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Intention to Be Bound and Cause

3.1 INTRODUCTION

This chapter attempts to build on Chapter 2, which dealt with the two building blocks necessary for the formation of contracts, namely, offer and acceptance. Here, we examine the remaining two requirements: the intention (*n̄yya*) to be bound and the existence of good cause or *causa*. Unlike English law where the so-called consideration is additionally required, this is not entertained in the CC, even if in places the language seems to suggest consideration.¹ This is in fact not true.² The chapter goes on to show how the parties' intention to be bound may be expressed and how the courts can make sense of such intent when the parties disagree about what it is they had offered or accepted. Intent has been a significant aspect of Islamic law.³ A significant part of this chapter will deal with the legal nature of promises, as unilateral acts, and whether they are enforceable under any circumstances. As will be demonstrated, Qatari law is generally reluctant to enforce promises.

3.2 EXPRESSION OF INTENTION

In the civil law tradition, the existence of offer and acceptance thereto are insufficient for the conclusion of a contract. The glue that transforms offer and acceptance into a *binding* contract is the parties' intention to be bound.⁴

¹ For example, Art 77 CL; Art 193 CC.

² It should be mentioned that despite the fact that the QFC hails itself as a common law jurisdiction, Art 31(2) of QFC Regulation No 4 of 2005 (QFC Contracts Regulations) expressly states that 'consideration is not required for a contract to be binding'.

³ P R Powers, *Intent in Islamic Law: Motive and Meaning in Medieval Sunni Fiqh* (Brill 2015); equally, O Arabi, 'Intention and Method in Sanhūrī's Fiqh: Cause as Ulterior Motive' (1997) 4 *Islamic Law and Society* 200.

⁴ Court of Cassation Judgment 124/2011; Court of Cassation Judgment 124/2012.

It is not uncommon for the offeree to either a) avoid any desire of being bound to an offer or, b) if he or she desires to be bound, to possess a different understanding of the offer from that intended by the offeror. In both cases there is clearly an offer and (something that resembles an) acceptance, but what is missing is a) an intention to be bound (in the first case) and b) a *dissensus* as to what was actually agreed (in the second case). Where a common intention to be bound⁵ is missing there is ultimately no contract to speak of. In most cases acceptance is also a reflection of an intention to be bound, but there may well be cases where acceptance and intention should not be conflated.⁶

In the spirit of the civil law tradition, article 65(1) of the CC emphasises the centrality of intention, further stipulating that

An intention shall be expressed orally or in writing, by a commonly used sign, by actual consensual exchange, and also by conduct that, in the circumstances, leaves no doubt as to its true meaning.

Article 65(1) CC discourages any reliance on form or formalities concerning the manner of ascertaining or expressing the parties' intention to be bound. This is further enhanced by paragraph 2 of article 65 CC, according to which 'a declaration of intention may be implied when neither the law, nor the agreement, nor the nature of the transaction requires that such declaration be expressed'. No doubt, some transactions will require a particular form of expressing intention and this must be followed.⁷ However, given that many transactions are concluded by way of email exchanges, the mere payment of the requested fee by the buyer to the seller,⁸ or by conduct,⁹ intention is

⁵ Intention to be bound, as a necessary element in the formation of contracts, should be distinguished from the parties' 'common intention' under Art 169 CC. In the latter case, the parties have already agreed to be bound by their offer and acceptance but are unsure as to the common goal of the contract. See Chapter 6 concerning interpretation.

⁶ Art 167 CL, for example, stipulates that passenger embarkation on means of transport represents acceptance, 'unless it is proven that the passenger's intention was not to conclude a contract for transportation'; equally, the Court of Cassation, Judgment 236/2011, held that in order for possession to be considered as a title deed according to Art 970 CC it must be actual and accompanied by the intent of ownership, free of any ambiguity; similarly, Court of Cassation Judgment 60/2012; the intent in the mortgage contract requires official form under Arts 1058 and 1080 CC. See to this effect, Court of Cassation Judgments 62/2013 and 167/2016.

⁷ See, for example, Court of Cassation Judgment 123/2010, concerning the registration of real estate transactions.

⁸ See Court of Cassation Judgment 76/2011, where it was held that unless otherwise agreed payment of the deposit means confirmation of continuation of the contract.

