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**THE CONTRACT OF SALE UNDER THE LAWS OF THE KINGDOM OF SAUDI ARABIA: A CRITICAL
APPRAISAL AND COMPARISON WITH THE INTERNATIONAL REGIME.**

Dissertation

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Dr. Saleem Sheikh

Abdul-Wahab Alkhadhari
ID: 0857629

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Declaration

This dissertation has been composed by myself and has not been submitted in any previous application for a degree. All quotations have been distinguished and sources of information acknowledged.

Abdul-Wahab Alkhadhari
aalkhadhari@ksu.edu.sa

Dedication

To my parents, who taught me to achieve this. Also, to my wife who helped me to achieve this.

Author's acknowledgements

At the risk I inadvertently forget to mention anyone, I would like to take the opportunity to express my thanks for all their advice and support Dr. Saleem sheikh, Professor Kofi Oteng Kufuor, Dr. John Strawson and Dr. Iwa Salami for all their support.

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{وَأَحَلَّ اللَّهُ الْبَيْعَ وَحَرَّمَ الرِّبَا} الآية 275 من سورة البقرة

“Whereas Allah has permitted trading and forbidden *Riba*”. {Surah Al-Baqarah 2:275}

{يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَأْكُلُوا أَمْوَالَكُمْ بَيْنَكُمْ بِالْبَاطِلِ إِلَّا أَنْ تَكُونَ تِجَارَةً عَنْ تَرَاضٍ مِنْكُمْ} الآية 29 من سورة النساء

“O you who believe! Eat not up your property among yourselves unjustly except it be a trade amongst you, by mutual consent.” {Surah An-Nisa4:29}

The Prophet Muhammad (peace be upon him), said, “ The truthful merchant is rewarded by being ranked on the day of resurrection together with the prophet, the truthful ones, the martyrs and the pious people”

Sahih Tirmidh, Hadith no.1209.

Abstract:

This paper will provide a critical analysis of the Contract of Sale under the laws of the Kingdom of Saudi Arabia, with a comparison between the Contract of Sale under Saudi law and the international regime through an analysis of the formation of the contract, the obligations of the seller and buyer, and the notion of good faith.

The first section considers an overview of the Contract of Sale as a source of obligation in Saudi law. This section will seek to explain the source of obligation in Civil Law, by discussing the Contract of Sale. It will provide an overview of the Contract of Sale, not as a legal obligation in itself, but rather as a legal fact that gives rise to a legal obligation.

The second section will discuss the position of a completed Contract of Sale. It will provide an overview of the elements of this kind of Contract, by looking at the concepts of offer (*Ijab*) and acceptance (*Qabul*). Furthermore, it will discuss the willingness to 'accept' and its legal implications. It will provide an overview of 'offer' and 'acceptance', which may or may not be performed at the same meeting, and which may also be verbal. It will provide a qualitative overview of what the 'contract session' option means, referring to the Islamic rulings of *Shafi* and *Hanbali*. It will also discuss the 'call' and 'put' options, which represent the seller and buyer's rights to a future contract at a specified price (strike price).

The third section will examine the contracting parties, namely the seller and buyer under Saudi law, by examining their obligations. It will discuss the seller's obligation to deliver the agreed goods and the buyer's obligation to accept the goods and pay for them. Moreover, it will discuss causes associated with the buyer's breach of contract.

The fourth section will provide an overview of the notion of good faith in the Contract of Sale. In this section, the meaning of good faith will be discussed, and it will provide an overview of good faith as implied in the Contract of Sale.

Finally, the paper will focus on the Contract for the International Sale of Goods (CISG). In this section, an overview will be provided of the United Nations' convention on CISG, including the formation of the Contract of Sale, the obligations of the seller and buyer, and the notion of good faith in the Contract of Sale. In addition, it will form a comparison between the Contract of Sale in Saudi law and CISG, by looking at the formation of the contract, obligations of the seller and buyer and the notion of good faith in a contract.

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Introduction:

Current research tackles the relationship between the Sales Contract of International Law and the Islamic Sales Contract. In other words, it discusses the main features, characteristics and influence of Islamic law on the Sales Contract, and the extent to which Holy texts affect the Sales Contract in Islam. In addition, the research explains the international Sales Contract, including its articles and its relationship with the Islamic Sales Contract. The study is not arbitrarily formed, as it focuses on certain points in order to understand the nature and the mechanism of the Islamic Sales Contract, highlighting aspects of difference and agreement between Islamic and International Law regarding the Sales Contract. The study uses an analytical methodology for analysing and criticising issues, and then discusses the extent to which they are relevant or otherwise to the current study. The study is not based on an explanation of data, but rather explores it and shows ambiguous areas in Contract Law, relating certain elements and showing the study's significance and relationship to the main concepts. Accordingly, the study is divided into four main parts, with an added conclusion.

The concept of obligation in Islamic law is discussed as a divine command, which is clearly reflected in the obligations of the Moslem, as in the *Ramadan* fast, prayer, *Hajj* (pilgrimage), *Zakat* (charity), and so on. Consequently, the idea of obligation is deeply embedded in the mind of the Moslem in a way that renders it unnecessary to force him or her to fulfil their obligations, as they act according to their principles. Such a cultural model has a deep impact on the personality of the Moslem as its influence extends to other aspects of life, such as attitudes to business etc. Thus, the Islamic concept of obligation inspires in the two parties of a contract, the notion of being obliged to the articles and rules of the previously held agreement. However, the idea of obligation in international law of Sales Contracts derives its power from a previously held agreement between the two parties, which does not come from intrinsic principles, but rather from the documentation.

A Contract, or *aqd*, consists of two important elements, the first being ‘offer’ (*Ijab*) and the second, ‘acceptance’ (*Qabul*). It seems clear regarding both *Ijab* and *Qabul* that a contract becomes legal and lawful when enforced by an announcement and declaration, resulting in legal consequences dealing with the subject matter. A renowned modern Moslem jurist defines a contract as, “The concurrence of two wills to create an obligation or to shift it or to relinquish it.”¹ The international Sales Contract consists of what is known as a proposal for concluding a contract addressed to one or more specific persons to form an offer only where adequately explicit and showing the intentions of the offeror in the case of acceptance. The proposal is to be effected only where it shows that the goods are either implicitly or expressly determined, either through quantity or price.

The parties of the Sales Contract are the seller and the buyer, who observe their commitment to their obligation according to the Contract. In addition, the Contract elaborates on the obligation of the seller to deliver the goods to the buyer and on the conditions that nullify it. In order to fulfill the obligation of the Contract, the vendor must be able to send the goods and commodities to the buyer. Thus, any commodities which are not available or cannot be delivered to the buyer are not permitted to be transacted. International Sales Law involves the same parties being involved in the Contract, namely the seller and the buyer.

The principle of good faith is a general principle of law that is prevalent in all civilised systems, including municipal systems, Islamic law and international law. It is one of the general principles approved by advanced nations, which are regarded as the source of international law. There is a clear connection between the principles of good faith and abuse of rights. The idea of good faith is stipulated to put an end to any potential abuse of rights in

¹ Ayub, M. (2007) ‘Understanding Islamic Finance’, at 104.

the Sales Contract, which one party may inflict on another. Therefore, international law provides the two following articles:

- 1- The contract must be performed in accordance with its contents, and in a manner consistent with the requirement of good faith.
- 2- The contract shall not be restricted to an obligation upon the contracting party to do that which is (expressly) contained in it, but shall also embrace that which is appurtenant to it by virtue of the law, custom and the nature of the transaction.

Finally, the conclusion concerns international and Islamic Sales Contracts, focusing on the aspects of difference and agreement between them. In addition, it highlights the mutual relationship between them, referring to the importance of international law to Islamic Sales Contract Law and vice and versa. It concludes by providing recommendations for both Islamic and international Sales Contracts.

First Section- the Contract of Sale as a source of obligation in Saudi law:

I. The Contract of Sale as a source of obligation in Saudi law:

The application of Islamic law in Saudi Arabia is difficult to understand outside the Kingdom. Saudi Law and economics are mainly based on Islamic law, which is a complicated affair requiring laborious and profound study of Islamic law, Islamic economics and international law. This study tackles the Sales Contract in both Saudi and international law, and therefore combines a trilogy of Islamic *Shari'ah*, modern law and economic theory.

It is of great importance to show the Sales Contract in international Civil Law and in Islam, as well as to show the influence of Islamic *Shari'ah* on the Sales Contract applicable in Saudi Arabia along with its counterpart in international law.

