The Invitation to Treat and *Mu`atah* in Online Contracts

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Abstract

When dealing with an offer, it is crucial to determine whether a "statement" amounts to an "offer" or a mere "invitation to treat." Even though "offer" and "acceptance" are among the basic elements of any binding contract, both [English] common law and Islamic law have their own views on what constitutes an invitation to treat. This paper focuses on the invitation to treat and *mu`atah* as specified in Islamic law. The following points will be discussed: (1) how the invitation to treat can be considered a valid contract, although common law has ruled it invalid because a mere invitation to treat does not constitute an offer; (2) a comparison of their differences in the context of online or cyber transactions. Several Qur'anic verses, hadiths, and opinions from Muslim and non-Muslim scholars will be presented, and specific cases will be referenced; and (3) providing a better understanding of both principles and an analysis of some critical issues, especially with regard to the invitation to treat.

Introduction

In both common and Islamic law, an offer and acceptance are among a contract's essential elements. In a commercial transaction, an offer to sell or purchase particular goods for a certain price can be made either in an express or an implied manner. Once the buyer accepts it, the transaction becomes binding on both parties. Both legal systems agree on this. The same cannot be said, however, of the invitation to treat, because common law does not regard

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it (viz., an auction, ad, display of goods on a shop's shelves or in its windows, tenders, and so on) as an offer, but only as a mere invitation to make an offer. In contrast, Islamic law recognizes such an invitation to treat as a valid offer that, once accepted, becomes legally binding. Given this, it is worthwhile to incorporate *mu`atah* or, in other words, implying the "give and take" that characterizes spot sales in Islamic transactions. It is also argued that *mu`atah*, the attaching of specific price tags to the displayed goods, constitutes valid offer.

The Invitation to Treat

How do we distinguish between an offer and an invitation to treat? An *offer* is defined as being made when one party proposes to another that it should buy a particular item on particular terms, including the item's precise nature, the price to be paid, the mode of delivery, and the date of payment. This must not be confused with an *invitation to treat*, which consists of one party's intimation to another that it may be willing to sell/buy a particular article on particular terms if the other party makes an offer to the first party in relation thereto. This can be a very subtle distinction; however, from the contractual perspective, it is a crucial one. An invitation to treat is only an inducement to offer, not an offer itself.[1] Although it may appear to be a contractual offer, in reality it is an invitation to another party to make an offer.

Malaysian law, which is based on English common law, makes a distinction between an offer and an invitation to treat. This distinction is important, because accepting a legitimate contractual offer immediately forms a binding contract and the terms of the original offer cannot be further negotiated without both parties' consent. An invitation to treat may be seen as a request for an expression of interest.

Sometimes it is hard to determine whether the statement in question is an offer or an invitation to treat. Therefore, people commonly identify an invitation to treat as an offer. The difference between them can be further illustrated by the following cases, which present the common law position and the Malaysian position.

As regards the former position, Gibson vs. Manchester City Council[2] precisely explains the distinction an offer and an invitation to treat. In this case, the Manchester City Council informed Mr. Gibson in writing that it "may be prepared to sell" the Council house to him at £2180 and invited him to make a formal application to buy it. He did so. But before the contract's preparation and exchange could occur, control of the Council passed from the

Conservative Party to the Labour Party, and the new Council refused to complete the sale. The House of Lords held that the Council's letter was, at most, an invitation to treat. The words "may be prepared to sell" and "to make formal application to buy" appearing in the Council's letter was fatal to the contention that the letter was a legally enforceable contract due to Mr. Gibson's written acceptance of it. His letter was an offer, not an acceptance.

In the case of Malaysian law, this principle is best illustrated in Abdul Rashid Abdul Majid vs. Island Golf and Properties Sdn Bhd.[3] Here, it was held that a contract comes into existence only when the plaintiff accepted the defendants' offer by paying the entrance fee and the first subscription. Therefore, the declaration in the application from was not part of the contract, but only an antecedent communication. The only contract between the plaintiff and the defendants was the rules of the club.

These two cases contain distinctions that draw the line between an offer and an invitation to treat. To understand this matter further, I will now discuss the underlying reason as to why an invitation to treat is not treated as an offer. The following section contains examples of invitations to treat in a sales contract: the display of goods on a shop's shelves or in its windows, an auctioneer's invitation for bids, circulars and ads, and tenders.

In general, an invitation to treat is designed to induce an offer. There are several underlying reasons why an invitation to treat is considered so, one of which is to protect the seller's interest so that he/she is not bound by a number of contracts exceeding the number of available items in stock. It is unreasonable to assume that the shopkeeper is making an offer to sell every article in the shop to any person who may come in and insist on buying it by saying "I accept your offer." For example, a boutique provides only few pieces of clothes for each design. Ten customers walk in and ask for the same design; however, there are only five pieces left. If those displayed clothes are considered an offer, then the seller is bound to sell them. Such an attitude is unreasonable, for if the displayed items are considered an offer, this will amount to forcing the seller to provide something that he/she cannot deliver.

An Invitation to Treat in an Online Contract

Technology now allows business to be conducted online and e-commerce represents a significant evolution in the way of doing business. But contract law, instead of adapting to these new realities, has sought to apply existing concepts to a new medium. The question now is whether we should treat the

items displayed on a website, an auctioneer's invitation for bids, circulars and ads placed on websites, or e-mails as an invitation to treat rather than an offer?

Generally, an ad placed on a website to sell a product is an invitation to treat followed by the potential customer's offer to buy and the seller's acceptance of that offer.[4] The contract is finally made where and when the seller's acceptance is communicated to the potential purchaser. Even El-Islamy states that a website's display of goods is equivalent to displaying goods at a fixed price in a shop window – an invitation to treat.[5]

An online contract is concluded after the potential customer accesses the relevant website, selects certain items, and proceeds to the checkout. The question of whether such a display constitutes an invitation to treat or an offer is also relevant to the website environment, as Argos[6] and other retailers have made mistakes in the prices advertised.

