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**Issues of Compatibility Between the CISG and Shariah law Based Legal
Systems**

Bachelor's Thesis

Programme Law, specialisation EU and International Law

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Tallinn 2021

I hereby declare that I have compiled the thesis independently and all works, important standpoints and data by other authors have been properly referenced and the same paper has not been previously presented for grading.

The document length is 9670 words from the introduction to the end of conclusion.

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ABSTRACT

The United Nations Convention on Contracts for the International Sale of Goods (“CISG”) was drafted more than 40 years ago, is one of the largest multinational treaties in the world and is often stated to be one of the most successful documents international trade agreements. It has been ratified by over 90 countries and accounts for around two-thirds of all global trade.¹ The CISG has been established to safeguard and promote trade under equitable terms according to article 7(1) of the treaty,² and to promote a unified legal system for cross-border trade and disputes. Despite its many ratifications, the majority of shariah-based countries, referred to as Islamic Countries and Muslim Countries, have not signed it, and the few that are contracting parties see it rarely applied.³

17 out of the 57 Member states of the Organization of Islamic Cooperation⁴ are signatories parties of the CISG most of which are influenced by a mixture of the French Civil Code and Islamic Shariah. Among the first 11 countries ratifying the convention on the 1st of January 1988 were Egypt and Syria with Iraq following suit later 1 April 1991, yet it is still rarely applied. Notably, the courts largely resort to their national law to settle which has not been properly explained or explored and goes against the unification aim of the CISG. The middle east alone is responsible for 27% of the world’s oil production,⁵ and in crucial trade-rich regions such as the Middle East and Central Asia, it is important to have a unified legal system to tackle international disputes with the ever-growing globalization trend.

This paper aims to observe the application of the CISG and examine the reasons for the lack of ratification and application of the CISG in Islamic countries. The research will also review the

¹ United Nations Commission on International Trade Law (UNCITRAL). Clout Cases. Retrieved from https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cisg_digest_2016.pdf, 11 September 2021

² United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980, S.Treaty Document Number 98-9 (1984), UN Document Number A/CONF 97/19, 1489 UNTS 3. The full text of the CISG is available in pdf format at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09951_e_ebook.pdf (hereinafter “CISG”)

³ El-Saghir, H. (2009). The Interpretation of the CISG in the Arab World. In *CISG Methodology* (pp. 355-374). Berlin, New York: Otto Schmidt/De Gruyter European law publishers. <https://doi.org/10.1515/9783866537224.355>

⁴ Petersen, M. J., & Kayaoglu, T. (Eds.). (2019). *The Organization of Islamic Cooperation and Human Rights*. University of Pennsylvania Press. <http://www.jstor.org/stable/j.ctv16t6hcd>

⁵ U.S. Energy Information Administration. "What countries are the top producers and consumers of oil?" Accessed November. 25, 2021.

shariah legal tradition and discuss whether it could potentially explain the lack of interest of the Shariah law legal systems in the CISG. The study uses a mixed methodologies approach that combines empirical and theoretical data, obtained from the extant literature and secondary sources to look into cases and trends of selected Islamic countries that could help clarify why the disregard of the CISG occurs and what are the preferred alternatives and methods to settle international trade disputes.

Keywords: CISG; Islamic law; shariah; international trade law; global regime; international sales of goods; dispute resolution; contract terms

INTRODUCTION

The accomplishment to achieve a uniform set of rules to regulate contracts for the international sale of goods was a work that took time, as exemplified in the process of drafting and developing the CISG, 1980. For countries of different legal and political systems, it became the default convention for international sales law if to consider that between seventy and eighty per cent of all international trade could potentially be governed by the Convention.⁶ Although the CISG has had a harmonizing effect on the domestic law of signatory states,⁷ the uniform acceptance and application of the convention under Article 7(1) are still not achieved. In some jurisdictions, it has become apparent that work is necessary for the legal practice, national courts and tribunals to participate in the unification process. Nevertheless, the CISG continues to be seen as one of the most successful international comparable only to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.⁸ Around 4,500 cases are recorded to have relied on this instrument according to the latest United Nations Commission on International Trade Law (UNCITRAL) case law digest.⁹

The achievements of the CISG are acknowledged, but it is not reasonable to argue its usefulness based solely on the number of ratifications it has or other accomplishments, but by analysing the effect it has had on the ratifying states. The applicability of the CISG is not limited to contracting states, but it is sometimes governing relations of parties from non-contract states.¹⁰ It is *lex specialis*, comprehensive and exclusively governing contracts for the international sales of goods, but not restricted to nationals of signatory states.¹¹ The CISG has influenced legal developments

⁶ Ingeborg Schwenzer, Pascal Hachem, The CISG—Successes and Pitfalls, *The American Journal of Comparative Law*, Volume 57, Issue 2, Spring 2009, Pages 457–478, <https://doi.org/10.5131/ajcl.2008.0013>

⁷ *ibid*

⁸ United Nations Commission on International Trade Law (UNCITRAL). (1958). *The Convention on the Recognition and Enforcement of Foreign Arbitral Awards —New York Arbitration Convention, New York Convention* —. New York. Retrieved from <https://www.newyorkconvention.org/countries>

⁹ UNCITRAL Digest (2016), *supra* note 1

¹⁰ *Ibid*

¹¹ Dawwas, A., & Shandi, Y. (2011). The Applicability of the CISG to the Arab World. *Revue De Droit Uniforme*, 16(4), 813-841.

and the contractual practice of many states and yet, case laws show that it is still not used.¹² Europe is the region where more than half of all reported cases involve the application of the CISG, while regions with a strong Muslim majority like the Middle East, Africa, and Central Asia have none to very few cases that reference the convention.¹³

Islam is the world's second-largest religion after Christianity, and the fastest-growing religion, It is estimated that by 2030,¹⁴ one-fourth of the world's population will be Muslim, and with Islam expanding, the need to make adjustments, combine or accommodate its law becomes necessary. Islamic Law, often referred to as 'Shariah' is the legal part of Islam, and it influences the codes of Muslim majority countries to some degree, within other words, in Muslim countries the Shariah serves as a basis for certain areas of the law, playing a very important role in the lives of their citizens. To make a proper assessment of the CISG application, it is critical to examine some aspects of this legal tradition and determine how big of a role does it play in determining the lack of enthusiasm towards the convention. Not only does Shariah influences Muslims and the legal systems of Muslim countries tremendously, but it is also growing.¹⁵ There are two primary sources for Shariah, the first is the Quran, which Islam states to be the word of god unveiled through revelation to the Prophet Muhammed,¹⁶ and the second is the Sunnah, which is the tradition and sayings of the Prophet as recorded by his companions, the Sunnah explains and supplements verses that are not directly explained by the Quran¹⁷,

This work will attempt to explain the lack of enthusiasm that Muslim countries under the Shariah law appear to have towards the CISG and to do that it will structure the thesis as follows, the first chapter will explain the historical and theoretical background including the relevant transnational law. The second chapter will investigate how different Muslim countries interpret the CISG and

¹² Gordon, M. W. (1998). Some Thoughts on the Receptiveness of Contract Rules in the CISG and UNIDROIT Principles as Reflected in One State's (Florida) Experience of (1) Law School Faculty, (2) Members of the Bar with an International Practice, and (3) Judges. *Am. J. Comp. L.*, 46.

¹³ *Ibid*

¹⁴ Twibell, T. (1997). Implementation of the United Nations Convention on Contracts for the International Sale of Goods under Shari'a : Will article 78 of the CISG be enforced when the forum is in an Islamic state? *International Legal Perspectives*, 9(1-2), 25.

