10

Performance and Damages

10.1 INTRODUCTION

We briefly mentioned in Chapter 2 that the main source of contractual obligations under Qatari contract law arises from (i) the contract itself; (ii) the intention of the parties at the time of forming the contract; and lastly (iii) the relevant laws regulating contractual affairs. Here, we need to highlight the fact that obligations,[1] in general, under the civil law are comprised of three tiers:[2] (i) civil obligations; (ii) natural obligations; and (iii) moral duties. Understanding these is vital to one's appreciation of the contractual performance. Civil obligations include statutory and contractual undertakings, such as the sale of goods and services. Civil obligations also include civil-wrongdoings, which are governed by the law of delict under the CC. Civil-wrongdoings are concerned with personal injury, negligence, defamation, mental distress, etc. All civil obligations are enforceable.

Natural obligations were originally treated as civil obligations, but due to prescription, they became unenforceable. The third and last tier comprises moral duties such as charity works and 'informal' gifts or donations, etc. It is important to note that civil obligations are predicated on two pillars, namely: (i) liability and (ii) debt. Liability represents the legal dimension of obligations and arises by virtue of contract and/or law. Debt, on the other hand, represents the financial value of an obligation. When liability fails by reason

[1] Obligations are legal bonds (in Latin '*vinculum iuris*') between one or more parties (such as obligors and obligees, creditor and debtor, etc.), who undertake to act or refrain from acting as per the terms and conditions of their agreement.

[2] This classification is common in the civil law tradition, which generally recognizes three types of obligations, namely: imperfect obligations [moral duties], natural obligations, and civil or perfect obligations. See K Shaw Spaht and H Alston Johnson II, 'Private Law: Obligations' (1976) 37 Louisiana L Rev 332.

of prescription, civil obligations are automatically converted into natural obligations and are no longer enforceable. Thus, natural obligations comprise a single pillar, namely debt.

10.2 COMPULSORY PERFORMANCE (INCLUDING DAMAGES)

The civil law of obligations regulates the implementation of the 'three-tier' system as illustrated in Figure 10.1, whereby only civil obligations are enforceable, unlike natural obligations and moral duties, which although not enforced are nonetheless recognised. Qatari legislators have followed the civil law system in dividing the performance of obligations into two types: (i) specific performance and (ii) compensatory performance (damages). Article 241 CC states that:

(i) Where the obligor fails to perform his obligations voluntarily, such obligation shall be enforced.
(ii) However, where the obligation is natural, it may not be enforced.

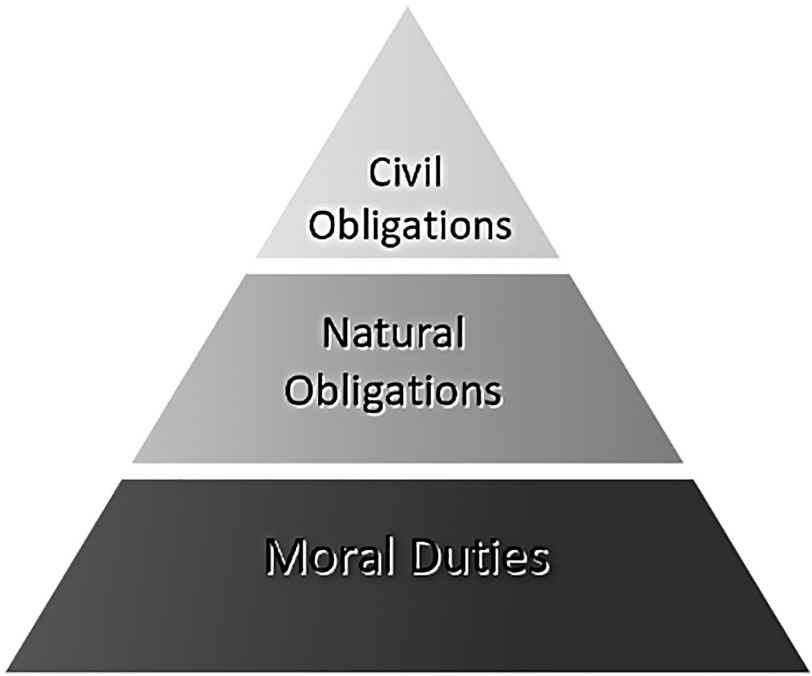

FIGURE 10.1 The obligations pyramid

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Article 241 CC emphasises the importance of the general rule whereby [civil] obligations must be performed by the obligor voluntarily. However, where the obligor fails to fulfil its [civil] obligation, the courts will enforce the performance. It is worth noting that compulsory performance dictates that the obligor must fulfil its civil obligations with 'reasonable care'. The test of reasonableness here does not require the obligor to achieve a specific objective unless the parties agreed during the negotiation and prior to finalising the contract that the obligor must achieve such a specific objective. In such cases, the court must respect the parties' intentions.

10.2.1 *Determination of Natural Obligations*

Article 242 CC stipulates that:

> In the absence of an express provision, the court shall determine whether an obligation is natural or not. In all cases, a natural obligation shall not breach public order.

The law here grants the courts *discretion* to decide the applicable classification to a particular obligation (whether natural or moral duty), where no explicit statutory provision exists. As a rule of thumb, natural obligations should never breach public order. The role of the judge in this particular scenario is closer to that of a legislator because of the unlimited discretion conferred upon the courts. The judge should consider the spirit of the law, natural law principles and jurisprudence. In this respect, the courts must apply a 'three-step' test to verify if an obligation is natural or a mere moral duty. The first step is meant to determine whether the obligation in question is a demoted 'civil obligation' due to prescription or a moral duty transformed into a natural obligation. Step two asks whether there exists a 'sense' of obligation to perform the duty in question by the obligor. Finally the last step, asks whether the said obligation or duty is in compliance with public order.[3]

Article 243 CC goes on to state that:

> An obligor may not recover any voluntary payment made by him in the performance of a natural obligation, nor shall such payment be considered a voluntary contribution.

Although natural obligations are unenforceable, any voluntary fulfilment thereof is deemed as non-recoverable payment of a debt. The obligor cannot

[3] A Farag Yousuf, *Restatement and Commentary of the Kuwaiti Civil Code: Comparative Law Study with the Egyptian Civil Code* (Modern Academic Office 2014) vol. 2, at 780–781.

claim that such payment is a contribution or a donation because he or she owed that amount of money (or payment in kind) to the obligee:

In this vein, article 244 CC claims that:

> a natural obligation may, depending on the circumstances, be sufficient to found a civil obligation.

The Qatari legislator here provides a circumstance where a natural obligation is elevated to a civil obligation, namely when the obligor *promises* to fulfil the said obligation to the obligee. Such a promise or undertaking may be enforceable because it is within the realm of public order for obligors to pay their debts to obligees. Thus, the aim here is to protect the stability of economic transactions.

It is worth noting that when an obligor voluntarily fulfils a natural obligation, a subsequent 'set-off'[4] between the natural obligation with another civil obligation *is prohibited*. Moreover, natural obligations cannot be guaranteed by a third party because a guarantee, as a matter of principle, is only available to civil obligations. Last but not least, if an obligor (a natural person) voluntarily fulfils its natural obligation at the death-bed, such fulfilment will be deemed as a contribution or 'informal' donation to the obligee; unless the obligee proves that the fulfilment in question concerned a debt created by a natural obligation, which is recognised by law.[5]

10.2.2 *Specific Performance*

The general rule for the enforcement of civil obligations is 'specific performance', that is, the law here expects obligors to voluntarily[6] comply with the

[4] The principle of 'set-off' is regulated by Arts 390 to 397 CC. The Court of Cassation, in Judgment 181/2011 has interpreted set-off as competing or opposing civil obligations (debts) arising from a contractual relationship. If the contracting parties have a commercial relationship and/or previous trade transactions, which resulted in such competing debts, then each party is a creditor to the other party in one transaction but at the same time, the said party is a debtor to the other in another transaction (simultaneously). The parties in this case may 'set-off' these debts when they settle the payments.

[5] Yousuf (n 3), at 782–785.

