanding, the historical development of the doctrine of anticipatory breach can be summarised in a few lines. As early as 1855, it was declared by a prominent American commentator that if a party promised to do a thing on a specific day and later found himself incapacitated to fulfil his promise, an action may be commenced immediately. Twenty years later, the New York Court of appeal pronounced that it was "well settled that if a person enters into a contract for a service, to commence at a future day, and before that day arrives does an act inconsistent with the continuance of the contract, an action may be immediately brought by the other party." Moreover, around 1915 (forty years after the decision of New York Court), the Supreme Court decided the case of *Central Trust Co. of Illinois v. Chicago Auditorium Association*[22] in which it was observed that where a party who is bound to execute a contract anticipatorily breaches the contract, the promisee can choose to treat the contract as at an end and commence an action at once for the damages that emanated from such a repudiatory breach.[23]

Anticipatory breach of contractual obligations under the Shari'ah

According to Wahbah Az-Zuhayly in his book "*Al-fiqhul Islaamiy wa adllatuhaa*", generally under the Islamic law, before a contract is considered breached, it must fulfilled certain conditions such as the contract must be bilateral, any of the two contracting parties must have violated a stated or assumed contractual agreement and, finally, the complying part must show his grievance over the conduct of the non-fulfilling party. Therefore, at any point in time (within, before or after the stipulated time of the contract), when these conditions are met, the contract is considered breached.[24] Meanwhile, there is no difference in remedies available for anticipatory breach of contract under the Shari'ah and that of conventional law. This will be discussed in the following lines.

Remedies for anticipatory breach of contract

At a glance, it has to be stated that the contractual obligations, based on the right-based theory, are created by the right to performance which is transferred from one party (the owner) to the other (beneficiary). Indeed, this right has to be protected from being infringed and this is the primary object of the law of remedy. The law of remedy has come to protect the contracting parties from being harmed by a breach by penalizing the breaker and compensating the committed party. As a well-known maxim signifies *"ubi jus ibi remedium"* and vice-versa, meaning that where a person's right is invaded, the remedy must be provided to compensate him and to award him damages for the loss. Similarly, there is a famous case in this regard which is frequently cited when dealing with matters concerning remedy. This is the case of *Ashby v White*[25] where Lord Chief Justice Holt ruled out and I quote: "if the plaintiff has a right he must of necessity have the means to vindicate it and a remedy if he is injured in the enjoyment or exercise of it." Pursuant to the above elucidation, this chapter aims to examine remedies for an anticipatory breach of contractual obligations. The approach will be later narrowed down to the awarding of damages for an anticipatory breach. This section argues that the remedy by awarding of damages shall not be inflicted in respect of an anticipatory breach for certain reasons which will be discussed subsequently.

Remedies

Remedies can be defined as every relief given to an aggrieved party by the legal system. In other words, a remedy is an "entitlement arising out of the breach of an obligation (or duty) and taking the form of a burden imposed on the person responsible for that breach."[26] This definition denotes that a remedy is something that is intended to redress a wrong or violation of any legal wrong. From this definition four core features of every civil remedy can be deduced:

(a) A remedy is a right or an entitlement;

(b) A remedial entitlement is produced as a result of a violation of a pre-existing right;

(c) A remedy involves, from the angle of the aggrieved party, a benefit awarded to him to alleviate the grievances; and

(d) A remedy involves the infliction of a disadvantage on the guilty party.[27]

In short, a remedy is also called a redress or a relief; it means "any of the methods available at law for the enforcement, protection, or recovery of rights or for obtaining a redress for their infringement. A civil remedy may be granted by a court to a party to a civil action. It may include the common law remedy of damages and/or equitable remedies of *quantum*

22 [1916] 240 U.S. 581
23 Ibid.
24 Az-Zuhayly, Wahbah, n. 16, (http://islamport.com/w/fqh/Web/1272/2744.htm), retrieved 25th March, 2019.
25 Ashby v White [1703] 2 Ld. Raym. 938.
26 Gabriela Shalev & and Yehuda Adar (2008), Electronic Journal of Comparative Law, vol. 12.1 (May 2008), http://www.ejcl.org, retrieved 25th March, 2019.
27 Ibid.