First of all, it is essential to show the areas from which the Islamic Sales Contract is derived, i.e. the subject matter, the contracting parties, and the wording of the Contract. Indeed, a Contract in Islam can be conditional or obligatory, although the latter is reserved for special cases and has a unique design. However, it is essential to understand the concept of obligation in Islam in general before going on to conceive of it in terms of the Sales Contract. According to professor Barber Johansen², in Islamic law, the concept of obligation is a divine command, which is clearly reflected in the obligations of the Moslem, particularly in the five pillars of Islam which include fasting during *Ramadan*, prayer, *Hajj* (pilgrimage), *Zakat* (charity), and so on. Therefore, the concept of obligation is deeply cultivated in the mind of the Moslem in a way that makes it unnecessary to have to force him or her to act upon the obligation or to behave in a suitable way. This culture consequently deeply impacts on the personality of the Moslem, in a way which affects other areas of activity, such as business dealings.

² Johansen, B. (2008) '*Concept of obligation in Islamic law*', University of Harvard- School of Law.

Hassan, A. (1994) clearly explains the idea of contractual obligation. He states that the discussion of the Sales Contract generates within itself the idea of business transactions or contractual obligations which are inextricably related to the term *bay*. *Bay* indicates the transaction, including both sale and purchase, and also refers to the exchange of commodities. It is therefore a state of exchange reciprocally made between two or more parties. In Arabic, it means the Contract of Sale: *b.y* and *sh.r.y*. Legally speaking "*safqah, mubaya'ah* or *mu'adaha*" are assumed when the purchaser strikes their hand on that of the seller to signify acceptance (*qabul*) of the offer (*ijab*), which is usually made in the same session. Sale is a bilateral transaction. The most ordinary foundation for an obligation is the contract (*aqd*).³

II. The idea of contract obligation:

Indeed, the foundation for establishing the idea of contract obligation is known as the Contract. The conclusion of the agreement is usually not formal as it can be made orally and as such, it is binding according to Islamic law. For example, the seller may issue their obligation by saying "I sell to you" or "I will entitle you to be the owner of" and at the same time the buyer shall confirm his confession to the agreement by saying "I accept such an agreement" or "I accept the ownership of such a thing". This action indicates the mutual consent which is required by Islamic law for the validity of a Contract of Sale or exchange of commodities or properties.⁴

For a clearer understanding of the idea of obligation in Islamic law, it is necessary to understand the 'elements of sale'. Such a process of sale consists of four basic parties: *al-bai* (the seller), *al-mubta* (the purchaser), *al-thaman* (price) and *al-muthan* (the object of value). The Qur'an explains the legality of the sale and how it can be validated. The Sales Contract,

³ Hassan, A. (2007) 'Sale and Contracts in Early Islamic Law'.

⁴ I will explain offer and acceptance further in the second section, when the discussion of the Contract of Sale has been completed.

which is based on the idea of obligation, should be based on a Contract consisting of four elements as well as synallagmatic contracts. The Sales Contract constitutes the basis of society as human beings, in their daily life, are expected to exchange commodities and other things necessary for their lives. In addition, all things in life were created by God for the benefit of man and so it is important for man to be aware of this fact. The importance of the Sales Contract has therefore become a reality.

Furthermore, the idea of obligation in Islamic contracts derives its power and legitimacy from certain values set out in Islamic law. There are around twelve ethical rules in the Islamic Sales Contract which play a major role in ensuring that the idea of obligation comes from within one's own self, without any need for imposition from any other authority. Without such rules and ethical values, the idea of obligation in the Sales Contract may be invalid. Such values are related to Islamic practices and the moral code of Moslems. The Sales Contract should clearly define the legal and illegal conditions to be observed or avoided among the contracting parties concerned.

It is apparent that Islam has made everything clear and established boundaries to create fairness, cultivating the idea of obligation as part of a choice that springs willingly from the human being. The Holy Qur'an tells us "O you who believe! Fulfil (your) obligations"⁵ (*Surah Al- ma'idah*6:1).

Furthermore, the parties involved in the Sales Contract should be both trustworthy and trusting. The Prophet Muhammad (peace be upon him) said that the 'truthful' are to be rewarded on the Day of Resurrection, together with the prophets, faithful ones, the martyrs and the pious people.⁶ At the same time, the Prophet Muhammad (peace be upon him) has

سورة الانعام الاية 1 { يَا أَيُّهَا الَّذِينَ آمَنُوا أَوْفُوا بِالْعُقُودِ } 5

6'Translation of Sahih Tirmidh', 'Sunnah and Hadith: Sale and Trade', University of Southern California. No. 1209.

warned against the dishonest trader who is despised by both believers and God, which is attested to in the holy Qur'an in the following verse, "O you who believe! Eat not up your property among yourselves unjustly except it be a trade amongst you, by mutual consent".⁷ {Surah An-Nisa4:29}.

Another important condition in the Islamic Sales Contract is that no defects must be concealed. The Islamic system of law establishes the idea of commitment in the heart of the Moslem that does not allow him or her to conceal defects or cheat, even if such cheating or concealment of defect is lawful from the Civil Law perspective.

"It was reported that one day the Prophet Muhammad (peace be upon him) was passing by a man who was selling foodstuff. The Prophet Muhammad (peace be upon him) asked him, 'How is your business?' The man told the Prophet Muhammad (peace be upon him) about his business. Then, it was revealed to him, 'put your hand in it' (the foodstuff). He put his hand in it and his hand got wet. After realising the man was concealing defects and cheating, the Prophet Muhammad (peace be upon him) said: 'Surely, whoever deceives in business transactions, is not (or does not behave like) one of us.'⁸

Therefore, it is clear that the idea of obligation results from the inner self rather than from being enforced against the Moslem.

III. 'Risk' (*al-ghrarar*) in Contracts of Sale under Islamic law:

Another ethical obligation provided by Islamic law concerning the Sales Contract is that the purchaser has the right to return the goods in the case of finding any defect or problem resulting from them. Indeed, Islamic law entails the implementation of '*majure*' as a

سورة النساء الآية 29 { يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَأْكُلُوا أَمْوَالَكُمْ بَيْنَكُمْ بِالْبَاطِلِ إِلَّا أَنْ تَكُونَ تِجَارَةً عَنْ تَرَاضٍ مِنْكُمْ } 7

⁸ Hassan, A. (1994) 'Sales and Contracts in Early Islamic Commercial Law,' at 38.

condition for terminating the Contract; thus, if the object of Contract is crops, and they are damaged by pests or natural calamities, then the Contract shall be invalid.

It is very important to show that the idea of obligation does not mean that any of the parties involved in the Contract may be subject to risk or loss due to their obligation. Such a rule can be clearly seen in the Sales Contract based on the sale of an article that is not yet known; sales involving risk or hazard, or sales where one does not know whether the commodity will arrive at a later date. Islamic law is very clear about such sales, which are called *bay al-ghrarak*, and has banned such activities.

Bay al-ghrarak is not permitted for parties involved in the Sales Contract because the seller may steal or destroy the property of the buyer, especially if it is supposed that the buyer could not obtain the ownership of the transacted goods. For avoidance of *al-ghrarak* in the Sales Contract, “the contract must not be doubtful or uncertain as far as the rights and obligations of the parties are concerned”.⁹ The object of the Contract should be fixed, clear, direct and known.

It is evident that the effect of Islamic law on the Sales Contract gives rise to a legal obligation, although it is not an obligation in itself, but rather cultivates deep within the parties a sense of the importance of obligation through disseminating the ethical values of fairness, justice and avoidance of cheating. It opens the mind to the fact that obligation is necessary for preserving the rights of all parties concerned in the agreement, as it prohibits the concealment of defects and cheating, and it provides the parties involved in the Contract with the required protection of their rights. In this case, obligation becomes a demand.

⁹ Ayub, M. (2007) ‘*Understanding Islamic Finance*’, Southern Gate Chichester, England: The Atrium, at 143.

Second Section- the Contract of Sale is completed:

I. Essential elements of a valid Contract:

A valid Contract is based on six important elements that should be present, i.e. offeror; offeree; offer; acceptance; subject matter, and consideration. In addition, the contracting parties must be legally competent to enter into a Contract.¹⁰ Competence for entering into a Contract is measured by the Qu'ran as follows:

“And try the orphans (as regards their intelligence) until they reach the age of marriage; if then you find sound judgement in them, release their property to them, but consume it not wastefully and hastily, fearing that they should grow up, and whoever (amongst guardians) is rich, he should take no wages, but if he is poor, let him have for himself what is just and reasonable (according to his labour) And when you release their property to them, take witness in their presence; and Allah is All-Sufficient in taking account”.¹¹
(*Surah An-Nisa 4:6*).

