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Comparative Analysis of Discharge of Contractual Obligations in Iran and Malaysia

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Abstract: The discharge of obligation is one of the most important legal issues to which special attention has been paid in both Iranian and Malaysian laws. Under Article 264 of the Iranian Civil Code, an obligation is discharged in one of the following ways: Fulfillment of the obligation, cancellation of agreement by mutual consent, release from obligation, substitution of a different obligation, set off and recoupment and acquisition of debt. In effect, Iranian legislation provides six modes of discharge of obligation. In Malaysian law on the other hand, an obligation is discharged through one of the following 4 ways: Performance, frustration, agreement and breach. With regard to form the Iranian Civil Code is dependent on a written legal system (the Roman-Germanic legal system) but in terms of content, it is influenced by Islamic law. By contrast, the Malaysian legal system is considerably influenced by an unwritten legal system (the common law). The task of this study is to examine and critique the modes of discharge of obligation under Iranian law in comparison with those under Malaysian law. The central goal is to remove the ambiguities and related problems observed in the Iranian law in order to give it greater efficacy. The research is a library-based type with a comparative analytic method.

Key words: Contract, obligation, discharge, civil code, common law, Iran, Malaysia

INTRODUCTION

The term discharge is a general expression found in the contract law of Iran. It means that an obligation has been performed and terminated. Article 264 of the Iranian Civil Code terminates a party's obligations in one of 6 ways: Fulfilment of obligation, cancellation of agreement by mutual consent, release from obligation, substitution of a different obligation, set off and recoupment and acquisition of debt. Except for a few modifications, Article 264 of the Iranian Civil Code was adopted from Article 1234 of the French Civil Code. The drafters of the Iranian Civil Code adopted the provisions of Article 1234 of the French Civil Code but omitted five of the modes of discharge of obligation found in that Code and added the cancellation of agreement by mutual consent, resulting in the six modes of discharge contained in Article 264 of the Iranian Civil Code (Shahidi, 2011).

Under Malaysian law (as in many other legal systems), a legal agreement is an agreement between two or more people which is binding (Cheong, 2010). It means that such an agreement creates rights and obligations. And the discharge of obligation is possible in 4 ways: Performance, frustration, agreement and breach (Ishan Jan, 2011).

When parties perform their obligations under a contract, the contract will be considered as discharged (Abdul Majid, 2008). Also, where without the fault of the contracting parties, an event occurs during the validity of a contract which renders the performance of such a contract impossible or illegal or results in a fundamental change of circumstances, causing the obligation to become different from what it was originally that contract will be considered discharged (Nurdianawati, 2008) or with the parties' agreement, terminated or modified. In this case, the possibility for modification exists but specific formalities must be followed. Cancellation of obligation, rescission, variation and waiver of are issues that will be clarified in the contract. With regard to cancellation of obligation, the parties to an obligation may intend to discharge it which means cancelling the primary contract. Where the parties change an agreement to a fundamentally new one, this would also amount to a termination of the contract. In other cases, the act of the parties may be considered to be merely a variation of the contract. Wavier is an optional indulgence which occurs in situations where one party insists on a specific way of performance based on law. In variation of contract, waiver can serve as a means of validating the variation without

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any consideration or necessary formalities. At common law, the party seeking a waiver does not have the right of rescission in law. Also, there would be a breach of contract where one party fails to fulfill the obligation and insists that he does not intend to complete same. It should be noted that in certain situations, there may be justifiable reasons to exculpate the defauting party from claims for a remedy, provided such a party is able to furnish convincing reasons that clear him from fault.

Rescission (serious violations) entails the cancellation of a contract between two parties due to the fault of one of the parties. After such a violation, the innocent party has the right to choose the course of action to follow. He may consider the violation as signifying discharge and termination of obligation or may decide to acquiesce in the breach and ratify the contract. However, in situations involving rescission due to breach of contract, it has to be proven that the party in breach has without doubt, intended not to perform his obligation.

Despite obvious differences, the laws and regulations of many countries share some similarities. The 3 big contemporary legal systems are written law (Roman-Germanic), Islamic law and common law (English-American). The written law and Islamic law are the governing laws in Iran whereas the common law is prevalent in Malaysia. The written law is one of the most important legal systems that prevail in large parts of Europe, Central and South America, as well as parts of Asia and Africa. It has its roots in Roman law. Islamic law is one of the main contemporary legal systems that influence the Iranian society. Presently, the governing legal system in Iran both in form and content, relates to the written law (Roman-Germanic). But at the same time, the Iranian legal system is profoundly influenced by Islamic law (Zarini and Hazhirian, 2009). An obvious product of that influence is the Iranian Civil Code. With regard to the common law, this legal system took shape in England and during many continuous centuries, grew and developed, subsequently influencing other countries (Rene, 1999). Under this system, case law (judicial system) has high importance and rules of common law are confirmed in judicial verdicts which have value and validity.