[6] See Court of Cassation Judgments 80 & 104/2015, in its interpretation of Arts 241(1), 245, 251 and 255 CC. It pointed out that when the court enforces compulsory performance of a civil obligation against the obligor, this action must not be understood as coercing the obligor; specific performance has a condition that must be met at all times, namely 'feasibility'. If specific performance is no longer feasible for any reason, the court will switch its course to compensatory performance. The Court of Cassation elaborated that the obligors' dignity and rights are protected by law and that the obligees' contractual right to request specific performance is limited to the obligor's resources. The rule is that the court may enforce specific performance

undertakings they made to their obligee(s) and perform the specific task to the satisfaction of the obligee(s). The 'conditional' exception to this general rule is the payment of compensation (in cash or in-kind) either in full or part in exchange for non-performance or partial performance by the obligor. Article 245 CC states that:

(i) Upon the obligor being notified, the obligation shall be enforced in kind, as soon as possible.
(ii) However, where enforcement in kind is extremely onerous to the obligor, the court may, at the request of the obligor, limit the right of the obligee to indemnity, provided that he suffers no serious prejudice thereby.

Paragraph 1 of article 245 CC clearly states that the obligee must *notify* the obligor *in writing* to fulfil its civil obligation by performing the contractual undertakings as agreed between the contracting parties. If the obligor does not set a deadline for performance, the obligor is expected to fulfil its obligation *within a reasonable time*. However, in paragraph 2 of the same article, if specific performance by the obligor is likely to produce an adverse impact, compensatory performance is permitted to mitigate that risk. As mentioned earlier, compensatory performance is a 'conditional' exception subject to: (i) serving a 'written notice' to the obligor with or without a deadline and (ii) specific performance is likely to cause *a severe adverse effect* to the obligor. Specific performance requires a balance between the interests of both contracting parties and hence specific performance *will not* be imposed where it is likely to result in great harm to the obligor(s); a minor harm to the obligor(s) is, however, acceptable.

Civil law jurisprudence has emphasised that specific performance relies on four elements:

i. It must be feasible;
ii. the obligee must demand specific performance, or the obligor must elect to perform its civil obligation in this particular manner;
iii. specific performance must not adversely impact the obligor; and

on the obligor only when such performance *does not* require the obligor's intervention. Thus, the court may step-in and fill that gap by ruling in favour of the obligee, in which case its decision will be deemed as a replacement of the obligor's specific performance. However, when specific performance requires the obligor's intervention, the court may: (i) impose monetary penalties on the obligor in order to induce him/her to perform in-kind, provided that the obligee has requested specific performance; or (ii) grant compensatory performance to the obligee, if either the obligee does not request specific performance or the obligor refuses to intervene and perform in-kind.

iv. a written notification must be served by the obligee to the obligor *on or before* the expiration of a specified or an agreed deadline, if such deadline exists from the outset, or within 'reasonable time' as mandated by the law or accepted commercial practice.[7]

10.2.2.1 Transfer of Ownership

Article 246 CC states that:

> The obligation to transfer title or any other right in kind shall automatically transfer such right, provided that the subject-matter of the obligation is a self-identified thing held by the obligor and subject to the rules in connection with registration.

Here the law provides rules governing the transfer of title and ownership of property (both real-estate and chattels) as part of fulfilling a civil obligation as a means of specific performance. If a contractual undertaking between obligee and obligor states that during the lifetime of the agreement, ownership of certain objects will be transferred from the obligor to the obligee, then once this condition materialises, the transfer of 'title and ownership' to the obligee is instantaneous by virtue of contract and law, with the exception of the statutory requirement to register such a property. Thus, there is a 'grace period' between the specific performance for a property that is intended to be transferred to the obligee and the time when 'title and ownership' passes from the obligor to the obligee after registration. Two conditions are required in order for the obligee to claim title and ownership of an object:

i. The said object must be owned by the obligor at the time of forming the binding contract with the obligee, or the title and ownership must have been acquired by the obligor during the lifetime of the contract and
ii. the said object must not contain a right *in rem* over which third parties have a right to in 'good faith', such as a mortgage or easement.[8]

Article 247 CC states that:

(i) Where the obligation relates to the transfer of a right in kind to a thing identifiable only by its kind, such right shall not be transferred until such thing is apportioned.

[7] Yousuf, above (n 3), at 787.
[8] Ibid, at 793.

(ii) Where the obligor fails to perform his obligation, the obligee may, with the permission of the court, or without its permission in the case of an emergency, obtain a thing of the same kind at the expense of the obligor. The obligee may also demand the value of the thing, without prejudice in either event to his right to indemnity.

The law stipulates that if the civil obligation requires the transfer of a particular object to the obligee, then the mere transfer of another object, even if similar, will not suffice. Specific performance of such civil obligation is mandatory and a monetary compensation is not acceptable as a general rule. If the obligor refuses to perform as the law requires, then the obligee must serve a written notice to the obligor and remind him or her to fulfil this civil obligation. If the obligor responds in writing confirming its refusal to perform, the law permits the obligee to file a claim to the court for compensatory performance (indemnity) from the obligor for the full damage; or even claim it directly from the obligor without judicial determination in the case of an emergency. Compensatory performance constitutes a valid exception in this case, not because specific performance is impossible but because of the confirmed refusal of the obligor to perform its contractual undertaking.

If the civil obligation pertains to the transfer of a defined amount of cash (debt) from the obligor to the obligee, then specific performance is compulsory too, and the court shall freeze the obligor's bank accounts if the latter fails to pay.[9]

10.2.2.2 Reasonableness Test and Statutory Duty of Care

Article 248 CC stipulates that:

> the obligation to transfer a right in kind [pertaining] to a thing shall include the obligation to maintain such thing in safe custody until it is delivered.

The law requires the obligor to exercise a statutory duty of care while fulfilling its civil obligation as a matter of specific performance. For example, the merchant must provide a duty of care while delivering or handing a good sold to the buyer. This duty of care does not render the merchant responsible for factors beyond its control. The appropriate test rests on the exercise of prudence and is hence a test of reasonableness. As already mentioned, the statutory duty of care required for specific performance is reasonableness, henceforth it does not require the obligor to achieve a specific target unless the parties agreed on

[9] Ibid, at 800.

such contractual condition beforehand. The law does not permit the parties to decrease the bar of reasonableness to a level whereby the obligor is exempted from fraud and gross negligence. Obligors are always liable if fraud or gross negligence materialises.

Article 249 CC states that:

(i) Where the obligor undertakes delivery of a thing but fails to do so after having been notified, he shall be liable for any loss caused by such failure, even where the liability for such loss lies with the obligee prior to the notification.
(ii) The obligor shall, however, not be liable for the loss even where he was notified, provided that he proves that the thing would also have been lost in the possession of the obligee if it had been delivered to the obligee, unless the obligor accepts liability for *force majeure* or unforeseen incident.
(iii) Where a thing that has been stolen is lost or damaged in any manner whatsoever, the thief shall be liable for such loss or damage.

The law makes it crystal clear that if the obligor promises to deliver a good but fails to deliver it even after being served with a written notice by the obligee, the liability of safeguarding this good falls. This is true even if such liability was contractually borne by the obligee. The obligor may escape from this burden by proving that the good in dispute is likely to perish under the possession of the obligee, as is the case with the delivery of food, which is susceptible to expiration. The only exception to this rule is *force majeure*. The burden of proof rests with the obligor. The third paragraph of article 249 CC sheds light on the fate of stolen goods, whereby the defence of *force majeure* in respect of goods that perished while in the custody of the obligor is impermissible. The obligor who is aware that a sold item was stolen (bad faith) *remains liable* for its safeguard *at all times* because this is a matter of public order.

10.2.2.3 Performance In-kind Directly by the Obligor

Article 250 CC states that:

> Where the terms of the agreement or the nature of the debt requires performance of the obligation by the obligor himself, the obligee may reject payment by any third party.

The law here enforces the will of the parties at the time a contract was formed by upholding the obligee's right to refuse specific performance from a third party rather than the obligor. This rule is very important where specific

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performance is expected from the obligor and there is no explicit provision of 'assignment' in whole or part to a subcontractor. This protection ensures that the obligor will not assign the contract to a third party that is less experienced in order to reduce costs. The obligee must be aware of the potential assignment and its consent is mandatory in this scenario.

Article 251 CC goes on to say that:

> (i) Where the obligor fails to perform his obligation, the obligee may apply to the court for permission to enforce the obligation at the expense of the obligor, if such enforcement is possible. (ii) In the event of an emergency, the obligee may enforce the obligation at the expense of the obligor without permission from the court.

