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Halal - contractual clarity for a holy commodity

Abstract

The modern halal food chain involves many parties, each selling or buying, exporting or importing, ingredients or finished products, across many different Islamic countries, cultures and religious denominations, covered by written and unwritten rules, national and international legislation - and lack of legislation. All the more important it is to agree on the specifics of the products. If the contract is not clear and explicit, it will be difficult, if not impossible, to establish, whether the delivered product is in conformity with the purchase contract.

Trade is fast and needs quick and ready solutions. In that respect certification has solutions to offer: to the extent, that a certification body publishes the requirements of its standard on which basis it issues a certificates, these requirements can be incorporated into B2B purchase contracts by referral to that standard. By taking as a default a particular standard, parties can still agree to add or skip requirements, according to the needs of the consumer of the final product. As an international legal framework the CISG, the UN Convention on Contracts for the International Sale of Goods (1980), is shown to accommodate the particular requirements of B2B halal purchase contracts and dispute resolution.

Keywords

halal-trade, CISG, conformity, incoterms, risk, interest, arbitration, model-contract

Introduction

Halal, a religious concept, a rule of Sharia law enters the world of commerce. Halal identifies food products and is a seal of quality that fosters trade. Producing, selling, buying and eating halal is a statement of Islamic faith.

Trade in halal food has grown to an estimated 600 billion USD representing 12% of the global food market. The scale of production and the length of the food chain has grown accordingly. Ingredients and products change many hands and cross many borders before reaching the consumer. To a consumer it has become largely unknown what the origin of ingredients is, in what way the food has been produced. Around the world different interpretations exist as to what constitutes halal. By specifying in their contracts, in each shackle of the food chain, the halal requirements of the ingredients, half-products and products, producers and traders offer clarity to consumers who wish to buy in the supermarket food in conformity with their interpretation of halal. This paper examines to what extent international secular law accommodates clarity for contracts and dispute resolution in the halal food chain.

Perspective

I am writing from the perspective of an industry, trade and transport lawyer. As a private practitioner, I represent enterprises from all over the world, which do business all over the world, in goods of any kind. Food products are a special kind of goods as these tend to be perishable. Time is of the essence in any business, but in food even more so. Health hazards require food to be produced, stored and handled with even more care than non-food goods. So matters concerning

food are a special case in a lawyers practice. Halal food distinguishes itself once more. Not only in the level of care taking, but the religious quality makes it difficult, and in some respects even impossible, to compare halal food to other goods.

Religion and secular law

Can a secular legal system at all offer a satisfactory framework for contracts and conflicts in the trade of halal food? If a Muslim country has managed to marry the secular and religious aspects of its national law, how does it deal with international commercial law? Is it possible to conclude treaties which cover trade in halal food products with non-Muslim countries in a meaningful and satisfactory manner?

Also, how to accommodate for diverging interpretations of halal? The halal-worthiness of a product is up to the interpretation of the last shackle in the food supply chain, the consumer who wishes to eat halal food. In consequence, the seller should deliver a product that is compliant with the consumers' requirements. A seller's own interpretation as to what constitutes halal is not to be imposed on the transaction as far as this conflicts with fulfilling the contractual obligations.

Trust

Buying meat from your local halal butcher is largely based on trust, that the meat is actually halal. But buying in a supermarket is a different thing. Instead of locally produced and sold by the producer directly to the consumer, the halal food product comes from far, from a producer with whom the consumer is not familiar, which has bought ingredients from all over the world, from parties the producer most likely will not know personally. On top of that, both ingredients and the finished products usually change hands several times by sale and resale, making the chain even longer. Packing, transport and storage, which may affect the halal quality, adds further to the complexity and uncertainties of the chain. The growth of scale, the industrialisation and the globalisation of halal food trade, has created a void in trust. Trusting that if I buy halal, I get halal.

This trust is important in every shackle of the food supply chain, starting from the very first ingredient to the finished product, from production to wholesale, to the supermarket and to the consumer.

Clarity

How to (re-) build trust? The first step is clarity. Clarity is to be achieved in each of the shackles of the chain to such an extent, that the seller knows exactly what needs to be delivered and the buyer gets exactly what he expects to get. How should sellers and buyers of ingredients, producers, resellers, retailers contract in a halal food supply chain? How to achieve a maximum of clarity on the specifics and requirements, in particular with regard to the religious quality of halal food?

Consumers and B2B

With respect to diverging interpretations as to what halal is and what halal is not, consumers may not always be able to make their requirements explicit. Consumers buying in a supermarket will rely on a particular trade mark which offers products in accordance with their expectations. But in a business to business contractual relationship, B2B, each party is expected to have professional in-depth knowledge about the ingredients and products they trade and consequently should be able to furnish exact specifications.

As a counterbalance to market power of food chains, consumer rights are often protected. The retail sale to consumers merits a separate research and discussion. This paper is restricted to B2B halal trade in the food chain.

In B2B, in contrast to consumer sales, parties are expected to have equal negotiating power[1], so neither the seller, nor the buyer enjoys stronger protection of its rights. Furthermore, one should realise, that in a B2B food chain every buyer is a seller as well.

Conformity

As a modern food chain involves so many parties, each buying and selling, importing and exporting, ingredients and finished products, across many different Islamic and non-Islamic countries, cultures and religious denominations, covered by written and unwritten rules, national and international legislation - and lack of legislation, all the more important it is to agree on the

1 Which is a theoretical assumption. This flaw is recognised by legislators by passing anti-trust/competion law. This aspect is not further covered in this paper, as it would need, i.a., an extensive discussion on horizontal and vertical anti-competition constructs. These constructs are not particular to the halal trade. Further information on this topic provided on http://ec.europa.eu/competition/antitrust/overview_en.html

specifics of ingredients, half-finished and finished products and write these into the purchase contracts.

Only to the extent that a contract is clear, explicit and complete one can establish, whether the delivered halal product or ingredients are in conformity with the purchase contract. The contents of the contract with the particulars of the traded goods become all the more relevant if damages occur. For the buyer the challenge then is to prove that goods are not in conformity, for the seller to prove the goods are in conformity with the contract. Surprising as it may seem, the outcome of most litigation depends exactly on this point: on which party is the burden of proof; which party bears the risk of having to prove that his contention of conformity or non-conformity is right.