Thus, a display that contains no statement indicating the owner's intention to make an offer is nothing more than an invitation to treat. For example, Amazon's UK website (www.amazon.com.uk) says "availability in titles for our catalog is listed website on each item's detail page. Beyond what we say on that page we cannot be more specific about availability. As we process your order, we will inform you by email if any items you order turn out to be unavailable." Such qualifications are considered more of an invitation to treat than an offer. When the buyer clicks the button to order the item, he/she is making an offer to buy that Amazon UK has the right to accept or reject. The principle of an invitation to treat states that any display of goods, even one on a website, with their prices attached does not constitute an offer.

A company that runs a proper e-commerce operation needs to ensure that its terms and conditions are properly adapted to the online environment, that potential clients know the relevant terms and conditions before concluding the contract, and that it constructs its site in a way that clearly indicates whether it is an offer that can be accepted (and, therefore, legally enforced) or merely an invitation to treat.[7]

This invitation to treat invites different perspectives in both common and Islamic law. The next section will discuss why a display of goods in a shop window, auctions, circulars and advertisement, and tenders are treated as an invitation to treat rather than an offer in a sales contract. I will also explain why Islam does not approve of an invitation to treat. Since Islam perceives an invitation to treat as a valid offer, I will also compare the intention to treat to ***mu`atah***.

Analysis and Views

COMMON LAW ON AN INVITATION TO TREAT. According to E. A. Lichtenstein and P. A. Read in *Contract Law Text Book*,[8] an invitation to treat made by one party to another is not an offer. In fact, it is made during the preliminary stage of making an agreement, for one party is seeking to ascertain whether the other would be willing to enter into a contract, and, if so, on what terms. In other words, it is an invitation to enter into negotiations or make an offer and therefore cannot be accepted as a binding contract, for the invitee is always asked to make the offer.

Here, the determination of whether a statement is an offer or an invitation to treat depends on the offeror's invitation.[9] If the offeror makes an invitation with the intention to make an offer, it amounts to an offer; however, if he/she intends only to make an invitation in order to create an offer, it is considered an invitation to treat. The latter situation is further explained below.

ADS. Common law classifies newspaper, television, radio, and similar ads into two categories: bilateral and unilateral.

Sighal and Subramanyam note that a "bilateral" ad amounts to a mere invitation to create an offer because it may lead to further bargaining, and thus the seller may want to make sure that the purchaser can pay the stated price before entering into the contract.[10] This principle has been explained in Partridge v. Crittenden.[11] In this case, the appellant had placed an ad in the newspaper stating that he has some wild birds to sell. The issue here is whether this amounts to an offer or an invitation to treat. The court of appeal ruled that this bilateral ad could be considered no more than a mere invitation to create an offer.[12]

Common law holds that a "unilateral" ad, whether it appears in a newspaper, on television, or otherwise and clearly states the price or reward, is an offer that is legally enforceable. In Carlill v. Carbolic Smokeball Co. Ltd.,[13] the defendant took out a newspaper ad promising to deposit a reward of $100 in the bank for anyone who did not recover from the influenza after taking the medicine manufactured by its company. In this case, the court held that such an ad constitutes an offer, since the defendant had clearly indicated his intention in the ad.[14]

AUCTION. An auction takes place when the owner presents a particular item hoping for the highest price from the bidders. In such a sale, the bidder makes an offer and the auctioneer accepts it. The former may withdraw his/her offer before the auctioneer accepts it. In such a case, S. 58(2) of the

Sale of Goods Act (U.K.) 1979 lays down the general principles concerning an auction. As a result, common law does not regard an auctioneer's ad for an auction sale as an offer,[15] but only as a mere invitation to create an offer. In Payne v. Cave,[16] the court held that "the call for bids is an invitation to treat," a request for offers. The auctioneer may or may not accept any of the bids made during the event, depending upon his/her option.[17]

A Display of Goods for Sale. Common law has long regarded a display of goods on a shop's shelves or in its window as a mere invitation to treat. If the customer selects the goods, brings them to the cashier and pays for them, it is considered an offer. This principle can be seen in Fisher v. Bell,[18] whereby the court held that the display of goods on the shelves in a shop or a supermarket amounts to no more than a mere invitation to treat, for the customer (not the shopkeeper) makes the offer. Thus the shopkeeper can accept or reject the offer, namely, the price paid by the customer/buyer. Lord Goddard C. J., in Pharmaceutical Society v. Boots Cash Chemists Ltd.,[19] said: "It would be wrong to say that the bookkeeper is making an offer to sell every article in the shop to any person who might come in and that person can insist on buying any article by saying "I accept your offer..."[20]

Given that such a display is not an offer, the shopkeeper may refuse to sell the displayed items. The buyer has no say in the matter, for the shopkeeper has not accepted his/her offer to buy the particular goods.

Tender. Similarly, common law holds that a statement placed in a newspaper, a journal, or elsewhere for the purpose of inviting a second party to supply a particular good or equipment does not constitute an offer.[21] In fact, it is no more than a mere invitation to the tenders in general to create an offer to supply the required goods. In other words, the tenders are acting as offerors and the company may accept or reject their offers. According to common law, therefore, they have no right to bring an action against the company for breach of contract.

Catalogues, Circular Letters, and Price Quotations. Mohd. Ma'sum Billah noted that a catalogue describes various items or goods together with their prices.[22] The question here is whether showing a catalogue to a customer amounts to an offer or an invitation to treat? Common law holds that doing so does not constitute an offer; however, as soon as the customer chooses and orders a particular item, an offer is made and could become binding if the merchant accepts it.[23] Hence, if the merchant refuses

to sell the item to the customer, the latter cannot bring an action against him because there is no contract.

