

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

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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 differentiated 'invitation to treat' from an 'offer' on policy grounds. The authors of 'contract law' in the UK and other common law countries have analyzed the principle of an 'invitation to treat' and have accepted the rationale for its differentiation from an '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 an 'invitation to treat' are not very convincing. The purpose of this paper is to put forward the argument that there is an 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 the Islamic law of contract as it does not contradict any *shariah* (Islamic law) principles. It is to be noted that in this article the English common law principle of 'invitation to treat' has been compared with Islamic law of contract. The relevant laws from other common law jurisdictions have not been discussed in this article.

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

1. INTRODUCTION

An 'Invitation to Treat' has been distinguished from an offer in the common law¹ as it is the creation of the common law in England which specifically differentiated an 'invitation to treat' from an 'offer' which incidentally 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 terms.² If any party breaches any of the terms of the contract, he will be liable for an appropriate remedy to the other party. 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.³ 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."⁴

The courts 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 'invitations to treat' to potential customers.⁵ 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. Thus, an 'invitation to treat' is not an 'offer' and an offeree cannot accept it as an 'offer' to bind the seller in a contract law.⁶ Examples of invitation to treat are: displaying of goods in the shop with prices attached on them, advertisements, auction sales, tenders etc.

Whether a statement is an offer or an invitation to treat is an objective test depends entirely on the intention of the offeror and the facts on the particular case.⁷ 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 to form a binding contract, since it is always the invitee who is being asked to make the offer."⁸

Invitation to treat plays an important role in business to protect sellers from a multiplicity of suits and claims for a huge amount of damages to be paid to the potential buyers.⁹ 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. As it might not be physically possible for the seller to sell the goods to all the customers due to a shortage of stock or the price mentioned in the advertisement was mistakenly put very low. Thus, the principle of invitation to treat is very beneficial to the seller. This paper discusses the advantages and the disadvantages of an 'invitation to treat' principle and ultimately shows that the advantages of the principle outweigh the disadvantages. Finally, the paper proposes the adoption of the principle in the Islamic law of contract with an intention to harmonize the civil law with the *shariah* (Islamic law). A descriptive and analytical research methodology has been applied in this research and the necessary data has been collected from books, journal papers and court decided cases (reported in various case reports), as well as from the Parliamentary legislation and the legal opinions of some prominent Islamic scholars. Finally the data has been analyzed and a conclusion has been distinctly made to the effect that the principle of invitation to treat is not in contradiction with any *shariah* principles and is thus beneficial to the ummah who are involved in the business activities. In view of the facts put forward above, this principle can be accepted in the Islamic contract law as a means of harmonizing the civil law (the conventional English law) with the *shariah* (Islamic law). As stated in the abstract, only English common law has been discussed in this article to compare the 'invitation to treat' principle with Islamic law of contract.

2. CONCEPT, NATURE AND ORIGIN OF 'INVITATION TO TREAT' IN THE COMMON LAW

As abundantly clarified above, an 'Invitation to Treat' is not an offer as it is just an invitation to make an offer realizable whereby it is legally inferred as a sort of a preliminary negotiation to buy something.¹⁰ The preliminary stage of offer to sell something may encourage a negotiation and establish a bargain. When a negotiation progresses, while in fact the offer is not accepted, it is modified in terms of price and other relevant matters, such as, specifying conditions to meet particular qualities of the goods. In such stage, it is said that the original offer ceases to exist and a new offer emerges from the customers to the seller. Thus, in a negotiation stage no binding contract is made and the statement of the offer becomes a mere invitation to treat to the customers. When the customers make some definite offers to the seller in response to the invitation to treat, it is up to the seller either to accept the offers or to reject them.¹¹ According to Mulcahy, "As a general proposition, offers must be distinguished from other statements made at a pre-contractual stage which are known

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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.”¹²

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 then established. Accepting an invitation to treat does not legally imply the establishment of 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 then an agreement is made binding 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.¹³

An example of an invitation to treat is that when you go to a supermarket you find different types of items are placed on the shelves with prices attached to them. You may think that the goods that are placed on the shelves are offers made to the 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 a mere invitation to treat. An invitation to treat means that the shopkeeper invites you to make a formal offer to buy the items that you have chosen.