⁹ For example, Arts 588 and 626 CC specify that if the lease contract expires and the lessee continues to benefit from the leased property with the knowledge of the lessor and without objection from him, the contract shall be deemed to have been renewed with its first conditions. See Court of Cassation Judgment 134/2013.

clearly presumed in certain crucial moments in the lifecycle of the exchange. The buyer is deemed to have agreed to the seller's offer, as well as its terms and conditions, upon emailing its acceptance to the offer, or upon receipt of the goods at its premises, and in more trivial transactions, the offeree's intention is presumed upon payment of the fee. It is equally taken for granted that neither party may unilaterally alter or amend the conditions in the agreement, as this requires the mutual will of all parties.¹⁰

In one case decided by the Court of Cassation, the respondent refused to pay the claimant by arguing there was no contract between them. The claimant relied on email exchanges and photocopies of bank transactions showing that the respondent had indeed intended to contract with him.¹¹ The Court of Cassation relied on article 4(1) of the Electronic Commerce Law¹² which states that 'An offer or acceptance of an offer may be expressed, in whole or in part, by means of electronic communications'. The Court of Cassation emphasised that the corresponding emails clearly demonstrated that the parties intended to enter into an agreement without the need for written documents.¹³

3.2.1 *Dissensus*

Dissensus, in the sense explained above, is a particularly vexing issue in the law of contract. As neither the law nor the courts can accurately predict the parties' desire when making their offer or acceptance, some sensible principles must be applied in order to, at least, presume or deduce the parties' individual intention. A necessary distinction should be made at this point to avoid confusion. The parties' intention to be bound under article 65 CC is wholly different from the parties' common intention, which refers to the parties' common contractual goal. The parties' 'common intention' is meaningful only where the parties have actually formed an undisputable common intention, in which case the existence of a contract is not in doubt. In such

¹⁰ Court of Cassation Judgment 35/2014. By extension, neither party may unilaterally terminate the contract. The Court of Cassation refers to the contract as 'the law of the parties' and developed its 'two wills' theory. See Court of Cassation Judgment 67/2014; equally, Court of Cassation Judgment 109/2015.

¹¹ Contracting through electronic means is recognised in the case law of the Court of Cassation. See Judgment 275/2016; equally Court of Appeal Judgments 483/2018 and 526/2018.

¹² Law No. 16 of 2010 on the Promulgation of the Electronic Commerce and Transactions Law (Electronic Commerce Law).

¹³ See above (n 10). See commentary in A Al-Amoury, 'Admissibility and Reliability of Electronic Evidence before Qatari Courts', available at: www.tamimi.com/law-update-articles/admissibility-and-reliability-of-electronic-evidence-before-qatari-courts/

cases it makes sense to assess defects of consent¹⁴ as well as provide an objective interpretation of the parties' mutual obligations on the basis of their common intention.¹⁵ Prior to an indisputable intention to be bound there does not exist a 'common intention'.

Paragraph 1 of article 68 CC distinguishes between 'intention' and 'actual intention'. Although the translation is inaccurate, 'actual intention' refers to a hidden intention of the offeror that was not fully expressed. 'Intent' is tantamount to the will expressed and understood by the offeree. Article 68(1) CC goes on to say that where actual intent differs from (expressed and objectively understood) intent, the latter prevails. This is clearly an objective test for intent and earnestness. As true as this usually is, it does not always reflect the parties' reality. It is not uncommon for the offer to be conveyed in such a manner that not only is it unclear and ambiguous in and of itself but also the offeree's understanding of what has actually been offered may be coloured by its, cultural, linguistic or other underpinnings. It is for this reason that paragraph 2 of article 68 CC qualifies the subjective test set out in paragraph 1 thereto. It states that

However, the offeree may rely on such expression even though it contradicts the intent of the offeror if he proves that he believed the expression conformed, without ambiguity, with the true intent of the offeror.