At the same time, circulating a letter that describes particular goods for sale at a particular price constitutes an invitation to create an offer.[24] Likewise, quoting the price of a particular good or item on a document being published for public distribution does not amount to an offer. Common law does not recognize such catalogues, statements, circular letters, and price quotations as valid offers because there is a lack certainty in the so-called offer, as the element of intention to contract is absent.[25]

Sales of Shares. A statement that appears in a newspaper, on television or radio, or in a pamphlet circulating among the public at large does not, even if it asks people to subscribe to its shares, in the eyes of common law, amount to an offer. It is regarded only as a mere invitation to people to make an offer to buy the shares. In this case, the people make an offer to buy the shares and the company either accepts or rejects it.[26]

Islamic Law on an Invitation to Treat

While common law views such exceptional statements or expressions as invitations to treat, which cannot be considered valid offers, Islamic law generally opposes such principles because a person's promise is a sacred trust that ought to be fulfilled regardless of whether it is being made socially or legally. The following section further discusses the Islamic perspective of mere invitation to treat under common law, which it presently denies is a valid offer.

Ads. The advertiser places an ad with the intention of acquiring or disposing of certain goods. Once this intention is proven, there is no room to deny his/her accountability for his/her own statement, which Islamic law views as a valid offer or promise. Therefore, the advertiser's first statement in the ad is, in fact, a valid offer or promise that is legally enforceable. The *Majelle* clarifies this point: "*Ijab* (the proposal or offer) is the word spoken for making a disposition of property..."[27]

There are, however, two exceptional situations whereby an ad does not become an offer: (1) when the advertiser expressly mentions that the ad is only meant to be an invitation to treat, or (2) when the ad only describes the items and remains silent on their acquisition or disposition. If the ad does not fall within either category, it becomes a valid offer that is not legally enforceable after the offeree has accepted it.

AUCTION. Billah mentioned that Islamic and common law share the same view: an auction held by the auctioneer to sell particular goods is an invitation to treat.[28] As such, it is not binding because it is a mere invitation to the bidders to make an offer. Once the offer is made, the auctioneer is free to accept or reject it. The contract becomes binding only when the auctioneer accepts the offered price.

The Islamic principle regarding on this type of sale is derived from the following prophetic tradition: "Narrated by Jabir bin Abdullah … the Prophet said to the effect: 'Who will buy this slave from me'? Nu`aym bin Abdullah bought him for such and such price, and the Prophet (saw) gave him the slave."[29] Here, the Prophet's statement was an invitation to bidders to make offers, Nu`aym's initiative to buy the slave constituted an offer, and the Prophet's act of giving the slave to him signified acceptance, which concluded the contract.

DISPLAY OF GOODS FOR SALE. The Islamic view on displaying goods on the shelves or in the windows of shops, markets, or similar places can be divided into two situations: (1) such a display constitutes a mere invitation to treat if the shopkeeper merely displays the goods without attaching any price tags to them. If the customer, upon inquiring about their price, takes them to the counter to pay for them, it is an offer that the shopkeeper can either accept or reject[30]; and (2) such a display constitutes a valid offer if the goods are displayed either on the shop's shelves or at its window with the price tags attached. Once the customer signifies his/her acceptance of the price by taking the item to the counter and paying for it, the contract becomes binding.

Furthermore, according to Billah,[31] the display of goods with the price tags attached in the second situation is based on the following grounds: (1) there is a sign (*qarinah*) of the shopkeeper's intention to make an offer for the particular goods displayed. The sign, in this case, is reflected in his/her attaching the price tags to the goods displayed and (2) Islamic law requires that the offer's statement be made in the past tense. In the above situation, the shopkeeper's attaching of the price tag to the goods before displaying them on the shelves or in the window signifies that his/her offer is being made in the past tense and thus constitutes a valid offer.

The shopkeeper's action also signifies his/her promise to sell that particular item to anyone who agrees to buy it at that particular price. Such a promise is binding in Islam, and the offeror/promisor cannot breach it. In fact, upholding one's promise is one of the criterion of a true Muslim, for "(truly pious) are they who keep their promises whenever they promise" (2:177).

TENDER. Billah also noted[32] that when a company puts a statement in a newspaper, journal, or elsewhere seeking tenders to supply certain required instruments or carry out certain projects, Islamic law views it in two different situations, which bear two legal consequences:

First, if the statement mentions the price, it becomes a legally enforceable valid offer because including a fixed price clearly signifies the company's seriousness and commitment in making its promise. Such a promise is considered valid and, given that Islamic law requires that such promises be fulfilled, legally enforceable (2:177). In this case, the company has no right to either deny or revoke its promise, while its statement inviting tenders is the offer. In the meantime, the tender's compliance with the statement (i.e., by supplying the required materials or carrying out certain projects) acts as an acceptance in a binding contract.

Second, according to Abd Rahman Idoi,[33] if the statement issued by the company in its quest of tender does not specify the particular required goods or instruments or remains silent on the details of the projects or the price for such performance, it is considered an invitation to treat. The tenders are the ones who make the offer by complying with the statement, while its acceptance on behalf of the company seals the contract. The purpose of such a statement is the presence of an element of uncertainty (*gharar*), which involves speculative risks in the contract.

Ibn Taymiyyah describes uncertainty, which can invalidate a contract because one does not know what is in store at the end of a business venture or bargain.[34] Since the company's statement does not specify the required instruments or remains silent on the details of the project or the price for the performance by the tender, it becomes an invitation to treat.

CATALOGUES, CIRCULAR LETTERS, AND PRICE QUOTATIONS. Islamic law regards catalogues that describe particular goods and mentions their prices to be valid offers, instead of a mere invitation to treat. Since Islamic law considers them to be valid offers, in this case the seller cannot deny his/her offer, which could be equivalent to saying one thing and doing another: "Grievously odious is in the sight of Allah that you say that you do not" (61:3).