As already observed, Malaysia is one of the countries influenced by this vast legal system. What in this research is noticeable and significant is that the Iranian and the Malaysia legal systems are not similar and each one is affiliated to a dissimilar legal tradition. Therefore, a comparison of discharge of obligation in both countries has to take account of these differences. As indicated before, the concern in this study is to identity, examine and analyse the modes of discharge of obligation under the laws of both Iran and Malaysia. The findings of the study should strengthen the legal basis of contracts concluded between business people from both countries, enhance understanding of similarities and differences between the two legal systems and provide a good basis for future reforms. This study is library-based. The method of research is analytic (Chatterjee, 2000) and comparative (Yaqin, 2007).

EXAMINATION OF FULFILLMENT OF OBLIGATION IN IRANIAN AND MALAYSIAN LAWS

In Persian, fulfillment of obligation in its literal sense, means keeping or conclusion (Langroudi, 2008). But in general legal terms, fulfillment of obligation means carrying out the responsibility of a debtor which results in discharge of obligation. In effect, fulfillment of obligation leads to the discharge of that obligation. According to this theory in every case, the fulfillment of obligation is in fact, the performance of that obligation and the end result is the discharge of the debtor from obligation. Mahdi Shahidi espouses this theory in his book entitled discharge of obligation. In cases where the obligation requires the transfer or delivery of property or the execution of an act, following which the obligation is discharged, the performance of the required act will constitute the fulfillment of the obligation and the termination of the contract. In this theory, there is no difference between a voluntary and an obligatory act by the promisor. Where the promisor refuses to perform the obligation, the obligation will still be recognized, irrespective of whether or not there is judicial intervention compelling him to fulfill same. Fulfillment of obligation will be realized based on terms that the law considers fit and proper. These terms may be related to the parties obligation regarding performance or the quality of performance (Shahidi, 2011).

The rules and regulations for the fulfillment of obligation in the Iranian Civil Code are provided in Articles 265 through 282 (Asghari and Atghayee, 2007). The term, fulfillment of obligation may be defined as a promisor acting as he has promised to do. In relation to a debt, fulfillment of obligation means performing the settlement of that debt. Both parties to a contract will not only agree mutually on the subject of the contract but they are also able to determine the mode of its fulfillment, as well as the time and place. In cases where the obligation relates to money, its fulfillment will call for payment, such as payment by check or bill of exchange. However in Iranian law, fulfillment of obligation is a

general term and includes payment of money, delivery of property, performing or refraining from doing an act. Specifically, fulfillment of obligation is the performance of a contractual obligation and the promisor's contractual responsibility includes an obligation to remedy any loss which results from his failure to fulfill his obligation to the other party (Katouzian, 2006).

A scrutiny of Malaysian contract law reveals that the term which has the closest connotation to fulfillment of obligation is called performance. This is because each time parties to an obligation perform their obligation as agreed, the contract will be fulfilled. However, a fundamental rule is that the performance should be complete and precise (Beatson, 1998). But, it should be noted that the requirement that performance be complete is an exception and not a general rule of contract. This is because obligation may be separable if it is possible to perform parts of it separately. Whether the obligation is inclusive (complete) or separable is open to the interpretation of the contract. Another point worthy of note is that a party who performs his obligation substantially but not completely may be asked by the other party to fulfill the remaining part of the obligation. And that party who fulfills his obligation substantially but not completely may also be responsible to pay for any loss caused by his partial performance. In the above connection, incomplete performance may in some cases be accepted but the defaulting party may also be asked to pay for loss arising from his default. If the fulfillment of the contract does not take place accordingly, he can be asked to pay quantum merit for the unaccomplished performance.

The other party also has the right to accept or reject the partial performance. Where the right to reject is exercised, the defaulting party cannot ask for quantum merit for the partial performance (Sinnaduri, 1987). It is further relevant to note that where a party cannot accomplish the contract without the collaboration of the other party, the party that failed to collaborate will be responsible. At common law where there is no specified time for the performance of a contract, the basic rule is that performance has to take place within a reasonable time (Duxbury, 2008). If a certain time has been specified for the performance of the contract, the time will be considered a fundamental term of performance and of fulfillment. And in addition to remedy, the court can compel the defaulting party to fulfill the contract.

In view of what has been discussed above on the fulfillment of obligation and performance of contract under Iranian and Malaysian laws, a vital question that may be asked is whether the performance of a contract can constitute discharge of obligation. Overall, the answer is in the affirmative. But, the issue is how to classify the modes of discharge of obligation. Different countries use various classifications for the modes of discharge and such classifications are based on norms considered appropriate for the regulation of society.

EXAMINATION OF CANCELLATION OF AGREEMENT BY MUTUAL CONSENT UNDER IRANIAN AND MALAYSIAN LAWS

In its literal sense, cancellation of agreement by mutual consent means removal. In the Iranian Civil Code, no definition is provided for the term. However from a legal perspective, cancellation of agreement by mutual consent could be said to be the mutual consent of both parties to the termination of the contract. Cancellation of agreement by mutual consent is used for the termination of an irrevocable contract and its use is not proper in revocable contracts. This is because it requires the consent of both parties (Roodijani, 2011). Cancellation of agreement by mutual consent is the second mode of discharge of obligation contained in Article 264 of the Iranian Civil Code and has been derived from Islamic jurisprudence by Iranian legislators. As pointed out above, the cancellation of agreement is attained through the demonstration of mutual intents. Thus, the mutual consent of two parties is the basis of its validity and it does not concern third parties' rights (Maghsoudi, 2009). For example, a guarantor and the party to whom a guarantee is given are not able to cancel the underwritten agreement by mutual consent (Ghasemzadeh, 2008).