When you decide to buy some goods and take them to the cashier and pay for the goods, the cashier has an 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 a breach of contract. The reason is that the common law considers this placing of different types of goods on the 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 the option either to sell the items or to refuse to sell the items.

The 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 which 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. Hence, an unequivocal acceptance of an offer makes a binding contract but an 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 a compensation for a breach of the contract.

According to Treitel, G.H., whether a statement to sell something is an offer or a mere invitation to treat is an objective test depends on the intention of the offeror. But if the offeror or seller intends to offer for sale then it is an offer, but if he intends to invite customers to make an offer, then it is an invitation to treat and not an offer.¹⁴ Hence, from the intention of the seller and from the wording of the statement we can determine whether a particular statement related to a sale transaction is an offer or a mere invitation to treat.

The concept of ‘invitation to treat’ originated in the early nineteenth century. At that time, courts were concerned of the interest of sellers. If display of goods in the shop was declared as an offer, then there was a possibility that there were more customers than the available stocks in the shop. Thus, 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 a breach of contract and will face multiple litigations for damages. A similar consideration was in the mind of the courts in the case of advertisements, auction sales and tenders. Some of the cases decided at that time are referred below as examples:

i. *Harris v. Nickerson* (1873),¹⁵ The English court held that an auctioneer who puts a property up for sale in an auction is not making an offer but merely making an invitation to potential customers to make bids.

ii. *Timothy v. Simpson* (1834) 6 C & P 499. In this case 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 displayed in a shop window or on a shelf inside the shop.

iii. *Spencer v. Harding* (1870).¹⁶ 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. G. Eilbeck & Co.' It was 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 the nineteenth century as stated above is still currently used in the UK and other common law countries and courts are of the opinion that this principle is capable of being used at the present time and in the future for the convenience of businessmen and is being applied in different common law countries in the world.

3. TYPES OF 'INVITATION TO TREAT'

In the above sub-heading we have discussed the concept, nature and origin of the principle of 'invitation to treat'. Now let us discuss the different types of invitation to treat. In fact there are different types of invitation to treat that have been developed by courts over the time while deciding cases related to an offer and an acceptance. The main types of invitation to treat are discussed below with the help of decided cases.

3.1. *Displaying of goods*

Displaying of goods in the shop with price tags is not an offer in law. The law regards it as an invitation to treat. An 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, the 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 the 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*¹⁷ the defendant was prosecuted for selling drugs in the absence of a 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.

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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 as it is merely an invitation to treat. In *Fisher v. Bell*¹⁸ the defendant displayed flick knives in his shop windows. He was, however, only prosecuted for a criminal offence on the basis of 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.”

3.1.1 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 an invitation to treat. If the display of goods with a 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 as he cannot refuse to sell the goods in that circumstance. 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 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.¹⁹

3.2 Advertisement

Advertisements are generally considered as mere invitations to treat and not offers. 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, then a binding contract is made between them.²⁰ Hence, in *Majumder v. Attorney-General of Sarawak*²¹, the Federal Court of Malaysia held that an advertisement in the newspapers for the post of a doctor was an invitation to treat and not an offer.

Similarly in *Coelho v. The Public Services Commission*,²² the court held that an advertisement in the Malay Mail newspapers inviting applicants for the posts of passport officers 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*,²³ the court held that the sale of a house through an advertisement in the newspapers was an invitation to treat and not an offer.

In *Partridge v. Crittenden*²⁴, 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 a 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 a mere invitation to treat and not an offer.

In *Eckhardt Marine GMBH v. Sheriff, High Court of Malaya, Seremban*,²⁵ Gopal Sri Ram in the Court of Appeal (Malaysia) observed that as a general rule an advertisement is considered not as 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 as it was merely an invitation to treat.

