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Working Paper Series**

**Commercial Law I:  
Contracts**

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**Iraq Legal Education Initiative (ILEI)**  
Stanford Law School  
Crown Quadrangle  
559 Nathan Abbott Way  
Stanford, CA 94305-8610  
[www.law.stanford.edu](http://www.law.stanford.edu)

**American University of Iraq, Sulaimani**  
Kirkuk Main Road  
Raparin  
Sulaimani, Iraq  
[www.auis.ed.iq](http://www.auis.ed.iq)

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## **Preface to the Series: *Introduction to the Laws of Iraq and Iraqi Kurdistan***

Iraq and Iraq's Kurdistan Region is at a compelling juncture in their histories. In the wake of the transition to a democratic state, the country and region economy has prospered and its institutions have grown more complex. As institutional capacity has grown, so too has the need for a robust rule of law. An established rule of law can provide assurances to investors and businesses, while keeping checks on government and private powers and protecting citizens' fundamental rights. Institutions of higher learning, such as universities and professional training centers, can and should play a key role in stimulating and sustaining this dynamic. Indeed, education is foundational.

This paper is part of the *Introduction to the Laws of Iraq and Iraqi Kurdistan*, a series of working papers produced by the Iraqi Legal Education Initiative (ILEI) of Stanford Law School. This series seeks to engage Iraqi students and practitioners in thinking critically about the laws and legal institutions of Iraq and Iraqi Kurdistan. Founded in 2012, ILEI is a partnership between the American University of Iraq in Sulaimani (AUIS) and Stanford Law School (SLS). The project' seeks to positively contribute to the development of legal education and training in Iraq.

The working paper series devotes significant attention to pedagogy. By writing in clear and concise prose and consulting with local experts at each step of the writing process, the authors strive to make the texts accessible to diverse and important constituencies: undergraduate law students, lawyers and judges, government officials, members of civil society, and the international community. By discussing the Iraqi and Kurdish legal regimes and applying specific laws to factual situations, the authors model how to “think like a lawyer” for the reader. They also use hypothetical legal situations, discussion questions, and current events to stimulate critical thinking and encourage active engagement with the material.

These working papers represent the dedicated efforts of many individuals. Stanford Law School students authored the texts and subjected each working paper to an extensive editing process. The primary authors for the initial series including papers on Commercial Law, Constitutional Law, and Oil and Gas Law, were John Butler, Mark Feldman, David Lazarus, Ryan Harper, and Neil Sawhney (J.D., 2014), under the guidance of Stanford Rule of Law Fellow Megan Karsh (J.D., 2009) and me. Jessica Dragonetti, Kara McBride, Cary McClelland, Neel Lalchandani, and Emily Zhang (J.D., 2015) are writing papers for the latter part of the series primarily concerned with Iraq's engagement with international law. I also thank the former and current deans of Stanford Law School, Deans Larry Kramer and Liz Magill, for their financial support, and the Stanford Law School alum, Eli Sugarman (J.D., 2009), who acts as an advisor to the project.

The faculty and administration of American University of Iraq in Sulaimani provided invaluable guidance and support throughout the writing process. Asos Askari and Paul Craft in particular

played a leadership role in getting the program off the ground and instituting an introductory law class at AUIS. Ms. Askari taught the first law class in the 2014 spring semester. Former and current presidents of AUIS, Dr. Athanasios Moulakis and Dr. Dawn Dekle, have provided unwavering support to the project. And finally, a special thanks to Dr. Barham Salih, founder and Chair of AUIS, without whose foresight and vision this project would not have been possible.

Finally, the authors of this series of papers owe an extraordinary debt of gratitude to many thoughtful Kurdish judges, educators, lawyers, and others who work within Iraqi institutions for their critical insights. In particular, the textbooks received vital input from Rebaz Khursheed Mohammed, Karwan Eskerie, and Amanj Amjad throughout the drafting and review process, though any mistakes are solely the authors' responsibility.

ILEI plans to continue publishing working papers through 2014. All texts will be published without copyright and available for free download on the internet.

To the students, educators, legal, and government professionals that use this set of working papers, we sincerely hope that it sparks study and debate about the future of Iraqi Kurdistan and the vital role magistrates, prosecutors, public defenders, private lawyers, and government officials will play in shaping the country's future.

Erik Jensen  
Professor of the Practice of Law  
Co-Director  
Stanford Rule of Law Program  
Stanford Law School  
Palo Alto, California

# COMMERCIAL LAW

## I. INTRODUCTION<sup>1</sup>

Hawre, an engineer by trade, has been out of school and working for eight years. He decides it is time to start his own construction company. In order to do so, he will need to **register** his business with the appropriate government authorities and raise start-up **financial capital**. Financial capital is the money that Hawre will use to operate his construction company. Hawre will then need to establish **credit** at a bank and receive loans to leverage his capital, sign **contracts** with employees and customers, and obtain **liability insurance** in case something goes wrong and he has to pay for it (and, in construction, something inevitably will go wrong).

Each step requires a different aspect of commercial law. The laws of **corporations** will tell Hawre how to register his business with the government and agency law will establish which of his employees represent his business and can sign contracts on its behalf. He will need established **investment** laws if he wants anyone—domestic or foreign—to invest in his business. If he wants foreign investors, there are special laws he will have to consult to allow them to invest; and if Hawre wants to open a **franchise** of a foreign construction company, he will likewise have to consult a specific law for foreign businesses operating in Iraq. Once Hawre has the capital and requisite registration to start a business, he will need contract law to hire employees, sign purchase and sale agreements with his suppliers and customers to ensure that he has the necessary supplies and that his customers do in fact pay him for his work.

As daunting and bureaucratic as this may all seem, these laws exist primarily to create a safe environment in which Hawre can open his business. All of these laws exist to raise confidence in Iraqi businesses. If commercial laws are strong, people will be more confident to invest in Hawre's business knowing that Hawre will deliver on his promises because he is legally

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<sup>1</sup> Sources consulted for this paper include: C.A. Hooper, *The commercial law of Iraq and Palestine*. Baghdad: Times Printing and Pub. Co., (1929); Iraqi Civil Code No. 40 of 1951 (translation of 1990 text); Iraqi Commercial Code No. 30 of 1984; Iraq Company Law No. 21 of 1997 (as amended in 2004); Zuhair E. Jwaideh, *The New Civil Code of Iraq*, 22 *George Washington Law Review* 176 (1953-1954); *Law of Investment in Kurdistan Region - Iraq*, Law No. 4 of 2006; Saleh Majid, *Enforcement of Foreign Judicial and Arbitral Awards in Iraq*, *Middle East Executive Reporter* 8 (September 1995); Jed S. Rakoff, *Heroic Judges of Iraq*, *New York Law Journal* (January 28, 2013); Georges Roux, *Ancient Iraq*, Allen & Unwin, London (1964); Dan E. Stigall, *Iraqi Civil Law: It's Sources, Substance, and Sundering*, *J. of Transnational Law & Policy*; Kristen A. Stilt, *Islamic Law and the Making and Remaking of the Iraqi Legal System*, 36 *Geo. Wash. Int'l L. Rev.* 695 (2004); Khalid Issa Taha & Howard L. Stovall, *Selected Aspects of Iraqi Commercial Law*, *Middle East Executive Reporter* 9 (February 1997); U.S. Department of Commerce, *International Trade Administration: Legal Guide to Investing in Iraq*, available at [http://www.trade.gov/iraq/tg\\_iqtf\\_003438.asp](http://www.trade.gov/iraq/tg_iqtf_003438.asp); U.S. Department Of Commerce, Office Of The Chief Counsel For International Commerce In The Office Of General Counsel, *Overview of Commercial Law in Iraq—Draft*, September 2003, available at [http://www.osc.army.mil/supportingdocs/Iraqi\\_Comm\\_Law.pdf](http://www.osc.army.mil/supportingdocs/Iraqi_Comm_Law.pdf).

obligated to do so. Likewise, Hawre is confident that he can run his business relying on contracts with employees, suppliers, customers and investors. The government will use its courts and its power to ensure that all of these parties follow through on their promises. This is called **contract enforcement**.