The law confers upon the obligee the right to demand specific performance for a civil obligation when the obligor fails to fulfil its contractual duty through a court order. Alternatively, in the event of an emergency, the obligee may perform the duty on behalf of the obligor and charge it to the obligor's account. It is worth noting that allowing the obligee to perform the duty on the obligor's expense is controversial in civil law because the law does not require the obligee to notify the obligor prior to performing the duty. Notification in the civil law serves the purpose of reminding the breaching party of its obligation, and in case of non-compliance, the notification may be used as evidence against the breaching party before the courts.

It is also important to distinguish between civil obligations requiring specific performance by the obligor personally from those where a substitute is permissible through assignment to a third party. Substitution is impermissible where the obligor is an artist or a person with unique skills hired to perform a specific job, thus, the obligee will be entitled to seek compensatory performance.

Article 252 CC allows the courts to close the parties' performance gap. It states that: 'the court judgment shall be considered as performance if the nature of the obligation so permits'. In certain circumstances where a contracting party to a civil obligation refuses to acknowledge its consent to it, the court steps in to fill that gap. If a mortgagor pays all instalments as per the mortgage agreement, albeit the mortgagee refuses to acknowledge receipt of the final instalments or take the necessary regulatory steps to free that property in question, the court may rule in favour of the mortgagor after reviewing all the evidence and remove the mortgage from said property. The same rule applies to cases where one contracting party denies the validity of its signature on a written contract to avoid specific performance. In this case, the other contracting party may seek court permission to validate the agreement and enforce specific performance.

Reasonable care in the discharge of contractual obligations is a key requirement. This is clearly articulated in article 253 CC, which goes on to say that:

(i) Where the obligor is required to maintain or manage a thing or to act carefully in the performance of his obligation, he shall have performed his obligation if he uses reasonable care, even where the intended purpose is not achieved unless the law or agreement provides otherwise.
(ii) At all times, the obligor shall be liable for any fraud or gross negligence committed by him.

As discussed earlier, the law demands from the obligor to act reasonably at all times while performing its contractual obligations and the duty of care imposed on the obligor does not require achieving a specific target or objective unless the law or the contract demands otherwise. Thus, the test of reasonableness applies. If the obligor commits fraud or gross negligence, the obligee will be entitled to damages for this civil wrongdoing.

When the obligor promises to refrain from doing something and fails to uphold or fulfil such a promise, the obligee has the right to obtain a court order to enforce the contractual condition between the parties. For example, if an employee breaches a promise preventing him from working for a competitor, the former employer may obtain a court order to enforce the specific performance in addition to seeking indemnity for the breach of the condition. This position is aptly illustrated in article 254 CC, which states that:

> where the obligor undertakes not to do something and then breaches such obligation, the obligee may petition the court to remedy such breach at the expense of the obligor, without prejudice to the obligee's right to indemnity.

10.2.2.4 Disciplinary Penalties

Where the execution of a specific performance becomes futile, article 255 CC allows the courts to impose a disciplinary penalty. This unique remedy is set out as follows:

(i) 'Where the performance of an obligation in kind is not possible or appropriate unless the obligor executes it, the obligee may obtain a judgment to require the obligor to perform such obligation or otherwise to pay a disciplinary penalty.
(ii) Where the court believes that the amount of the penalty is insufficient to force the obligor to perform the obligation, the court may increase the amount as necessary.

(iii) In the event of performance in kind, or where the obligor insists on rejecting the performance, the court may determine the amount of indemnity against the obligor's non-performance or delay in performance, taking into account the damages suffered by the obligee'.

The first paragraph sheds light again on the importance of using the 'disciplinary penalty' as a means of inducing a specific performance, where the contractual undertaking so demands. The obligee may obtain a court order to impose a disciplinary penalty on the obligor until the specific performance is achieved. The obligee is permitted to charge a 'disciplinary penalty'[10] (on a specified rate) to enforce performance in-kind on the obligor, solely to the extent that such disciplinary penalty is either explicitly provided in the contract or exists implicitly in the law. Last but not least, in contrast to the common law, penalties are prohibited in the civil law tradition of contracts; however, 'liquidated damages' are permitted.

The second paragraph stipulates that the court at its discretion may increase the disciplinary penalty if it deems it insufficient to force the obligor to perform the civil obligation in dispute. The disciplinary penalty does not amount to compensatory performance nor indemnity; rather, it is *an interim penalty* until a final judgement is rendered by the court. Hence, time is crucial, because specific performance is subject to time limitations, for example a completion date for handing over a project to the client as specified by the contract.

The third paragraph mandates that if such deadline has elapsed without specific performance being achieved due to the obligor's refusal to perform, the court will order compensatory performance (damages) for partial performance or non-performance, which may include indirect and consequential losses (also known as collateral damages), such as loss of profit or revenues.

[10] As of the time of writing this book, our research did not indicate that the Qatari Court of Cassation has interpreted or established a legal principle concerning disciplinary penalties in civil and commercial contracts. As persuasive authority we looked at case law from the Kuwaiti Court of Cassation. In particular, in Judgment 908/2013 the Kuwaiti Court decided that disciplinary penalties are indirect means by which to force the obligor to perform the civil obligations in-kind. Thus, the magnitude of disciplinary penalties may not be proportional to the actual loss suffered by the obligee. The court has the discretion to either increase or decrease the disciplinary penalties as necessary and such decision is a temporary measure until the obligor declares that it will not perform in-kind. Alternatively, if the court decides that specific performance is no longer feasible it will not enforce the disciplinary penalties, but will determine the applicable compensatory performance (damages) for either partial performance or non-performance.

10.2.3 *Compensatory Performance (Damages)*

In the civil law tradition, preference is granted to specific performance over compensatory performance (damages) because of the inherent public interest in honouring civil obligations by performance in-kind. In this vein, article 256 CC states that:

> Where the obligor fails to perform the obligation in kind or delays such performance, he shall indemnify any damages suffered by the obligee, unless such non-performance or delay therein was due to a cause beyond his control.

As discussed earlier, the obligee has the right to claim for compensatory performance from the obligor, that is, indemnity or damages as a last resort if specific performance is not feasible. The obligor's liability for non-performance or delay in performance remains at all time unless the obligor proves that the breach was the result of *force majeure*.

Article 257 CC complements article 256 CC by stating that:

> The court may decrease the amount of indemnity or reject any request for indemnity where the negligence of the obligee contributed to or aggravated the damage.

This provision gives rise to the delict of 'contributory negligence' whereby the obligee's breach of the statutory duty of care [with a valid causation] has contributed to the overall negligence by the obligor. Thus, the court will apply the principle of set-off;[11] that is, the court may decrease damages due to the obligee's contributory negligence.

Article 258 CC makes the case that the parties may well agree that the obligor shall bear liability in respect of unforeseen events, or those otherwise described as *force majeure*.[12] The Qatari legislator permits the contracting parties to agree beforehand that *force majeure* will not offer relief to the obligor.[13] The obligor may use the defence of coercion to prove being forced to accept such a strict condition during the negotiation phase, which may help relieve him from such obligation. The burden of proof of 'coercion' will be on the obligor.

[11] See Art 390 CC.

[12] Court of Cassation Judgment 257/2018. See also Court of Cassation Judgment 13/2010, where it was held that impossibility beyond the control of the obligor arises where the event in question is unpredictable and impossible to avoid and the implementation of the commitment under the contract was impossible for everyone in the debtor's position. See also Court of Cassation Judgment 51/2008 regarding the burden of proof.

[13] The Court of Cassation in its Judgment 114/2009 emphasised the sanctity of party autonomy in consonance with the parties' agreement. This clearly applies to the contractual regulation of *force majeure*.

10.2.3.1 Limitation Clauses

The parties may well agree in their agreement to limit each other's liability. Such limitation of liability is acceptable under article 259 CC, which also complements article 258 CC, by stating that:

(i) 'The parties may agree to discharge the obligor from any liability arising from his failure or delay to perform his contractual obligation, except for his fraud or gross negligence.
(ii) The parties may also agree to discharge the obligor from liability for fraud or gross negligence committed by persons employed by the obligor to perform his obligation.
(iii) Any agreement concluded prior to the liability for the unlawful act arising shall be revoked and the obligor shall be discharged from such liability in whole or in part'.

