

**A Comparison of the Shari'ah and the Convention on Contracts for the International Sale of Goods in International Business Transactions**

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Islam is the world's second largest religion after Christianity. Some have estimated that by 2030, one out of four people in the world will be a Muslim. This growing Muslim population, along with globalization, requires that international business law attorneys find new ways to accommodate Islamic law, widely known as the Shari'ah. The Shari'ah has had a tremendous impact on the law of Muslim countries, as it is the primary source of law in many of their constitutions. T.S. Twibell, *Implementation of the United Nations Convention on Contracts for the International Sale of Goods (CISG) under Shari'a Law: Will Article 78 of the CISG Be Enforced When the Forum Is an Islamic State?* 9 INT'L LEGAL PERSP. 25, 32 (1997).

The Shari'ah largely consists of two primary sources. The primary source is the Qur'an, which is believed by Muslims to be the actual word of God revealed through the Prophet Muhammad (peace be upon him). Although the Qur'an consists of 6,616 verses, only 80 of these relate to legal issues. The verses are binding on certain matters, such as the strict prohibition on gambling and the sale of alcohol, and provide guidance on other matters such as the preferred use of arbitration. Qur'an 2:219; 4:35. The second primary source is the Sunnah, which is the traditions of the Prophet Muhammad (p.b.u.h.) recorded during his lifetime. The Sunnah supplements or clarifies verses from the Qur'an and provides guidance on subjects that are not directly addressed by the Qur'an. For example, the Sunnah also supports arbitration, as the Prophet Muhammad (p.b.u.h.) agreed to submit a dispute to a neutral third party to resolve a conflict between himself and a Jewish tribe. Mohammed Abu-Nimer, *A Framework for Nonviolence and Peacebuilding in Islam*, 15 J.L. & RELIGION 217, 265 (2001).

The Convention on Contracts for the International Sale of Goods (CISG) is an international treaty that applies to contracts for the sale of commercial goods between parties that have places of business in different countries that have adopted the treaty. The CISG has been adopted by the United States along with 80 other countries to date and has been instrumental in providing uniformity to international commercial transactions. The CISG allows ratifying countries to make reservations and deviate from the standard provisions. However, despite the success of the CISG, only seven of 37 Muslim countries have ratified the CISG. In the wake of their colonial past, a majority of these Muslim countries follow the French civil law tradition, which is consistent with the CISG in most areas. Fatima Akaddaf, *Application of the United Nations Convention on Contracts for the International Sale of Goods (Cisg) to Arab Islamic*

*Countries: Is the CISG Compatible with Islamic Law Principles?* 13 PACE INT'L L. REV. 1, 19 (2001).

Accordingly, this article will explore the major similarities and the differences between the Shari'ah and the CISG in an effort to examine their compatibility and improve international trade.

## **Major Similarities**

### ***Statute of Frauds***

One of the major similarities between the Shari'ah and the CISG is the no-writing requirement. Article 11 of the CISG provides that a contract does not have to be in writing and can instead be proved by witnesses. The Shari'ah similarly supports a no-writing requirement, although the Qur'an strongly recommends the use of writings and witnesses to evidence a contract. Qur'an 2:282. However, it is important to note that the minority view under the Shari'ah is that a writing must be formally witnessed by at least two witnesses to be enforceable. Akaddaf at 28. The Shari'ah's lack of a writing requirement implies that prior or contemporaneous oral agreements are admissible, while article 8(3) of the CISG allows these agreements even if they openly contradict the terms of the written agreement.

### ***Good Faith***

Another similarity between the Shari'ah and the CISG is the importance placed on the duty of good faith. Article 7(1) of the CISG provides that good faith is a broad concept and applies to all aspects of the CISG. The Shari'ah also imposes a duty of good faith in commercial transactions but extends this duty beyond just the contract. The Qur'an prohibits any type of fraud in commercial transactions, stating "Woe to those that deal in fraud, [t]hose who, when they have to receive by measure from men, exact full measure, but when they have to give by measure or weight to men, give less than due." Qur'an 83:1-5 (translated by Yusuf Ali). This means parties to a commercial transaction are also required to look out for the interests of the general public and ensure their products are made available at reasonable prices. Although this duty is implied, Muslim countries have codified this duty due to its importance under the Shari'ah. HOSSAM A. EL-SAGHIR, *THE INTERPRETATION OF THE CISG IN THE ARAB WORLD, CISG METHODOLOGY*, (Sellier 2008).

