

# Adoption of the Principle of 'Invitation to Treat' in Islamic Law of Contracts

(Adoptasi Prinsip Pelawaan Tawaran dalam Kontrak Undang-undang Islam)

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## ABSTRACT

*'Invitation to treat' looks similar to an offer in a contract but for business convenience and to protect the interests of sellers of goods, the courts have differentiated 'invitation to treat' from offer on policy grounds. The authors of 'contract law' in the United Kingdom and other common law countries have analyzed the principle of 'invitation to treat' and have accepted the rationale for its differentiation from 'offer' in contracts. Some Islamic scholars have opposed the differentiation and argued that 'invitation to treat' is in fact an offer and when accepted by the offeree, becomes a binding contract. However, their arguments for not accepting the rule of 'invitation to treat' are not very convincing. The objective of this article is to argue that there is acceptable rationale for differentiating an 'invitation to treat' from an offer and to propose that the principle of 'invitation to treat' can be adopted in Islamic law of contracts as it does not go against any shariah (Islamic law) principles.*

*Keywords: offer, invitation to treat, contract, invitation to treat in Islamic law, harmonization of civil law with shariah*

## ABSTRAK

*Dalam kontrak, pelawaan tawaran kelihatan mirip kepada satu tawaran, namun bagi tujuan kemudahan perniagaan dan demi melindungi kepentingan peniaga barangan, mahkamah membezakan pelawaan tawaran dari tawaran sebenar atas dasar polisi. Penulis undang-undang kontrak di United Kingdom and negara Komanwel lain telah menganalisis dan menerima rasional perbezaan prinsip pelawaan tawaran dari tawaran. Sungguhpun begitu, terdapat penulis undang-undang Islam yang menolak perbezaan yang disarankan dan berpendapat bahawa pelawaan tawaran adalah satu tawaran dan boleh diterima oleh penerima janji bagi menjadikannya satu kontrak yang mengikat. Namun, alasan mereka kurang meyakinkan. Tujuan artikel ini adalah untuk membahaskan bahawa terdapat rasional yang boleh diterima bagi membezakan pelawaan tawaran dari tawaran dan untuk mencadangkan bagaimana prinsip pelawaan tawaran ini boleh diadaptasi ke dalam undang-undang kontrak Islam kerana ianya tidak bertentangan dengan syariah.*

*Kata kunci: tawaran, pelawaan tawaran, kontrak, pelawaan tawaran dalam undang-undang Islam, harmonisasi undang-undang sivil dan syariah*

## INTRODUCTION

'Invitation to treat' has been distinguished from an offer in common law.<sup>1</sup> It is the creation of common law in England. Common law differentiated an 'invitation to treat' from an 'offer'. 'Offer' is an essential element of a valid contract. When an offer is accepted by the offeree, a binding contract is made and both the parties become bound to fulfill its term.<sup>2</sup> If any party breaches any of the terms of the contract, he will be liable for appropriate remedy to the other side. According to Sinnadurai, an offer is an indication by one party to another party of his willingness to enter into a legally binding contract, on certain specified terms.<sup>3</sup> The terms of an offer may expressly or impliedly indicate that the offeror intends to be legally bound by the contract when the offeree accepts the offer. In this regard Salleh Abas FJ observed in the Federal Court of Malaysia that "An offer is an intimation of willingness by an offeror

to enter into a legally binding contract. Its terms either expressly or impliedly must indicate that it is to become binding on the offeror as soon as it has been accepted by the offeree."<sup>4</sup>

The court in England ruled in many cases in the past that some of the offers to sell something would not be considered as 'offers', but they would be treated as mere 'invitation to treat' to potential customers.<sup>5</sup> An 'invitation to treat' invites potential customers to make a formal offer to the seller to buy the goods and it is up to the seller either to accept the 'offer' or to reject it. So, 'invitation to treat' is not an 'offer' and an offeree cannot accept it as an 'offer' to bind the seller in contract law.<sup>6</sup> Examples of invitation to treat are: displaying of goods in the shop with price attached on it, advertisement, auction sale, tenders etc.

Whether a statement is an offer or an invitation to treat is an objective test and it depends on the intention of the offeror and the facts on the particular case.<sup>7</sup>

According to Lichtenstein, "An invitation to treat made by one party to another is not an offer. In fact, it is made at the preliminary stage in the making of an agreement whereby one party seeks to ascertain whether the other would be willing to enter into a contract, and if so, upon what terms. It is an invitation extended by one party to the other to enter into negotiations or to make an offer. An invitation to treat, hence, cannot be accepted so as to form a binding contract, since it is always the invitee who is being asked to make the offer."<sup>8</sup>

Invitation to treat plays an important role in business to protect sellers from multiplicity of suits and claims for huge amount of damages to be paid to the potential buyers.<sup>9</sup> For example, if an advertisement to sell something is considered as an offer, then thousands of offerees may accept the offer in the advertisement and thereby binding contracts are made between the seller and the customers. Now, it might not be possible to the seller to sell the goods to all the customers due to shortage of stock or the price mentioned in the advertisement was mistakenly put very low. So, the principle of invitation to treat is very beneficial for the seller. This article discusses advantages and disadvantages of 'invitation to treat' principle and shows that advantages of the principle outweigh the disadvantage. Finally, the paper proposes the adoption of the principle in Islamic law of contract with an intention to harmonise civil law with *shariah* (Islamic law). Descriptive and analytical research methodology has been applied in this article. Necessary data has been collected from books, journal papers, court decided cases (reported in various case reports), Parliamentary legislation and legal opinions of some prominent Islamic scholars. Finally the data has been analysed and a conclusion has been made that the principle of invitation to treat is not contradictory with any *shariah* principles. It is beneficial for the ummah who are involved in business activities. So, this principle can be accepted in Islamic contract law as a means of harmonisation of civil law (traditional English law) with *shariah*.

#### CONCEPT, NATURE AND ORIGIN OF 'INVITATION TO TREAT' IN COMMON LAW

Invitation to treat is not an offer. It is just an invitation to make an offer. It is a sort of preliminary negotiation to buy something.<sup>10</sup> The preliminary stage of offer to sale something may encourage negotiation and bargain. When negotiation goes on, in fact the offer is not accepted, it is modified in terms of price and other matters such as putting condition to meet particular quality of the goods. In such stage, it is said that the original offer ceases to exist and new offer comes from the customers to the seller. So, in negotiation stage no binding contract is made and the statement

of the offer becomes mere invitation to treat to the customers. When customers make some definite offer to the seller in response to the invitation to treat, it is up to the seller either to accept the offer or to reject it.<sup>11</sup> According to Mulcahy, "As a general proposition, offers must be distinguished from other statements made at a pre-contractual stage which are known as invitations to treat. This is an old-fashioned expression which describes attempts by one party to encourage the other to enter into negotiations with them or make an offer to them."<sup>12</sup>

Therefore, an invitation to treat should be differentiated from an offer. When an invitation to treat is made, any person interested in it can make formal offer to buy and the person who is making an invitation to treat may accept the offer. If the offer is accepted by the person making the invitation to treat, a binding contract is made. Accepting an invitation to treat does not make a contract. According to Jawahitha *et al*, it is important to differentiate an offer from a mere invitation to treat. An offer is a proposal and therefore if it is accepted an agreement is made that binds both the offeror and the offeree. On the other hand, an invitation to treat is merely an invitation to negotiate or to bargain. Hence, the acceptance to a mere invitation to treat is not in fact an acceptance of an offer; it is simply a formal offer to buy something and the person who makes an invitation to treat has the option either to accept the offer or to reject it.<sup>13</sup> An example of invitation to treat is that when you go to a supermarket, you find different types of items are placed on shelves in the supermarket with price attached to them. You may think that the goods that are placed on shelves are offer made to customers and the shopkeeper is bound to sell the goods to you when you have accepted the offer to buy some goods. This thinking is wrong. In fact the display of goods is not an offer but it is mere invitation to treat. Invitation to treat means that the shopkeeper invites you to make formal offer to buy the items that you have chosen. When you decide to buy some goods and take them to cashier and pay for the goods, the cashier has option either to accept the offer or to reject the offer. If the cashier rejects your offer to buy, you cannot sue the cashier or the shop owner for breach of contract. The reason is that common law considers this placing of different types of goods on shelves in the market is not an offer in the legal sense, it is merely an invitation to treat asking the potential customers to make offers to buy and the cashier has option either to sell the items or to refuse to sell the items.

