

THE GUIDE IN DETERMINING THE CRITERIA IN DEVELOPING CONTRACT PARAMETERS OF SHARI'AH COMPLIANT E-COMMERCE

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ABSTRACT

E-commerce has become a common phenomenon today throughout the world, including Malaysia. Muslims, too, have been involved in this modern activity in order to fulfill their obligatory needs and individual necessities. Therefore, it is very important to ensure all e-commerce related activities conform to the basic principles of selling and buying according to the current fiqh muamalat and viewpoint of scholars in relation to the contract. Using the qualitative method approach, this article aims to underline some criteria to be used as a guide in developing the parameters of e-commerce contracts which are shari'ah compliant. The researcher uses the literature review and interview for data collection in identifying and determining the relevant criteria of guide in developing e-commerce parameters. In determining the main dimension, it must be verified through the method of interview with informant of muamalat experts. Results of the study found that e-commerce parameters comprise of three main dimensions and twenty-eight guide items to ensure that e-commerce contracts are shari'ah compliant.

Keywords: e-commerce; parameter; online; shari'ah compliant

INTRODUCTION

The development of information technology today has undeniably brought many different benefits to people as a whole, and not forgetting the emergence of electronic online business or better known as e-commerce. Business transactions which are electronic based, either online or virtual through the media such as computers, smart phones, and the Internet, have made life easier and apparently become advantageous in people's life. E-commerce technology includes product search, service and information, advertising and purchasing, selling and paying for any charges as well as subscribed services (Syed Shah Alam, A. Ali Khatibi, Hishamuddin Ismail, & Ismail Ahmad, 2005). The evolution of e-commerce is as Muslims are bound by religious rules and norms of the necessity in running their economic

activities. This is to ensure that e-commerce contracts are compliant with the principles of *fiqh muamalat* and the transactions are in accordance to the rules and laws of form of contract (*ijab* and *qabul*), contracting parties (*'aqid*), and subject of the contract (*ma'qud 'alaih*).

Since e-commerce contracts are done based on *'aqd bayn al-ghaibin* (contract inter absentees), it requires the details of jurisprudence law (*fiqh*) to guarantee that it is compliant to the principles of Islamic muamalah. This is different from purchase agreement that takes place face-to-face between contract inter praesentes (*'aqd bayn al-hadirayn*) with the process that facilitates the implementation of contracts and trade agreement. Matters like offer (*ijab*), acceptance (*qabul*), and unity of contract (*majlis 'aqad*), take place directly with the presence of contracting party and subject of contract. If there is any dispute in relation to the transaction that takes place, the rules are clear in order to solve it. However, there could be issues arising from the point of shari'ah and legislation when contracts are implemented without the presence of contracting party (*'aqd bayn al-ghaibin*) and subject of contract, physically.

ISSUES AND PROBLEMS REGARDING E-COMMERCE CONTRACTS

A valid contract which is shari'ah compliant in e-commerce contracts must have the elements of offer and acceptance, contracting parties and subject of contract (Billah, 2006; Securities Commission Malaysia, 2009). Those elements mentioned must adhere to the basic principles of *fiqh muamalat* which include the most important pillars and rules in the form of contract, contracting parties and subject of contract as outlined by *fiqh*. However, as e-commerce contract is different in a way that it is conducted without the presence of the contracting parties physically, it is afraid that some issues will rise in the perspective of shari'ah. According to Juaina Ahmad Fadzil and Mohammed Yusoff (2015), form of contract is done electronically through the use of e-mail, Internet website or social media application. The forms are definitely different than the foundation stipulated by *fiqh* whether it is orally, through writing, action (*mu'atah*), silence or even signals. In addition, a contract has to fulfill three important elements in order to make sure that e-commerce contracts are shari'ah compliant, namely - clear form of contract (*sighah al-'aqd*), contracting parties is to get well-defined information about the contract, and that there is continuity in the form of contract. E-commerce contracts which are based on *bayn al-ghaibin* through the use of e-mails, e-commerce websites or social applications require a clear and practical determination for the aspects like offer, acceptance, completion as well as cancellation of contract similarly it is stipulated in traditional purchase.

