



RIGHTS AND DUTIES OF THE BUYER UNDER THE
SALE OF GOODS IN *SHARĪ'AH* AND INTERNATIONAL
TRADE LAW: A COMPARATIVE ANALYSIS

BY

MAZIN ABDULHAMEED DAWOOD HASSAN

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Ahmad Ibrahim Kulliyyah of Laws
International Islamic University Malaysia

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ABSTRACT

Sale of goods is considered as the most common kind of transaction in the world. The people practise sale of goods to satisfy their several, renewable, and daily needs. As a result, the buyer acquires some rights and bears some duties towards the seller. Basically, these rights and duties are provided by the applicable law in context which may or may not be the same as another. Thus, the purpose of this dissertation is, firstly, to discuss and compare the general concept of sale of goods in *Shari'ah* and international trade law. It also intends to examine the rights and the duties of the buyer under the sale of goods in *Shari'ah* and international trade law and, then, compare between the two laws in this regard. This research is based on library-based method where both sources of *Shari'ah* such as *Qur'an* and *Hadith* and sources of international trade law such as the United Nation Convention on Contracts for International Sale of Goods 1980 and the UNIDROIT Principles 2016 are taken into account. Upon comparing between the two laws as to the rights and duties of the buyer under the sale of goods, it becomes clear that there are, generally, significant similarities between the two laws. As for the rights of the buyer, there are some similarities and differences. The similarities include that the two laws recognise the right of negotiation and the right to receive the goods. The differences covers that *Shari'ah* recognize the right of examination of the goods before the conclusion of the contract but international trade law provides this right after it. As for duties of the buyer under the sale of goods, it seems that there are many similarities and few differences between the two laws. The similarities include that both of them impose the duty to pay the price and take the necessary steps to effect the payment. For the differences, *Shari'ah*, for example, does not acknowledge the duty to specify the form, the measurement or other features of the goods after the conclusion of the contract while international trade law does.

خلاصة البحث

يعتبر بيع السلع أكثر المعاملات أهمية لأن الناس يقومون بشراء السلع لسد حاجاتهم الأساسية. يترتب على بيع السلع حقوق للمشتري و والتزامات عليه إزاء البائع . هذه الحقوق و الإلتزامات ينص عليها القانون المطبق في الدعوى المعنية و الذي قد يتفق أو يختلف مع غيره . الهدف من هذا البحث اولا هو مناقشة المفهوم العام لبيع السلع في الشريعة الإسلامية و قانون التجارة الدولي و المقارنة بين القانونيين في هذا الخصوص ثم القيام بدراسة تحليلية لحقوق و الإلتزامات المشتري في بيع السلع وفق الشريعة الإسلامية و قانون التجارة الدولي و المقارنة بينهما في هذا الشأن. هذا البحث يعتمد أساسا على مصادر الشريعة الإسلامية مثل القرآن و الأحاديث و مصادر قانون التجارة الدولي مثل إتفاقية الامم المتحدة لعقود بيع البضائع لعام 1980 و مبادئ أندرويت لعام 2016 الموجودة في المكتبة . عند المقارنة بين الشريعة الإسلامية و قانون التجارة الدولي من حيث حقوق و الإلتزامات المشتري في بيع السلع ثبت عموما أن هنالك تماثل كبير بين القانونيين. ففي ما يختص بحقوق المشتري هناك بعض التماثل وبعض الإختلاف بين القانونيين. فالتماثل يشمل أن كلاهما يقر بحق المشتري في التفاوض و إستلام المبيع. أما الإختلاف يتضمن أن الشريعة الإسلامية تفر بحق المشتري في فحص السلعة قبل إكمال العقد بينما يمنح قانون التجارة الدولي هذا الحق بعد إكمال العقد. أما فيما يختص بالإلتزامات المشتري، يتماثل القانونان في كثير منها و يختلفان في قليل منها . فالتماثل يشمل أن كلاهما يلزم المشتري بدفع الثمن و إتخاذ الإجراءات اللازمة لذلك. أما الإختلاف فيشمل على سبيل المثال أن قانون التجارة الدولي يقر بالإلتزام المشتري ببيان شكل و وزن المبيع وسائر خصائصه الأخرى بعد إكمال العقد بينما لا تجيز الشريعة الإسلامية ذلك.

APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion; it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a thesis for the degree of Master of Comparative Laws.

.....
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.....
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.....
Mohamad Asmadi Abdullah
Examiner

This dissertation was submitted to the Department of Islamic Law and is accepted as a fulfilment of the requirement for the degree of Master of Comparative Laws.