Common law has differentiated an offer from a mere invitation to treat. An offer is a proposal. If it is accepted by an offeree, an agreement is made which binds both the offeror and the offeree. On the other hand, an invitation to treat is merely an invitation to negotiate or bargain and the bargain can be considered as making an offer by a customer. Hence, an invitation

to treat cannot be accepted as an offer. It is only an invitation to potential customers to make a formal offer to buy a particular item. A binding contract will be made when a potential customer makes a formal offer to buy and the seller accepts the offer without modification of the offer. So, unequivocal acceptance of an offer makes a binding contract but acceptance of an invitation to treat does not make a contract between the seller and the buyer. Hence, the potential buyer neither can force the seller to sell nor can claim compensation for breach of contract.

According to Treitel, whether a statement to sell something is an offer or mere invitation to treat is an objective test and it depends on the intention of the offeror. If the offeror or seller intends to offer for sale then it is an offer, but if he intends to invite customers to make offer, then it is an invitation to treat and not an offer.<sup>14</sup> So, from the intention of the seller and from the wording of the statement we can determine whether a particular statement related to sale transaction is an offer or mere invitation to treat. The concept of 'invitation to treat' originated in the early nineteenth century. At that time, courts were concerned for the interest of sellers. If display of goods in the shop was declared as offer, then there was a possibility that there were more customers than the available stocks in the shop. So, many customers may accept the offer and the seller will be bound to sell to all of them. As the seller will be unable to sell to all of them because of unavailability of stocks, he will be liable for breach of contract and will face multiple litigations for damages. Similar consideration was in the mind of the court in case of advertisement, auction sale and tenders. Some of the cases decided at that time are *Harris v Nickerson*,<sup>15</sup> *Timothy v Simpson*<sup>16</sup> and *Spencer v. Harding*.<sup>17</sup> In *Harris v Nickerson*, the English court held that an auctioneer who puts property up for sale in auction, is not making an offer but merely making an invitation to potential customers to make bids. In *Timothy v Simpson* the court held that the general rule is that a display of goods is an invitation to treat and not an offer whether it is display in a shop window or on a shelf inside the shop. In *Spencer v. Harding*, the court held that the tender was not an offer, rather it was invitation to treat. The court observed: "Here there is a total absence of any words to intimate that the highest bidder is to be the purchaser. It is a mere attempt to ascertain whether an offer can be obtained within such a margin as the sellers are willing to adopt." The court also stated that had the circular goes on to say 'and we undertake to sell to the highest bidder', this would have constituted an offer to sell to the highest bidder, to be accepted by making the highest bid.

The principle of 'invitation to treat' developed in nineteenth century is still used at present time in the UK and other common law countries and courts are of the opinion that this principle is capable of being

used at present time and in future for the convenience of businessmen. Hence, this principle is carrying importance at present time and courts are applying it in different common law countries.

#### TYPES OF 'INVITATION TO TREAT'

There are different types of invitation to treat that have been developed by courts over the time while deciding cases related to offer and acceptance. The main types of invitation to treat are discussed below with the help of decided cases.

##### DISPLAYING OF GOODS

Displaying of goods in the shop with price tag is not an offer in law. Law regards it as an invitation to treat. Invitation to treat cannot be considered as an offer. Any person interested to buy an item from the shop has to make a formal offer to the seller and if the seller agrees to sell and accepts the price, a binding contract is made. If a customer just takes an item and goes to cashier for payment, cashier can refuse to sell the item and the customer cannot force him to sell the item as the display of goods is merely an invitation to treat to potential customers. However, the normal practice in shop is the cashier usually does not refuse to sell unless there is a good reason to refuse.

In *Pharmaceutical Society of Great Britain v Boots Cash Chemist*<sup>18</sup> the defendant was prosecuted for selling drugs in the absence of supervision by a registered pharmacist. The customer selected a drug and put it in the basket and had not paid yet to the cashier. Actually there was a pharmacist in the pharmacy who was sitting near the cashier. The issue was whether putting the drug in the basket amounts to accepting an offer which makes a binding contract. The Court of Appeal in the UK held that displaying of medicine in the pharmacy is merely an invitation to treat and not an offer. When a customer chooses and puts a particular drug in the basket with an intention to buy it, he in fact offers to buy the drug and the sale takes place at the cashier's desk when the cashier accepts the price for the drug. Similarly, displaying of goods in the shop windows also does not amount to an offer, it is merely an invitation to treat. In *Fisher v Bell*<sup>19</sup> the defendant displayed flick knives in his shop windows. He was prosecuted for a criminal offence for offering such knives for sale. The court held that display of any goods with a price tag in a shop window is not an offer but rather it is an invitation to treat. In this case Lord Parker observed that:

... displaying of an article with a price on it in a shop window is merely an invitation to treat. It is in no sense an offer for sale; the acceptance of which constitutes a contract.

#### EXCEPTIONS TO THE GENERAL RULE IN DISPLAY OF GOODS

In exceptional circumstances it may be held that a particular display of goods in the shop is an offer instead of invitation to treat. If the display of goods with statement in the shop clearly signifies the intention of the shopkeeper to be legally bound, then if a customer accepts the terms of the display, we can say a binding contract has been made and the shopkeeper will be legally bound to sell the goods to the buyer, he cannot refuse to sell the goods in that circumstances. An example of such exceptional situation might be that the display states: "Try our new chocolate bar. It's yours as soon as you present it at the cash desk with your 1 dollar." Such a display of the chocolate bar with the statement indicates a clear intent to be legally bound as soon as a customer presented the chocolate bar at the checkout with the money.<sup>20</sup>

#### ADVERTISEMENT

Advertisements are generally considered as mere invitation to treat and not an offer. Hence, acceptance of an advertisement cannot constitute a binding contract. The person putting an advertisement is actually inviting any interested person to make a formal offer and if the offer is accepted by the person who puts the advertisement, a binding contract is made between them.<sup>21</sup> Hence, in *Majumder v Attorney-General of Sarawak*,<sup>22</sup> the Federal Court of Malaysia held that an advertisement in newspaper for the post of a doctor was an invitation to treat and not an offer.

Similarly in *Coelho v The Public Services Commission*,<sup>23</sup> the court held that an advertisement in the Malay Mail newspaper inviting applicants for the post of passport offers in the Immigration Department was 'an invitation to qualified persons to apply and the resulting applications for the post were offers.' In *MN Guha Majumder v RE Donough*,<sup>24</sup> the court held that the sale of a house through an advertisement in the newspaper was an invitation to treat and not an offer. In *Partridge v. Crittenden*,<sup>25</sup> the defendant made an advertisement in the classified section of a magazine for the sale of wild birds "bramblefinch". He was prosecuted for committing an offence for unlawfully offering for sale of such wild birds. The issue raised before the court was whether the advertisement in the magazine was an offer or mere invitation to treat. The Court held that the advertisement was a mere invitation to treat and not an offer for sale. The defendant was not guilty for the offence of offering for sale of wild birds as the advertisement was mere invitation to treat and not an offer.

In *Eckhardt Marine GMBH v Sheriff, High Court of Malaya, Seremban*,<sup>26</sup> Gopal Sri Ram in the Malaysian Court of Appeal observed that as a general rule an advertisement is considered not an offer but

a mere invitation to treat. In this case sheriff made an advertisement for the sale of a motor vessel. The appellant communicated his intention to purchase the vessel by sending a letter and a banker's draft for 10% of the purchase price. The appellant made the offer subject to two conditions. Sheriff accepted the offer with the conditions. Therefore a binding contract was made when sheriff accepted the offer made by the appellant, but the advertisement for sale of the motor vessel was not an offer, it was merely an invitation to treat.