The parties are allowed during the negotiation of the contract to limit or waive their right to claim damages against certain liabilities. However, such 'damage limitation clauses' *shall not exempt* any party from 'civil wrongdoing' liabilities, which include but are not limited to fraud and gross negligence. The only exception to this rule is that the parties are permitted to exempt the obligor from the liability of fraud and/or gross negligence arising from work performed by its subcontractor. The third and last paragraph of this article emphasises that any agreement to limit or discharge statutory liability concerning 'unlawful acts, that is, delicts' is strictly prohibited by law. Statutory obligations include implied warranties for goods and services protecting consumers against defective products. If a contracting party forces such agreement, the contract will be considered null and void and the obligor will no longer be liable for performing the contractual obligations, whether in whole or in part.

10.2.3.2 Notifications

Notifications are a central part of the civil law tradition and this is true of the Qatari CC. Article 260 CC states that:

> Indemnity shall not be payable until the obligor is notified, unless the parties agree or the law provides otherwise.

The law here demands the obligee to notify the obligor in writing on or before the contractual deadline for specific performance in order to be entitled at a later stage to claim for compensatory performance. The only applicable exception is where the law or the obligor waives its right to receive a notification

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prior to initiating any legal action by the obligee to claim for damages arising from non-performance or partial performance or delay in performance.

The form of notification is equally important. Article 261 CC states that: 'an obligor may be notified by a warning or by any other official paper in lieu of the warning. A notice may be given by registered mail or by any other means as agreed'. The parties may agree on the form of written notification in case of a potential breach. The notification may take the form of (i) a court statement of claim or (ii) written notice signed by the obligee and delivered by registered mail to the obligor's address as mentioned in the contract. It is worth noting that there is no general rule mandated by law to regulate the acceptable forms of notification.

The CC sets out when notification is mandated. This is specified in article 262 CC, which states that:

'A notice shall not be necessary in any of the following cases:

(i) Where it is agreed that the obligor be considered notified immediately upon the maturity of the debt;
(ii) Where the performance of the obligation in kind is not possible or futile due to the act of the obligor[14];
(iii) Where the obligation is an indemnity arising from any unlawful act;
(iv) Where the obligation requires the return of a thing that the obligor knows to have been stolen, or the delivery to the obligor of a thing to which he knowingly has no right;
(v) Where the obligor expressly states in writing that he shall not perform his obligation'.

The law here provides conditions in circumstances where notification to the obligor will serve no purpose and thus not required as a prerequisite to initiate a legal action against the obligor and claim for compensatory performance. These conditions include a contractual agreement between the parties whereby the breaching party is automatically considered as having been notified as soon as the deadline to perform in kind elapses. Another scenario arises where the obligor is not cooperative and refuses to perform the civil obligation in kind, in which case the obligee's notification is futile. A third situation arises where notification is useless because the indemnity in question arose

[14] See Court of Cassation Judgment 261/2014, where it was held that tendering a written notification to the obligor – in this particular case the seller of 10 blocks of land – who breached a sales contract to enforce performance in-kind is not possible or futile due to his acts. The seller sold the property in 1977 and received full payment from the buyer in the tune of QAR 1.1 million. The seller later registered the sold property under his name with the Real Estate Registration System (Ministry of Justice) during 1982 and re-sold it to third parties. Thus, the tendering of a written notification to the seller prior to initiating a legal action by the buyer or his heirs was deemed not to be required.

from a civil wrongdoing (delict) or statutory obligation, both of which are protected by law. Thus, the claimant need not serve a notification by which to commence legal proceedings. Furthermore, the law here emphasises the principle enunciated in article 249(3) CC as explained above. Lastly, when an obligor expresses its non-compliance in writing to the obligee and refuses to perform in-kind then notification by the obligee is not necessary.

10.2.3.3 Estimation of Damages and Collateral Damages

The parties are generally at liberty to agree on the extent of applicable damages. Article 263 CC states that:

(i) 'The court shall calculate the indemnity unless such calculation is provided in the contract or by the law.
(ii) Indemnity shall cover damages incurred by the obligee, including loss of profit, provided that such damages or loss of profit are a natural consequence of the obligor's failure or delay to perform the obligation. Damages shall be deemed consequential if they were reasonably foreseeable or within the contemplation of the parties at the time of the conclusion of the contract.
(iii) However, if the source of obligation is contractual, an obligor who *did not* commit fraud or gross error is only liable to indemnify damages which are reasonably foreseeable at the time of concluding the contract[15]'.

The courts possess discretion to calculate the value of compensatory performance (damages) where this is not specified in the contract or the law. Indemnity should include direct and indirect losses (also known as collateral damages) unless the parties waive their right to claim indirect and consequential losses. Indirect and consequential losses are required by law to be 'reasonably foreseeable or within the contemplation of the parties at the time of the conclusion of the contract'; thus, any claim for 'remote' indirect losses is impermissible.

10.2.3.4 Moral Damages

This is not free from controversy and indeed moral damages are not necessarily envisaged in all legal systems. Article 264 CC states that:

> indemnity shall include moral damages and shall be governed by the provisions of Articles 202 and 203.

[15] Art 263(3) CC was mistakenly omitted in the English translation of the legislative text as published by Al-Meezan database, compared to the original Arabic text.

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Qatari legislators adopted the approach of encompassing moral damages, which includes the delicts of mental distress and defamation. Moral damages will be discussed in more details under sub-section 10.2.3.8 of this chapter.

10.2.3.5 Liquidated Damages

Much like other developed jurisdictions, article 265 CC provides for the justification of liquidated damages, as follows:

> 'Where the obligation *is not for*[16] the payment of money, the parties may calculate the amount of indemnity in advance in the contract or in any subsequent agreement'.

Qatari legislators have permitted the parties to foresee and calculate indemnities for potential damages at the time of the contract in the form of a 'liquidated damage' clause subject to the condition that the obligation itself is unconcerned with the payment of money. The rationale behind the restriction of establishing indemnity for a payment of money is related to the Islamic prohibition of monetary interest (*riba*). Islam considers monetary interest as 'enrichment without cause', where the obligee will gain more money compared to the original amount of money borrowed by the obligor without performing anything justifying the extra profit. It is worth noting that Islamic opposition to 'monetary interest' does not take into account the economic principle of 'inflation', where the economic value of the original amount of borrowed money today will not be the same after the passage of time when the money has been repaid to the obligee.

10.2.3.6 Restitution

Restitution is a remedy that is recognised in most legal systems and in the common law it is also an equitable remedy. It is envisaged as a contractual remedy under article 266 CC as follows:

> No agreed indemnity shall be payable if the obligor proves that the obligee has suffered no damages. The court may decrease the agreed amount of indemnity if the obligor proves that the calculation is exaggerated or if the obligation has been performed in part. Any agreement to the contrary shall be invalid.

[16] There is a mistake/discrepancy in the English translation of Art 265 CC as published by Al-Meezan database, compared to the original Arabic text.

Here the law emphasises the importance of 'restitution', which allows the courts to grant indemnity for non- or partial performance on the basis of 'fairness'. The law intends to place the injured party in the position before the occurrence of the breach. If the obligor proves that the obligee did not suffer losses, the obligee will not be entitled to indemnity, even if the contract mandates otherwise. Moreover, the court at its own discretion may increase or decrease the contractually liquidated damage based on evidence demonstrating that such indemnity was exaggerated or inflated by the obligee at the time of the contract. Thus, any agreement contrary to public order is invalid. The burden of proof falls on the obligor, who must demand it in the statement of claim; otherwise, the court will not automatically grant it without request.

Article 267 CC goes on to say that: 'where the damages exceed the agreed amount of indemnity, the obligee may not claim a higher amount unless he proves the obligor's fraud or gross negligence'. The law here sets a clear rule that indemnity must be equal in value to the loss suffered by the obligee, unless the latter proves that the obligor committed fraud and/or gross negligence. In this particular circumstance, the obligee will be entitled to 'inflated' damages as a penalty for a conduct that breached public order.

Article 268 CC makes the point that: 'Where the obligation is the payment of money and the obligor fails to make such payment after being notified to do so and provided that the obligee proves he has incurred damages due to such non-payment, the court may order the obligor to pay indemnity, subject to the requirements of justice'. This article must be read in conjunction with article 265 CC because the civil obligation concerns borrowing/lending money, which encompasses an inherent prohibition of 'monetary interest' in order to be compatible with Islamic law. Article 268 CC deals with situations where the obligor is financially capable of returning the debt but chooses to either avoid or delay payment. If the obligee can prove that: (i) the obligor refused to pay the debt even after being notified in accordance with the parties' agreement and (ii) the obligee has suffered damages due to non-payment, such as by its reliance on the obligor's promise to pay another debt or civil obligation, the court is entitled to award damages (direct and indirect) to the obligee. Qatari legislators adopted this approach in order to mitigate the risk of obligors deliberately delaying payment of monetary debts by relying on the *riba* prohibition, at least at an individual level (not corporate level), which conflicts with public order and hinders economic growth.