Paragraph 2 goes on to cement what is otherwise the standard test in the civil law tradition, which is effectively objective in nature, despite language suggesting subjective qualities (e.g. 'he proves', 'he believes'). Because it is next to impossible for the offeree to prove 'without ambiguity' (effectively beyond reasonable doubt) that its personal belief was consistent with what it thought the offeror actually intended, save in limited circumstances, such commonality of intention can only be assessed objectively.¹⁶ That is, the offeree must demonstrate more than simply on a balance of probabilities, that a reasonable person in the circumstances of the parties in question would have understood the offer in the manner argued by the offeree.¹⁷

¹⁴ See Chapter 8 concerning defects of consent.

¹⁵ See Chapter 7.

¹⁶ This objective dimension may also be borne out of the Court of Cassation's Judgment 63/2008. Although in that case the Court dealt with an existing contract (a lease) its rationale may be applied by analogy to ascertain the parties' intention prior to the formation of the contract. The Court postulated that the courts must construe the parties' intention on the basis of relevant facts and circumstances, which belies objective outcomes.

¹⁷ See J Smits, *Contract Law: A Comparative Introduction* (Edward Elgar, 2nd ed, 2017) 65–70.

3.2.2 *The Parties' Common Intention*

In Chapter 6, we explain how the courts interpret the parties' contract in order to determine the existence of their common intent, when this is not abundantly clear from the text of the agreement. That process assumes the formation of a contract, whereas the identification of a common intention in this chapter is a necessary condition for the formation of a contract to be. Even so, the discussion on interpretation is important because the principles on common intention apply *mutatis mutandis* in the present context. Although the CC is not predicated on classic Islamic contract law, it is important to highlight the centrality of the meeting of the minds (*rida*) in transforming offer and acceptance into a valid contract. This is reflected in the Majalla, which clearly stipulates that intention constitutes 'the connection between offer and acceptance (*ijab wa qabul*)'.¹⁸

Article 169(2) CC demands that construction must be predicated on the 'common intention' of the parties:

... without restriction to the literal meaning of the words, taking into account the nature of the transaction as well as the honesty and confidence that should prevail between the parties in accordance with commercial custom.

In line with transnational practice, the parties' common intention is imputed by the courts and is generally demonstrated by reference to objective standards under the particular circumstances of the parties. There is no indication that the situation is any different in the Qatari CC.¹⁹ The parties' common intention may just as well be demonstrated by what the contract aims to achieve, in which case the individualistic pursuits of one of the parties, contrary to the expressed common pursuit, will not prevail over the common intention. Where the parties' common subjective intention is not susceptible to accurate verification then such common intention will be inferred on the basis of the average person under the circumstances of the parties.²⁰ Article 169(2) CC makes the task a lot easier for the courts by adding another possible inference as to the parties' common intention, namely, prevailing commercial custom.²¹ The courts' pursuit of

¹⁸ Majalla, Arts 103–4.

¹⁹ In its Judgment 86/2008, the Court of Cassation was asked to determine whether the parties to a contract providing for arbitration held the same intention following two addenda to their initial contract, one of which clearly opted for litigation. The Court of Cassation held that the lower court was entitled to infer the parties' intention in a manner that it is more fulfilling to their purpose, on the basis of tolerable grounds and without transcending the apparent meaning of words.

²⁰ Art 4.1(2) UNIDROIT PICC.

²¹ This is common to all legal systems, for example, s 346 of the German Commercial Code states that 'due consideration shall be given to prevailing commercial custom and usages

the parties' common intention must not deviate from the apparent meaning of the terms of the contract and associated documents, without, however, being restricted to what is indicated by a specific phrase or words.²²

Qatari courts employ standard language to emphasise the 'complete' authority of the trial court to interpret both the contract and related documents in order to ascertain the common intention of the parties.²³ The courts are under an obligation 'not to deviate from the apparent meaning of the terms of the contract or other written documents and should consider what a particular expression or phrase therein truly indicates. The courts must be guided by the nature of the transaction and the degree of trust expected, in accordance with the current custom in transactions'.²⁴ Where the courts in ascertaining the parties' common intention determine that the apparent meaning of contractual terms is different to the parties' common intention they are bound to fully justify how the non-apparent meaning best reflects the parties' common intention.²⁵ Hence, the overall context of the parties' contractual relationship is central to the construction of the parties' common intention.²⁶ Under no circumstances should the courts exceed the explicit statement or words in the parties' contract.²⁷ The Court of Cassation has emphasised that the courts should not put too much emphasis on the meaning of a specific sentence, but on the overall meaning of all its sentences and conditions, guided by the nature of the transaction and the honesty and trust that should guide the parties in the fulfilment of their transaction.²⁸

3.2.3 *Timing of Intent*

The precise time of utterance of intent is crucial. As article 66(1) CC stipulates, 'an expression of intention shall become effective once uttered'. Hence,

concerning the meaning and effect of acts and omissions among merchants' and Art 1511(2) of the French CCP, which states that tribunals 'shall take into account trade usages'.

