Formation of Contract under Vienna Sale Convention and Islamic Law: A Comparative Study

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Abstract

The UN Convention on Contracts for the International Sales of Goods (CISG) is a compromise of common law and civil law systems to promote international legal uniformity aimed at facilitating cross-border sale transactions in goods. While drafting this instrument the drafters did not consider Islamic law, which is one of the important legal families of the world. Prima facie, this is perhaps the main reason why the Muslim countries except a few have not ratified it. As a result, CISG has not attained universality yet. This issue has motivated the undertaking of the present research, which compares the formation aspect of sale contract under CISG and Islamic law.

Keywords: Formation of Contract, Vienna Convention, and Islamic Law.

1. Introduction

Does Shari'ah law qualify as an applicable law under international trade law? In answering this important and significant question, the English Court of Appeal in *Shamil Bank of Bahrain EC v Beximco and Others*,[1] by the affirmation of the lower court's decision, held that to apply to an international contract, the law must be a "single" country law. The Court found that Shari'ah law did not meet this requirement and therefore was inapplicable under the (EU) Rome Convention on the Law Applicable to Contractual Obligations 1980 (now repealed) scheduled to the English Contracts (Applicable Law) Act 1990. The Court furthermore decline to accept Shari'ah as an applicable law in combination with English Law. The freedom of contracting parties to make a contract is a paramount principle of contract law, both nationally and internationally. Therefore, the chosen forum being a law court or arbitral tribunal should respect the agreement of the parties.[2] It is submitted that as a respected law court, the English Court of Appeal should respect the agreement of the contracting parties in this case (to apply mix choice of law English and Shari'ah).

Apart from above Court's decision, western scholars have often described Shari'ah law as an essentially defective and backward legal system. Interestingly, for the last 600 years, most Muslims countries were occupied and rule by the British Empire and this is the major reason Islamic legal system did not develop and progress for a long time. Prior to the English rule,

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[1] EC [2004] Part 12, Case 9 [CAEW], available at www.ipsofactoJ.com/international/index.htm.

[2] See Anowar Zahid and Hasani Mohd Ali, *Shari'ah as A Choice of Law in International Islamic Financial Contracts: Shamil Bank of Bahrain Case Revisited*, US-China Law Review, Vol. 10:27, 2013, page 33, available at http://heinonline.org, (last visited December 14, 2014).

Islamic law was applied in Muslim countries in the informal courts to give decisions on disputes submitted to courts. Once the English rules Muslim countries, they applied English law which they brought from England instead of the Islamic law. Therefore, the Islamic legal system could not develop in a systematic way as the common law and the civil law system have been developed by refinement and amendment process from time to time.[3]Even today, all the Muslim countries which were ruled by British are applying the English contract law principles in their daily business transactions. This has been the main reason until today, Islamic law of contract is not applied in Muslim countries and for this particular reason the Islamic law of contract cannot be developed to meet the standard of business transactions in the present era.[4]

The research is an important one that contributes to the understanding and awareness of Islamic law of contract particularly in the international trade law and also to refute any baseless claim by western scholars that Shari'ah law as an essentially defective and backward legal system. For example in the case of *Beximco Pharmaceuticals v Shamil Bank of Bahrain* where the English Court of Appeal took an extreme position in favour of English law despite an Islamic contract agreed by the disputing parties. It was a disrespect shown to the principles of autonomy, and the rules and principles of Shari'ah law, which is one of the old and leading legal systems of the world.[5]

It is hoped that this research would encourage parties to international trade contract both Muslim and non-Muslim to opt for Islamic law of contract in their sale contract since it does also promotes the same universal principles such as *pacta sunt servanda* and good faith similarly to CISG. It is of irony that some Muslim traders still prefer the conventional law of contract as compare to Shari'ah law despite knowing that apart from being a legal duty, it is also coupled with religious duty.

The researcher hope that this article perhaps would provide a platform for Muslim scholars to push for a reform in regard to accommodating Muslim countries in international trade by making CISG compatible to Islamic law principles. Hence, Muslim countries will be able to use CISG with utmost confidence in international trade and without fear in the event of dispute settlement. It must be noted that the task is not impossible since Islamic Finance transactions has successfully gained recognition in the international banking system.

Finally, the researcher is also hopeful that this research would create a better understanding of Shari'ah law as an Islamic lex mercatoria with its own principles of business and commerce and not just a merchant law of custom and best practice which was enforced

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[3] See Dr. Md. Abdul Jalil & & Muhammad Khalilur Rahman, *Islamic Law of Contract is Getting Momentum*, International Journal of Business and Social Science, Vol 1,No . 2, 2010, page 180, available at http://www.ijbssnet.com/journals/Vol. 1 No. 2 November 2010/14.pdf?update/journals/Vol. 1 No. 2 November 2010/14.pdf, (last visited October 25, 2014).

[4] See Dr. Md. Abdul Jalil & & Muhammad Khalilur Rahman, *Islamic Law of Contract is Getting Momentum*, International Journal of Business and Social Science, Vol 1,No . 2, 2010, page 180, available at http://www.ijbssnet.com/journals/Vol. 1 No. 2 November 2010/14.pdf?update/journals/Vol. 1 No. 2 November 2010/14.pdf, (last visited October 25, 2014).

[5] See Anowar Zahid and Hasani Mohd Ali, *Shari'ah as A Choice of Law in International Islamic Financial Contracts: Shamil Bank of Bahrain Case Revisited*, US-China Law Review, Vol. 10:27, 2013, page 34, available at http://heinonline.org, (last visited December 14, 2014).

through a system of merchant courts which avoid legal technicalities and deciding cases based on equity and conscience (ext aequo et bono).

2. The Vienna Convention on Contracts for the International Sale of Goods (CISG)

(a) CISG as an International Sale Law

CISG is an international legislation that harmonizes the laws of various countries relating to international sale of good. The United Nations Commission on International Trade Law ("UNCITRAL") is the organizational body that prepared the text of CISG prior it being duly adopted by 62 countries at the Vienna Convention in April 1980. CISG became effective on January 1, 1988. As of 26 September 2014, UNCITRAL reports that 83 States have adopted the CISG.[6] These States are known as the "Contracting States" to the Conventions.

The CISG serves two important purposes, which may be gleaned from the Preamble of the text.[7] The first of these is to ensure legal certainty.[8] The second goal of CISG is to promote international trade by removing legal barriers in transactions in transactions between international traders.[9] The CISG achieves this goal because it is a uniform body of law, irrespective of nationality and legal tradition, and does not favor any party to the transaction that its governs. It is interesting to note that CISG is unique in that it combines both common law and civil law elements.[10] CISG does not apply to purchases for personal, family or household use; goods to be manufactured where materials necessary for such manufacture are a substantial part; most matters related to the "validity of the contract"; nor does it apply to claims for personal injury or death.[11]

The widespread acceptance of the CISG might suggest that the CISG is frequently used in practice. In reference to Article 1(1)(a), the CISG is applicable if seller and buyer have their places of business in Contracting States. Thus, export-import transactions as between the 82 Contracting States that have the CISG in place seems to be governed by the Convention. However, Contracting States may choose to "contract-out" as the CISG as permitted under Article 6 of the Convention. But despite this permission, it is almost impossible to "contract out" of the Convention because an effective "contract-out" requires highly specific language that is often unmanageable to satisfy.[12]

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[6] See CISG: Table of Contracting States, available at http://www.cisg.law.pace.edu/cisg/countries/cntries.html, (last visited 30 October, 2014).

[7] See Kina Grbic, *Putting The CISG Where It Belongs: In the Uniform Commercial Code*, 29 Touro Law Review 173, 2012-2013, page 177, available at http://heinonline.org, (last visited October 30, 2014).

[8] Ibid

[9] Ibid

[10] Ibid. page 178.

[11] See Fatimah Akaddaf, *Application of the United Nations Conventions on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles*, Pace International Law Review (2001), page 3 available at http://www.cisg.law.pace.edu/cisg/biblio/akaddaf.html#183, (last visited October 30, 2014).

[12] See Kina Grbic, *Putting The CISG Where It Belongs: In the Uniform Commercial Code*, 29 Touro Law Review 173, 2012-2013, page 179, available at http://heinonline.org, (last visited October 30, 2014).

Pursuant to Article 1(1)(b), of the CISG, where one party belongs to the ratifying State, the parties may choose the former's law unless the State has made any reservation with respect to the said Article under Article 95.[13] For example US ratified the CISG; however it made a reservation to the treaty by virtue of Article 95 of CISG which eliminates Article 1.1 (b) from the American text.

With reference to Article 1(1)(b), of the CISG, the convention is also applicable in court litigation in Contracting States if the local conflict rule point to the application of the law of a Contracting State.[14] In other word, in the event the parties have made no choice, the chosen forum (court or tribunal) may apply the CISG by the "Rule of private international law" (Article 1(1)(b)). This indirect application of CISG further extends the Convention's scope.[15] Often the local conflict rule is the law of the seller's country. For example, in the EU states, the applicable law for a sale of contract is that of the seller's place of habitual residence.[16] Hence, in Contracting States, export transactions to non-Contracting States will frequently be governed by the CISG whereas import transactions from non-Contracting States will not.

Local conflict rules in non-contracting States may also lead to the application of the law of the Contracting States (for instance for import transactions from the Contracting State if the conflict rule is the law of the seller's country).[17] Although courts in Non-Contracting states are in those cases under no treaty obligation to apply the CISG, they may well be willing to apply the CISG as the law on international sales of the applicable foreign law.[18] Non-Contracting States may be able to choose CISG under the principles of autonomy.

(i) Formation of Contract under CISG

Criteria of an Offer

The CISG adopted the traditional theory of using offer and acceptance as the elements that are necessary for the formation of the contract. The CISG requires evidence of offer and acceptance before there could be said to exist a contract. Articles 14 to 17 and 24 of CISG are provisions that are related to subject of offer.

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[13] Lecture 4-Contract of International Sales of Goods –III: Choice of Law, Power Point presentation by course lecturer Dr. Md. Anowar Zahid for Advanced International Trade Law course for LLM program at National University of Malaysia. The lecture was delivered on October 9, 2014.

[14]See Filip De Ly, *The Relevance of Vienna Convention for International Sales Contracts-Should We Stop Contracting it Out*, Business Law International 241, 2003, page 241, available at http://heinonline.org, (last visited October 30, 2014).

[15] Ibid. page 242.

[16]Lecture 4-Contract of International Sales of Goods –III: Choice of Law, PowerPoint presentation by course lecturer Dr. Md. Anowar Zahid for Advanced International Trade Law course for LLM program at National University of Malaysia. The lecture was delivered on October 9, 2014.

[17]See Filip De Ly, *The Relevance of Vienna Convention for International Sales Contracts-Should We Stop Contracting it Out*, Business Law International 241, 2003, page 241, available at http://heinonline.org, (last visited October 30, 2014).

[18] Ibid

In general, Article 14 of CISG provides for the contractually significant offer. Article 14(1) of CISG states that:[19]

"A proposal for concluding a contract addressed to one or more specific persons constitute an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in the case of acceptance."

Overall, there are three significant criteria of offer derived from the article 14 of CISG namely the following:[20]

i) Offer to be made at least to one specific person;
ii) Offeror must indicate to be bound if offer is followed by an acceptance; and
iii) Offer to the world at large is an invitation to treat.

However, there are several limitations in Article 14(1) of CISG which need to be addressed as the following:

i) When is a proposal "sufficiently definite"?
This is a problem when a proposal where the price for the goods has yet to be agreed.[21] However, the 2nd limb of the Article seems to provide the solution to this problem by stating that a proposal is sufficiently definite if it indicates the goods and expressly or implicitly or make provision for determining the quantity and the price.[22] In contrary, Article 55 of CISG only applies if the contract has been validly concluded without determining the price.[23] This situation is seen as the inconsistency between the two provisions of CISG. Despite scholars approaches that it is easy to understand why both provisions exist together but Courts in respective jurisdictions differ in their decisions with regard to interpretation of both provisions.

ii) The Article states that an offer should be "addressed to one or more specific persons". There is no problem when the proposal addresses to a definite person or persons there but a problem arises when the proposal is directed towards an unspecific group of persons i.e. a public offer. Proposals made to an unspecific group of persons, such through a catalogue or a webpage would not constitute an offer, only invitation to treat offers via Article 14(2).[24] The vague situation arises where the offeror makes it plain that he does not intend to make an offer to the public, interestingly Article 14(2) allows that to be given proper effect to.[25]

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[19]J.C.T. Chuah, *Law of International Trade: Cross-Border Commercial Transactions*, Thompson Reuters (Professional) UK Limited, 4th Ed, 2009, p 154.

[20]Lecture 4-Contract of International Sales of Goods –III: Choice of Law, PowerPoint presentation by lecturer Dr. Md. Anowar Zahid for Advanced International Trade Law course for LLM program at National University of Malaysia. The lecture was delivered on October 9, 2014.

[21]J.C.T. Chuah, *Law of International Trade: Cross-Border Commercial Transactions*, Thompson Reuters (Professional) UK Limited, 4th Ed, 2009, p 154.