Regarding offer and acceptance, Islamic law considers both express and implicit offers as well as express and implicit acceptance. It therefore shows the making of an offer either orally, in writing or by conduct. Regarding the subject matter of the Contract, Islamic Law highlights the importance of lawfulness, existence, deliverability and clear determination. Lawfulness shows that the object of the contract must be legal and binding under the law. The subject matter and the underlying cause of the contract must be lawful.

After briefly presenting the elements of the Sales Contract, it is important to pay attention to the elements that may impede the legal system of the Contract. This is divided into two types. The first is characterized by involuntary impediments, which are the elements that are beyond

¹⁰ Gaddy, W. & Havt, R., ‘Real Estate Fundamentals: Essential Elements of a valid contract’, at 97-99.

¹¹ {وَابْتَلُوا الْيَتَامَىٰ حَتَّىٰ إِذَا بَلَغُوا النُّكَاحَ فَإِنْ آنَسْتُمْ مِنْهُمْ رُشْدًا فَادْفَعُوا إِلَيْهِمْ أَمْوَالَهُمْ وَلَا تَأْكُلُوهَا إِسْرَافًا وَبِدَارًا أَن يَكْبَرُوا وَمَن كَانَ غَنِيًّا فَلْيَسْتَعْفِفْ
وَمَن كَانَ فَقِيرًا فَلْيَأْكُلْ بِالْمَعْرُوفِ فَإِذَا دَفَعْتُمْ إِلَيْهِمْ أَمْوَالَهُمْ فَأَشْهُدُوا عَلَيْهِمْ وَكَفَىٰ بِاللَّهِ حَسِيبًا} سورة النساء الآية (6)

one's control, like insanity, imbecility, unconsciousness, sleeping, death or illness. The second is characterized by voluntary impediments which result from one's own actions and choices such as drunkenness, prodigality, or insolvency.

II. The elements of a Sales Contract in Islamic law:

After understanding that the Islamic contract '*aqd*' is a source of obligation in itself, as the Moslem is prepared spiritually to accept the idea of obligation as a duty and not as a burden, it is important to show the elements of a Sales Contract in Islamic law. From the lexical perspective, '*aqd*' means to tie two separate things or separate entities together. Nazim, S. (2005) defines it as follows: "It is the conjunction of an offer emanating from one of the two contracting parties with the acceptance by the other in a manner that affects the subject matter of the contract."¹² *Al-Majallah al-Ahkam al-Adaliyyad* explains that '*aqd*' is put into effect when two parties became responsible for certain obligations regarding any subject matter.¹³ Moreover, to Koeher, B. (2009), a contract is based on two important elements, and without them the contract is null and incomplete. The first is the offer (*Ijab*), and the second is acceptance (*Qabul*).¹⁴ It seems clear in relation to both *Ijab* and *Qabul* that contracts have a legal standing which is formed by announcement and declaration, and this results in the legal consequences dealing with the subject matter. A modern Moslem jurist defines the Contract as the concurrence of two wills to create an obligation, to shift, or to relinquish it.

III. 'Offer' (*Ijab*) and 'acceptance' (*Qabul*) in Contract of Sale:

Studying the aforementioned definitions shows that the Contract is based mainly on two factors: offer (*Ijab*) and acceptance (*Qabul*). According to Rosly, S. (2005), there should be a

¹² Nazim, S. (2005) '*Islamic Legal and Regulation Issues*', New York; Cambridge University Press.

¹³ Al-Majallah al-Ahkam al-Adaliyyad, 'The Contract of Sale; Fundamental Basis of Sale'...

¹⁴ Koeher, B. (2009) 'Islamic Finance as a Progenitor of Venture Capital', *Social Science Research Network or Institute of Economic Affairs*, Vol. 29, at 89-91.

legal unification between the two declarations concerning the subject matter of contracts.¹⁵

As stated, *aqd* reflects within itself an obligation resulting from a mutual agreement. The term *aqd* therefore implies the idea of conjunction, intention and the announcement of the two parties involved, the Holy Qur'an tells us:

“O you who believe! Eat not up your property among yourselves unjustly except it be a trade amongst you, by mutual consent.”¹⁶ {Surah An-Nisa4:29}.

The Prophet Muhammad (peace be upon him) said: “The seller and the buyer have the option of cancelling or confirming the deal unless they separate, or one of them says to the other, 'Choose (i.e. decide to cancel or confirm the bargain now).' Perhaps he said, 'Or if it is an optional sale.’”¹⁷

Indeed, looking deeply into the aforementioned definitions, the conclusion can be reached that a Sales Contract consists of two parts: the first is the issuance of an outward act depicting internal willingness, which is called an offer (*Ijab*); the second part is the acceptance, which is called accept (*Qabul*). Furthermore, there should be legal unification between the two parties regarding the subject matter.¹⁸

IV. The willingness to accept and its legal implications:

The terms offer and acceptance can be identified as the procedure which makes the contract legal and valid. In fact, the offer shall be written in clear language, and in a straightforward manner. It is also noted that there should be a relationship between offer and acceptance with the subject matter of the contract. It is very important to focus attention on another important factor, which is that the issuance of the offer and its acceptance should occur during the same

¹⁵ Rosly, S. (2005) ‘*Critical Issues in Islamic Banking and Financial Markets*’, Bloomington, Indiana: Authorhouse.

¹⁶ سورة النساء الآية 29 {يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَأْكُلُوا أَمْوَالَكُمْ بَيْنَكُمْ بِالْبَاطِلِ إِلَّا أَنْ تَكُونَ تِجَارَةً عَنْ تَرَاضٍ مِنْكُمْ}

¹⁷ *Translation of Sahih Bukhari*, at ‘*Sunnah and Hadith: Sale and Trade*’, University of California, Vol. 3, Book 34, no. 322

¹⁸ Al-Majallah al-Ahkam al-Adaliyyad, ‘The Contract of Sale: Fundamental Basis of Sale’.

session. It is worth mentioning that the offer (*ijab*) is the most important condition for making a contract valid and applicable; it has been defined as a declaration or a firm proposal first made with a view to creating an obligation, while the subsequent declaration is termed acceptance (*qabul*).

Ijab signifies the willingness of a party to do something positive. The Islamic view is silent on whether or not the willingness of a party to abstain from a thing also constitutes *Ijab*. Only the commission of an act forms *Ijab*. Abstinance from an act cannot be regarded as *Ijab*.¹⁹ *Al-Majallah al-Ahkam al-Adaliyyad* is of the opinion that a contract may consist of either doing or abstaining from doing something.²⁰ It is clear that such a definition is to some extent identical to the meaning of *Ijab*. According to the Contract Act of 1872 in English law, at Section 2(a), “When one person signifies to another his willingness to do or to abstain from doing anything with a view to obtaining the assent of that other person to such an act or abstinence, he is said to make a proposal.”²¹

There are different ways in which both the offer and acceptance can be expressed e.g. through words, gestures, clarification, implementation or conduct. There is no problem among the jurists regarding the conclusion of contracts through words and no particular words are specified or used for making a contract... The most important thing in making contract is to convey a clear and understandable meaning of it. Moreover, it does not matter whether the terms are explicit or implicit. There are also certain conditions under which an offer should be cancelled:

¹⁹ Ayub, M. (2007) ‘*Understanding Islamic Finance*’, Southern Gate Chichester: The Atrium, at 106.

²⁰ Al-Majallah al-Ahkam al-Adaliyyad, ‘The Contract of Sale: Fundamental Basis of Sale’.

²¹ This Act came into force on 1st September, 1872 and is called the Contract Act, 1872. The legislative intent behind its legislation is to ensure that contractual obligations are performed. It provides terms and conditions for the validity of the contracts but leaves the form and conditions of contract to be mutually settled by the contracting parties. See Black’s Law diction, ‘*Pronunciation*, 6th ed.’ (1991).

- 1- If the maker of the contract withdraws his offer.
- 2- If one of the contracting parties dies or loses their capacity.
- 3- If the contractual session is terminated without concluding the contract.
- 4- If the subject matter is to be destroyed.²²

V. The contract session option:

It is clear that Islamic law makes it clear that acceptance should coincide with the offer in all details, and the acceptance should be effected and come into force at the same session meeting: namely that there should be unity of session. Indeed, the unity of a session can be understood in different ways. Such a rule derives its legitimacy from following the Prophet Muhammad (peace be upon him), who stated: “the contracting parties have the right of option (to finalise or not) until they separate.”²³ Jurists advocate the viewpoint that the contract is to be made complete, including offer and acceptance, in the same session and the right to ratify or cancel or revoke shall be given to any party during the session. This is the option of stipulation, which is an Islamic mechanism provided by Islamic law to find a solution to a problem resulting from the restriction of a unity session. Such an option means the contract is not binding for the party which has acquired that right for a specified period. Al-Mansuri, M. (2004) gives a more illuminating and clearer explanation of the validity of the contract within a specific session and of whether or not it can be revoked after the end of this same session.