Note how easily this chain of confidence could break down if commercial laws did not exist or if the government did not enforce contracts. If Hawre enters into a supply contract for cement, but does not trust that the courts would **enforce** the contract if the supplier decided at the last moment not to deliver the cement, then Hawre will not be confident that he can complete the construction contract by the date he had promised and he may never enter into the contract in the first place, or he may have to offer his services for less than they are worth to account for the risk of delay. If his customer knows that contracts are not enforced, the customer may never enter into a contract with Hawre, or may **breach** the contract and enter into another contract with a different construction company, leaving Hawre with thousands of Kilos of concrete and nothing to build. Bankers and investors looking at this market will see that, even if Hawre's business were successful, it may be difficult to retrieve their investment if the courts are not enforcing contracts. As a result, they will be much less likely to give him capital to start his business, and without capital, he cannot afford to start his business at all.

As you can see, unless everyone is playing by the same rules and unless these rules are enforced, business can be extremely risky—so risky that few people could afford to open a business in the first place. Commercial laws exist primarily to reduce this risk and facilitate business by increasing confidence and uniformity in the system.

This working paper presents an overview of commercial law in Iraq. We will begin with a history of commercial law, followed by an introduction to contract law, as contracts provide the basis for nearly all commercial transactions. We will then proceed to overviews of the laws of corporations, banking, investment and trade. By the end of the paper, it is our hope that you will understand the fundamental principles underlying commercial law and be familiar with the most important commercial laws in Iraq.

### **A. History of Commercial Law in Iraq**

For thousands of years<sup>2</sup>, uniform legal systems have been used to maintain order and facilitate trade among diverse cultural groups and ethnicities that inhabit the area that is now modern day Iraq. The region's legal history stretches back to the Code of Hammurabi, one of the most complete early legal codes in the world. Under King Hammurabi (1792-1750 B.C.), the Babylonian Empire covered a vast area from Sumer and the Persian Gulf in the South to Assyria in the North. To rule over such an expansive, increasingly urban population, Hammurabi enacted

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<sup>2</sup> This section draws heavily from *Iraqi Civil Law: Its Sources, Substance, and Sundering*, J. OF TRANSNATIONAL LAW & POLICY.

a large number of laws designed to facilitate trade and promote economic development throughout the empire.

**Discussion Questions: Hammurabi's Code**

Article 102 of Hammurabi's Code reads, "If a merchant entrusts money to an agent (broker) for some investment, and the broker suffers a loss in the place to which he goes, he shall make good the capital to the merchant."

What is this the underlying goal of this law? What would happen if this law did not exist? How would merchants and brokers interact with each other?

Similarly, in more recent history, the Ottoman Empire controlled areas far beyond the Middle East to the Balkans and North Africa. The Empire required a legal system that would tie its empire together and allow its economy to grow. The modern commercial laws of Iraq trace their origins to the Ottoman Empire and the French Civil Code. In the eighteenth and nineteenth centuries, the Ottoman Empire was in decline while Western Europe's influence was expanding. Attempting to emulate newly developed Western legal systems, the Ottomans adapted a large portion of the French Civil Code to their own territories. They did not, however, adopt French laws on contracts and torts. For these subjects, the Ottomans wrote the *Mejelle*—their own code written in the style of European laws, but founded on Islamic principles. The preliminary part of the *Mejelle* contains 100 articles outlining general legal principles. The majority of the sixteen books that follow focus on specific issues in Islamic commercial law. Thus, perhaps surprisingly, commercial laws, not personal status, were the first laws to incorporate *shari'a* in the Ottoman Empire.

**Discussion Questions: The *Mejelle***

1) Why would the Ottoman Empire write their own Islamic laws on contracts instead of adopting the rest of the French Civil Code?

2) How do you imagine Islamic contract law might be different from European contract law?

The *Mejelle* is a set of very specific rules telling judges what to do when they confront issues in certain types of contracts. In contrast, most civil codes provide legal frameworks applicable in many situations. The Iraqi Civil Code, for example, will begin by answering generally, "What is a contract?" and providing a judge with a framework with which she may analyze all contracts.

Following World War I, European nations carved up the Ottoman Empire and created Iraq in 1920 as a British mandate comprised of various groups—Shi'a, Sunni, Kurdish, Arab,

Christians—inhabiting a single nation-state. Though the Ottoman Empire had fallen, the *Mejelle* remained in force in Iraq under Britain’s rule, and, once the British government was overthrown in 1932, the *Mejelle* served as the foundation for Iraqi civil law.

The rest of the Iraqi Civil Code can be traced to the Egyptian Civil Code. The Ottomans never fully controlled Egypt, and in its relative independence, Egypt was able to create a largely distinct legal code based on the French system. Unlike the Ottoman legal system, 19<sup>th</sup> century Egyptian law was split such that economic issues were resolved by state courts applying French law, whereas issues involving family relations and inheritance were settled in religious courts applying primarily Islamic law. Maintaining this dual system was complex, and as Egypt became a fully independent state, they sought to **codify** their laws in a unified system. Abd al-Razzaq Al-Sanhuri, an Egyptian law professor trained in both French and Islamic law, was in charge of drafting a civil code that would blend Islamic and European legal principles.<sup>3</sup> The result—the Egyptian Civil Code, enacted in 1949—relies on French legal principles, except for the laws of personal status, which are heavily influenced by Islamic principles. In one form or another, the Egyptian Civil Code has been adopted by Jordan, Kuwait, Libya, Qatar, Sudan, Somalia, Algeria and Iraq.

The fall of the Ottoman Empire left Iraq with a set of unharmonious laws and administrative rules coming from various sources. Iraq, like Egypt before it, required codification to unify the laws applied throughout the nation. Conveniently, Al-Sanhuri, the same man who drafted the Egyptian Civil Code, was the dean of the Iraqi Law College in the 1930s and 40s. He was selected to be the principal drafter of the Iraqi Civil Code. He based the code off of the *Mejelle* and the Egyptian model, again blending Islamic and European legal principles. In 1951, the Iraqi Civil Code No. 40 was **enacted**, which means it officially became the law in Iraq. It entered into force two years from the date of publishing in the official gazette on September 8, 1953 and continues to be the principal source of Iraqi law today.

**The Iraqi Civil Code** is a blend of the *Mejelle* (left over from the Ottoman Empire, modeled after Western laws but using Islamic foundational principles) and the Egyptian Civil Code, which is based primarily on the French system.