The view of Islamic law on circulating letters can be divided into two categories: (1) if it describes the goods and specifies their prices, it is a valid offer and (2) if such information is absent, it is a mere invitation to treat and thus not binding. This implies that if the circulating letter falls into the first category, its issuer (the promisor/offeror) must keep his/her promise or offer, as keeping one's promise is obligatory in Islamic law. The Prophet says:

"There is no faith in him/her who has got no trust, and no religion for him/her who has got no promise."[35]

Sale of Shares. Any company that places statements in newspapers and other venues, thereby inviting the world at large to subscribe its shares, is, according to Islamic law, making valid offers if each share's price is described and specified. The company's intention to make a valid offer in this situation can be best presumed from the whole transaction, as after making such a statement the company usually expects people to come forward and accept its offer by subscribing to the advertised shares. In this case the company's statement constitutes an offer, while the acceptance comes from those who subscribe to the shares. Thus once the offer has been accepted, the company cannot deny or revoke its offer, for it is still valid and binding.[36] Allah states: "Those who fulfill the promise of Allah and fail not in their plighted word" (13:20).

The Islamic Argument

Islamic legal doctrine generally holds such ads, displays of goods, tenders, catalogues, circular letters, and auctions to be valid offers that are enforceable once they have been accepted. Such a view clearly contrasts with that of common law, which generally regards such statements as mere invitations to treat.

The following items form the basis of the Islamic legal doctrine:

(1) In Islamic law, the wording of the contract's offer is generally formulated in the past tense (*sighat al-madi*). The *Mejelle* states: "For the offer and acceptance the past tense is generally used."[37] Similarly, the fact that the statements in ads, tenders, and so on are usually made in the past tense enhances the fact that they are valid offers that become binding once the offeree accepts them.

(2) Once the seller makes a statement describing the items and specifying their prices, his/her intention of making an offer is clearly reflected. This also indicates that the seller is making a valid offer and hoping that the buyer will accept it. Hence once the buyer/offeree accepts the seller's offer, the latter must fulfill his/her offer/promise. The Prophet once described a person does not do so:" Abu Hurayrah narrated the saying of the Prophet: There are three signs of a hypocrite … when he/she makes a promise, he/she breaks it…"[38]

(3) A statement of an offer is legally enforceable, even though the seller expressly denies it, provided there is a strong sign (*qarinah*) that signifies an offer. At this point, Sir Abd. Rahim (1911) suggests that "besides human testimony, facts and circumstances *qarinah* may also be relied upon as a proof.[39] Thus, in the cases of ads, tenders, etc. when the seller specifies the prices for the performance, according to such statements, there is a strong sign, that the seller does intend to make an offer hoping for the other party to accept it, by performing according to such statement. Looking at the instruction as a whole, the presumption that such a statement is indeed an offer is difficult to be denied. The *Mejelle* supports this when it says: "A complete presumptive proof is an inference which attains the degree of positive knowledge."[40]

(4) Billah also mentioned that in the case of ads, tenders, and so on, holding that such statements do not constitute valid offers and thus are not legally enforceable may create injustice and hardship for the offeree/promisee.[41] The reasoning behind this is that the offeree, relying on the offeror's statement, has willingly come forward to fulfill the requirements of the statement, which bears all of the characteristics of a valid offer. Thus, allowing the offeror to deny or revoke his/her offer after giving hope to the offeree is unjust and clearly violates the principle of natural justice. Allah, however, commands humanity to uphold justice in this world: "Verily Allah (swt) commands (to establish) justice…" (16:90) and condemns those who decline to do so: "… Follow not lusts (or your hearts), least you swerve and distort (justice) or decline to do justice, verily Allah is well acquainted will all that you do." (4:135)

(5) Allowing such injustice to rule will lead to further corruption in society: "Do no corruption in the land after it has been set in order…" (7:56). Allah (swt) again stresses the importance of avoiding in corruption: "… refrain from evil and corruption in the land" (7:74) and "…Allah loves not those who do corruption" (28:77).

The Concept of *Mu`atah*

The concept of *mu`atah* implies give and take.[42] It is believed that the item's physical aspects might distinguish it from cyber displays. Apparently, applying *mu`atah* in Islamic transactions mainly involves spot sales in which the

counter values are present, exchanged, or about to be exchanged without any verbal communication as regards offer and acceptance.

Its Nature and Practice

It was argued that when the goods are displayed with their attached price tags, a valid offer is being made.[43] This kind of action may fall under the category of *mu`atah* because the buyer simply needs to hand over the displayed price to the seller. This leads to the misconception that this is an acceptance to the offer.

In addition, it is believed that the contract concluded by *mu`atah* is valid, namely, that one does not need to utter any express statement as regards offer and acceptance when paying the item's price. Nevertheless, this does not necessarily imply that such a display constitutes an offer, for the display is not the offer, but rather the conduct of the buyer handing it over for the stated price. Thus the contract comes into force when the seller accepts the price paid, for only then is there an acceptance, not when the buyer hands over the money.

Other Views

El-Islamy mentioned that applying *mu`atah* is subject to certain conditions.[44] Muslim jurists have formulated three options:

(1) The Hanafis and Hanbalis allow the formation of contract through *mu`atah* on two conditions: it is within the normal practice known to trade usage and the price of the goods must be satisfactorily described.[45] Therefore, a valid contract comes into being when the buyer takes any item displayed on the shelf and pays its stated price, if the common trade usage views that this may affect the legal transfer of such items. According to this view, public acknowledgement is a clear indication of consent to such a practice. Hence, even when the goods are displayed on the Web, a valid offer exists only if the trade usage recognizes such a display in such a manner as an offer.[46]

But this recognition is not extended to a situation where the customs do not consider such a display to constitute an offer.[47] Hence, merely displaying any goods on the Web without any further indication of the site owner's intention to contract does not constitute an offer. This is due to the fact that if it is considered an offer, many issues will be raised, among them the seller's inability to fulfill all

of the acceptances made by the buyers, whose numbers are far greater than the availability of the stocks, goods, or subject matter of the contract. Moreover, this will lead to the unfair market practice of the buyers being able to claim that when they are accepting, the contract will be concluded and they will be entitled to compensation if the sellers refuse to deliver the goods. The situation is different, however, if the seller has included the phrase "first come, first serve basis," because this can serve as an exemption clause to protect the seller if the demand is higher than the available stocks. In this particular situation, the buyers have no right to the goods if their offers are later than those of the others when making an acceptance. Consequently, when faced with an advertisement on the Web, it is wiser to hold the view that when the buyer communicates his/her intention to buy the commodity, he/she is only making an offer, which the seller can either accept or reject.