Generally advertisement is considered as an invitation to treat and not an offer. The reason of such treatment might be that advertisement is not targeted to any specific person. It is made to any person in the country or in the world. Hence, many people may accept the advertisement as offer and many binding contracts will be made without the knowledge of the advertiser. The problem will be that the items for sale might be limited in number but the buyers (acceptors) are many. So, the advertiser cannot sell the items to all persons who accepted the offers. As a result the question of compensation will arise whereby the advertiser will have to pay compensation to the acceptors who cannot get the item because of shortage in stock.<sup>27</sup>

Hence, to save the advertiser and to avoid his liability for compensation to the acceptors for shortage of stock of goods offered for sale, probably the legal mechanism of invitation to treat was developed. Under this principle of invitation to treat the advertisement is not an offer. It is merely inviting the potential customers to make a formal offer to the advertiser to buy the goods. Now the advertiser can exercise option either to sell or refuse to sell the item to some potential customers and thereby can avoid liability of paying compensation to them. In supermarkets we find that the shop owner announces 40 to 70% discounts on some items to empty the stock. Now many customers buy the items and eventually the stock is finished. Some potential customers cannot buy. If this discount is considered as offer then the shop owner has to pay compensation to the potential customers who cannot get the items for shortage of stock. Thus, to protect the shop owner from undesired situation this offering of discount is considered as mere invitation to treat and not an offer.

#### EXCEPTIONS TO THE GENERAL RULE OF ADVERTISEMENT

Although advertisement is generally considered as an invitation to treat, it has exceptions. In certain circumstances an advertisement might be considered as an offer. This may happen when the advertisement includes a promise to all potential customers for using the item. For example a shop owner is selling watermelons by advertisement with a promise that if



the watermelons are not sweet and red colour, he will return the money paid. In such a circumstance, the advertisement might be considered as an offer and the advertiser might be liable to all potential customers to return the payment made if the particular watermelon is not sweet and red coloured. The reason of holding this advertisement as offer is that the advertisement includes a promise to return the purchase money if the condition of sale is not fulfilled. If the advertisement was other way without any such promise, then the general rule will be applicable, that the advertisement would be mere invitation to treat.

Such a situation arose in *Carlill v Carbolic Smoke Ball Co. Ltd.*<sup>28</sup> In this case the defendant company advertised in newspapers that it would offer £100 to anyone who took its medicine as prescribed by the defendant for a fixed period and still succumbed to flu after finishing the prescribed doses. The plaintiff bought the medicine relying on the advertisement and used it for a fixed period of time as prescribed, but she still contracted flu. The plaintiff then sued the defendant for the money as promised but he refused to pay saying that the advertisement was a mere invitation to treat and not an offer. However, the Court of Appeal in the United Kingdom held that the advertisement was unilateral offer and the plaintiff was entitled to the £100 as she had accepted the offer made to the world at large. The court also held that in such cases where promise for reward is made, there is no need to communicate the acceptance to the offeror. The Court of Appeal did not consider the advertisement as an invitation to treat rather the court considered the advertisement as an offer because of the nature of advertisement and the promise made therein.

In advertisements where rewards are promised, they are held as offers although a large number of people may accept the offer. However, only a limited number of people would be able to meet the conditions set out in the offer. Examples of such cases are finding a lost dog and furnishing information leading to the apprehension of a criminal.<sup>29</sup> In an Indian case of *Lalman Shukla Gauri Datt*,<sup>30</sup> the Court held that in cases of public advertisements offering a reward, the performance of the conditions of the offer raises an inference of acceptance under section 8 of the Indian Contracts Act. So, this case from India also proves that in exceptional cases advertisements might be considered as an offers rather than invitations to treat.

In *Bowerman v. Association of British Travel Agents Ltd.*,<sup>31</sup> a notice was displayed in the offices of members of the Association of British Travel agents (ABTA) stating that ABTA would reimburse holiday makers in certain circumstances to people who had booked holiday with ABTA members. The issue was whether the notice was an offer or mere invitation to treat. Hobhouse LJ at the Court of Appeal held that the notice was an offer. Similarly, in *Lefkowitz v*

*Great Minneapolis Surplus Stores Inc.*,<sup>32</sup> the defendant published an advertisement in a newspaper stating that: 'Saturday 9 am sharp, 3 brand new fur coats worth to \$100, first come first serve, \$1 each.' The Supreme Court of Minnesota held that this advertisement was an offer and not an invitation to treat. The court observed: "The offer by the defendant of the sale of the Lapin fur was clear, definite and explicit, and left nothing open to negotiation' and therefore constituted an offer rather than an invitation to treat."

#### REPLY TO INQUIRY

Potential customers may inquire about price and other information from the seller. When such information is inquired about, the seller usually reply to the inquiry by supplying the required information. Reply to inquiry for information about products is not an offer to sell. It is simply supplying the information asked about. Usually, in reply to inquiry for information there is no intention of the seller to make a contract. When there is no intention to make a contract, no contract can be made simply by responding to the inquiry for information unless an intention to make a contract is expressed or presumed from the conduct of the seller. This was decided in *Harvey v Facey*.<sup>33</sup>

Therefore, reply to inquiry for information is not an offer to sell the item, probably it might be considered as a type of invitation to treat not amounting to an offer for sale. Because, there is absence of intention to create legal relation by the seller. In the absence of intention to make a binding contract, mere reply to inquiry cannot be considered as an offer and the inquirer cannot accept it as an offer to make a binding contract.

#### AUCTION SALE

A call for bids by the auctioneer is not an offer, it merely an invitation to treat. When people place bids to buy the auction item, they are regarded as making offers to buy the item. The auctioneer is free to accept or reject the bid. If the auctioneer rejects the offer (bid), the bidder (buyer) cannot sue him as no contract has been made yet and the auctioneer has right to reject the offer made by a bidder. The auctioneer has also right to withdraw the call for bid as long as he has not accepted the offer by knocking down the hammer. A sale by public auction is completed when the auctioneer announces its completion by the fall of the hammer.

According to O'Sullivan, there are two types of auctions: auctions 'with reserve' and auctions 'without reserve'. In auction 'with reserve', a reserve price is stated and inviting bids to be made constitutes an invitation to treat. The bidders are the ones making offers, and the offer is accepted by the auctioneer by bringing down his hammer.<sup>34</sup> This principle has been incorporated in the Auction Sales Act (Malaysia)

which provides that “A sale by public auction shall be complete when the auctioneer announces its completion by the fall of the hammer.”<sup>35</sup>

In *Payne v Cave*<sup>36</sup> the court held that the auctioneer’s request for bids is an invitation to treat and each bid is an offer. In this case the plaintiff put his goods for auction sale and the defendant made the highest bid for the goods. However, the defendant withdrew the bid before it was accepted by the plaintiff by knocking down his hammer. The court held that no contract has been made in this case as the bid by the defendant was an offer which the plaintiff did not accept by announcement and completed the auction sale by the fall of his hammer.

The auction sale can be concluded by announcement of the auctioneer in front of people. Knocking down the hammer might not be compulsory as long as the auctioneer expressed his intention to accept the highest bid and concluded the sale by announcement. When the auctioneer announces the completion of the auction sale by accepting the highest bid, a binding contract is made but the contract is not complete yet. Both the parties in the contract have to fulfil their obligations. The buyer (bidder) has to pay the price for the goods and the seller (auctioneer) has to deliver the goods or transfer the title and possession on the goods to the buyer. When this is done an auction contract is complete. This was observed by Wan Yahya J. in the Supreme Court of Malaysia in *M & J Frozen Sdn Bhd v Siland Sdn Bhd & Anor*.<sup>37</sup>

#### EXCEPTIONS TO THE GENERAL RULE ON AUCTION SALE

There is an exception to this auction sale rule. If an auction sale expressly states that particular goods will be auctioned ‘without reserve’ price, such an auction will be considered as an offer and anyone can accept the offer by placing the highest bid no matter how low it may be. This was decided in *Warlow v. Harrison*.<sup>38</sup> In this case the Court held that when no reserve price is stated in the auction, it is the auctioneer who makes the offer to sell the goods to the highest bidder, and this offer is accepted as soon as the highest bid is made.

Initially the above exception created some controversy<sup>39</sup> but later it was solved by the Court of Appeal (UK) in *Barry v Davies*. In this case, the Court of Appeal United Kingdom followed the decision in *Warlow v. Harrison* and held that when auction is made without reserve it is an offer and the offer is accepted as soon as the highest bid is made.