10.2.3.7 Nature of Damages

In the civil law tradition, damages accruing from a contractual obligation[17] or liability arise where (i) an obligor breaches either an 'explicit' term that is mandated by the contract or an 'implied' term that is mandated by applicable law (statute) or accepted commercial practices and (ii) the obligee has suffered an actual damage (not a possible damage) due to the action or omission of the obligor. If the mere contractual breach does not result in actual damage to the obligee, then a claim for damages under contract law is not admissible.[18] For example, if a seller under a sales contract was overdue at delivering the sold goods to the buyer, while the latter was not available at the time and place of the supposed delivery and did not even delegate a third party to collect the sold goods on its behalf, then the former does not have recourse to compensation because the buyer has contributed to the breach and did not suffer an actual damage from such a breach, that is, the over-due delivery by the seller.

The main objective of granting damages to a contractual obligation or liability is to indemnify and compensate obligees from an actual damage that was a direct result of the obligor's non- or partial performance. Thus, *causation*[19] between the contractual breach[20] and actual damage is a mandatory requirement. The

[17] Qatar Court of Cassation Judgment 36/2016, where it held that the general rules governing a contractual obligation (المسؤولية العقدية) differ from those governing a delictual obligation (المسؤولية التقصيرية). Damages which arise from a contractual obligation must be governed by the terms of the contract and relevant laws. If the parties to a dispute have a contractual relationship, then it is not permissible to apply the general rules of delict unless the contractual breach is deemed a criminal offence or the result of fraud or gross error. The main objective behind prohibiting the application of delictual rules to a contractual breach is the risk of diluting the enforceability of contractual terms, and thus weaken the legal instrument of contracts as a whole.

[18] Mohammad Hassan Qassim, *Civil Code – Sources of Obligations: Contracts* (Al-Halabi Legal Publications, 2018) vol 2, at 215–216.

[19] According to the Qatar Court of Cassation Judgment 390/2017, courts of substance (i.e. court of first instance and the court of appeal) possess discretion to determine: (i) the contractual breach; (ii) damages; and (iii) causation between the breach and damages, without supervision from the Court of Cassation as long as the outcome is supported by evidence filed with the court. Moreover, contractual remedies in the case of the obligor's non-performance or late performance may be granted in accordance with Arts 256 and 253 CC. Courts of substance *may not* award contractual remedies to the obligee, if the obligor managed to prove that *no damage occurred* in the first place. Furthermore, courts of substance may *reduce* contractual remedies if the obligor managed to prove that the estimated value of contractual remedies is either *disproportionate to the damage in dispute* (i.e. an exaggerated value) or *partial performance of the contractual obligation has already been fulfilled*.

[20] According to the Court of Cassation Judgment 122/2017, a breach constitutes non-performance of a contractual obligation by the obligor. Such contractual obligation can be construed from the contract, the intentions of the parties and the law.

general rule here is that obligees have the burden to prove that actual damage has occurred due to the contractual breach committed by the obligor(s). Courts of substance have the discretion to assess the evidence filed by the parties and decide on the contractual damages to be awarded, if any.[21]

10.2.3.8 Types of Damages

Damages in contract law comprise two main types, namely: (i) material damages and (ii) moral damages. The former is defined as damages which harm the obligee's economic estate such as property, money, shares and bodily injury.[22] Thus, material damages can be easily identified and quantified. On the other hand, moral damages are defined as harm to the obligee's non-economic estate, such as reputation and mental status. Hence, moral damages are intangible and difficult to quantify. Unlike the common law which limits contractual damages to one's economic assets and thus excludes bodily injury,[23] the civil law tradition permits contractual damages to encompass both economic and non-economic claims.[24] The legislative text makes a clear reference to material damages[25] by emphasising that: 'indemnity shall

[21] According to the Court of Cassation Judgment 95/2016, the estimation of damages falls within the discretion of the courts of substance, which may rely on the available evidence as the basis for their ruling. Estimation of damages must be based on sound justification, where a proportionality between the damage in dispute and value of remedies to be awarded is established. Remedies shall not exceed nor fall short of the actual harm suffered by the obligee (i.e. rules of fairness apply here); equally to the same effect, Court of Cassation Judgments 46/2008 and 37/2014.

[22] According to Qassim, above (n 18), at 222, bodily injury claims are considered material damage rather than moral damage. Qassim provides an example of a transportation contract where the obligor has a legal duty to transfer passengers from point A to point B while complying with applicable health and safety standards. If the obligee suffers a bodily injury as a direct result of the obligor's breach, a claim for a material damage under the transportation contract is permissible.

[23] In common law systems, bodily injury and non-economic claims fall under the ambit of tort law such as the torts of personal injury, mental distress and defamation.

[24] Contractual and delictual damages overlap in civil law systems, whereas in the common law there is a clear divide between damages under contracts and torts. The reason behind the overlap in the civil law tradition is that the law of delict did not develop into an autonomous discipline in the same way as tort law in the common law world. According to Qassim, above (n 18), at 222, 'Moral damages as a contractual remedy is no longer a controversial topic among systems scholars in civil law. Even if moral damages are better visualised as a delictual remedy under negligence, judges have the discretion to award moral damages in contractual disputes. There is a consensus in the civil law jurisprudence that moral damages in contractual disputes may be granted without material damages, if the court determines that the contracting party's interest was moral (non-economic) not necessarily material (economic). Thus, the general rules which apply to material damages can be applied in the same manner to moral damages'.

[25] Art 263 CC.

cover [material] *damages incurred* by the obligee, including loss of profit' and moral damages[26] ('indemnity shall include *moral* damages'). As discussed earlier, material damages consist of two elements: (i) direct losses and (ii) consequential or indirect losses (collateral damages), that is, loss of profit. The latter must be foreseeable by the contracting parties at the time of concluding the contract; otherwise, the court may not grant indemnity for consequential losses (collateral damages). The contracting parties may exclude consequential losses (collateral damages) by using a limitation clause in the contract, which the courts must respect. In all cases, causation between the contractual breach and actual damage is a mandatory requirement that is referenced in the statutory text as 'a *natural consequence* of the obligor's failure or delay to perform the obligation'.[27]

Moral damages are governed by articles 202 and 203 CC,[28] whereby the general successors of a deceased obligee who suffered the aftermath of the obligee's death arising from the contractual obligation may claim for moral damages up to the obligee's second kin.[29] The court may not grant moral damages to all applicable second kins but the judge has discretion to indemnify only those who suffered a 'real' pain for the loss of the deceased obligee.[30] As persuasive authority, the Egyptian Court of Cassation held that the legislative text in articles 121 and 122 Egyptian CC [equivalent to articles 263 and 264 Qatari CC] does not limit moral damages to the obligee's death but these may be extended to cover the obligee's severe injury if he/she remains alive. Thus, indemnity may be granted to the obligee's general successors or relatives up to the second kin.[31] Finally, the Qatari legislator has followed the Egyptian CC and mandated in article 203 CC that moral damages cannot be assigned

[26] Art 264 CC.

[27] Art 263 CC.

[28] According to the Qatari Court of Cassation Judgment 89/2016, courts of substance shall take into consideration moral damages alongside material damages when determining indemnities. Moral damages include disputes related to defamation and mental distress among others. Courts of substance shall not underestimate moral damages to avoid aggregating the pain of the injured person. Indemnity must be: (i) monetary in form; and (ii) sufficient in value to fully rectify the injured party for both material and moral damages. Similarly, the Court of Cassation in Judgment 124/2016, held that despite the award of moral damages only, courts of substance had not clearly construed the elements on which moral damages were estimated. Furthermore, there was no valid justification for the ruling to exclude material damages, even if they were adjudicated in previous rulings [i.e. different claims]. The general rule for damages is to encompass both material and moral elements.

[29] Second degree kinship includes a living spouse, parents, grandparents, children, grandchildren and siblings, that is, brothers and sisters. Qassim, above (n 18), at 227.

[30] Qassim, ibid, at 228.