(2) Imam Malik and Imam Hanbal rule that *mu`atah* may give effect to a valid contract if there is definite indication of consent, regardless of whether such practice is known to common usage or not.[48] Therefore, a virtual display of goods along with such simple statements as "for sale while stocks last," "offer for sale," or "first come, first served" may constitute an effective offer, because such words indicate the seller's intention to make an offer, thereby signifying his/her consent. In the absence of anything that may infer such a person's intention to contract, his/her conduct of displaying goods does not constitute an offer.

In applying this view to the cyber-world context, when the virtual display of goods is free from any statement indicating the owner's intention to make an offer, it constitutes no more than a mere invitation to treat. Hence, when the website owner prefers to make such display an offer so that any response to it will constitute an effective acceptance and thus conclude the agreement, such an intention shall be indicated on the Web.

(3) The Shafi`i, Shi`i, and Zahiri schools of thought reject the validity of any contract formed through *mu`atah* on the grounds that mere conduct does not imply an intention to contract. Consent is an intangible mental fact that can be ascertained only through words or an understandable gesture expressing it; thus, mere conduct is not enough[49] and the offer must be made by an apparent intention indicating it.

Al-Sharbiniy's *Mughni al-Muhtaj* cites al-Mutawalli as having clarified this matter by stating that simply weighing or measuring and taking away the subject matter without any *ijab* and *qabūl* does not constitute a valid contract. In other words, such ambiguous conduct does not constitute a valid offer or an acceptance in the absence of a clear indication to that effect.[50] The argument that since the offeror usually words the offer in the past tense, attaching a price tag is a past conduct that signifies the his/her intention to make a valid offer.[51]

While it is true that the past tense form undoubtedly infers the offeror's consent in making the offer, this is not necessarily applicable if the alleged offer is in the form of conduct, for mere conduct is ambiguous.[52] Thus it is very difficult to construe the simple action of displaying goods as a consent to sell them to anyone who sees them.

It is also debated whether the seller's describing the goods and specifying their prices shows a strong indication of his/her intention to make offers. "Such intentions of making offers, although are difficult to be proven, could be inferred from the above-mentioned *qarinah*." Thus the sellers cannot deny the presumption that they have made legally enforceable valid offers.[53]

The display normally is meant to invite potential customers to make an offer. It is also part of commercial or marketing strategies designed to attract the market or potential buyers. In the meantime, it is worth citing a passage of Lord Goddard's judgment in Pharmaceutical Society of Great Britain v. Boots Cash Chemists (Southern) Ltd.[54]:

> I agree with the illustration put forward during the case of a person who might go into a shop where books are displayed. In most book-shops customers are invited to go in and pick up books and look at them even if they do not actually buy them. There is no contract by the shopkeeper to sell until the customer has taken the book to the shopkeeper or his assistant and said "I want to buy this book" and the shopkeeper says "Yes." That would not prevent the shopkeeper seeing the book picked up, saying: "I am sorry I can't let you have that book; it is the only copy I have and I have promised it to another customer."[55]

On the other hand, some have argued that it is unjust to allow the offeror to deny his/her offers while the other parties, relying on these statements, accept these offers by acting in accord with these statements. It is only fair to hold that such statements made by the sellers are indeed valid offers.[56]

In relation to the above argument even the principle of invitation to treat, which was enunciated in England based on the rule of fairness, it would be unfair to bind the seller to the number of contracts exceeding the number of goods he/she may supply, thus forcing him/her to contract that he/she may not perform. It is also unreasonable to presume that the website owner intend to contract with everyone who views his/her website. Further, when the displays or advertisements do not identify the offeree, it is unlikely that a reasonable person would reply on this to his/her detriment.

It is also unfair to the offeror, who does not intend to mislead the offeree and has taken all reasonable steps to make an invitation to treat (as opposed to an offer) and being bound by it. As Islam does not permit injustice to be done to either contracting party and the Shari`ah emphasizes that contracts should be clear of ambiguity, the parties involved must clearly communicate their intention to one another. This may be done by holding that a mere display of commodities is not an offer, so that placing any unjust and undesired imposition of a binding contract on the buyer can be avoided. Given the facility of instant online access to the other party, the requirement of clarity and open communication in unambiguous words is not excessive.

Moreover, an offer must be addressed to one or more specific persons; if not, a proposal merely constitutes an invitation to treat.[57] In the case of displaying goods on the Internet, the addressee is normally not specified.[58] It is unreasonable to presume that the website owner intends to contract with everyone who has access to the site.[59] Hence, it is submitted that the general rule will be to regard the display as a mere invitation to treat unless the contrary is clearly indicated by the person making the proposal.

For an Islamic contract to be valid, an offer must be clearly addressed.[60] The interpretation of this will not validate the transaction when the buyer simply asks the seller: "Are you selling this for RM100?" or "Are you selling this for this much?" and the seller says "yes" or "I've sold this for this much." In these examples, it is not clear to whom the offer is addressed. The latter example explains that simply displaying an item, even though its price tag is attached, without any further clarification indicating the buyer's intention to contract or not, does not by itself constitute an offer. If it is unclear to whom the offer is addressed, it is unreasonable to infer that the seller intends to make an offer; rather, such a situation only executes the buyer's intention to invite a person to make an offer for the price as stated. In other words, it is simply a declaration that he/she may consider selling the item for the stated price and not, in the absence of anything to the contrary, an implication of his/her consent to be bound by a contract to anyone who sees the display and is interested in buying the item.[61]

Likewise, the mere display of a item along with its description does not necessarily constitute an offer. An offer is made only when the buyer selects the item and pays the price; the contract becomes valid when the seller accepts the offer by allowing him/her to have the commodity and receiving its price from the buyer.[62] In this way, all of the contract's elements are satisfied and the contract will be valid. Some jurists, however, still require the use of the past tense to avoid risk, especially when the item is expensive and of great value.