Apart from that, the implementation of contract for delivery of products (*al-taslim wa al-qabd*) for contract subject in e-commerce means there is a delay in terms of delivery. E-commerce contracts usually require the customer to make payment in advance before delivery of product to the contract subject. Delivery of product depends on the types of goods whether they can be delivered immediately or delayed. Digital goods such as online tickets, e-books, computer software or the like can be delivered immediately to the customer once payment is made. This is different from physical products which require certain duration of time to be delivered. Other than the delay in terms of delivery of e-commerce subject contract which is based on *bay' al-ghaib*, it does not provide enough space and opportunity to get to know the seller, to examine the products and to know where their business operates. The insufficient knowledge and information can affect the validity of the contract. In the absence of

appropriate space for consumers to research products for physical and matters connected therewith allow the elements of fraud (*ghalat*) or fraud in providing the details of the nature and characteristics of the subject contract. This problem may invite *gharar* elements in the contract and cause the imperfect contract (canceled) if not carried out with clearly defined rules.

In addition, most studies in e-commerce contract are related to formation of contract based on Islamic law. This is because e-commerce contract is a method of selling that involves inter absentees and non-existing products. Therefore, online trust among the parties is crucial as stated by Muhd Rosydi and Marjan Muhammad (2013). They proposed to develop a model in order to build online trust among the parties. This model should consist of four elements, (i) the transactions which do not involve prohibited products such as *riba*, gambling, *gharar*, (ii) contracting parties, (iii) offer and acceptance, and (iii) products and price.

Based on the issues discussed, they can also lead to e-commerce contract containing elements of *gharar* (uncertainty) and *ghalat* as stated by Siti Salwani (2007) and Mohd. Fuad (2003). These elements can lead to consumer issues and problems such as fraudulent e-commerce transactions as reported by the Ministry of Domestic Trade and Consumer Affairs (KPDNKK) in which from January to April 2015 alone there were cases of fraudulent e-commerce transactions amounted to 849 cases. Statistics also indicate that the number of fraudulent e-commerce transactions is the third highest of ten categories of complaints after service transactions and price manipulation (Statistik Utama KPDNKK, 2015). As e-commerce transactions are different, this requires a thorough explanation from the perspective of shari'ah to protect the interests of e-commerce users.

Among them is the protection against the formation and clear breakdown of the information content of the contract in order to avoid the element of *gharar*. In addition, the method of withdrawal or cancellation of the e-commerce contracts as a form of consumer protection either by implementing the principle of *khiyar* (options) or certain mechanisms. Similarly, e-commerce contracts disorders that complicate the process of claiming compensation after the contract such as the return of goods that do not meet the contract, claims for compensation mechanism and claims method. Thus, based on the issues and concerns raised, the researcher suggests a shari'ah based parameters for e-commerce contracts, covering aspects of the establishment, implementation and protection contracts.

ANALYSIS OF DEVELOPMENT OF DIMENSIONS AND ITEMS

Methods Used to Develop Dimensions and Items of Parameters

To identify and develop e-commerce contract parameters, the first aspect that needs to be carried out by the researcher is to identify the dimensions that must be present in these parameters. The researcher has adopted two methods to identify and determine the dimensions, namely with; (i) literature review and (ii) interview. Through literature review, the researcher conducted an analysis of the content of previous studies and as a secondary source of primary sources such as the works of jurisprudence (*fiqh*) and legislation. While the methods of interview were with the experts based on the questions that have been determined as result of literature review. Structured interview with closed and open responses was carried out on three experts.

Based on the determination of dimensions for the construction of the e-commerce parameters, the researcher then devised and developed the items that need to be made as guide criteria for the parameters. The determinations of those items were done by adopting a literature review based on the content analysis of primary and secondary sources. These resources consist of works of *fiqh* and legal resources related. Based on these studies, the researcher identified 28 items that need to be recommended in these parameters, namely (i) eight items under the dimension of contracting parties, (ii) nine items under the dimension of products and price, and (iii) eleven items under the dimension of form of contract.