A narrow interpretation of *Majlis* would mean that the offer of the promissory should be accepted without any delay and without giving the promisee any opportunity to think or consult someone in order to make up his mind. This may be practicable in small transactions

²² Hassan, A. (1994) For more information, see ‘Sales and Contracts in Early Islamic Commercial Law.’

²³ *Translation of Sahih Bukhari*, at ‘*Sunnah and Hadith: Sale and Trade*’, University of California, Vol. 3, Book 34, no. 326..

but will fail in bigger transactions, which may require considerable inquiry. Thus, if an offer is made for the sale of a factory, it will require inquiry into the title, power to sell, value of machinery, value of buildings, its liabilities, if any, profitability, etc. If the *Majlis* is interpreted to mean a single session, no one will consider purchasing property.²⁴ However, according to the above saying of the Prophet Muhammad (peace be upon him), if two parties agree to sign a contract at the same meeting, each of them has the right to terminate or cancel the contract till the meeting is ended and expired. This means that the offer must be taken seriously.²⁵ Even so, modern scholars consider the word ‘meeting’ as fictional. Ayub, M. (2007) explains that “the word meeting is only a legal fiction, in that whatever time is taken by the promisee to communicate, his acceptance may be called a continuance of the same meeting.”²⁶

Accordingly, if the seller makes an offer to the buyer, saying to him "I can sell to you this commodity for a certain price", but the buyer does not respond to his offer before they separate, in such a case, the sale cannot be completed and the offer no longer exists. However, if the buyer obtains a specific time frame for making his mind up about which items he can buy, then it is accepted and the sale is valid until the expiry of such timing. Therefore, it is clear that the requirement of the unity of the session does not apply to certain forms of contract, such as agency agreements, gifts, or the appointment of an executor for the property of a minor.

The Islamic scholars, *Shafi* and *Hanbali*, recommend fulfilling the promise or *Wa'd* taken in the contract session. *Wa'd* is necessary to show the parties' commitment to perform contracts as mutually expressed and agreed during the session. Moreover, they affirm that promises or

²⁴ Ayub, M. (2007) ‘*Understanding Islamic Finance*’, Southern Gate, Chichester: The Atrium, at 107.

²⁵ *Translation of Sahih Bukhari*, at ‘*Sunnah and Hadith: Sale and Trade*’, University of Southern California Vol. 3, Book 34, nos. 326, 293, 296, 321, 322, 323, 324, 325 and 326..

²⁶ *Ibid.* Note 24.

agreements that are not intended to be fulfilled are considered illegal and are disapproved of (*haram*). The Holy Qur'an tell us:

“And fulfil (every) covenant. Verily, the covenant will be question about.”²⁷ (*Surah Al-Isra.17:34*).

They recommend fulfilling the promise, even if it is subject to certain conditions and rules. However, although a promise taken in such sessions is religiously binding, it does not represent a legal duty. This can be explained on the grounds that a promise is part of a voluntary contract. However, *Hanafi* makes a difference between absolute promise and conditional promise, as the conditional promise is binding to avoid risk (*gharar*) in the subject matter of the contract. The Prophet Muhammad (peace be upon him) said, “No deal is settled and finalized unless the buyer and the seller separate, except if the deal is optional (whereby the validity of the bargain depends on the stipulations agreed upon).”²⁸

²⁷ الإسراء: الآية 34 (وأوفوا بالعهد إن العهد كان مسؤولاً)

²⁸ *Translation of Sahih Bukhari*, at ‘*Sunnah and Hadith: Sale and Trade*’, University of Southern California, Vol. 3, Book 34, no. 326.

Third Section- the contracting parties and their obligation:

I. The parties of the Contract and their obligation:

This section discusses the contracting parties, the seller and the buyer, and their commitment to their obligation as stipulated in the Sales Contract. In addition, it will discuss the obligation of the seller to deliver the goods to the buyer and the conditions that nullify the Contract. For fulfilling the obligation of the Contract, the vendor must be able to send the goods and the commodity to the buyer. Thus, any commodities which are not available or cannot be delivered to the buyer are not permitted to be transacted. In this respect the Prophet Muhammad (peace be upon him) is reported to have said: "Do not sell a thing which is not with you."²⁹ The sale of non-existent and undeliverable goods was common in pre-Islamic times. For example, Abdul- Allah Bin Abbas prohibited the selling of dates on a palm tree before harvesting them. Thus, the transaction was not valid unless the goods were ready to be delivered.³⁰ Furthermore, the seller must not conceal the defects of the goods and the commodities that will be sold to the buyer. It is reported that one day, the Prophet was passing by a man who was selling foodstuffs. The Prophet asked him:

"How is your business?" The man answered the Prophet about his business. Then, it was revealed to him, "put your hand in the foodstuff." So, he put his hand in it and his hand got wet. After realising the man was concealing defects, the Prophet said: "Whoever deceives in business transactions, is not (or does not behave like) one of us."³¹

The buyer has the right to return the defective goods without any objection. Such a condition is included in the Sales Contract before the defects are discovered. In such a case, the vendor

²⁹ Ibid.

³⁰ Ibn 'Abbas said, "Allah's Apostle forbade the selling of foodstuff before its measuring and transferring into one's possession." I asked Ibn 'Abbas, "How is that?" Ibn 'Abbas replied, "It will be just like selling money for money, as the foodstuff has not been handed over to the first purchaser who is the present seller." See: '*Translation of Sahih Bukhari*', University of Southern California, at *Sunnah and Hadith: Sale and Trade*, Vol. 3, Book 34, no. 326...

³¹ Ibid.

cannot escape from their liability and should return the price and take back the goods, once the fault or the mistake in the goods is discovered.

In addition, the seller should not reduce the weight or the measure to the buyer. In this respect the Holt Qar'an tells us:

- “1. Woe to *Al-Amutaffifun* (those who give less in measure and weight).
2. those who, when they have to receive by measure from men, demand full measure,
3. And when they have to give by measure or weight to (other) men, give less than due.”³²
(*Surah Al-Mutaffifin*.83:1-3).

The Prophet Muhammad (peace be upon him) said:

“O Emigrants! There are five things which may befall you and I pray to God that you may escape them: moral decay never openly shows itself among people but they suffer from pestilence and disease such as their fathers have never known; they do not use light weights and measures but they are smitten by famine and the injustice of rulers.”³³

Accordingly, the seller is committed to not decreasing the weights or the measures as such things may make the Contract invalid. However, in such a case, the buyer should give the seller clear evidence of the mistake and the defects in the goods, so the seller is obliged to pay suitable compensation.

In addition, in cases of fraud carried out by the seller through deceiving the buyer and reassuring him or her of the quality and specifications of the commodity, the Sales Contract is considered invalid. It is banned in Islamic law to deceive in contracts or in business transactions. For example, the buyer does not have the right to sell an animal that has not

³² سورة المطففين الآية 1 (3-) {وَيْلٌ لِّلْمُطَفِّفِينَ * الَّذِينَ إِذَا اكْتَالُوا عَلَى النَّاسِ يَسْتَوْفُونَ * وَإِذَا كَالُواهُمْ أَوْ وَزَنُواهُمْ يُخْسِرُونَ}

³³ Hassan, A. (1994) ‘*Sales and Contracts in Early Islamic Commercial Law*’, Southern Gate, Chichester: The Atrium, at 38.

been milked for a few days in order for it to yield larger amounts of milk when it is due to be sold. Such fraud entitles the buyer to cancel the sales process.

In addition, the Islamic law Contract gives the right to the purchaser to return the goods if he or she finds any defect in them and “all the right of usufruction and other benefit from the goods during his possession belongs to him.” The Prophet Muhammad (peace be upon him) said “the Prophet belongs to him who bears responsibility.”³⁴

II. The obligation of the seller and the buyer:

As has been discussed earlier, the Contract is based mainly on two important roles: the first is offer (*ijab*) and the second, acceptance (*qabul*). Once the acceptance and *ijab* are confirmed through the Contract, the contracting parties, the buyer and the seller, are committed to implementing the parts and the articles validated by the Contract. Thus, the valid Contract requires that both buyer and seller agree to the following:

- The buyer shall make clear to the seller that the object of the Contract must be accepted and valid.
- The object should be free of *gharar* (risk), which means that the seller has to explain and clarify all things related to the object without cheating the buyer.
- The seller shall sell to the buyer something that exists and which is under his or her control.