Generally an advertisement is considered as an invitation to treat and not as an offer. The reason of such treatment might be that the 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 an 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) may outnumber the items. Thus, 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 items because of shortage in stock.²⁶

Hence, to save the advertiser and to avoid his liability for compensations 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 an option either to sell or refuse to sell the item to some potential customers and thereby can avoid the liability of paying compensations to them.

In a supermarket we may find that a shop owner announces 40 to 70% discounts on some items to empty the stock. Several customers buy the items and eventually the stock is finished while some potential customers cannot buy them. If this discount is considered as an offer then the shop owner has to pay compensations to the potential customers who cannot get the items for shortage of stock. Thus, to protect the shop owner from an undesired situation this offer of discount is considered as a mere invitation to treat and not as an offer.

3.2.1 Exceptions to the general rule of advertisement

Although an advertisement is generally considered as an invitation to treat, however, it has its own 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 coloured, 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 without any such promise, then the general rule will be applicable and the advertisement would be a mere invitation to treat.

Such a situation arose in *Carlill v. Carbolic Smoke Ball Co. Ltd.*²⁷ 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 the 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 UK held that the advertisement was a unilateral offer and the plaintiff was entitled to the £100 as she had accepted the offer made to the world at large. The

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court also held that in such cases where a promise for reward is made, there is no need to communicate the acceptance to the offeror.

Thus, in the above case 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 the 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, furnishing information leading to the apprehension of a criminal, etc.²⁸ In *Lalman Shukla Gauri Datt*,²⁹ (an Indian case) 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 Contract Act. Hence, this case from India also proves that in exceptional cases advertisements might be considered as offers rather than invitations to treat.

In *Bowerman v. Association of British Travel Agents Ltd.*, (1995) Times, 24 November, CA, 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.*,³⁰ the defendant published an advertisement in a newspaper stating that: ‘Saturday 9 am sharp, 3 brand new fur coats worth \$100, first come first served, \$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.”

3.3 Reply to inquiry

Potential customers may inquire about prices and other information from the seller. When such information is inquired about, the seller usually reply to the inquirer 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. 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*³¹.

Therefore, a reply to an 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 as there is the absence of an intention to create a legal relation by the seller. In the absence of an intention to make a binding contract, a mere reply to an inquiry cannot be considered as an offer and the inquirer cannot accept it as an offer to make a binding contract.

3.4 Auction sale

A call for bids by the auctioneer is not an offer as it is 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 the right to reject the offer made by a

bidder. The auctioneer has also the 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: i) auctions 'with reserve' and ii) 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 the offers, and the offer is accepted by the auctioneer by bringing down his hammer.³² 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."³³

In *Payne v. Cave*³⁴ 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 did not complete the auction sale by the fall of his hammer.

The auction sale can be concluded by announcement of the auctioneer in front of the 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.*³⁵

3.4.1 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.*³⁶ 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 controversy³⁷ but later it was solved by the Court of Appeal (UK) in *Barry v. Davies.* In this case, the Court of Appeal (UK) 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.

3.5 Tenders

When tenders are invited from the public to supply required items/services or for a particular project, it is regarded as a 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 to him to consider. Therefore, his statement is generally an invitation to treat and not an offer.³⁸ 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

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offer. Example 2: A government department invites tenders to construct few administrative buildings. Such invitation to submit tenders is generally regarded as a mere invitation to treat like auction sale.

In *Spencer v. Harding*³⁹, the court held that an invitation to submit tenders is a mere invitation to treat like an auction sale as 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.”

3.5.1 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 an invitation to treat.⁴⁰ 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, and this type of invitation for tenders will be considered as an offer.

