EGYPT

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PART ONE

INTRODUCTION

General characteristics of the Egyptian law of contracts

Egyptian civil law is a mixed system composed of two major elements: Islamic law and French law.

Islamic influence

Egypt, as is well known, was conquered by the Arabs in 640 A.D. Down to the latter half of the 19th century, Egypt was almost exclusively governed by Islamic jurisprudence. In 1875 and 1883 were promulgated many codes including a mixed civil code and a native civil code of French inspiration.

The national revival in the years following World War II led many Egyptians to question the utility of having a civil code based on French law. A special committee was accordingly set up to investigate the possibility of introducing into the Egyptian civil code some of the concepts and rules of Islamic law.

On October 15, 1949, the New Egyptian Civil Code came into force and ended the unrivalled dominance of French law in Egypt. The new code drew material from all the schools of Islamic jurisprudence, many of the world's civil codes and the decisions of the Egyptian tribunals since the reform of the late 19th century.

Article 1 of the Egyptian civil law enunciates the fundamental principle that Islamic law is a source of Egyptian law :

> Provisions of law govern all matters to which these provisions apply in letter or spirit. In the absence of a provision of law that is applicable the judge will decide according to custom and in the absence of custom in accordance with the principles of Islamic law. In the absence of such principles, the judge will apply the principles of natural justice and the rules of equity.

The explanatory memorandum to the Egyptian code considered this to be of significance since it was felt that the circumstances in which a judge could not find a relevant provision would be many, so that the courts would have to revert to Muslim law to derive the applicable principles. The committee further stated that Islamic law had affected greatly the customs of the country particularly in the rural areas; so through either custom or code Islamic law would be very influential.

French influence

In spite of increased Islamization of Egyptian civil law, French law is still the source of many basic ideas and techniques.

French text-books and French judgements (*jurisprudence*) are often cited by Egyptian lawyers.

New trends

In the present period of development of Arab nationalism, Egypt's and Libya's future union in one single state will have a far-reaching effect on Egyptian civil law, in the sense of injecting more of the Islamic concepts in its veins. The new codes prepared to be the union codes are characterised by this fusion between Islamic law and codified law.

The basic concepts of French law that are relevant to our subject are the following :

(a) There is in Egypt and Libya the basic distinction known in French law between civil law and administrative law. Therefore it is important to distinguish between two different sorts of contract.

(b) There is in Egypt and Libya the basic distinction, also adopted from French law, between civil law and commercial law. Therefore it is relevant to distinguish between civil contracts and commercial agreements.

We should however point out that the draft codes and laws of the new State contain radical reforms in the basic concept and techniques of administrative law and commercial law.

On the other hand the proposed amendments in the civil code and in the civil procedure code are not drastic. The most important change is the introduction of the debtor's committal to prison as an indirect means of enforcing a judgment admitting the creditor's right.

Distinction between civil and commercial contracts

The distinction between commercial and civil contracts is not as important as it may look at first sight. The distinction in fact does not amount to anything more than the fact that the so-called commercial contracts are nothing but "contrats nommes", *i.e.*, contracts minutely regulated by law or custom.

In other words there is no general theory of commercial contract in Egyptian law equivalent to its general theory of civil contracts.

The most important kinds of commercial contracts in Egyptian commercial law are the contract of sale, the contract of pledge, the contract of ship building, and the contract of partnership. All these contracts are minutely regulated by commercial legislation and commercial custom.

There are two major differences between commercial contracts and civil contracts.

(a) In commercial contracts more importance is given to the rules of commercial custom, while civil contracts are mainly governed by the civil code.

(b) While according to article 400/1 of the civil code the proof of civil contracts of a value more than ten Egyptian pounds must be given in writing, the proof of commercial contract is not required to be given in writing whatever be its value provided the law does not expressly require the writing as a formal condition of its formation.

Egyptian commercial transactions are not subject to rules similar to those prevailing in other countries concerning trade monopoly or anti-trust laws or restrictive practices covenants.

Administrative contracts in Egyptian law

A fundamental requirement of the administrative contract, in Egyptian law, is that the government or any public entity must be a party to it.

If this requirement is not satisfied the contract cannot be considered as falling within the category of administrative contracts.