.....
Mohamad Asmadi Abdullah
Head, Department of Islamic Law

This dissertation was submitted to the Ahmad Ibrahim Kulliyah of Laws and is accepted as a fulfilment of the requirement for the degree of Master of Comparative Laws.

.....
Ashgar Ali Ali Mohamad
Dean, Ahmad Ibrahim Kulliyah
of Laws

DECLARATION

I hereby declare that this dissertation is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

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GOODS IN *SHARĪAH* AND INTERNATIONAL TRADE LAW: A
COMPARATIVE ANALYSIS**

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To my parents, my sisters and brother who encouraged and supported me throughout my study period to complete this research work.

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TRANSLITERATION TABLE

Romanization	Arabic Letters
A	ا
B	ب
T	ت
Th	ث
J	ج
H	ح
Kh	خ
D	د
Dh	ذ
R	ر
Z	ز
S	س
Sh	ش
Ş	ص
Ḍ	ض
Ṭ	ط
Ẓ	ظ
‘	ع
GH	غ
F	ف
Q	ق
K	ك
L	ل
M	م
N	ن
W	و
Y	ي

Arabic Vowels	Romanization	Arabic Vowels	Romanization	Arabic Vowels	Romanization
اَ	A	اِ	Ā	يِ	ī
اُ	U	وِ	AW	يِوِ	AY
اِ	I	وِ	Ū		

CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND OF THE STUDY

Sale of goods is considered as the most common kind of transaction in the world.¹ Basically, people practice sale of goods to satisfy their several, renewable and daily needs such as food and water. It plays a significant role in circulating wealth and deemed to be one of the ways of obtaining ownership. Traders also rely on Sales of goods as a source of income and profit.

In the *Shari'ah*, sale of goods is necessarily justified since human desire towards essential things is alluded to on the basis of the verse of the *Qur'an*: “wealth and sons are allurements of the life of this world”² and “and ye love wealth with inordinate love!”³ In fact, *Shari'ah* commands human beings to satisfy their basic needs to the limit that keeps them alive. This is indicated by stressing that eating *halal* (permissible) product is a duty while refraining from *haram* (impermissible) is also a duty upon all Muslims. This is enshrined in the verse which said: “O you who believe! Eat of the good things We have provided for you, and give thanks to Allah, if it is Him that you serve”⁴ and “O you who believe! Do not prohibit the good things Allah has permitted for you”.⁵

In addition, a sale can be an approach to benevolence cooperation and brotherhood among mankind. This is because it usually involves “give and take” process for achieving the interests of the agreed parties. This, in turn, may establish

¹ Ahmad al-Sa'id al-Zagharad, *Aqd al-Bay'* (Egypt: Al-Maktabah al-'Asriyyah, 2010), 6.

² *Surat al-Kahf*, 18:46.

³ *Surat al-Fajir*, 89:20.

⁴ *Surat al-Baqarah*, 2:172.

⁵ *Surat al-Ma'idah*, 5:87.

positive relationships, collaboration and cooperation among the people. These two principles are both instructed in the *Qur'ān*. For the former, Allah said: “Help you one another in righteousness and piety, but help ye not one another in sin and rancour: Fear Allah: For Allah is strict in punishment”.⁶ For the latter, Allah said: “the Believers are but a single Brotherhood: So make peace and reconciliation between your two contending brothers; and fear Allah, that you may receive Mercy”.⁷ Furthermore, *Shari'ah* encourages the making of profit through trade. This is expressed in the *Hadith*: “The best way to gain a profit is a man’s work through his hand and any *mabrūr* sale”.⁸

For this valuable status of the sale of goods in Islam, *Shari'ah* conveyed significant and explicit rulings of the sale of goods in comparison to any other transactions. This is to maintain the practice of sale of goods, regulate the relationship between buyer and the seller and protect their rights respectively. In fact, the sale of goods illustrates the essence of the Islamic law of contractual obligations or commerce and trade. Therefore, the contract of sale is where rights of a contracting parties are originally developed.⁹

Contemporarily, the sale of goods has tremendous economic importance because it contributes to the economic progress of developing and, even, developed countries through best utilizing of the surplus resources. It also leads to peace and better standards of living and harmony of human existence at a global level.¹⁰ In addition, it strengthens market competition under free trade atmosphere. Here, the

⁶ *Surat al-Ma'idah*, 5:2.

⁷ *Surat al-Hujrāt*, 49:10.