¹⁵ *ibid*

¹⁶ Syed, A. (2015). A comparison of the Shari'ah and the convention on contracts for the international sale of goods in international business transactions. *International Law News*, 44(3), 29.

¹⁷ *ibid*

will lay out parts where the CISG and Shariah law may be seen to disagree. The third section will expand on the lack of interest that Islamic countries have in some of the trade rules in question and comment on the prospects as to whether the situation would change if the CISG was more compatible with Islamic laws. The Last section will outline the main conclusions of the work.

1. Historical and Theoretical Background of the CISG and Islamic Law

1.1 the CISG and Transnational Law

The CISG is the compilation of work since medieval times and can be seen as the embodiment of Lex Mercatoria, also known as Law Merchant. It is one of the most successful international commercial law treaties to ever be concocted. The Lex Mercatoria is not a law of a specific country but the law of all nations. This transnational law is pluralistic and expeditious in its application and is not under one specific nation but is self-regulating and outside the reach of local authorities and local leaders yet within that of merchant judges and this is the reason why leaders favoured a universal system.¹⁸ The modern law merchant is similar yet widely different from that of medieval time, and many have tried to unify it. In the latter half of the 1800s that movement started to pick up steam when constant efforts for the promotion of globalization and international trade forced countries to re-examine their legal systems. The movement culminated in 1928 when the International Institute for the Unification of Private Law (UNIDROIT) was inaugurated in and at the same time Ernst Rabel, an esteemed Austrian scholar, proposed to start his work on the unification of international sales law.¹⁹ In 1930 a committee containing ambassadors of different legal systems; Anglo-American, Germanic, Latin, and the Scandinavian legal systems was founded based on the works of Rabel,²⁰ in cooperation with Rabel later in 1935 would finish the draft for the uniform sales law and in 1936 Rabel himself would release the first volume of his magnum opus “Das Recht des Warenkaufs”²¹ which translates to “Law of the sale of goods”, however, soon after his work would be halted due to the second world war. It was not till 1951 that he resumed his work when the Dutch government started holding conferences in The Hague to discuss the unification of international sales law.²² There would be multiple meetings during the 1950s in The Hague, where Rabel would eventually submit a first draft of substantive law as well as a draft for the formation of international sales contracts which would be revised by UNIDROIT

¹⁸ Trakman, L. (2011). The Twenty-First-Century Law Merchant. American Business Law Journal, 48(4), pg.776

¹⁹ Supranote 6 Ingeborg Schwenzer, Pascal Hachem, (2009) pg. 459

²⁰ ibid

²¹ Ibid see also Rheinstein, M. (1956). In Memory of Ernst Rabel. The American Journal of Comparative Law, 5(2), pg. 185.

²² Ibid see also Rheinstein, M. pg. 192

in 1963 to include comments and suggestions from multiple governments and be present in the 1964 Hague Conference.²³

The 1964 Hague conference would eventually accept the early work on uniform law to one of the two sales conventions it adopted.²⁴ The formation convention would require the state ratifying it to incorporate the uniform law into its domestic law,²⁵ and although it eventually came into force it was not as widely adopted as it was thought. Later pundits were less critical of the actual substance of the convention and more critical to its attempt to extend its relevance to a transaction that has no contact with a contracting state.²⁶ In 1966 the UNCITRAL was finally established and pursued to unify international sales law using the previous Hague conventions as a framework. The UNCITRAL finally reached the first draft in 1976 and would release another draft a year later containing rules on contract formation along with other substantive law.²⁷ In 1980, a delegation from 62 countries attended the Vienna Conference to discuss the CISG and by the end, 42 countries would vote in favour of the convention,²⁸ and the convention would enter into force on January 1, 1988, after the necessary number of ten ratifications under article 99 of the CISG with the original contracting states being Argentina, China, Egypt, France, Hungary, Italy, Lesotho, Syria, the United States and Zambia, with the translation being in Arabic, Chinese, French, English, Russian and Spanish, a German translation was agreed upon but Germany, Austria and Switzerland could not agree on the terminology.²⁹

During the same time as the Hague Convention, the modern law merchant, as founded by Goldman, Honnold, and Schmitthoff, emerged after the second world war when the romanticised version of the medieval law system became influential, and the idea of an autonomous legal system

²³ Ibid

²⁴ Winship P. (1984). The Scope of the Vienna Convention of International Sales Contracts. In Galston N. M., Smit H. (Eds.). *International Sales: The United Nations Convention on Contracts for the International Sale of Goods*.

²⁵ Ibid, see also Honnold, J. (1964). The 1964 Hague Conventions and Uniform Laws on the International Sale of Goods. *The American Journal of Comparative Law*, 13(3), 451–453. <https://doi.org/10.2307/838689>

²⁶ Ibid, pg. 3

²⁷ Supranote 6, Ingeborg Schwenzer, Pascal Hachem, (2009) pg. 460

²⁸ ibid

²⁹ Ibid, pg. 461

was the basis for theoretical and political claims.³⁰ However, the works of Godman and Schmitthoff have caused an endless discussion and have been excessively reported on by scholars and lawyers alike so that there is no further need for another discussion on their works and therefore only the milestones and most important feats will be mentioned.

The CISG, which is adopted by organisations such as the UNCITRAL and the International Chamber of Commerce (ICC), is seen as an affirmation of Law Merchant.³¹ However, the movement towards unification can be seen as harmonising laws of different legal systems as well as merchant law, with the driving force being to unify both the common and civil law systems.³² Yet, with this unification process, some issues arose with non-western legal traditions like Islamic and Hindu law being marginalised and viewed as secondary to Western Common and Civil law principles which in turn can be seen as not giving merchants who would prefer to utilise those legal systems with effective regulations.³³ The major difference between Schmitthoff and Goldman is the sources of the law merchant, which Goldman argues should be autonomous and be derived from general principles of law, e.g. *pacta sunt servanda*, good faith or estoppel,³⁴ while Schmitthoff argues that law merchant should be derived from national law and to be amended by merchants, ultimately they both agree on a romantic version of the medieval legal system.³⁵

1.2 Shariah Law

Islam is the world's second-largest religion and the fastest-growing religion in the world. The significance of Shariah in the lives of Muslims and Islamic countries is therefore tremendous. Unlike Common and Roman (Civil) Law, Islamic deals with both secular and religious issues, and so has a crucial impact on legal transactions as well as the daily lives of millions across the globe. In the words of World-renowned professor and the leading western scholar on Islam, Joseph

³⁰ Elcin, Mert, *Lex mercatoria in international arbitration theory and practice*, Florence : European University Institute, 2012, EUI PhD theses, Department of Law Retrieved from Cadmus, European University Institute Research Repository, at: <http://hdl.handle.net/1814/25204>

³¹ Trakman, L. (2011). *The Twenty-First-Century Law Merchant*. *American Business Law Journal*, 48(4), 775-834.

³² *ibid*

³³ *Ibid* at 810, see also Posner, E. (1999). *Arbitration and the harmonization of international commercial law: A defense of Mitsubishi*. *Virginia Journal of International Law*, 39(3), 647.