The Analysis of Dimensions for the Construction of Parameters

The study found that the dimensions which require backed up are referring to the rule of sales contract as a decisive majority of scholar's view that the rule of the contract of sale is made up of sellers, buyers, things that are contracted and the pronouncement of the contract (al-Khin, al-Bugho, & al-Syarbaji, 1992; al-Hujawi, n.d.; Ibn Juzai, 2008; al-Zuhaily, 2005). The same elements are emphasized in the law relating to contracts in Malaysia particularly in Section 10 (1) of the Contracts Act 1950 which describes all the agreements should be considered as a contract made on the free consent of the parties qualified to perform the contract for a valid consideration as well as to the legitimate objective. According to Shaik Mohd Noor (2014), the Contracts Act 1950 contains elements of the agreement, the ability, the willingness of independent, legitimate response and legitimate purposes that meet the characteristics of the offer and acceptance. Similarly, Stone (2002) and Turban, Lee, King, & Chung (2000) explain that the pillar of the classical theory of contract in respect of the contract consists of offer, acceptance and consideration. In Section 4 (1) of the Sale of Goods Act 1957, it states that the contract of sale of goods is a contract in which the seller is ready and agrees to transfer the property in goods to the buyer for a price. Meanwhile, Billah (2007) has concluded that offer and acceptance are the main principles of the rule regardless of whether the contract is according to Islamic law or *common law*.

Elements contained in the pillars have been made the dimensions in constructing the parameters in this research with customized needs of e-commerce contracts. In fact, previous studies which were examined by the author show that the key elements must be present in e-commerce and demonstrate similarity in findings. One of the studies by Nasrul Hisham (2008) on the establishment of e-commerce contract shows that underpinning the principle tenets of the contract is the same as in the sale and purchase of established rule of *fiqh*. According to Abu al-'Izz (2008), the three pillars of the *fiqh* of buying and selling are; (i) *sighah* (form of contract), (ii) the subject of the contract, and (iii) the contracting parties, thus showing the same rule applies in the contract of e-commerce. Other findings by Nor Adila and Nor Azlina (2008), Saiful Azhar Rosly (2010) and Muhd Rosydi and Marjan Muhammad (2013) also refer to the rule in *fiqh* of buying and selling e-commerce contracts.

Apart from the basic determinations based on a literature review, an interview was conducted on three muamalat scholars to seek the views of experts. Based on interviews conducted, they agree on the acceptance of dimensions. Researchers have put forward structured interview questions with closed and open response and the results showed all three experts agree with the dimensions that have been developed. Analysis of descriptive data indicates that the informants agree with the two main aspects, which are (i) three dimensions which are the main components of parameters and (ii) three elements that must be include in that

components, namely the formation of a contract, contract enforcement and protection of contract. This is shown in Table 1.

Table 1:
Dimensions and Elements of Guide Parameters Based on Experts' Views

Guide		Frequency	Percentage
Dimensions	Contracting parties (buyer and seller)	3	100
	Products and price	3	100
	Form of contract	3	100
Elements	Formation of contract	3	100
	Contract enforcement	3	100
	Protection of contract	3	100

Based on Table 1, it shows that all experts agree with the dimensions and elements proposed by the researcher to develop e-commerce contract parameters that are in line with Islamic principles. All three experts unanimously voted for the basis of selling and buying as outlined by *fiqh* as dimensional parameters in developing e-commerce. In addition, the elements contained in the parameters which include the formation of a contract, contract enforcement and protection contract, are also fully accepted by the experts. All three of these elements can be placed either in the dimensions of the contracting parties, product and price or form of contract. In conclusion, the dimensions which have been agreed upon by experts and included in parameter elements of e-commerce are:

- (i) Dimension I : Contracting parties (seller and buyer)
- (ii) Dimension II : Products and price
- (iii) Dimension III : Form of contract

Item Analysis for Constructing Guide Criteria

The researcher identified 28 items that need to be recommended in these parameters, namely (i) eight items under the dimension of contracting parties, (ii) nine items under the dimension of products and price, and (iii) eleven items under the dimension of form of contract. This is shown in Table 2.

Table 2:
Dimensions and Number of Items for Developing the Parameters

Dimension	Number of Items
Contracting parties	8
Products and price	9
Form of contract	11
Total	28

Table 2 above shows the number of items of guide criteria for the three dimensions. Meanwhile the determination of dimensions and items of guidance on the content of e-commerce contract parameters based on shari'ah is shown below in Table 3.