On the other hand, the mere fact that the government (or any other public entity) is a party to the contract is not sufficient to make it an administrative contract.

The test of administrative contracts in Egyptian law is twofold :

(a) The contract is administrative if by express provision of the law the disputes relating to the contract are within the jurisdiction of administrative tribunals.

(b) The contract is administrative, in the absence of such express provision, if it contains clauses that confer upon the contracting

parties certain powers or rights unfamiliar in contracts governed by civil law.

The administrative and civil contracts are not subject to the same rules. But the difference between the two categories of contracts is limited by two important qualifications :

(a) Administrative contracts may contain clauses that are civil in character. Such clauses are considered accordingly as civil contractual clauses.

(b) The financial position of the parties is protected in many effective ways :

The government have the right to change unilaterally the clauses of the contract, and have also the right to terminate the contract. But these two rights are not absolute : the change of the clauses of the contract or its termination must be in pursuance of a true public interest. The judges have the right to review the change or termination to see whether they are based upon good reasons or not. If the change or termination is not lawful, the other party is entitled to obtain complete damages covering not only his actual loss but also all the profit he would have realised had the change or termination not taken place.

PART TWO

THE SANCTITY OF CONTRACT IN EGYPTIAN CIVIL LAW

The binding force of contracts in Islamic law

The binding force of valid contracts is a central theme in Islamic *Fik'h*. Many verses in the Quran reveal the fundamental principle of fulfilling the contract :

1) "O ye who believe ! Fulfil all obligations".

2) "... fulfil (every) engagement, for (every) engagement will be inquired into (on the Day of Reckoning)".

3) "But it is righteousness ... to fulfil the contracts which ye have made; and to be firm and patient, in pain (or suffering) and adversity, and throughout all periods of panic. Such are the people of truth, the God-fearing".

4) "Fulfil the covenant of God when ye have entered into it, and break not your oaths after ye have confirmed them; indeed ye have made God your surety ... and be not like a woman who breaks into untwisted strands the yarn which she has spun, after it has become strong. Nor take your oaths to practise deception between yourselves, lest one party should be more numerous than another...

and take not your oaths, to practise deception between yourselves... .

Ye may have to taste the evil (consequences) of having hindered (men) from the faith of God, and a mighty wrath descend on you. Nor sell the covenant of God for a miserable price : for with God is (a prize) far better for you, if ye only know".

5) "(But the treaties are) not dissolved with those pagans with whom ye have entered into alliance and who have not subsequently failed you in aught, nor aided any one against you. So fulfil your engagements with them to the end of their term : for God loveth righteousness.

As long as these stand true to you, stand ye true to them : for God doth love the righteous."

6) "Whenever ye speak, speak justly, even if a near relative is concerned and fulfil the covenant of God. Thus doth He command you, that ye may remember".

The sayings of Prophet Muhammad enjoin respect for contractual engagement : "Muslims are bound by their stipulations". Of course the respect is due only to valid contracts : "Muslims are bound by their stipulations, except a stipulation which makes unlawful what is lawful".

The binding force of contracts in Egyptian law

In conformity with the Islamic traditions, article 147/1 of the Egyptian Civil Code provides that the contract makes the law of the parties. Many consequences flow from this basic principle :

1. Full effect must be given by the parties to the contents of the contract. It is not sufficient to perform the contract in a formal manner; it is absolutely necessary to perform the contract according to its true spirit and taking into thoughtful consideration the interests of the other party.[1]

Article 148 of the Civil Code provides that :

(a) A contract must be performed in accordance with its contents and in compliance with the requirements of good faith.

(2) A contract binds the contracting party not only as regards its expressed conditions, but also as regards everything which, according to law, usage and equity is deemed, in view of the nature of the obligation, to be a necessary sequel to the contract.

The contract must be performed during all the period indicated in it. Any change or variation of the contract must be agreed upon by the parties. No party can take the law into his hands and put an end to the contract by his own will.[2] Article 147/1 of the Civil Code provides that :

(1) The contract... can be revoked or altered only by mutual consent of the parties or for reasons provided for by the law.

Many remedies are available to the party to enforce contractual obligations.