²² Court of Cassation Judgment 5/2012.

²³ Court of Cassation Judgment 44/2010; Court of Cassation Judgment 87/2010; Court of Cassation Judgment 113/2012; Court of Cassation Judgment 53/2012; Court of Cassation Judgment 40/2013; Court of Cassation Judgment 394/2015.

²⁴ Court of Cassation Judgment 219/2011.

²⁵ Court of Cassation Judgment 23/2012; Court of Cassation Judgment 323/2014; Court of Cassation Judgment 18/2015.

²⁶ See Court of Cassation Judgment 126/2013, where it was held that the courts must be led by what is stated in the contract as a whole and the circumstances of its issuance; see also Court of Cassation Judgment 120/2014; equally Court of Cassation Judgment 80/2015; Court of Cassation Judgment 437/2018.

²⁷ Court of Cassation Judgment 82/2011; Court of Cassation Judgment 84/2011.

²⁸ Court of Cassation Judgment 219/2012.

once uttered, whether by the offeror or offeree such intent becomes binding and cannot be rescinded, subject to the following discussion. If the intention to be bound could be rescinded at any time, then the existence of contracts would come into doubt. As a general rule, article 66(1) CC, following long-established tradition, iterates that an expression of intention shall have no effect until it comes to the notice of the intended recipient. It may well be that because of the particular method, or underlying exigencies, of the dispatch the intended offer or acceptance does not reach the other party immediately. As a result, revocation is possible until such time as the offer or acceptance has not yet reached the intended recipient. Paragraph 2 of article 66 CC introduces a rebuttable presumption concerning the precise point in time at which the addressee received its counterparty's intent. It stipulates that 'the intended recipient shall be deemed to have notice of the declaration of intention from the time that it reaches him'. Consequently, secure methods of receipt, such as email correspondence²⁹ and recorded delivery, will constitute significant evidence of receipt.

By implication, if the retraction of intent reaches the addressee prior, or at the same time, as the original expression of intent, then the latter expression of intent is superseded by the retraction, and hence, the contract does not come into existence.³⁰ Again, this is based on long-standing practice in both the civil law and common law traditions.³¹ In line with this tradition, although the CC is silent, an offer may not be retracted if it contains a fixed time for acceptance or is otherwise declared as irrevocable.³² The same *mutatis mutandis* applies to the revocation of the acceptance by the offeree.

3.2.4 *Evidence to Prove Intent and Common Intent*

The Qatari CCP does not ascribe to the so-called parole evidence rule, whereby evidence that is extrinsic to the contract, such as draft contracts, statements and emails exchanged during the negotiation of the contract,

²⁹ In order for electronic evidence to be admissible before the court, it must take the form of a data message which, according to Art 1(4) of the Electronic Commerce Law, is any type of information that was sent, received, displayed or stored by any means of electronic communications. It must moreover comply with the requirements of Art 26 of the Electronic Commerce Law. Article 26 generally demands certainty of the origin of the data message and the identity of its receiver to ensure that the data message was not manipulated by the parties or that it was not a counterfeit.

³⁰ Art 167 CC.

³¹ Art 2.1.4 UNIDROIT PICC.