[22] Ibid

[23]See Belkis Vural, *Formation of Contract According to CISG*, Ankara Bar Review, 2013, available at http://heinonline.org, p 133, (last visited November 7, 2014)

[24]J.C.T. Chuah, *Law of International Trade: Cross-Border Commercial Transactions*, Thompson Reuters (Professional) UK Limited, 4th Ed, 2009, p 155.

[25] Ibid

Despite the above limitations, overall, it can be said that Article 14(1) of CISG is more through in defining the key conditions for a sale of goods contract. This is due to the fact that the CISG is the uniform code for international commercial sale of goods with its scope limited to international sales contracts.[26]It can also be concluded from Article 14(1) CISG, that the fundamental elements of an offer are the price, the quantity and the goods.[27]

Acceptance of an Offer

Articles 18 to 22 of CISG are the provisions that are related to subject of acceptance.

By virtue of Article 18(1) of CISG, in order for the offeree to accept the offer, the offeree needs to indicate his assent either with a statement or other conduct.[28] This Article is explicit in the notion of 'assent'. This parallels to common law concept.[29] Article 18(1) also states that mere silence will not constitute an acceptance. Thus, a party cannot deem another to be party to a contract if the latter does not respond to the first party's offer by a fixed term.[30] Article 18 of CISG, sets a rule that actually protects the offeree from the traps of the offeror, for example, if no reaction is enough to amount the acceptance in itself, through sending goods and sending a proposal that stipulates in cases of not sending unsolicited goods will constitute an acceptance, would mostly lead to unwelcome situations to the offeree.[31]

Pursuant to Article 18(2) of CISG, acceptance becomes effective when it is received by the offeror. This is contrasting to the common law rule that acceptance become effective when it is mailed. In other word, this Article discards the 'mailbox rule'. In addition to this it is effective as long as it does so within the time he has fixed or, if no time is fixed, within a reasonable time.[32] It is worth to mention that the Convention allows making oral offer and acceptance; however it should be done immediately.

On the other hand, Article 18(3) of CISG has different approach from the receipt theory. The acceptance is effective at the moment the act is performed.[33] Hence, such acts are effective even without notice to the offeror. However, this act must be performed within the period of the

[26] See Cvetkovic Predrag, *Characteristics of an Offer in CISG* and PECL, Pace International Law Review, Vol.14, Issue 1, 2002, page 123, available at http://heinonline.org, (last visited October 30, 2014).
[27] Ibid. page 129.
[28]Lecture 4-Contract of International Sales of Goods –III: Choice of Law, PowerPoint presentation by course lecturer Dr. Md. Anowar Zahid for Advanced International Trade Law course for LLM program at National University of Malaysia. The lecture was delivered on October 9, 2014.
[29]Gabriel Moens and Peter Gillies, *International Trade and Busineness:Law Policy and Ethics*, Routledge Cavendish, 2nd Ed. 2006, page 16.
[30] Ibid. page 15.
[31]See Belkis Vural, *Formation of Contract According to CISG*, Ankara Bar Review, 2013, available at http://heinonline.org, p 139, (last visited November 10, 2014).
[32] J.C.T. Chuah, *Law of International Trade: Cross-Border Commercial Transactions*, Thompson Reuters (Professional) UK Limited, 4th Ed, 2009, p 155.
[33]See Dr A F M Maniruzzaman, *Formation of International Sales Contracts: a Comparative Perspective*, International Business Lawyer, 2001, page 488, available at http://heinonline.org, (last visited November 14, 2014).

time laid down by Article 18(2). The waiver of the need for communicating acceptance can be done in the offer, or be the result of practices established between the parties, or of usage.[34]

Time of Conclusion of Contract

Article 23 of CISG deals with time of conclusion of contract and is based on the rules of offer and acceptance. However, rarely it is necessary to know of the time of conclusion, such as to know time of passing of risk involved in transit sale (Article 68 of CISG), which is the time of conclusion of contract.[35]

The 'receipt rule' described throughout Part II of CISG (Formation of the Contract) is mentioned in Article 24 of CISG. The concept of 'reaches' as applied to communications is defined in Article 24 includes:

i) oral communication reaches the addressee immediately;
ii) other means of communications when they reach the address of the addressee; and
iii) electronic communication reaches the sphere

Form Requirement

Article 11 of CISG said that a contract of sale need not be concluded in or evidenced by writing and not subject to any other requirement as to form. Therefore, it can be submitted that formalities of contract (offer, acceptance etc.) and also contract itself need not be in writing.[36] Some domestic laws require contract to be in writing however Article 4 of CISG stated that domestic law does not apply to CISG since the Convention governs only the formation of contract of sale not the validity of the contract. Declarations directed to the formation of contract are not attracted by State law of validity, but other declarations necessary for valid contracts, such as consent of the principal, representative of the minor, etc. are affected by validity provisions.[37]Oral contract cannot be declared invalid under State law that requires contract in writing.[38] Yet, administrative or criminal sanctions related to written contract would still be enforceable against a party in breach.[39]It is worthy to note that the provisions that allow conclusion, modification or termination of contract without writing do not apply where one party belongs to a State that has made a reservation under Article 96 of CISG.

3. An Overview of Islamic Law of Contract

[34]Gabriel Moens and Peter Gillies, *International Trade and Busineness:Law Policy and Ethics*, Routledge Cavendish, 2nd Ed. 2006, page 16.
[35]Lecture 4-Contract of International Sales of Goods –III: Choice of Law, PowerPoint presentation by course lecturer Dr. Md. Anowar Zahid for Advanced International Trade Law course for LLM program at the National University of Malaysia. The lecture was delivered on October 9, 2014.
[36] Ibid.
[37] Lecture 4-Contract of International Sales of Goods –III: Choice of Law, PowerPoint presentation by course lecturer Dr. Md. Anowar Zahid for Advanced International Trade Law course for LLM program at the National University of Malaysia. The lecture was delivered on October 9, 2014.
[38] Ibid.
[39] Ibid.

(a) In General

It is interesting to note that the word Shari'ah appears in the Quran first to mean "path" or "way".[40] In Islam, law and religion are inseparable; both are considered the expressions of God's will and justice.[41] The Shari'ah deals with Moslem life according to set of revelations transmitted to the Prophet Mohammed by Allah (God).[42] Islamic law, with its traditions, provides the believers with the right Shari'ah ("path"); the Shari'ah governs relationship between man and God. It is therefore a divine made and transmitted by Quran scholars or "Ulama" or "Fuquha".[43] Shari'ah law has four principal sources. The Quran and the Sunnah which are the primary sources whereas Ijma (Consensus) and Qiyas (reasoning by analogy) are the secondary sources. On the other hand, there are also other less importance sources such as istihsan (equity or juristic preference), istishab (presumption of continuity i.e. juristic reasoning), istislah or maslaha (opinion based on public interest), darura (necessity), and urf (custom). All these sources are tools and principles that can be used to arrive at the correct interpretation or implementation of the primary sources.[44]

Shari'ah law in the context of international trade is by nature transnational. In reference to trade and commercial transactions, Shari'ah law consist of general principles and detailed rules of specific contracts (called nominate contracts), such as contract of sale, contract of loan, contract of gifts. These (principles and rules) may be called Islamic *Lex Mercatoria*, "which apply automatically to the international trade contracts between Muslims parties, and can apply where one party Muslim if the other party agrees."[45]

Lex Mercatoria is defined as mercantile law which were originally developed as a body of rules and principles among the European traders to regulate their dealings. It functioned as international law of commerce and evolved as a system of custom and best practice, which was enforced through system of merchant courts along the main trade routes. It emphasised contractual freedom, alienability of property, while shunning legal technicalities and deciding cases ex aequoet bono.[46] Being part of *Lex Mercatoria*, to have a separate Islamic law of trade

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[40] See Fatimah Akaddaf, *Application of the United Nations Conventions on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles*, Pace International Law Review (2001), page 7, available at http://www.cisg.law.pace.edu/cisg/biblio/akaddaf.html#183

[41] Ibid

[42] Ibid

[43] Ibid 8.

[44] See Malkawi Bashar H, *Shari'ah Board in the Governance Structure of Islamic Financial Institutions*, American Journal of Comparative Law, Vol.61, Issue 3 (2013), page 542, available at http://heinonline.org.www.ezplib.ukm.my/HOL/Page?handle=hein.journals/amcomp61&div=23&collection=journals&set_as_cursor=6&men_tab=srchresults&terms=maysir|gambling&type=matchall#558, (last visited October 23, 2014).

[45] See Anowar Zahid & Hasani Mohd Ali, *Shari'ah As Choice of Law In International Islamic Financial Contracts: Shamil Bank of Bahrain Revisited*, US-China Law Review, Vol 10:27, 2013, page 31, available at http://heinonline.org, (last visited December 14, 2014).

[46] See Halimah Yaacob, *Towards Our Own Lex Mercatoria: A Need for Legal Consensus in Islamic Finance,* Pertanika Journal of Social Sciences and Huminities - J. Soc. Sci. & Hum. 22 (S): 257 - 270 (2014), page 259, available at http://www.pertanika.upm.edu.my/ (last visted October 23, 2014)

and finance known as Islamic Lex Mercatoria is vital to ensure certainty in international trade and commerce and consequently recognize the sanctity of Shari'ah contract.

The most important principle of the general principles in the Islamic *Lex Mercatoria* in international commercial transactions is the principle of pacta sunt servanda. Pacta sunt servanda means promises must be kept.[47]It is an expression signifying that the agreements and the stipulations of the parties to a contract must be observed.[48] This is based on the Quran orders that obligation and contracts be fulfilled as can be seen from the following verse: *"0 ye who believe! Fulfil all obligations".*[49]In commenting on this verse, Abdul Yusuf Ali[50] explains that obligations are of three categories and the one that are relevant is the mutual obligations which those occur in our material life. Among others is making a promise or entering into commercial contracts such as sale.

The second important principle is that a valid contract takes place through free consent.[51]The Quran says to the effect:

> *"O you who believe! Eat not up your property among yourselves in vanity, but let there be among you trade by mutual consent".*[52]

This principle is related to the first principle since the obligation to obey a contract arises when the contract is a valid one. However, parties to the contract have no obligation to honour the contract if the consent is being obtained by force, fraud or misrepresentation or some other illegal means which renders the contract invalid in the event arise. Fraud is clearly forbid in transactions as Quran says:

> *"Woe to those that deal in fraud. Those who, when they have to receive by measure from men exact full measure. But when they have to give by measure or weight to men, give less than due."*[53]

The third principle is that the parties are free to enter into a contract so long it is permissible in terms of the subject matters and other conditions, and it is not tainted with any prohibitions under Shari'ah.[54] For instance, there are three conditions for subject of contract to be correct as the following:[55]

a) The subject matter of a contract should in principle be something legal. It is not legal according to Shari'ah rules, then the contract is invalid. For example, a Muslim

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[47] Ibid
[48] Ibid
[49] Surah al-Ma'idah, 5:1, translation of Quran obtained from the book written by Dr. Razali Hj Nawawi, *Islamic Law on Commercial Transactions*, CERT Publications Sdn Bhd, 2009, page 51.
[50] Ibid. The Holy Quran Texts. Translations and Commentary.
[51] See Anowar Zahid & Hasani Mohd Ali, *Shari'ah As Choice of Law In International Islamic Financial Contracts: Shamil Bank of Bahrain Revisited*, US-China Law Review, Vol 10:27, 2013, page 32, available at http://heinonline.org, (last visited December 14, 2014).
[52] Surah al-Nisa' 4:29, translation of Quran obtained from the book written by Dr. Razali Hj Nawawi, *Islamic Law On Commercial Transactions*, CERT Publications Sdn Bhd, 2009, page 59.
[53] Surah al-Mutaffifin (83): 1-3), translation of Quran obtained from the book written by Dr. Mohd. Ma'sum Billah, *Modern Financial Transactions Under Shari'ah*, Ilmiah Publishers Sdn Bhd, 2003, page 120.
[54] See Anowar Zahid & Hasani Mohd Ali, *Shari'ah As Choice of Law In International Islamic Financial Contracts: Shamil Bank of Bahrain Revisited*, US-China Law Review, Vol 10:27, 2013, page 32, available at http://heinonline.org, (last visited December 14, 2014).
[55] Prof. Dr Ala' Eddin Kharofa, Transactions in Islamic Law, A.S. Noordeen Publications, 1997 page 19-21.

cannot enter into a contract whose subject or place of reference is wine (khamr) as consuming wine is illegal in Islam. The Holy Prophet (saw) said:
"Surely Allah (swt) and His messenger have prohibited the sale of wine, the flesh of dead animals, swine and idols."[56]

b) The subject matter of a contract has to be specified in a way to prevent ambiguity. Dispute may arise if this condition is not met.
c) For a contract to be correct, the subject of contract has to be existent. If it not actually existent, this may involve deceit or ignorance leading to conflict and dispute.

(i) Elements Prohibited by Shari'ah in a Contract

As mentioned earlier, a contract is permissible unless it is prohibited by Shari'ah. If a contract involves any of these three things namely riba (usury), gharar (uncertainty) and maysir (gambling) which are fundamental prohibited elements under Shari'ah, and then the contract is invalid.