Hence, the statement inviting tenders may intend to make an offer rather an invitation to treat. Thus, 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 the English law on public interest and policy grounds. 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.*⁴¹ a referential tender was submitted and the House of Lords held that referential bid is not acceptable as it is ineffective and legally defective. 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 Defendant 1. 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 the House of Lords observed: 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. In such a case, 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* ⁴². 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.⁴³ 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."

3.6 Catalogues, circular letters and price quotations

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

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 invitations to treat. As a general rule, the common law considers them as mere invitations to treat and not offers.⁴⁴ Customers may choose a particular item from the catalogue or price quotation and may place 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.⁴⁵ 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 the common law for a breach of contract. However, justice and fairness demands that the merchant should not reject the offer unless there is a good or reasonable ground for his decision.

3.7 Sale of shares

Public listed companies are allowed to sell their shares to the market. Thus, public listed companies advertise through the newspapers, radio, television or prospectus to invite 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, constitutes an offer or a mere invitation to treat? The common law regards this offering of shares in various media as a mere invitation to treat and not an offer.⁴⁶ If some people are interested to buy the shares, they make offers to the company by submitting applications to subscribe in the 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.⁴⁷

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3.8 Transport Timetables

Bus, train, airline companies display timetables for their transports to 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 the tickets from the seller. The sellers are agents of the transport companies. However, in *Wilkie v. LPTB* (1947), 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 hold that the timetable was an invitation to treat and when a passenger presents a 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* (1960). 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.”

3.9 Online display of goods or advertisement

Now a days goods are sold online in which online enterprises create their web sites in the Internet and display their goods with prices and also put advertisements for selling goods with prices. 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 the customers to proceed to a virtual checkout. In a virtual checkout, customers need to write relevant information of their credit cards. Finally, a virtual contract is made through a virtual offer and a virtual acceptance on the Internet after which the tangible goods are supplied later by transport or by post to the customers.

Now, is this online display of goods with prices and online advertisements 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 a traditional way and opined that these should be treated as invitations to treat and not offers. For business convenience, they say that online display of goods and advertisement has similar features like offline display of goods and advertisement, in which case, they should be similarly considered; that is ‘invitations to treat’ and not offers.⁴⁸

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.”⁴⁹ Hence, online display of goods, online advertisement, online auction sale, online tender etc. are mere invitations to treat and not offers.

4. 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 the 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 prices written on the goods are very cheap or 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’s say, is RM 700. As such, 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 a multiplicity of suits and a huge amount of damages to be paid to the customers.

The distinction between an offer and an invitation to treat is a very fine one. Most of the time, they look like the same thing. However, the common law made a difference between the two with the intention of protecting the sellers from a dilemma of offer as explained in the above paragraph. Another example of such a dilemma of the seller is that: a shop displays goods in the shop with prices attached on them. The shop is selling different types of 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 as RM20 by an employee of the shop. Now if a display of goods in the shop with the price tag is considered as an offer, then any customer can accept it by paying the price and the shop will be bound to sell the kettles each for RM20 only instead of the market price of RM120 to all the customers who have accepted the offer, in which case, the shop will suffer a huge amount of loss on that particular item.

Thus, in order to help sellers from unwanted consequences of such offer to sale, the 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; which means 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. Hence, the court protected the sellers by developing a new principle of the law known as an 'invitation to treat'.

In the circumstances as explained above, probably the seller has the right to refuse selling the goods and can withdraw the goods from sale, as the law considers such advertisement or display of goods as a mere invitation to treat and not an offer.⁵⁰ This is a reason to consider displaying of goods with prices marked on them or an advertisement as mere invitation to treat with an intention to protect the sellers of goods.