Table 3:
Items for Guide Parameters of Shari'ah Compliant E-commerce Contracts

No.	Guide Items
Dimension: Contracting Parties (seller and buyer)	
A01	E-commerce contract can only be done by those aged 18 and above for both contracting parties.
A02	Both contracting parties form the e-commerce contract without any force.
A03	Both parties have the ability to use electronic equipment to implement e-commerce contracts.
A04	Both parties have access to methods specific to the e-commerce contract such as the Internet, email, WhatsApp, Facebook, Instagram or other social applications as appropriate.
A05	E-commerce entrepreneurs are registered with the Companies Commission of Malaysia (SSM).
A06	The seller/entrepreneur states personal details, company, address, and means of communication to the buyer.
A07	Buyers provide personal information such as name, address, telephone number, and e-mail to the seller prior to implementing e-commerce contracts.
A08	Personal information of buyers/clients is assured full protection by the seller.
Dimension: Products and Price	
B01	Products subscribed exist clearly and conspicuously in the market.
B02	Product specifications are clearly stated by the seller.
B03	Buyers are provided with special methods should they want to find out more information about the products they intend to buy.
B04	Payment is made in cash in the event of the contract such as using a debit card, credit card or electronic funds transfer.
B05	Delivery of products made within the time period specified clearly.
B06	Prices of products are clearly defined as well as the side cost.
B07	If there is cost of delivery, cost is clearly stated whether it is borne by the seller or the buyer.
B08	Buyers are given a replacement product, damages or reimbursement for products that do not meet the specifications as stated.
B09	Buyers are given a replacement product, compensation or refund for defective products or damage upon receipt.
Dimension: Form of contract	
C01	E-commerce contracts are contracts executed in writing.
C02	The event of contract takes place even though it is formed without the presence of contracting parties (face-to-face).
C03	Acceptance should be in accordance with the offer within a reasonable time clearly and distinctly.
C04	Offer and acceptance by both contracting parties to be notified by electronic messages like WhatsApp, email, acceptance key or other suitable applications.
C05	Acknowledgment of receipt of electronic messages (such as WhatsApp, email or other social applications as appropriate) by both parties facilitates that e-commerce

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- contract has been performed.
- C06 Seller shall agree to send the product to the designated destination requested by the buyer or to any destination agreed upon in the contract.
 - C07 Buyers can check the details (such as a summary of transaction) before completing the purchase contract with the payment.
 - C08 E-commerce contract provides a method for both parties to cancel the transaction before it is finalized.
 - C09 Contracts provide a reasonable period of time to cancel or withdraw from the contract such as the return of goods traded in three days.
 - C10 Both parties are provided with evidence, receipts, and documents for each transaction made.
 - C11 Printed documents such as subscription forms, receipts, and proof of reservation/payment is owned and maintained by both contracting parties.
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Based on Table 3, it shows that the 28 guide items that should be examined by those involved in e-commerce transactions play important role to ensure that contracts which they carried out are in accordance with the provisions of *fiqh*. This is because the determination of the item is carried out with a guide based on the principles of jurisprudence and legal practice in Malaysia. Thus, the seller's or the buyer's compliance to these guidelines will not only preserve the purchase contract as lawful according to *fiqh*, but also its compliance with trade laws is guaranteed.

CONCLUSION

The rapid growth of e-commerce is not an obstacle to the Muslim community to engage with this activity and to ensure that the principles set according to *fiqh* are obeyed. *Fiqh* rules in the contract of sale are clearly based on the principles and conditions which have been stipulated. However, the difference in e-commerce contracts can lead to uncertainty for operators and users which in turn lead to contracts that are against shari'ah.

In order to avoid any contract from becoming null and void, the researcher suggested this study as a guide to the Muslim community to implement e-commerce contracts that adhere to the principles outlined by shari'ah. From an initial stage research in the guide criteria, the researcher then identified that there are three dimensions that should be made the main components of parameters based on the tenets of the contract of sale and subsequently supported by the guide of 28 items for this parameter. The dimensions consist of contracting parties, products and price, and form of contract.

Basically, the item that has been developed in this research already existed in the pillar of Islamic law of contract. However, Muslim community needs clear guidelines to ensure that their e-commerce transactions are operating based on shari'ah. Therefore, the determination of the criteria will help Muslim community to apply these criteria in their transactions.

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