³⁴ Howarth, R. (2004). *Lex Mercatoria : Can general principles of law govern international commercial contracts?* *Canterbury Law Review*, 10(10), 36-76. Pg 44

³⁵ Supranote 31, Elcin, Mert (2012) pg.17

Schacht “Islamic Law is the epitome of Islamic thought the most typical manifestation of the Islamic way of life, the core and kernel of Islam itself”.³⁶ This sentiment is also backed by some of the most influential Islamic scholars such as Ibn Khaldun and others. As stated previously the shariah has two primary sources, the Quran and the Hadith, and although the Quran consists of 6,226 verses, only 80 consists of legal issues such as the sale of alcohol and the prohibition of gambling, as well as some give the preferred way for arbitration and other guidance,³⁷ Muslims believe the Quran is a compilation of verses received by the Prophet by God and although the Quran touches fundamental legal rules it does not deal with them in great detail, therefore, scholars would have to turn to the Hadith and the Sunnah to supplement the Quranic rules or the Islamic code found in the Quran. In the early days of Islamic history, when a conflict arose, the parties would resort to Quranic verses, and in the absence of any, they would resort to the sunnah, the conduct and traditions of the prophet, which was originally the Arabian customary law.³⁸ As time went on, Sunnah was restricted to be taken as the traditions, actions and speeches of the prophet as opposed to only the tradition.³⁹

Ever since its emergence in the 7th century in the Arabian Peninsula and then spread of Islam from Spain to China has had a great impact on the legal systems of those regions.⁴⁰ A brief explanation of the Islamic faith is needed before proceeding to the structure of the Legal system and the principles of jurisprudence (Fiqh). Islam means “to submit to God” and finds its origins in the word “Istislam”, Literally meaning “submission” thus a Muslim means “one who submits”. Islam as a religion has the same prophets that are found in Judeo-Christian tradition, progress Islam became the dominating force in the Middle East with the tenets of the religion that were revealed to the Prophet Mohammed, the Quran, sometimes referred to as Koran, is believed to be the actual word of god revealed through the Angel Jibril (Gabriel) to the Prophet, as stated before the Quran contains 6,226 verses or Ayats and 114 Surahs or Chapters. With the great importance placed on the Quran and Sunnah as the primary sources, they do not always address the issues at hand and

³⁶ Schacht, J. (2012). An introduction to Islamic law. Clarendon Press.

³⁷ Supra note 14, Syed, A (2015)

³⁸ S. H. Amin, Middle East Legal Systems 26 (Royston Limited 1985).

³⁹ Akaddaf, F. (2001). Application of the United Nations Convention on Contracts for the International Sale of Goods to Arab Islamic countries: Is the GISG compatible with Islamic law principles? Pace International Law Review, 13(1), 1. See also Fazhir Rahman, Concepts of Sunnah, Ijtihad, and Ijma In the Early Period, Islamic Studies 1 (1962)

⁴⁰ Simonsohn, U. (2018). The Beginnings of Islamic Law: Late Antique Islamic Legal Traditions, written by Lena Salaymeh, 2016. Islamic Law and Society, 2018(4), 467-472.

when that happens judges turn to Ijma, which means consensus. Ijma is the consensus of Islamic scholars on issues based upon the Quran and the Sunnah. If the Issue is not found in the Quran or Sunnah, then the rule created by Ijma becomes permanent and Binding. Lastly, Qiyas, which is the use of analogical reasoning to apply the issue at hand to an accepted principle. Qiyas is usually done when a novel legal issue occurs that is not addressed by the Quran, Sunnah or the Ijma. To sum up, the hierarchy for sources in Islamic law is as follows; [1] Quran, the Holy Book of Muslims [2] Sunnah/Hadith, the Authentic Traditions and Sayings of Prophet Mohammed [3] Ijma, Consensus [4] Qiyas, Juristic Analogy

There are two sects of Islam, Sunni, which is around 85-90% of the total Muslim population,⁴¹ and Shia, which is around 10-15% of the Muslim population.⁴² Sunni Muslims follows the Quran and the Sunna. Shia Muslims follow religious leaders, called Imams, who interpret the Quran and the Sunna for the people⁴³. Within the Sunni tradition there are four schools of jurisprudence called Madhabs; [1] The Maliki Madhab [2] The Hanafi Madhab [3] The Shafi'i Madhab [4] The Hanbali Madhab

While the Shiites predominantly follow the Jaafari School, the difference between the schools of thoughts stems from the sources of supplemental law,⁴⁴ e.g. the Maliki school of thought emphasises the use of the Sunna and the minimization of opinion,⁴⁵ the Hanafi school emphasises the use of analogy and the principle of equality,⁴⁶ the Hanbali school adheres to the Quran and the Sunna to avoid the use of opinions.⁴⁷ Even then modern scholars suggest that contemporary Islamic countries can be further divided into three categories; Countries that mainly follow western systems and shariah plays a small role e.g., Egypt and Syria. Countries with laws primarily based on Shariah e.g., Saudi Arabia and Oman. And lastly countries with westernized commercial code shariah-compliant interpretation and legal system. Iraq and Jordan. However, a crucial factor when

⁴¹ Lugo, L. (2020, August 20). Mapping the global Muslim population. Pew Research Center's Religion & Public Life Project. Retrieved November 12, 2021, from <https://www.pewforum.org/2009/10/07/mapping-the-global-muslim-population/>.

⁴² Ibid

⁴³ Supranote 40 Akaddaf, F. (2001) pg. 18

⁴⁴ Ibid, pg. 19

⁴⁵ Ibid

⁴⁶ Ibid

⁴⁷ Ibid see also Mourad, S. (2019). Islamic Shari'a Law, History and Modernity: Some Reflections. *Revista De Direito Internacional*, 15(3), pg.26

talking about Islamic Law is the perception of Islam in the Western world, especially when it comes to issues of Arab stereotyping, woman's and human's rights, which can be attributed to the Islamic Government's behaviour, which the Quran and Islam may not be the ultimate source of their decisions. The Arab world is still a major focal point of Islam, even though only one-fifth of all Muslims speak Arabic. Furthermore, Sunni Muslims have a system of grading Hadith with the highest grade being Authentic or Sahih, six major hadith collections stand out them being; [1] Sahih Bukhari, collected by Imam Bukhari [2] Sahih Muslim, collected by Muslim Ibn al-Hajjaj [3] Sunan al-Sughra, collected by al-Nasa'i [4] Sunan Abu Dawood, collected by Abu Dawood [5] Jami al-Tirmidhi, collected by al-Tirmidhi [6] Sunan ibn Majah, collected by Ibn Majah, some Muslims, mostly belonging to the Maliki tradition consider Muwatta collected by Imam Malik to be the sixth book.

Usually, Muslim countries adopt those Madhabs, some countries like Egypt have different Madhabs for different regions, and as stated previously, only 3% of the Quran deals with legal issues, yet, when it comes to Islamic law, especially when it comes to contracts, there are two portions of Shariah. First is the Mu'amalat or Transactions, which deals with the same issues as other legal systems and can be seen as mostly secular and Ibadat means "Rituals" which deals mostly with the religious side. Jurists needs to be proficient in both, Mu'amalat is mostly man-made and has few religious components.⁴⁸