⁸ Narrated by Rāfi' Ibn Khadij. See Musnad al-Imam Aḥmad Ibn Ḥanbal, vol.7, ed. Muḥammad ‘Abdulqāder ‘Aṭā (Beirut: Dar Al-Kutub Al-‘Ilmiyyah, 2008) 17728:169. The word *Mubrūr* means free from deceit and unfaithful swear. See Moḥammed Ibn Ismā‘īl Ibn Ṣalaḥ al-Ṣan‘ānī, *Subul al-Salam*, vol.3, ed. ‘Isām al-Sababiṭī et al (Cairo: Dar Al-Ḥadith, 2007), 6.

⁹ Razali Nawawī, *Islamic Law on Commercial Transaction*, (Kuala Lumpur: CERT, 2009), 103.

¹⁰ Indira Carr, *International Trade Law*, 4th edition (USA and Canada: Routledge: Cavendish, 2010), 1.

buyer can obtain goods of higher quality with a lower price and the seller can despatch his goods of lower quality with a higher price.¹¹ This is also underpinned on the fact that not all the resources and goods are found and produced in all countries, thus international trade provides a substitute way of transferring them from one country to another, thereby, satisfying the needs of states, corporates, and individuals.¹² Even rich countries depend on poor countries for raw materials to continue production and avoid economic decline. To make it clear, states shall not depend only on their own limited and non-renewable resources or otherwise it will impede economic growth.¹³ International trade has become robust and of great weigh because of the development in both transportation and telecommunication.¹⁴ This encourages states to adopt the free market policy and paves the way for more closeness between the customers and vendors worldwide. This has consequently increased and diversified the stock of services and products to include goods, materials, and means of production, information and ideas.¹⁵

Because the contract of sale is the backbone of international trade in all countries, there is need for certainty in the legal framework that governs parties' rights and duties,¹⁶ the law relating to sale contracts varies from state to state to ensure economic growth. Any uncertainty with regard to applicable law means uncertainty in respect of the rights and duties of the parties to the contract and the available remedies in the event of dispute. For all these reasons, states had been enjoined to harmonize

¹¹ G. V. Vijayasri, "The Importance of International Trade in the World", *International Journal of Marketing*, vol.2, No. 9, 2013, 112-113.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ Al-Zagharad, 8. See also Moḥammad Ibrāhim Mūsā, *In 'ikāsāt al-'Awlamah 'alā 'Uqūd al-Tijārah al-Dawliyyah* (Alexandra: Dar al-Jam'ah al-Jadīdah, 2007) 1, 2.

¹⁵ Mūsā, 7.

¹⁶ Carr, 1.

the law relating to sale of goods since 1930.¹⁷ This prolonged step has been crowned by the drafting of the United Nation Convention on Contracts for International Sale of Goods 1980 -herein referred to as the CISG 1980.

Thus, this research analyses the rights and duties of the buyer under the sale of goods from *Sharī'ah* and international trade law perspectives. Comparison will be made between the Islamic law and United Nation Convention on Contracts for International Sale of Goods 1980.

1.2 OBJECTIVES OF THE RESEARCH

This research has the following specific objectives:

1. To discuss and compare the general concept of sale of goods in *Sharī'ah* and international trade law.
2. To evaluate the rights and duties of the buyer under sale of goods from *Sharī'ah* and international trade law perspective.
3. To compare between the rights and duties of the buyer under the sale of goods in *Sharī'ah* and international trade law.

1.3 RESEARCH QUESTIONS

The questions of this research are as follows:

- i. What are the similarities and differences between the general concept of sale of goods in *Sharī'ah* and international trade law
- ii. What are the rights and duties of the buyer under the sale of goods in *Sharī'a'h* and international trade law?
- iii. How similar and different are *Sharī'a'h* and international trade law with regards to the rights and duties of the buyer under the sale of goods?

¹⁷ *Ibid*, 1 and 57.

1.4 HYPOTHESIS

The hypothesis in this research is that there is divergence between *Shari'ah* and international trade law in regards to the rights and duties of the buyer under the sale of goods. This is because *Shari'ah* is based on revealed sources while the international trade law is based on common law and civil law which are man-made laws.

1.5 STATEMENT OF THE PROBLEM

Nowadays, sale of goods law is becoming an important part of the economic activities and the free market policy around the world. This, in turn, enhanced the international trade and made close connection between individuals and corporates of different countries including Muslim countries.