[31] Egyptian Court of Cassation Judgment 755/1959.

or transferred to third parties (general or special successors) unless one of the following conditions materialises: (i) moral damages are stipulated either by contract or law or (ii) the obligee has filed a claim for moral damages before the obligee passes away.[32]

10.2.3.9 Conditions for a Valid Claim of Damages

Contractual damages must be (i) certain; (ii) direct and (iii) foreseeable. Certainty entails that the damage must be actual, not just possible, that is, either a damage has already occurred or will inevitably occur in the near future. Let us assume a procurement contract to supply a factory with raw materials needed for a manufacturing process. When the supplier fails to deliver the raw material on time to the factory, the contractual damage may not occur immediately because it is reasonably expected that factories should have a sufficient stock of raw materials in their warehouse to keep their production process healthy for a limited period of time. Thus, contractual damages arising from the supplier's failure to perform its obligation under the procurement contract are deemed to be inevitable in the near future, once the factory runs out of stocked raw materials. Courts of substance have the discretion to either: (i) determine 'provisional' contractual damages from the evidence available while permitting the oblige to seek 'final' contractual damages at a later stage or (ii) grant a stay to the litigation proceedings (i.e. postpone the adjudication of the case) until the contractual damage materialises, at which time the court will determine the final damages and applicable compensation.[33]

The second condition here is directness. When the Qatari legislator demands that contractual damages must be direct, this condition refers to causation between the contractual and the claimed damage. As discussed earlier, the law does not grant a remedy to an obligee merely because a breach has occurred. An obligor is liable to indemnify the obligee for direct damages only (including both direct losses and consequential losses). Indirect damages are not recoverable because the legislator expects prudent obligees to exercise a reasonable effort to avoid the risk of indirect damages; thus, its occurrence is deemed as an error made by the obligee.[34] A famous example of indirect damages was illustrated by the French jurist Robert Joseph Pothier, who is credited with the narration of a story where a farmer purchased an ill cow and then put it in the same barn with other healthy cows without isolation. The healthy

[32] Qassim, (n 18), at 230.
[33] Ibid, at 231–232.
[34] Ibid, at 235.

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cows became infected with the same disease as the purchased ill cow, and consequently all the cows died. The farmer became unable to seed his land and thus lost the potential profit of the land's harvest. As a result, the farmer could not pay his debts and all his estates were sold in auction, which yielded a low-value outcome. The seller of the ill cow may not be held liable for all the damages. The buyer has a legal recourse to seek remedies for direct damages, that is, the death of his healthy cows, if the buyer can prove to the court that an error or fraud has occurred at the time of concluding the sales contract and the buyer could not reasonably avoid the death of his cows. However, for the loss of potential harvest profit and default payment of his debts (collateral damages), the seller is not liable for the indirect losses because the buyer could have: (i) procured new cows in order to seed his land; (ii) arranged for other farming tools or methods to seed his land without the need for cows, so he will not miss the harvest season or (iii) even renegotiated the postponement of the default payments of his debts with its creditors to avoid the aftermath of selling his estate in an auction.[35]

The third and last condition is foreseeability. In civil law systems, foreseeability is a mandatory condition for contractual remedies only – that is, delictual remedies may be awarded for direct damages whether these damages are foreseeable or unforeseeable. The general rule of limiting obligors' liability to foreseeable direct damages is based on the legal principle of 'good faith'; that is, the obligor must have acted in good faith while performing its civil obligations under the contract in dispute. The exception to this general rule materialises in circumstances where the obligor committed fraud or gross error[36] (acting in bad faith), in which case contractual liability extends to unforeseeable damages as well as damages pursuant to paragraph 3 of article 263 CC. The main objective for enforcing foreseeability as a condition for contractual damages is the law's expectation that while negotiating a potential contract obligors should demonstrate prudence and assess the potential risk of non-performance or partial performance of their civil obligations. Moreover, this objective aligns with the principles of fairness (known as equity in the common law), because an obligor acting in good faith must not be liable for damages that are more severe or which 'go above and beyond' the original civil obligation itself.[37]

[35] Ibid.

[36] In the civil law tradition, fraud in contractual obligations is deemed an 'intentional' wrongdoing because the obligor intended to avoid performing its obligation. On the other hand, gross error is deemed an 'unintentional' wrongdoing, but is treated in a similar manner to intentional wrongdoings. Thus, an obligor may commit a gross error without intending to do so and henceforth becomes liable to pay damages to the obligee. Qassim, ibid, at 248 and 251.

[37] Qassim, ibid, at 240.

One controversial question arising from the requirement of foreseeing contractual damages concerns whether the obligor must have foreseen the 'cause' of the harm, its 'value' or both. Let us assume a situation where a passenger loses luggage handed to an airline company for safekeeping during a flight from point A to point B and the luggage contained precious items, whose value the airline company could not possibly foresee. Is the airline liable to indemnify the cost of the lost precious items? French jurisprudence (not unanimously it has to be said) tends to suggest that the cause of harm alone is sufficient to establish liability for foreseeable damages even if the true value of the harm was not foreseeable. Thus, by making reference to the above example, French courts may award contractual damages to the passenger for the loss of precious items. Nevertheless, Egyptian jurisprudence requires the foreseeability of both cause and value of contractual damages. According to the Egyptian Cassation Court, a foreseeable harm materialises when a prudent person facing circumstances similar to those of the obligor at the time of concluding the contract would be able to foresee (i.e. the court here applies the reasonableness test).[38] The same Court elaborated that it is not sufficient to foresee the cause of harm only, since foreseeability of the value of such harm is a mandatory element in order to establish liability.[39]

10.3 PERFORMANCE IN ACCORDANCE WITH SPECIAL LAWS

10.3.1 *Performance in Sales Contracts*

Articles 102 to 124 of the Qatari Commercial Law uphold specific performance between seller and buyer as the default method for fulfilling civil obligations and discharging contractual liabilities under a sales contract. Compensatory performance (damages) is the exception to the general rule. The seller is obligated to safeguard the sold merchandise, while the goods are kept under its possession. The point whereupon 'title and risk' may pass from seller to buyer depends on the agreed delivery arrangements. In commercial practice, such obligation may pass temporarily to a third party hired by either the buyer or seller to collect the sold goods from the seller and deliver to the buyer. If the goods perish or become defective before collected or delivered to the buyer, the loss must be borne by the seller, unless the seller can prove that this unfortunate result: (i) was unforeseeable and (ii) occurred beyond the seller's control (i.e. *force majeure*). In this case, the buyer will be entitled to cancel

[38] Egyptian Court of Cassation Judgment 145/1973.
[39] Qassim, (n 18), at 243–244.

the transaction and receive a refund. However, if the seller takes reasonable precautionary measures to protect the sold goods and notifies the buyer of its conditions for collection or delivery, the loss must be borne by the buyer. If the said defect(s) does not render the sold goods 'seriously' defective and consequently reduce its economic value, the buyer will be entitled to either cancel the transaction [and get a refund] or accept the merchandise with a 'reasonable' discounted price.

10.3.1.1 Delivery and Incoterms Clauses

In general, most sale and purchase agreements nowadays contain specific clauses, which deal with 'incoterms' and specify which party bears the obligation for the collection/delivery of the sold good. In the absence of such clauses, the law fills this gap by conferring this obligation on the seller for exportation and the fulfilment of such a duty will not suffice until the sold goods are delivered to the buyer.[40] When the parties agree to outsource delivery to a third party, such as a courier, the law[41] stipulates that if the contractual terms and conditions of such delivery mature once the sold items reach the courier, both title and risk pass from seller to buyer at that particular moment. Moreover, if the buyer requests the seller to deliver the sold goods to a shipping address that is not specified in the sale contract, the buyer bears the risk of loss or damage of such delivery unless the seller does not follow the buyer's shipping instructions without reasonable justifications; that is, the necessity to deviate from the buyer's shipping instructions for safety or regulatory compliance.[42] If the sold goods are paid in instalments, the title thereof does not pass to the buyer during the delivery process. However, the risk passes to the buyer during delivery and hence if the goods perish while in the possession of the buyer, the buyer is liable.

In sales contracts, the type of commodity sold determines the rules regarding delivery, especially where the underlying contract is silent about the deadline of delivery. In circumstances concerning perishable goods, article 108 CL states that delivery should take place: (i) before the items perish and (ii) before the end of a season as mandated by acknowledged commercial practices. However, if the buyer specifies the delivery deadline in the sales contract, the seller is expected to comply and deliver the items within the deadline,

[40] It is worth highlighting that Qatari law has regulated 'Incoterms' pertinent to maritime transactions in Arts 142 to 163 of the Commercial Law.