## **B. Sources Of Commercial Law**

Today, there are two primary sources of commercial law in Iraq: the Civil Code and the Commercial Code. The Civil Code is Iraq's most important commercial law as it details the civil law concept of **obligations**, including contracts and **Delict Law**. The Civil Code is composed of a preliminary part that lays out definitions and principles that apply throughout the code, and two substantive parts. The first substantive part is obligations—this is where the majority of Iraqi

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<sup>3</sup>Zuhair E. Jwaideh, The New Civil Code of Iraq, 22 George Washington Law Review 176 (1953-1954)



commercial principles are located. The second substantive part addresses property, ownership and real rights.

The Commercial Code, Law No. 30 (1984) regulates businesses engaged in a specific set of commercial transactions as defined in the code, such as **bills of exchange**<sup>4</sup>. One can think of the Commercial Code as an addendum to the Civil Code for particular commercial matters.<sup>5</sup>

In addition to the general principles outlined in the Civil Code, there are more specific codes and laws that govern particular situations or industries. The Code of Civil Procedure, Law No. 83 (1969), regulates judicial procedures in civil and commercial matters (for example, issues of jurisdiction and rules on *pleadings* and *service of process*). The Iraqi Companies Law No. 21 (1997; amended 2004) governs the organization of companies, and the Commercial Agency Law No. 51 of 2000 regulates the operation of foreign businesses within Iraq. The Central Bank of Iraq Law No. 56 (2004) governs the structure and functions of the Central Bank of Iraq. The Kurdish Investment Law of 2006 lays the foundation for national and foreign investment in businesses in Iraqi Kurdistan, whereas the Iraqi National Investment Law (2006) applies to investments in the rest of Iraq. All of these laws are statutes passed by legislatures. Judges are required to follow these statutes if they are relevant to the issue presented before the court.

### *Hierarchy of Authority*

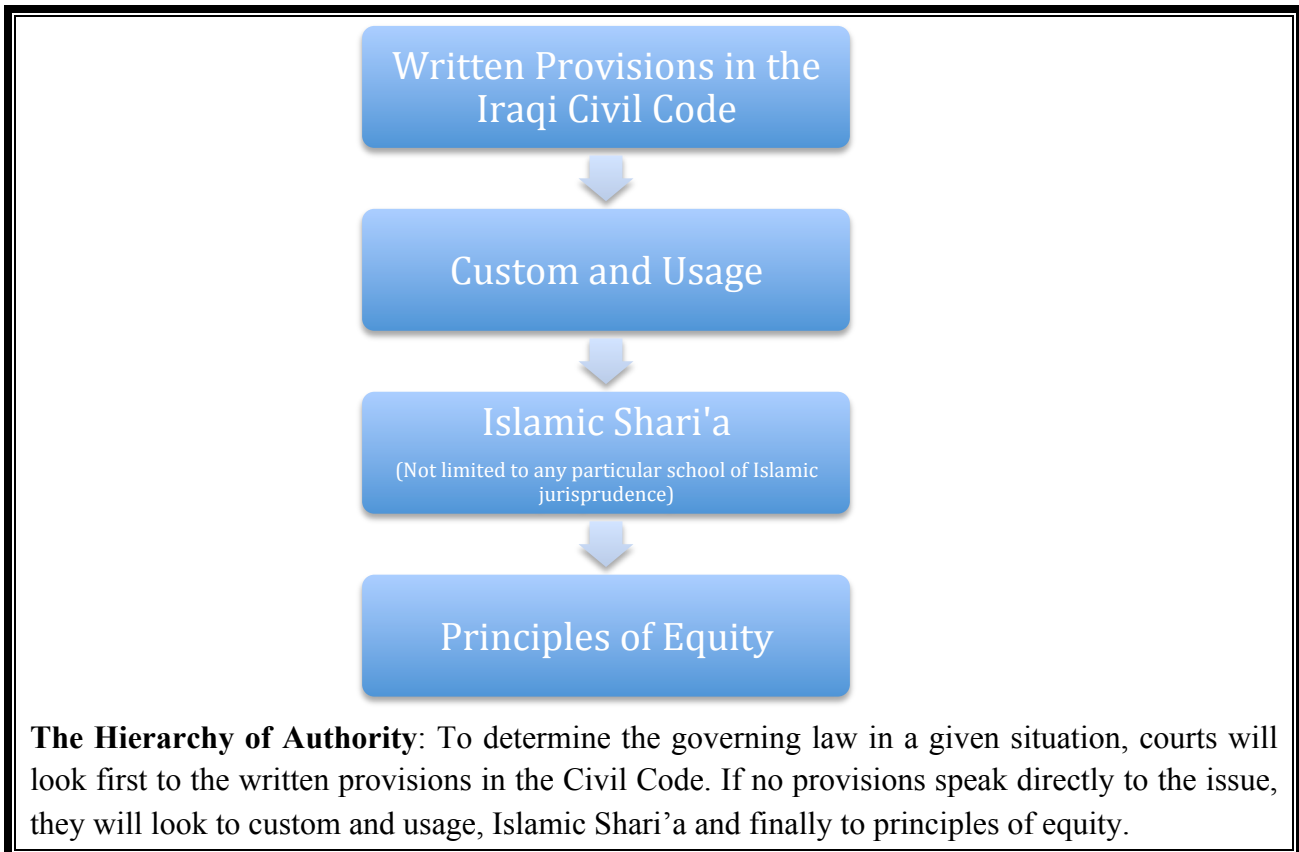
Article I of the Civil Code begins with the **sources of law**—where courts should look to determine the governing law in a given situation. Where there is a written provision in the Civil Code that speaks directly to a topic, the Civil Code controls and must be followed. To emphasize this point, Article II states that, "where there is a provision, no independent judgment is permissible." Thus, if the Civil Code explicitly answers a legal question presented to the courts, the judge must follow the written law. If no such written provision exists, the court will look to **custom** and **usage** to decide the issue. The court will consider whether there is an accepted custom that is so common that the parties could have expected a particular result. In the absence of an applicable custom, the court may consider Islamic *shari'a* law. Here it is important to note that the Civil Code explicitly states that, should the court turn to *shari'a* to resolve an issue, the courts are not "bound [to] any specific school of [Islamic law]." This is a distinct departure from the Mejjelle, which was limited to the Hanafi school of law, and from the Egyptian Civil Code, which contains no such provision, presumably because Al-Sanhuri believed it would have been redundant in a country entirely composed of Sunnis. In Iraq in 1951, however, this provision may have provided reassurance to Shiites that the Sunni-controlled government would not

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<sup>4</sup> **Bills of Exchange:** Written documents from one party to a second party, ordering the second party to send payment to a third party. Bills of exchange will be discussed in more detail later in the paper.

<sup>5</sup> Article 4 of the Iraqi Commercial Code reads "(1) This Law shall apply to the economic activity of the Socialist, Mixed and Private Sectors. (2) The Civil Law shall apply to all matters not specifically provided for herein or in any other specific law."

impose strictly Sunni *shari'a* law through the court system.<sup>6</sup> Finally, if none of the above sources of law resolve the issue, the court should look to principles of **equity**—principles the court will apply to achieve a just outcome.



Article III notes that, in all cases, courts should be guided by the rulings of other Iraqi courts and of courts in countries with similar laws as those in Iraq (for example, Egypt, or countries with Civil Codes based on the Egyptian Civil Code). A judge *must* follow the written provisions of the Civil Code, but *may* use rulings of other courts as guidelines, or suggested methods of interpreting the law. Note that this differs from common law countries, like Great Britain and the United States, where judges must follow both written provisions and the decisions of higher courts.