From the *Shari'ah* perspective, legal entities and individuals are encouraged to cooperate with each other in order to satisfy their several, renewable and daily needs. Also, it is favoured to achieve economic interest on the basis of *maslahah* (interest). In consequence, this would pave way for more relief of the poor when money comes to the hand of generous people pursuant to Allah's saying that: "In order that it may not merely make a circuit between the wealthy among you".¹⁸

Furthermore, as Muslim countries are not isolated from the interaction between countries all over the world, it is by necessity that people avail themselves of the legal certainty provided by international legal framework. In other words, they may have to consider whether or not the existing international rules are compatible with *Shari'ah* before proceeding to ratify any treaty or incorporate any standard international rules into their own legislations.

¹⁸ *Surat al-Hashir*, 59:7.

As the world is becoming narrower, states are committed to produce an international legal instruments and general rules of trade acceptable to all.¹⁹ However, they are only based on common law and civil law, the two legal systems which are distinct from *Sharī'ah*.

Consequently, it is necessary to examine the rights and duties of the parties in a sale of goods from both *Sharī'ah* and international trade law perspective. Furthermore, comparative study is of high importance and requires proper understanding and exploration. The study takes into account the rights of both parties to a sale of goods i.e. the buyer and seller.

1.6 LITERATURE REVIEW

The existing literatures show lacks of a comprehensive and comparative analysis between *Sharī'ah* and international trade law on the rights and duties of the buyer under the sale of goods. A search of literature seems to show that previous related studies attached either to the rights and duties of a buyer under *Sharī'ah* or otherwise rights and duties under international trade law and only few are focussed on comparing between *Sharī'ah* and international trade law. These few writings, however, address the sale of goods in general.

This literature review begins with the rights of the buyer under the sale of goods in *Sharī'ah* and international trade law and followed by the duties of buyer under the sale of goods in *Sharī'ah* and international trade law as follows:

¹⁹ For the legal traditions on which the CISG is based see Gabriel Moens et al, *International Trade and Business: Law, Policy and Ethics*, 2nd edition, (USA and Canada Routledge: Cavendish, 2006), 2. The UNIDROIT and the Principles of the European Contract Law are examples of these general principles. They are, actually, guided by the CISG 1980, so they mainly follow the tradition on which it based. See Ingeborg Schwenzer et al., *International Sales Law* (USA and Canada: Routledge-Cavendish, 2007), 22.

1.6.1 Rights of the Buyer Under the Sale of Goods in *Shari'ah* and International Trade Law

Muslim scholars endeavoured to identify and analyse the rights of both buyer and seller in Islamic law. Mohd Ma'sum Billah, in Chapter two of his book entitled "*Shari'ah* Standard of Business Contract" gives a brief overview of the contract of sale, its classifications and some international terminologies used in international trade namely: the C.I.F and F.O.B and their validity at the eye of *Shari'ah*.²⁰ He also provides an analysis on the different rights of option (*al-khiyārāt*).²¹ The definitions, requirements, legality and the basic features of all the remedies provided for the aggrieved party in business contracts under *Shari'ah* were also explained in the book.²² The same author in another book published under the name of "Applied Islamic Law of Trade and Finance: A Selection of Contemporary Practical Issues", focuses among other issues on the right of defect in Islamic law known as *khiyār al-'ayb*. He provides all the related principles and rulings and concluded with a comparison between the right to defect and the principle of caveat emptor in common law.²³ It is not within the aim and scope of these two books to examine the rights of the buyer in international trade law. Also, discussed by Billah is a comparison between Islamic law and international law on the same issue. The former book does not address the sale of goods in particular; it rather referred to the broad words of business contracts.

Razali Hj Nawawi also discusses in the book entitled "Islamic Law on Commercial Transaction" the general features of the sale of goods and presents some

²⁰ Moḥammad Ma'sum Billah, *Shari'ah standard of business contract* (Kuala Lumpur: A.S. Noordeen, 2006), 73-77. See *Ibid*, 85-87.

²¹ *Ibid*, 120-130.

²² Moḥammad Ma'sum Billah, *Remedies for Breach of Business Contract in Shari'ah Standard of Business Contract*, 141-150.

²³ Moḥammad Ma'sum Billah, *Applied Islamic Law of Trade and Finance: A Selection of Contemporary Practical Issues*, 3rd edition (Malaysia: Sweet & Maxwell Asia, 2007), part 2.

particular issues on “*gharar*”, the goods and the price, apportionment of the price, deferred payment and instalments and the types of sale.²⁴ Another book published under the title of “*Aḥkām Al-Mu‘āmalāt Al-Shar‘īyyah*” written in Arabic language by ‘Ali Al-Khafīf indicates the pillars, the requirements alongside the Islamic principles and rulings governing the sale and types of sales. However, comparative analysis of this subject is still left undiscussed by both authors. Furthermore, neither the former and nor the latter provides a full understanding on the rights of the buyer under the sale of goods though the rights were outlined and highlighted in the discussion.²⁵

The work of Indira Carr on International trade law explores the rights of the buyer under the sale of goods based on the United Nation Convention on Contracts for International Sale of Goods 1980 (hereinafter referred to as CISG 1980). The study covers aspect such as delivery of goods, handing over the documents and transfer of property in the goods.²⁶ Nothing in this book mentions the *Shari‘ah* point of view on the rights of the buyer under the sale of goods or even to any point within the scope of this research.