Remedies for breach of contract

The main remedies known in Egyptian civil law are the following :

A. The wronged party has the right to abstain from fulfilling his

1. El-Sanhoury, *The General Theory of Obligations*, Vol. I, (Dar-el-Nahda el-Arabiyya, 1966, in Arabic), No. 269, p. 241.
2. El-Sanhoury, *op. cit.* No. 268, p. 240.

duties arising under the contract. This is regarded as a means to compel the other party to perform his duties. The right of non-performance as a counter attack against the non-performance of the other party is technically termed *exceptio non adimpleti contractus.*[3]

Article 161 of the Civil Code provides that "when, in case of bilateral contract, correlative obligations are due for performance, either of the contracting parties may abstain from the performance of his obligation if the other party does not perform his obligation".

B. The wronged party has the right to ask the court to order the other party to carry out his duties. If possible, the eventual order of the court is enforced specifically.[4] If specific performance is not possible, the court awards damages to the wronged party.[5] The judgment awarding damages is executed by auction and satisfying the judgment creditor out of the proceeds of sale.[6]

The relevant articles of the Egyptian Civil Code are the following :—

Art. 199/1 : An obligation is enforceable against the debtor.

Art. 203 : 1) A debtor shall be compelled, upon being summoned to do so in accordance with articles 219 and 220, specifically to perform his obligations, if such performance is possible.

2) When, however, specific performance is too onerous for the debtor, he may limit performance to payment of a sum of money as indemnity, provided that this method of performance does not seriously prejudice the creditor.

Art. 209 : 1) In the case of non-performance by the debtor of an obligation to do something, the creditor may apply to the court for an order to carry out the obligation at the cost of this debtor, if this is possible.

2) In a case of urgency, the creditor may carry out the obligation at the cost of the debtor without an order from the court.

Art. 213 : 1) When the specific performance of an obligation is impossible or not practicable, unless performed by the debtor

3. See El-Sanhoury, *op. cit.* p. 284 *et seq.*
4. El-Sanhoury, *op. cit.*, p. 763 *et seq.*
5. El-Sanhoury, *op. cit.*, p. 789.
6. El-Sanhoury, *op. cit.* p. 790.

himself, the creditor may obtain a judgement ordering the debtor to perform the obligation and to pay a penalty if he abstains from performing his obligation.

2) If the judge finds that the amount of the penalty is insufficient to make the debtor perform his obligation he may increase the penalty each time he considers it desirable to do so.

Art. 214 : After specific performance has been carried out or when a debtor has persisted in his refusal to perform the obligation the judge shall fix the amount of damages that the debtor shall pay, taking into account the prejudice suffered by the creditor and the unjustifiable attitude of the debtor.

Art. 215 : When specific performance by the debtor is impossible he will be condemned to pay damages for non-performance of his obligation, unless he establishes that the impossibility of performance arose from a cause beyond his control. The same principle will apply if the debtor is late in the performance of his obligation.

C. In case the breach of contract is substantial, that is, of a fundamental duty engendered by the contract, the wronged party can claim the dissolution of the contract with *restitutio in integrum* and the appropriate damages for the loss suffered.[7]

Art. 157 of the Civil Code provides that :

> In bilateral contracts (*contrats synallagmatiques*) if one of the parties does not perform his obligation, the other party may, after serving a formal summons on the debtor demand the performance of the contract or its rescission with damages, if due, in either case.
>
> The judge may grant additional time to the debtor if it is necessary as a result of the circumstances. The judge may also reject an application for rescission when the part of the contract which the debtor has failed to perform is of little importance in comparison with the obligation in its entirety.

7. El-Sanhoury, *op. cit.*, No. 296, p. 270.

PART THREE

DAMAGES

Fundamental principle

According to article 215, if one of two parties to a contract breaks the obligation which the contract imposes, a new obligation will arise : a right of action for damages conferred upon the party injured by the breach.

Unless the parties themselves limit, or fix, the amount of damages to be awarded, the assessment of damages is a matter for the judge.[8]

Whether fixed by the judge or by the parties themselves, damages are always of compensatory nature, and it follows from this rule that the injured party must take any reasonable steps that are available to him to mitigate the extent of damage caused by the breach.

The compensatory nature of damages

According to article 221/1 damages for breach of contract are given by way of compensation for deprivation of gains or incurring of losses to which the plaintiff has been subjected by the defendant's wrong.