The prohibition of riba is based on evidences from Quran, Sunnah and consensus. In the Shari'ah, riba is technically refers to the "premium" that must be paid by the borrower to the lender along with the principal amount as a condition for the loan or for an extension in its maturity.[57]Riba is clearly prohibited in Shari'ah based on several verses in Quran among others states that: "*God has allowed trade and forbidden riba*"[58] And Prophet himself warns his subjects about riba via several Hadith. Jabir ibn Abdullah reported that: *The Prophet (saw) cursed the receiver and the payer of interest, the one who records it (the contract), and the two witnesses to the transactions and said, "They all alike (in guilt)."* Shari'ah wants to eliminate not merely the exploitation that is intrinsic in the institution of interest, but also that which is inherent in all form of unjust exchange in all sorts of business transactions.[59] Another view why riba is so prohibited because it creates economic injustice in society:[60] While the earning of profit is uncertain, the payment of interest is predetermined and certain. The profit may or may not be realised. Hence, there can be no doubt that the payment of something definite in return for something uncertain inflicts a wrong (haram).[61]

The next prohibition is Gharar which is the case where the subject matter of the contract is uncertain. The Prophet (saw) prohibited the element of uncertainty in transaction as enshrined

[56]Translation of Hadith obtained from the book written by Dr. Mohd. Ma'sum Billah, *Modern Financial Transactions Under Shari'ah*, Ilmiah Publishers Sdn Bhd, 2003, page 121.
[57]See M.Umer Chapra, *The Nature of Riba in Islam*, The Journal of Islamic Economics and Finance (Bangladesh), Vol 2, No. 1, (2006), page 2 available at http://www.isdb.org/irj/go/km/docs/documents/IDBDevelopments/Internet/English/IRTI/CM/downloads/Distance_Learning_Files/B4.4b%20The%20Nature%20of%20Riba%20in%20Islam.pdf (last visited October, 24 2014).
[58] Al Quran, Surah al-Baqarah (2:275)
[59] See Marjan Muhammad, Muhd Rosydi Muhammad and Khalil Mohammed Khalil, Towards Shari'ah Compliant E-Commerce Transactions: A review of Amazon.com, Middle-East Journal of Scientific Research 15(9): 1229-1236, 2013, page 1230, available at http://www.idosi.org/mejsr/mejsr15(9)13/5.pdf, (last visited on October 25, 2014).
[60]See Anowar Zahid & Hasani Mohd Ali, *Shari'ah As Choice of Law In International Islamic Financial Contracts: Shamil Bank of Bahrain Revisited*, US-China Law Review, Vol 10:27, 2013, page 32, available at http://heinonline.org, (last visited December 14, 2014).
[61] Ibid.

in the following Hadith:[62] *"The Holy Prophet prohibited any dealing that involves uncertainty."* (al-Muwatta). Gharar could be attached to the object or the price in contract of exchange.[63] The rationale of Gharar is to ensure full consent and satisfaction of the parties in the contract.[64] Hence, full consent can only be achieved through certainty, full knowledge, full disclosure and transparency and without full consent a contract may not be valid. An example of Gharar, in a contract of marine insurance, the promise by the insurance company to pay for the loss or damage caused by maritime peril, such as tsunami, is not define to be performed as the happening of tsunami is uncertain.[65]It is interesting to note that Islamic jurists do permit some Gharar transactions based on maslahah[66] and some of them which stipulate conditions such as give both or one party an option, so as to reduce the causes of dispute to an acceptable level and to make the Gharar involved a light Gharar.[67] In other words, Gharar is classified into excessive and minor; where the latter could be tolerated because it cannot be totally avoided in any business transaction.

The third prohibition is maysir (gambling). Maysir refers to acquisition of wealth by chance, whether or not it deprives the other's right.[68] Allah declared the prohibition of maysir when He says, "O you believe, indeed intoxicants, gambling, dedication of stone altars (to anybody other than Allah), and the divination by arrows are but the abomination of the Satan's work, so avoid them in order to attain success."[69] The main objective for the prohibition of gambling in Islam is that money should be earned by way of work and effort and not by mere

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[62] Dr Mohd. Ma'sum Billah, *Modern Financial Transaction Under Shari'ah*, Ilmiah Publishers Sdn Bhd, 2003, page 15.

[63] See Marjan Muhammad, Muhd Rosydi Muhammad and Khalil Mohammed Khalil, *Towards Shari'ah Compliant E-Commerce Transactions: A review of Amazon.com*, Middle-East Journal of Scientific Research 15(9): 1229-1236, 2013, page 1230, available at http://www.idosi.org/mejsr/mejsr15(9)13/5.pdf, (last visited on October 25, 2014).

[64] See Dr Mohammed Alwosabi, *The Prohibition of Gharar*, available at http://staff.uob.edu.bh/files/620922311_files/Prohibition-of-Gharar.pdf, page 1 (last visited on October 25, 2014).

[65] See Anowar Zahid & Hasani Mohd Ali, *Shari'ah As Choice of Law In International Islamic Financial Contracts: Shamil Bank of Bahrain Revisited*, US-China Law Review, Vol 10:27, 2013, page 33, available at http://heinonline.org, (last visited December 14, 2014).

[66] Maslahah is defined by Imam Al-Ghazali as the considerations which secures a benefit or prevent harm, but is in the meantime, harmonious with the aim and objective of the Sharia. These objectives consist of protecting the five essential values, namely religion, life, intellect, lineage and property. See Elvan Saputra, Faridl Noor Hilal,Muhammad Febriansyah, Issa Qaed, Muhammad Majdy Amiruddin, Muhammad Ridhwan abdul Aziz, *Maslahah as an Islamic Source and its Application in Financial Transactions*, Journal of Research in Humanities and Social Science Volume 2 ~ Issue 5 (2014) pp: 66-71, page 67, available at http://www.questjournals.org/jrhss/papers/vol2-issue5/G256671.pdf, (last visited October 25, 2014).

[67] See Abdul-Rahim Al-Shaati, *The Permissible Gharar (Risk) in Classical Islamic Jurisprudence*, J.KAU: Islamic Econ., Vol. 16, No. 2, pp. 3-19 (1424 A.H / 2003, page 15, available at http://www.kau.edu.sa/Files/121/Files/68212_162-Al-Saati-5.pdf, (last visited October 25, 2014).

[68] See Elvan Saputra, Faridl Noor Hilal,Muhammad Febriansyah, Issa Qaed, Muhammad Majdy Amiruddin, Muhammad Ridhwan abdul Aziz, *Maslahah as an Islamic Source and its Application in Financial Transactions*, Journal of Research in Humanities and Social Science Volume 2 ~ Issue 5 (2014) pp: 66-71, page 67, available at http://www.questjournals.org/jrhss/papers/vol2-issue5/G256671.pdf, (last visited October 25, 2014).

[69] See Anowar Zahid & Hasani Mohd Ali, *Shari'ah As Choice of Law In International Islamic Financial Contracts: Shamil Bank of Bahrain Revisited*, US-China Law Review, Vol 10:27, 2013, page 33, available at http://heinonline.org, (last visited December 14, 2014).

chance.[70] In reference to the same marine insurance example in gharar, earning premium over the chance of uncertain occurrence of tsunami is a gambling.

(ii) Formation of Contract

Offer (Ijab)

In the Majallah, Ijab has been defined as "a declaration that is made first with a view to creating an obligation.[71] In Islamic law, ijab signifies the willingness of a party to do something positive.[72] In other word, an offer is when someone wants to make a contract; he has to make a proposal to the other person to obtain his consent to the act or abstinence.[73]

Interestingly, there are three kinds of offer in the Islamic Law of contracts namely:[74]

i) Verbal offer (kalam)
ii) Offer by conduct ('amal)
iii) Offer in writing (kitabah)

Invitation to Treat (Al-Muasah)

We can find two opinions with regard to invitation to treat in Islamic contract law:[75]

i) Majority scholars say that advertisement, display of goods, auction sale, tenders etc. are offers in Islamic law.
ii) Others say they are not offers but are mere invitation to treat in Islamic law. In other word it is merely an invitation to make an offer to buy something.

The scholars who say they are not offers, in reality argue in line with the English common law principles that labelling them as offers will cause hardship and harassment to the seller of goods.[76]According to many Islamic scholars English law principles are generally applicable and enforceable in Islamic legal system as long as they conform to shari'ah law.[77]Hence if this opinion is accepted, then indeed we can say that an English law principle of 'invitation to

[70] See Elvan Saputra, Faridl Noor Hilal,Muhammad Febriansyah, Issa Qaed, Muhammad Majdy Amiruddin, Muhammad Ridhwan abdul Aziz, *Maslahah as an Islamic Source and its Application in Financial Transactions*, Journal of Research in Humanities and Social Science Volume 2 ~ Issue 5 (2014) pp: 66-71, page 67, available at http://www.questjournals.org/jrhss/papers/vol2-issue5/G256671.pdf, (last visited October 25, 2014).

[71] Ibid; page 26.
[72] Ibid; page 26.
[73] See Dr. Md. Abdul Jalil & & Muhammad Khalilur Rahman, *Islamic Law of Contract is Getting Momentum*, International Journal of Business and Social Science, Vol 1,No . 2, 2010, page 181, available at http://www.ijbssnet.com/journals/Vol. 1 No. 2 November 2010/14.pdf?update/journals/Vol. 1 No. 2 November 2010/14.pdf, (last visited October 25, 2014).
[74] Ibid
[75] See Dr. Md. Abdul Jalil, *Adoption of the Principle of 'Invitation to Treat' in Islamic Law of Contracts*, Jurnal Undang-Undang & Masyarakat 16 (JUUM) 79-92, 2012, page 88, available at http://www.ukm.my/juum/JUUM%202012/Adoption%20of%20the%20Principle%20of%20%E2%80%98Invitation%20to%20Treat%E2%80%99%20in%20Islamic%20Law%20of%20Contracts.pdf, (last visited October 26, 2014).
[76] Ibid
[77] Ibid

treat' is not contradictory with shari'ah principles and therefore, this principle is applicable and enforceable in shari'ah courts.[78]

Acceptance (Qabul)

An acceptance under Islamic law of contract is known as qabul. A legally binding agreement is made between the parties when there is an effective acceptance. Similar to the offer, an acceptance can be verbal, by conduct or in writing. For a valid contract, an acceptance must either be in the past or present tense and in no situation can acceptance be justified if it is expressed in the future tense.[79]

There must be a consideration in a contract under the Islamic law of contract. Therefore, the agreement will not be valid as it is not enforceable by law if there is no consideration. However, a consideration needs not be adequate as an inadequate consideration is enough to validate a contract as long as the parties give consent freely to the agreement upon which they are satisfied.[80]

In order to effect a contract under the Islamic law, issuance of the offer and acceptance must be in the same session (*majlis*). In other words, when the offer is made, it must be accepted in the same meeting. However, the offeree is allowed to think over the offer for some time.[81] This argument is based on the Prophet saying that "The contracting parties have the right of option until they separate".[82] Despite divided opinion on the interpretation on the Prophet saying of the phrase "until they separate", Islamic scholars are unanimous that a contract must be completed by offer and acceptance in the same meeting unless one party reserves for itself the right to think over to ratify or to revoke the contract later.[83]

Communication of Offer and Acceptance (Ittisal)

When the parties are contracting, the offer could be brought to the knowledge of the offeree either orally, through a messenger or by letter.[84]Majority of the Muslim jurists viewed that the communication of acceptance is complete as soon as it come to the knowledge of the offeree.[85] The jurists are also of the opinion that when an offer is made to a person who is not

[78] Ibid
[79] Dr. Mohd. Ma'sum Billah, *Modern Financial Transactions Under Shari'ah,* Ilmiah Publishers Sdn Bhd, page 65.
[80] See Dr. Md. Abdul Jalil & & Muhammad Khalilur Rahman, *Islamic Law of Contract is Getting Momentum*, International Journal of Business and Social Science, Vol 1,No . 2, 2010, page 181, available at http://www.ijbssnet.com/journals/Vol._1_No._2_November_2010/14.pdf?update/journals/Vol._1_No._2_November_2010/14.pdf, (last visited October 25, 2014).
[81] Dr M. Tahir Mansuri, *Islamic Law of Contracts and Business Transactions*, Adam Publishers & Distributors, 2006, page 29.
[82] Ibid
[83] Ibid
[84] Dr. Razali Hj Nawawi, *Islamic Law on Commercial Transactions*, CERT Publications Sdn Bhd, 2009, page 71.
[85] See Dr. Md. Abdul Jalil & & Muhammad Khalilur Rahman, *Islamic Law of Contract is Getting Momentum*, International Journal of Business and Social Science, Vol 1,No . 2, 2010, page 183, available at http://www.ijbssnet.com/journals/Vol._1_No._2_November_2010/14.pdf?update/journals/Vol._1_No._2_November_2010/14.pdf, (last visited October 25, 2014).

present nears the offeror, the majlis (meeting) will continue until the offeree receives the offer.[86] It is interesting to note that when a contract is made *inter absente*, the offer and the acceptance can be communicated by using modern systems of communication, such as telex, fax, e-mail etc., the offer and the acceptance would be considered valid.[87]

Free Consent

Consent or Rida to the contract is an example where the jurists have regulated detailed causes and ground rule on broad Quranic sanction:[88]

> *' O You who believe, do not eat up your property among yourselves in vanity except in trade and traffic among yourselves with goodwill." (4:29)*

The above sanction clearly provides that a contract can only take place by the free consent of the parties. Under the Islamic contract law, a free consent of parties is very important in the discharge and execution of the contract. The proof of free consent between the offeror and the offeree is very significant and highly required as the essence of the Islamic contract law (aqd).[89]

Intention to Create Legal Relation

According to the Islamic jurists, intention with the reference to an act is the condition of the mind which directly and immediately sets the nerves and emotions, resulting in the act.[90] An intention to create a legal relationship is significant in Islamic contract law since lacking of it may caused the agreement not being able to be enforceable by law. Business contracts are usually considered as having the intention to create a legal relationship in one way or another.[91]

Formality

The Islamic law of contract emphasizes on writing down the terms of a contract which is to avoid a dispute between the parties as one or more parties may, after long period of time, forget what they had actually decided or agreed upon.[92] In fact, Quran (Al-baqarah 2 verse 282) clearly mentioned that people are requires to write down a loan contract and the verse also requires witnesses to testify the contract when any dispute arises out of this contract. A contract

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[86] Ibid

[87] Ibid

[88] Dr. Mohd. Ma'sum Billah, *Modern Financial Transactions Under Shari'ah,* Ilmiah Publishers Sdn Bhd, page 65.