In Iranian law, cancellation of agreement by mutual consent is legitimately possible only in financial contracts. Non-financial contracts such as marriage and pious endowment are not subject to cancellation of agreement (Vahid, 2004). This is because in cancellation of agreement by mutual consent, 2 parties are required whereas in Islamic jurisprudence, a man has the right of unilateral divorce, just as in pious endowment, there is no specific owner to negotiate with other parties and conclude an agreement. The drafters of the Iranian Civil Code considered the cancellation of agreement and termination as two synonymous concepts and used it, as such in Article 283 of the code. The cancellation of agreement is realised through the mutual consent of the contracting parties following which they no longer have rights against each other.

Cancellation of agreement by mutual consent involving minors, immature and insane persons is invalid. In addition, the loss of either the object of sale or the consideration does not constitute a ground for

cancellation of agreement by mutual consent. In such situations, a counterpart of the destroyed object if such an object happens to have counterparts or the price thereof if such object happens to be appraisable may be given in its place, pursuant to Article 286 of the Iranian Civil Code. Based on the meaning of cancellation of agreement by mutual consent, the cancellation can be done in any manner by express agreement, conduct or both. It should be stressed that the cancellation of agreement by mutual consent does not terminate the contract immediately but rather on the maturity date of the cancellation of agreement by mutual consent (Sadeghi, 2005).

In analysing the modes of discharge of obligation, this study found some similarities and differences between an agreement in Malaysian contract law and the cancellation of agreement by mutual consent in the Iranian Civil Code. Cancellation of agreement by definition means bilateral cancellation or cancellation of the contract by mutual consent or agreement. In Malaysian contract law, a contract may terminated or altered by agreement and the general rule is a requirement for consideration to furnished (Ishan Jan, 2011) in order for the agreement to terminate or change the contract to be valid and in some situations, adherence to specific formalities is also necessary (Leong, 1998). Contracts are created by agreement, therefore they may be discharged by agreement. A contract can be discharged in 2 ways, bilaterally (through agreement) or unilaterally (Ishan Jan, 2011).

The bilateral form of discharge is available to the parties whether their contract is wholly or partially executory. A unilateral discharge by one of the parties to the contract can be seen in a situation where, for example A has supplied goods to B and B is unable to pay for them. In such a situation, A may agree to release B of his obligation to pay completely. A release of this nature must be supported by consideration. If there is consideration, it then amounts to accord and satisfaction (Dass, 2005). When a simple contract must be performed by both parties (each party owes an obligation to other party), an agreement for the termination or alteration of that contract would count as valid consideration (Dass, 2005). In that case, each party agrees that the other party will be free from due obligation. When a simple contract has been performed by one party, the other party needs a valid official document in order to be discharged from the required obligation. In the absence of an official document, the other party will have to provide a document with a guarantee and this is called agreement and verdict.

The parties may intend to terminate the existing contract and replace it with a new contract or may simply want to change the existing contract. If the parties change the original profile of the existing contract with a new one, the annulment of contract will be obvious. In any other case such an act will be considered only as alteration of contract. Therefore, alteration means a less than radical change of contractual terms. In Malaysian contract law, there is another concept called waiver. Wavier occurs in situations where one party insists on a specific way of performance based on law. It involves the optional (voluntary) indulgence of one party which can be obtained by a specific declaratory act. Waiver can be valid, free of charge (no consideration) and even without any necessary formality for alteration (Leong, 1998).

In light of the above discussion, it can be said that the classification of the modes of discharge of obligation provided in Article 264 of the Iranian Civil Code is based on a wide range of theories of discharge of obligation, an attempt was made to include all direct modes of discharge of obligation but that attempt was unsuccessful and deficient. For example, the drafters included in that classification the fulfillment of obligation which is actually an indirect mode of dischar.ge of obligation. This inconsistency causes confusion. Moreover, apart from direct modes of discharge of obligation, there are also other indirect modes of discharge, such as lapse of time, revocation and impossibility of performance all of which have not been included in the classification. Furthermore, if the cancellation of agreement by mutual consent is considered a mode of discharge of obligation, then it must be queried why cancellation as a mode of dissolving a marriage contract which has the effect of discharge of obligation is not included. By the same token, questions also arise as to why the loss of object of obligation has been omitted. Viewed in this way, the defect in Article 264 of Iranian Civil Code is so obvious that one can only acknowledge it.

In both Iranian and Malaysian contract law, agreement as a mode of discharge of obligation is important. However, some Malaysian writers fail to mention agreement in their classification of the modes of discharge of obligation while some others include it. This observation shows that agreement can be subsumed under each classification under Malaysian contract law. Furthermore, although in both Iranian and Malaysian contract law, agreement has been considered to be one of modes of discharge of obligation, the issues addressed under the sections dealing with agreement in both legal systems are different. For example, in Malaysian contract law, waiver is included in the section relating to agreement whereas in Iranian contract law, it is subsumed under the section dealing with release from obligation.