### C. Dispute Settlement and Commercial Law Enforcement

Contracts and commercial laws are only effective if they are **enforced** by the courts. When a dispute arises over a contract or a violation of a law of commerce—where do the parties resolve the issue?

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6. See Kristen A. Stilt, *Islamic Law and the Making and Remaking of the Iraqi Legal System*, 36 GEO. WASH. INT'L L. REV. 695, 729 (2004).

For the most part, commercial disputes will be **adjudicated** in the Civil Courts. The Civil Courts have jurisdiction over all civil and commercial matters. The courts are divided into three levels, all supervised by the Ministry of Justice: Courts of First Instance, Courts of Appeal, and a Court of Cassation. If a dispute involves a foreign investor, the parties may instead choose to bring their dispute to the Commercial Court, established in Baghdad in 2011. In its first year, the Commercial Court resolved 300 disputes; in its second year, 400, and more than half of the cases were brought by foreign entities, suggesting that foreigners are increasingly confident in the court's handling of their cases. There is no such court in the KRG; foreign and national investors alike must take their commercial disputes to the Civil Courts.

### Arbitration

To avoid adjudicating disputes in domestic Iraqi courts applying Iraqi law, foreign parties will often include an arbitration clause in their contracts, stipulating that, in the case of a dispute, another country's law should be applied to resolve the issue. This means that parties are bound to use an arbitrator instead of the regular court system, and will apply the law of the country stipulated in the arbitration clause.<sup>7</sup>

Iraq is a member of the Permanent Court of Arbitration at the Peace Palace, The Hague, Netherlands, and has ratified the Geneva Protocol on Arbitration Clauses (1923). However, Iraq is not a party to the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, and has no domestic law requiring the enforcement of foreign arbitral awards.<sup>8</sup> Consequently, most foreigners who wish to have their arbitral awards enforced in Iraqi court may first have to obtain a ruling to that effect from a domestic Iraqi court.

Foreign citizens of states that belong to the Arab League may see a more favorable result when arbitrating disputes. Iraq is a party to the Riyadh Convention for Judicial Cooperation (1983) and the Arab Convention on Commercial Arbitration (1987). Article 37 of the Riyadh Convention generally requires member states to recognize and execute arbitral awards issued in other member states. In theory, the Arab Convention applies more broadly to any person or entity of any nationality connected by means of commerce with a member state, but to little effect, since it orders member states to enforce arbitral awards designated by the Arab Centre for Commercial Arbitration, which does not exist.

#### **D. Regional Variations in Commercial Law**

At present, commercial laws are relatively uniform throughout Iraq, though there are a few exceptions. As previously noted, the KRG has broad authority to enact its own laws and to repeal

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<sup>7</sup>**Arbitration:** A type of dispute resolution in which the parties select an impartial third party to settle their dispute.

<sup>8</sup> Saleh Majid, Enforcement of Foreign Judicial and Arbitral Awards in Iraq, Middle East Executive Reporter 8 (September 1995).

existing Iraqi laws, provided they are not in the sectors explicitly reserved for the Iraqi federal government in the Constitution. Additionally, since the KRG does not automatically enact Iraqi statutes passed after 2005, the Kurdistan Parliament may choose not to enact new Iraqi laws. In terms of commercial law, the Constitution grants the Iraqi central government exclusive control over banking and currency—thus, banking laws in the KRG are identical to and governed by the laws of the central government.

Although the commercial legal framework is largely the same in the KRG, there have been a few recent developments in both the central government and the KRG that distinguish the two regions. The KRG enacted the Iraqi Kurdistan Investment Law, No. 4 of 2006 in an attempt to create a more attractive environment for foreign investment than the one provided by the Iraqi National Investment law of 2006 (see *Investment Law* section for more information). The primary difference is that foreigners are permitted to own land in the KRG<sup>9</sup>, whereas they are flatly prohibited from doing so in the rest of Iraq.

Similarly, as mentioned previously, the central government sought to make Iraq more attractive to foreign investors by creating the Commercial Court for resolving any dispute in which one or more parties is a foreign investor. While the investment laws are *substantively* distinctive, the Commercial Court is the primary *procedural* difference between the commercial laws of the KRG and the rest of Iraq.

### Comprehension

1. Where are commercial disputes settled in Iraq?
2. What are two ways commercial law is different in the Kurdistan region?
3. If a provision in the Civil Code directly resolves a disputed question, can a judge in an Iraqi court say, “I disagree with the Civil Code’s answer to this question. *Shari’a* provides a better solution...”?

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<sup>9</sup> Except where there is oil, gas or precious mineral resources.

## II. CONTRACT LAW

### A. Introduction

#### Reading Focus

How do contracts facilitate business? What are some questions that might arise in a contract dispute? Why is the enforceability of a contract important?

Contracts are the basis for almost all commercial transactions. A **contract** is a legally enforceable promise between two parties. When people enter into commercial transactions, contracts are used to determine exactly what each party expects to receive from the bargain. When civil contract law is clearly elaborated and consistently applied, all parties to the transaction know what their rights under the contract are, and the parties also know that their rights under the contract will be enforced in a predictable way. Without civil contracts, parties to a transaction cannot be certain that they will receive the benefits of the agreement. It might be unclear whether or not a valid agreement has even been struck, or the parties may have different interpretations of the actual terms of the agreement even if they can agree that they made an agreement.

For instance, you and I might agree that I will sell you all of the wheat harvested from my farm for a fixed price. If bad weather destroys almost all of the wheat before it is harvested, do we still have a contract? Must I still pay you the agreed upon price even though I am now only receiving a small portion of what I expected? Such doubt tends to make parties less willing to enter into transactions and limits economic opportunities for all. Civil contract law reduces this doubt by creating rules that parties to a contract can use to answer these questions.

This sub-section will provide an overview of the general principles of contracts and the sources of contract law in Iraq today.

### B. Sources of Contract Law in Iraq

Article 76 of the Iraqi Civil Code establishes that all contracts-- commercial and civil-- are governed by the general rules contained in the Civil Code. There are, however, some rules specific to civil contracts, and others specific to commercial contracts, that are governed by the Civil Code and Commercial Code respectively. But for general principles of contract law, we look to the Civil Code.

*Foundation in Islamic and French Law*

As noted in the introduction, the Iraq Civil Code is derived from the *Mejelle* and the Egyptian Civil Code. The *Mejelle*, the Ottoman Empire's western-style codification of Islamic principles from the Hanafi School, focused in large part on Islamic principles of contract law. However, the *Mejelle* outlined rules for specific types of contracts, and never set out to define a general theory of contracts. To add more general principles of contract law, Al-Sanhuri incorporated aspects of the French civil code, as he had done previously with the Egyptian Civil Code. Thus, although many of the general contract theories set out in the Iraqi Civil Code are harmonious with the *Mejelle* and Islamic principles, they are, for the most part, derived from French law.

### C. Principles of Civil Contracts

#### *The Definition of a Contract and the Purpose of Civil Contracts*

A contract is a legally enforceable promise between two parties. Every legal system makes distinctions between promises that are deemed to be legally enforceable and promises that are not. Recall Hawre's construction business. If one of Hawre's suppliers promised to deliver 1,000 Kilos of concrete to Hawre on a certain day for a certain price, and Hawre accepted all the terms of the offer, that would constitute the kind of promise the law should enforce—it is a "contract." But if Hawre were to promise his friend Rawand that he will come over for dinner tomorrow night, the law will not enforce his promise.