[89] See Dr. Md. Abdul Jalil & & Muhammad Khalilur Rahman, *Islamic Law of Contract is Getting Momentum*, International Journal of Business and Social Science, Vol 1,No . 2, 2010, page 183, available at http://www.ijbssnet.com/journals/Vol._1_No._2_November_2010/14.pdf?update/journals/Vol._1_No._2_November_2010/14.pdf, (last visited October 25, 2014).

[90] Dr. Mohd. Ma'sum Billah, *Modern Financial Transactions Under Shari'ah,* Ilmiah Publishers Sdn Bhd, page 74.

[91] See Dr. Md. Abdul Jalil & & Muhammad Khalilur Rahman, *Islamic Law of Contract is Getting Momentum*, International Journal of Business and Social Science, Vol 1,No . 2, 2010, page 184, available at http://www.ijbssnet.com/journals/Vol._1_No._2_November_2010/14.pdf?update/journals/Vol._1_No._2_November_2010/14.pdf, (last visited October 25, 2014).

[92] See Dr. Md. Abdul Jalil & & Muhammad Khalilur Rahman, *Islamic Law of Contract is Getting Momentum*, International Journal of Business and Social Science, Vol 1,No . 2, 2010, page 188, available at http://www.ijbssnet.com/journals/Vol._1_No._2_November_2010/14.pdf?update/journals/Vol._1_No._2_November_2010/14.pdf, (last visited October 25, 2014).

can be concluded in writing if the writing is clear, readable and understandable. Interestingly, an oral contract is valid under the Islamic law of contract if it can be proven by reliable and capable witnesses. The Islamic law of contract has not specified any formalities for making a contract even though the above Quran verse requires to write down contracts and to have witnesses. In other word no specific format of writing down a contract is mention in the Quran. Hence, it may be argued that people are at a liberty to develop a specific formality of contract based on practice in the society and the nature of the contract as long as it is not against Shari'ah principles.

4. Formation of Contract under CISG and Islamic Law: Comparisons

(a) Introduction

This part will provide a comprehensive review on the rules and principles under Islamic law and CISG on the formation of contract. A comparative study will be made to find out similarities and differences of requirement on the formation of contract between both regimes. The comparative study will be based on the standard or traditional approach to contract law (i.e. offer, acceptance, consideration etc.). Some special features on formation of contract in both regimes will also be discussed in this Chapter.

(b) Requirements of Form

Form is the instrument or the means by which a contract is made.[93] Under Islamic law of contract form consists of ijab (offer) and qabul (acceptance). In general there are three kinds of offer and acceptance in the Islamic law of contract namely by verbal, writing and conduct. Verbal offer and acceptance is good for immediate sale. However, when the sale will take place in the future, it is recommended that the terms of offer and acceptance should be written down concisely so that no disagreement can arise due to ambiguity.[94] An offer and acceptance can also be made by conduct, that is, without any verbal words or gestures being exchanged or expressed.[95] Nevertheless, this form of concluding a contract is subject to several conditions namely the following:[96]

a) conduct must be from both sides from the buyer and seller;
b) there must be an intention; and
c) the item must be of small value.

Perhaps, the best way of making a contract is in writing since the terms of offer and acceptance are in writing and signed by the parties in which case if any dispute arises later, it can

[93]Dr M. Tahir Mansuri, *Islamic Law of Contracts and Business Transactions*, Adam Publishers & Distributors, 2006, page 25.
[94]See Dr. Md. Abdul Jalil & & Muhammad Khalilur Rahman, *Islamic Law of Contract is Getting Momentum*, International Journal of Business and Social Science, Vol 1,No . 2, 2010, page 181, available at http://www.ijbssnet.com/journals/Vol._1_No._2_November_2010/14.pdf?update/journals/Vol._1_No._2_November_2010/14.pdf, (last visited October 25, 2014).
[95] Ibid
[96] Dr M. Tahir Mansuri, *Islamic Law of Contracts and Business Transactions*, Adam Publishers & Distributors, 2006, page 28.

be resolved by referring to the written terms of the agreement. Majority of Muslim jurists also agree that offer and acceptance can occur in other forms such as telegram, telephone, fax and telex or by e-mail.[97] In order to avoid any degree of uncertainty and the offer should have an immediate effect to the offeree, Islamic law requires that the words must be convey in past or present tense, but not in the future tense. A contract concluded in the future is invalid.

CISG on the other hand, by virtue of Article 11, concludes that no requirement of writing is imposed by the Convention, nor does it stipulate any other requirement of form.[98] Hence, formalities of contract (offer, acceptance, modifications, etc) and also the contract itself need not be in writing. A contract can be wholly or partially oral in form.[99] Article 11 also states that the contract "may be proved by any means, including witnesses". Article 13 of CISG states that "writing" includes 'telegram and telex' in the Convention provision but does not mention 'e-mail'.[100] However, in keeping with the spirit of the convention, there is no doubt this modern technology mode of communication to be included under 'writing'. Article 12 taken with Article 96 of CISG provide that some states may consider the requirement that contracts for international sale of goods be in writing as a matter of important public policy even in the context of the relation between the parties.[101] For example, many States, especially those belonging to the 'socialist' legal family, do impose a requirement or requirements of writing and of signature.[102]The provisions in CISG that allow conclusion, modification or termination of contract without writing do not apply where one party belongs to a State that has made a reservation under Article 96.[103]

It may be concluded that Islamic law of contract and Article 11 of CISG is similar in terms of requirement of writing where writing is not a compulsory instrument in the formation of contract. Strong recommendation that a contract be in writing is being laid down in Islamic contract law via verses from Al-Quran, However, Muslim jurists interpreted the verses from Al-Quran as a simple recommendation and considered that written documents are not enjoined as a duty, nor are they forbidden.[104]It may be submitted that it is best for Islamic contract and CISG

[97]See Marjan Muhammad, Muhd Rosydi Muhammad and Khalil Mohammed Khalil, *Towards Shari'ah Compliant E-Commerce Transactions: A review of Amazon.com, Middle-East Journal of Scientific Research* 15(9): 1229-1236, 2013, page 1229, available at http://www.idosi.org/mejsr/mejsr15(9)13/5.pdf, (last visited on October 25, 2014) and Dr. Mohd. Ma'sum Billah, *Modern Financial Transactions Under Shari'ah,* Ilmiah Publishers Sdn Bhd, page 61 & 65.

[98]Gabriel Moens and Peter Gillies, *International Trade and Busineness:Law Policy and Ethics*, Routledge Cavendish, 2nd Ed. 2006, page 13.

[99] Ibid.

[100] See Dr A F M Maniruzzaman, *Formation of International Sales Contracts: a Comparative Perspective*, International Business Lawyer, 2001, page 484, available at http://heinonline.org, (last visited November 14, 2014).

[101] Ibid.

[102]Gabriel Moens and Peter Gillies, *International Trade and Busineness:Law Policy and Ethics*, Routledge Cavendish, 2nd Ed. 2006, page 13.

[103]Lecture 4-Contract of International Sales of Goods –III: Choice of Law, PowerPoint presentation by course lecturer Dr. Md. Anowar Zahid for Advanced International Trade Law course for LLM program at the National University of Malaysia. The lecture was delivered on October 9, 2014.

[104] See Fatimah Akaddaf, *Application of the United Nations Conventions on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles*, Pace International

to opt for writing to avoid ambiguity and dispute arising from the contract. Another common ground between Islamic contract law and Article 11 of CISG is oral agreement seems to be admissible and enforceable to both. In Islamic law of contract, however, oral contract is only good for immediate sale. Both Islamic law of contract and CISG agreed that that offer and acceptance can occur in other forms such as telegram, telephone, fax and telex or by e-mail. Islamic law requires that the words must be conveyed in either past or present tense whereas the issue of tense is not expressly address in CISG. However, in international commercial agreements, when employing the language of performance within a contract, active language should be employed within the contract and such language should be set out in the present tense.[105] In term of requirements of form in general, there seems to be similarities between Islamic law of contract and CISG.

(c) Offer and Acceptance

In Majallah, ijab (offer) has been defined as "a declaration that is made first with the view to creating an obligation, while the subsequent declaration is termed qabul.[106] On the other hand, Article 14(1) of CISG provides that the proposal indicating the intention of the offeror should be bound in the case of acceptance.[107] In other word, the CISG provision includes the offeror's intention to be bound by offer in the case of acceptance. Hence, it may be argued that Islamic law of contract and CISG shares the common ground of willingness to be bound by the offer in the event of acceptance.

As mentioned earlier, the Islamic contract form (sighah) comprises an offer (ijab) from one party and an acceptance (qabul) from the other. Interestingly, Islamic jurists have laid down certain conditions for offer and acceptance. Hence, without the fulfilment of these conditions, the contract cannot be concluded. These conditions are:

a) conformity of the offer and acceptance on the same subject matter; and
b) issuance of the offer and acceptance in the same session (majlis).

The first condition, under the general principles of Islamic contract law, the subject matter must be precisely determined as regards its essence, quantity and value or otherwise the contract will be invalid. In determination in a contract belongs to variety of things such as price, quality or value. It is important to note that subject matter is ascertained by the acquisition of such knowledge that does away with all uncertainty and vagueness likely to lead to dispute

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Law Review (2001), page 12 available at http://www.cisg.law.pace.edu/cisg/biblio/akaddaf.html#183 (last visited October 6, 2014).

[105]See Michala Meiselles, *International Commercial Agreements: An Edinburg Law Guide*, Edinburg University Press Ltd., 2013, page 44, available at https://books.google.com.my/books?id=etI5QMN0EqkC&pg=PA43&lpg=PA43&dq=tense+used+in+CISG&source=bl&ots=A9IQug6_h_&sig=zwHo76owABZBd-H7WVZC1n9PVF8&hl=ms&sa=X&ei=S3KIVMTyIouYuQTJpILABQ&ved=0CEoQ6AEwBw#v=onepage&q=tense%20used%20in%20CISG&f=false (last visited November 20, 2014).

[106] Dr M. Tahir Mansuri, *Islamic Law of Contracts and Business Transactions*, Adam Publishers & Distributors, 2006, page 26.

[107] See Dr A F M Maniruzzaman, *Formation of International Sales Contracts: a Comparative Perspective*, International Business Lawyer, 2001, page 484, available at http://heinonline.org, (last visited November 14, 2014).

among contracting parties. On the other hand, article 14(1) of CISG indicates that a proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for, determining the quantity of the price.[108] Accordingly in a proposal; goods, quantity and price are considered essential elements of a valid contract and therefore, they have to be sufficiently determined. In addition to Article 14(1), Article 55 of CISG applies only if the contract has been validly concluded without determining the price. This is based on the argument that the price generally changed at the time of conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.

The second condition, under the Islamic law of contract, in order to effect a contract, the offer must be accepted by the offeree and the acceptance must be in the same meeting (majlis) not later.[109] The majlis creates the essential unity of time and place necessary for the dual declaration of intention and consent.[110] This condition is due to the Islamic law of contract which emphasized on an immediate acceptance of an offer to make a valid contract. The main purpose behind the formation of this condition is to determine the allowed time length for the offer to be legally stand for acceptance without bringing potential damage to the offering party, by delaying the issuance of acceptance for a long time after the breaking up of the parties from their meeting place, nor damaging the accepting party as this condition provides him with more time to contemplate the worth and the benefit of the proposal before making any rushed decision.[111] This condition may not be possible in the modern business world as businessmen need time to think about the possibility and viability of making a contract and to finally decide positively. However, the offeree is allowed to think over the offer for some time. The basis of this view point is a precept by the Prophet saying that "The contracting parties have the right of option until they separate.[112] Opinion is divided among the Islamic jurists in regard to the interpretation of the phrase "until they separate".[113] However, the jurists are unanimous on the point that a contract must be completed by offer and acceptance in the same meeting unless one reserves for itself the right to think over to ratify or to revoke the contract later.[114] The right to think over the transaction and revoke it within the specified time is known in Islamic law as "option of stipulation" (Khiyar al-Shart).[115] In other word, time taken by the offeree to communicate his acceptance may be called continuance of the same meeting. The option of stipulation is the

[108]Gabriel Moens and Peter Gillies, *International Trade and Busineness:Law Policy and Ethics*, Routledge Cavendish, 2nd Ed. 2006, page 14.