Both the seller and buyer shall agree to the stipulations shown in the Contract, which can be justified as a general principle, such as specifying quantity, quality and number. There are many *Hadith* (examples from the life of Prophet Muhammad -peace be upon him-) which

³⁴ *Translation of Sahih Bukhari*, University of Southern California, at ‘*Sunnah and Hadith: Sale and Trade*,’ Vol. 3, Book 34, nos. 358, 359 and 361.

tackle the topic of stipulations of the Contract and obligations of both seller and buyer.³⁵ According to a contemporary of Prophet Muhammad (peace be upon him), Ibn Umar, “I saw the people buy foodstuff randomly (i.e. blindly without measuring it) in the life-time of Allah's Apostle and they were punished (by beating), if they tried to sell it before carrying it to their own houses.”³⁶ Thus, the features and the traits of the transaction must be discussed by both the seller and buyer.

The Sales Contract should define everything in the Contract and the seller should remove any doubts from it. The Prophet Muhammad (peace be upon him) said:

“Both the legal and illegal are clearly defined and in between them are some doubtful matters which are not known by many people. So whoever is wary of those doubtful things, he purifies himself for his religion and his honour.”³⁷

The seller should be trustworthy as the Prophet Muhammad (peace be upon him), said, “ The truthful merchant is rewarded by being ranked on the day of resurrection together with the prophet, the truthful ones, the martyrs and the pious people.”³⁸

The Holy Qur'an, which shows that the Islamic Law of Contract admits the theory of amendments or modification due to urgency or contingencies, which is attested to in the following verse “And fulfil the Covenant of Allah (*Bai'ah*: pledge for Islam) when you have covenanted, and break not the oaths after you have confirmed them- and indeed you have Appointed Allah your surety. Verily, Allah knows what you do.”³⁹ (*Surah An-Nahl 16:91*)

The theory of contingences relies on the concept of equity and justice at the heart of Islamic

³⁵ *Translation of Sahih Bukhari*, University of Southern California, at ‘*Sunnah and Hadith: Sale and Trade*’, Vol. 3, Book 34, no. 326.

³⁶ *Ibid.* ob cit. at *Hadith*, 347

³⁷ *Translation of Sahih Tirmidh: Sale and Trade*, University of Southern California, no. 1209, at ‘*Sunnah and Hadith*’.

³⁸ *Ibid.*

³⁹ سورة النحل الآية 91 (وأوفوا بعهدهم إذا عاهدتم ولا تنقضوا الأيمان بعد توكيدها وقد جعلتم الله عليكم كفيلا إن الله يعلم ما تفعلون)

Shar'iah. Indeed, if there is an urgent condition or necessity, then the seller can amend their agreement with the buyer. Likewise, certain options allow contracting parties to validate the offer and acceptance of their proposed counterparts.

Indeed, in Islamic law, there are binding laws that compel the seller to be legally obliged to the rights of the buyers and the stipulations of the Contract. These terms are called *Mithaq* and *Ahd* or *W'adah* and *Aqd*. *Mithaq* means the firm determination on the part of both the buyer and seller to fulfil the contractual obligations. The term *Mithaq* is mentioned in various places in the Holy Qur'an. The Holy Qur'an refers to the agreement between God and human beings, and treaties between nations or groups, "and", it declares: "who fulfils their covenant when they make it"⁴⁰ (*Surah Al-Baqarah 2:177*).

Ahd or *W'adah*: Both seller and buyer should be committed to their *Ahd*, as it is based on both a unilateral and bilateral obligation. The Holy Qur'an says: "And fulfill every Ahd for each will be inquired into (on the Day of Judgment)" or "(But righteous) are those who fulfil the contracts, which they have made."⁴¹ *Ahd* is also called *W'adah* in the *Fiqh* literature.

Furthermore, both *Ijab* and *Qabul* involve two parties, and imply internal willingness from both contracting parties which is legalised and certified through the Contract. Thus, there are two wills that create, change or relinquish the obligation. The Contract shows the obligation of both the contractual parties arising from mutual agreement, which gives an idea of conjunction, intention and declaration. For a clearer idea about the obligation of both seller and buyer, it is necessary to understand the subject matter of the Sales Contract and its elements.

⁴⁰ سورة البقرة الآية 177 {والموفون بعهدهم إذا عاهدوا}

⁴¹ Ayub, M. (2007) 'Understanding Islamic Finance', Southern Gate, Chichester: The Atrium, at 103.

III. The subject matter of the Sale Contract:

The subject matter of the Contract contains the object of the Contract commodity or the performance of an act. Detailed conditions in respect of the subject matter should be in, or potentially in, existence; valuable; usable; capable of being owned; capable of being delivered, possessed, specified and quantified and the seller must bear its title and risk. If a nonexistent thing is sold, even with mutual consent, the sale is void according to Islamic law.⁴² The subject matter of the Sales Contract must have a value. The seller cannot sell to the buyer a commodity which has not yet come into existence or that cannot be delivered. It is very important to avoid *gharar* in the Sales Contract. The seller should duly consider the items in the Sales Contract agreement, as the subject matter should include pure materials, which are legally approved. In addition, the commodity must not include things which are prohibited by *Shari'ah* such as pork, wine, and so on. It must be lawful and under the terms of Islamic law. Furthermore, the purpose of the Contract should not be contrary to the goals of Islamic law. A Contract based on selling a casino is not valid because it is against Islamic law.

Furthermore, the seller should sell a legal commodity which is owned by someone, as it should be free from legal charge. Furthermore, "the subject matter of the contract should fulfill the objective of the contract. Thus, perishable goods like vegetables cannot be the subject of a pledge."⁴³ The seller should not sell harmful materials on the market such as the drug heroin and so on.

⁴² The Prophet Muhammad (peace be upon him) is reported to have said: "Do not sell a thing which is not with you. See '*Translation of Sahih Bukhari*' at *Sunnah and Hadith: Sale and Trade*', University of Southern California, Vol.3, Book 34, Hadith no. 343.

⁴³ Ayub, M. (2007) '*Understanding Islamic Finance*', Southern Gate, Chichester: The Atrium, at 108.

The seller should fix with the buyer the essence, quality and value of the subject matter before the Sales Contract. Such determination may be made by pointing or by detailed specification. The subject matter should be seen, known and specified.

Fourth Section: the notion of good faith in the Contract of Sale:

I. The notion of good faith in the CISG:

The principle of good faith is a general principle of law. It is prevalent in all civilized systems, including municipal systems, Islamic *Shar'iah* and international law. It is one of the general principles approved by advanced nations, which are considered to be a source of international law. There is a clear similarity between the principles of good faith and abuse of rights. The idea of good faith is stipulated to put an end to the abuse of rights that a party may cause to the second party in the Sales Contract. Thus, international law stipulates the following two articles:

- 1- The contract must be performed in accordance with its contents, and in a manner consistent with the requirements of good faith.
- 2- The contract shall not be restricted to an obligation upon the contracting party to do that which is (expressly) contained in it, but shall also embrace that which is appurtenant to it by virtue of the law, custom and the nature of the transaction.⁴⁴

According to the CISG, at Paragraph 1, Article 7, “In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.”⁴⁵

The Sales Contract requires that the seller applies the idea of good faith in their Contract with the purchaser, as the idea of good faith is considered part of the ethical value, moral status and good principle in the performance of the Contract, for example, if the Sales Contract contains the sale of a certain type of fruit to the buyer. Here, if the seller does not resort to

⁴⁴ United Nations Convention on Contracts for the International Sale of Goods, April 11, 1980, S. Treaty Doc. No. 98-9 (1983) 19 I.L.M. 668 (1980) [hereinafter CISG] (entered into force on Jan. 1, 1988), *available in* 15 U.S.C.A. app. At 49 (West Supp. 1996), 52 Fed. Reg. 6262-80, 7737 (1987), U.N. Doc. A/Conf. 97/18 (1980).