Think back to the chain of confidence connecting people in business with one another and the role of the law in making sure the chain does not break down. Without the state enforcing Hawre's promise to pay his suppliers for their concrete, Hawre's suppliers might never agree to sell Hawre concrete since they are not confident they will receive full payment. These enforced promises are necessary for the state to grow economically; they allow business-owners, employees, and customers to make and accept promises beyond the small sphere of people they personally know and trust.

Generally, contracts are formed when parties exchange promises to take (or not take) certain actions. At the heart of a contract is the agreement between the parties. The agreement is most easily visualized in terms of **offer** and **acceptance**. To form a contract, one party (the **offeror**) expresses an offer to contract to another party (the **offeree**), and the offeree must indicate that they accept the offer. For example, you may offer to your friend, "I will buy your car for 10,000,000 Iraqi Dinar." You are the offeror and your friend is the offeree. If your friend accepts, then presumptively a contract has been created. You are both legally **bound** to that contract and must perform on your promises. Therefore, the first step to understanding and applying civil contract law is the recognition of when an offer and an acceptance of that offer have been made.

Under civil contract law, a party who does not fulfill their promise is said to have **breached the contract**. When a party breaches a contract, they are required to compensate the other party or parties to the contract for the harm caused by their breach. Whenever possible, the breaching party will be required to perform on the contract as they originally promised. This is called **specific performance**. If fulfilling their end of the contract is not possible, the court may require the breaching party to compensate the non-breaching party with **money damages**. Note that in contracts, “damages” has a special meaning. A party may be harmed when one party breaches a contract. The court will then order the breaching party to pay money—we call this money “damages”—to the non-breaching party to compensate for the harm caused by the breach.

In the event of a breach, the ultimate goal of civil contract law is to provide the damaged party with the benefits they should have received had the promise been fulfilled. Therefore, when a court or other authority assesses damages, the damages are assessed with the intent of compensating the damaged party for the losses they have sustained as a result of the breach and are not intended to penalize the breaching party for wrongdoing. Unlike criminal law, there is less focus on penalties and more focus on fulfilling the promises agreed to by the parties. Frequently, the parties will agree to an alternative arrangement when one party breaches a contract since actual enforcement of the contract could take time and may be expensive.

#### **D. Contract Formation**

##### **Civil Code Article 73:**

A contract is the unison of an offer made by a contracting party with the acceptance of another party in a manner which establishes the effect thereof in the object of the contract.

##### *Requirements for a Valid Contract*

Under the principles outlined in the Iraqi Civil Code, a contract consists of three elements:

1. Mutual consent of the parties,
2. A valid object, and
3. A lawful cause

**Mutual consent** of the parties means that one party offers to enter into an agreement, and the other party accepts the terms of the agreement that the offering party has proposed. First, we will explore what constitutes a valid offer; then we will look at what constitutes a valid acceptance.

If Hawre makes a formal, written offer to Rawand, and Rawand accepts in writing, they have formed a contract. But contracts do not need to be so formal. Indeed, contracts are usually quite

informal and occur more often than you might think. Every time you buy vegetables at the market, purchase phone credit, or agree to work for someone, you are creating a contract.

There are various ways of communicating an offer to contract. An offer could be in writing, over the phone, or orally in person. You see offers every day, since displaying goods in a store with their price is considered an offer. Offers can be for various things—you can offer to sell kifta or to hire an employee—but the offer must be reasonably clear about what is being offered and it must be clear that the offeror intends to be bound to the contract.

Acceptance can be explicit, either orally or in writing, or through customarily accepted gestures (in the West, a handshake might constitute acceptance). In some cases, even without explicit acceptance, consent may be inferred through the actions of the parties if the circumstances make it clear that the parties desired to enter into a contract. For example, if Hawre sends Rawand a letter telling him he will pay 100,000 Dinars for 1,000 Kilos of cement, and Rawand delivers the cement to Hawre the next day without ever verbally accepting the offer, Rawand's actions may be sufficient to constitute acceptance of Hawre's offer.

Even silence may constitute acceptance in limited situations where the offeror and offeree repeatedly contract with each other. However, in cases where the value of the agreement is high or the contract is for certain purposes, civil contract law may require that the parties make their agreement in writing. This decreases the likelihood that there will be a misunderstanding about what was intended by the parties.

Only the intended offeree can assent. If Hawre makes an offer to Rawand, only Rawand or someone legally authorized to act on Rawand's behalf can assent.

The offeree need only assent to the essential terms of the agreement for a contract to be formed. Although the Civil Code does not specify what constitutes essential terms, they are generally the terms that make it clear that the parties intended to contract for the object of the agreement. For example, in a contract for a sale of goods, terms that specify identity and quantity of the goods are essential. Hawre can contract to sell cars to Rawand if Hawre identifies *which* cars he wants to sell, and *how many*. For land sales, the essential terms are the price and a description that is sufficiently clear to identify the land that is being sold. If the parties agree to all the essential terms but leave some terms to be decided at a later date, the contract is formed at the moment they agree to the essential terms. If the parties later dispute the non-essential unresolved terms, a court will decide those additional terms by looking at the subject matter of the contract, relevant laws, common usage and principles of equity.

Acceptance must match the essential terms that were offered. If the offeree attempts to change any of the essential terms when they accept, they have not accepted the original offer. Instead,



they have created a **counteroffer**. This means that offeree has rejected the original offer and proposed a new offer with new terms. It is then up to the original offeror to accept or reject the counteroffer.

What if Hawre makes an offer to Rawand, but before Rawand accepts, Hawre decides he no longer wants to enter the contract? Hawre can withdraw the offer. The offeror is the master of the offer—he can withdraw the offer up until the moment it is accepted, and the contract is concluded only when the offeror becomes aware that his offer has been accepted by the offeree. If the offeror repeats the offer before acceptance, the first offer will be voided and only the second offer may be accepted.

It is important to emphasize that both offer and acceptance are generally required for a contract to be formed; unilateral expressions of will—where only one party expresses an intent to contract—are generally not binding without specific provisions noting otherwise. For example, if Rawand tells Hawre "I am going to give you 1,000 Kilos of cement and you are going to give me \$100,000 Dinars," this offer still requires an acceptance; there will be no contract without Hawre's consent. Hawre can accept verbally, in writing, or by giving Rawand the \$100,000 Dinars. Article 81 of the Iraqi Civil Code notes that even silence can be considered acceptance in certain situations. In this situation, if Hawre and Rawand have entered into similar agreements in the past and do so on a regular basis, Hawre's silence may be sufficient to accept Rawand's offer.

**Problem: Offer and Acceptance**

Hawre places a sign on his car that says "GREAT CAR! BUY FOR \$22,000." He has had the car for years and loves it dearly, but he needs the money and figures it is time to let it go. Rawand sees the car and decides he wants it, so he goes home and writes "I WANT TO BUY YOUR CAR. I ACCEPT YOUR OFFER AND HAVE ENCLOSED FULL PAYMENT OF \$22,000 DINARS!" He places the message in an envelope, along with a check for \$22,000 Dinars, and mails it to Hawre.

Before Hawre receives the check, his wife finds out that Hawre was going to sell the car, and she gets extremely angry with him. She is very attached to the car and tells Hawre, "You can't sell it! Not if you love me." Valuing his marriage, Hawre decides he can't sell the car. The next day, he receives the letter from Rawand. Hawre writes Rawand back saying, "I'm sorry for changing my mind, but I've decided not to sell the car. Your check is enclosed."