EXAMINATION OF RELEASE FROM OBLIGATION IN IRANIAN AND MALAYSIAN LAWS

According to Article 289 of the Iranian Civil Code, release from obligation means a creditor voluntarily waiving his claim (Mirzaee, 2009). It seems that this definition is not clear and precise, however because in Iranian law, the waver of a right is not always considered to be release from obligation. Therefore, a more suitable definition for release from obligation may be proffered as the waiver of a debt by a creditor. In another sense, release may be said to be an unsolicited release from obligation. Release from obligation may also be described as a unilateral legal act done with free will and by virtue of which a creditor voluntarily waives his claim. The Iranian Civil Code classifies this as one of the modes of discharge of obligation and Articles 282-288 of that code dwell on this issue (Aliabadi, 2009).

In Iranian law, debt is one of a creditor's essential rights and it is a personal right. Thus, the owner of the right can voluntarily transfer it to other parties, request for its execution or abandon and discharge it. In exercising this right, the creditor does not need the consent of the debtor and can freely exercise his right (Yazdani-Sudjani, 2002). In Iranian law, the voluntary waver of a right is called release from obligation which is classified under the articles of the civil code relating to unilateral legal acts. In Malaysian law, the mode of discharge that can be considered similar to release from obligation is agreement. However, agreement and release from obligation are very far apart in meaning. Nonetheless, some similarities and differences between them can be observed.

In Malaysian contract law, the waiver of a creditor's right requires mutual consent between the creditor and debtor (Leong, 1998). The main reason for this is the definition of obligation as a legal relation between a creditor and a debtor. Because of this, a creditor cannot transfer or abandon his right without the consent of the debtor. In effect, unlike the case of Iran, the creditor's exercise of such rights depends on the debtor and without his consent, is impossible.

In Iranian law by contrast a creditor can waive his right voluntarily and the obligation can be discharged without the debtor's consent. Agreement is one of the modes of discharge of obligation in Malaysian law and a contract may be terminated or altered by agreement. However, consideration has to be furnished in order for the agreement to terminate or alter a contract to be valid.

With regard to release from obligation, since the exercise of this financial right is considered a unilateral legal act, the creditor does not need the consent of the debtor and can relinquish his right freely. In Malaysian law, there is a classification of contracts. In this classification, contracts are divided into simple contracts and contracts by deed. There is also another classification, such as unilateral and bilateral contracts. In a bilateral contract, the obligation of one party is the basis for the other party's obligation. But in a unilateral contract, one party undertakes to perform an act in return for the other party's act. For example, should a party that finds a lost object return it to the owner, the latter is obligated to pay the reward promised. As a result, unilateral contracts are one-sided but this is not an accurate description for release from obligation (Ishan Jan, 2011). In bilateral contracts, a creditor can waive his claim and cancel it.

In Malaysian contract law in order to create a simple valid contract, some essential elements have to exist. First of all, there has to be the mutual agreement of both contracting parties. This means that offer and acceptance are necessary requirements (Dass, 2005). The second element is that the parties' intention should be legally enforceable. The third is that the parties should have legal capacity (Alsagoff, 2010). Also, important is that both parties have to furnish valuable consideration. And in some cases, compliance with a special formality is required.

From the mentioned earlier consideration of the issues, it appears that because the Iranian and Malaysian laws are based on two separate legal traditions, there are occasionally similarities and differences in terminologies (Graw, 1998). In Malaysian law under the subject of agreement, waiver is also mentioned which is different from release from obligation. In fact, release from obligation is considered under the classification of unilateral legal acts. A straightforward description of release from obligation is the discharge of debt without the debtor's consent. In Malaysian law, contracts can be categorized as simple contracts and contracts by deed. Such contracts may be terminated lawfully.

In Malaysian law, alteration means changing the terms of a contract and waiver is considered, as the voluntary waiver by a party of a specific way of performance. Waiver can be valid without any consideration and formality. One typical example is a situation where the purchaser of a product allows the seller a delay in its delivery. In common law, a party who voluntarily waives his right cannot afterwards, reestablish the former conditions of the contract (Leong, 1998). Therefore, the fulfillment of a waiver once offered is binding. However as already pointed out, under the Iranian Civil Code, waiver and release from obligation are

two different issues even though they seem occasionally alike in conception. In the Iranian Civil Code, there is no definition for waiver, it is only mentioned in Article 178. According to the said Article, the good which has sunk in the sea and has been abandoned by its owner, belongs to the one who retrieves it. Therefore, waiver is defined as a creditor's voluntary waiver of his claim concerning an obligation.