Compensation involves not only assessment of gains prevented by the breach but also of losses ensuing which would not have occurred had the contract been performed. From these must be deducted any saving to the plaintiff due to the non-performance of the contract. The result will give the net loss to the injured party.

Damages being of a compensatory nature, the vindictive or exemplary damages of the law of tort having no place in the law of contract, if a contract has been broken but the injured party has suffered no loss by the breach, he is entitled to judgment in his favour, but for nominal damages only. Moreover, the measure of damages is not affected by the motive or the manner of the breach, damages for breach of contract being given not by way of punishment for wrong committed but by way of compensation for loss incurred.

The object of awarding damages for breach of contract is not to put the injured party in the position which he would have enjoyed had the contract never been made. It is to put him into the position in which he would have been had there been performance and not breach. In fixing the amount of damages, the general purpose of the law is, and should be, to give

8. Article 221/1.

compensation, that is, to put the plaintiff in as good a position as he would have been had the defendant kept his contract.

According to article 222, damages may be allowed not only for pecuniary loss, but also for injury to the feelings (mental suffering).

Measure of damages

According to article 221 the measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the breach of the contract, or reasonably foreseeable as liable to result from the breach.

Therefore damages are recoverable when they arise directly, without any break in the chain of causation, from the breach, or when they are such as the party in default must, from the circumstances known to him at the time of contracting, be deemed to have foreseen as the probable result of its breach.

Everyone, as a reasonable person, is taken to know the "ordinary course of things", and therefore, to know what loss is liable to result naturally and directly from a breach in that ordinary course.

Fixing the losses reasonably foreseeable as liable to result from the breach, depends on the knowledge possessed, at the time of making the contract, by the parties, or at all events, by the party who later commits the breach.

The damages must not cover losses which are the consequence of abnormal and exceptional circumstances not known to the party in default at the time he entered into the agreement.

Duty to mitigate damage suffered

According to article 216, a party to a contract is bound to take all reasonable means of mitigating the damages consequent upon a breach by the other party ; and he cannot recover any part of the damages which is due to his neglect of such means.

In fact, it follows from the rule that damages are compensatory and not penal that one who has suffered loss from a breach of contract must take any reasonable steps that are available to him to mitigate the extent of damage caused by the breach. He cannot claim to be compensated by the party in default for loss which is really due not to the breach but to his own failure to behave reasonably after the breach.

Assessment of damages by the parties

According to article 223, the parties to a contract may, themselves, fix the sum to be paid by way of compensation for breach of the contract by one or both of them, and introduce their assessment into the terms of the contract.

By so doing, however, the parties cannot exclude the application of the rule that damages for a breach of contract are to be compensatory and not penal, and it is a question of the proper construction of the contract to decide whether a sum fixed in this way, regardless of how the parties may have described it, is a "penalty", in which case it cannot be recovered, or a genuine attempt to "liquidate", that is to say, to reduce to certainty, prospective damages of an uncertain amount, in which case the sum will be recoverable.

If the sum so specified is a "genuine pre-estimate" of the damage which seems likely to be caused if the breach should occur, or again, if, although it is not an estimate of the probable damage, the parties have fixed it because they were agreed in limiting the damages recoverable to an amount less than that which a breach would probably cause, the court will accept the sum fixed by the parties.

On the other hand, if the sum was fixed *in terrorem*, that is to say, in order to prevent or penalize a breach, the court will not accept it, and the damages actually incurred must be assessed in the usual way.

It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach.

The problem of anticipatory or prospective breach of contract

The fundamental idea of contractual duty being to perform that which has been promised, a breach of contract is properly defined in substance as a failure — without legal excuse — to perform any promise which forms the whole or part of a contract. According to Egyptian law[9] one who contracts to do a certain thing on a certain contingency or at a certain time does not and indeed cannot break that promise unless the contingency happens or the time arrives. We can, therefore, say that Egyptian law does not know the doctrine of anticipatory or prospective breach of contract, where there is a repudiation of the obligations of a contract by a party to it before the time has come for performance on his part. In such a case the other party is not entitled to obtain any damages.

9. Articles 268 and 274.