#### TENDERS

When tenders are invited from the public to supply required items/services or for a particular project, it is regarded as mere invitation to treat. According to O’Sullivan, the general rule is that if someone invites

parties to tender or bid for a particular project, this indicates that he is inviting the parties to make offers for him to consider. Therefore, his statement is generally an invitation to treat and not an offer.<sup>40</sup> Example 1: A company wants to sell certain goods and invites tenders from people to submit tenders complying with the instructions. This invitation of tenders is an invitation to treat and not an offer. Example 2: A government department invites tenders to construct few administrative buildings. Such invitation to submit tenders is generally regarded as mere invitation to treat like auction sale.

In *Spencer v. Harding*,<sup>41</sup> the Court held that invitation to submit tenders are mere invitation to treat like an auction sale, it is not an offer. In this case the defendants sent out a circular saying that ‘we are instructed to offer to the wholesale trade for sale by tender the stock in trade of Messrs. B. Eilbeck & Co’. It was held by the Court that this was not an offer, it was a mere invitation to treat. The court observed:

Here there is a total absence of any words to intimate that the highest bidder is to be the purchaser. It is a mere attempt to ascertain whether an offer can be obtained within such a margin as the sellers are willing to adopt.

#### EXCEPTIONS TO THE GENERAL RULE ON TENDERS

However, there are exceptions to the general rule mentioned above. Under certain circumstances invitation to submit tenders is regarded as an offer rather than invitation to treat.<sup>42</sup> An example of such a situation is that when it is expressly stated in the invitation for tenders that the tender will be given to whoever offers the highest price for the tendered items or services or whoever offers the lowest price to supply the required items or service, the invitation for tenders will be considered as an offer. So, the statement inviting tenders may intend to make an offer rather an invitation to treat. Hence, in *Spencer case*, (facts stated above) the court stated that had the circular gone on to say ‘and we undertake to sell to the highest bidder’, this statement would have constituted an offer to sell to the highest bidder, to be accepted by making the highest bid.

Referential bid is not acceptable in English law on public interest and policy ground. Referential bid is submitted by one party who attempts to win the tender by reference to other bids submitted by other parties. For example, a company invites tenders to sell certain cars and buses. A party submits tender with reference to other bids stating that he will pay RM 10,000 more than the highest tender. This is known as referential bid or referential tender which is not acceptable as a general rule. In *Harvela Investments Ltd. v Royal Trust Co of Canada Ltd.*<sup>43</sup> a referential tender was submitted and the House of Lords held that referential bid is not acceptable, it is ineffective. In this case the defendant invited two parties to purchase a quantity of

shares and promised to accept the highest bid made in accordance with the terms laid down by first defendant. The plaintiff's bid was £2,175,000 and the second defendant's bid was £2,000,000 or £10,000 in excess of any other bid, whichever is higher. As a result the second defendant won the tender and the plaintiff was unhappy with the decision and brought this action in the court. The House of Lords held that the referential bid of the second defendant was ineffective. Therefore, the fixed bid of the plaintiff which was the highest bid should have been accepted. The statement inviting tenders was an offer and the plaintiff has accepted it by submitting the highest bid. In this case House of Lords observed that the bids are to be confidential and no bidder will know the amount of bid by others. To allow the practice of referential bid is to defeat the notion of confidential and competitive tender.

Sometimes, a statement inviting tenders promises that the authority will consider all the properly submitted tenders while taking a decision on tenders. So, if a tender is properly submitted within the time limit, the person submitting the tender has a right that his tender should be at least considered if not accepted. In this situation, the tender becomes an offer to consider the properly submitted tender as promised.

Such a situation arose in *Blackpool and Fyde Aero Club Ltd. v Blackpool Borough Council*.<sup>44</sup> In this case, Blackpool Borough Council (the Council) invited BFAC and others to submit tenders for a pleasure flight concession from Blackpool airport. The invitation stated that the Council 'do not bind themselves to accept all or any part of any tender' and that 'no tender which is received after the last date and time specified shall be admitted for consideration.' The tender deadline was 12 noon on 17 March. BFAC posted their tender at 11 am on that day in the Town Hal post box which was meant to be cleared each day at noon. However, it was not checked on the 17 March and BFAC's tender was dismissed as late. The Court of Appeal (UK) held that the promise to consider all properly submitted tenders was an offer and the Council was bound to consider the tender of BFAC as it was properly submitted in accordance with the instructions and within the deadline. Therefore, the Council had breached the contract.<sup>45</sup> In this regard Bingham LJ observed:

Where tenders are solicited from selected parties all of them known to the invitor, and where a local authority's invitation prescribes a clear, orderly and familiar procedure ..... the invitee is in my judgment protected at least to this extent: if he submits a conforming tender before the deadline he is entitled, not as a matter of mere expectation but of contractual right, to be sure that his tender will after the deadline be opened and considered in conjunction with all other conforming tenders or at least that his tender will be considered if others are.

#### CATALOGUES, CIRCULAR LETTERS AND PRICE QUOTATIONS

A catalogue is a booklet which contains descriptions of different types of goods with price. A circular letter is also like a brochure which describes of different types of goods for sale and it also provides price for each goods. A price quotation is a leaflet which contains descriptions of goods and their price.

Now the issue here is whether the catalogue, circular letter or price quotation used in trade as a mechanism of publicity or advertisement of goods to people for sale, are offers or mere invitation to treat. As a general rule, common law considers them as mere invitation to treat and not an offer.<sup>46</sup> Customers may choose a particular item from the catalogue or price quotation and may make order for the item. This ordering of the item constitutes an offer and the merchant may accept the offer. When the merchant accepts the offer a binding contract is made between them.<sup>47</sup> In fact, the merchant has an option either to accept the offer or to reject the offer. If the merchant rejects the offer, the customer cannot sue him in common law for breach of contract. However, justice and fairness demands that the merchant should not reject the offer unless there is good or reasonable ground for his decision.

#### SALE OF SHARES

Public listed companies are allowed to sale its shares to the market. So, public listed companies advertise through newspaper, radio, television or prospectus to the people to subscribe shares to the company. By offering shares for sale to the public, public listed companies raise share capital for doing business. It may be asked, is this offering of shares in the various media for sale, constitute an offer or mere invitation to treat? The common law regards this offering of shares in various media as mere invitation to treat and not an offer.<sup>48</sup> If some people are interested to buy the shares, they make offers to the company by submitting application to subscribe in shares. This application to subscribe in shares in the company is an offer and the company may accept the offer or can reject it based on acceptable reasons.<sup>49</sup>

#### TRANSPORT TIMETABLES

Bus, train, airlines companies display timetables for their transports for passengers. The general rule is that such display of timetables is not an offer but a mere invitation to treat. If a passenger is interested to travel, he has to make an offer to buy tickets to the seller. The sellers are agents of the transport companies. However, in *Wilkie v LPTB*, it was suggested that the timetable itself constitutes an offer which is accepted by the passenger by buying the ticket or getting on a bus or train. It would have been better if the court could held



that the timetable was an invitation to treat and when a passenger presents price to buy a ticket, he makes an offer to buy the ticket and that offer can be accepted by the seller by taking the price and issuing the ticket.

Merely booking tickets cannot constitute a binding contract. A binding contract is made when the passenger buys the ticket. That was decided in *Cockerton v Naviera Aznar SA*. In this case Streatfeild J. commented that: "Nobody booking a passage on a ship (or on a railway train) considers that he has a perfected contract merely by paying the passage money. It is the receipt of the ticket in exchange which, in my judgment, clinches the bargain."

#### ONLINE DISPLAY OF GOODS OR ADVERTISEMENT

Now-a-days goods are sold online. Online enterprises create their web sites on the Internet and display goods with price and also put advertisement for selling goods with price. These enterprises allow customers to browse their web sites and to choose the goods they want. These online enterprises provide virtual shopping basket to select goods and put in the virtual shopping baskets. When the browsing is complete, the web site instructs customers to proceed to a virtual checkout. In virtual checkout, customers need to write relevant information of their credit cards. Finally, a virtual contract is made through virtual offer and acceptance on the Internet. Of course, the tangible goods are supplied later by transport or by post to the customers.