[109]See Dr. Md. Abdul Jalil & & Muhammad Khalilur Rahman, *Islamic Law of Contract is Getting Momentum*, International Journal of Business and Social Science, Vol 1,No . 2, 2010, page 182, available at http://www.ijbssnet.com/journals/Vol. 1 No. 2 November 2010/14.pdf?update/journals/Vol. 1 No. 2 November _2010/14.pdf, (last visited October 25, 2014).

[110] Dr. Mohd. Ma'sum Billah, *Modern Financial Transactions Under Shari'ah,* Ilmiah Publishers Sdn Bhd, page 58.

[111]See Abdul Rahman Alzaagy, *The Islamic Concept of Meeting Place and its Application in E-Commerce*, The Masaryk University Journal of Law and Technology, Vol 1 Issue 1 (2007), page 34, available at , available at http://heinonline.org, (last visited November 17, 2014).

[112]Dr M. Tahir Mansuri, *Islamic Law of Contracts and Business Transactions*, Adam Publishers & Distributors, 2006, page 29.

[113] Ibid

[114]Dr M. Tahir Mansuri, *Islamic Law of Contracts and Business Transactions*, Adam Publishers & Distributors, 2006, page 30.

[115] Ibid.

power by virtue of which one of the two contracting parties can give his final assent to the contract within a specific time.[116] Hence, it can be said that Islamic law of contract recognizes this right for the contracting parties and also provides a mechanism to overcome the problem caused by the restriction of unity of session.

Similarly under CISG, in order to effect a contract, the offer must be accepted by the offeree. However, CISG differ than the Islamic law of contract in regard to the condition that immediate acceptance of the offer is a must to make a valid contract. CISG does not require to the offeree to accept the offer immediately since according to Article 18(2) of CISG, the rule for acceptance is that it becomes effective when it reaches the offeror as long as it does within the time he has fixed or, if no time is fixed, within a reasonable time. However, in terms of oral communication, CISG seems to share common ground with Islamic law of contract where it is possible to make oral offer and acceptance but it should be done immediately. It is also may be argued that "option of stipulation" (Khiyar al-Shart) provided under the Islamic law shared common similarity with Article 18(2) of CISG where the acceptance is effective when it reaches the offeror as long as it is being done within the stipulated time.

It is also worthy to mention that under Article 21 of CISG, two exceptions are being made to Article 18(2). Firstly, late acceptance is still effective if the offeror informs the offeree without delay or dispatches the notice to the effect or in the event. Secondly, where transmission of acceptance had been unduly interrupted, where under normal conditions the acceptance would have reached the offeror, the late acceptance is effective unless without delay the offeror inform the offeree that he considers his offer to have lapsed. However, under the Islamic law of contract, an offer is made with the condition that it should be accepted within specified period of time and if the offeree fails to accept within the prescribed time limit, the offer is considered terminated.[117] In the case of lapse of time, Islamic law of contract seems to be more rigid than CISG. In this scenario, CISG pass the risk to the offeror.[118]

(d) Withdrawal, Revocation and Rejection of Offer

There seems to be different views on the revocation of offer among the four schools of thought in the Islamic jurisprudence. The different views are as following:

a) According to the Hanafi and Hanbali schools, the offeror has the right to withdraw/revoke his offer at any time before acceptance[119]
b) Even though the above right also exist in Shafie school, it is doubtful whether the offeror will find time to exercise it since the Shafie school requires the acceptance to be made immediately after the offer is made, otherwise the offer will cease to exist.[120]

[116] Ibid. page 31.
[117] Dr. Mohd. Ma'sum Billah, *Modern Financial Transactions Under Shari'ah,* Ilmiah Publishers Sdn Bhd, page 62.
[118] J.C.T. Chuah, *Law of International Trade: Cross-Border Commercial Transactions*, Thompson Reuters (Professional) UK Limited, 4th Ed, 2009, p 156.
[119] Dr M. Tahir Mansuri, *Islamic Law of Contracts and Business Transactions*, Adam Publishers & Distributors, 2006, page 47.
[120] Dr. Mohd. Ma'sum Billah, *Islamic Law of Trade and Finance (A Selection of Issues)*, 2003, Ilmiah Publishers Sdn Bhd, page 62.

c) According to the Maliki school of law, the offeror is bound by his offer until the meeting breaks up.[121] Thus if he revoked his offer and the offeree afterward accepts before the meeting breaks up, the contract would be concluded.[122]

However, based on the above views it may be concluded that majority of the jurists said that the person offering has the option to withdraw/revoke his offer at any time before it has been accepted. The issue whether the revocation of offer can have any effect before it is communicated there does not arise in Maliki school.[123] Nor it is of much significance in the Shafie and Hanbali schools since these schools allow either party to repudiate the contract after it has been concluded, at any time before the meeting breaks up.[124]This is called the option to meeting (khiyar al-majlis).[125]There are two views in the Hanafi School on this matter namely the following:[126]

a) According to the first view, the revocation is not effective until it is communicated. For example if the seller should say, "I have sold to you this for so much", and added, "I have revoked my offer", and the buyer without hearing the revocation says, "I have bought", the sale is concluded.
b) The second view states that the offeror can revoke his offer whether or not the other party knew about the revocation.

Since the Hanafi school insists that both the offer and acceptance should be communicated, a better view would seem to be that the revocation of an offer also has to be communicated.[127] Based on the above views, it is interesting to note that Islamic law of contract did not distinguish between withdrawal and revocation of an offer. Under Islamic law of contract, if an offer is not accepted and it is rejected by the offeree, it will be treated as terminated.[128]

Article 15(1) of CISG speaks of the offer as becoming effective when it reaches the offeree.[129] It is interesting to note that withdrawal and revocation of an offer must be distinguished in CISG because their consequences in terms of the Convention are not corresponding.[130] Legal scholar Prof. Gyula Eorsi claims that this distinction exists in different stages of contract formation.[131] According to Article 15(2) of CISG, the offer may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer regardless of whether

[121] Dr M. Tahir Mansuri, *Islamic Law of Contracts and Business Transactions*, Adam Publishers & Distributors, 2006, page 68.
[122] Ibid.
[123] Dr. Mohd. Ma'sum Billah, *Islamic Law of Trade and Finance (A Selection of Issues)*, 2003, Ilmiah Publishers Sdn Bhd, page 62.
[124] Ibid.
[125] Dr M. Tahir Mansuri, *Islamic Law of Contracts and Business Transactions*, Adam Publishers & Distributors, 2006, page 68.
[126]Dr. Mohd. Ma'sum Billah, *Islamic Law of Trade and Finance (A Selection of Issues)*, 2003, Ilmiah Publishers Sdn Bhd, page 62.
[127]Ibid
[128] Ibid. page 63.
[129]Gabriel Moens and Peter Gillies, *International Trade and Busineness:Law Policy and Ethics*, Routledge Cavendish, 2nd Ed. 2006, page 14.
[130]See Belkis Vural, *Formation of Contract According to CISG*, Ankara Bar Review, available at http://heinonline.org, 2013, p 134, (last visited November 10, 2014).
[131] Ibid.

or not an offer is stated to be irrevocable.[132]Article 16(1) of CISG said that an offer may be revoked if the revocation reaches the offeree before he has despatched an acceptance.[133] This provision is similar to common law rule where the offer cannot be revoked once the acceptance is despatched. In this case, it is reasonable that the offeree should be protected for his expectation of contract and that revocation should no longer be permitted.[134] In the CISG, accept the general principle that an offer may be revoked at any time but do make an offer irrevocable in certain cases.[135]According to Article 16(2) of CISG offer is irrevocable if the acceptance time is fixed.[136] The crucial test of the irrevocability of an offer is whether it 'indicates' expressly or by implication that it is irrevocable under the circumstances.[137] The 'fixed time for acceptance' under this provision in an offer would, in itself, not necessarily always make the offer irrevocable.[138] Hence, it should be interpreted "independently of any legal doctrine" taking the "intent" of the parties into account according to Article 8 of the Convention.[139]According to Article 17 of CISG, an offer, even if it is irrevocable, is terminated when rejection reaches the offeror.

It may be approximates that both regimes agreed that the offer must be communicated. However, there is difference between the two regimes in regard of distinguishing between withdrawal and revocation of offer, where Islamic law of contract did not distinguish between the two whereas in CISG it was clearly done with reasons. Despite distinguishing between withdrawal and revocation of offer, the general principle of CISG on this matter is similar to the Islamic regime where offer may be withdraw/revoke at any time before it has been accepted. In reference to the rejection of offer, it seems that Islamic law of contract and Article 17 of CISG shared the common ground that an offer can be terminated by a rejection by the offeree.

(e) Communication of Acceptance

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[132] See Dr A F M Maniruzzaman, *Formation of International Sales Contracts: a Comparative Perspective*, International Business Lawyer, 2001, page 485, available at http://heinonline.org, (last visited November 14, 2014).

[133] Lecture 4-Contract of International Sales of Goods –III: Choice of Law, PowerPoint presentation by course lecturer Dr. Md. Anowar Zahid for Advanced International Trade Law course for LLM program at National University of Malaysia. The lecture was delivered on October 9, 2014.

[134] See Dr A F M Maniruzzaman, *Formation of International Sales Contracts: a Comparative Perspective*, International Business Lawyer, 2001, page 485, available at http://heinonline.org, (last visited November 14, 2014).

[135] Ibid.

[136] Lecture 4-Contract of International Sales of Goods –III: Choice of Law, PowerPoint presentation by course lecturer Dr. Md. Anowar Zahid for Advanced International Trade Law course for LLM program at National University of Malaysia. The lecture was delivered on October 9, 2014.

[137] [137] See Dr A F M Maniruzzaman, *Formation of International Sales Contracts: a Comparative Perspective*, International Business Lawyer, 2001, page 486, available at http://heinonline.org, (last visited November 14, 2014).

[138] Ibid

[139] Lecture 4-Contract of International Sales of Goods –III: Choice of Law, PowerPoint presentation by course lecturer Dr. Md. Anowar Zahid for Advanced International Trade Law course for LLM program at National University of Malaysia. The lecture was delivered on October 9, 2014.

Part of this issue has been discussed earlier under the offer and acceptance. However, this part will discuss in details the comparative of communication of acceptance between both regimes the Islamic law of contract and CISG.

An acceptance must be communicated to the offeree under Islamic law of contract to form an effective acceptance. As stated earlier, an acceptance can be verbal, by conduct or in writing. Hence, it may be concluded that mere silence may not be considered as an acceptance unless it is accompanied by writing or by conduct. The communication of acceptance is complete the moment it comes to the knowledge of the offeree.[140] According to the majority view of classical Muslim jurists, if the acceptance does not come to the knowledge of the offeree, it would not be an effective acceptance and no contract will be performed.[141] They are also of the opinion that when an offer is made to a person who is not present near the offeror, the majlis (meeting) will continue until the offeree receives the offer for example, if the offer is sent by a letter through the post office, the majlis will continue until the offeree receives the letter and he will be given some time to accept the offer, but not for long.[142]

When a contract is made inter absente, the offer and acceptance can be communicated by using instantaneous mode of communications and the offer and acceptance would be considered valid.[143]It is interesting to note that all four schools of thought agreed that when the parties are contracting inter absentee, the acceptance need not be communicated.[144] The contract is complete as soon as the offeree declares his acceptance.[145]

Similar to Islamic law of contract, CISG by virtue of Article 18(1) summarised that mere silence will not constitute an acceptance. Under Article 18(2) of CISG, the acceptance becomes effective when it is received by the offeror. Article 18(2) further states that an acceptance will not be effective if it does not reach the offeror within the time he has set or if no time limit is set, the acceptance must reach the offeror within a reasonable time. As mentioned earlier Article 21 of the Convention provides the exceptions to Article 18(2) that late acceptance is effective subject to conditions herein. Unlike offer where there are provisions under the Convention for withdrawal, revocation and rejection, there is only withdrawal of acceptance via Article 22 of the Convention which states that an acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time that the acceptance would have become effective.