⁴⁸ Supranote 14, Twibell, T. (1997). pg. 69

2. Interpretation and Application of the CISG

2.1 Similarities and Conflict views between the CISG and the Shariah

Globalization, in recent years, has made regions of the world once separated grow closer than ever, and the closer those regions get the more trade increases. As one of the most significant regions the Middle East and Central Asia always influenced the world of business transactions, as the CISG becomes more and more influential, the Muslim world is being brought closer than ever to the Western world. Yet, some issues are still major impediments to this unity, inter alia, Article 78 is a focal point for analysis since it awards parties interest in damages where Islamic law, as well as Jewish and other legal systems, explicitly forbids it.⁴⁹ Article 78 of the CISG states “If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74.” The prohibition of interest, referred to as “riba”, is rooted in the Quran, with the problem being that it is exploitative, the prohibition of riba is found in 5 different places; [1] “Those who consume interest cannot stand [on the Day of Resurrection] except as one stands who is being beaten by Satan into insanity. That is because they say, "Trade is [just] like interest." But Allah has permitted trade and has forbidden interest. So, whoever has received an admonition from his Lord and desists may have what is past, and his affair rests with Allah. But whoever returns to [dealing in interest or usury] - those are the companions of the Fire; they will abide eternally therein.”⁵⁰ [2] “Allah destroys interest and gives increase for charities. And Allah does not like every sinning disbeliever.”⁵¹ [3] “O you who have believed, fear Allah and give up what remains [due to you] of interest if you should be believers.”⁵² [4] “And if you do not, then be informed of a war [against you] from Allah and His Messenger. But if you repent, you may have your principal - [thus] you do no wrong, nor are you wronged.”⁵³ [5] “O you who have believed, do not consume usury, doubled and multiplied, but fear Allah that you may be successful.”⁵⁴

⁴⁹ Ibid pg. 27

⁵⁰ Holy Quran 2:275, Sahih International Translation

⁵¹ Holy Quran 2:276, Sahih International Translation

⁵² Holy Quran 2:278, Sahih International Translation

⁵³ Holy Quran 2:279, Sahih International Translation

⁵⁴ Holy Quran 3:129, Sahih International Translation

and although none of the Islamic nations signed to the CISG have made reservations against it, the issue has been raised that it may happen.⁵⁵ Furthermore, it is a generally accepted principle in Islam that in trading, one must get what they paid for and not more,⁵⁶ this total and absolute rejection of Interest is common in all madhabs of Islamic fiqh. The main rationale behind it is the concept of justice and fairness in Islamic thought, as well as the basis of cooperation between capital and enterprise in which Islam advocates for a system of equitable sharing of risks and rewards. Even though early Islamic laws were specific on what can be traded to make sure usury was not committed, merchants were also observed closely to make sure there is no usuary in loan transactions since Islam also bans practices that have the same effect as riba.⁵⁷ The reasoning behind none of the Islamic countries having a reservation to article 78 is that if a Muslim party is not interested in dealing with interest, they freely choose to not abide by article 78 regardless of the signature of their country's signature.⁵⁸ Thus giving more autonomy to the application of the CISG, the parties could want a contract that fully abides by Shariah or they can disregard the issue for a more secular contract. Furthermore, if countries would have a reservation to article 78, the elimination of interest would eliminate potential business as well as companies would be sceptical of dealing with such countries, fearing the lack of compensation of the contract foes astray. Yet, despite the innate Western nature of the legal structure in Muslim countries, shariah banking is gaining momentum around the world, and with article 78 still in force, Islamic countries may change their view on riba and start going against it, On the contrary, although Interest is prohibited, Islamic law is ever-changing, at one time, Muslims were not allowed to have money in an institution that deals with interest, now it is generally acceptable. The same could happen to riba since it was jurists who made the specific stipulations that prevent multiple types of usury, and although it is not even thinkable in some countries such as Saudi Arabia or Pakistan, which do not recognize interest and instead use Islamic banking for financial transactions,⁵⁹ making it difficult for them to sign to the CISG without having reservations to article 78. On the other hand, it is still

⁵⁵ Supranote 14, Twibell, T. (1997). pg. 76

⁵⁶ Ibid, See also Nabil A. Saleh, Unlawful Gain and Legitimate Profit In Islamic Law: Riba, Gharar and Islamic Banking (1986)

⁵⁷ Ibid, pg. 78

⁵⁸ Ibid, pg. 80

⁵⁹ Nicole C. O'Neal. (2009). THE DEVELOPMENT OF ISLAMIC FINANCE IN AMERICA: THE FUTURE OF ISLAMIC REAL ESTATE INVESTMENT TRUSTS. Real Property, Trust, and Estate Law Journal, 44(2), 279-297.

thinkable that other countries will follow in the footsteps of Egypt and Syria.⁶⁰ Additionally, when it comes to the prohibition of riba, it must be kept in mind that in Islam contracts are sacred and must be upheld, equally to Muslims and non-Muslims, and to deny riba under a valid contract is to deny a source of shariah, so when it comes to whether a Muslim party does not want to pay riba or denying the enforcement of a contract, the enforcement of the contract will always prevail.⁶¹

Moreover, since sales contracts are a universal phenomenon and among the objectives of the CISG is to unify sales law,⁶² yet, the convention only covers the formation of the contracts along with the rights of the parties arising from contracts, however, the shariah deals with many other issues inter alia liability and failure to perform,⁶³ formation of a contract, rights of parties, the validity of the contract, effects of the contract. According to the CISG, the seller must deliver the goods and transfer the property in the goods, and the rights of the buyer are to mainly demand the transfer of property. Where the buyer is obligated to take delivery and pay the property's price, the seller's right is to demand that the buyer take the delivery and the price be paid. Thus, sales laws usually deal with the obligations of the parties, these obligations are found in Chapter II Part III of the CISG. Under Islamic law, it can be said that honesty in business is one of a principle in Islamic law since it was Prophet Muhammad who urged his followers to adopt trade as their profession and exhorted them to observe truthfulness and honesty in their business transactions.⁶⁴

According to article 30 CISG, the first obligation of the seller is to deliver the goods and any documents related to the goods,⁶⁵ which is found essentially in all legal systems. Nevertheless, the manner of how the goods should be delivered varies from one to the other, and although there is no sale with the delivery of the goods, the CISG does not go into detail about the transfer of property and does not designate when the property passes and is thus what happens concerning the transfer of property is outside the scope of the convention according to article 4 is left to national law to decide. Moreover, article 31⁶⁶ goes into detail on the place of delivery and is the obligation

⁶⁰ Ibid, pg. 86

⁶¹ Ibid pg. 87

⁶² Supranote 2, CISG

⁶³ Mahasneh, N. (2010). Liability Exemption for Failure to Perform under both the Vienna Convention for International Sale of Goods 1980 and Islamic Jurisprudence. *Arab Law Quarterly*, 24(1), 73-103.

⁶⁴ Sahih Muslim, Book 10: The Book of Transactions (Kitab Al-Buyu').

⁶⁵ Documents related to the goods is further explained in article 34 of the CISG, see supranote 2 at article 34

⁶⁶ Ibid, at article 31

that the seller has to fulfil to finish the delivery. Additionally, article 31 states that if the seller is not bound to deliver the goods, then it is fulfilled in case he transports the goods to the first carrier, as there are usually many carriers when dealing with international trade. However, if there is only one carrier, then they are considered the first carrier, the seller is not liable for the carrier's failure to deliver the goods, although it is essential to explain that in case there is not a contract of carriage e.g. the goods are already with the buyer then the seller is only bound by time, and that he only delivered the goods to a certain place at a certain time, which is further explained in article 33 of the CISG.⁶⁷ However, the obligations of the buyer's can be defined as making paying and accepting the delivery of the goods, so the remedies and obligations of the sellers and buyers have a reciprocal nature. Article 53⁶⁸ of the CISG describes the general obligations of the buyer and recognises that along with the obligations mentioned the contract still has primacy and the buyer's obligations are those arising from both the contract as well as the substantive law. Article 54⁶⁹ of the CISG discusses the payment of the goods and explains that the obligation to pay the price also includes costs that are necessary to make sure the payment is made and enable the buyer to pay the price of the goods, the further article explains the determination of price, place of payment, and other obligations in the seller in the subsequent articles till article 60. Under Islamic law, the term "aqd", meaning contract is concluded with offer and acceptance, however, transactions such as bequests and gifts only need offer.⁷⁰ The term 'aqd also includes divorce and release of debt, and it includes obligations not only among the parties but also to god. Principles such as pacta sunt servanda can be found preached in the Quran "O you who have believed, fulfil [all] contracts."⁷¹ Furthermore, Islamic jurists went out of their way to properly define and demarcate contracts, with the rules of a contract being mandatory, with additional terms that modify the nature of the contract being null and may in some cases nullify the contract itself.⁷² The terms that follow the type of contract that is entered upon by the signatory parties are not only pursuant with the will of the parties but they also must be fair and ensure equality in the exchange value, these contracts can be traced back to Aristotelian philosophy found in Nicomachean Ethics,⁷³ and equality in contracts