Now, is this online display of goods with price and online advertisement of goods, an offer or mere 'invitation to treat'? To date, most academic scholars have attempted to analogize the online display of goods and advertisement in traditional way and opined that these should be treated as invitation to treat and not an offer. For business convenience, they say that online display of goods and advertisement has similar features like offline display of goods and advertisement. So, they should be considered similarly; that is 'invitation to treat' and not an offer.<sup>50</sup>

According to Mulcahy, "Goods displayed on the virtual shelves of a web site can by analogy be treated as an invitation to treat in the same way as the goods on the shelves in the *Boots* case. The supplier's program checks the availability of the item and if it is in stock, the purchaser can make their offer by entering their credit card details and clicking on a button to confirm their choices."<sup>51</sup> So, online display of goods, online advertisement, online auction sale, online tender etc. are mere invitations to treat and not offers.

#### RATIONALE FOR THE PRINCIPLE OF 'INVITATION TO TREAT'

The rationale of differentiating an 'offer' from an 'invitation to treat' is to protect the seller from undesirable situations where the seller is required to sell a limited number of goods to buyers whose number exceeds the number of goods in the stock or when the price written on the goods are very cheap and it is wrongly written. For example, A advertises: "Hurry up! Colour televisions from Sonny company, 21 inches, for RM 400 only." Here, the market price of the television, let say, RM 700. So, many customers will be interested to buy the televisions and will place hundreds of orders to buy while the stock is limited to 30 televisions only. Here, if the advertisement is treated as an 'offer', the seller will be bound to sell to all the potential customers who have accepted the offer and if he fails to sell to them, he will face multiplicity of suits and huge amount of damages to be paid to the customers.

The distinction between an offer and an invitation to treat is very fine one. Most of the time, they look like same thing. However, common law made a difference between the two with the intention of protecting sellers from dilemma of offer as explained in the above paragraph. Another example of such dilemma of the seller is that: a shop displays goods in the shop with price attached on them. The shop is selling different types automatic water kettles with different prices. The price attached on a type of electrical kettle indicates RM20. Actually the selling price should be RM120, but it was wrongly written RM20 by an employee of the shop. Now if display of goods in the shop with price tag considered as an offer, then any customer can accept it by paying the price and the shop will be bound to sell the Kettles for RM20 only instead of the market price RM120 to all the customers who have accepted the offer. So, the shop will get huge amount of loss on that particular time. Therefore, to help sellers from unwanted consequences of such offer to sale, courts designed a mechanism saying that such a display of goods in the shop shelves or in its windows is not an offer but it is merely an invitation to treat; meaning that the buyer has to offer to buy the goods and the seller has an option to sell with the price on it or to refuse the sale. Thus court protected sellers by developing a new principle of law known as 'invitation to treat'.

In the circumstances as explained above probably the seller has right to refuse selling the goods and can withdraw the goods from sale, as law considers such advertisement or display of goods as mere invitation to treat and not an offer.<sup>52</sup> This is a reason to consider displaying of goods with price marked on it or an advertisement as mere invitation to treat with an intention to protect the sellers of goods. According to Unger, if display of goods is to constitute an offer, there might be a large number of customers accepting



the offer than the shopkeeper would be able to supply.<sup>53</sup> In such cases, the shopkeeper has to pay compensation to all the customers who have accepted the offer but could not get the goods because of shortage of stock in the shop. However, according to O'Sullivan, there is an easy solution to this problem: the offer could be construed as only being open while stocks last or imply a term to this effect.<sup>54</sup> Lord Goddard CJ at first instance and Somervell LJ in the Court of Appeal in the UK in *Boots Cash Chemists* case<sup>55</sup> observed that if a display of goods with price tag were an offer, the customer would accept the offer by putting the goods in his basket, so a contract would be made at this point and the customer would not be able to change his mind and put the goods back. In other words, when the customer puts the goods in his basket or takes to the cashier for payment, it may be said that he has accepted the offer and the shop is bound to sell the goods. So, holding the display of goods to constitute an offer removes the shop's freedom to decide which of its customers it wants to sell its goods to.<sup>56</sup> Winfield has commented to this regard that "a shop is a place for bargaining, not for compulsory sales."<sup>57</sup> So, the seller should have a right to refuse to sell to certain customers whom he may not like for some reasons.

According to Chitty, advertisements of unilateral contracts are commonly held to be offers (as decided in *Carlill* case and *Bowman* case), the courts are less willing to find that an advertisement of a bilateral contract will constitute an offer.<sup>58</sup> There are two reasons for this. First, for advertisement of bilateral offers is often intended to lead to further bargaining. For example, if you advertise that "My house is for sale" then you envisage negotiation over the price before a contract is entered into. Second, a bilateral contract requires the offeree to promise to do something. So, the offeror will naturally wish to assure himself that the offeree is able, financially or otherwise, to perform the contract. If an advertisement of a bilateral contract were held to be an offer which would automatically create a contract when accepted by the person receiving it, the offeror would not have any choice but to be bound by the contract.<sup>59</sup>

According to Mulcahy, even where an advertisement in the 'For Sale' columns of a newspaper contains specific wording, a court would almost certainly, on the basis of the 'limited stocks' argument, regard the advertisement as an invitation to treat.<sup>60</sup> Such an argument was presented by Lord Parker in *Partridge v Crittenden* in which the defendant inserted in a periodical an advertisement stating 'Bramblefinch cocks and hens 25s each'. He observed that if the advertisement had been construed as an offer and demand had exceeded the defendant's supply, he could have faced any number of breach actions, as well as being guilty of an offence under the Protection of Birds Act 1954.<sup>61</sup>

Sinnadurai also argues that the rationale for holding advertisement as mere invitation to treat rather than an offer is that if it is considered as an offer then thousands of customers will accept the offer and put orders to buy it but it is unreasonable to expect a seller to have sufficient goods for sale to thousands of customers who may accept the offer.<sup>62</sup> According to Sinnadurai, the rationale for holding goods advertised for sale in newspaper, circulars or for the goods displayed in supermarkets, to be invitations to treat rather than offers is that it would be unreasonable to expect a seller to have sufficient goods for sale. Suppose a shopkeeper puts an advertisement in the newspaper to sell a particular class of goods and as a result all the goods were sold out but thousands of members of the public might crowd into the shop and demand to be served, and each one would have a right of action against the proprietor for not performing his contract.<sup>63</sup>

There are contrary arguments that display of goods and advertisement should be regarded as offers rather than invitation to treat and 'limited stocks' argument can be dispensed with by including the words 'offer lasts till the stocks remain available' or can state that a particular statement for sale is not an offer but mere invitation to treat. Such words in the display or advertisement for sale of goods can save liability of the sellers when the stock is not adequate. In this regard Mulcahy states:

It has been argued that the law would be better served to regard displays or advertisements as offers subject to the condition, sometimes found in advertisements, that stocks remain available, as this position would better reflect the expectations of the public and business community. Parties may of course indicate that their statements do not constitute offers. Estate agents often do this by including a form of words on details of properties, such as the statement that 'these particulars do not form, nor constitute any part of, an offer, or a contract for sale'.<sup>64</sup>

However, it might be argued that the pragmatic approach taken by courts to distinguish an invitation to treat from an offer is better for both the seller and buyer. Another important point is that labeling some offers as mere invitation to treat does not create any problem or cause any injustice to potential customers. Because, when goods are displayed at the shelves in a shop with price attached on them or advertisements are made with price for goods, although they are treated as mere invitations to treat but still the customers can buy them after making offers to sellers as long as the stocks remain available and this is fair decision in business environment. Catalogues, circular letters and price quotations are considered as mere invitation to treat in common law and the reason behind such decision is that there is lack of certainty in so called offer and the element of intention to create legal relation is absent in such statements.<sup>65</sup>

## ‘INVITATION TO TREAT’ IN ISLAMIC CONTRACT LAW

Some of the Muslim scholars say that display of goods with price, advertisement of goods with price, auction sales, tenders etc. are offers and not invitation to treat.<sup>66</sup> They argue that when goods are displayed with price, we can assume clear intention on the part of the shopkeeper that he intends to create legal relation with the prospective customers. So, display of goods is a promise, and the promise must be kept by the shopkeeper, unless he will be liable for breach of contract. According to them these proposals for sale are offers and when customers accept them, binding contracts are made. So, the seller cannot refuse to sell to the customer who has accepted the proposal, as a binding contract has been made.