⁴⁵ *See* CISG, at Article 7.

good faith, they can sell him second class fruit. A second example is if the Sales Contract is entered into between the trader of commodities and the buyer, and they agree that the seller should send the commodities to the buyer's destination, providing that the buyer is committed to paying the cost of transportation. The seller then takes the longer route in order to get more benefits from the buyer and sells him a lower quality commodity with some faults that only the seller can be aware of. This is then considered to be a deviation from the rules of good faith in sales. "What is meant by the necessity of performing a contract with good faith is that it is necessary to abide by honesty and faithfulness and to seek economy and moderation in performance so that it does not become disastrous to the other contracting party."⁴⁶

A sales contract requires that both purchaser and seller have the notion of good faith, which is necessary for the validation of the Contract of Sale. Thus, it is of great importance to define the notion of good faith, highlighting its connection with the Sales Contract. Indeed, defining good faith is a controversial affair, as Powers notes: "The term lacks fixed meaning because it is loose and amorphous."⁴⁷ Powers states that the notion of good faith is "an elusive term best left to lawyers and judges to define over a period of time as circumstances require." He also defines it as "an expectation of each party to contract that the other will honestly and fairly perform his duties under the contract in a manner that is acceptable in the trade community." he resumes his definition by stating that it is "an international doctrine that requires parties to an international transaction to act reasonably, as they would expect the other party to act."⁴⁸

In addition, good faith is also related to the legal article in the Sales Contract, which concerns honesty, fairness and reasonableness. O'Connor therefore describes good faith as follows:

⁴⁶ Tetley, W. (2004) 'Good Faith in Contract .Particularly in the Contracts of Arbitration and Chartering', at 7.

⁴⁷ Powers, J., '*Defining the Indefinable: Good Faith and the United Nations Convention on the Contracts for the International Sale of Goods*' (1999) 18 J.L. & Com. 333 -353.

⁴⁸ Ibid.

“A fundamental principle derived from the rule *pacta sunt servanda*, and other legal rules, distinctively and directly related to honesty, fairness and reasonableness, the application of which is determined at a particular time by standards of honesty, fairness and reasonableness prevailing in the community which are considered appropriate for formulation in new or revised legal rules.”⁴⁹

Accordingly, good faith in the Sales Contract shows the just, fair and honest conduct of both buyer and seller, which shall be practiced by both parties in their dealings with each other, or with a third party, who may be directly or indirectly involved in the Contract and its process. Furthermore, good faith requires that each party should be fair and honest in negotiations, thus the seller should explain and show all the defects of the sold item to the purchaser. He shall not resort to *gharar* as he should not cheat the purchaser. Furthermore, once the agreement has been reached and entered into, both parties- seller and purchaser- should perform their respective obligations and enforce their rights honestly and fairly.

II. The idea of good faith in Islamic law:

Indeed, after discussing the notion of good faith in a Sales Contract under the CISG, it is necessary to take a look at it in Islamic law, where it is considered a major element. “The idea of good faith in Islamic law can be traced as far back as the Ottoman empire where it took the form of the *Al-Majalla ai-Ahkam al-Adaliyyad* Code. It has been said that this codification is proof that general principles of Islamic Contract Law do exist. The *Al-Majalla* clearly states that one of the fundamental principles of Islamic Contract Law is the duty to act in good faith.”⁵⁰ It is clear that different customs of the Islamic world pay a great deal of attention to the concept of good faith in Contract Law. Al-Sanhory, A. (1989) in his book *Discuss Civil*

⁴⁹ For more information, see Tetley, W. (2004) ‘*Good Faith in Contract, Particularly in the Contracts of Arbitration and Chartering.*’

⁵⁰ *Al-Majallah al-Ahkam al-Adaliyyad, The Contract of Sale. Fundamental Basis of Sale.*

Law, defines five events in the Sales Contract where the principle of good faith should be applied:

- 1- Good faith in the conclusion of a Contract.
- 2- Good faith in the performance of the Contract.
- 3- Good faith in the termination of the Contract.
- 4- The notion of *riba* or usury.
- 5- The notion of *gharar*.⁵¹

It is clear that the notion of good faith requires many elements, and among them is the Freedom of Contract. Islamic *Shar'iah* emphasises the importance and necessity of respecting the contractual obligations or the promises contained in the Contract, which is mainly related to the idea of good faith. In addition, the notion of good faith derives its power from the principle of equity and equality, which is attested to in the Holy Qur'an in the following verse: "God commands you to render back your trusts to those to whom they are due; and when you judge between men that ye judge with justice."⁵² (*Surat An-Nisa 4:58*) Such a principle is mainly related to good faith as it discourages cheating and cultivates a feeling of justice and honesty. Furthermore, the Islamic notion of good faith acknowledges that there should be equilibrium in forming the Contract between the buyer and seller, as it does not grant any party concerned the use of excessive power to affect or withdraw the rights of the other party. The notion of good faith necessitates the idea of prohibiting *gharar*, which means the Contract must not include any element of uncertainty relating to the object of sale, otherwise, its price or delay in the delivery of goods are considered risky (*gharar*) and *gharar* is not accepted in terms of good faith. The notion of good faith is also against the idea

⁵¹ Al- Sanhory, A. (1989) 'Discuss Civil Law' *al-Lawsuit fil sharh Alganon Almadany*, Cairo: Dar Al-Thaqafa Press.

⁵² (إِنَّ اللَّهَ يَأْمُرُكُمْ أَنْ تُؤَدُّوا الْأَمَانَاتِ إِلَىٰ أَهْلِهَا وَإِذَا حَكَمْتُمْ بَيْنَ النَّاسِ أَنْ تَحْكُمُوا بِالْعَدْلِ إِنَّ اللَّهَ نِعِمَّا يَعِظُكُمْ بِهِ إِنَّ اللَّهَ كَانَ سَمِيعًا بَصِيرًا) سورة النساء الآية (58)

of interest (*riba*) between the buyer and seller, meaning it is not acceptable that the seller exploits the need of the buyer regarding a certain commodity, and must not sell it to gain a certain amount of interest in return for delayed payment.

Fourth Section- The United Nations Convention on Contracts for the International Sale of Goods:

The goals of the resolutions applied by the Sixth Session of the General Assembly of the United Nations include the establishment of a new international economic order, and progression in international trade based on equality and bilateral benefits, which is deemed a vital element in enhancing mutually friendly relationships between states. Therefore, it is vital to focus great attention on the adopting of certain rules which govern trade. The United Nations Convention on Contracts for the International Sale of Goods (CISG) was signed in Vienna on 11th April 1980 by the United Nations and entered into force on 1st January 1988. On 12 of July 2009, 70 countries had adopted the CISG, among them most of the great trading countries of the world, Such as the United States of America, Russia, China and most of the European Union Member States.⁵³

According to the CISG “BEING OF THE OPINION that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade.”⁵⁴ The Convention is applicable to the Contract of Sales of goods between parties belonging to different countries or different places. However, this issue cannot be taken into consideration if it does not appear in the Contract, as the Contract does not stipulate that both parties belong to different countries. Furthermore, the application of the Convention is not based upon Paragraph 3 of Article 1 of the CISG “the nationality of the parties nor the civil or commercial character of the parties or

⁵³ The United Nations. Convention on Contracts for the International Sale of Goods (CISG). April 11, 1980, S. Treaty Doc. No. 98-9 (1983) 19 I.L.M. 668 (1980) [hereinafter CISG] (entered into force on Jan. 1, 1988), available in 15 U.S.C.A. app. At 49 (West Supp. 1996), 52 Fed. Reg. 6262-80, 7737 (1987), U.N. Doc. A/Conf. 97/18 (1980).

⁵⁴ Chatterjee, C. (1996) ‘Legal Aspects of Transnational Marketing and Sales Contracts’, at 24.

of the contract is to be taken into consideration.”⁵⁵ Neither is the convention applicable to sales of goods that are purchased for personal, family or household use.

I. Formation of the Contract of Sale:

It is very important to discuss the formation of the Contract: The first element of the Contract is what is known as a ‘proposal for concluding’. According to the paragraph (1) of article (14) of the CISG “a contract addressed to one or more specific persons”⁵⁶, which forms an offer only in cases where it is adequately explicit and showing the intention of the offeror where accepted. Furthermore, the proposal is to be effected only in cases where it shows that the goods are either implicitly or expressly determined, either through quantity or price.

The Contract includes the offer, which represents its core point, and “the offer will be effective and valid when it reaches the offeree. However, the offer can be withdrawn”.⁵⁷ If the withdrawal reaches the offeree before or at the same time as the offer, the offer can be cancelled, and it can be nullified if the revocation reaches the offeree before he sends acceptance. Yet, at the same time, there are certain conditions in which the offer cannot be cancelled. The first is by stating a certain defined time for accepting, which means that it is irrevocable; the second is “if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.”⁵⁸

Furthermore, the offer shall be terminated once the refusal reaches the offeror. Any statement of consent or approval made by the offeree can be considered as an acceptance, although silence or inactivity does not in itself mean acceptance. The acceptance of an offer can be validated and enforced only when the offeror is informed by assent, and the acceptance is not

⁵⁵ See CISG, at Article 1.

⁵⁶ Ibid. ob cit. at Article 14.