If the seller is not able to prove conformity and consequently has to bear the loss, he will try to take regress, if he is of the opinion that the non-conformity originated earlier in the chain. So as a buyer he will, in turn, hold his seller liable for the damages incurred.

Certification

Does a halal certificate relieve a party from liability for non-conformity of the product? A halal certificate is the statement of a third party, a certification body, that a producer or a product complies with a halal standard. If the certificate certifies that the product is halal, one will have to know against which standard and which requirements the halal conformity has been checked, how this has been checked and whether the requirements of the certificate standard are the same as, that is in conformity with, the contractual requirements. Only halal certificates which offer this degree of transparency may qualify as persuasive evidence in litigation, if it can be shown how the certification body verified that this particular consignment complied with these particular requirements. However, if it is proven that the food contains, for instance, pork, no matter how many halal certificates are issued, the product is demonstrably not halal.

In B2B trade a theological discourse on what constitutes halal is not desired. Trade is fast and needs quick and ready solutions. In that respect certification has solutions to offer: to the extent, that a certification body publishes the exact requirements of its standard on which basis it issues certificates, these requirements can be incorporated into B2B purchase contracts by referral to that standard. By taking as a default a particular standard, parties can still agree to add or skip requirements, according to the needs and convictions of the consumer of the final product.

Essential elements of international civil law

This paper examines what structures are offered by international legal instruments to negotiate clear, precise and comprehensive contracts and to facilitate dispute resolution between parties trading within an international halal food chain.[2] To that end let us first look at some essential elements of international civil law.

Private international law

Whenever a conflict with international aspects arises (parties residing in different countries, or same country, but the traded goods cross borders) the first two legal questions to be asked and answered are:

1. What court has jurisdiction over the matter?
2. The law of which country applies?

These questions belong to so called "private international law".[3]

Jurisdiction

The Latin term "jurisdiction" is composed of *ius (*law), and *dicere (*to speak). So it is, principally, the territory over which the state, or a court, speaks law. For a court to have jurisdiction in a matter, its state must have jurisdiction in the matter and the state must have bestowed jurisdiction for this matter to this national court in particular. Mostly this so called relative jurisdiction of a court is based on geography: the claimant or defendant resides in the district of the court. In some cases, however, jurisdiction of a court is based on the subject matter. For intellectual property cases, for instance, the court in the Hague has exclusive jurisdiction over all other Dutch courts, irrespective of territorial provisions on local jurisdiction.

National procedural law decides on the question, whether a national court has jurisdiction. So a Dutch court can decide it has jurisdiction or it can decide it has no jurisdiction. But it cannot decide,

2 National law remains of the essence in effectuating rights bestowed by international legal instruments, in particular the enforcement of a judgement or an arbitral award. In that respect international law does not exist in itself: enforcement of law always boils down to national law as long as national sovereignty exists.

3 Despite the word "international", every state has its own, national "private international law".

that a German court has jurisdiction instead. Only a German court can decide whether it has jurisdiction or not.

National procedural law usually provides for jurisdiction of their courts by virtue of one or more of the parties residing on its territory, or by virtue of an event having taken place within its jurisdiction (e.g. delivery of the goods) or because of assets being on its territory.

However, parties may in their contract also appoint a court to have jurisdiction.[4] Such a "jurisdiction clause" may or may not be exclusive. If the clause is exclusive, a court from another country, although it would in principle have jurisdiction according to its national procedural laws, should decline jurisdiction to the favour of the foreign court chosen by the parties to the contract.

Within the EU the member states have agreed on reciprocate rules on jurisdiction and cross border enforcement of judgements, the so called Brussels Regime. The Regime is a set of rules, which has been developed and tested in practice over a time span of fifty years. The foundation was laid by the 1968 Brussels Convention.[5] It provides a common framework to decide on jurisdiction and limits exequatur proceedings for recognition and enforcement of a foreign judgment to a formal test, such as fair hearing. Also, it contains some basic rules on lis alibi pendens: a court is called upon while proceedings have also been initiated before the court of another member state. EU Regulation 44/2001[6] modernised and “internalised” these rules and instruments into directly applicable EU law. Still exequatur proceedings were needed to have a judgement recognised and made enforceable in another member state.

The next step in removing cross border enforcement barriers was taken by a parallel regulation, the European Enforcement Order for uncontested claims.[7] For the first time national courts were empowered to certify their judgements as a “European title”, a judgement recognised and enforceable in all member states without exequatur proceedings. So, in whatever member state the judgement is rendered, it obtains the binding power of any national judgement of any and all member states. The European Payment Order[8], based on the German Mahnverfahren, are low threshold proceedings geared to obtaining payment of unpaid invoices. The Small Claims

4 See as an example the clause on *Jurisdiction* of the model contract at the conclusion of this paper
5 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A41968A0927%2801%29
6 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32001R0044
7 http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32004R0805
8 http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32006R1896

Procedure[9] is based on common law and provides an uncomplicated resolution of claims up to € 2000. Both proceedings, in force since 2008 and 2009, render a European title. Finally, Regulation 1215/2012[10], the present Brussels I Regulation (also referred to as "recast Brussels I"), has adopted the principle of a European title, giving civil courts in any member state the power to render a judgement which can immediately be enforced in the jurisdiction of any other member state, without intervention of the courts of that member state.

Most commercial parties are deterred by cross border litigation. Within the EU, however, halal trade, just as other economic branches, can benefit from these straight forward legal instruments for unpaid invoices and small damage claims, whose threshold is in many instances lower than instances offered by national legislation.

The judgements project of the Hague Conference (www.hcch.net/en/projects/legislative-projects/judgments) envisages a global scheme for jurisdiction clauses and recognition and enforcement of judgements, based on the Brussels Regime. The treaty on exclusive jurisdiction clauses is already in force.[11] The treaty on recognition and enforcement of judgements is being negotiated.