### ***Force Majeure Clause***

Force majeure is a principle that is recognized under both the Shari'ah and the CISG. Article 79(1) of the CISG states that a party cannot be held liable for its failure to perform contract obligations if the failure is due to a reasonably unforeseeable contingency outside of his control. The Shari'ah expands this concept even further such that any unforeseeable contingency can be a basis to void a contract. This means that if the performance becomes "unexpectedly more difficult or involves more than original[ly] contemplated, the contract is seen as being fundamentally defective . . . [and] the aggrieved party may rescind it." David J. Karl, *Islamic*

*Law in Saudi Arabia: What Foreign Attorneys Should Know*, 25 GEO. WASH. J. INT'L L. & Econ. 131, 161(1992).

### ***Trade Usage***

Trade usage or custom in modern commercial transactions is so well recognized in Muslim countries that it is said to be “one of the minor sources” of the Shari’ah. Akaddaf at 31–32. This is because the Prophet Muhammad (p.b.u.h) himself was at one point a merchant and was involved in trade practices, even operating a commercial partnership with his wife. *Id.* Similarly, Article 9 of the CISG recognizes trade usage “widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade,” though it does not place trade usage at the level of importance given to it by the Shari’ah.

### ***Warranty of Merchantability***

The Shari’ah recognizes the warranty of merchantability to such an extent that it “cannot be contracted around or waived” and the burden of proof is on the seller to demonstrate that the goods were not defective when delivered. Jacqueline McCormack, *Commercial Contracts in Muslim Countries of the Middle East: A Comparison with the United States*, 37 INT’L J. LEGAL INFO. 1, 25–26 (2009). Similarly, Article 35 of the CISG also recognizes the warranty of merchantability in that the “seller must deliver goods which are of the quantity, quality and description required by the contract.” However, Article 35 of the CISG allows the warranty to be disclaimed or waived by the contracting parties, unlike the Shari’ah. Nevertheless, the CISG’s provisions favor the creation of the warranty of merchantability, which is in accordance with the strong recognition of this warranty under the Shari’ah.

### **Major Differences**

#### ***Prohibition on Interest***

Perhaps the major difference between the Shari’ah and the CISG relates to the charging of interest. Article 78 of the CISG permits the application of interest in the calculation of damages, while interest is so unequivocally prohibited by the Qur’an, that some Muslim scholars believe, the charging of interest can void a contract. The prohibition stems from the rationale that interest “is a source of oppression leading to the exploitation of the poor” based on arguments of social justice as well as equality and property rights. Akadaff, at 48–49. The Islamic view is that money is “only “potential capital” and requires the service of the entrepreneur to transform it to actual productive use . . . [and] the accumulation of wealth through interest is selfish compared with accumulation through hard work and personal activity.” *Id.*

Muslim countries such as Egypt and Iraq that have ratified the CISG expressly allow damages in interest even though it contradicts their constitutions, which are based on the Shari’ah. *Id.* at 54–55. Further, the Muslim countries that have ratified the CISG did not make any reservations on with respect to its interest provision. It seems that the legal systems of these

Muslim countries are so “deeply influenced by the Western legal structure” that they have “adopted the modern trend on the applicability of interest.” *Id.* at 57.

Nevertheless, other Muslim countries that have not yet ratified the CISG are reluctant to acquiesce to the charging of interest. A viable option remains in the form of article 6 of the CISG, which would allow a Muslim party to opt out of the interest provision despite his country having ratified the CISG. This would ensure that the contract is completely compatible with the Shari’ah. Twibell at 70. Another option for a Muslim country concerned about the inclusion of interest in damages is to make a reservation to this interest provision. However, this could result in loss of business in international trade because non-Muslim parties may avoid entering into the resulting contracts out of fear of a lack of adequate compensation for damages. *Id.* at 81.