meruit, injunction, decree of specific performance, or declaration."[28] These remedies are also available under the Islamic law of contract (as stated in some renowned Islamic literature) likewise in the civil law system. This, indeed, demonstrates the harmonisation of remedies for breach of contractual obligations in both the civil law and Shariah. Thus, the following remedies are observed as the typical remedies found in both the civil law and Shariah literature[29]:

i. Rescission
ii. Specific performance
iii. Injunctions
iv. Restitutionary remedies
v. Quantum meruit
vi. Damages

However, the only differences can be found in the hierarchical process of application of the above listed remedies. In the common law jurisdictions, damages are the typical remedy for a breach of contractual obligations and other remedies are perceived equitable alternatives. However, under the civil law jurisdictions, a specific performance spearheads the hierarchy of remedies available for a breach of contract. This is akin to the Islamic law approach, however, the remedies by *Khiyar* (right of rescission) is preferable unless the alternative is more adequate[30]. Finally, damages are also comparable among these jurisdictions.

Analysis and Conclusion

The remedies listed above are typical remedies for an actual and an anticipatory breach of contractual obligations in both the civil law and Shariah. This indicates that remedies for an anticipatory breach of contract have not been perceived different from remedies for an actual breach of the contract, especially, the awarding of damages. Surprisingly, it is rampant in the contract law books to distinguish between the actual and the anticipatory breach when discussing the breach of contractual obligations but they tend to generalise when dealing with remedies for a breach of contract. The writer views that the remedies for an anticipatory breach of contract must be different from the remedies for an actual breach because of the difference in their meanings.

More surprisingly, a large number of Muslim scholarly writings referred to in the course of this paper also use the format of the modern laws. Even Sanhūrī and Mahmasānī, those who are crowned the pioneers of voluminous writings in the field of the Islamic law of obligations, and also writers, like, Liaquat Ali, Ma'sum structured their works based on the common law's format. Hence, the separate remedies for an anticipatory breach of contract are very difficult to extract from their books.

In a narrower approach, it should be highlighted that this work does not dispute the application of the above remedies to settle the grievances relating to an anticipatory breach of contract. However, it argues against the awarding of damages in the case of an anticipatory breach of contract. Hence, the main argument remains in the notion that damages should not be awarded for an anticipatory breach of contract as it is exposed to the element of uncertainty and against the principle of no damages without damage and vice-versa (*la darara wala dirar*). Indeed, the prohibition of a *garar* (uncertainty) is a key doctrine within the Shariah law and that is why Saudi Arabia limited damages for a breach of contractual obligation on those losses which are actual (not anticipated) and direct. Because of the principle of *garar*, Saudi Arabia law does not permit recovery of expected damages.[31]

Suggestion and Recommendation

Although the above examination of remedies for anticipatory breach of contract shows the convergence between the civil law and Shariah in that none of them separates remedies for such breach from those available for actual breach. This paper suggests that even though damages are the adequate remedies for such a breach, it should not be inflicted for the purpose of loss or damage or expectation interest which are hypothetical as performance is not yet due and the damage is equivocal. This paper recommends, however, for the purpose of the public interest (*masalihu mursalah*), that damages may be awarded as a penalty for non-commitment of the breaching party. This, at least, can eliminate the long entrenched controversy on the certainty of damage/loss concerning an anticipatory breach of contract. Of course, some

28 Matin and Jonathan, n. 8 at 454.

29 Subhi Mahmasani, An Nazariyyat Al 'Amah Lilmujibat Wal u'qud fi Ash Shariah Al Islamiyyah, Vol. 1-2, 3rd edn, 1983, at 485. The remedies provided by the author are not different from those found in the Civil law system.

30 In one of the hadiths, Prophet has stated "He who does the Iqala (rescinding of the contract) with a Muslim who is not happy with his transaction, Allah will forgive his sins on the Day of Judgment." See Sunan Abi Dawud, (http://library.islamweb.net/newlibrary/display_book.php?flag=1&bk_no=55&ID=5971), retrieved 26th March, 2019.