Is there a contract? Was the contract breached? If Rawand were to take Hawre to court, which one of them gets the car?

The previous sections of this paper have addressed different ways parties can create legally binding obligations. Up to this point, we have assumed that the parties themselves are legally capable of creating those obligations. But the Civil Code does not allow everyone to make contracts. In this section, we explore some of the rules regarding when a person can and cannot enter into a legally binding contract.

For the contract to be valid and enforceable, the parties must have **capacity** to understand the consequences of entering into a contract. Assuming Hawre and Rawand are both adults, the Iraqi Civil Code presumes that they fully understand the implications or consequences of their contract:

**Civil Code Article 93**

Every person has the (legal) capacity to conclude a contract unless the law has determined his incompetence or restricted it.

There are, however, some persons that the law presumes do not have the capacity to enter into a valid contract. Generally, children are not deemed to have the capacity to enter into enforceable contracts because they do not have the maturity to understand the implications of their actions. There are a few exceptions, with the primary one being if a "rational minor" (age seven or older) enters into a contract that is completely beneficial to him, it is valid.

**Discussion Questions: Capacity**

- 1) Why does the Civil Code make an exception for contracts that are wholly beneficial to children?
- 2) Can you think of an example of a contract that a child might enter into that the state would want to enforce as valid?

Contracts with mentally ill or insane adults are presumptively invalid, although, in the case of temporary insanity, it may depend on the state of mind of the person at the time of the contract. As with children, courts are concerned that mentally ill or insane adults lack the mental capacity to understand the implications of entering a contract. Courts are particularly concerned that others might attempt to take advantage of people with diminished capacity. This rule seeks to protect those with diminished mental capacity from entering contracts that would be unfavorable to them by presuming such contracts to be invalid if they benefit the capable person. Thus, the law makes it risky for a person with capacity to enter into a contract with someone who does not have such capacity. If the contract proves to be to the advantage of the capable person, the

contract is void and unenforceable; if the contract is wholly beneficial to the person without capacity, the contract is valid and enforceable.

The **object** and **cause**<sup>10</sup> of the contract must be lawful in order for the contract to be enforceable. The object of a contract is what the parties are contracting for—such as goods, services, property, or money. The cause is the underlying reason the parties are entering the contract. A contract with an illegal object or an illegal cause is unenforceable. For example, if Hawre were to contract with Rawand to steal a car in return for some amount of money, the courts would not enforce the contract and indeed both of them would be committing a crime by attempting to negotiate such an agreement.

Although some objects are legal, the state may still refuse to enforce the contract if it views the contract as contrary to public order and morals<sup>11</sup>. Remember, when parties ask the state to enforce their contracts, they are asking the state to use its resources to back their private promises. While the state seeks to promote contracting in many situations, the state is unwilling to enforce transactions it perceives as being contrary to public welfare.

In contrast to traditional Islamic law and the *Mejelle*, the Iraqi Civil Code explicitly allows for contracts regarding objects that do not yet exist, as long as the thing will exist in the future. For example, farmers can contract to sell their crops before they have harvested them. This allows farmers to avoid waste by planting only as much as they know they will sell. However, if the object or the thing to be performed is impossible—meaning it can never exist or can never be performed—the contract is void.

Even if parties have consented to contract and possess sufficient capacity to legally do so, their consent may be voided by **defects of the will**. In Iraqi civil law, consent to contract can be **nullified**<sup>12</sup> by mistake, fraud or duress. On occasion, there may be a **mistake** in a contract such that the object of the contract is not what the parties intended. The Civil Code gives the following example: if a stone has been sold as an emerald, but later turns out to be glass, the sale is void. But if the stone was described as red but it was sold at night and later turned out to be yellow, the sale will be subject to the approval of the purchaser.<sup>13</sup>

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<sup>10</sup> The Civil Code presumes that every obligation has a lawful cause, even when the cause is not mentioned in the contract, unless proof to the contrary is established. Article 132(2).

<sup>11</sup> Article 130, Iraqi Civil Code.

<sup>12</sup> **Nullified**: Invalidated or legally void. When consent to contract is nullified by a defect of the will, the parties did not legally consent to contract.

<sup>13</sup> Article 117.

### **Problem: The Wrong Cow**

Hawre has a restaurant that sells kafta. He decides he could save money if he purchases a whole cow and slaughters it himself. Hawre goes to Rawand, a farmer who sells cows. Generally, there are two kinds of cows: “breeders” that cost 50,000 Dinars, and “eaters” that cannot breed and are only good for meat. As a result eaters are much cheaper, selling for 30,000 Dinars each. Rawand only has one cow—an eater that he agrees to sell to Hawre for 30,000 Dinars. Hawre pays Rawand 30,000 Dinars, and Rawand says he will deliver the cow to Hawre in one week.

However, two days later... Rawand realizes to his delight that the cow is pregnant! It isn't an eater; it is a much more valuable breeder. Upon this discovery, Rawand informs Hawre that he will not deliver the cow, since he did not intend to sell a breeder, and moreover, Hawre only paid 30,000 Dinars—the price of an eater. Hawre thought they had a contract, and decides to take Rawand to court to see if he can get the cow for 30,000 Dinars as initially agreed.

Is the contract valid? What was the “mistake” in this contract? Is this situation more like the emerald that turned out to be glass, or the red stone that turned out to be yellow? If you were the judge, how would you decide?

If the misunderstanding was not a mistake but a result of **fraud**—where one party knowingly deceived another party to the contract—the party who was the victim of the fraud may be able to sue the fraudulent party for damages.

The most serious defect of the will is **duress**. In Iraqi law, a contract is unenforceable if it is executed under any kind of duress, which is defined as the "illegal forcing of a person to do an act against his free will."<sup>14</sup> For example, if Rawand said to Hawre, "If you don't purchase my cow, I will break your legs and come after your family," and if Hawre agreed to the contract out of fear, the contract between them would be unenforceable because Hawre's consent was improperly obtained through duress.

Courts will look to the circumstances surrounding the formation of the contract to determine if the threat was so coercive as to force the party to enter the contract against his will. Threats against a person's life or the threat of a violent beating are clearly duress; threats to cause injury to one's honor, or to one's parents or spouse may rise to the level of duress depending on the circumstances. Note that, in order for a contract to be voided by duress, the person making the threat must be capable of following through with it<sup>15</sup>, and the person who is threatened must fear

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<sup>14</sup> Article 112.

<sup>15</sup> Article 113.

the execution of the threat such that he believes it will occur if he does not consent to the contract.

#### **Comparative Note:** Defects of the will in Islamic law and French law

The three defects of the will-- mistake, fraud and duress-- that void an otherwise valid, consensual contract appear in both Islamic and French legal systems. French civil law treated these three concepts equally, whereas Islamic law and the *Mejelle* traditionally placed greater emphasis on duress and fraud, and less emphasis on mistakes or errors. The reason for this is that Islamic contract law tends to give preference to the **objective** over the **subjective**, and would prefer to enforce a contract rather than speculate as to the subjective beliefs of the parties at the time they entered the contract. It is relatively easy for the court to assess whether Rawand threatened Hawre with a weapon, and somewhat more difficult to tell whether Hawre *believed* he was entering into a contract for one object when in fact it was for another.

The Iraqi Civil Code, departing from Islamic tradition, adopts the French framework and considers mistake, as well as duress and fraud, to void an otherwise consensual contract.