### ***Prohibition on Risk***

Under the Shari’ah, risk or uncertainty in contracts is strictly forbidden on the basis of the prohibition on gambling. This means that contracting parties must ensure that their contract terms are definite and certain. This approach differs significantly from that of article 55 of the CISG, which allows contract terms to fluctuate and remain uncertain.

Due to the strict prohibition against risk, insurance is also forbidden under a strict application of the Shari’ah, as “parties are not able to mitigate risk by insurance . . . because the outcome of the contract is uncertain and considered speculative.” McCormack, at 22. The CISG does not have any prohibitions against insurance. In response to the great demand for insurance, there has been a modern trend in Muslim countries to allow certain types of insurance under the Shari’ah. *Id.*

### ***Consequential Damages***

The Shari’ah does not include consequential damages such as lost profits when calculating a party’s remedy, again due to the prohibition on risk or uncertainty. The rationale is that only “God can foresee the future, [so] it would be inappropriate for Shari’a[h] courts to award damages based on anticipated profits.” Karl, at 162. Nevertheless, Shari’ah courts usually provide some type of compensation to the aggrieved party, but it will not be in the form of consequential damages. *Id.* Contrary to the Shari’ah, article 78 of the CISG recognizes the concept of consequential damages in a breach of contract claim as long as the damages were foreseeable to the contracting parties. It may be that if consequential damage can be shown to be more definite, it may be allowed under the Shari’ah.

### ***Specific Performance***

The Shari’ah strictly requires that all obligations be specifically performed by the respective parties under a contract. The tradition of the Prophet Muhammad (p.b.u.h) requires that all agreements be “specifically performed unless performance contravenes the Islamic code of conduct or is against public policy of the law.” Akaddaf, at 36. Muslim scholars hold that breaching a contract obligation is similar to breaching a moral obligation such that the breaching party must now specially perform. *Id.* The CISG addresses specific performance in article 28,

which expressly provides that a court is not required to grant specific performance. Further, article 7 of the CISG does not allow a buyer to force a seller to perform when the performance would be unreasonable. There has been a modern trend among Muslim countries not to require absolute specific performance because this could result in hardship to the breaching party greater than the non-breaching party in some circumstances. *Id.* Under both the Iranian Civil Code and the Moroccan Code, the remedy of specific performance is a secondary remedy left to the judge's discretion. McCormack, at 27.

### ***Statute of Limitations***

The traditional view based on the Shari'ah rejects a statute of limitations, as a non-breaching party's right is not extinguishable by any lapse of time. This is based on a statement of the Prophet Muhammad (p.b.u.h) that "[a] Muslim's right cannot be abolished even if it is remote in the past." Akaddaf, at 43. However, Muslim countries that have ratified the CISG apply a statute of limitations of 10 to 15 years in their own countries, while Iran, a country known for its strict adherence to the Shari'ah, does not recognize the statute of limitations. McCormack at 25.

The CISG does not directly address the statute of limitations but allows it to be supplemented by another convention applicable to its signatories, the United Nations Convention on the Limitation Period in the International Sale of Goods of 1974. Akaddaf, at 42. Under, the Limitation Convention, the statute of limitations is four years. Further, the Limitation Convention does not allow contracting parties to modify the statute of limitations. *Id.* at 43.

### **Conclusion**

Overall, there are strong similarities between the Shari'ah and the CISG. The recognition of oral contracts and witnesses to evidence a contract are great starting points for comparison. Legal principles such as good faith and force majeure remain important under the CISG but hold heightened value under the Shari'ah. Further, the CISG's favorable provisions regarding trade usage and the warranty of merchantability complement the Shari'ah's strong recognition of these concepts.

In regard to the differences, the flexibility of Muslim countries in applying the Shari'ah proves that these differences can be resolved. The prohibition on interest and consequential damages can be circumvented by Muslim countries finding other ways to compensate the aggrieved parties. The prohibition on risk can be avoided by ensuring there are no contract terms left open or uncertain. Further, the modern trend in Muslim countries of not requiring absolute specific performance and introducing statutes of limitations demonstrates that these may be minor differences. Lastly, Muslim countries concerned with violating the Shari'ah can make reservations with respect to the conflicting provisions of the CISG, or they can give notice to their citizens to opt out of the conflicting provisions in their commercial contracts.