³² Art 2.1.4(2), *ibid*.

travaux or witness statements are inadmissible.³³ The CCP implicitly allows all such evidence in order to allow the judge to ascertain the parties' common intention and excludes nothing that has probative value, subject to the requirements demanded of each evidence as discussed.³⁴ This is evident in the language and practice of the Court of Cassation, though which it has supported the authority of trial courts to examine and interpret all relevant evidence pertaining to contracts, so long 'as judgments are reasoned and based on reasonable grounds'.³⁵ The existence of an employment relationship (which by extension evinces an employment contract) has been viewed as a question of fact by the Court of Cassation³⁶ and the same is true with the renewal of a lease.³⁷ As a result, all evidence with a probative value is admissible.³⁸ This may include the appointment of an expert, which is at the discretion of the courts.³⁹ The Court of Cassation has made it clear that probative value is tantamount to the 'truth'.⁴⁰ In several instances, the Court of Cassation has ordered that the parties provide oral evidence in court where the material presented, including the underlying contract, did not provide sufficient clarity.⁴¹ This rationale is aided by specialist legislation. Article 38 of Labor Law No. 14 of 2004 indicates that if the contract was not in writing, the employee may prove the work relationship by all means of proof.⁴² No doubt, such instances are exceptional and the general rule remains whereby it is not permissible to disprove a written document except by another written document.⁴³

³³ See Art 4.3 UNIDROIT PICC, which refers to a list of five extrinsic factors as relevant circumstances in interpreting a contract. This is consistent with the Qatari CC, save for the fact that extrinsic factors are expressly permitted in the PICC but not the CC.

³⁴ It is established that photocopies of originals, whether written documents or photographs have no probative effect except to the extent they lead to the signed originals, if any. See Court of Cassation Judgment 9/2010.

³⁵ Court of Cassation Judgment 161/2010; Court of Cassation Judgment 45/2011; Court of Cassation Judgment 74/2011; Court of Cassation Judgment 22/2012; Court of Cassation Judgment 113/2012.

³⁶ Court of Cassation Judgment 89/2011.

³⁷ Court of Cassation Judgment 33/2012; equally, Court of Cassation Judgment 158/2012.

³⁸ Court of Cassation Judgment 89/2011.

³⁹ Court of Cassation Judgment 93/2012; equally Court of Cassation Judgment 191/2012.

⁴⁰ Court of Cassation Judgment 90/2011; equally Court of Cassation Judgment 154/2012; Court of Cassation Judgment 22/2013; Court of Cassation Judgment 369/2014; Court of Cassation Judgment 139/2014; Court of Cassation Judgment 258/2016.

⁴¹ See Court of Cassation Judgment 10/2011. This was viewed by the Court as a valid exception to the principle of material evidence only as articulated in Arts 261 and 262 CCP; see equally Court of Cassation Judgment 47/2011.

⁴² See Court of Cassation Judgment 98/2014.

⁴³ Court of Cassation Judgment 115/2012.

3.3 INTENTION IN UNILATERAL CONTRACTS AND PROMISES

The following two subsections will examine unilateral contracts and promises. Despite the admonition in article 1 CC, which reserves a supplementary role for Islamic law, there are several unilateral dispositions under Islamic law that are not regulated by the CC. These include: gifts (*hadiyah*), loans (*qard*), wills (*wasiya*) and endowments (*waqf*), as well as promises more generally (*wa'ad*).⁴⁴ Qatari law regulates several of these in statute,⁴⁵ but an analysis of these is beyond the ambit of this book. A brief analysis should be helpful in order for the uninitiated reader to appreciate the complexities of Islamic law in this field and its potential application to contracts with a *Sharia*-based component.

3.3.1 *The Position in Islamic Law: In Brief*

The term *wa'ad* which is translated as promise is defined by Badr al-Dīn al-'Ainī as notifying someone of conveying something good to him in the future.⁴⁶ Ibn Arafah, a proponent of the Maliki School, defined it as notification in which the notifier creates an obligation along with fulfilment in the future.⁴⁷ The qualifier 'who is meant to fulfil in the future' is explained by al-Raṣṣā' in his commentary as a promisor who does not intend to fulfil the obligation in the future and as a result the subject of the promise does not qualify as a *wa'ad*.⁴⁸ In other words, because it is not recognised as an enforceable promise (*wa'ad*) it is assumed that there is no intention to fulfil the obligation at the time it was made.

With this in mind, a promise is generally lawful in Islam. This is based on several authorities. From the Qur'an, we have the saying of Allah Ta'ālā:

Also mention in the Book (the story of) Isma'il: He was (strictly) true to what he promised, and he was an apostle (and) a prophet.⁴⁹

⁴⁴ See I Bantekas, J Ercanbrack, U Oseni, I Ullah, *Islamic Contract Law* (OUP 2023), chp 12.