Applicable law

However many international conventions and treaties exist and apply, as long as states are sovereign, international commercial law only exists by virtue of of national laws. The provisions of national law apply and only to the extent that a treaty, to which the particular state has signed on to, applies, rules of national law are mutated by the provisions of the treaty. So national law is and remains the basis and a treaty merely influences the content of national law. Germany and the Netherlands have their own provisions on sale contracts. If a conflict between a Dutch seller and a German buyer arises, the CISG as a treaty will apply (if not excluded in the sales contract), but first and foremost it should be decided, which national law, the Dutch or German law applies.

Although private international law varies from country to country, by tradition and within the EU by virtue of the so called Rome I Regulation[12], in principle the law of the country in which the seller

9 http://eur-lex.europa.eu/eli/reg/2007/861/oj
10 http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32012R1215
11 https://www.hcch.net/en/instruments/conventions/specialised-sections/choice-of-court/
12 https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32008R0593

resides applies. However, parties may choose another law, for instance making applicable the law of the country where the buyer resides. Taking the above example, instead of Dutch law, German law would apply.

The discourse on the applicable national law does not exlude the possibility that the Sharia applies. However, it would apply by virtue of a national law. Dutch law does not decide on the question whether a particular product is halal or not. Dutch law leaves that question to be decided by the rules explicitly or implicitly chosen by the parties. If halal is ordered, one implicitly refers to the Sharia as a set of rules which decide on the question whether food can be regarded to be halal or not. For the desired interpretation of halal under Sharia law, parties need to be explicit in their contract.

Ordre Public

Jurisdiction and applicable law being two questions to be answered separately, according to their own rules, it is not uncommon, that a court has to apply not its own national law, but a foreign law. So a German court applying Dutch law, for instance. What if a rule of Dutch law goes entirely against the sense of justice in Germany? Suppose Dutch law allows for claiming interest and suppose that in Germany an absolute ban on interest exists. In such a case the German court may sustain the main claim according to Dutch law, but disregard the claim for interest. The German court will do so on basis of the *ordre public* (public policy) of Germany, which (in this hypothetical example) forbids interest. So the *ordre public* sets aside a provision of foreign law. The *ordre public* can usually also be invoked against a foreign judgement, to prevent the enforcement of those elements of a judgement which contradict public policy of the state where the judgement is to be enforced.

Arbitration

So far we have presumed that unresolved conflicts can be brought before courts only. Parties may, however, agree on arbitration. Arbitration could be described as private court proceedings,

providing an alternative dispute resolution.[13] If parties have agreed on arbitration[14], a court will have no jurisdiction to hear the merits of the case.

An arbitral tribunal usually consists of one or three arbitrators. If three arbitrators, each party will appoint one arbitrator, who does not necessarily have to be a lawyer. As a 15th century arbitration clause put it: "...shall be an honest merchant man". An arbitration institute, on which parties in most cases have agreed to warrant impartiality, will then appoint the third arbitrator as chairman. The chairman mostly is a lawyer to safeguard the compliance with the rules of arbitral procedure, prescribed by the arbitration institute. The advantage of arbitration is confidentiality: in contrast to court hearings, arbitration hearings are not public. The disadvantage: usually arbitration is more expensive, as the arbitrator fees tend to be far higher than court costs.

Nowadays alternative dispute resolutions are en vogue. Arbitration having the longest tradition, mediation has received a lot of attention the past decades. Mediation is possible where the parties agree to disagree and are both interested and determined to resolve the conflict. Lawyers should always strive for an out of court settlement for their clients. If parties on both sides are represented by professional council, such a settlement can often be reached. A mediator can be of assistance in such a process, but in my practice mediation is extremely rare.

Mediation is not geared towards a decision, but towards a settlement. If a settlement is not reached, parties will have to start court proceedings or arbitration proceedings, if contractually agreed.

To enforce an arbitral award, it needs to be submitted to a court, which will verify, whether basic principles of fair proceedings, such as fair hearing (*audi et alteram partem*) have been adhered to. After this limited judicial review, the award will be stamped as enforceable, as if it were a judgement of a court. As such it can be enforced by a bailiff on the assets of the defendant: bank account, machines, real estate, outstanding invoices of customers.

13 The compatibility of arbitration with the Sharia is favourably discussed in https://www.abacademies.org/articles/the-impact-of-sharia-on-the-acceptance-of-international-commercial-arbitration-in-the-countries-of-the-gulf-cooperation-council-6626.html and in Arbitration with the Arab Countries, by ʻAbd al-Ḥamīd Aḥdab, Jalal El-Ahdab, Kluwer Law International, 2011

14 See as an example the clause on Arbitration in the model contract at the conclusion of this paper, which can be used as an alternative to the *Jurisdiction* clause

Just as a judgement is restricted to the sovereign borders, to the jurisdiction of the country, the validity and enforceability of an award is restricted to the borders of the jurisdiction of the court having stamped the award. What if the defendant resides in another country or if assets in another country need to be attached? Should a court of that other country verify again whether the arbitration proceedings have been conducted in an orderly and fair manner? To ensure that an arbitral award once having been stamped to be enforceable in one country, is recognised and enforceable in another country, in 1958 the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, or New York Arbitration Convention[15], was agreed. More than 65 countries are signatory to this convention.[16]

One could imagine an initiative to establish a Halal Arbitration Institute. If the Institute would have a list arbitrators accredited for their knowledge about halal trade, the parties would have the advantage of their dispute being resolved with knowledge about the halal trade customs and practices.

EU legal instruments

This paper wishes to examine legal instruments on a global basis. Not being familiar with all legal systems around the world, I wish to discuss some EU legal instruments as regional solutions to challenges which exist worldwide.

The European Union enacts many directives and regulations to protect the consumer. Similar consumer protection laws will exist in other regions of the world. EU legislation has an impact on all trade to and from the EU, also for those parties, which are not in the retail business. A discussion of EU legislation reveals the impact of consumer protection on cross border B2B halal trade.

Food safety

In Regulation 178/2002 the EU has laid down the general principles and requirements of food law, procedures in matters of food safety and has established the European Food Safety Authority.