On the other hand, the principle of *mu`atah* is not an authority for saying that the seller's conduct (i.e., displaying the goods attached with their price tags) is an offer that may be accepted by simply taking or communicating one's intention to take such items. Thus before it can be concluded if an agreement can result from such conduct, it is necessary to determine the seller's intention by referring to the relevant circumstances, the nature of the goods involved, or whether such a practice is already known to the accepted trade usage. This is especially true when the party's intention, as opposed to the wording, shall be considered in commercial matters.[63]

In conclusion, Hurriyah et. al. mentioned that in the case of cyberspace activities, since the prospect of a spot transaction in the sense of physical give and take (as in *mu`atah*) is limited, implied intention should have a limited role. A greater degree of clarity in explicit communication is therefore required.

A Comparison

It is essential for us to distinguish between the principle of invitation to treat and the principle of *mu`atah*, as shown in table on the next page:

Summary and Conclusion

As discussed earlier, common law generally regards statements such as ads, auctions, display of goods, and so on as mere invitations to treat. Thus they are unenforceable in the eyes of the common law. On the contrary, Islamic law generally regards such statements as legally enforceable valid offers. This is similar in the case of auctions, which amount only to mere invitations to treat.

The following list summarizes the Islamic point of view,[65] as well as the basis of their arguments in advocating such statements (except in the case of auction sales), are valid offers.

Table 1: A Comparison.

The Principle of an Invitation to Treat (Display of Goods)	***Mu`atah / Ta`til / Murawadah* (Display of Goods)**
In general, a display of goods with a price tag attached does not constitute an offer.	In general, an offer may be made by the seller's conduct if such an intention is apparent.
An apparent intention to make an offer constitutes an offer.	A contract is not valid without a *sighah*, unless there is an indication of one's intention to make an offer or if existing trade usage acknowledges such a practice.[64]
In the absence of such an indication, it merely constitutes an invitation to treat. Thus the buyer's intention to contract constitutes only an offer.	In the absence of such an indication, the seller's consent to the contract is required. Otherwise, the contract is no more than a mere invitation to treat.
When it is not clear if the seller intends to make offer or merely invite potential buyer to make an offer, the reasonableness test applies.	When there is no clear indication of the seller's intention, customary trade usage determines whether the item may be transferred by conduct or otherwise.

Source: Hurriyah El-Islamy, *E-business: An Islamic Perspective*, 1st ed. (Kuala Lumpur, A.S. Noordeen Publisher, 2002), 22.

- An ad designed to sell a particular item together with its description and specific price tag is, in fact, an offer that is legally enforceable.
- Both common and Islamic law agree that an auction sale is a mere invitation to treat, not a valid offer. Hence, bidders make an offer and thus allow the auctioneer to accept or reject it.
- The display of goods on a shop's shelves, in its window, or in other such places is also an offer.
- The position of a company statement requesting a tender to supply certain required instruments or to carry out certain projects depends on whether that statement describes those particular items and their price. If it does contain such information, it amounts to a valid offer that is legally enforceable. If it does not, it amounts to a mere invitation to treat.
- Islamic law regards statements found in catalogues and circulating letters describing the goods and specifying their prices as valid offers. Similarly, it regards quotations attached to the goods on sale as offers that

are binding upon the sellers once the customers signify their acceptance by buying these goods.

- A company statement issued to invite the public at large to subscribe to its shares is an offer if the shares' prices are specified therein.

Meanwhile, the basis of arguments from Islamic point of view[66] is summarized as follows:

- In the Islamic law of transaction, the wording of the offer used by the offeror is usually in the past tense. Hence the fact that the sellers in the above-mentioned situations word their statements accordingly clearly signifies their intention to make valid offers that are acceptable to the buyer.
- The statements made by the sellers (or buyers, in the case of tenders) in the above-mentioned situations are usually made in a form of a promise. Since Islamic law regards a promise as binding, such statements can be considered as valid offers that are binding on the person who makes it.
- The fact that the sellers (or buyers, in the case of tenders) describe the goods and specify the prices of these items shows a strong *qarinah*, which signifies the sellers (or the buyers, as the case may be) intend to make offers. Such intentions, although difficult to prove, could be inferred from the above-mentioned *qarinah*. Thus the sellers (or buyers, in the case of tenders) cannot deny that they have made valid offers that are legally enforceable.
- Islam seeks to establish justice in all aspects of human life and dealings. Thus, since there is a strong presumption that the sellers (or buyers, in the case of tenders) are making valid offers and that the other party is relying on these statements and accepting these offers by acting in accordance with the statements, it is only just and fair to consider such statements to be valid offers.
- To deny such statements as offers may only create further injustice, hardship, and corruption in society, and Islamic law is clearly against such things.

Meanwhile, as cited in El-Islamy,[67] if the statement is meant to be no more than a mere invitation to treat, this has to be expressed clearly and without any misleading statements. In contract law, the applicable test to

determine the construction of any statement is objective reasonableness. Thus the offeror is not allowed to prove that his/her statement is a mere invitation to treat if a fair construction of his/her statement will persuade a reasonable person to believe that he/she is making an offer. Furthermore, he/she also stressed that it is important to express the duration of the offer and to whom it is addressed, if it is meant for a specific person, a number of persons, or categories of persons, to avoid the possibility of being bound by an unwanted contract.