⁴⁵ By way of illustration, Art 5 of Law No 22 of 2006, Promulgating the Family Law [Family Code], stipulates that an 'engagement is a request of marriage and/or the expressed promise of marriage as the consequences of marriage [as] determined by custom'. It goes on to say that it does not have the consequences arising from the contract of marriage. The Family Code, as stressed in Art 3 thereof, is predicated on the Hanbali school of Islam.

⁴⁶ A M M bin Ahmad al-Ghaitābī Badr al-Dīn al-'Ainī, *Umdat al-Qārī fī Sharḥ Ṣaḥīḥ al-Bukhārī* (Al-Muniriyyah, Cairo, n.d.), 1:220.

⁴⁷ M bin Qāsim al-Anṣārī, *Sharḥ Ḥudūd ibn Arafah – al-Hidāyah al-Kāfiyah al-Shāfiyah li Bayāni Ḥaqā'iq al-Imam ibn Arafah al-Wāfiyah* (Al-Maktabah al-'Ilmiyyah, Beirut, 1350H), 428.

⁴⁸ *Ibid*, 429.

⁴⁹ Qur'an 19:54.

Here, Allah Ta'ālā has praised his messenger, Sayyiduna Isma'il, and described him as true to his promise. This suggests that fulfilling a promise is a virtuous act; and as a result, it shall be said that making a promise is lawful.⁵⁰ The Hanafis as well as the Malikis opined that a promise attached to a condition precedent is binding, provided that such a promise is predicated on good cause.⁵¹ In other words, a promise that is not based on any cause shall not be binding.

Jurists are generally in agreement that where a person promises to perform a prohibited conduct, it is not lawful for such person to fulfil such a promise.⁵² This may be gleaned from the saying of the Prophet, as narrated by 'Imrān bin al-Ḥuṣain, as follows: 'there shall be no (fulfilment of) vowing (*nadh'r*) in sinful act'.⁵³ Similarly, jurists have agreed that where an individual promised to perform an obligatory action, such as taking care of parents or maintaining one's wife, or payment of debt, the promise shall be obligatory upon said promisor. There is also agreement that where one promises to perform a lawful action he or she should fulfil this on the basis of Islamic ethics. According to Ibn AbdulBarr, 'I do not know of any disagreement that fulfilment of promise is recommended. Allah has praised those who fulfil their promises and vows'.⁵⁴ There is also consensus that it is lawful to make a promise regarding that which is lawful and with the determination that it shall be fulfilled.⁵⁵

There is some divergence, however, as to whether a promise is binding on the promisor. The majority view is that fulfilment of a promise is not obligatory both in law and religion. The reason is that fulfilment of a promise is supererogatory (*sunnah*), its performance of fulfilment attracts reward and there is no sin for failure to fulfil it. This opinion is held by Shafi'is, Hanbalis as well as a weak minority among the Malikis, given that it contradicts that which was narrated by Malik.⁵⁶

⁵⁰ Bukhari, Hadith 2296 and Muslim, Hadith 2314.

⁵¹ Z bin Ibrahim bin Muhammad Ibn Nujaim al-Maṣrī, al-Ashbāh wa al-Nazā'ir 'alā Madh'hab Abi Hanifata al-Nu'mān (Dar al-Kutub al-'Ilmiyyah, Beirut, 1991) 247.

⁵² A bin Ali al-Rāzī Al-Jaṣṣās, Ahkām al-Qur'an (Dar Ihyā' al-Turāth al-Arabī, Beirut, 1405H), 5:334.

⁵³ Muslim, Hadith No. 1641.

⁵⁴ A Musa Yusuf bin Abdullah bin AbdalBarr al-Namrī al-Qurtubī, *al-Istidhkar al-Jāmi' li Madhāhib Fuqahā' al-Amsār* (Dar Qutaibah, Damascus, 1993), 14:349.

⁵⁵ Al-Jaṣṣās, *Ahkām al-Qur'an*, 5:334.