15 http://www.newyorkconvention.org
16 http://www.newyorkconvention.org/list+of+contracting+states

Citing the official explanation:[17]

The safety of food is of critical importance. Consumers must have confidence and assurance that the food they buy will do them no harm or have an adverse effect. The General Food Law Regulation establishes that only safe food and feed can be placed on the Union market or fed to food-producing animals. It also establishes basic criteria for establishing whether a food or feed is safe.

Tracing food and feed throughout the food chain is very important for the protection of consumers, particularly when food and feed are found to be faulty. The General Food Law Regulation defines traceability as the ability to trace and follow food, feed, and ingredients through all stages of production, processing and distribution.

Traceability:

- *facilitates withdrawal of faulty food/feed from the market*
- *provides consumers with targeted and accurate information on specific products*
- *covers all food and feed, all food and feed business operators, without prejudice to existing legislation on specific sectors*
- *affects importers who are required to be able to identify from whom the product was exported in the country of origin*
- *obliges businesses to be able to identify at least the immediate supplier of the product in question and the immediate subsequent recipient, with the exemption of retailers to final consumers - one step back-one step forward (unless specific provisions for for further traceability exist).*

A comprehensive overview of the tracebility is given on the EU site.[18]

The system of traceability has shown its importance for instance in the E.coli crisis in 2011, which killed 48 people in Germany and 11 in France. The source was traced back to contaminated fenucreek seeds, used to grow soya sprouts in Germany.

It should be noted that any EU member state retains the right to restrain import of food products, if

17 https://ec.europa.eu/food/safety/general_food_law/general_requirements_en
18 https://ec.europa.eu/food/sites/food/files/safety/docs/gfl_req_factsheet_traceability_2007_en.pdf

it considers the product to be a hazard to the health of its citizens. Such act of sovereignty occasionally gives rise to small trade wars within the EU, as has happened with the mad cow disease and fipronella eggs.

Product liability[19]

Directive 85/374/EEC[20] provides for liability for defective products. Directive 1999/34/EC[21] extended the scope of liability to agricultural and fishery products.

If a defective product causes any damage to consumers or their property, the producer has to provide compensation irrespectively of whether there is negligence or fault on the part of the producer.

Organic food

Council Regulation 834/2007 regulates production of organic food and labelling of organic products.

The preamble shows certain parallels with considerations about halal food:[22]

(1) Organic production is an overall system of farm management and food production that combines best environmental practices, a high level of biodiversity, the preservation of natural resources, the application of high animal welfare standards and a production method in line with the preference of certain consumers for products produced using natural substances and processes. The organic production method thus plays a dual societal role, where it on the one hand provides for a specific market responding to a consumer demand for organic products, and on the other hand delivers public goods contributing to the protection of the environment and animal welfare, as well as to rural development.
(2) The share of the organic agricultural sector is on the increase in most Member States. Growth in consumer demand in recent years is particularly remarkable. Recent reforms of the common agricultural policy, with its emphasis on market-orientation and the supply of quality products to

19 https://ec.europa.eu/growth/single-market/goods/free-movement-sectors/liability-defective-products_en
20 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31985L0374:en:HTML
21 https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32008D0641
22 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32007R0834

meet consumer demands, are likely to further stimulate the market in organic produce. Against this background the legislation on organic production plays an increasingly important role in the agricultural policy framework and is closely related to developments in the agricultural markets.

These secular ideas and ideals resemble the religious respect for the Creation. This respect cannot be expressed in money and has a personal as well as a community aspect. The fact that organic principles have been laid down in EU law, shows that it is not impossible to embed, or at least support, the imponderable in a secular legal system.

Global legal instruments

Transport and Incoterms

What happens when halal food products are damaged during transit from the seller to the buyer? Who is liable, who bears the damages, who bears the risk?

Risk for goods in a legal context implies liability for a certain period of time in which the good are in one's sphere of responsibility, without necessarily having the custody of the goods at the time and, if damage occurs, without being personally at fault. Risk is an important concept, where it is often more difficult to establish exactly what has happened to the goods, than to establish when it happened.

EXW, FOB and CIF are so called Incoterms. These three acronyms (many more exist) stand for “ex works”, “free on board” and “cost insurance freight”. Incoterms are used in contracts to establish a concise and clear allocation of costs and risk during the carriage of the goods from the seller to the buyer.

Citing from https://en.m.wikipedia.org/wiki/Incoterms:
The Incoterms or International Commercial Terms are a series of pre-defined commercial terms published by the International Chamber of Commerce (ICC) relating to international commercial law. They are widely used in international commercial transactions or procurement processes and their use is encouraged by trade councils, courts and international lawyers. A series of three-letter

trade terms related to common contractual sales practices, the Incoterms rules are intended primarily to clearly communicate the tasks, costs, and risks associated with the global or international transportation and delivery of goods. Incoterms inform sales contracts defining respective obligations, costs, and risks involved in the delivery of goods from the seller to the buyer, but they do not themselves conclude a contract, determine the price payable, currency or credit terms, govern contract law or define where title to goods transfers.

The Incoterms rules are accepted by governments, legal authorities, and practitioners worldwide for the interpretation of most commonly used terms in international trade. They are intended to reduce or remove altogether uncertainties arising from different interpretation of the rules in different countries. As such they are regularly incorporated into sales contracts worldwide.

The Incoterms in particular provide pre-defined rules for parties to choose from and include their sales contract.[23] With three letters parties can contract concisely and precisely who bears what costs and who bears the risk for the goods at which part of the transport and intermediate storage and when this risk will pass from the seller to the buyer. If damages occur, for instance contamination with non-halal food, the contractually chosen Incoterm will in most cases help to establish which party bears the risk of such contamination. Although the allocation of risk does establish which of the two contracting parties has to bear a loss in first instance, it does not preclude the risk-bearing-party from seeking indemnity from a third party which has actually caused the damage.