Hence, it may be concluded that apart from both regimes agreed that mere silence will not constitute an acceptance. In this context, both regimes are perhaps parallel to English law where mere silence on the part of the offeree does not amount to acceptance. There is significant difference between both regimes in regard to when acceptance becomes effective. Under Islamic law of contract, the acceptance becomes effective when the acceptance does come to the

[140]See Dr. Md. Abdul Jalil & & Muhammad Khalilur Rahman, *Islamic Law of Contract is Getting Momentum*, International Journal of Business and Social Science, Vol 1,No . 2, 2010, page 183, available at http://www.ijbssnet.com/journals/Vol. 1 No. 2 November 2010/14.pdf?update/journals/Vol. 1 No. 2 November 2010/14.pdf, (last visited October 25, 2014).
[141]Ibid
[142]Ibid
[143] Ibid.
[144] Dr. Razali Hj Nawawi, *Islamic Law on Commercial Transactions*, CERT Publications Sdn Bhd, 2009, page 72.
[145] Ibid.

knowledge of the offeree. However, under CISG, the acceptance becomes effective when it is received by the offeror. It is worthy to mention that both regimes do not replicate the common's law postal acceptance rule that acceptance becomes effective when it is mailed.[146] As mentioned earlier, under the Islamic law of contract, an offer is made with the condition that it should be accepted within specified period of time and if the offeree fails to accept within the prescribed time limit, the offer is considered terminated.[147] This is another difference from CISG where late acceptance is still effective subject to some conditions laid down in Article 21 of the Convention. Under the Islamic law of contract, if the offeree wanted to revoke the acceptance, he must revoke it before it comes to the knowledge of the offeror and not afterwards. Similarly, CISG took almost the same approach on this matter where withdrawal of an acceptance may be done if the withdrawal reaches the offeror before or at the same time the acceptance would have become effective. It seems that both regimes apply the receipt theory here. In the case of instantaneous mode of communication, both regimes accepted them as mode of communication for offer and acceptance and share common ground that if the acceptance is communicated by e-mail, the acceptance is complete the moment the acceptance in the e-mail enter the designated e-mail account of the offeror.

(f) Counter Offer

Under the Islamic law of contract, the offer and acceptance must match in order to create a building agreement. The offeree must accept all the terms of the offer.[148]If in his reply to an offer, the offeree introduces or poses a new term(s) or varies the terms of the offer, then that reply cannot amount to an acceptance.[149] Instead, the reply is treated as an offer itself, which can be accepted or rejected.[150]

On the other hand, Article 19(1) of CISG adopts the traditional "mirror image" rule, that an acceptance which adds to or modifies the terms of the offer constitutes only a counter-offer.[151]The "mirror image" rule is however qualified by Article 19(2) and (3) in the following terms:

> "(2) A reply to an offer which purports to be an acceptance but contains additional or different terms, and such terms do not materially alter the terms of the offer shall constitutes an acceptance, unless the offeror, without unduly delay objects by any means to the discrepancy.[152]

[146]Gabriel Moens and Peter Gillies, *International Trade and Busineness:Law Policy and Ethics*, Routledge Cavendish, 2nd Ed. 2006, page 15.
[147] Dr. Mohd. Ma'sum Billah, *Modern Financial Transactions Under Shari'ah,* Ilmiah Publishers Sdn Bhd, page 62.
[148]Ibid.
[149] Ibid.
[150] Ibid.
[151]J.C.T. Chuah, *Law of International Trade: Cross-Border Commercial Transactions*, Thompson Reuters (Professional) UK Limited, 4th Ed, 2009, p 156.
[152]See Dr A F M Maniruzzaman, *Formation of International Sales Contracts: a Comparative Perspective*, International Business Lawyer, 2001, page 487, available at http://heinonline.org, (last visited November 14, 2014).

(3) It counts certain matters which would amount to material alteration in the terms of the offer (as additional/different terms) relating to the price, the payment, the quality and the quantity of goods, the place and time of delivery, the extent of one party's liability or the settlement of disputes (e.g. arbitration and/court).[153]

It may be concluded that in general, Islamic law of contract and Article 19(1) of CISG are similar in the sense that an acceptance which adds to or modifies the terms of the offer constitutes only a counter-offer which can be accepted or rejected. However, the difference arises when CISG further qualified this issue via Articles 19(2) that as long as the additional or modification of the terms is not material modification of the offer shall constitute as an acceptance. This condition is however subject to the offeror, without delay objects by any means to the discrepancy. Article 19(3) listed certain matters that constitute to material modification in the terms of the offer. Perhaps the most significant difference between the two regimes is with regard to the' battle of the forms'. Under Islamic law of contract the issue of 'battle of the forms' does not exist since one of the requirement for form is the acceptance must conform to the offer in all its details irrespective of whether such conformity is express or implied. However, under CISG 'battle of the forms' is an issue since the Convention has no special provision that governs the standard terms of a contract. If there is problem of conflicting standard terms in international sales contract, two approaches taken by the court have been identified to treat this problem namely knock out approach and last short approach. In the knock out approach, the court took the terms which the contracting parties substantially agree, and the non-matching terms cancel each other out. In last shot approach, if there is a performance by one party, it means that the last submitted offer is accepted through a performance which indicates assent to the offer (Article 18(1) of CISG).[154]Accordingly, the last sent form is the part of contract and the sender of the last form is the winner of the battle.[155]

(g) Invitation to Treat

In Islamic law of contract, an invitation to treat is known as al-mu'atah which simply means displaying goods for sale. There seems to be two opinions of Islamic scholars in regard to invitation to treat in Islamic contract law. The majority scholars say that advertisement, display of goods, auction sale, tenders etc. are offer in Islamic law but on the contrary others said that they are not offers.[156] These minority scholars, who said they are not offers, are arguing in line with the English common law principle that labelling them as offer will cause hardship and harassment to the seller of goods.[157] One of the respected majority scholars by the name of Billah

[153]Ibid.
[154] See Belkis Vural, *Formation of Contract According to CISG*, Ankara Bar Review, available at http://heinonline.org, 2013, p 144, (last visited November 10, 2014).
[155] Ibid
[156]See Dr. Md. Abdul Jalil, *Adoption of the Principle of 'Invitation to Treat' in Islamic Law of Contracts*, Jurnal Undang-Undang & Masyarakat 16 (JUUM) 79-92, 2012, page 88, available at http://www.ukm.my/juum/JUUM%202012/Adoption%20of%20the%20Principle%20of%20%E2%80%98Invitation%20to%20Treat%E2%80%99%20in%20Islamic%20Law%20of%20Contracts.pdf, (last visited October 26, 2014).
[157] See Dr. Md. Abdul Jalil, *Adoption of the Principle of 'Invitation to Treat' in Islamic Law of Contracts*, Jurnal Undang-Undang & Masyarakat 16 (JUUM) 79-92, 2012, page 88, available at

has not accepted that auction, tenders, advertisements, display of goods on shelves and the like are mere invitation; according to him they are valid offers.[158] When they are accepted by someone, they become binding upon the parties involved in the transaction. Dr Billah listed four grounds as the basis of his argument namely the following:[159]

a) The wording of offer in an Islamic law of contract is generally in past tense or "Sighatul Madi". The fact that the advertisements, tenders and etc are usually made in past tense enhances the fact that they are valid offer.
b) He based his argument on Al-Quran and Al-Hadith on the issue of promise made by person is a sacred trust, which ought to be fulfilled by the promisor.
c) A statement of an offer is enforceable in the eyes of Islamic law even though the seller expressly denies it, provided that there is a strong sign of intention to create legal relation or 'Qarinah', which signifies an offer.
d) He argued that if advertisements, tender and etc. do not constitute valid offer and not enforceable under Islamic law, this may create injustice and hardship to the offeree. To allow the offeror to deny or revoke his offer after giving hope to the offeree, will indeed be unjust to the offeree, and is clearly against the principles of natural justice. He then quoted several verses from the Al-Quran about injustice done to mankind.

Another interesting finding is on the status of using technology to display goods. According to another scholar Salwani, said that when the display of goods is made on the websites, it may constitute a valid offer if the trade usage does recognise the display as an offer but it will only be valid if the price is satisfactory described on it.[160]

However, there are also arguments that there is nothing wrong to terming some statements as mere invitation to treat as long as it does not contradict with Shariah principles. Besides looking at the injustice and hardship done to the offeree in the event the invitation to treat is not a valid offer, one also needs to look that terming some proposals as offers cause injustice to seller.[161] Salwani again mentioned that "in this case if the display of goods or the advertisement is considered an offer, then this will bring injustice to sellers who may faced the problem of being bound by too many contracts exceeding the number of stocks available; thus amounting to providing something he is unable to deliver."[162] Perhaps one needs to look at the

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http://www.ukm.my/juum/JUUM%202012/Adoption%20of%20the%20Principle%20of%20%E2%80%98Invitation%20to%20Treat%E2%80%99%20in%20Islamic%20Law%20of%20Contracts.pdf, (last visited October 26, 2014).

[158] Dr. Mohd. Ma'sum Billah, *Islamic Law of Trade and Finance (A Selection of Issues)*, 2003, Ilmiah Publishers Sdn Bhd, page 16.

[159] Ibid. pages 16 & 19.

[160] See Dr. Md. Abdul Jalil, *Adoption of the Principle of 'Invitation to Treat' in Islamic Law of Contracts*, Jurnal Undang-Undang & Masyarakat 16 (JUUM) 79-92, 2012, page 89, available at http://www.ukm.my/juum/JUUM%202012/Adoption%20of%20the%20Principle%20of%20%E2%80%98Invitation%20to%20Treat%E2%80%99%20in%20Islamic%20Law%20of%20Contracts.pdf, (last visited October 26, 2014).

[161] See Dr. Md. Abdul Jalil, *Adoption of the Principle of 'Invitation to Treat' in Islamic Law of Contracts*, Jurnal Undang-Undang & Masyarakat 16 (JUUM) 79-92, 2012, page 89, available at http://www.ukm.my/juum/JUUM%202012/Adoption%20of%20the%20Principle%20of%20%E2%80%98Invitation%20to%20Treat%E2%80%99%20in%20Islamic%20Law%20of%20Contracts.pdf, (last visited October 26, 2014).

[162] Ibid.

principle of Islamic law of al-maslaha al-mursalah which states that if anything is beneficial for the people, and that the thing is not prohibited in shari'ah then it is permitted.[163]

Article 14(2) of CISG provides that a proposal addressed to one or more unspecified persons is an invitation to treat.[164]Hence, proposals made to an unspecific group of persons, such through a catalogue or a webpage would not constitute an offer but merely an invitation to treat. It may be argued the approach under Islamic law of contract in regard invitation to treat based on the majority scholars opinion is a stark contrast to the approach taken under Article 14(2) of CISG. Under Islamic legal doctrine advertisements, display of goods and etc. is treated as valid offer, which are enforceable once they are accepted but Article 14(2) does not consider them as valid offer since the offer is made to the world at large but merely as an invitation to treat. Furthermore, it seems that Article 14(2) of CISG is in line with the principle laid down under the common law system in regard to invitation to treat whereas the Islamic law of contract opposes such principle. It is significant to inform that the reason why the common law does not recognize advertisements, display of goods and etc as a valid offers but only invitation to treat due to the absent of element of intention to contract in such statements. Interestingly, the opinion given by a Muslim scholar Dr. Md Abdul Jalil that terming some statements as mere invitation to treat as long as it does not contradict with any established Shari'ah principles and not causing injustice to the customers ought to be given some weight of consideration. Indeed, treating display of goods as offer also causes injustice to seller as he may need to pay huge amount of damages due to shortage of stock.[165] In this scenario, it can also be argued that Islamic law of contract and CISG shared common ground that an offer made to the world at large is not a valid offer but is an invitation to treat.

(h) Consideration in Contract

There must be a consideration under Islamic law of contract. The validity of a contract depends on the purpose of the validity of consideration.[166] Consideration falls under subject matter which is the second essential element of contract under Islamic law of contract. Islamic law does not hold consideration as an independent element of contract.[167]The reason is that the contractual obligation of one party according to Islamic law is consideration for the contractual obligation of another party.[168] In a contract of sale, the commodity is the consideration for the purchaser and the price is the consideration for the seller.[169] Islamic law also requires the

[163] Ibid. page 89-90.
[164] See Dr A F M Maniruzzaman, *Formation of International Sales Contracts: a Comparative Perspective*, International Business Lawyer, 2001, page 484, available at http://heinonline.org, (last visited November 14, 2014).
[165] See Dr. Md. Abdul Jalil, *Adoption of the Principle of 'Invitation to Treat' in Islamic Law of Contracts*, Jurnal Undang-Undang & Masyarakat 16 (JUUM) 79-92, 2012, page 90, available at http://www.ukm.my/juum/JUUM%202012/Adoption%20of%20the%20Principle%20of%20%E2%80%98Invitation%20to%20Treat%E2%80%99%20in%20Islamic%20Law%20of%20Contracts.pdf, (last visited October 26, 2014).
[166] Dr. Mohd. Ma'sum Billah, *Modern Financial Transactions Under Shari'ah,* Ilmiah Publishers Sdn Bhd, page 77.
[167] Dr M. Tahir Mansuri, *Islamic Law of Contracts and Business Transactions*, Adam Publishers & Distributors, 2006, page 35.
[168] Ibid.
[169] Ibid.

consideration to be known to both contracting parties.[170] This rule is obviously related to the prohibition against want of knowledge, which may lead to fraud, deceit and conflict between the parties.[171] A consideration needs not be adequate as an inadequate consideration is enough to validate a contract as long as the parties give consent freely to the agreement upon which they are satisfied.[172] If a contract is not caused by a misrepresentation, fraud, coercion, undue influence and other attendant legal ambiguities then the contract is valid even though its consideration is not adequate.[173]Nonetheless, under certain circumstances there are exceptions to this general rule that a contract might be valid without consideration. For example, maintenance cost to be paid to wife and children in the event the husband leaves his family to stay in other country.