⁵⁶ Abu Zakariyyā Muhyuddīn Yahya bin Sharaf al-Nawawī, *Raudat al-tālibīn wa 'Umdat al-Muḥtāḥ* (Al-Maktab al-Islāmī, Beirut, 1991), 5:390; 'Alā'uddīn Abu al-ḥasan Ali bin Sulaiman al-Mardāwī, *Al-Inṣāf fī Ma'rifaṭ al-Rājiḥ min al-Khilāf 'alā Madh'hab al-Imām Ahmad bin Hanbal* (Maṭba'at al-Sunnah al-Muhammadiyah, Cairo, 1956) 11:152.

3.3.2 *Unilateral Contracts under the CC*

Both the civil and common law traditions are cautious about conferring a binding character on promises and unilateral acts. In English law this is easily explained because of the absence of consideration. In the civil law, promises are not generally viewed as binding on the promisor unless several layers of formalities are satisfied, chiefly notarial approval.

Article 192 CC regulates acts of unilateral disposition in a manner that reflects the general position in both the civil and common law traditions. It states that

1. A legal act by sole will shall not create any obligation or amend or terminate any existing obligation, other than where provided by law.
2. If the law provides that an obligation is created, amended or terminated by such legal act made by sole will, such act shall extend to the provisions of the law that govern the contract in general, other than those in conflict with acting by sole will.

As a general rule, therefore, a promise does not bind the promisor to the promisee. Of course, where the promisor does give effect to the promise, such as by actually making a gift or a donation, then these may not be retrieved as they are no longer part of the sphere of the promise.⁵⁷

Certain promises are, nonetheless, binding on the promisor.⁵⁸ Article 193 CC concerns those situations where the promisor makes a promise of a reward to the public in exchange for performing a certain act. Article 193 CC speaks of this relationship as entailing ‘consideration’, which although overlaps with its common law counterpart under the same name, should not be conflated with it. Article 193 CC explains that the promise of a reward in exchange for something is binding on the promisor, in which case the promise is no longer a unilateral act but is contingent on another’s performance under the terms demanded by the promisor. Following well-established civil law tradition, article 193 CC goes on to say that such promises are enforceable ‘even where [the promisee] performed the promised act prior to receiving [the] promise, or without thought of the promise of reward, or without knowledge thereof’. Article 197 CC provides a significant insight into the legal nature of promises made to the public. It stipulates that the promisor is not entitled as a right to

⁵⁷ See Art 203 of Law No 22 of 2006 [Family Law], as well as Arts 507 and 508 CC. For a commentary on these see Court of Cassation Judgment 46/2013.

⁵⁸ Exceptionally, the Court of Cassation in Judgment 31/2009, in a case concerning *res judicata*, held that the extension of an existing lease by means of a promise made by the lessor ‘becomes a full-fledged lease between the successors of the original lessor and the lessee’.

the performance associated to the prize, unless the conditions of the promise provide otherwise.

The promisor, of course, may withdraw his or her promise made to the public in exchange for a performance. However, such withdrawal/retraction shall be effective only from the date it is so declared. If a person performed the required act prior to the promisor's declaration of withdrawal, such person has a lawful claim to the reward.⁵⁹ Where a person commenced but not completed performance (in respect of the prize) upon the promisor's declaration of withdrawal, such person may demand payment from the promisor with respect to 'any expenses incurred ... within the limits of the prize'.⁶⁰ Such expenses are due only where the promisee can prove that 'he could have completed the job in a timely manner'.⁶¹

Promises to the general public are not of an indefinite duration. Where the promisor determines a timeframe for completion of the performance associated with the prize/promise, he may not withdraw the promise during such period.⁶² The promise shall, however, lapse after the expiry of this period. Where no such timeframe has been set out in advance, the prize/promise may be withdrawn 'by notice to the public in the same manner as the promise was offered, or in a similar manner through other media'.⁶³ In any event, the promisor shall decide whether the prize is payable or not within six months from the expiry date of the period set out in the notice, unless such notice contains another date.⁶⁴ In equal measure, the 'suit to claim a prize or other rights arising from the promise shall prescribe after a period of six months from the date of the decision referred to in Article 196 ... or from the date of declaring the withdrawal of the promise, as the case may be'.⁶⁵

3.3.3 *Promises Giving Rise to Reasonable Reliance*

The CC does not expressly regulate the exceptional situation where a promise creates a reasonable reliance on the promisee, who then acts (while incurring expenses and time) on the basis of the promise. This is wholly different to promises that do not give rise to reasonable reliance, other than promises in

⁵⁹ Art 195(1) CC.