Waiver is a one-sided legal act (unilateral legal act), mutual intent is not required for its accomplishment. The most important recognised difference between release from obligation and waiver is that the former directly results in discharge of obligation whereas the later only indirectly has the same effect. For this reason, waiver does not always lead to discharge of obligation and the Iranian Civil Code does not consider it to be a mode of discharge of obligation. In Iranian law, one of the closest elements to release from obligation is the voluntary surrender of a claim against a debtor which occurs by mutual consent. In this regard, Article 806 of the Iranian Civil Code states that if a creditor agrees to surrender his claim against a debtor, he has no right of revocation. The effect of these 2 acts (release from obligation and surrender of claim) is similar because in both cases, the obligation will terminate. Nevertheless, one should remember that release from obligation differs from the surrender of a claim, just as it is also different from waiver. In French law, under Articles 1285 and 1287 of the civil code, release from obligation is by agreement, not a unilateral legal act. This contrasts with Iranian law in which the consent of the debtor is required. Under Iranian law, release from obligation could be done orally or in writing.

EXAMINATION OF SUBSTITUTION OF OBLIGATION IN IRANIAN AND MALAYSIAN LAWS

Substitution of obligation is the replacement of an existing obligation with another one by virtue of which the previous obligation will be extinguished and a new one created in its place. In the Iranian Civil Code, the rules for the substitution of obligation are contained in Article 292 and 293 but as indicated earlier, no definition for substitution of obligation is provided. It is, however possible to define substitution of obligation as the discharge of a previous obligation through the construction of a new obligation which substitutes the prior one. Considering that the substitution of obligation requires establishing a new one, it cannot be accomplished through the unilateral intent of one party, the mutual intent of both parties is required (Ghaem-Maghami, 2007). To surmise, in order to understand the substitution of obligation, 3 steps have to be borne in mind:

- The discharge of a prior obligation
- The creation of a new obligation
- The realization of these two acts in one simultaneous transaction

Under the Iranian Civil Code because the substitution of obligation was adopted from the Roman-Germanic legal system and especially French law, it is considered to be one of the modes of discharge of obligation (Navard, 1995). However, the fundamental aim of this principle is not discharge of obligation. Instead, the main purpose is the transformation of that obligation, the obligation is changed for a new one (Nouri, 2002). In contemporary times with the possibility of debt and credit transfer as voluntary legal actions, some of the assumptions of the old legal establishment have come to naught. This is because a person in possession of a commercial paper can transfer his credit to another person by simply endorsing or handing it over without any need for the complicated process of substitution of obligation.

For example, a company's promissory notes can be transacted in stock markets and like other goods can be transferred from one person to another without informing the debtor. These developments advise the need for studies revisiting transfer and substitution of obligation. Transfer of credit is the displacement of credit from a creditor's personal property to another property. In this displacement, one obligation replaces another and will have the same effect. By contrast, in set off and recoupment what takes place is not transfer and displacement but the creation of a new obligation in place of a prior one that is an alteration of obligation. Article 293 of the Iranian Civil Code provides that when an obligation is altered any securities laid down in the original agreement will not be binding under the subsequent agreement, unless the 2 parties have made an express stipulation to that effect (Ghaem-Maghami, 2007).

In transfer of credit, although debt will be transferred along with all the attendant obligations, it is not subject to alteration. In Islamic jurisprudence, transfer of debt is used only for contractual liability and draft. One can divide the transfer of debt into 2 groups, automatic liability and voluntary liability. In automatic liability which is a transfer caused by death, the deceased's debts in addition to other properties, pass to his heirs. In voluntary liability caused by the debtor's mutual consent, responsibility does not lie in a third party.

Legal terminologies and substitution of obligation found in the Iranian Civil Code are a legacy of the Roman-Germanic legal system which has made inroads into many countries.

But today, the notion of substitution of obligation has only a nuisance value. Its retention in the Iranian Civil Code is not because of its benefit in regulating legal relations but is simply a consequence of Roman influence. For this reason, some countries, such as Germany and Switzerland have already freed themselves from this relic, replacing it instead with the transfer of credit and debt. The same is true for Malaysian law which is based on the common law system.

Discharge of obligation does not take place with the substitution of obligation and the legal effect of this mode of discharge (substitution of obligation) is yet to be seen. But discharge of obligation can occur in 4 ways:

- Performance
- Frustration
- Agreement
- Breach

As explained already, a contract may be discharged by mutual agreement or the parties may choose to vary it. Parties may decide to rescind the main contract and substitute it with a new one or choose to vary the main contract. In a situation where the parties opt for a radical change in the main contract, the rescission of contract will be confirmed and this will come close to substitution of obligation under Iranian law. If the change is not a radical one and only covers subordinate matters, such an act will be considered to be a variation of contract which is very different from substitution of obligation, as defined in Iranian law.

It is suggested that Iranian legislators reexamine the notion of substitution of obligation found in the Iranian Civil Code with a view to getting rid of the nuisance. In a new era when it is possible for a creditor to transfer his right by way of a simple endorsement and sometimes, through the delivery of document, there is no justifiable reason to saddle him with the problem of obtaining the debtor's consent and fulfilling other requirements for the substitution of obligation. If the Iranian legislators wisely put aside the traditional Roman principles and consider using the transfer of credit which is a new instrument meant to achieve an ancient European purpose such a step would be laudable as fruitful one in the right direction which is not only in tune with modern times but also fosters legal understanding.