Why is it important to know when the risk of the goods passes from the seller to the buyer? Goods may get lost or may get damaged during transport. Halal goods may, for instance, in transit loose their halal quality through contamination by non-halal food. If goods are lost while the buyer still bears the risk, he may be found not yet having fulfilled his obligation to deliver the purchased goods to the buyer. If, however, the risk has already passed to the buyer, the buyer may be held to pay the purchase price, without getting the goods. If goods under a halal sale contract are delivered, but have lost their halal quality on the way, who is to bear the loss of value? The fact that damages could perhaps be recovered from a carrier, does not make the risk allocation and liability issue superfluous. Should the seller bear the damages and try and recover from the carrier, or should the buyer do so? Contracts of carriage are subject to limitation of liability. So a claim for damages of € 100.000 may be limited to a recoverable sum of € 5.000, leaving unrecoverable damages of € 95.000, to be borne by the seller or the buyer, whoever has to bear the risk.

23 See as an example the clause on *Purchase and Delivery* in the model contract at the conclusion of this paper

How about insurance? Most trade is insured. But the questions of liability and risk do not disappear with insurance. These issues are simlply transferred to the insurer of the seller and the insurer of the buyer, who will have to settle on which insurance company has to pick up the tab.

International conventions

Before examining in more depth the international convention CISG, it is is important to describe the nature of an international convention and an important trait: the opt-out (a well known legal term from the Brexit negotiations).

What is an international convention or treaty? It is an agreement between states, which binds the states and through direct application (an exception) or through enactment into national legislation citizens and legal persons of that state.

The mother of all treaties is the Vienna Convention on the Law of Treaties (VCLT).[24] The VCLT describes the rules for agreeing and implementing a treaty. One of the rules is that a state may accede a treaty, while opting-out of certain provisions:

Article 19
Formulation of reservations
A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:
(a) the reservation is prohibited by the treaty;
(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
(c) in cases not failing under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

The VCLT itself is a lively example of these opt-outs. For example:

The Kingdom of the Netherlands does not regard the provisions of Article 66 (b) of the Convention as providing "some other method of peaceful settlement" within the meaning of the declaration of

24 https://treaties.un.org/doc/.../volume-1155-i-18232-english.pdf

the Kingdom of the Netherlands accepting as compulsory the jurisdiction of the International Court of Justice which was deposited with the Secretary-General of the United Nations on 1 August 1956.[25]

CISG
UN Convention on Contracts for the International Sale of Goods

Having discussed some essential concepts in international civil law and various international legal instruments, the CISG, the UN Convention on Contracts for the International Sale of Goods will now be examined in more detail. The CISG as a legal instrument not only in its its subject matter, its practical, uniform solutions, but also in its globally diverse roots can offer a sound and firm legal basis to international halal trade. Together with countries from Asia, Europe, Middle-East, Africa, North and South America, Islamic countries have initiated the CISG. Arabic is one of the six official CISG languages, which are equally authentic.

History of the convention

To cite www.cisg.law.pace.edu/cisg/text/gap-fill.html:

In the medieval age there was the lex mercatoria, a set of rules which knew no boundaries in its application. Parallel with the development of the modern notion of sovereignty, national legislators commenced the localization of the law of trade. Differences between laws of countries have created barriers to international trade and added to the expense of such trade. Lack of mutual understanding of the national laws of trading partners presented added complications. Standardizing the law of international trade became an important objective.

The beginning of the unification process dates back to the late twenties. In 1929 the noted German jurist, Professor Ernst Rabel suggested to Vittorio Scialoja, the then president of the International Institute for the Unification of Private Law (UNIDROIT) to initiate work on the formation of a uniform law of international sales. UNIDROIT accepted this challenge.

25 https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en

A Committee to which the elaboration of future uniform law on the sale of goods was entrusted, submitted a preliminary draft in 1934. The revised version of that draft was approved by the Governing Council of UNIDROIT in 1939 but a plan to submit it to a Diplomatic Conference was disconcerted by the outbreak of the Second World War.

In 1951 the Government of the Netherlands convened a Conference at The Hague. Its achievement was formation of a Special Commission which produced two drafts: one in 1956 and, following comments made by Governments and interested international organizations, another draft in 1963. Encouraged by the favorable reactions the draft uniform laws received, a Diplomatic Conference was convened at The Hague in 1964. It led to the adoption of two Conventions: the Uniform Law of International Sale (ULIS) and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF).[1]

From 1966, the leading role in the creation of a uniform law of international sales that would be acceptable to a larger segment of the world trade community was taken over by United Nations Commission on International Trade Law (UNCITRAL). The general climate to promote the Hague Conventions was unfavorable. Member States of the United Nations described them as too dogmatic, complex, predominantly of the European civil law tradition and unclear, but perhaps the biggest objection was lack of global representation in the rule-making.[2] The need for a more acceptable set of trade rules encouraged UNCITRAL to undertake and advance the codification process.

The United Nations Conference on Contracts for the International Sale of Goods was held in Vienna from March 10 to April 11, 1980. It was attended by representatives of 62 states and 8 international organizations. The final outcome of the Vienna Conference was the adoption of the United Nations Convention on Contracts for the International Sale of Goods. After 50 years of work, the main document of the New Law Merchant was created.

A global convention

The CISG is a truly global convention. The eleven States which originally signed the convention were: Argentina, China, Egypt, France, Hungary, Italy, Lesotho, Syria, United States, Yugoslavia and Zambia:

DONE at Vienna, this day of eleventh day of April, one thousand nine hundred and eighty, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

The following countries have acceded the convention now:

Albania
Argentina
Armenia
Australia
Austria
Bahrain
Belarus
Belgium
Benin
Bosnia-Herzegovina
Brazil
Bulgaria
Burundi
Canada
Chile
China (PRC)
Colombia
Croatia
Cuba
Cyprus
Czech Republic
Denmark
Dominican Republic
Ecuador
Egypt
El Salvador
Estonia
Finland

France
Gabon
Georgia
Germany
Greece
Guinea
Guyana
Honduras
Hungary
Iceland
Iraq
Israel
Italy
Japan
Kyrgystan
Latvia
Lebanon
Lesotho
Liberia
Lithuania
Luxembourg
Macedonia
Mauritania
Madagascar
Mexico
Moldova
Mongolia
Montenegro
Netherlands
New Zealand
Norway
Paraguay
Peru
Poland