⁶⁷ Ibid, at article 33

⁶⁸ Ibid, at article 53

⁶⁹ Ibid, at article 54

⁷⁰ Supranote 65, Hassan, H. (2002) pg.257

⁷¹ Holy Quran 5:1, Sahih International Translation

⁷² Supranote 65, Hassan, H. (2002) pg.284

⁷³ Ibid pg.283

plays a crucial role in Islamic commutative justice, and is best demonstrated through the general structure of contracts along with the two main rules. The first rule is the passing of property as soon as the contract is concluded and the second is against unfair exploitation (Esteghlal) banning principles such as Interest/Usury (riba) and Uncertainty (Gharar)⁷⁴.

Much like the CISG, it is mandatory to pass the property and ownership once the contract is completed with the ownership of the property whether moveable (manqul) or immovable (ghairumanqul) transfers from the seller to the buyer and this transfer of ownership which invokes the obligation of the buyer to pay the price. The buyer only pays after the transfer of the goods, hence, if the property is destroyed before the transfer the buyer has no duty to pay the price. Likewise, if the buyer has not communicated a price to the seller, then the seller is not under a duty to deliver the object. This reciprocal nature is found in other situations such as if the buyer has broken the goods he is obligated to pay, yet if the buyer is deprived of an object, he has a right to ask for a reimbursement.

2.2 Interpretation and Application of the CISG

After half a century in the works, Ernst Rabel's uniform contract law can be embodied in the CISG. After its entrance into the convention, one of the first ten countries to sign it was Egypt. The Egyptian Legal System is a mix of Shariah and French civil law traditions. Arab legal systems are highly influenced by their Egyptian legal counterpart and almost all of the scholarly writing and case laws that come from Arab countries comes from Egypt.⁷⁵ The contemporary Egyptian legal system stems from late Ottoman reforms in 1869 and 1877, where it was built on the trends of various efforts for a centralized and hierarchical judiciary. To put it simply, it got boiled down to Islamic Law, in content, but is structurally based on the Napoleonic code.

Article 7 of the CISG encourages an autonomous interpretation void from the influence of domestic law, furthermore the first section of the article regarding the uniform application of the convention, good faith, and the international character of the CISG. This means that courts should not resort to interpreting the CISG national laws and principles and instead, interpreters should

⁷⁴ Ibid pg.285

⁷⁵ Supranote 3, El-Saghir, H. (2009). Pg 355-374

consider rulings on the same or comparable problems made by other tribunals, including foreign courts. Although they are not binding, it has implied importance with the CISG's main task being the harmonization of international sales because interpreters and judges can access cases and use the CLOUT reporting system. They can also use the database regarding the CISG in Pace Law School, which collaborates with the Middle East Center for International Commercial Law (MECIC) to translate those cases into Arabic.⁷⁶ Furthermore, the second section of the article regarding the gap-filling principle when dealing with issues not directly overseen by the CISG, yet falling within its scope, can be solved by following the general principles of the CISG. This provision helps the CISG expand its scope of solving issues and making contracting states apply national law. The provision stipulates that an interpreter can only reference national principles when the general principles fail. However, under the Egyptian Commercial Code, the enactment of Article 7(2) was altered. The code sets the standard for how commercial sales transactions should be and it is subject to international conventions that are enforced in Egypt. It prioritizes international trade usage over national law. Egyptian law recognizes *lex Mercatoria* at the legislative level and in cases where Egyptian law governs an issue under Article 7(2). *Lex Mercatoria* is more often used than national law and the rules of the Egyptian Commercial code are only used when *lex Mercatoria* is unable to solve them.

Egyptian courts tend to resort to national law and principles to articulate the understanding of the international treaties in effect.⁷⁷ However, this is hard to prove because there is only one Court of Cassation case that applies to the CISG. The case involved an Italian marble seller and an Egyptian buyer, the buyer paid a portion of the amount to the seller and refused to pay the rest. The seller brought the case to the First Instance Court and sought payment in full, showing evidence of the price and the goods. The First Instance Court applied domestic law and ordered the buyer to pay the rest of the money, without even mentioning the CISG and its applicability in the case. The buyer appealed to the Court of Appeals and eventually to the Court of Cassation where he reasoned that the seller failed to prove that the buyer took delivery of the items. So, the Court of Cassations did not apply domestic law and ruled that the CISG has full applicability and remanded the court to that effect. The Court of Cassations emphasized the use of the evidentiary rules of the CISG

⁷⁶ El-Saghir, H. A. (2014). The CISG in Islamic Countries: The Case of Egypt. *International Sales Law, A Global Challenge*, 505-517.

⁷⁷ *Ibid*, pg. 513

before using domestic law and that the effect of the principle of good faith as found in the CISG plays in its applicability in this case. This case demonstrates the extent to which Egyptian national courts lack knowledge of the CISG. The Court of Cassations cannot order them to use the CISG when applicable because of the lack of knowledge. Two other arbitral cases cited by UNILEX in the Cairo Regional Center for International Commercial Arbitration that apply the CISG is where one Asian seller and an Egyptian buyer had a dispute over the sale of grain⁷⁸. The buyer advertised a public tender for the supply of grains and the seller submitted a bid through their African agent. They had been awarded the tender of a thousand tons of grain to supply, the goods were shipped on four vessels which arrived within a month at the port of destination when the Egyptian Agricultural Quarantine department withheld the goods because of insects being in the grains. The panel reasoned that under C&F contracts, the risk passes to the buyer at the time the goods are loaded at the port and that the buyer could not prove that the insects existed at the time they were shipped, pursuant to article 36 of the CISG. The arbitral panel based its decision on Incoterms, which is why the panel mentioned Article 36 and the extent to which the decision was based on the article is vague. The other arbitral case cited by UNILEX was a dispute concerning an Egyptian Seller and an American Buyer for the sale of apparatuses.⁷⁹ The parties agreed that the issues regarding the contract will be under the CISG and Egyptian law. Later on, issues arose about the conformity of the supplied units and the seller's non-performance of their obligation to obtain a guarantee from the bank. The buyer thus sought damages and the arbitrator then deviated from rules regarding Article 7 of the CISG by applying the CISG equally to Egyptian law, then citing Article 45 of the CISG and concluding that it differs from Egyptian domestic law and applying Egyptian rules concerning contractual liability.

On the other hand, Indonesia, the most populous Muslim nation and one of the eight countries to have not ratified the CISG in Southeast Asia are seen as one of the most lucrative markets and its decision to not ratify the CISG can critically impact international business. Since Indonesia is not a CISG contracting party, practitioners there are able to choose what type of contract law will

⁷⁸ Ibid, See also Cairo Regional Center for International Commercial Arbitration (CRCICA), Cairo, Award No. 19/1990, April 13, 1991, published in *Arbitral Awards for the Cairo Regional Center for International Commercial Arbitration* (ed. Mohie Eldin and I. Alam Eldin) (Kluwer Law International, 2000), 23–7.