At the outset it is important to mention that so far no extensive research has been conducted on this harmonization issue. In fact, a few scholars have written on this point and we can find two opinions: one, majority scholars say that advertisement, display of goods, auction sale, tenders etc. are offers in Islamic law but on the contrary others say that they are not offers; they are mere invitation to treat in Islamic law. The scholars who say they (above mentioned proposals to sale something) are not offers, they in reality argue in line with the English common law principle that labeling them as offers will cause hardship and harassment to the seller of goods as mentioned earlier in this article. Billah has not accepted that auctions, tenders, advertisements, display of goods on shelves and the like are mere invitations; according to him they are offers. When they are accepted by someone, they become binding upon the parties involved in the transaction.<sup>67</sup>

According to Billah, common law views some statements (offers) as mentioned above are ‘invitations to treat’ but Islamic law views them as offers. This is because a promise made by a person is a sacred trust, which ought to be fulfilled by the promisor.<sup>68</sup> To support his argument Billah quotes a verse from the holy Quran that “Truly pious are they who keep their promises whenever they promise.”<sup>69</sup> He quotes a few *ahadith* in support of his argument that: i. “There is no faith in him who has got no trust, and no religion for him who has got no promise.”<sup>70</sup> ii. Abu Hurairah (r.a.) narrated that Prophet (s.a.w.) said: “There are three signs of hypocrites and one of them is: when he makes a promise he breaks it.”<sup>71</sup> However, the above verse from the Quran and the *ahadith* are not convincing to prove the matter on which I will comment later in the next sub-topic.

According to Billah, an advertisement is an offer in Islamic law of contract if the advertisement mentions price for the goods, provides description of the goods and information related to its acquisition. He

says, there are two exceptional situations whereby an advertisement does not become an offer in Islamic law. They are: i. when the advertiser expressly mentions in his statement that the advertisement is only meant to be an ‘invitation to treat’ and not an offer; and ii. When the advertisement only gives the description of the goods and remains silent as regards to the price of the goods and its mode of acquisition.<sup>72</sup> It can be argued that according to Billah, if the advertiser does not specify the advertisement in the aforesaid manner, the advertisement becomes an offer and not an invitation to treat.

According to Nadavi and Billah, display of goods in shops constitutes a mere ‘invitation to treat’ and not an offer, if the shopkeeper merely displays the goods in the shelves or in the windows without any price. However, if the goods are displayed with price attached to it, such display is an offer in Islamic law.<sup>73</sup>

Similarly, Liaquat observed that generally a statement with description and price of goods, constitutes an offer in Islamic law of contract. Hence, a display of goods with the price is an offer.<sup>74</sup> However, Liaquat could not prove his observation with convincing Quranic verses and *ahadith*. 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.<sup>75</sup> If we accept this opinion, then indeed, we can say that the English law principle of ‘invitation to treat’ is not contradictory with *shari’ah* principles and therefore, this principle is applicable and enforceable in *shari’ah* courts. According to the Hanbali school of *shari’ah* law any contract law principle which might be of non-Muslim contract law is legally binding in *shari’ah* court provided that that contract law principle is not specifically prohibited under *shari’ah* law.<sup>76</sup> In the Islamic law of contract, an invitation to treat is known as *al-mu’atah*. There are different types of invitations to treat in the English common law which are recognized in the Islamic contract law as *al-mu’atah*.<sup>77</sup> *Al-mu’atah* basically means displaying of goods for sale.<sup>78</sup> *Al-mu’atah* principle has been mentioned by Hurriyyah El-Islamy in her Masters’ thesis. She in fact, has elaborated a little bit about what is *al-mu’atah* but she did not clearly say whether *al-mu’atah* is an offer or mere invitation to treat in Islamic law. Other Islamic scholars have not also clearly said whether *al-mu’atah* is offer or invitation to treat. They put different conditions and argue in different ways. Hence, it is open for the scholars to do further extensive research on this issue to clearly say whether it is offer or mere invitation to treat. According to Hurriyyah, *al-mu’atah* (displaying of goods for sale) under Islamic law is a kind of spot sale in which the counter values are present, exchanged or about to be exchanged without any verbal communication in terms of offer and acceptance. She has opined that, before the agreement can be concluded in such conduct, it

is necessary to determine the intention of the person displaying the goods by reference to the circumstances, nature of the goods involved or whether such practice is already known to trade usage.<sup>79</sup>

According to Hanafi and Hanbali scholars, displaying of goods on the shelf is an offer and when the customer pay the price it becomes a binding contract on the parties if common trade usage views that this may affect legal transfer of such commodities. Salwani argued in different line that is the status of displaying of goods on the web sites. She has said that when the display of goods is made on the web, it may constitute a valid offer if the trade usage does recognize the display as an offer. However, she says, it will only be valid if the price is satisfactorily described on it.<sup>80</sup>

According to Maliki school *al-mu'atah* is an offer and it may give effect to a valid contract if there is a definite indication of consent on the part of both the seller and the buyer. According to Az-Zuhaily, displaying of goods has strong *qarina* (inference) which is sufficient to assume consent on the part of the seller. According to Shafii jurists *al-mu'atah* is not valid on the ground that mere conduct does not imply any intention to contract. So, according to the Shafii jurists, in *al-mu'atah* there is absence of clear intention to sale the goods displayed and therefore it is not an offer.<sup>81</sup> Here, Shafii jurists emphasizes on 'consent' to sell which also means intention to sell goods. They emphasize on 'consent' based on the Quranic verse in Surah an-Nisa which states, "O you who believe, do not eat or distribute your property amongst you with fraud but you can conduct trading with a clear consent."<sup>82</sup>

#### ADOPTION OF 'INVITATION TO TREAT' PRINCIPLE IN ISLAMIC CONTRACT LAW

We have seen the opinions of some Muslim scholars about different types of invitation to treat. They say that advertisement, display of goods in the shop with price tag, auction sale, tenders etc are proposals to sell and therefore they are offers and not invitations to treat in Islamic law of contract. They say that when price is attached or mentioned with the goods, the display of goods, advertisement, auction sale and tenders are offers, but if no price is mentioned and there is uncertainty (*gharar*) in the terms of the offer, then they are invitation to treat and not offers.<sup>83</sup> According to them, whether a statement is offer or invitation to treat depends on the sign of intention to create a legal relation (*Qarina*). If there is clear *qarina*, it is offer and if the *qarina* is not clear it is an invitation to treat and not an offer.<sup>84</sup> Some Muslim scholars (mentioned above) also oppose the common law view on invitation to treat based on the idea of 'promise'. They say that what common law calls invitations to treat; they are actually promise by the seller. Hence, there is intention

to create legal relation in the promise; and therefore, in Islamic law it should be considered as offer and not mere invitation to treat.

Our argument is that common law named some types of proposals to sell goods as mere invitations to treat because of business convenience and to protect the interest of sellers i.e. sellers might be liable for breach of contract and they may face multiple suits with claim for huge amount damages as mentioned above. However, the Muslim scholars who oppose the common law view do not focus on this point. They have not said any thing on this point that terming some statements as offer rather than invitation to treat may cause the sellers to pay huge amount of compensation for shortage of stock. Therefore, the arguments offered by some Muslim scholars saying that display of goods, advertisement, auction sale, tenders etc. are offers; are not very convincing. The Quranic verse and two ahadith mentioned in their support are not relevant to the context of declaring some offers as mere invitation to treats in English common law; they are not also convincing in the prevailing exceptional situations at present and in the past. Those arguments are not attractive to the sellers also.