Republic of Congo
Republic of Korea
Romania
Russian Federation
Saint Vincent & Grenadines
San Marino
Serbia
Singapore
Slovakia
Slovenia
Spain
Sweden
Switzerland
Syria
Turkey
Uganda
Ukraine
United States
Uruguay
Uzbekistan
Yugoslavia
Zambia

Indonesia and other ASEAN countries, like Brunei, Lao PDR, Phillippines, Sri Lanka, Malaysia and Thailand, are reportedly preparing to accede to the CISG.[26]

When does the CISG apply

The CISG convention applies when at least one of the parties to a sales contract resides in a state which is signatory to the CISG, or if the law of a signatory state applies. But the parties can decide not to be bound by the CISG simply by stating in the contract: CISG is not applicable/excluded.[27] It

26 https://globalarbitrationnews.com/cisg-will-widespread-adoption-asean-result-growth-arbitration/

27 See as an example the clause on *Applicable Law* of the model contract at the conclusion of this paper. The positive choice for the CISG is in fact superfluous if the CISG would be applicable anyway, as in case of the sample parties; by adding „not“ it may serve as an example how to exclude the CISG, which is, obviously, not recommended.

is a kind of private opt-out. In this respect the CISG is an exception to the rule that once acceded, natural and legal persons of the acceded state are bound by the provisions of that convention.

If the CISG is applicable and not excluded by the parties, it supersedes concurrent provisions of national law. Only to the extent the CISG does not cover a certain aspect (for instance the interest rate) national law is to decide on that aspect of the contract.

Another special trait of the CISG is that its provisions are *ius dispositivum*: while retaining the general applicability of the CISG, parties may divert from any provision of the CISG by excluding a provision or explicitly agree that instead of the CISG provision some other, contractual, provision applies. So parties could, for instance, exclude any claim for interest.[28]

Compatibility of CISG and Islamic Law

Some discussion has been dedicated to the question whether the CISG and Islamic law are compatible.[29] Is it possible to apply Islamic Law *and* the CISG? Don't the two exclude each other? The main stumbling block obviously is the possibility to claim interest pursuant to the CISG.
The above mentioned discussion and the fact that several Islamic countries have adopted the CISG, seems to point to a direction, where CISG and Islamic law do not exclude, but rather complement each other. In my opinion the legal framework of CISG is capable to respect, accommodate and sanction a prohibition of interest. Furthermore enforcement of a CISG judgement or award in an Islamic country can, on the basis of *ordre public*, be restricted to those elements of the judgement or award which are in line with Islamic Law.

Structure of the convention

The convention[30] consists of 101 articles, divided infour parts:

1. Scope of application
2. Formation of the contract
3. Rights, obligations, passing of risk and damages
4. Final clauses

28 See as an example the clause on *Interest* of the model contract at the conclusion of this paper
29 https://www.cisg.law.pace.edu/cisg/biblio/akaddaf.html and https://www.cisg.law.pace.edu/cisg/biblio/chuah.html
30 Full text available at several sources, but easiest acces to several languages, including Arabic, being one of the authentic CISG languages: http://iicl.law.pace.edu/cisg/page/texts-cisg

ad 1. *Scope of application* has been addressed shortly above at applicable law. Without going into further detail, trade in in halal products usually does fall under the scope of the CISG if the buyer or seller resides in a CISG country, or if the law of a CISG country has been chosen by the parties.

ad 2. *Formation of the contract* is a wide field and knows many legal intricacies. For day to day business important, however, is the fact that a written contract is not needed for applicability of the CISG. So an order accepted by telephone is enough to invoke the provisons of the CISG.

ad 3. *Rights, obligations, passing of risk and damages* is obviously the main part we are concerned with in this paper. With help of the main concepts the practical working of the CISG will be further explained below.

ad 4. *Final clauses*, which contain *inter alia* provisions on reservations, the opt-outs discussed above under the heading of international conventions. It should be noted that no signatory state has opted out of the CISG provisions on interest as a component of a claim for damages.

Main concepts of the CISG

To understand the general working of the CISG it is necessary and sufficient to be familiar with its main concepts. I will discuss conformity, notification, passing of risk, fundamental breach, remedies and, as it is of high relevance to halal trade, interest.

Conformity

Article 35 CISG reads:
*(1) The seller must **deliver** goods which are of the quantity, **quality** and description required by the contract and which are contained or packaged in the manner required by the contract.*

*(2) Except where the parties have agreed otherwise, the goods do not **conform** with the contract unless they:*

(a) are fit for the purposes for which goods of the same description would ordinarily be used;

*(b) **are fit for any particular purpose expressly or impliedly made known to the seller** at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely,*

or that it was unreasonable for him to rely, on the seller's skill and judgement;

(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

(3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

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Applied to the sale and purchase of halal ingredients and products, what is "halal quality" and when does a seller deliver goods not in conformity with "halal quality"?

I propose as a definition of goods of halal quality: food which complies with the Sharia as being halal. In that definition the CISG leaves it tot the Sharia to establish what halal means in a contract between a seller and a buyer.

The next question is: is it enough to state in a purchase order: 1000 kg *halal* veal?

Different interpretations as to what constitutes halal exist, depending on denomination, country, culture. The diversity in interpretation on what constitutes halal is reflected in differences in requirements for certifications.[31] To name a few, which are stated in some standards, but absent or different in other standards:[32]

31 Initiatives exist to develop a global standard as to what constitutes halal. Discussing these initiatives is beyond the scope of this paper. A reportedly failed attempt was made to develop an ISO standard. It should, however, be mentioned that ISO certification is required by some halal importing countries, such as UAE, for certification bodies issuing halal certificates.

32 Inspired by A Comparative Analysis of Global Halal Certification Requirements, Ismail Abd Latif et al. (2014), Journal of Food Products Marketing, 20:sup1, 85-101.