⁷⁹ Ibid See also Cairo Regional Center for International Commercial Arbitration (CRCICA), Cairo, Award No. 50/1994, October 3, 1995.

apply to their business and in many cases, they choose to apply their partner's national law because of the shortfalls in the Indonesian Civil Code. The civil code was introduced by Dutch colonial forces in 1848⁸⁰. Those shortfalls inter alia being no separation between domestic-international sales law and consumer-commercial transaction. This leads Indonesian practitioners to prefer other legal systems and utilize trust-based contracts with foreign companies⁸¹. The Indonesian Civil code is unable to regulate international sales contracts and yet the government still has not ratified the CISG. This proves to be both a blessing and a curse, the benefit being that practitioners can freely choose what type of legal system they want their contracts to abide by or use simple principles based on freedom of contract in the Indonesian Civil Code. If they are dealing with someone from a CISG contracting party they can simply choose the CISG to regulate the contract. But there are still negatives such as only being able to use partner's national laws since many countries have reservations to article 95, especially with Indonesia's top trading partners the USA, Singapore, and China all having reservations to article 95.

3. Legal gaps and Discussions

3.1 Likely Explanations for Lack of Interest in the CISG

The relation between the CISG and Islamic countries is a puzzling one. On one hand, Egypt, Syria, and Iraq were some of the first countries to show interest in the CISG, on the other hand, other Islamic countries seem to dismiss it. With the rising importance of trade and globalization, it is important to identify the obstacles that prevent more countries from signing the CISG. There are multiple reasons why Islamic countries can be giving the cold shoulder to the CISG and its goals, but to keep it short, this paper will only discuss four possible hindrances (I) Errors in the Arabic Version of the CISG (II) Compatibility Issues Between the CISG and National Law (III) Compatibility Issues Between the CISG and Shariah (IV) Ignorance of the CISG.

A. Errors in the Arabic Version of the CISG

⁸⁰ Oktaviandra, S. (2018). Indonesia and Its Reluctance to Ratify the United Nations Convention on Contracts for the International Sale of Goods (CISG). *Indonesia Law Review*, 8(3), 243.

⁸¹ *Ibid*, pg. 248

When the CISG was issued in 6 different languages, Egyptian scholars have reported differences between the translations and issues with the terminology. Comparisons between the Arabic version and the English version showed a multitude of differences, which has led judges to attach different meanings to CISG provisions depending on which version a country wants to adopt. Egypt, which influences Arab states' legal systems, has published the Arabic Version of the CISG without a proper review and incorporated it into the national legal system without review of terminology and thus contains many errors.⁸² Egyptian scholars have found that in the Arabic and English versions, Article 1(2) of the CISG states "The fact that the parties have their places of business in different States is to be disregarded". The term "place of business" is used when in the French version the term "établissement" is used, which is more accurate since it denotes the importance of the physical place of their establishments rather than the place which they conducted business which is what is intended in the CISG.⁸³ Further deviations have forced MECIC to an official complaint to UNICITRAL to correct them, which happened in 2001 when a new Arabic version was released however some issues persisted such as those with Article 25 and 36 of the CISG.⁸⁴

The English version of article 25 states "A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result." Yet in the Arabic version it states "تكون مخالفة العقد من جانب أحد الطرفين مخالفة جوهرية إذا تسببت في إلحاق ضرر ، إلا إذا لم يكن الطرف بالطرف الآخر من شأنه أن يجرمه بشكل أساسي مما كان يحق له أن يتوقع الحصول عليه بموجب العقد ، إلا إذا لم يكن الطرف بالمخالف يتوقع مثل هذه النتيجة ولم يكن أي شخص سوي الإدراك من نفس الصلة يتوقع مثل هذه النتيجة في نفس الظروف". The difference between the two translations is that in the Arabic version it is implied that a breach is not fundamental if the breached party, or a reasonable person, in this circumstance could foresee a breach, thus omitting the negation of the second phrase.⁸⁵

In the English version of Article 36 of the CISG it is stated "(1) The seller is liable by the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the

⁸² Supranote 78, El-Saghir, H. A. (2014) pg. 511

⁸³ Ibid

⁸⁴ Ibid

⁸⁵ Ibid

buyer, even though the lack of conformity becomes apparent only after that time. (2) The seller is also liable for any lack of conformity that occurs after the time indicated in the preceding paragraph and which is due to a breach of any of his obligations, including a breach of any guarantee that for some time the goods will remain fit for their ordinary purpose or some particular purpose or will retain specified qualities or characteristics.” Yet in the Arabic version it makes a completely different assumption stating “(١) يُسأل البائع، وفقا لشروط العقد وأحكام هذه الاتفاقية، عن كل عيب في المطابقة يوجد “ وقت انتقال التبعة إلى المشتري، وإن لم يظهر هذا العيب إلا في وقت لاحق.

(٢) وكذلك يُسأل البائع عن كل عيب في المطابقة يحدث بعد الوقت المشار إليه في الفقرة السابقة، ويُنسب إلى عدم تنفيذ أي من إلتزاماته، بما في ذلك الإخلال بأي ضمان يقضي ببقاء البضائع خلال مدة معينة صالحة للاستعمال العادي أو للاستعمال الخاص، أو محتقظة بصفاتها أو بخصائصها.” The difference between the two translations is that they tackle two different issues. The English version discusses the lack of conformity that does not exist at the time the risk of loss is passed to the buyer. The seller is liable for the lack of conformity that *occurs* after the risk is passed. The Arabic terminology uses the term *يظهر* instead of *occurs*, thus implying that the seller is liable whether the nonconformity comes to existence before or after the passing of the risk, thus making Article 36(1) and Article 36(2) deal with the same issue. These issues did not exist before the 2001 amended version.⁸⁶

B. Compatibility Issues Between the CISG and National Law

The issue of compatibility between the CISG and all 57 Member states of the Organization of Islamic Cooperation is a tremendous task and cannot be fully discussed in a small paper like this. For the sake of brevity, this paper will only discuss the issues between the CISG and Arab countries in brief, which is a perplexing matter. As stated before, when it comes to issues regarding the compatibility of the CISG with national law, it is shown to not be an issue. Arab countries generally have a similar legal system to Egypt, which is one of the first nations to sign the CISG. Furthermore, the CISG has greatly influenced the Egyptian Legal System, specifically the New

⁸⁶ *ibid*

Egyptian Commercial Code, Law No. 17 of 1997.⁸⁷ This has affected countries such as Kuwait⁸⁸ and Jordan,⁸⁹ and since Arab countries generally have plenty of influences from the Civil and Common Law traditions it is shown to be not an issue of incompatibility between the CISG and domestic law, which transitions to the next issue of Shariah.

C. Compatibility Issues Between the CISG and Shariah

Although Islamic countries generally have their legal systems based on their colonial past, it is still clear that there is a great deal of influence from Islamic fiqh and principles. While there are some huge differences between shariah law and the CISG like article 78 and charging interest it's been shown to not be that large of a hindrance since parties not keen on dealing with interest can just decide to opt-out from the article. However, the CISG has also shown huge similarities when dealing with the obligations remedies of sellers and buyers similar to the Islamic traditions and can be demonstrated that the negatives are easily remedied while the similarities are a huge bonus, thus it is not that big of a hindrance.