According to Unger, if a 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.⁵¹ In such cases, the shopkeeper has to pay compensations to all the customers who have accepted the offer but cannot get the goods because of a shortage of stock in the shop. However, according to O'Sullivan, there is an easy solution to this problem: the offer can be construed as only being open while stocks last or imply a term to this effect.⁵²

Lord Goddard CJ as the first instance and Somervell LJ in the Court of Appeal in the UK in *Boots Cash Chemists* case⁵³ observed that if a display of goods with price tags were an offer, the customer would accept the offer by putting the goods in his basket, as 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. Thus, 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.⁵⁴ Winfield has commented to this regard that "a shop is a place for bargaining, not for compulsory sales."⁵⁵ Hence, 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 *Boweman* case), the courts are less willing to find that an advertisement of a bilateral contract will constitute an offer.⁵⁶ There are two reasons for this. Firstly, an advertisement of a bilateral contract is often intended to lead to further bargaining. For example, if you advertise that "My house is for sale" then you envisage a negotiation over the price before a contract is entered into.

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Secondly, a bilateral contract requires the offeree to promise to do something. As such, 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.⁵⁷

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.⁵⁸ Such an argument was presented by Lord Parker in *Partridge v. Critenden* 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 the demand had exceeded the defendant's supply, he could have faced any number of breach of actions, as well as being guilty of an offence under the Protection of Birds Act 1954.⁵⁹

Sinnadurai also argues that the rationale for holding advertisement as a 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.⁶⁰ According to Sinnadurai, the rationale for holding goods advertised for sale in the newspapers, 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 newspapers 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.⁶¹

There are contrary arguments that display of goods and advertisement should be regarded as offers rather than invitations 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 conditions, 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'." ⁶²

However, it might be argued that the pragmatic approach taken by the 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 invitations to treat does not create any problem or cause any injustice to potential customers. Because, when goods are displayed on the shelves in a shop with prices attached on them or advertisements are made with prices of goods, although they are treated as mere invitations to treat but still the customers can buy them after making offers to the sellers as long as the stocks remain available and this is a fair decision in business environment.

Catalogues, circular letters and price quotations are considered as mere invitations to treat in the common law and the reason behind such decision is that there is a lack of certainty in the so called offer and the element of intention to create a legal relation is absent in such statements.⁶³

5. 'INVITATION TO TREAT' IN THE ISLAMIC LAW OF CONTRACT

Some of the Muslim scholars say that display of goods with prices, advertisement of goods with prices, auction sales, tenders, etc. are offers and not invitations to treat.⁶⁴ They argue that when goods are displayed with prices, we can assume a clear intention on the part of the shopkeeper that he intends to create a legal relation with the prospective customers. Hence, a display of goods is a promise, and the promise must be kept by the shopkeeper, otherwise he will be liable for a breach of contract. According to them these proposals for sale are offers and when customers accept them, binding contracts are made. Thus, the seller cannot refuse to sell to the customer who has accepted the proposal, as a binding contract has been made.

According to Billah, the common law of the UK views some statements (proposals) are 'invitations to treats' but the 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.⁶⁵ To support his argument Billah quotes a verse from the Holy Quran that "Truly pious are they who keep their promises whenever they promise." ⁶⁶ He quotes a few *hadis* 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." ⁶⁷ ii) Abu Hurairah (r.a.) narrated that the Prophet (s.a.w.) said: "There are three signs of hypocrites and one of them is: when he makes a promise he breaks it." ⁶⁸

According to Billah, an advertisement is an offer in the Islamic law of contract if the advertisement mentions prices 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 the 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.⁶⁹

According to Nadavi and Billah, a display of goods in shops constitutes a mere 'invitation to treat' and not an offer, if the shopkeeper merely displays the goods on the shelves or in the shop windows without any price. However, if the goods are displayed with a price attached to it, such display is an offer in the Islamic law. ⁷⁰

6. ADOPTION OF 'INVITATION TO TREAT' PRINCIPLE IN THE ISLAMIC CONTRACT LAW

We have seen the opinions of some Muslim scholars on some types of invitation to treat. They say that those proposals to sell something are offers and not invitations to treat in the Islamic law of contract. They say that when a price is attached or mentioned with the goods and it is displayed in shops, advertisement of goods either offline or online, 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. According to them, whether a statement is an offer or an invitation to treat depends on the sign of intention to create a legal relation (*Qarina*). If there is a clear statement of *qarina* (intention to create legal relation), it is an offer and if the *qarina* is not clear it is an invitation to treat and not an offer.⁷¹ Some Muslim scholars (mentioned above) also oppose the common law view on the 'invitation to treat' based on the idea of a 'promise'. They say that what the common law calls invitations to treat; they are actually promises by the seller. Hence, there is an intention to create a legal relation in the promise; and therefore, in the Islamic law of contract it should be considered as an offer and not as a mere invitation to treat.