⁵⁷ Ibid. ob cit. at Article 15.

⁵⁸ Ibid. ob cit. at Article 16.

valid if the indication of assent never reaches the offeror within the agreed fixed time limit between both parties. If there is no such fixed time, it must be within a reasonable amount of time. In addition, the oral offer shall be accepted immediately unless circumstances indicate otherwise.

Paragraph 3 of Article 18 of the CISG proceeds, however, by specifying the condition “if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to dispatch of the goods or payment of the price, without notice to the offeror, in the period of time laid down in the preceding paragraph.”⁵⁹ Indeed, the reply to an offer that is considered as an acceptance with new additions which have altered the core of the contract “is considered as a rejection of the offer and represents a counteroffer.”⁶⁰ However, if the reply to the offer implies only certain additions and certain amendments which do not result in changing the core of the agreement or materially affecting the terms and conditions of the offer, this means acceptance and is based on the offeror’s willingness- as the offeror has the right to oral objection to the new amendments in the Sales Contract.

According to the CISG, at Article 19,

“(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer. (2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance. (3) Additional or different terms

⁵⁹ Ibid. ob cit. at Article 18.

⁶⁰ Ibid. ob cit. at Article 19.

relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.”⁶¹

II. The obligations of the seller and buyer:

First: The obligations of the seller.

It is very important to highlight an issue related to the obligations of the seller, which is:

1. Delivery of the goods and handing over of documents.

The seller must send the goods, in addition to all related documents to the buyer, as stipulated and described in the Sales Contract. The documents must be handed over to the buyer as they prove the right of the buyer to have or to receive the goods. The seller's commitment to deliver the goods to the buyer is implied in the following points:

- A. If the Contract of Sale is based upon carrying the goods or handing over the goods to the buyer.
- B. If the Contract of Sale is related to specific or defined goods that must be taken directly from the seller to the buyer in terms of a certain defined place of delivery for the goods.
- C. In case of placing the goods at the disposal of the buyer at the place where the seller has defined the place of the transaction during the same time as affecting the Contract.

Furthermore, according to the CISG, the goods shipped to the buyer must be identified and known, and the seller is entitled to show the buyer the evidence, and the specification, of the goods. For example, if the seller sends the goods to the carrier but the goods are not

⁶¹ Ibid.

identified as shown or reflected in the Contract, the seller must send a notice to the buyer about the consignment, specifying all goods.

The Sales Contract, according to CISG, should specify the carriage that will transport the goods from a certain point to the place of destination and this should be fit for the usual terms of transportation as internationally agreed.

Regarding the insurance of the goods, if the seller is not entitled to insure the shipped goods, they must clarify and explain all related points of insurance to the buyer in order to enable them to take out such insurance. Furthermore, the seller must deliver the goods according to the following data:

Delivery must be according to the fixed date in the Sale of Contract, unless the buyer changes the date replacing it with another; or the delivery date must be assigned at any reasonable time after the conclusion of the Contract.

If the seller is responsible for sending the documents to the buyer, they must be sent according to certain time limits and certain dates, which are stipulated in the Sales Contract. The seller has to send accurate, correct and valid documents to the buyer, and in case of any mistake in the documents, they should be amended and modified in the best way for the buyer. Also, the buyer retains the right to claim damages as provided for in the Convention.

2-Conformity of goods and third party claims:

Among the different obligations of the seller, there are the conditions of goods conformity and third party claims. The seller must send the goods based on the quantities shown in the Contract, and the quality and description of the goods must be identical to the Contract, regarding packaging and shipping, and all agreed points. However, there are certain exceptions to such rules, for example:

- The goods may not conform or be identical to the Contract unless they, as stated in Paragraph 2, Article 35 of the CISG, “are fit for the purpose for which the goods of the same description would ordinarily be used.”⁶²
- If they are fit for any particular purpose, expressly or implicitly made known to the seller at the time of the conclusion of the Contract, except where the circumstances show that the buyer did not rely on, or if it was unreasonable for them to rely on, the seller's skill and judgment.
- If they provide the same quality of goods, agreed between the two parties and based on a sample, or if there is no difference in the packaging.

According to international law and convention Geneva (CISG), the seller is responsible for any difference in the conformity of the goods, due to being liable for the data and instruction shown in the Sales Contract. Furthermore, the buyer must make sure of the quality of the goods by inspecting and examining them carefully, and in the case of overseas trade, the shipment of the goods must be delayed after arrival at the destination.

In addition, if the goods do not conform with the mutual agreement, the buyer has to send a notice to the seller in which it explains the points of defect, and if notification is not sent, then the right to conformity will be declined and doomed to failure. If the seller cannot carry out any of their obligations in terms of the Contract or such conventions, the buyer has the right to ask for compensation.

⁶² Ibid. ob cit. at Article 35.

Second: The obligations of the buyer:

After discussing the obligations of the seller, it is necessary to go on to the obligations of the buyer:

1- Payment of the price:

The buyer has to pay the cost of the goods as shown in the Contract and in the Convention. Regarding fixing the price according to weight, it has to be determined according to the net weight.

The buyer shall pay the price to the seller at the seller's place of business, which is based upon the stipulations of the Contract and its laws and regulations that stipulate the process of payment.⁶³

According to CISG, Article 53 “the buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention. Indeed The buyer must pay the price on the date fixed by or determinable from the contract and this Convention without the need for any request or compliance with any formality on the part of the seller.”⁶⁴

Indeed the buyer must pay when the seller places either the goods or documents at their disposition. According to CISG, Paragraphs 1, 2 & 3, Article 58,

“If the buyer is not bound to pay the price at any other specific time, he must pay it when the seller places either the goods or documents controlling their disposition at the buyer’s disposal in accordance with the Contract and this Convention. The seller may make such payment a condition for handing over the goods or documents.

⁶³ See Contracts for the International Sale of Goods (CISG) ‘If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller: (a) at the seller's place of business; or (b) if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place. (2) The seller must bear any increases in the expenses incidental to payment which is caused by a change in his place of business subsequent to the conclusion of the contract’.

⁶⁴ CISG, at Article 53.

(2) If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price.

(3) The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity.”⁶⁵

2- Taking delivery:

The buyer may be obliged to take part in the delivery of the goods, which will help the seller to deliver the goods in the best condition and assist in taking over the goods. According to CISG, Article 60, Paragraphs 1 & 2, “The buyer’s obligation to take delivery consists: in doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery, and in taking over the goods.”⁶⁶

III. The breach of the Contract of Sales:

Contract Sales breach is possible when one of the two parties deprives the second party from the rights entitled by the Contract. Furthermore, the declaration of the termination must be made through notice to the second party.

The seller has the right to terminate the agreement or to claim damages if the buyer fails to perform or execute any of their obligations under the Contract, or according to the Convention.⁶⁷

The Sales Contract can be avoided only in one case, which is if the seller sends a notice to the purchaser or vice versa. Furthermore, all parties are concerned with the application of the articles of the Sales Contract and its obligations. According to the CISG, Article 28 says,

⁶⁵ Ibid. ob cit. at Article 58.

⁶⁶ Ibid. ob cit. at Article 60.

⁶⁷ For more information see Contract for International Sale of Goods [CISG] article 49 and 64.

“If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.”⁶⁸

The Contract can be amended or cancelled by the mutual agreement of the two parties. The second paragraph at Article 29 of the CISG declares “A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such provision to the extent that the other party has relied on that conduct.”⁶⁹

⁶⁸ Ibid. ob cit. at Article 28.

⁶⁹ Ibid. ob cit. at Article 29.

IV. A comparison between the Contract of Sale in Saudi law and the Contract for International Sale of Goods [CISG]:

After having explained the Contract of Sale in Saudi Law and Contract for International Sale of Goods, it needs to be briefly compared to the Islamic Sales Contract, which has been discussed in the previous sections.

The Islamic Sales Contract consists of two parties, the seller and the buyer, which is also typical of the Contract for International Sale of Goods. It derives its power from the idea of *iajab* (offer) and *qubul* (acceptance), and this generates various obligations for both seller and buyer. The notion of good faith is a joint element in both the Contract for International Sale of Goods and Islamic Sale Contracts, but the notion of good faith in Islamic law is generated more from the inner self, that is, from the human being's inner conscience. However, the notion of good faith in the Contract for International Sale of Goods derives its power purely from agreement, and if it can be avoided without falling under the authority of the Contract, it will be done so easily.

The Sales Contract in Islamic law is more comprehensive, fairer and more humanistic because its power lies in cultivating the idea of justice within oneself, along with respect for law and respect for the agreement. Furthermore, the Islamic Sales Contract takes care of the minor details in the agreement. On the other hand, the Contract for International Sale of Goods focuses on the clear details of the Contract.