D. Ignorance of the CISG

Lastly, and most likely is that Islamic countries are largely unaware or not incentivized to sign into the CISG. Even Islamic countries like Egypt who was one of the earliest nations that signed the CISG offer no courses on the CISG at the undergraduate level and courses at the graduate level are limited. The same goes for other Arab countries like Iraq, Syria, Mauritania, and Lebanon.⁹⁰ It can also be mentioned that scholarly writings and case laws of the CISG in Egypt are extremely rare since Egypt only publishes opinions by the Constitution Court and the Court of Cassation.⁹¹

⁸⁷ Supranote 3 El-Saghir, H. (2009). 355-374

⁸⁸ al-Mukhaizeem, B. (2020). Application of CISG in Kuwait, Arab Law Quarterly, 35(3), pg. 312. doi: <https://doi.org/10.1163/15730255-14030660>

⁸⁹ Mahasneh, N. (2011). The Ratification of the United Nations Convention on Contracts for the International Sale of Goods by Jordan: The Legal Perspective and Impact. *Revue De Droit Uniforme*, 16(4), 843-865.

⁹⁰ Supranote 78, El-Saghir, H. A. (2014) pg. 511

⁹¹ Ibid

3.2 The Way Forward

No matter the reasons for not signing the CISG, Islamic countries have two possible ways to go about the situation (I) Ratify the CISG (II) Modify National Laws. Of course, it is easy to choose the first option, but for some countries like Saudi Arabia and Pakistan, it is much more difficult since they would have to either amend their constitution and recognize the concept of interest or make a reservation to article 78. This would have not been looked upon favourably by companies that use interest as a compensation measure, however other countries like Kuwait and Jordan have a great potential for signing the CISG. For countries like Kuwait, the CISG can be applied since its considered customary law between merchants and thus can be potentially used by a Kuwaiti court,⁹² customary law is crucial and is important in both shariah and Kuwaiti law One of the only issues standing in Kuwait's way to signing the CISG is the applicability of conflict-of-law rules which would still be applicable according to the CISG. Although the CISG would be a binding law, if a sale of goods contract is concluded in a non-contracting country between a Kuwaiti and a person of another nationality, with Kuwait hypothetically being a contracting state and the dispute is brought to a court in Kuwait, the CISG will be applied not the place of the conclusion of the contract.⁹³

Although both the CISG and Islamic traditions have principles such as Pacta sunt servanda and good faith in common, they are still far apart with the CISG being strictly secular. Islamic law deals with both the secular or Transactions (Mu'amalat) which deals with the same issues and the religious rituals (Ibadat),⁹⁴ and as stated Mu'amalat is mostly man-made and is hugely derived from Aristotelian Ethics,⁹⁵ and thus open to change. Moreover, it can be seen as a trait of Islam is that it is flexible, except with matters of core principles and fundamental beliefs, as being demonstrated by the impact of Islam in many different regions from North Africa to Central Asia, can be seen that Islam has been successfully incorporated into major cultures before and even during contemporary times can still be seen influencing countries such as the UK⁹⁶ so it is not

⁹² Supranote 90 al-Mukhaizeem, B. (2020) pg. 313

⁹³ Ibid

⁹⁴ Supranote 14, Twibell, T. (1997). pg. 69

⁹⁵ Supranote 65, Hassan, H. (2002) pg.283

⁹⁶ Pearl. (1997). The 1995 Noel Coulson Memorial Lecture: The Application of Islamic Law in the English Courts. Arab Law Quarterly, 12(2), 211-219.

distant to believe that Islamic scholars can find a way to successfully incorporate the CISG. Some scholars have noted the interactions between Islamic law and the CISG and have called for a more shariah-compliant model of the CISG without the interest as well as other modifications to issues such as lack of conformity, transfer of property and termination of the contract.

CONCLUSION

With the ever-going process of unifying international trade laws and trying to bridge the gaps between different legal systems, the decision of whether to ratify and apply the CISG should not rely on its compatibility with national legislation and should instead be evaluated by its many actual benefits including the relevant economic factors.

This Thesis aimed to examine the application of the CISG and analyse the reasons for the lack of ratification and application of the CISG in Islamic countries. This paper also reviewed the shariah legal tradition and discussed possible reasons why shariah countries don't use the CISG, the study used both theoretical and empirical approaches as a way to carry out the study. Regarding the issue of application the study discussed a few case laws, most important the Court of Cassations caselaw which is one of the few available cases in Egypt, in which the Egyptian court at first failed to use the CISG to then use it when the case was appealed, the thesis then discussed some of the possible explanations for why shariah countries don't utilize the CISG which were (I) Errors in the Arabic Version of the CISG (II) Compatibility Issues Between the CISG and National Law (III) Compatibility Issues Between the CISG and Shariah (IV) Ignorance of the CISG. While they are all valid reasons and contribute to the disinclination to signing the convention, none of the options can be seen as the sole factor for not doing so, as since various countries of the same legal tradition have found ways to reconcile those issues with their legal systems. The only issue that seems to play a major factor is that the Islamic world is still largely ignorant about the presence and benefits of the CISG, but it still can't be seen as the conclusive as there are a plethora of smaller reasons that may contribute to the demoralization E.g., lack of political will and existing business culture.

Two possible ways to go about incentivizing Islamic countries are to increase education about the CISG and find a way to reconcile the major differences between the CISG and Islamic principles.

For example, in countries like Egypt, which is a contracting nation, no courses about the CISG are offered in universities where this convention may be introduced at the undergraduate level and very limited options at the graduate levels. It can also be seen from the Court of Cassations Caselaw that Egyptian Judges lack crucial knowledge of the CISG and prefer to apply national law in cases where the CISG is not only applicable but vital to resolving the case fairly, in connection to major principles of private international law like good faith. Regarding the second possible incentive is to adjust the laws to a more contemporary and internationally compatible interpretation of both general principles of trade law and shariah. It was mentioned that dealing with interest and uncertainty pose crucial hindrances to countries like Saudi Arabia and Pakistan which do not recognize interest and cannot sign the CISG with making a reservation to those articles which would also act as an obstacle if international companies became sceptical towards those legal systems, fearing lack of compensation in cases where it is called for. It may be viable to find a way to deal with those issues by increasing education and adjusting laws to incorporate Islamic countries into the CISG. However, due to the nature of the topic, the reasons mentioned are by no means the only ones and are not conclusive, possible studies for more potential reasons can be done under an empirical study, which can also uncover more about the application processes since as stated before there are only a few cases that are readily available to the public.

LIST OF REFERENCES:

Conventions:

[1] United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980, S.Treaty Document Number 98-9 (1984), UN Document Number A/CONF 97/19, 1489 UNTS 3. The full text of the CISG is available in pdf format at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09951_e_ebook.pdf

Academic Sources:

[1] Petersen, M. J., & Kayaoglu, T. (Eds.). (2019). *The Organization of Islamic Cooperation and Human Rights*. University of Pennsylvania Press. <http://www.jstor.org/stable/j.ctv16t6hcd>

[2] Ingeborg Schwenzer, Pascal Hachem, *The CISG—Successes and Pitfalls*, *The American Journal of Comparative Law*, Volume 57, Issue 2, Spring 2009, Pages 457–478, <https://doi.org/10.5131/ajcl.2008.0013>

[3] Dawwas, A., & Shandi, Y. (2011). *The Applicability of the CISG to the Arab World*. *Revue De Droit Uniforme*, 16(4), 813-841.

[4] Gordon, M. W. (1998). *Some Thoughts on the Receptiveness of Contract Rules in the CISG and UNIDROIT Principles as Reflected in One State's (Florida) Experience of (1) Law School Faculty, (2) Members of the Bar with an International Practice, and (3) Judges*. *Am. J. Comp. L.*, 46.