It can be argued that the 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

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might be liable for a breach of contract and they may face multiple suits with claims for huge amount of damages as mentioned above. However, the Muslim scholars who oppose the common law do not focus their view on this point. They have not said anything on this point that terming some statements as offers rather than invitations to treat may cause the seller to pay a huge amount of compensation for shortage of stock. Therefore, the arguments offered by some Muslim scholars (which have been mentioned above) who hold to the philosophy that display of goods, advertisement, auction sale, tenders etc. are offers ; are not very convincing. Their arguments are also unrealistic and unjustly inconsiderate in terms of transactional fairness where justificatory operatives form the pivot of the Islamic philosophy. Furthermore, those arguments are not favourable to sellers.

The main aspect we have to consider is that whether terming some types of proposals to sell something as mere invitations to treat will cause any harm or injustice to potential 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. Hence, no injustice is caused to customers by terming display of goods as a mere invitation to treat. On the other hand, by terming a display of goods as a mere invitation to treat will protect the interest of sellers.

The other legal angle that we have to consider is whether terming some statements as a mere invitations to treat goes against any established Islamic law (*shariah*) principles, such as, interest (*riba*), uncertainty (*gharar*), gambling (*maysir*), selling prohibited (*haram*) goods, etc. If it does not go against these Islamic law principles, we can say ‘invitation to treat’ is valid in Islamic law of contract. If it does not contradict with any of these *shariah* principles, we can say that there is nothing wrong of terming some statements as mere invitations to treat rather than offers. Another argument is that the advantages of terming some statements as a mere invitations to treat outweighs its disadvantages to the parties involved. For these reasons, we may propose that the common law principle of ‘invitation to treat’ can be well accepted in the Islamic law of contract as it does not contradict with any established *shariah* (Islamic law) principles nor does it impair the philosophy of commercial justice in Islam or conventional law.

7. CONCLUSION

In the 19th century and earlier the common law courts in England made some exceptions to an offer. As stated earlier, an ‘offer’ is an essential element to make a valid contract. The court in England found that if some statements for selling of goods are considered as an ‘offer’ it would cause a serious inconvenience to a business and the sellers will be enormously affected. In view of this, the common law courts in England developed some exceptions to the general rule of ‘offer’ in the 19th century saying that some of the offers will be considered as mere invitations to treat and not as offers. 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 UK and all common law countries in the world including Malaysia.

This development of exceptions by the common law courts 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 whereby the offer can add “this is not an offer but a 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 conditions, 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 in the statement here do not form, nor constitute an offer, or a contract, for sale.'" ⁷²

Some Muslim scholars have also opposed the common law rule on an 'invitation to treat' as has been stated earlier. They say that those invitations to treat should be treated as offers in the Islamic law of contract. They argue that if a clear intention to create a 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 a breach of promise made by the seller.

However, the courts in the UK and other common law countries have not accepted such suggestion. The courts in common law countries think that it will serve better to the business community if English common law decisions on 'invitation to treat' are upheld even at the present time. Another important point should be considered that courts in England 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 the prospective customers.⁷³ In this case, the exceptions to the 'invitation to treat' rule make a balance between an 'invitation to treat' and an 'offer'.⁷⁴ The exceptions also ensure justice to the 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 *shariah* principles as stated earlier.⁷⁵ These two aspects are very crucial to approve the principle of 'invitation to treat' in the Islamic law of contract.

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