The main thing we have to consider is that terming some types of proposals to sell something as mere invitations to treat will cause any harm or injustice to the buyers or not. To us, in such cases the buyer does not suffer from any injustice. For example, display of goods in the shop; a customer chooses some goods and takes them to the cashier and offers to him to buy the goods. The cashier will usually sell the goods to the customer by accepting the offer unless there is a good reason to refuse. So, no injustice is caused to customers by terming display of goods as mere invitation to treat. On the other hand, by terming display of goods as mere invitation to treat will protect the interest of sellers.

Other things we have to see whether terming some statements as mere invitation to treat goes against any established Islamic law (*shariah*) principle such as interest (*riba*), uncertainty (*gharar*), gambling (*maysir*), selling prohibited (*haram*) goods etc. If it does not contradict with these *shariah* principles, we can say that there is nothing wrong of terming some statements as mere invitation to treat rather than offers.<sup>85</sup> Another argument is that the advantages of terming some proposals as mere invitation to treat outweighs its disadvantages to the parties involved. Indeed, terming some proposals as offers cause injustice to sellers as said by Salwani, "In this case if the display of goods or the advertisement is considered an offer, then this will bring injustice to the seller who may face 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."<sup>86</sup> Besides, *al-maslaha ar-mursalah* principle of Islamic law which states that if anything is beneficial for the people

and that thing is not prohibited in *shari'ah* then it is permitted. For these reasons, we may propose that the common law principle of 'invitation to treat' can be well accepted in Islamic law of contract as it does not contradict with any established *shariah* principles.<sup>87</sup>

## CONCLUSION

In the 19<sup>th</sup> century and earlier the common law court in England made some exceptions to an offer. As stated earlier, 'offer' is an essential element to make a valid contract. The court in England found that if some statements or proposals for selling of goods are considered as 'offer' it would cause serious inconvenience to business and the sellers would be enormously affected. So, the common law court in England developed some exceptions to the general rule of 'offer' in the 19<sup>th</sup> century saying that some of the specific offers will be considered as mere 'invitations to treat' and not offers for the interest of sellers. The decision of the common law courts in England to name some of the offers as 'mere invitations to treat' is still followed in the United Kingdom and all common law countries in the world including Malaysia.

This development of exceptions by common law court has been criticized by some scholars saying that it is not necessary to make those exceptions. The problem of 'shortage of stock' can be overcome by adding a statement in the offer that "this offer ceases to exist when the stock is finished." Or to provide a right of choice to the seller to choose customers, the offer can add "this is not an offer but mere invitation to treat." In this regard we may quote from Mulcahy as follows:

It has been argued that the law would be better served to regard displays or advertisements as offers subject to the condition, sometimes found in advertisements, that stocks remain available, as this position would better reflect the expectations of the public and business community. Parties may of course indicate that their statements do not constitute offers. Estate agents often do this by including a form of words on details of properties, such as the statement that: 'These particulars do not form, nor constitute any part of, an offer, or a contract, for sale'.<sup>88</sup>

Some Muslim scholars have also opposed the common law rule on 'invitation to treat' as has been stated earlier. They say that those invitations to treat should be treated as offers in Islamic law of contract. They argue that if there is inference of clear intention to create legal relation (*qarina*) can be presumed from the statement, then the statement for example advertisement, will be considered as an offer and not an invitation to treat. If the statement is considered as invitation to treat, then there will be breach of promise made by the seller.<sup>89</sup>

However, the court in the United Kingdom and other common law countries has not accepted such suggestion. Courts in common law countries think that it will serve better to the business community if the common law decisions on 'invitations to treat' are upheld even at present time. Another important point should be considered that courts in English have developed certain exceptions to the 'invitation to treat' rule and said that in exceptional circumstances an 'invitation to treat' can be considered as an 'offer' to make the offeror liable for a binding contract when the offer is accepted by prospective customers.<sup>90</sup> Therefore, the exceptions to the 'invitation to treat' rule make a balance between 'invitation to treat' and 'offer'.<sup>91</sup> The exceptions also ensure justice to business community including customers. The important thing is that the principle of 'invitation to treat' is not causing injustice to the customers and it is not contradictory with any *shari'ah* principles as stated earlier. In fact, treating display of goods as offer causes injustice to the seller as he may need to pay huge amount of damages due to shortage of stock.<sup>92</sup> The above points are very crucial to approve and incorporate the principle of 'invitation to treat' in Islamic law of contract.

## NOTES

<sup>1</sup> B. Vohrah, & W.M.Aun. *The Commercial Law of Malaysia*, Longman, Malaysia, UK, 2010.

<sup>2</sup> J. O'Sullivan, & J. Hilliard, *The Law of Contract*, Oxford University Press, London, 2006, p 17.

<sup>3</sup> V. Sinnadurai, *Law of Contract*, Butterworths, Kuala Lumpur, 3<sup>rd</sup> Edn., 2003, p 33.

<sup>4</sup> *Preston Corporation Sdn Bhd v. Edward Leong & Ors* [1982] 2 MLJ 22.

<sup>5</sup> S.A. Alsagoff, *Principles of the Law of Contract in Malaysia*, LexisNexis, USA, UK, 2010.

<sup>6</sup> N.I Abdullah, & S.S Razali, *Commercial Law in Malaysia*, Prentice Hall, Kuala Lumpur, 2008, p 11.

<sup>7</sup> E.A Lichtenstein, & P.A Read, (eds.), *Contract Law Text Book*, HLT Publications, London, 1990, p 9; see also N.I Abdullah, & S.S.Razali, *Commercial Law in Malaysia*, p 12.

<sup>8</sup> E.A Lichtenstein, & P.A Read, (eds.), *Contract Law Text Book*, p 9.

<sup>9</sup> L.M Pheng, and I.J Detta, *Business Law*, Oxford University Press, Oxford, New York, 2010.

<sup>10</sup> S Jawahitha, M.A Jalil, et al, *Basic Law: Questions & Answers*, Prentice Hall, Kuala Lumpur, 2002, p 18.

<sup>11</sup> Mulcahy, L. & Tillotson, J., *Contract Law in Perspective*, Cavendish Publishing Limited, London, 4<sup>th</sup> Edn., 2004, p 65.

<sup>12</sup> L. Mulcahy, & J.Tillotson, *Contract Law in Perspective*, p 65.

<sup>13</sup> S Jawahitha,.; M.A Jalil, et al, *Basic Law: Questions & Answers*, p 18.

<sup>14</sup> G.H Treitel, *The Law of Contract*, Stevens & Sons, London, 6<sup>th</sup> Edn., 1983, p 8.

<sup>15</sup> (1873) LR 8 QB 286.

<sup>16</sup> (1834) 6 C & P 499.

<sup>17</sup> (1870) LR 5 CP 561.

<sup>18</sup> [1953] 1 QB 401 (Court of Appeal).

<sup>19</sup> [1961] 1 QB 394.

<sup>20</sup> J. O'Sullivan, & J. Hilliard, *The Law of Contract*, p 20.

<sup>21</sup> J. O'Sullivan, & J. Hilliard, *The Law of Contract*, p 21.

<sup>22</sup> [1967] 1 MLJ 101 (FC).