[5] Twibell, T. (1997). Implementation of the United Nations Convention on Contracts for the International Sale of Goods under Shari'a: Will article 78 of the CISG be enforced when the forum is in an Islamic state? *International Legal Perspectives*, 9(1-2), 25.

[6] Syed, A. (2015). A comparison of the Shari'ah and the convention on contracts for the international sale of goods in international business transactions. *International Law News*, 44(3), 29.

[7] Mohammed Abu-Nimer, A Framework for Nonviolence and Peacebuilding in Islam, 15 *J.L. & RELIGION* 217, 265 (2001).

[8] Trakman, L. (2011). The Twenty-First-Century Law Merchant. *American Business Law Journal*, 48(4), pg.776

[9] Rheinstein, M. (1956). In Memory of Ernst Rabel. *The American Journal of Comparative Law*, 5(2), pg. 185.

[10] Winship P. (1984). The Scope of the Vienna Convention of International Sales Contracts. In Galston N. M., Smit H. (Eds.). *International Sales: The United Nations Convention on Contracts for the International Sale of Goods*.

[11] Honnold, J. (1964). The 1964 Hague Conventions and Uniform Laws on the International Sale of Goods. *The American Journal of Comparative Law*, 13(3), 451–453. <https://doi.org/10.2307/838689>

[12] Elcin, Mert, *Lex mercatoria in international arbitration theory and practice*, Florence: European University Institute, 2012, EUI PhD theses, Department of Law Retrieved from Cadmus, European University Institute Research Repository, at: <http://hdl.handle.net/1814/25204>

- [13] Trakman, L. (2011). The Twenty-First-Century Law Merchant. *American Business Law Journal*, 48(4), 775-834.
- [14] Posner, E. (1999). Arbitration and the harmonization of international commercial law: A defence of Mitsubishi. *Virginia Journal of International Law*, 39(3), 647.
- [15] Howarth, R. (2004). Lex Mercatoria: Can general principles of law govern international commercial contracts? *Canterbury Law Review*, 10(10), 36-76. Pg 44
- [16] Clive M. Schmitthoff, *International Business Law, A New Law Merchant*, 2 CURRENT L. & SOC. PROBS. 129 (1961)
- [17] Schacht, J. (2012). *An introduction to Islamic law*. Clarendon Press.
- [18] S. H. Amin, *Middle East Legal Systems* 26 (Royston Limited 1985).
- [19] Akaddaf, F. (2001). Application of the United Nations Convention on Contracts for the International Sale of Goods to Arab Islamic countries: Is the GISG compatible with Islamic law principles? *Pace International Law Review*, 13(1),
- [20] Fazhir Rahman, *Concepts of Sunnah, Ijtihad, and Ijma In the Early Period*, *Islamic Studies* 1 (1962)
- [21] Simonsohn, U. (2018). *The Beginnings of Islamic Law: Late Antique Islamicate Legal Traditions*, written by Lena Salaymeh, 2016. *Islamic Law and Society*, 2018(4), 467-472.
- [22] Lugo, L. (2020, August 20). Mapping the global Muslim population. Pew Research Center's Religion & Public Life Project. Retrieved November 12, 2021, from <https://www.pewforum.org/2009/10/07/mapping-the-global-muslim-population/>.

[23] Mourad, S. (2019). Islamic Shari'a Law, History and Modernity: Some Reflections. *Revista De Direito Internacional*, 15(3), pg.26

[24] El-Saghir, H. (2009). The Interpretation of the CISG in the Arab World. In *CISG Methodology* (pp. 355-374). Berlin, New York: Otto Schmidt/De Gruyter European law publishers. <https://doi.org/10.1515/9783866537224.355>

[25] Brown, N. J. (1997). *The Rule of Law in the Arab World: Courts in Egypt and the Gulf*. Cambridge University Press.

[26] El-Saghir, H. A. (2014). The CISG in Islamic Countries: The Case of Egypt. *International Sales Law, A Global Challenge*, 505-517.

[27] Nicole C. O'Neal. (2009). THE DEVELOPMENT OF ISLAMIC FINANCE IN AMERICA: THE FUTURE OF ISLAMIC REAL ESTATE INVESTMENT TRUSTS. *Real Property, Trust, and Estate Law Journal*, 44(2), 279-297.

[28] Nabil A. Saleh, *Unlawful Gain and Legitimate Profit In Islamic Law: Riba, Gharar and Islamic Banking* (1986)

[29] Hassan, H. (2002). Contracts in Islamic Law: The Principles of Commutative Justice and Liberality. *Journal of Islamic Studies* (Oxford, England), 13(3), 257-297.

[30] Al-Mukhaizeem, B. (2020). Application of CISG in Kuwait, *Arab Law Quarterly*, 35(3), pg. 312. DOI: <https://doi.org/10.1163/15730255-14030660>

[31] Mahasneh, N. (2011). The Ratification of the United Nations Convention on Contracts for the International Sale of Goods by Jordan: The Legal Perspective and Impact. *Revue De Droit Uniform*, 16(4), 843-865.

[32] Pearl. (1997). The 1995 Noel Coulson Memorial Lecture: The Application of Islamic Law in the English Courts. *Arab Law Quarterly*, 12(2), 211-219.

[33] Mahasneh, N. (2010). Liability Exemption for Failure to Perform under both the Vienna Convention for International Sale of Goods 1980 and Islamic Jurisprudence. *Arab Law Quarterly*, 24(1), 73-103.

[34] Oktaviandra, S. (2018). Indonesia and Its Reluctance to Ratify the United Nations Convention on Contracts for the International Sale of Goods (CISG). *Indonesia Law Review*, 8(3), 243.

Cases:

[1] United Nations Commission on International Trade Law (UNCITRAL). Clout Cases. Retrieved from https://uncitral.un.org/sites/uncitral.un.org/files/mediadocuments/uncitral/en/cisg_digest_2016.pdf, 11 September 2021

[2] Cairo Regional Center for International Commercial Arbitration (CRCICA), Cairo, Award No. 19/1990, April 13, 1991, published in *Arbitral Awards for the Cairo Regional Center for International Commercial Arbitration* (ed. Mohie Eldin and I. Alam Eldin) (Kluwer Law International, 2000), 23–7.

[3] Cairo Regional Center for International Commercial Arbitration (CRCICA), Cairo, Award No. 50/1994, October 3, 1995.

[4] United Nations Commission on International Trade Law (UNCITRAL). (1958). The Convention on the Recognition and Enforcement of Foreign Arbitral Awards —New York Arbitration Convention, New York Convention —. New York. Retrieved from <https://www.newyorkconvention.org/countries>

Quranic Verses:

- [1] Holy Quran, Surat Al-Baqarah (The Cow), 2:275, Sahih International Translation
- [2] Holy Quran, Surat Al-Baqarah (The Cow), 2:276, Sahih International Translation
- [3] Holy Quran, Surat Al-Baqarah (The Cow), 2:278, Sahih International Translation
- [4] Holy Quran, Surat Al-Baqarah (The Cow), 2:279, Sahih International Translation
- [5] Holy Quran, Surat 'Ali Imran (Family of Imran), 3:129, Sahih International Translation
- [6] Holy Quran, Surat Al-Maidah (The Table Spread)5:1, Sahih International Translation

Hadith Collections:

- [1]Sahih Muslim, Book 10: The Book of Transactions (Kitab Al-Buyu’).
- [2]Sahih al-Bukhari, Book 34: Sales and Trade (Kitab Al-Buyu’).

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