He also mentioned that Islamic contract law is basically guided by the Shari`ah's textual injunctions. In the absence of such injunctions, commercial usage (*`urf*) is a reliable indicator of the Shari`ah's position. In the case of a position under common law and the law as applicable in Malaysia, the display of goods is clearly considered to be a mere invitation to treat. Indeed, it is desirable to extend this principle to contracts formed over the Internet. The Shari`ah's position here will be guided by commercial usage. If a clear ruling of *`urf* can be said to have arisen as regards items displayed on the Internet as to whether they are an offer or a mere invitation to treat, that position will apply to a Shari`ah-based analysis. The question remains as to whether a commercial *`urf* can be said to have come into existence.

In conclusion, on whether the *mu`atah* application that appears to be similar to the display of goods on a website (offer or invitation to treat), the Hanafi and Hanbali schools hold that the contract will become valid if a buyer takes the goods as displayed and then pays their stated prices. Likewise on the website, if common trade usage is recognized as display, it is equivalent to an offer. According to the Malikis, *mu`atah* is valid if there is an indication of consent, whereas the Shafi`is hold that it is invalid because mere conduct does not constitute an intention to contract. Last but not least al-Sharbini, who also supported the Shafi`i's view, noted that taking goods without an offer and or an acceptance will invalidate the contract.

Endnotes

1. Cheshire, Fifoot, and Furmston, *Law of Contract.* First Singapore and Malaysian Students' Edition (Andrew Phang Boon Leong), 79.
2. (1979) 1 All ER 972.
3. (1989) 5 MLJ 576.
4. Most websites are like virtual shops, and therefore products are presented as invitations to treat (as in Fisher vs Bell).
5. Hurriyah El-Islamy, *E-business: An Islamic Perspective*, 1st ed. (Kuala Lumpur: A. S. Noordeen Publication, 2002), 15-42.

6. In 1999, this came close to being tested. The Argos website accidentally advertised a Sony television for £3 instead of £300. Argos argued that it had made an invitation to treat. Some customers had received confirmation e-mails. One buyer was Taylor Joynson Garrett, an employee of the London-based law firm Taylor Joynson Garrett. However, the buyers abandoned the proceedings due to the associated costs. If this had gone to court, according to Richards, it is unlikely that it would have been enforceable, as in Hartog v Colin and Shields (1939) 3 All ER 566, for it was held that no contract arises when one party makes an offer knowing the other party is acting under a fundamental mistake as regards its terms.
7. Simon Halberstam, head of the Internet and e-commerce law group at Sprecher Grier Halberstam LLP, Solicitors (www.weblaw.co.uk/art_contract_online.php).
8. E. A. Lichtenstein and P. A. Read, eds. *Contract Law Text Book* (London: HLT Publication, 1990), 25.
9. Ibid., 26.
10. Sighal & Subramanyam, *The Indian Contract Act*, 2d ed., rev. Dr. R. C. Vyas (Allahabad and Lahore: Law Book Co., 1980), 45.
11. (1968) 2 AER 421.
12. Ibid.
13. E (1893) 1QB 256.
14. Ibid.
15. See Harris v. Nickerson (1873), L.R. 8QB 286, as cited in G.H. Treitel, 19.
16. 3 Term Rep., 1789, 148.
17. Ibid.
18. 1 QB 394 (1961).
19. 2 QB 795 (1952).
20. As quoted in Dr. Artar Singh, Law of Contract, 3d ed. (India: Eastern Book Co., 1983), 12.
21. See Spencer v. Harding, LR 5 C.P. 561, (1870), as cited in Treitel, 12.
22. Mohd. Ma'sum Billah, "Is An 'Invitation to Treat' An Offer? A Jurisprudential Conflict between the Islamic Law of Contract and the Common Law Doctrine," CLJ 4 (1994):1iii, at. 1vii, 1ix-1xi.
23. Ibid., v.
24. See, for example, Montgomery Ward & Co. v. Johnson 209 Mass, 89:95 NE 290 (1911), as cited in Sighal.
25. See Moulton v. Keshaw, 59 Wis, 416: 18NW: 48 Rep 516 (1884), as cited in Sighal, 122.
26. See Hebbs Case, (1867), L.R. 4EQ 9, as cited in Sighal, 126 and also Treitel, 12.
27. *The Majelle*, Art. 101. Also see *The Hedaya Commentary on the Islamic Law*, trans. Charles Hamilton (India: Kitab Bavan, New Delhi [reprinted, 1985], 2:361.

28. Billah, "Is An 'Invitation to Treat' An Offer?"1iii, at. 1vii, 1ix-1xi.
29. *Ṣahih al-Bukhari*, trans. M. M. Khan (New Delhi: Kitab Bavan, 1984), vol. 3, hadith no. 351.
30. Billah, "Is An 'Invitation to Treat' An Offer?" 1iii, at. 1vii, 1ix-1xi.
31. Ibid., v.
32. Ibid., vi.
33. Abd. Rahman Idoi, *Shari`ah: The Islamic Law* (Kuala Lumpur: A. S. Nordeen Publication, 1990), 35
34. See Liquat Ali Khan Niazi, *Islamic Law of Contract* (1990), 124.
35. Anas ibn Malik narrated, as reported in Bayhaqi and cited by Mohd. Shariff Chowdhury, *A Code of the Teachings of al-Qur'an*, 1st ed. (1988), 349.
36. Billah, "Is An 'Invitation to Treat' An Offer?" 1iii, at. 1vii, 1ix-1xi.
37. *The Mejelle*, Art. 169. See also Hamilton, *Hedaya*, 361.
38. Al-Bukhari and Muslim, as cited in *Mishkat al-Maṣabih* (Arabic) (Pakistan: Qadhi Kutub Khanah, 1368 AH), 17.
39. Abd. Rahim, *The Principle of Muhammadan Jurisprudence* (Lahore: Civil and Criminal Law Publication, 1911), 45.
40. *The Mejelle*, Art. 1741.
41. Billah, "Is An 'Invitation to Treat' An Offer?" 1iii, at. 1vii, 1ix-1xi.
42. Hurriyah El-Islamy, *E-business*, 18.
43. The same principle is extended to ads designed to sell a particular goods, catalogues, circular letters, and price quotations where the statement used contains the description of the goods as well as their specific prices. For an argument defending this view, see Billah, "Is an 'Invitation to Treat' an Offer?" 1iii, at. 1vii, 1ix-1xi.
44. El-Islamy, "e-business," 15-42.
45. Al Sharbiny, *Mughni al-Muhtaj* (Cairo: 1367 AH), 2:324, also quoted in Wahbah Zuhayliy, *Al-Fiqh al-Islami*, 4:100; Art. 36 of the *Mejelle* provides that custom is in force. Art. 44 of the *Mejelle* states that "a thing known amongst merchants is as though fixed by stipulation between them; Further Art. 45 provides that "what is directed by custom is as though directed by law."
46. Hence, Al-Sharbiniy, *Mughni al-Muhtaj*, 2:324 stated that Imam Abu Hanifah opined that the formation of a commercial contract by conduct is only allowed if it is pertaining inexpensive commodities as such practice was common at that time.
47. This is a very likely view if what is meant by "trade usage" is the ordinary day-to-day trade practice that does not specifically refer to an Islamic trade practice. The prevailing view, which has been held as a settled principle of law, does not consider the display of commodities as an offer, as opposed to mere invitation to treat; as per Lord Parker in Fisher v. Bell (1961) 1 Q.B. 394 at 399. Furthermore, there is no clear evidence to show that an offer is made by the seller simply displaying his/her commodities with their price tags attached,