[41] Art 105 CL.

[42] Art 106 CL.

taking into consideration relevant commercial customs and practices. In case the seller fails to fulfil its contractual obligation and delivery to the buyer did not materialise, the buyer must *notify the seller in writing* of its intention to enforce the terms and conditions of the sale agreement *within three days from the delivery deadline*; otherwise, the sales contract will be unenforceable. Once this condition is met, the buyer will have recourse to the courts, or in urgent situations without the court's permission, to procure the sale items from a different vendor and charge all relevant costs to the seller.[43] This requires 'good faith' on the part of the buyer. If the sale agreement states that the seller shall deliver the sold items in batches and fails to meet the delivery requirements, the buyer may request the revocation of the non-performed obligations. In order to revoke the entire sales contract, the buyer must prove an 'adverse effect' from the seller's performance even for the delivered items.

Once the sales contract is revoked either in whole or in part, the buyer may claim compensatory performance (damages) from the seller. The buyer has the right to claim monetary compensation for the difference between the market price for the sold items effective on the delivery deadline and the agreed price as per the sales contract.[44] This monetary compensation does not prejudice the buyer's right to seek other damages from the court as a result of the seller's failure to perform the contractual obligations, that is, specific performance.

10.3.1.2 Inspection of Sold Goods

The law obligates the buyer to inspect the delivered goods[45] once under its possession in accordance with commercial custom. The buyer must immediately notify the seller in writing about any defects discovered during the inspection process; otherwise, the buyer is deemed to have waived its right to return the defective goods. If the buyer fails to notify the seller in writing of its findings (whether during the course of normal examination of the goods or as soon as the defects are discovered), the buyer may risk losing its right to seek compensation from the seller.

10.3.1.3 Payments and Financial Securities

With regard to payment, buyers are obligated by law to make such payment at the time of delivery, that is, when title and risk pass to the buyer, or at a

[43] Art 109 CL.
[44] Art 110 CL.
[45] Art 114 CL.

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specific due date as stipulated under the sales contract or established by commercial custom. The place for making the payment is the buyer's residence, especially in cross-border transactions.[46] If the buyer suspects that the seller does not possess good 'title' to the sold goods, the law grants the buyer the right to withhold payment until such claims are resolved, unless the sales contract prohibits such withholding. The same right is granted to the buyer if it detects defects in the sold goods.[47] However, the seller may still demand that payment be made by the buyer subject to a guarantee or a financial security on the sold goods, that is, a third-party guarantor who shall indemnify the buyer in case the sold items do not have a good title or contain defects.[48] The law grants the seller the right to withhold delivery of the sold goods if it was agreed that payment (partial or full) be made *immediately* to the seller until the money is collected. Even if the buyer provides the seller with a mortgage or a financial security to secure payment, the seller still has the right to maintain temporary possession of the sold goods until payment is made; save if the sales contract granted the buyer a 'grace period' for payment.[49] The seller is allowed to prolong the possession of the sold goods if it becomes aware that: (i) the buyer has declared bankruptcy; (ii) the buyer's financial security has weakened due to its action or even without the intervention from the buyer's side but through its failure to take the necessary action to rectify such weakness, or (iii) because of the buyer's failure to provide the seller with the required guarantees or financial security as per the terms and conditions of the sales contract. In this scenario, if the sold goods perish while in the possession of the seller, any loss will be borne by the buyer unless the goods perished through conduct attributed to the seller.[50]

10.3.1.4 Damages in Sales Contracts

Sellers are entitled to compensatory performance from buyers who fail to perform under the sales contract. This is generally fixed at the price difference (delta) between the market price at the effective due date for payment and the agreed sale price between the parties, subject to notification in writing. Buyers may make payment for the sold goods or services *on or before* the due date of the payments.[51] It is worth highlighting that the sales contract or the established

[46] Art 116 CL.
[47] Art 117 CL.
[48] Ibid.
[49] Art 118 CL.
[50] Art 119 CL.
[51] Arts 120 and 121 CL.

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commercial customs and practices can determine the deducted amount from the price against payment made *before* the due date, that is, an early payment. If the sales contract or customs are silent about the time and place, or the place of performance, time and place are deduced from the circumstances of the conclusion of the underlying transaction. The sold goods must be delivered to the buyer as soon as possible without delay unless reasonable logistical requirements must first be met.[52] The default rule here is that delivery cost shall be borne by the seller unless the sales contract shifts this obligation to the buyer. Finally, if the buyer refuses to collect or receive the sold goods, the seller is entitled to keep them temporarily in a warehouse until disposed, whether by direct negotiation with potential buyers or through an auction after notifying the buyer in writing of the contractual breach. The seller also has the right to determine a reasonable time and place to dispose the goods rejected by the buyer. If the sold goods are perishable, the seller can dispose them without notifying the buyer.[53] Moreover, if the sold goods have a known market price (price index), they may be sold at that price through a broker. The sale proceeds of such disposal process shall be deposited in the court's account. The law grants the seller the right (without prejudice) to reduce the price and/or deduct all expenses incurred in this commercial transaction.[54]

10.3.2 *Performance in Lease Contracts*

Performance in lease contracts embodies the same priorities as civil contracts in general, that is, specific performance first, then compensatory performance (damages), if the latter is not feasible – subject to notification in writing with the exception of urgent situations. According to articles 4 to 14 of the Lease Property Law ('**LPL**'), specific performance for lease agreements is a straightforward process, whereby the lessor is obliged to ensure that the leased property is readily available for hand over to the lessee on the effective date of the lease agreement, free of possession. The possession of such leased property must remain with the lessee as long as the lease agreement is valid. On the other hand, the lessee is obliged to pay rent as agreed in the lease contract, whether on a monthly rate (which is most common in residential properties), biannually or annually.[55] The lessor has a duty to maintain the leased

[52] Art 122 CL.
[53] Art 124 CL.
[54] Ibid.
[55] See Court of Cassation Judgment 108/2015, which held that the lessee's civil obligation to pay due rent as agreed in the lease contract depended on the applicable law for such contract, that is, the CC or LPL. If the lease contract is subject to the LPL, Art 11 thereof dictates that

property and repair any damage brought to its attention by the lessee, such as electrical, plumbing or structural, as well as arrange for the completion of any other works needed to keep the leased property's condition suitable for residential renting. The lessee must notify the lessor in writing and within a reasonable time about all repairs. If the lessor fails or refuses to fix and maintain the property, the lessee is entitled to report to the Leasing Committee and seek permission to repair the property from the lessee's account and deduct it from the rent (i.e. set-off the maintenance costs against due rent payments). It is also worth highlighting that in practice most tenants end up paying for property repairs from their own pocket without exercising their right to seek support from the Leasing Committee due to the bureaucracy of the application process.

The law permits the lessee to carry out 'emergency or necessary maintenance' on the leased property even without consent from the lessor in order to preserve and keep the 'habitational condition' of the said property. In this case, the lessee is entitled to: (i) deduct repair costs from the rent; (ii) extend the duration of the contract, that is, the term in exchange for the money paid toward repairs; or (iii) terminate the lease contract. However, the law deems the lessee's right in this circumstance waived if the lessee occupies the leased property for thirty days from the date such maintenance works were undertaken without resorting to the Leasing Committee. The sole exception to this is where the lessee provides reasonable justification for such delay. The law prohibits the lessee to make any changes, especially structural changes to the premises, without obtaining written consent from the lessor and use the leased property for a different purpose other than the purpose stipulated in the contract. If the lessee breaches these statutory obligations, then the lessee is obligated to restore the leased property to its original condition at its own expense,

the lessee is obliged to: (i) pay the lessor on the due date and no longer than seven days from the due date in full; and (ii) collect a written receipt from the lessor to prove that the rent was paid on-time. In case the lessor refuses to accept the rent or provide a receipt, the lessee is obligated by law to: (i) notify the lessor in writing that the rent is due within seven days and if the lessor does not accept the rent, then the money will be deposited to the Leasing Committee; and (ii) deposit such rent within seven days of the lessor's refusal to the treasury of the Leasing Committee. When the lessee performs the required action mandated by law, the rent is deemed to have been paid on the due date by virtue of such deposit. However, where the lease contract is regulated by the CC, the lessee's obligation to pay the rent is prescribed by Art 607 CC. The lessee does not have a positive obligation to notify the lessor in writing about payment nor to deposit the rent. Nevertheless, the lessor has the civil obligation to request such payment of due rent and collect it from the lessee's place of domicile unless there is agreement or accepted commercial practice dictating otherwise. If the lessor fails to take the proper action of requesting and collecting the rent from the lessee, the lessee is not in breach of the lease contract but remains in debt to the lessor until the rent is paid in full.

in addition to monetary compensation to the lessor.[56] Furthermore, the lessee may not sublease or assign all or part of the lease to third parties, except with the written consent of the lessor.[57] Moreover, the lessee is obligated to pay all utility bills during the term of the lease contract, unless the rent rate is inclusive of such utility charges.