⁶⁰ Art 195(2) CC.

⁶¹ *Ibid.*

⁶² Art 194(1) CC.

⁶³ Art 194(2) CC.

⁶⁴ Art 196 CC.

⁶⁵ Art 198 CC.

the form of awards to the public, discussed in the previous section. Given that reasonable reliance on a promise generally entails the enforceability of the promise,⁶⁶ and in conjunction with the express language of article 193 CC, it is reasonable to assume that such reasonable reliance suffices under Qatari law to render the promise enforceable.

3.4 CAUSE

'Cause' does not correspond to the requirement of 'consideration' under the common law. Its purpose in the civil law tradition has served to enhance the legality of contracts, even at the expense of party autonomy. Even so, 'cause' or '*causa*' (*causa obligationis*) was abandoned in the latest round of amendments to the French Civil Code.⁶⁷ As things stand, articles 155 to 157 CC not only retain the importance of cause but render it effectively the fourth element in the establishment of a valid contract, after offer, acceptance and an intention to be bound.

Article 155(1) CC stipulates that a contract shall be revoked where the obligation of a contracting party is 'without good cause or unlawful'. There is a clear demarcation between 'good cause' and unlawful purpose, although some overlap between the two is evident. Although paragraphs 1 and 2 of article 155 CC refer specifically to 'good cause' and not to 'cause', article 157 refers to 'cause'. If a meaningful distinction is to be made between good cause and unlawful [cause] in article 155 CC, this must necessarily mean that the former refers to unethical, immoral or grossly imbalanced causes,⁶⁸ such as that remuneration (wages) is only due for work undertaken,⁶⁹ whereas the latter only to illegal and unlawful causes.⁷⁰ Of course, both instances are already covered in the CC, so there is little to no need to include them again as a necessary condition of the contract. In any event, paragraph 2 of article 155 CC goes on to say that

In the determination of good cause, the motive for concluding the contract shall be taken into account if the other contracting party was aware or must have been aware thereof.

⁶⁶ See Art 1.8 UNIDROIT PICC.

⁶⁷ Art 1128 French CC (2016 revision) no longer requires *causa* for the valid formation of a contract under French law.

⁶⁸ For the Islamic origins of good cause, see (n 42); see Court of Cassation Judgment 131/2014.

⁶⁹ Court of Cassation Judgment 50/2012.

⁷⁰ The Court of Cassation, in Judgment 123/2011, held that the payment of the sale price by the buyer did not necessarily lead to the formation of a contract where the sold object was not owned by the seller.

This somewhat lends credence to the distinction between good and unlawful cause. If a party takes advantage of gross disparity with its counterpart, then such a contract clearly does not start off with a good cause; yet, it is not unlawful as such, unless it is an adhesion contract. Article 155 CC puts forth what is known in the civil law tradition as objective and subjective *causa*. Objective *causa* generally prevents the formation of a contract where one or more of the parties' obligations cannot, objectively speaking, be realised. Subjective *causa*, on the other hand, refers to the parties' personal circumstances and how these make performance onerous, unfair or grossly disproportionate.

Article 156 CC introduces an evidentiary rule, whereby an obligation is generally deemed to be lawful and with good cause, unless evidence to the contrary is provided. Presumably, the burden is on the party claiming the absence of good cause and the standard must be one of reasonableness.⁷¹

Article 157 CC, although seemingly innovative, adds nothing to the discussion in article 155 CC. It reads as follows:

1. The cause of the contract shall be its true cause until evidence to the contrary is provided.
2. Where the cause is fictitious, any party alleging that the obligation has another lawful cause shall provide evidence to support this allegation.

A fictitious or untrue cause would prevent formation of the contract under article 155 CC, because there is an absence of 'good cause' or worse because the fictitious or untrue cause gives rise to some type of illegality.

⁷¹ See Art 98, Law No 13 of 1990 (Civil Procedure Law).