#### **Concept Review:** The Contract Process

The enforcement of a contract is premised on a promise being made as part of a bargained exchange. This bargained exchange usually takes the form of an offer made by a person identified as the offeror, and an appropriate and timely acceptance being made by the offeree, the person to whom the offer was made.

An offer is a communication that shows an intent on the part of the offeror to be legally bound. The offeree may then form a contract by manifesting an appropriate acceptance.

If either party fails to perform the contract as agreed, this is a breach of contract.

In the event of a breach of contract, the aggrieved party may seek legal **remedies** to compensate him for what he would have received had the contract been performed. When possible, remedies take the form of specific performance, requiring the breaching party to perform what they initially promised in the contract. If performance is impossible, the court will order the breaching party to compensate the aggrieved party in the form of money damages.

In order for an Iraqi contract to be valid and enforceable, it must be concluded with the mutual consent of parties with full capacity, free of defects and it must be for a lawful cause and a lawful object.<sup>16</sup>

### *Contract Formation Under the Iraqi Commercial Code*

The principles of contract formation in the Civil Code lay the basic foundation for an Iraqi contract. However, some types of contracts are simply too complex or too important to assume the contracting parties will include every term necessary to create a clear and enforceable contract. At a more basic level, recall that, under the Iraqi Civil Code, contracts do not even need to be written to be valid. If Hawre wants to sell Rawand the rights to the flour mill in Hawre's building, but the flour mill is too large to physically move to Rawand's building, they can transfer the right to the mill through a **bill of sale**. But if there is nothing written to document the transfer, Hawre could later claim that the mill was his all along—after all, it is still in his building. To avoid this potential confusion, the Commercial Code sets out requirements for bills of sale and other types of commercial contracts beyond those that would have been required by the Civil Code.

**Bills of exchange**, a form of **negotiable instrument**, are another type of contractual relationship governed by the Commercial Code. Bills of exchange are written documents from one party to a second party, ordering the second party to send payment to a third party. For example, if you have a current account, the checks you use to pay others are bills of exchange. When you write a personal check, you (the drawer) are ordering your bank (the drawee) to send a certain amount of money to a third party (the beneficiary) on a certain date. Since bills of exchange are even more abstract than bills of sale, the Commercial Code imposes very strict formal rules for such a bill to be valid and enforceable. According to Article 40 of the Commercial Code, a bill of exchange must include all of the following:

- 1) the words 'Bill of Exchange' or 'Bill' written in the text thereof in the language in which the Bill of Exchange is written;
- 2) an unconditional order to pay a certain sum of money;
- 3) the name of the person ordered to pay (drawee);
- 4) the date of maturity;
- 5) the place of payment;
- 6) the name of the person to whom or to whose order payment must be made (the beneficiary);
- 7) the date and place of making the Bill;

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<sup>16</sup> Article 133(1).

8) the name and signature of the maker of the Bill (drawer).

If *any* of the above is missing, the bill is presumed invalid (except in a few particular situations noted in Article 41 of the Commercial Code). In addition to formal requirements for written bills of exchange, the Commercial Code includes special rules for acceptance, and damages to be awarded when a bill is not paid on the stipulated date, which essentially take the place of the Civil Code's remedies following a breach of contract.

### Discussion Question

Articles 39-132 of the Commercial Code are all devoted to bills of exchange. Why are there so many specific rules for bills of exchange? What might be some public policy justifications for strict regulation of bills of exchange?

A significant section of the Commercial Code is devoted to contracts that arise in the banking sector, including mortgages and current accounts. These contracts will be covered in more detail in the introduction to Banking and Credit.

### Comparative Note: What about *Consideration*?

Under Iraqi civil law, **consideration** is not a requirement for a valid contract. Since it is required in common law countries and you may encounter the term in law classes or practice, we will describe it briefly here. Consideration is an abstract concept that is best thought of as the underlying motive for the promise. The law seeks to enforce promises that result in mutual benefits, as these promises are more likely to generate wealth and increase welfare. Thus, the requirement of consideration means that no party should enter into a binding agreement from which they will receive nothing. When one party gives something to another party without the expectation of receiving anything in return, then the law will view this act as giving a gift, not entering into a contract. Under most circumstances in common law countries, one person's promise to give a gift to another person is not enforceable as a contract. Again, however, consideration is not required for a valid contract in Iraq.

### E. What Happens When a Contract Is Ambiguous or Incomplete?

The primary concern of contract law is protecting the expectations of the parties who entered a contract. As we have seen, this concern is reflected in how the law chooses to recognize whether or not a contract has been formed. It is also reflected in how the court interprets the terms of a contract in the case of a dispute.

The problem is that it would be nearly impossible for contracts, other than those for a single, immediately completed transaction, to incorporate provisions for all possible scenarios that could arise during the life of the contract. For example, suppose Hawre contracted with Rawand for cement, believing he would receive X brand cement. Rawand usually has X, but recently, he ran out of X and delivered Y brand cement to Hawre instead. The parties may have had different expectations when they entered into the contract—Rawand thought he was to deliver cement; Hawre expected to receive a certain kind of cement. If this difference in expectations becomes a source of dispute, then the interpretation of the contract is a question of law to be decided by a judge.

Consequently, the Iraqi Civil Code establishes principles to guide the courts in interpreting contracts to resolve disputes that arise over ambiguous or missing terms. In Iraqi law, contracts are to be interpreted in accordance with the **subjective intention** of the parties, not merely the words of the agreement. The subjective intention is the true intention that the parties to the contract actually had in their minds when they entered into the contract. However, since the parties are engaged in a dispute, it is likely that their subjective intentions were not the same. Hawre and Rawand, for example, attached different meanings to the word "cement."

**Problem: Old Chickens**

Suppose Hawre runs another restaurant that sells roast chicken. Hawre usually buys his chicken from Asad, but Asad recently moved so, for the first time, Hawre bought chicken from Rawand. After settling on a price of 12,000 Dinars per chicken, Hawre sent Rawand an order stating, "I would like to order 25 chickens to be delivered to my roast chicken restaurant on Monday. 300,000 Dinars are enclosed as payment." On Monday, Hawre received 25 chickens. However, 10 of the chickens were young and fit for roasting, while 15 of them were old-- still good chickens, but they were not good enough for roasting and could only be used in soups. Hawre claims Rawand breached the contract-- he needed 25 chickens fit for roasting and only received 10-- but Rawand claims he fulfilled the contract and delivered 25 chickens as promised.

Did Rawand breach the contract? What factors should the court consider in interpreting this contract to preserve the subjective intention of the parties? Here, the word "chicken" is ambiguous-- does it mean "any chicken"? or a "chicken fit for roasting"? If you were the judge, how would you decide what chicken means for the purposes of this contract?

When interpreting a written contract, the court will go beyond the literal meaning of the words and consider the intentions and meanings in the context of the contract. The court will always attempt to make sense of the words in the contract, but, if need be, the court may go so far as to



disregard words that do not conform with the underlying subjective intentions of the parties. The Civil Code gives the following example: If a man says, "I donate this house against this suit of yours," even though he said "donate," it will be considered a sale because the sentence as a whole indicates a two-way exchange rather than a gift.<sup>17</sup>

If Hawre had purchased chickens from Rawand in the past, the court might look to their previous **course of dealing** to see what sort of chickens they might have traded in the past. If no previous relationship exists between them, the court would look to **custom** or prevailing norms for similar transactions. The point is to get as close as possible to the subjective intentions of the parties. Unfortunately, we cannot know exactly what they believed "chicken" meant when they entered the contract, but we might get close if we look to what "chicken" meant to Hawre and Rawand in the past, what "chicken" means to others in the same industry, and what "chicken" customarily means in the area in which Hawre and Rawand operate their businesses.