31 See Muhamed Mattar, "Islamic Law in U.S. Courts: Theory and Practice", Islamic law forum, (October 3, 2005), <http://meetings.abanet.org/webupload/commupload/IC850000/relatedresources/IslamicLaw.pdf>, (accessed November 12, 2009).

people may maintain that this view would go against the principle of "no damages without damage" because awarding of damages simply for the non-commitment of a party, without damage or loss, would be baseless. The argument seems to be true, however, if the writer's point of view is viewed from the breaching party's angle, then there would be no contradiction. This is because releasing the breaker or leaving him until the contract is actually breached is hazardous for the social and contractual relationship as anybody can anticipatorily break the contract and claim the uncertainty of loss or damage. If this notion is implemented, the result will still be the same and the innocent party would still be placed in the situation he would have been in had the contract been performed.

Bibliography

Abdul Wahab, A.A (2009), *A Comparative Study of Contractual Obligations in Common Law, Civil Law and Shariah*, MCL dissertation, IIUM.

Abubakr, Y. S, Ogunbado, A. F. & Mpawenimana, A.S. (2018). Doctrine of Good Faith in Contract: A Comparison between Conventional and Islamic Law. *Indian Journal of Health Research and Development.* Vol.9 November 11 Nov. 2018. Pp.1534-1540

Ahmad Hidāyat B. (2000). *Studies in the Islamic Law of Contracts: The prohibition of Gharar*, Kuala Lumpur: International Law Book Services.

Atiyah, P. S. (1995). *An Introduction to the Law of Contract*. edited by Peter Cane, Tony Honoré, and Jane Stapleton. Oxford: Clarendon Press.

Az-Zuhayli, Wahbah. (1997). *Al-Fiqh Al-Islamī wa 'Adillatuh* (4th edn.). Vol 4. Damascus: Dar Al-Fikr.

Britannica Concise Encyclopeadia, Civil Law, available on <http://www.answers.com/topic/civil-law>, (accessed November 10, 2009).

Chen – Wishart, M. (2005). *Contract law*. New York: Oxford University Press.

"Legal Lexicon on Contract", The Lectric Law Library, <http://www.lectlaw.com/def/c123.htm>, (accessed November 10, 2009).

Liu Q. (November 2007). "Inferring Future Breach: Towards a unifying test of anticipatory breach of contract". *Cambridge Law Journal*, 66(3), no. 07-21: 573–603.

Markham William A. (n.p.). *"An Overview of contract law"* Maldonado & Markham, LLP, <http://www.maldonadomarkham.com/Contract-lawyer-San-Diego.htm> , (accessed November 10, 2009).

Matin & Jonathan. (2006). *Oxford dictionary of law* (6th edn). New York: Oxford University Press.

Mohamad Akram, Laldin. (2008). *Shari'ah & Islamic Jurisprudence* (2nd edn.). Kuala Lumpur: CERT Publication Sdn. Bhd.

Muhamed Mattar. (October 3, 2005). "Islamic Law in U.S. Courts: Theory and Practice". Islamic law forum. <http://meetings.abanet.org/webupload/commupload/IC850000/relatedresources/IslamicLaw.pdf>, (accessed November 12, 2009).

Owsia, P. (1994). *Formation of contract: A comparative study under English, French, Islamic and Iranian law*. London: Graham & Trotman Limited.

Palestinian National Authority, *"Majallatul Ahkām Al-'Adliyyah,"* Ministry of Justice, <http://www.moj.ps/images/majallatalhkam.pdf> (accessed November 13, 2009).

Rowley Keith, A. (2000/2001). "A brief history of anticipatory repudiation in American Contract Law". *HeinOnline 69 U. Cin. L. Rev.*: 572.

Sunan Abi Dawud, (*http://library.islamweb.net/newlibrary/display_book.php?flag=1&bk_no=55&ID=5971*), retrieved 26th March, 2019.

Wiechman Denis, J. (n.p.). Jerry D. Kendall, & Mohammad K. Azarian, *Shariah Islamic Law*, available at http://www.shariah.net/shariah-islamic-law/, accessed November 10, 2009).

Yusuf Ali, Abdullah, *The Holy Qur'ān: Arabic Text with an English Translation and Commentary*: *Surah Al-Jasiyyah*, verse 18. Maryland: Amana Publication, 11 edn., 2006, at 1297.