In a rather different tune, Fatima Akkadaf wrote on the Application of The United Nations Convention on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries. The author inquired whether the CISG is compatible with Islamic Law Principles as it concerns the rights of the buyer under the sale of goods. Special focus was placed on the CISG 1980 and its provisions with respect to Islamic law on freedom of the contract and good faith under article 7 (1) of the CISG 1980. She also suggests the use the adaptability character of Islamic law to bring Islamic law

²⁴ Nawawī, 103-144.

²⁵ ‘Ali al-Khafīf, *Aḥkām Al-Mu‘āmalāt Al-Shar‘īyyah*, vol.3 (Cairo: Dar Al-Fikr Al-‘Arabī, 2005), 402-430.

²⁶ *Ibid* 76-77.

into conformity with the CISG.²⁷ However, it does not consider the primary rights that are provided under the contract of sale of goods. The study also makes no reference to rules other than the CISG 1980 such as the UNIDROIT Principles.

The most related piece of writing from previous studies to this research is the work by Ahmed A. Syed on “A Comparison of the *Sharī‘ah* and the Convention on Contracts for the International Sale of Goods in International Business Transactions”. The author focussed on the comparison after a brief description of *Sharī‘ah* and the CISG 1980. He finds out some similarities between the two laws in relation to the rights of the buyer under the sale of good. These similarities include: absence of statute of fraud by which the parties can freely enter into a contract without requirement of writing, principle of good faith and principle of warranty of merchantability under which the buyer is entitled to receive the required goods.

The paper concluded by giving some suggestions on how Muslim countries can deal with the specific non-compliance with the general principles and rules stipulated in the CISG 1980.

Although, the paper approaches targeted the process of comparison, it concentrates on general principles of sale of goods and not the detailed rulings on the rights of the buyer. Moreover, the paper does not examine the main rights such as the right take delivery of the goods and right to receive all the related documents. Also, as far as international trade is concerned, it refers exclusively to the CISG 1980.

²⁷ Fatima Akaddaf, “Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG compatible with Islamic Law Principles?” *Pace International Law Review*, vol.13, No. I, spring 2001, 1-58.

1.6.2 Duties of the Buyer Under the Sale of Goods in *Shari'ah* and International Trade Law

All the Islamic *fiqh* books mentioned above except “Applied Islamic Law of Trade and Finance: A Selection of Contemporary Practical Issues” written by Mohd Ma’sum Billah, briefly, identifies the duties of the buyer under the contract of sale in *Shari'ah* while presenting the general rulings of the sale. In addition, they do not isolate the sale of goods from the general contract of sale except the discussion by Razali. International trade law scholars transmit their own knowledge in this field. Indira Carr in his book explains the duties of the buyer, with reference to the CISG 1980, which include taking delivery of the goods, doing all acts which could reasonably be expected of him in order to enable the seller to make delivery and in taking over the goods, the duty to examine the goods once the goods have been delivered and give timely notice in the event of non-conformity of goods, and the duty to pay the price for the goods on the date fixed and take the formalities required to effect the payment.²⁸

A more related article is written by Abdullah S. Aloudh entitled “The Notice Requirement of Article 39 and Islamic Law: Developed vs. Developing Countries”.²⁹ It examines article 39 of the CISG 1980 which provides for buyer’s obligation to give notice to the seller in the case of non- conformity and the exceptions found in articles 40 and 44 with the aid of related cases. The cases helped to point out the different interpretations of this provision. Also, examined in the paper is article 39 of the CISG 1980 as applied in developing countries including Islamic law jurisdictions particularly Saudi Arabia. Within this area of discussion, he clarifies the case in

²⁸ Indira Carr, *International Trade Law*, (USA and Canada: Routledge: Cavendish, 2010), 77-81.

²⁹ Abdullah S. Aloudh, “The Notice Requirement of Article 39 and Islamic Law: Developed vs. Developing Countries”, *Arab Law Quarterly* vol.26, 2012, 481-498.