Examination of set off and recoupment in Iranian and Malaysian laws: In the Iranian Civil Code, set off and recoupment is considered to be one of the modes of discharge of obligation and this issue is addressed in Articles 294-299 of the code (Mortazavi, 2008). Iranian legislators consider set off and recoupment to be a simple means for mutual payments by two debtors. From an analytical point of view, these two mutual payments amount to the fulfillment of two obligations not the discharge of them. Discharge will only follow after the fulfillment of obligation. This is because each creditor in return for losing his right, obtains an equal value (Javanmardi, 2001). In other words, both obligations will be fulfilled and discharge will take place after set off and recoupment, the result is the attainment of this final goal. For this reason, set off and recoupment is used in modern trade for the settlement of accounts, bank transactions, as well as in some situations where 2 parties have a continuous commercial relation with a bank and trading accounts have to be liquidated in a specific time frame (Langroudi, 2010).

In international barter trade, set off and recoupment in bank accounts play an important role in the simplification of payments. According to Article 295 of the Iranian Civil Code, set off is a compulsory and automatic process which will be accomplished without the consent of the two parties. Thus, when 2 parties are indebted to one another at the same time, their debts are removed to the amount that both parties are indebted through set off and the parties to that extent will be released from their mutual debts.

This removal of two equivalent debts is what Iranian legislators call set off and recoupment. In Iranian law, set off and recoupment is divided into 3 types:

- Compulsory
- Legal-contractual
- Judicial

Set off is a compulsory and automatic process based on Article 295 of the Iranian Civil Code and it results without the two party's mutual consent. In compulsory and automatic set off and recoupment, the two equal debts will be discharged by law (Aliabadi, 2009). Contractual set off and recoupment is obtained based on the intention of parties. It is a kind of contract that results in the discharge of both parties from the contract. And judicial set off and recoupment is effected through a judicial verdict. This arises where the existence or terms for obtaining set off and recoupment are disputed by the debtor. Legal or obligatory set off and recoupment requires some express terms.

However, although set off in Iranian contract law has some similarities with agreement in Malaysian contract law, it is not compatible with any mode of discharge of obligation in Malaysia.

EXAMINATION AND COMPARISON OF AACQUISITION OF DEBT IN IRANIAN AND MALAYSIAN LAWS

Acquisition of debt is one of the modes of discharge of obligation. Article 300 of the Iranian Civil Code focuses on this issue and in its definition, states that if a debtor becomes the owner of what he owes his liability ends. In acquisition of debt, there is no such thing as debtor and creditor and the debtor's obligation for payment is extinguished (Bagheri, 2003). For example if anyone is the debtor of his ancestor, the debt is settled after the death of the said ancestor to the extent of the portion of inheritance to which the said debtor is entitled. The debt becomes a part of his property. Death is the source of the obligatory acquisition of debt. Acquisition of debt could also be voluntary and the source is a contract between a creditor and a debtor as in the donation of the credit to the donee. According to Article 806 of the Iranian Civil Code, donation to a debtor should not be mistaken for performance. However, the result of both legal acts is discharge of obligation. Also, donation can be considered as a voluntary source of acquisition of debt by virtue of the similarity of acquisition of debt in both Islamic custom and French law.

However, acquisition of debt has no significant practical use and despite searches so far made in Iran courts not one example of a case involving this mode of discharge of obligation has been found. For this reason, the inclusion of acquisition of debt among the modes of discharge of obligation in the Iranian Civil Code is only of theoretical value. In common law and Malaysian contract law, acquisition of debt is not found among the modes of discharge of obligation because contracts will usually be discharged upon performance, frustration, agreement and breach (Noor Alam, 1994). Whenever, one party to a contract suffers a loss, he will be entitled to receive a remedy.

Among the four modes of discharge of obligation found in Malaysian law, two of them frustration of contract and breach are not comparable to those in the Iranian Civil Code because of the specific classification of the modes of discharge of obligation in the Iranian Code. In the modes of discharge provided in Article 264 of Iranian Civil Code, other modes of discharge considered in the laws of other countries are not mentioned. These include revocation, lapse of time, frustration, loss of the object of obligation, divorce, waiver, guarantee contract and bill of exchange. In summary, the point can be made that although these other modes of discharge have not been mentioned in Article 264 of the Iranian Civil Code, they can be found in various articles of that code.

CONCLUSION

The discharge of obligation is one of the most important legal issues to which special attention has been paid in both Iranian and Malaysian laws. In Article 264 of the Iranian Civil Code, an obligation is discharged in one of the following ways: Fulfillment of the obligation, cancellation of agreement by mutual consent, release from the obligation, substitution of a different obligation, set off and recoupment and acquisition of debt.

The purpose of fulfilment of obligation is the performance of an obligation resulting from a contract. Cancellation by mutual consent is an automatic termination by mutual consent and the discharge of contract is based on the parties' intention. Release from obligation means that the creditor voluntarily waives his right. Substitution of obligation is the replacement of an existing obligation with a new one. Offset and recoupment occurs when two parties are indebted to each another. An offset may be used in cases of mutual debts. And acquisition of debt occurs where a debtor becomes the owner of what he owes. In that way, his liability ends.