not even in Islamic contract law. Hence, there is an inclination to consider such displays as an effective offer.

48. Zuhayliy, *Al-Fiqh al-Islami,* 4:100. However, in *Mughni al-Muhtaj* at 324, it is stated that Imam Malik views that whatever people consider to be a transaction is a valid transaction, and hence similar to the view of the first group.
49. Al-Shaybiny, *Mughni al-Muhtaj*, 2. Zuhayliy, *Al-Fiqh al-Islami*, 4:101. This is al-Shafi`i's well-known opinion, as stated in *Mughni al-Muhtaj*, 323; Ramli, Shamsuddin Muhammad Ibn Abi Abbas Ahmad Ibn Hamzah Ibn Shihab al-Din, *Nihayah al-Muhtaj ila Sharh al-Minhaj fi al-Fiqh `ala Madhhab al-Imam al-Shafi`i* (Egypt: Shirkah Maktabah wa Matba`ah Mustafa al-Bab al-Jali wa Awladuh, 1386 AH/1967 CE), 3:375.
50. Al-Sharbiniy, *Mughni al-Muhtaj*, 2:324.
51. Mohd. Ma'sum Billah, "Is An "Invitation to Treat" An Offer?," 1ix-1xii.
52. See P. Owsia, *Formation of Contract: A Comparative Study under English, French, Islamic and Iranian Law* (London: Graham & Trotman, 1994), 398.
53. Billah, "Is an "Invitation to Treat" An Offer?," 1x and 1xii. (iii) provided that there is a strong sign (*qarinah*), which signifies an offer.
54. (1952) 2 Q.B. 795; affirmed (1953) 1 Q.B. 401.
55. (1952) 2 Q.B. 795 at 802.
56. Billah, "Is An "Invitation to Treat" An Offer?," 1x and 1xii.
57. Art. 14(2) of the 1980 Vienna Sales Convention; J. Leyser as cited in Owsia, *Formation of Contract*, 527.
58. In fact, many companies offer only product information on their website; R. F. Wilson, 1998. "Manufacturers' Dilemma: To Sell or Not to sell Directly," *Web Commerce Today* (ISSN 1094-9001) A Newsletter on Selling Products Directly on the Web: 15 May, Issue 10 (part I), www.wilsonweb.com/wct1/issue10.txt.
59. This is to be distinguished with the fact as found in Carlill v. Carbolic Smoke Ball Co. (1892) 2 Q.B.484; affirmed (1893) 1 Q.B.256. In this case, although the offer is made to the whole world, the contract is made with that limited portion of public who come forward and perform the condition on the faith of the ad. Furthermore, the defendant's conduct (i.e., depositing a sum of money in banking account to assure the seriousness of the offer), indicated that the defendant intended to make an offer and not a mere invitation to treat.
60. Al-Sharbiniy, *Mughni al-Muhtaj*, vol.2 at 327.
61. In Timothy v. Simpson (1834) 6C & P499, the counsel suggested that: "If a man advertises goods at certain price, I have a right to go into his shop and demand the article at the price marked." At page 500, Parke B rejected this contention by a simple reply: "No; if you do, he has a right to turn you out."
62. And not at the very moment he/she communicates his/her intention to buy either via expression or conduct, such as by taking it from the shelf. This is similar to the traditional way of contract transaction where the consumer buys goods from a supermarket. The contract is not concluded when the customer

puts an article into his/her basket, as such conduct will constitute an offer to buy (i.e., acceptance to the seller's invitation to treat). Consequently, the site owner should not be subjected to binding contracts merely upon the communication of its viewer's intention to buy the virtually displayed commodities. When a viewer communicates his/her intention to buy a virtually displayed car, for example, he/she is making an offer and it is up to the web owner to accept or reject it, unless it is indicated that the display is meant as an offer and not merely an invitation to treat. This is usually adopted by businesses that sell relatively cheap commodities, such as books (www.amazon.com), cassettes, and CDs.

63. Art. 3 of the *Mejelle*; further Art. 2 provides that "[a] judgment is in accordance with what the object of an act may be."
64. The word *ṣighah* (format) means the utterances expressing the wills of the two parties, showing the purpose of contract and bringing it into existence after it had been a hidden and unknown thing or intention. (Ala' Eddin Kharofa, 2004).
65. Billah, "Is An "Invitation to Treat" An Offer?" 23.
66. Ibid., 24-25.
67. El-Islamy, *E-business*, 15-42.