- <sup>23</sup> [1964] MLJ 12 (HC).
- <sup>24</sup> [1974] 2 MLJ 114 (HC).
- <sup>25</sup> [1968] 1 WLR 1204.
- <sup>26</sup> [2001] 4 MLJ 49.
- <sup>27</sup> L. Mulcahy, & J. Tillotson, *Contract Law in Perspective*, p 66.
- <sup>28</sup> [1893] 1 QB 525.
- <sup>29</sup> V.Sinnadurai, *Law of Contract*, p 38.
- <sup>30</sup> (1913) 11 ALJ 314.
- <sup>31</sup> (1995) Times, 24 November, CA.
- <sup>32</sup> (1957) 251 Minn 188.
- <sup>33</sup> [1893] AC 552.
- <sup>34</sup> J. O'Sullivan, & J. Hilliard, *The Law of Contract*, p 24; see also *British Car Auctions v Wright* (1972) and Sale of Goods Act 1979 (UK), section 57(2).
- <sup>35</sup> Section 10 of Auction Sales Act (Malaysia).
- <sup>36</sup> (1789) 3 TR 148.
- <sup>37</sup> [1994] 1 MLJ 303.
- <sup>38</sup> *Warlow v Harrison* (1859) 1 E & E 309; see also O'Sullivan, J. & Hilliard, J., *The Law of Contract*, p 24.
- <sup>39</sup> The controversy has been discussed by Slade, "Auction Sales of Goods without Reserve" (1952) 68 *LQR* 238; Gower, 'Auction sales of goods without reserve' (1952) 68 *LQR* 457; and Slade, 'Auction sales of goods without reserve' (1953) 69 *LQR* 21.
- <sup>40</sup> J. O'Sullivan, & J. Hilliard, *The Law of Contract*, p 22.
- <sup>41</sup> (1870) LR 5 CP 561.
- <sup>42</sup> *Blackpool and Fyde Aero Club Ltd. v Blackpool Borough Council* [1990] 3 All ER 25.
- <sup>43</sup> [1986] AC 207.
- <sup>44</sup> [1990] 3 All ER 25.
- <sup>45</sup> See also *Fair Clough Building Ltd. v Borough Council of Port Talbot* (1993); *Dickson Trading (S) Pte. Ltd. v Transmarco Ltd.* [1983] 2 MLJ 408. In these two cases the court discussed exceptions to the general rule in tender.
- <sup>46</sup> *Montgomery Ward & Co. v Johnson*, 209 Mass 89; 95 NE 290 (1911); Billah, M.M., *Islamic Law of Trade and Finance: A selection of issues*, Ilmiah Publishers, Kuala Lumpur, 2003, p 7.
- <sup>47</sup> Sigal & Subramanyam, *The Indian Contracts Act*, (edited and revised by Dr. R.C. Vyas), Law Book Co., Allahabad, India, 2<sup>nd</sup> Edn., 1980, p 121.
- <sup>48</sup> See the decision in *Hebbs Case* (1867) LR 4 EQ 9.
- <sup>49</sup> G.H Treitel, *The Law of Contract*, Seven and Sons, London, 6<sup>th</sup> edition, 1983, p 8; Sigal & Subramanyam, *The Indian Contracts Act*, p 126; Billah, M.M., *Islamic Law of Trade and Finance: A selection of issues*, p 8.
- <sup>50</sup> L. Mulcahy, & J. Tillotson, *Contract Law in Perspective*, p 67.
- <sup>51</sup> L. Mulcahy, & J. Tillotson, *Contract Law in Perspective*, pp 67-68.
- <sup>52</sup> Australian Competition and Consumer Commission, 'When can I withdraw mispriced goods from sale? – Invitation to treat', [www.accc.gov.au/content/index.phtml/itemId/322984](http://www.accc.gov.au/content/index.phtml/itemId/322984).
- <sup>53</sup> Unger, 'Self-service shops and the law of contract' (1953) 16 *MLR* 369.
- <sup>54</sup> J. O'Sullivan, & J. Hilliard, *The Law of Contract*, p 20.
- <sup>55</sup> [1953] 1 QB 401 (Court of Appeal).
- <sup>56</sup> J. O'Sullivan, & J. Hilliard, *The Law of Contract*, p 20.
- <sup>57</sup> Winfield, 'Some aspects of offer and acceptance' (1939) 55 *LQR* 499.
- <sup>58</sup> Beale, *Chitty on Contracts*, Sweet & Maxwell, London, 29<sup>th</sup> Edn., 2004.
- <sup>59</sup> Beale, *Chitty on Contracts*; see also O'Sullivan, J. & Hilliard, J., *The Law of Contract*, pp 21-22.
- <sup>60</sup> L. Mulcahy, & J. Tillotson, *Contract Law in Perspective*, p 66.
- <sup>61</sup> L. Mulcahy, & J. Tillotson, *Contract Law in Perspective*, p 66.
- <sup>62</sup> V. Sinnadurai, *Law of Contract*, p 37.
- <sup>63</sup> V. Sinnadurai, *Law of Contract* p 37; see also Farnsworth, *Contracts*, Aspen Law & Business, 3<sup>rd</sup> edition, 1999, p 137; see also the case of *Crawley v R* [1909] Transvaal 1105, 1108 (South Africa).
- <sup>64</sup> V. Sinnadurai, *Law of Contract*, p 37.
- <sup>65</sup> *Moulton v Keshaw* 59 Wis 416; 18 NW 17248 Rep 516 91884; Sigal & Subramanyam, *The Indian Contracts Act*, p 12; M.M Billah, *Islamic Law of Trade and Finance: A selection of issues*, p 8.
- <sup>66</sup> M.M Billah, *Islamic Law of Trade and Finance: A selection of issues*, p 16; M. Nadavi, *Islami Fiqh* (Translated in Bangla by M.M Hossain.), Islamic Foundation Bangladesh, Dhaka, Vol. III, 1987, p 24; C.Hamilton, *The Hedaya Commentary on the Islamic Laws*, Kitab Bavan, New Delhi, Vol. II, 1985, pp 364 & 370; Doi, A.R.I., *Shariah: The Islamic Law*, A.S. Noordeen, Kuala Lumpur, 1990, p 359; Niazi, L.A.K., *Islamic Law of Contract*, Dyal Singh Trust Library, Lahore, 1990, p 124.
- <sup>67</sup> Billah, Mohammad Masum, *Applied Islamic Law of Trade Finance - A Selection of Contemporary Practical Issues*, Sweet and Maxwell, London, Malaysia, 2007, p 5.
- <sup>68</sup> Billah, Mohammad Masum, *Applied Islamic Law of Trade Finance - A Selection of Contemporary Practical Issues*, p 9.
- <sup>69</sup> Al-Quran, Surah Baqara, verse 177.
- <sup>70</sup> This hadis has been narrated by Anas bin Malik (r.a.) and reported in *Baihaqi*; This hadis has been cited in M.S Chowdhury, *A Code of the Treacings of al-Quran*, 1988, p 349.
- <sup>71</sup> *Sahih Bukhari & Muslim*. These two ahadis have been cited in *Miskatul Masabih*, Qadhi Kutub Khanah, Pakistan, Hijra 1368, p 17.
- <sup>72</sup> M.M Billah, *Islamic Law of Trade and Finance: A Selection of Issues*, pp 9-10
- <sup>73</sup> M Nadavi, *supra*, at p. 364; Billah, M.M., *Islamic Law of Trade and Finance: A Selection of Issues*, Kuala Lumpur: Ilmiah Publishers, 2003, at p. 11.
- <sup>74</sup> Liaquat Ali Khan Niazi. 1990. *Islamic Law of Contract*, Lahore, Pakistan, at p. 124.
- <sup>75</sup> Alan Sfeir and Joe Tirado. 2010. *The International Comparative Legal Guide to International Arbitration*, Global Legal Group. See also Seaman, Bryant W. 1980. "Islamic Law and Modern government: Saudi Arabia Supplements the Shari'ah to Regulate development", *Columbia Journal of Transnational Law*, 18:413-481.
- <sup>76</sup> Otto, Jan Michiel. 2010. Shariah Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present, p. 167; See also, Kourides, P. Nicholas. 1970. "Influence of Islamic Law on Contemporary Middle Eastern Legal Systems: The Formation and Binding Force of Contract." *Columbia Journal of Transnational Law*, Vol. 9, p. 429.
- <sup>77</sup> M.A Jalil., 2010. "Islamic Law of Contract is Getting Momentum." *International Journal of Business and Social Science*, Vol. 1, No 2, pp. 175-192 at 183.
- <sup>78</sup> Razali, S.Salwani, *Islamic Law of Contract*, Singapore: Cengage Learning, 2010, at p. 9; See also El-Islamy, Hurriyyah, *Business on the Internet: The Islamic Perspective and its Online Contract Issues*, 2001, at p. 51.
- <sup>79</sup> El-Islamy, Hurriyyah, *Supra*; Razali, S.Salwani, *supra*.
- <sup>80</sup> Razali, S.Salwani, *Islamic Law of Contract*, Singapore: Cengage Learning, 2010, at p 10.
- <sup>81</sup> Razali, *Supra*; Az-Zuhayli, Wahbah, *Al-Fiqh al-Islami wa Adillahtuh*, Vol. 4, No date, p. 2939.
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