In contrast, the CISG unlike the common law system does not have, as one of its pivots of formation of contract, a requirement of consideration. To the extent that CISG is about international sales, and necessarily refers to issues of price (Article 14 of CISG) and contract comprehended by it will be supported by consideration from both sides.[174] It seems that consideration is implicitly mentioned in this Article. However, the concept of consideration does not otherwise figure in the Convention, so that there are no rules to be found in dealing with legally insufficient consideration.[175] According to Professor J. Honnold who concluded that from the constant rejection of the doctrine of consideration during the negotiations of CISG that this permanent rejection of consideration under the CISG by the working party members when the issue came to the fore (because consideration was a barrier to enforcing the agreement) amounted to one of the 'general principle' pursuant to Article 7(2) of CISG.[176]Since consideration is not pivotal in the Convention, several provisions in CISG do indicate that there is no requirement of consideration for example Articles 14 read together with Article 55 states that a contract can be formed although the parties have not fixed a price. Perhaps it is of some significant to mention that Article 29 of CISG states that a contract may be modified or terminated by the mere agreement of the parties. No consideration is needed. However, it is worthy to note that according to Dr Md Anowar Zahid, CISG is basically a contract of sale where consideration is definitely one of the essential elements of it.

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[170] Dr. Mohd. Ma'sum Billah, *Modern Financial Transactions Under Shari'ah,* Ilmiah Publishers Sdn Bhd, page 79.
[171]Ibid.
[172]See Dr. Md. Abdul Jalil & & Muhammad Khalilur Rahman, *Islamic Law of Contract is Getting Momentum*, International Journal of Business and Social Science, Vol 1,No . 2, 2010, page 182, available at http://www.ijbssnet.com/journals/Vol._1_No._2_November_2010/14.pdf?update/journals/Vol._1_No._2_November_2010/14.pdf, (last visited October 25, 2014).
[173]Ibid
[174]Gabriel Moens and Peter Gillies, *International Trade and Busineness:Law Policy and Ethics*, Routledge Cavendish, 2nd Ed. 2006, page 17.
[175]Ibid.
[176]See Petra Butler, *The Doctrines of Parol Evidence Rule and Consideration – A Deterrence to the Common Law Lawyer*, presented in "Celebrating Success: 25 Years United Nations Convention on Contracts for the International Sale of Goods" (Collation of Papers at UNCITRAL -- SIAC Conference 22-23 September 2005, Singapore), published and copyright by the Singapore International Arbitration Centre at 54-66 available at http://www.cisg.law.pace.edu/cisg/biblio/butler4.html, (last visited on November 25, 2014). J. Honnold is an author of a book Uniform Law for International Sales, Kluwer Law and Taxation Publishers, Deventer, 2nd Ed (1991)

It can be said that consideration is a vital element for the validity of contract under Islamic law. On the other hand, it seems that consideration does exist not expressly but implicitly in the Convention. However, the contract is still valid without consideration since the requirement of consideration is not pivotal in formation of contract under CISG. On the other hand, basing on Dr Md Anowar Zahid opinion, CISG and Islamic law of contract shared common ground in regard to consideration as an essential element in the formation of contract under both regimes.

(i) Free Consent

Under the Islamic law of contract, an agreement must be made by a free consent of the parties in order for the contract to be valid. However, if the contract is caused by any of these three elements namely coercion, fraud or undue influence either directly or indirectly; it would be a voidable contract. As mentioned earlier in Chapter 3, Al-Quran and Hadith have established the authorities which emphasize on the importance of executing a trade contract by a mutual consent. Hence, the element of free consent is a fundamental principle in the Islamic law contract. The contract must be based on free consent of both parties and not sufficient to be given by only either one of them. It is worthy to note that the proof of free consent between the offerror and the offeree is very significant and highly required as the essence of the Islamic law of contract *aqd*.[177]

There seems to be a distinction between the element of free consent in Islamic law of contract and CISG. The CISG does not mention to the mutual consent of the parties. Perhaps this is generally due to the fact that CISG does not being formulate based on the basic formation of the contract where free or mutual consent is an essential element for the formation of contract. CISG only mentions the indication of assent of the parties. However, the most significant argument is by virtue of Article 4(a) of the Convention which states that it governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract and is not concerned with the validity of the contract or of any of its provisions or of any usage. Consequently, domestic law applicable by virtue of the rules of private international law will govern issues of validity.[178]According to one decision, the CISG does not regulate legal issues pertaining to lack of mutual assent based on error or mistake.[179]

It can be concluded the element of free consent is one of the salient elements to determine the validity of the contract under the Islamic law of contract. In contrast, CISG does not consider free consent of the contracting parties as one of the elements for the validity of contract since it only governs the formation of contract but not otherwise. It is also worth mentioning that the

[177]See Dr. Md. Abdul Jalil & & Muhammad Khalilur Rahman, *Islamic Law of Contract is Getting Momentum*, International Journal of Business and Social Science, Vol 1, No. 2, 2010, page 185, available at http://www.ijbssnet.com/journals/Vol._1_No._2_November_2010/14.pdf?update/journals/Vol._1_No._2_November_2010/14.pdf, (last visited October 25, 2014).

[178]See UNCITRAL, Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, Ed. 2012, page 84, available at http://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf, last visited November 26, 2014).

[179] Ibid.

requirement of the element of free consent under Islamic law of contract is similar to the requirement of the law of contract under the common law system.

(j) Intention to Create Legal Relation

An intention to create legal relationship is an important element under the Islamic law of contract since lacking of it may cause the agreement not being able to be enforced by the law. However, the party that claims that there is a lack of intention to create the legal relationship has to prove beyond the shadow of doubt of its tangible existence.[180] Normally, an agreement which has a consideration is regarded as having an intention to create a legal relationship between the parties.[181]Usually, business contracts considered as having an intention to create legal relationship in one way or another.[182]

In contrary to Islamic law of contract, CISG imposes no such requirement that an intention to create legal relation as an element of formation of contract. Yet, under Article 14 of CISG does refer to offer as being a proposal which, inter alia, indicates the intention of the offerror to be bound in case of acceptance.[183] Hence, it may be argued that intention to create legal relation implicitly stated in this provision. While it is perhaps of little significance, given that agreements alleged to be within the purview of the Convention will be entered into in business context, no such parallel requirement is enunciated in respect of the party accepting the offer, thus forming a contract.[184] However, it is worthy to note that according to Dr Md Anowar Zahid, CISG is basically a contract of sale where intention to create legal relation is definitely one of the essential element of it.

Hence, it may be submitted that intention to create legal relation is a vital element for the validity of contract under Islamic law. On the other hand, it seems that intention to create legal relation does exist not expressly but implicitly in the Convention. However, taking into consideration of Dr Md Anowar Zahid opinion, both CISG and Islamic law agreed that intention to create legal relation is an essential element in the formation of contract under both regimes. It also seems that an intention to create a legally binding agreement as an element of formation of contract under both regimes is parallel to the common law requirement on formation of contract.

(k) Legality of the Objective and Consideration of the Contract

[180]See Dr. Md. Abdul Jalil & & Muhammad Khalilur Rahman, *Islamic Law of Contract is Getting Momentum*, International Journal of Business and Social Science, Vol 1, No. 2, 2010, page 186, available at http://www.ijbssnet.com/journals/Vol. 1 No. 2 November 2010/14.pdf?update/journals/Vol. 1 No. 2 November 2010/14.pdf, (last visited October 25, 2014).

[181] Ibid.

[182] Ibid.

[183]Gabriel Moens and Peter Gillies, *International Trade and Busineness:Law Policy and Ethics*, Routledge Cavendish, 2nd Ed. 2006, page 17.

[184] Ibid.

The objective of contract under the Islamic law should be lawful and legally binding. If the objective of a contract is to perform some form of illegal act or immoral acts, then the contract will be invalid.[185]

Likewise, in order for the contract to be valid, the consideration or a subject matter of the contract should be legal, legitimate and lawful. For instance, the contract will be illegal and not enforceable by law if the subject matter of the contract is being prohibited in Islam. The lists of things prohibited by Shari'ah have been affirmed in the al-Quran and Sunnah.[186]This includes among others a contract to sell swine meat, different types of wines and etc. is legally considered as invalid especially when the contracting parties are Muslims. Therefore, it can be mention that the objective and consideration must be lawful and must fall within the ambit of legal enforceability to form a valid contract under the Islamic law of contract. It is also of significant to note that goods which are prohibited under the Islamic law of contract are perhaps based on religious ground for instance Shari'ah prohibit Muslim to consume pork and wine.

On the other hand, CISG seems to be silent on these matters. Again, Article 4(a) of the Convention is the source of reference on this issue. The convention only concern with formation of contract of sale i.e. rights and obligations of seller and buyer not validity of contract. When we talk about validity it is about having legal force. Domestic law applicable by virtue of the rules of private international law will govern this matter. For example, in order for a buyer to import goods, he needs an import license from the government. Import license is governed by statute. For instance, in Malaysia, import license is governed by the Custom Act 1967. Under the Custom Act, there are goods which are prohibited to import. Hence any importation of goods which are prohibited under the statute will be illegal. The contract between the buyer and seller may be valid under CISG but will be rendered useless since the buyer cannot import the goods because of the prohibition.

In conclusion there is a difference in the legality of the objective and consideration of contract between the two regimes Islamic law of contract and CISG. While Islamic law of contract required the objective and consideration of contract should be legal, CISG on the other hand concern with formation of contract and placed less emphasized on legality of it. As compared to Islamic law of contract where prohibition of goods traded probably based on the religious nature of it, CISG being an international convention is more concern on the commercial value of the goods rather than it religious nature.

(l) Certainty

As mentioned earlier, the terms of an agreement must be definite, clearly defined and unambiguous under the Islamic law of contract. If the terms or subject matter is uncertain and

[185]See Dr. Md. Abdul Jalil & & Muhammad Khalilur Rahman, *Islamic Law of Contract is Getting Momentum*, International Journal of Business and Social Science, Vol 1, No. 2, 2010, page 186, available at http://www.ijbssnet.com/journals/Vol._1_No._2_November_2010/14.pdf?update/journals/Vol._1_No._2_November_2010/14.pdf, (last visited October 25, 2014).

[186]Dr M. Tahir Mansuri, *Islamic Law of Contracts and Business Transactions*, Adam Publishers & Distributors, 2006, page 35.

ambiguous, the contract will be void.[187]If a term in the contract is not very clear to be understood then the contract is considered uncertain. Under Islamic law of contract, the subject matter should exist at the time of contract. Hence, the subject matter must be precisely determined as regards its essence, quantity and value.[188] An overwhelming majority of traditional Muslim scholars have nullified bilateral transactions whose subject matter at the time of conclusion of contract is non-existent (Ma'dum).[189]It was obvious to them that what is non-existent involves, necessarily, a strong element of Gharar (uncertainty), for it is uncertain whether the non-existent object would ever materialize, or in what condition or state it would be materialize.[190]However, a leading jurist Ibn Qayyim explained the concept applied to uncertainty of availability of the subject matter and not merely to nonexistence at the time of contract.[191]If the nonexistent article or subject matter is certain to be delivered or performed at a future date the prohibition of Gharar does not apply.[192] The risk in such transactions is minimal and does not attract the prohibition imposed by gharar.[193]

Under CISG, Article 14 states that the offer must be sufficiently definite if it indicates the goods, and expressly or implicitly fixes, or makes provision for determining, the quantity and the price. Interestingly, the latter requirement may have deviate from common law.[194] Under common law, a failure to specify, or a procedure for determining it, can be repaired by the implication of a term to pay a reasonable price.[195] However, it seems that Article 55 of the Convention comes to rescue where neither price or a price-fixing procedure is agreed upon, and in the absence of any indication to the contrary, there is (what is in effect) an implied term that the parties have agreed that the price generally changed at the time of conclusion of the contract for such goods sold under the comparable circumstances in the trade concerned.[196]

From the above, it may be concluded that Islamic law of contract and CISG in general agreed that the subject matter of the contract i.e. goods, quantity and price should definitely be fixed at the time of contract. However, CISG via Article 55 seems to deviate from the common ground with Islamic law of contract when it allow price of the goods to be determined later on the argument that the price generally changed at the time of conclusion of the contract. Hence, under Islamic law of contract this is prohibited since it contains the element of uncertainty

[187]See Dr. Md. Abdul Jalil & & Muhammad Khalilur Rahman, *Islamic Law of Contract is Getting Momentum*, International Journal of Business and Social Science, Vol 1,No . 2, 2010, page 186, available at http://www.ijbssnet.com/journals/Vol. 1 No. 2 November 2010/14.pdf?update/journals/Vol. 1 No. 2 November 2010/14.pdf, (last visited October 25, 2014).

[188] Dr M. Tahir Mansuri, *Islamic Law of Contracts and Business Transactions*, Adam Publishers & Distributors, 2006, page 41.