The Contract for International Sale of Goods is related more to what is stated in the documents, without considering the importance of the intentions of buyers and sellers. Furthermore, the Islamic Sales Contract's consideration of *gharar*, *riba* and cheating is more useful to the validity and the justice of the Sales Contract.

In the Islamic Sales Contract, the sale is bilateral or mutual, as it occurs between two parties- the purchaser and the seller. Moreover, in Islamic law, there is the Contract, or what is known as *aqd*, which represents the foundation of the obligation between the two parties: the seller and the purchaser. In an Islamic Sales Contract, oral agreements might be used to validate it, as when the seller says "I sell you" or " I make you the owner of " such and such a thing, and the purchaser has to utter their consent to the deal or the transaction by saying, "I accept the ownership" of something, or "I accept the object." Consequently, this shows the mutual consent between the two parties which is a necessity in Islamic law for the validity of sale, or exchange of commodities or properties. However, the Contract for International Sale of Goods, the agreement of sale is mostly in written form and authenticated by the concerned authorities.

The Sales Contract consists of four parts, namely, *al-ba'I* (the seller or vendor), *al-mubta* (the purchaser), *al-thaman* (the price) and *al-muthaman* (the prized or valued commodity or the object of value).⁷⁰ This is similar to the Contract for International Sale of Goods, whenever a case consists of four parties. Indeed, the Islamic Sales Contract takes its power from the fact that all resources are created by God for the benefit of man, so it is essential that man should be aware of his or her basic needs regarding the requirements of legal contracts. Therefore, the study is of great importance to every Muslim.⁷¹ The Islamic Sales Contract is more humanistic, fairer and more comprehensive than the Contract for International Sale of Goods, considering minute details, as it does not allow any room for oppressing either of the two parties.

According to the jurists, there are various codes to be considered in Islamic commercial transactions. The first one is wariness of doubtful property and work, which means that legal

⁷⁰ Al- Sanhory, A. (1989) 'Discuss Civil Law' [*al-Lawsuit fil sharh Alganon Almadany*], Cairo: Dar Al-Thaqafa Press.

⁷¹ Hassan, A. (1994) 'Sales and Contracts in Early Islamic Commercial Law'.

and illegal things have to be clearly defined and between them anything doubtful should be avoided.

The second is trustworthiness in business transactions, as the trader must be honest in their transaction, showing the buyer any defects in the commodity being sold. The Prophet Muhammad (peace be upon him), said, “ The truthful merchant is rewarded by being ranked on the day of resurrection together with the prophet, the truthful ones, the martyrs and the pious people”⁷²

The third is generosity in bargaining and modesty in claiming the debts, as the trader should be easy, flexible and generous in bargaining. The Prophet Muhammad (peace be upon him) said: “May Allah's mercy be on him who is lenient in his buying, selling, and in demanding back his money.”⁷³ Whoever demands their debts should do so in a modest manner.

The fourth is that the seller should allow a grace period for the debtor to pay their debt, or to pay the amount due for the sold goods. The Prophet Muhammad (peace be upon him) said: “There was a merchant who used to lend the people, and whenever his debtor was in straitened circumstances, he would say to his employees, 'Forgive him so that Allah may forgive us.' So, Allah forgave him.”⁷⁴

The Prophet Muhammad (peace be upon him) also said “Before your time the angels received the soul of a man and asked him, 'Did you do any good deeds (in your life)?' He replied, 'I used to order my employees to grant time to the rich person to pay his debts at his convenience.' So Allah said to the angels; "Excuse him." Rabi said that (the dead man said), 'I used to be easy to the rich and grant time to the poor.' Or, in another narration, 'grant time to the well-off and forgive the needy,' or, 'accept from the well-off and forgive the needy.’”⁷⁵

⁷³ *Translation of Sahih Bukhari*, University of Southern California, at *Sunnah and Hadith: Sale and Trade*, Vol. 3, Book 34.

⁷⁴ *Ibid.*

⁷⁵ *Translation of Sahih Bukhari*, at *'Sunnah and Hadith: Sale and Trade'*, University of Southern California, Vol. 3, Book 34.

Conclusion:

To sum up, Sales Contract in both Islamic and international law are in dire need of further modification and amendments as there are so many weaknesses and inconsistencies in both approaches. However, the Islamic Sales Contract is more unified, taking into account both material and spiritual values. It is also more rooted in concepts of divinity than the international Sales Contract.

The Islamic Sales Contract is more humanistic and can ensure the rights of both buyer and seller equally, because its sense of obligation results from Islamic values based on justice and equality. Such ideas are deeply embedded in devout and pious Moslems, whose oral promise is enough to ensure their obligation and commitment to their prior agreements. Furthermore, the idea of legislation and documentation of an agreement has a long history in Islamic *Shari'ah*, which emphasizes the importance of documenting and authenticating agreements between the purchaser and vendor. Therefore, the Islamic Sales Contract is both religious and legally binding on the contracting parties. However, it is still in urgent need of updates to keep in touch with the rapid progress of international trade and the latest technology, which complicates matters with e-contracts and e-transactions. Furthermore, the borders between countries have been eroded and the wider world reduced to the virtual size of a small village through such innovations. Consequently, the nature and content of Sales Contracts have been greatly altered from their original state, so the Islamic Sales Contract should upgrade itself to recent global developments in order to protect the rights of both purchaser and seller.

The Islamic Sales Contract must adapt itself to rapid progress in business, as business and transactions are no longer confined to domestic and local transactions, or primitive forms of local trading, but have transcended these barriers to gain an international and global flavour.

This requires new and updated legal proceedings that can be adapted to the new forms of transaction, such as the shipment of goods overseas and dispatching goods by air. Indeed, the traditional Islamic Sales Contract has hindered progress in international business. It is therefore recommended that it assimilates and adapts itself to current global conditions, which have turned the world into a village, and where trade and transactions are transferred from a limited domain to undertake worldwide business transactions.

Furthermore, international law should consider the ethical and humanistic codes of Islamic law which protect the rights of both sellers and buyers, without fraud or cheating. The ethical values of Islamic law should be explained clearly and applied to international transactions, which are more materialistic and focus solely on documentation. Aspects of Islamic law are more comprehensive, humanistic and logical than those of international law due to their thorough assertion of rights. In addition, its divine element promotes human conscience and honesty which leads to an automatic respect for the rights of others, even if the responding party ignores or fails to notice such matters. Islamic law does not permit the principle of *gharar* or cheating the buyer. In international law, this is also prohibited, but not if the buyer is satisfied with it or does not notice it. To sum up, international Commercial Law should investigate and carefully study the principles of Islamic Commercial Law and benefit from them, and Islamic law should be reviewed, with a careful examination of the rules and legal aspects of international law, in order for it to be applied more carefully and adapted and adjusted to the rapidly changing world.

The Islamic Sales Contract could be effectively practiced in the case of considering the importance of International Sales Law and its value to it. Both the Islamic Sales Contract and the International Sales Contract are in mutual need of each other. The Islamic Sales Contract includes the divine elements of the agreement, and the International Sales Contract contains

the material elements which are important for any Contract. However, ignoring either of them causes the contract to lose its effectiveness and legal power.

The Islamic Sales Contract is distinguished by its extraordinary power of obligation, that is to say, its secret lies in its ability to provide the parties of the Contract with the divine elements that allow them to feel a sense of obligation without being restricted by any Contract. It is the obligation to the promise rather than to the documents. In addition, it does not ignore the importance of contracts and documentation in its application, as valid documents are necessary for obliging both parties to the conditions of the agreement. But concerning this issue, the research poses an important question: can the international Sales Contract be globally practiced? This question is left unanswered by the research as it is impossible for one piece of research to cover all points.

The power of the Islamic Sales Contract is in the application of the two ideas of *ijab* and *qabul*; however, these two notions may lose their importance within the international Sales Contract whose excessive materialist interpretation of its articles can result in harm to both of the two involved parties. Thus, the religious core of the Islamic Sales Contract can create conditions that permit both parties to act with one another on the basis of justice and mutual respect for the rights of each other. Accordingly, the importance of good faith in the Sales Contract gains a far reaching power, but the question is how the notion of good faith can be cultivated into the minds of the contracting parties without being restricted to a superpower that guides them to the importance of good faith. Thus, despite the fact that , the term ‘good faith’ arrived later, it is one of the roots of the Islamic Sales Contract, exemplified in the idea of inner obligation resulting solely from a fear of God and divinely established limitations and restrictions set down by God.

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