Halal Requirements

- Company
    - Owner must be Muslim

- Premises of Slaughter House
    - Minimum two Muslim workers are employed
    - Only halal food and beverages are to be served, sold, stored or processed on the approved premises

- Workers
    - Muslim workers must slaughter all birds and animals
    - Staff must be briefed on their roles and responsibilities
    - Staff must practice good personal hygiene
    - Staff must wear proper attire or decent clothing at all times
    - Smoking, eating, drinking, or storing of food, drink cigarettes, medicine and other things are not allowed in production areas
    - staff must be in good health

- Equipment
    - Tools and equipment must be properly organized and kept safe

- Raw Material
    - High-risk ingredients such as intoxications and colourings must be avoided
    - Raw materials should be tested randomly by an approved laboratory
    - Questionable ingredients such as Genetically Modified Organisms must be avoided

- Packaging and Labelling
    - Labels must state the name and brand of the product
    - A halal logo must be printed on the label
    - Halal products must be hygienically packed before being transported/distributed from the manufacturing plant

- The label must be clearly printed for easy reading and be long-lasting
- A minimum content of each ingredient must be clearly stated
- The label must contain the name and address of the manufacturer as well as its trademark
- Date and/or production batch number/expiry date must be stated

- Logistic
    - Transport—must deliver halal food only

- Procedures and Documentation

    - Stunning is not allowed
    - There must be a process for the investigation of complaints so that corrective action can be taken
    - Characterisation and documentation of the genetic origins of the material must be made to ensure that undesirable impurities are controlled or totally absent

Given the diversity in interpretations as to what constitutes halal, reflected by the differences in halal requirements used by certification bodies in their standard, instead of just stating *halal,* a buyer should be more specific as to what he understands to be halal. Only to the extent that the buyer is specific, the seller knows what his buyer expects to be delivered and only to that extent it can be ascertained, once the goods have been delivered, whether the good are in conformity with the sales contract.

A standard of a halal certification body can be used in a sales contract, to state in a comprehensive and short way what the halal requirements are of the good to be delivered.[33] Even if not all requirements fit, or if requirements miss, parties can refer to the standard which comes closest to their needs, adapting the list by skipping or adding requirements and write these changes in the contract.

33 See as an example the clause on *Purchase and Delivery*, *Annex 1,* of the model contract at the conclusion of this paper. Annex 1 will, as an example, look like the Halal Requirements just stated

Notification

The buyer has to inspect the goods upon receipt and to inform the seller about deficiencies, lack of conformity, within reasonable time.[34]

Certain deficiencies can be detected by buyer, for instance whether food contains pork can be ascertained by lab analysis. But how should a buyer ascertain whether an animal has been slaughtered in the name of Allah? It is customary to distinguish between apparent and hidden defects. As long as hidden defects will remain undetected, they will not unfold any legal consequences. To provide a certain degree of comfort, that the Sharia has been followed in producing halal food also in respects, which are not measurable and detectable by worldly means, certification can play a preventive role by assessing and examining production plants to the extent, that the requirements which the examined production line has to meet are made public.

Passing of Risk

Passing of risk is an issue to be emphasised for halal trade. On top of the normal hazards during carriage for any kind of goods, halal food is prone to extra risks, apart from its perishable nature, through contamination by non-halal goods – a contamination which would not lead to monetary loss and claims in the case of non-halal food.

Above the Incoterms were introduced as a system of agreeing on allocation of risk for the goods during transit. The CISG also has in the articles 66-70 provisions on risk. As a general rule article 67 CISG prescribes:

...the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale.

This CISG risk and the Incoterms risk should be distinguished as the Incoterms deal with transport risks and explicitly not with other risks within the purchase contract.

"Delivery" and "delivery" should also be distinguished as it has points to two moments which may fall together, but more often than not do not fall together:

34 See as an example the clause on *Duty of Inspection* of the model contract at the conclusion of this paper

1. the legal Delivery of the goods by the seller to the buyer, transferring the title of ownership of the goods and
2. The physical delivery of the goods by the carrier to the receiver, which may or be the buyer, or a third party, for instance a storage house.

So Delivery (1) is an issue in the sale contract between the seller and the buyer and delivery (2) is an issue in the contract between the carrier and one of the parties of the sale contract (usually the seller, who organises the goods to be transported to the buyer).

According to the CISG, as in many legal systems, Delivery (1) takes place in the moment that the risk for the goods pass from the seller to the buyer. And often Delivery (1) also means transfer of title of Ownership. Whereas the CISG is concerned with the moment of passing of risk, tying the obligation for payment to the issue of risk, it leaves the question of transfer of title of ownership to the applicable national law.

To make it even more complicated, although Incoterms should not have an impact on risk allocation in the sales contract, other than transport risks, choosing EXW, FOB or CIF may have an impact on the moment of Delivery(1) and the passing of risk.

A German court got so confused on this topic, that it concluded that a Russian buyer failing to check on conformity at the sellers premises in Germany for an EXW sale, had forfeited on the right to claim damages for non-conformity. The goods never reached the buyer as they were destroyed by the Russian customs, finding out that the goods deviated from the description in the contract. Article 38, 2 CISG would have made the court clear, that EXW as a carriage condition does not prescribe an obligation for the buyer under the sales contract to examine the goods an at the sellers premises:

Article 38 CISG
(1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.

(2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.

The complexity of the intertwinement of sale and transport, Delivery(1) and delivery(2), different

allocation of different risks, different national rules on transfer of title make it hard to give any hard and fast rules. All the more important it is, that on basis of the sale contract it is clear what rules decide on allocation of risk and liability.

Fundamental breach

What if goods lack conformity in the halal quality? Here we touch on an essential difference between religious and worldly quality. If 100% beef protein is ordered and the seller delivers 99,8% beef protein and 0,2% pork protein, an industry allowance of less than 1% will make the product still "within specs", still in conformity with the ordered specifications. A buyer which would like to increase the purity to be received, may order 100,00 % beef protein. That will raise the threshold for the producer of the protein in cleaning his production tanks, but he will get away with 99,998 % beef protein and 0,002% pork as an allowance.[35]

If, however, halal is ordered (even without the buyer having to specify he does not want any pork) there cannot be an allowance. 99,8% halal, is not halal. 99,99999999% halal, is not halal. Despite the different interpretations as to what constitutes halal, food is halal or it is not halal. Food cannot consist of 99,8% halal and of 0,2% not halal.