10.4 ENRICHMENT WITHOUT CAUSE

Enrichment without cause in the civil law system[58] is a legal principle that falls outside the ambit of contract law and, in general, its rules cannot be applied to disputes arising from contracts.[59] However, courts may apply it to disputes in which contractual obligations cease to exist such as disputes arising from (i) nullity of contracts[60] or (ii) prescription of commercial instruments,

[56] See Court of Cassation Judgment 32/2015, which held that according to Art 8 LPL, the lessee is prohibited from making any significant change to the leased property without seeking prior written consent from the lessor. The law has already prescribed the remedy of such statutory breach, whereby the lessor is entitled to demand that the lessee remove all changes made to the leased property and reinstate it to its original condition, with all costs of such modification borne by the lessee. The lessor may be entitled to seek compensatory performance (damages), in addition to making all the required changes to the leased property. The Court emphasised that such a breach *is not* a sufficient reason to evict the lessee from the leased property.

[57] According to the Court of Cassation Judgment 98/2015, under the terms of Arts 14 and 19 of the Leasing Property Law, the lessor is entitled to evict the lessee once he or she subleases the leased property to third parties without written consent. The Court emphasised that even if the lessee attempts to rectify the breach after its occurrence, such rectification does not suffice to remedy the situation. In this particular case, the lessee was a legal person (company) that subleased the leased shop to another legal person without the lessor's consent. Both the lessee and the sub-lessee had different commercial registration numbers. After the lessor sought legal action against the lessee, the lessee submitted documents showing that the sub-lessee had been acquired by the lessee. However, the court did not accept such manoeuvre because the acquisition was a disguised attempt to rectify the breach of subleasing to third parties without consent.

[58] The common law doctrine of 'unjust enrichment' is the equivalent counter-part to the civil legal principle of 'enrichment without cause'.

[59] According to Court of Cassation Judgment 443/2017 and its interpretation of Art 220 CC, where the parties have *a valid contractual relationship*, then a claim of 'enrichment without cause' and in particular its application of 'receipt of undue payment' is *inadmissible*. The rationale here is that the contract [as a lawful cause] is the only legal ground which defines the rights and obligations between the contracting parties and thus determines any damage that may be awarded to rectify a breach.

[60] According to Court of Cassation Judgment 60/2012, a nullified contract pursuant to Art 163(1) and 164(1) CC *does not* create any legally binding effect between the parties who intended to form it. Thus, the nullification process has a retroactive effect and the parties must be reinstated to their original position at the time of concluding the nullified contract. If such reinstatement is impossible, then the court may grant damages on the ground of 'enrichment without cause' to the impoverished party, that is, the lesser value of either enrichment or impoverishment.

for example cheques.[61] The most disputed application of enrichment without cause is the 'receipt of undue payment'.[62] Damages awarded pursuant to article 220 CC is *the lesser value* of either enrichment or impoverishment. Enrichment without cause aims to provide fairness and restitution to the parties in dispute when one party gains at the expense of its counterpart without lawful cause to justify it.

10.5 DETRIMENTAL RELIANCE ON A PROMISE

The last topic discussed in this chapter concerns detrimental reliance on a 'promise', which is recognised in the vast majority of civil law jurisdictions. This arises where one contracting party (a 'promisee') has acted in 'good faith' and relied on a promise made by its counterparty (a 'promisor') before the former becomes aware that this particular promise is legally *unenforceable*. It depends on the criticality of such promise whether unenforceability tarnishes the contract in whole or part (i.e. severability). Unlike the common law tradition which requires valid contracts to comply with the doctrine of 'consideration' and its *rigid* requirement of 'bargaining', the civil law tradition *does not require bargaining (i.e. an exchange of promises)* between the contracting parties under the *flexible* legal principle of 'cause'. Thus, a unilateral promise that is made by the promisor without seeking in exchange an obligation to perform or abstain from a specific act by the promisee may form a legally binding contract under the civil law tradition, as is the case with donation contracts and gifts.

French legal theory did not adopt 'detrimental reliance on a promise', which effectively mirrors the common law doctrine of promissory estoppel, because of the consensus that 'the command of the [French Civil Code] that contracts be performed in good faith has been read broadly and extended to pre-contractual negotiations. Taken together with the vast scope of rights,

[61] According to Court of Cassation Judgments 55/2012, 94/2013, 139/2014, and 62/2019, pursuant to Arts 599 and 602(1) CL, prescription of commercial instruments (e.g. cheques) of one year from the date of issuing the commercial instrument *does not* bar the issuer of claiming damages on the ground of 'enrichment without cause'. The holder who cashed the cheque without lawful cause is obligated by law to refund the issuer. Prescription of 'receipt of undue payment' as an application of 'enrichment without cause' pursuant to Art 228 CC is 'three years from the date on which the claimant became aware of its right to recover such prepayment, or after a period of fifteen years from the date on which such right arose, whichever occurs first'. The court elaborated by saying that the law aims to provide stability and trust in commercial instruments even after the prescription, so issuers will feel protected and claim for partial or full refund against a partial or non-performance by the holder.

[62] Receipt of undue payment is regulated by Arts 222–228 CC.

French law is well equipped without promissory estoppel'.[63] Egyptian legal theory maintains that 'detrimental reliance does not fall within the definition of cause'.[64] It is evident that the Qatari position, chiefly through case law, does not deviate from the Egyptian and French approaches. As discussed earlier, in Judgment 125/2008 the Qatari Court of Cassation granted damages to a concerned party suffering loss due to the nullification[65] of a contract with retroactive effect on the contracting parties. Such damages are governed by the law of delict. Hence, Qatari jurisprudence did not see the need to adopt the legal principle of detrimental reliance. Instead, it relied on the law of delict to award damages (i.e. the rules of negligence were applied).

In a similar ruling, the Qatar Court of Cassation held that the courts may grant damages to a contracting party that suffered harm from the annulment of a contract, *not on* the basis of a contractual obligation but in accordance with article 164(1) CC.[66] In another case, the Qatari Court of Cassation concluded that upon annulment a contract shall not be used as a legal basis to claim for contractual damages.[67] Damages in this context arise from civil wrongdoings that are governed by the law of delict (rules of negligence). Delictual damages require the materialisation of three conditions, namely (i) breach of the statutory duty of care; (ii) injury; and (iii) causation between the breach of the statutory duty of care and the subsequent injury in dispute.

[63] D V Synder, 'Comparative Law in Action: Promissory Estoppel, the Civil Law, and the Mixed Jurisdiction' (1998) 15 Arizona Journal of International and Comparative Law 695, at 705.

[64] Synder, above (n 63) at 722.

[65] It is worth highlighting that unlike nullity of contracts which produces retroactive effect and bars claims for contractual damages, contracts may be terminated where a significant contractual obligation is not performed, even following notification. Thus, claims for contractual damages arising from terminated contracts are admissible for the period covering the lifetime of the contract. The Qatari Court of Cassation in Judgment 99/2016 held that contractual damages arising from the unilateral termination of an indefinite employment contract by the employer without making any justification was limited to the employee's wage during the notice period pursuant to Art 49 LL. In judgment 335/2016 the Qatar Court of Cassation held that contractual damages could be sought against unilateral termination or non-renewal of a commercial agency contract (i.e. 'exclusive' sale of goods and/or services). Such claims were found to be admissible pursuant to Arts 300, 301 and 304 CL. On the other hand, contractual damages sought against unilateral termination or non-renewal of a distribution contract (i.e. 'non-exclusive' sale of goods and/or services) *are not* admissible because 'exclusivity' is a fundamental requirement for a valid contractual damages claim.

[66] Court of Cassation Judgment 32/2014.

[67] Court of Cassation Judgment 100/2016.