A major drawback of Article 264 of the Iranian Civil Code lies in its improper classification of the modes of discharge of obligation. Moreover, there is an obvious lack of definition for some of the modes of discharge contained therein. In this study, an effort has been made to compare them to the modes of discharge of obligation found in Malaysian contract law. And by subjecting them to critical analysis, their deficiencies have been highlighted. This then provides a basis for the review of some of those provisions, particularly Article 264 of the Iranian Civil Code. The provision of an appropriate classification of the modes of discharge of obligation will be, no doubt indispensable to the realisation of the discharge of obligation. As mentioned earlier, in Malaysian contract law, there are 4 modes of discharge of obligation: Performance, frustration, agreement and breach of contract. Each of these modes has been explained in this article.

The general rule is that performance has to be complete and exact. A party that performs his contractual obligation substantially but not completely can enforce the contract and claim his right. Where there is incomplete performance of obligation by one of parties, the other party can accept the incomplete performance and claim on a quantum meruit basis. Also, if that party has suffered any loss, he has the right to claim a remedy. Where in a contract, no definite time for performance has been indicated, the general rule applies that the performance must be completed within a reasonable time. Based on this

comparative analysis of performance as a mode of discharge of obligation in both the Iranian Civil Code and the Malaysian contract law, it can be observed that while this mode of discharge is discussed in Malaysian contract law under title, performance in the Iranian Civil Code, it is represented as the fulfilment of obligations. In both countries, the concept includes performing the obligation due to an obligation or performing an obligation that the obligor has agreed to. In Islamic law, this principle is completely acceptable and is, in fact the simplest and most normal way through which the obligor can free himself from his debt responsibility. This means that through the fulfilment of obligation, the parties end a contract in the way that they expected from the beginning.

The second mode of discharge of obligation is frustration. The basic principle here is that if after a contract is made, something happens, through no fault of the parties, to make its performance impossible, the contract is said to be frustrated and the obligations under it come to an end. The doctrine of frustration is embodied in Section 57(2) of the Malaysian Contracts Act 1950. The situations in which a contract may become frustrated cannot be exhaustively (conclusively) listed. But, one example that can be provided is where it becomes impossible to perform the contract because the subject matter has been destroyed.

From a comparative analysis of frustration in the two legal systems under study Iranian Civil Code and Malaysian contract law, it can be said that this mode of discharge in Malaysian contract law is similar to the impossibility of fulfilment of obligation in Iranian Civil Code. Although, Iranian legislators should have considered including impossibility of fulfilment of obligation among their classification of the modes of discharge of obligation in Article 264 of the Iranian Civil Code, they have not attempted to do so. Instead, they have discussed it sporadically in different articles of the code. Impossibility of fulfilment of obligation is mentioned in Articles 239 and 240.

Section 2(h) of the Malaysian Contracts Act 1950 provides that an agreement enforceable by law is a contract. Thus, the nucleus of a contract is an agreement. Agreement is another mode of discharge of obligation in Malaysian contract law, meaning that a contract might be terminated by agreement. Parties may decide on the termination of a contract by recession, variation or waiver. It means that the parties may decide on the termination of the main agreement and the substitution of a new agreement in its place or simply vary the main agreement.

In both Iranian and Malaysian contract law, agreement is an important mode of discharge. However, some Malaysian writers have not mentioned it in their classification of the modes of discharge of obligation. This suggests that agreement can be subsumed under each classification in Malaysian contract law. Furthermore in both Iranian and Malaysian contract law, although agreement has been considered as one of the modes of discharge of obligation, the issues considered under the section dealing with agreement are different. For example in Malaysian contract law, waiver is considered under the section relating to agreement whereas in Iranian contract law, this mode of discharge is to be found under the section dealing with release from obligation. In Iranian law, the voluntary waiver of a person's right is called release from obligation which is categorised under the articles on unilateral legal act.

Breach is the 4th and last mode of discharge of obligation in Malaysian contract law. A breach of contract is the failure by one of the contracting parties to perform his obligations under the contract or within the time stipulated for performance of the obligation. Any failure to perform a contractual obligation will constitute a breach of contract giving rise to an obligation to pay damages. Breach may be in the form of a failure to perform a condition precedent, a condition as opposed to a warranty or a fundamental term. Among the four modes of discharge of obligation found in Malaysian contract law, breach is not comparable to any of the modes of discharge of obligation present in the Iranian Civil Code because of the specific classification of the modes discharge of obligation in Iran which is a different type of legal system based on written law.

In this study, each of the modes of discharge of obligation in Malaysian contract law and the Iranian Civil Code has been explained. As already made clear, the national law of each country has been influenced by historical, economic, political, cultural and religious factors. While the Iranian legal system is organised around two major systems of written law (Roman-Germanic) and Islamic law, the Malaysia legal system is conditioned by an unwritten system of law (common law). This study has tried to uncover similarities and differences by comparing both systems of law. However, the presence of influences from 2 different legal systems in both Iranian and Malaysian law reduces the scope of comparison. Nevertheless, this endeavour yields some insights that could prove helpful in the search for satisfying answers to identified problems. Additionally, an effort has been made to provide a suitable solution to ambiguities contained in Article 264 of the Iranian Civil Code and associated problems.