So 100% beef and halal have to be dealt with differently when deciding if a product is in conformity with the contractual specifications. The provisions of the CISG do accommodate for halal conformity: if halal is agreed halal is to be delivered. Under the CISG the lack of halal quality would in most cases qualify as a fundamental breach of the contract.

If parties have not specified what elements constitute halal, a conflict may arise according to which interpretation it should be decided whether the goods delivered are in conformity. That, however, is a gap which the parties, and the parties only can fill by entering into a complete and accurate contract. The CISG, and for that matter any convention, treaty or national legislation, cannot relieve parties from this task.

35 A halal producer would never have pork protein in its tanks, but this example may apply to other kinds of contamination through insufficient cleaning.

Remedies

If it has been established that the delivered goods are not in conformity with the contract, what are the options for the buyer? The CISG gives the buyer three possible remedies:

1. Demand for performance (meaning the seller should take back the deficient consignment and deliver a conform consignment)
2. Claim damages (can be exercised together with remedy 1. and 2.)
3. Avoidance of the contract (the annulment, as if the contract never existed, meaning return of the goods and of the purchase price, if already paid)

Annulment of the contract is only possible if the breach has been fundamental. The halal quality failing will in most cases be regarded as a fundamental breach.

Interest

Article 78 CISG
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.

This article has attracted most interest in the discussion whether the CISG is compatible with Islamic law. The conclusion of the discussion seems to be that the CISG is not incompatible with Islamic law. Not being an expert on Islamic law I do not wish to express an opinion on the compatibility, but as to providing the possibility to claim interest, I believe it to be unlikely that it can be construed as an absolute hindrance to making use of the CISG for halal sales contracts:

1. The CISG is *ius dispositivum*: parties may always exclude the right to claim interest
2. The interest rate is left to national law. If the law of an Islamic state applies, the interest rate could, as a practical solution, be fixed at 0%
3. States may opt out of article 74 CISG, interest, when acceding
4. If parties have not excluded a claim for interest and judgement has awarded interest, the enforcement in an Islamic state of the interest claim may be refused on basis of *ordre public.*

In an international setting laws and opinions on justice will always divert. That in itself does not

prevent a convention being agreed between states, as long as the convention allows for an application which is in accordance with the *ordre public* of each signatory state. The CISG leaves room for parties to write their contracts and solve their conflicts in conformity with Islamic law, in all its different forms and interpretations.

Conclusion and model contract

Also on an international level Islamic law and secular law can reinforce one another. Tried and tested international legal instruments can help to ensure that the rules of the Sharia are respected and followed. International conventions offer resolution for disputes whether a product is halal or not. The only prerequisite for the effective use of the international legal instruments are contracts which provide clarity, in particular also on the halal requirements.

To help fulfil this prerequisite, a model[36] for an international B2B halal sales contract is offered. Its shortness is made possible by using the framework of tried and tested international legal instruments, which sustain contractual clarity for a holy commodity.

36 I wish to thank Alessandra Silva for the research and helping prepare this model, Laura Kurth for the many discussions on halal, without which this paper would have lacked clarity and Hans Kroon for the final touch.

SALE AND PURCHASE CONTRACT
FOR
HALAL FOOD PRODUCTS[37]

Halal Meat BV
Gezondheidsstraat 1
3311 AD Rotterdam
Netherlands

hereinafter ***Seller***

and

Halal Eat Ltd
Healthy Street 1
PLZ1234 Singapore

hereinafter ***Buyer***

HAVE AGREED AS FOLLOWS:

Purchase and Delivery

Parties have agreed upon the sale and delivery of 1500 kg of halal veal (hereinafter Halal Food Products), halal requirements as specified in ***Annex 1***[38]*, CIF premises of the Buyer no earlier than 29th of June and no later than 1st of July 2018 against payment of € 50.000 by documentary credit.*

Carriage and Storage

The Seller shall ensure that the Halal Food Products will be stored and carried separately from any non-halal food products until delivery at the premises of the Buyer.

37 With apologies for the small print: this model serves as an example and is not to be regarded or used as legal advice. Anyone aspiring to enter into a halal sales contract should seek prior legal advice to ensure that his interests are safeguarded. This disclaimer applies further to this paper in its entirety.

38 Annex 1 will contain requirements such as those listed above in the subheading Main concepts of the CISG/Conformity/Halal Requirements

Duty of Inspection

The Buyer will inspect the Halal Food Products within 10 days from the delivery at its premises. The Buyer will inform the Seller in writing of any defect and/or non-conformity of the Halal Food Products within 3 days after discovering such deficiency

[Interest

*Neither party shall be entitled to claiming interest, neither for late payment of the purchase price, nor as damages, nor on other grounds.**]***

Applicable Law

This contract shall be governed by the law of the state where the Seller resides.
The UN Convention on Contracts for the International Sale of Goods (1980) is applicable to this contract.

[Jurisdiction

*The courts of the state where the Seller has residence will have jurisdiction over claims against the Seller (and over subsequent counterclaims against the Buyer); the courts of the state where the Buyer has residence will have jurisdiction over claims against the Buyer (and over subsequent counterclaims against the Seller).**]***

or

[Arbitration

*All claims and disputes arising under or relating to this contract are to be settled by binding arbitration in Berlin, Germany according to the rules of the Halal Arbitration Institute.**]***

Rotterdam, June 18, 2018 *Singapore, June 18, 2018*

_____ _____

Seller, represented by _____ *Buyer, represented by* _____

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Biography

Murk Muller is an international trade lawyer with over thirty years practice in industry, trade and transport. Admitted to the bar in Rotterdam (Advocaat) and Berlin (Rechtsanwalt), he has worked in London, Lima, New York, Houston, San Francisco, Rotterdam, Amsterdam, Utrecht and Berlin. The increase in international trade of food products and growth of the halal market influenced his practice. Having studied Arabic and Islamic Law he has turned his focus on halal related trade. The aim of the focus is to contribute to contractual dispute resolution which acknowledges the religious and health quality of halal products.