#### F. Breach of Contract and Its Remedies

When parties form a contract, they are agreeing to perform on their promises. Most of the time, contracting parties follow through with what they said they would do. But what if the parties fail to perform on their promises as expected? This is called a **breach of a contract**. Deciding what to do in the case of a breach of contract is one of the most important aspects of civil contract law. If courts did not hold parties to perform on their contracts, people could break their promises as soon as it became favorable to do so, regardless of the damage to the other party to the contract. Thus, courts seek to uphold parties' obligations to contracts and order remedies in the event of a breach. After it has been established that a party to an enforceable contract has failed to perform his obligations, a court must determine what **remedy** the other parties should receive to compensate them for the damages caused by the breach.

In civil law, the **debtor** is the party that breached the contract, and the **creditor** is the non-breaching party to whom some remedy is owed. Under Iraqi law, the primary remedy is **specific performance**-- that is, whenever possible, the court will order the debtor to follow through with the original terms of the contract.<sup>18</sup> In our example, if Rawand were found to have breached the contract by delivering 10 young chickens and 15 old ones when he should have delivered 25 young chickens, the court may order Rawand to deliver 15 young chickens.

If it is impossible for the debtor to perform on the contract, the court may order the debtor to financially compensate the creditor in the form of **monetary damages**.<sup>19</sup> The goal of monetary damages is to award the non-breaching party with an amount of money equal to what he expected to receive had the contract been fulfilled. It is important to note that, when the court

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<sup>17</sup> Article 155.

<sup>18</sup> Article 246.

<sup>19</sup> Article 168.

determines the loss to the non-breaching party, it will consider the actual loss as well as lost profit as a result of the breach. Hawre may have needed the 25 chickens on Monday because he knew a group of 25 people were coming to his restaurant, but, because Rawand only delivered 10 chickens fit for roasting, Hawre did not have enough food and the entire group went to a different chicken restaurant. Thus, if Hawre were to receive 15 additional chickens now, it would not make up for the 25 dinners he could not sell on Monday as a result of the breach. The court may consider this lost profit when calculating the monetary damages owed to Hawre.

Hawre may not want to leave it up to the court to decide how much money is owed to him, because the court might not properly value his loss. For example, the court may easily calculate Hawre's lost profit from having to turn away 25 customers, but what about his lost profit the next time the group decides to have a chicken dinner at a different restaurant because they do not believe Hawre will have enough food for them? Or the damage to Hawre's business when the 25 people tell their friends and families that Hawre sells old chickens? Damage to reputation is particularly uncertain and difficult to calculate. To avoid these questions, parties may specify in the contract the amount of damages that will be owed in the event of a breach. These are called **liquidated damages**. Under most circumstances, Iraqi courts will honor liquidated damages and will give the creditor no more than the amount agreed upon in the contract. While this may help the parties anticipate the consequences of a breach, contracting parties should be aware that the Iraqi courts will limit compensation to the liquidated damages even if the actual damage was significantly greater, unless the court finds the debtor has committed "deception or grievous fault."<sup>20</sup>

How courts deal with breach of contract depends largely on how civil contract law deals with the policy tension inherent in many areas of commercial law that we introduced at the beginning of this paper. The way that a court decides to award damages in a contract dispute must balance the need to protect a contracting party who is damaged with the providing incentives for all parties to enter into a contract in the first place. Parties may want strong enforcement and large damages to create greater certainty that the contract will be fulfilled, but at the same time, parties may be discouraged from entering into some contracts if it is likely they may face excessively high damages in the event that they cannot fulfill their end of the contract.

### Comprehension

- 1) In "The Wrong Cow" problem, if the court were to rule in favor of Hawre and order specific performance, what would that mean?
- 2) In the "Old Chickens" problem, which remedy seems most appropriate to you? Why?

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<sup>20</sup> Article 170.

### **Comparative Note**

Remedies for breach of contract is one area in which Iraqi Civil Law differs significantly from common law countries such as the United States and the United Kingdom. The first major difference is that, in common law countries, monetary damages are the presumptive remedy and specific performance is only ordered in situations where money damages are difficult to quantify or insufficient to restore the non-breaching party to the situation they would be in had the contract been performed. For example, in a common law country, if a party contracted to purchase a famous painting and the seller breached, the painting might merit specific performance because money damages would not fully compensate the purchaser for the loss of such a unique item.

The second difference is that liquidated damage provisions are often unenforced in common law courts because they prevent parties from *efficient* breaches of contract, where it is cheaper for one party to breach and compensate the non-breaching party than it is for the breaching party to fulfill the contract. Some courts believe such breaches should be allowed as long as the damages awarded to the non-breaching party are sufficient to compensate her for the losses she has incurred.

## GLOSSARY

### ***Arbitration***

A type of dispute resolution in which the parties select an impartial third party to settle their dispute.

### ***Breach of Contract***

When one party fails to fulfill his obligation under a contract, this constitutes a breach of the contract, for which the law offers a remedy.

### ***Bills of Exchange***

Written documents from one party to a second party, ordering the second party to send payment to a third party.

### ***Capacity***

The legal power for an individual to enter into an enforceable contract.

### ***Capable Parties***

The law only recognizes enforceable contracts between parties who have the capacity to understand the implications of their actions.

### ***Codification***

The process of forming a legal code.

### ***Consideration***

The circumstances or factors that the offeror and the offeree considered when agreeing to the contract, and which motivated the contract.

### ***Defects of the Will***

Otherwise valid, consensual contracts can be voided by defects of the will: mistake, fraud or duress.

### ***Liquidated Damages***

Because the damages that result from a breach of contract may sometimes be difficult to define, parties to a contract may choose to protect themselves from this uncertainty by including a liquidated damages provision in their contract. With a liquidated damages provision, the parties will agree beforehand as to the value of the remedy that will be paid in the event of breach. Iraqi courts will generally honor liquidated damages provisions. However, if parties sustain greater injury than would be compensated by the liquidated damages, they will be limited to receiving the amount stipulated in the contract unless the breaching party is also guilty of deception or grievous fault.

### ***Monetary Damages***

A type of remedy granted by the court to the victim of a breach of contract. The calculation of this remedy is based on the monetization of the damage that was incurred by the victim of the breach.

### ***Mutual Consent***

The agreement between the offeror and the offeree to be bound by the terms of the contract as proposed by the offeror.

### ***Remedy***

A remedy is some form of redress offered by the law to compensate the victim of a contractual breach. The general goal of a remedy is to put the victim of the breach in the position that he would have been in had the contract been carried out as expected. Generally, the law offers two types of remedy: monetary relief and specific performance.

### ***Specific Performance***

Specific performance is a type of remedy under which the court will order the party in breach to perform on the contract as agreed upon. This is a rarer type of remedy and is only justified under circumstances where monetary relief would be insufficient to fully compensate the victim of the breach. In those cases, a court may choose to award specific performance as a remedy.

### ***Subjective Intention***

Subjective intention is what a party actually meant to do in a particular situation. This is the opposite of objective intention, where a party's intent is deemed to be what a reasonable person in the position of the other party would understand it to be.