[189] Dr. Mohd. Ma'sum Billah, *Modern Financial Transactions Under Shari'ah,* Ilmiah Publishers Sdn Bhd, page 48.

[190] Ibid.

[191] See Noor Mohammed, Principles *of Islamic Contract Law*, Journal of Law and Religion, Vol 6 No. 1, 1988, page 121, available at .http://www.jstor.org/page/info/about/policies/terms.jsp.

[192] Ibid. page 123

[193] Ibid.

[194] Gabriel Moens and Peter Gillies, *International Trade and Busineness:Law Policy and Ethics*, Routledge Cavendish, 2nd Ed. 2006, page 14.

[195] Ibid.

[196] Ibid.

(gharar) and will invalid the contract. However, if the nonexistent article or subject matter is certain to be delivered or performed at a future date the prohibition of Gharar does not apply.

(m)Capacity

Under Islamic law of contract, capacity is known as ahliyyah. The word ahliyyah means absolute fitness or ability.[197]As mentioned in Chapter II, capacity is the ability to make a contract under fully sane physical condition with a healthy mental awareness. Hence, a person such as minor, an insane person and any person incapable of making a decision due to physical and mental defect etc. cannot make a legal contract. Under Islamic law of contract a person can legally enter into contract at the age of fifteen years. This is known as bulug (puberty).[198] However, attaining puberty in itself alone is not sufficient evidence that a person has acquired complete capacity for execution of a contract.[199] In addition to puberty, the possession of maturity of action is also deemed necessary.[200]

Again, CISG is silent on the capacity of a person to enter into a valid contract. Article 4(a) of the Convention is again the source of reference on this issue. The convention only concern with formation of contract of sale i.e. rights and obligations of seller and buyer not validity of contract. Domestic law applicable by virtue of the rules of private international law will govern this matter. For instance, the Malaysian Contract Act 1950 and Age of Majority Act (Malaysia) state that a person must be eighteen years of age before he can make a valid legal contract.[201] This requirement is basically similar to the contract law of United Kingdom.[202]

In general, the capacity to enter into a valid contract is important under Islamic law of contract. On contrary, despite CISG silent on this matter, the importance of capacity to enter into a valid contract must not be denied. CISG seems to pass this requirement to domestic law to ascertain the capacity of a person to enter into a valid contract by virtue of the rules of private international law.

5. CONCLUSION

[197] Dr. Mohd. Ma'sum Billah, *Modern Financial Transactions Under Shari'ah,* Ilmiah Publishers Sdn Bhd, page 36.

[198] See Dr. Md. Abdul Jalil & & Muhammad Khalilur Rahman, *Islamic Law of Contract is Getting Momentum*, International Journal of Business and Social Science, Vol 1,No . 2, 2010, page 187, available at http://www.ijbssnet.com/journals/Vol. 1 No. 2 November 2010/14.pdf?update/journals/Vol. 1 No. 2 November 2010/14.pdf, (last visited October 25, 2014).

[199]Dr M. Tahir Mansuri, *Islamic Law of Contracts and Business Transactions*, Adam Publishers & Distributors, 2006, page 49.

[200] Ibid.

[201]See Dr. Md. Abdul Jalil & & Muhammad Khalilur Rahman, *Islamic Law of Contract is Getting Momentum*, International Journal of Business and Social Science, Vol 1,No . 2, 2010, page 187, available at http://www.ijbssnet.com/journals/Vol. 1 No. 2 November 2010/14.pdf?update/journals/Vol. 1 No. 2 November 2010/14.pdf, (last visited October 25, 2014).

[202] Ibid.

Based on the discussion in Chapter IV of this Article, there are differences in regard to the formation of contract between both regimes Islamic law of contract and CISG. These differences will be highlighted as follows:

a) Under Islamic law of contract, the terms of agreement must be definite, clearly defined and unambiguous otherwise the contract will be considered void. For example, subject matter which is non-existent at the time of conclusion of contract will cause the contract to be nullified. What is non-existent involved a strong element of Gharar (uncertainty) which is prohibited in Islam. In general, it seems that CISG by virtue of Article 14 is similar to Islamic law where it said that the offer must be sufficiently definite if it indicates the goods, and expressly or implicitly fixes, or makes provision for determining, the quantity and the price. In other word, both regimes agreed that subject matter of contract i.e. good, quantity and price should definitely be fixed at the time of contract. The difference between the two regimes came when Article 55 of CISG allow price of goods to be determined later. This is prohibited under Islamic law since it contains the element of uncertainty (Gharar) and will invalid the contract. However, if the nonexistent article or subject matter is certain to be delivered or performed at a future date the prohibition of Gharar does not apply.

b) Islamic law of contract requires the offer must be accepted by the offeree and the acceptance must be in the same meeting (majlis) not later. The majlis creates the essential unity of time and place necessary for the dual declaration of intention and consent. CISG differ than the Islamic law of contract in regard to the condition that immediate acceptance of the offer is a must to make a valid contract. The rule for acceptance by virtue of Article 18(2) of CISG is that it becomes effective when it reaches the offeror as long as it does within the time he has fixed or, if no time is fixed, within a reasonable time. However, in the modern business world, the Islamic law condition may not be possible since businessmen need time to think about the possibility and viability of making a contract and to finally decide positively. To overcome the problem caused by the restriction of unity of session, Islamic jurists introduced a mechanism called “option of stipulation” (Khiyar al-Shart) where contracting parties were given the right to think over the transaction and revoke it within the specified time. Time taken by the offeree to communicate his acceptance may be called continuance of the same meeting.

c) Under Islamic law of contract, there seems to be different views on the revocation of offer among the Islamic jurists from the four schools of thought. However, majority of the jurists said that the person offering has the option to withdraw/revoke his offer at any time before it has been accepted. The Islamic law did not distinguish between withdrawal and revocation of offer. If an offer is not accepted and it is rejected by the offeree, it will be treated as terminated. In contrary, CISG clearly distinguished withdrawal and revocation of offer. In CISG by virtue of Section 15(2) means that withdrawal can be made before or at the time when the offer reaches the offeree. Article 16(1) of CISG said that an offer may be revoked if the revocation reaches the offeree before he has despatched acceptance. Despite distinguishing between withdrawal and revocation of offer, the general principle of CISG on this matter is similar to the Islamic regime where offer may be withdraw/revoke at any time before it has been accepted.

d) There are two differences between both regimes on the issue of communication of acceptance. Islamic law said that the acceptance becomes effective when the acceptance does come to the knowledge of the offeree. In contrary, CISG said that the acceptance becomes effective when it is received by the offeror. In this case, both regimes do not replicate the common's law postal acceptance rule. Another notable difference between the two regimes is Article 21 of CISG which provides exception to Article 18(2) where it allows late acceptance subject to the offeror informs the offeree without delay or dispatches the notice to the effect or in the event. In contrary, under Islamic law of contract, an offer is made with the condition that it should be accepted within specified period of time and if the offeree fails to accept within the prescribed time limit, the offer is considered terminated.

e) In the issue of counter offer, generally Islamic law of contract and Article 19(1) of CISG shared common ground that an acceptance which adds to or modifies in terms of the offer constitutes only a counter-offer which can be accepted or rejected. The only difference between the two regimes is CISG further qualified this issue by Article 19(2) which said that as long as the additional or modification of the terms is not material modification of the offer shall constitute as an acceptance. However, this condition is subject to the offeror, without delay objects by any means to the discrepancy. Matters that constitute to material modification in the terms of the offer are listed in Article 19(3) of the Convention. Perhaps the most significant difference between the two regimes is with regard to the' battle of the forms'. Under Islamic law of contract the issue of 'battle of the forms' does not exist since one of the requirement for form is the acceptance must conform to the offer in all its details irrespective of whether such conformity is express or implied. However, under CISG 'battle of the forms' is an issue since the Convention has no special provision that governs the standard terms of a contract. If there is problem of conflicting standard terms in CISG, two approaches will be taken by the court to treat this problem namely the knock out approach and last short approach.

f) Interestingly, there seems to be two opinions of Islamic scholars in regard to invitation to treat in Islamic law of contract. The majority scholars said that the advertisement, display of goods, auction sale, tenders etc. goods are offer in Islamic law but on the contrary the minority said they are not offers. These minority scholars argued that by labelling them as offer will cause hardship to the seller for example the seller may need to pay huge amount of damages due to shortage of stock. Article 14(2) of CISG said that a proposal addressed to one or more unspecified persons is an invitation to treat. Firstly, it seems that the approach taken by the majority scholars in regard to invitation to treat under the Islamic law of contract is a stark contrast to the approach taken under Article 14(2) of the Convention. Under Islamic legal doctrine advertisements, display of goods etc. is treated as a valid offer, which are enforceable once there are accepted but Article 14(2) of CISG does not consider them as valid offer since the offer is made to the world at large but merely as an invitation to treat. Secondly, it is worth mentioning that the minority opinion of the Islamic scholars should not be totally discarded and perhaps ought to be given some weight of consideration as long as it does not contradict with any established Shari'ah principles and not causing injustice to the customers.

g) An agreement must be made by the free consent of both parties in order for the contract to be valid under Islamic law of contract. Proof of free consent is the essence of Islamic law of contract *aqd*. In contrast, CISG does not consider free consent of the contracting parties as one of the elements for validity of contract. CISG only mentions the indication of assent of the parties. Perhaps the most significant argument on this issue is by referring to Article 4(a) of the CISG which said that the Convention governs only the formation of the contract of sale and the rights and obligations of the seller and buyer arising from such a contract and is not concerned with the validity of the contract or of any of its provisions or of any usage. Consequently, domestic law applicable by virtue of the rules of private international law will govern issues of validity.

h) The objective of contract under the Islamic law of contract should be lawful and legally binding. The contract will be invalid if the objective of a contract is to perform some form of illegal act or immoral acts. Likewise, the consideration or subject matter of the contract should be legal, legitimate and lawful for a contract to be valid under Islamic law. A contract will be illegal and not enforceable by law if the subject matter of the contract is prohibited in Islam. CISG, however, seems to be silent on these matters. Again Article 4(a) of the Convention is the source of reference of this issue. Domestic law applicable by virtue of the rules of private international law will govern this matter. It is deem necessary for contracting parties to know what items are prohibited to be import or export. Any import or export of goods which are prohibited under the statute will be illegal. In conclusion, there is a difference in the legality of the objective and consideration of contract between the two regimes. It seems that Islamic law is more concern with the legality of the contract and religious nature of the goods traded whereas CISG being an international convention placed less emphasized on legality and is more concern on the commercial nature of the goods.

i) In the issue of capacity to make a contract, Islamic law not only required the person to attain puberty but must also show sufficient evidence that he or she has acquired complete capacity for execution of the contract. In other word, in addition to puberty, the possession of maturity of action is also deemed necessary. CISG is silent on this matter. Perhaps Article 4(a) of the Convention once again will be the source of reference on this issue. Domestic law applicable by virtue of the rules of private international law will govern the issue of capacity to make a contract. For example, the age of majority to enter into a valid contact is 18 years based on the provisions in Malaysian Contract Act 1950 and Age of Majority Act (Malaysia). To sum up despite the difference on the issue of capacity to enter into a valid contract between the two regimes, the importance of it must not be denied. CISG on the other hand by virtue of private international law seems to pass this issue to domestic law to ascertain the capacity of the person to enter into a valid contract.

Recommendations

Based on differences highlighted above albeit major or minor differences on formation of a contract between both regimes Islamic Law of Contract and the Vienna Convention on Contracts for the International Sales of Goods (CISG), two important recommendations should be considered:

a) Muslim countries that wanted to ratify this international Convention should keep in mind of these differences especially in the event of disputes arises between the contracting parties. This is particularly significant if one of the contracting parties is non-Muslim and the chosen forum to settle the dispute is not familiar with Islamic law of contract. This is perhaps evident in the case of *Beximco Pharmaceuticals v Shamil Bank of Bahrain* where the English Court of Appeal took an extreme position in favour of English law despite an Islamic contract agreed by the disputing parties. It was a disrespect shown to the principles of autonomy, and the rules and principles of Shari'ah law, which is one of the old and leading legal systems of the world.[203]

CISG needs to amend or modify some of its provisions particularly in the formation of contract to accommodate the Muslim countries. Interpretation plays an important role in Islamic law, however, and business law can probably benefit from the Shari'ah power of adaptability.[204] Hence, it is suggested that members of UNCITRAL and Islamic scholars should involved in serious intellectual discourse on the possibility of making international treaties like CISG compatible with Islamic law principles. This task might be difficult and probably time consuming but not impossible to achieve. Anyway, Rome is not built in a day. The CISG Convention itself took a long time before it was adopted and ratified by member States.

[203] See Anowar Zahid and Hasani Mohd Ali, *Shari'ah as A Choice of Law in International Islamic Financial Contracts: Shamil Bank of Bahrain Case Revisited*, US-China Law Review, Vol. 10:27, 2013, page 34, available at http://heinonline.org, (last visited December 14, 2014).

[204] See Fatimah Akaddaf, *Application of the United Nations Conventions on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles*, Pace International Law Review (2001), available at http://www.cisg.law.pace.edu/cisg/biblio/akaddaf.html#183 (last visited October 10, 2014).