REFERENCES

Abdul Majid, K.A., 2008. Contract Law in Malaysia. Malaysia Publications, Malaysia.

Aliabadi, A., 2009. Constitution and Discharge of Obligations from Contract in Islamic Law. 1st Edn., Daneshpazir, Tehran, Iran.

Alsagoff, A., 2010. Principle of the Law of Contract in Malaysia. 3rd Edn., Lexis Nexis, Kuala Lumpur, Malaysia, ISBN: 9789675371776, Pages: 668.

Asghari, F. and K. Atghayee, 2007. The description and interpretation of article 265 of civil code of Iran. J. legal Stud., 46: 129--146.

Bagheri, A., 2003. Discharge of Obligations Articles 264 to 300. 1st Edn., Aan Publications, Tehran, Iran.

Beatson, J., 1998. Anson's Law of Contract. 27th Edn., Oxford University Press, Oxford, England, ISBN: 9780198252610, Pages: 682.

Chatterjee, C., 2000. Methods of Research in Law. 2nd Edn., Old Baily Press, London, England.

Cheong, M.F., 2010. Contract Law in Malaysia. 2nd Edn., Sweet and Maxwell Asia, Malaysia.

Dass, S.S., 2005. General Principle of Contract Law in Malaysia. Marsden Law Book, Kuala Lumpur, Malaysia, ISBN: 9789834056513, Pages: 553.

Duxbury, R., 2008. Contract Law. 1st Edn., Sweet and Maxwell Publications, London, England.

Ghaem-Maghami, A., 2007. Obligations Law (General Law, Legal Occurrences). 1st Edn., The University of Tehran, Tehran, Iran.

Ghasemzadeh, S.M., 2008. The Principles of Contracts and Obligations, Theoretical and Applied Perspectives. 10th Edn., Dadgostar Publications, Tehran, Iran.

Graw, S., 1998. An Introduction to the Law of Contract. LBC Information Service Press, Sydney, Australia.

Ishan Jan, M.N., 2011. Law of Contract. 1st Edn., Sdn. Bhd Malaysia Publications, Malaysia.

Javanmardi, N., 2001. The nature of fulfillment of obligation and examination of its Evidences in Law of Iran. J. Law Policy Res., 45: 45-45.

Katouzian, N., 2006. Civil Law, General Theory of Obligations. 3rd Edn., Mizan Publications, Tehran, Iran.

Langroudi, M.J., 2008. Encyclopaedia of Civil Code and Business Laws. Danesh Publication, Tehran, Iran.

Langroudi, M.J., 2010. Law of Obligations. 1st Edn., College of Justice and Administration Publications, Tehran, Iran.

Leong, A.B., 1998. Law of Contract. 2nd Edn., Butterworths Asia Publications, Malaysia.

Maghsoudi, M., 2009. Contracts and Obligations. 2nd Edn., Pazhouhan Publications, Tehran, Iran.

Mirzaee, A., 2009. Persian and English Civil Code. 1st Edn., Behnam Publications, Tehran, Iran.

Mortazavi, A., 2008. General Rules of Contracts. 1st Edn., Nikbakht Publicaitons, Tehran, Iran.

Navard, R.S., 1995. Substitution of contract and its justifications in iranian civil code. M.A. Thesis, Qom University, Qom, Iran.

Noor Alam, S.M., 1994. Contract and Obligation. Vol. 4, Malaysian Current Law Journal Sdn. Bhd., Kuala Lumpur.

Nouri, M.A., 2002. Similarities of Egyptian Law (Article 371 Civil Law) and French Law (Art, 1282 Civil Law). 1st Edn., Tehran University Publications, Tehran, Iran.

Nurdianawati, I.A., 2008. Commercial Law in Malaysia. Pearon Prentice Hall Publications, Malaysia.

Rene, D., 1999. The Contemporary Large Legal Systems. 4th Edn., Tehran University Press, Tehran, Iran.

Roodijani, M.M., 2011. Discharge of obligation. 1st Edn., Ava Publications, Tehran, Iran.

Sadeghi, M., 2005. A criticism on the causes of discharge of obligation in civil code of Iran. Center Notary Public, Vol. 54, No. 1.

Shahidi, M., 2011. Discharge of Obligations. 5th Edn., Majd Publications, Tehran, Iran.

Sinnaduri, D.V., 1987. The Law of Contract in Malaysia and Singapore. 2th Edn., Butterworth Publications, Malaysia.

Vahid, A.H., 2004. Cancellation of bargain by mutual consent, one of the causes of discharge of obligations. Lawyers Inst. J., 51: 95-110.

Yaqin, A., 2007. Legal Research and Writing. 1st Edn., Lexis Nexis Publications, Selangor, Malaysia.

Yazdani-Sudjani, T., 2002. Release from an obligation and its effects and orders in religious jurisprudence and constitutional law of Iran. LLM. Thesis, Qom University, Gom, Iran.

Zarini, H. and H. Hazhirian, 2009. Contemporary History of Iranian Judicial System and Its Changes. 1st Edn., Tehran Publications, Tehran, Iran.