Syariah Governance in E-Commerce Transactions

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Abstract: E-commerce retail has become the fastest growing medium of business transactions and has outpaced every other medium since more than a decade ago. The huge growth of e-commerce had concerns the Muslim consumers regarding the Islamic commercial law or syariah governance in terms of the validity of the purchasing contract involve in e-commerce. Several issues had been identified including how the purchasing contract is conducted, the qualification of involved parties (seller and buyer) and the product (item and price). This paper will discuss all these issues and clarifies the legitimacy of the e-commerce contract according to syariah governance based on the relevant literature and author’s experience and observation on several well-known online business stores namely Kinokuniya and MPHonline. This study had found that the purchasing contract produced by both companies are in line with syariah governance in terms of the legitimacy of contract, the eligibility of contracting party and the status of contract item as discussed by the four Islamic schools of Fiqh; as-Shafi’i, al-Maliki, al-Hanbali and al-Hanafi.

Key words: E-Commerce • Islamic Commercial Law

INTRODUCTION

The application of information technology is increasingly growing and has changed the pattern and style of human life in various aspects such as the method of communication, sharing of information and social lifestyle. One of the highly significant things that arise as a result of the advances in information technology is the emergence of e-commerce as a new medium of business transactions. Since more than a decade ago, e-commerce has become the fastest growing medium of business transactions and has outpaced every other medium where people can purchase and sell products and services through the internet. E-commerce offers a huge market for sellers without any border or limit, at a very low cost and fast response [1].

But, a number of fiqh issues in Islamic commercial law or syariah governance had emerged in terms of the validity of the e-commerce contract, how the purchasing contract is conducted, the qualification of involved parties (seller and buyer) and the product (item and price). These issues require a detail clarification to see how far the application of syariah governance in e-commerce activities [2].

Definition of Syariah Governance: In terms of terminology, there is no definition or standard name for the governance of syariah. There are several names used to refer to it such as Syariah Committee, The Committee of Religious Affairs, The Syariah Council and the Fatwa Authority [3].

However, at the international level, a term that is commonly used by the international standard setting bodies is syariah governance. According to [4], Islamic governance means the process of examining the commitment of an institution so that it is submissive and obedient to the law in all its activities [5]. While, the Islamic Financial Services Board (IFSB) defines syariah governance as a process that allows a financial institution to ensure the independent monitoring works effectively and in compliance with syariah [6]. Those definitions are quite brief and general in nature in which the syariah
governance is seen as a process of achieving the objectives of Syariah compliance in every Islamic financial activity.

The general definition of syariah governance can also be seen in the definition given by the current Fiqh members and experts in the field of Islamic banking and finance as [7-9]. According to [7], Syariah means the process of ensuring the supervision of a financial product or service comply with the principles of Islamic law. While in [8] defines syariah as the efforts of surveillance or monitoring activities that are used to identify the practice of Islamic banking in the financial system based on the concept of Islamic law. The definition of syariah governance by [9] is the process of examining and analyzing the activities, actions and processes carried out by an institution to ensure its consistency with the principles of Islamic law.

The Definition of E-Commerce: According to [10], e-commerce means doing business based on processing and transmitting data electronically in the form of text, sound and video. This definition is similar to the definition of e-commerce by Electronic Commerce Australia (ECA) in its annual report in 2009. According to the report, e-commerce is the process of controlling all business between several parties electronically in order to achieve the organizational activities [11]. Both definitions are quite common as they see e-commerce as an operating business electronically with no intermediary state.

According to Zain and Zakaria [12], e-commerce is the buying and selling of information, products and services through computer communications networks. Small Business Information Center in Canada gives a similar definition of e-commerce; the buying and selling of products, services and information via computer networks [13].

Both definitions are more specific than the first two definitions as it stated the intermediaries to the e-commerce, namely computer communications network. However, the definition of computer network in both this definition is used generally.

The Validity of E-Commerce Contract: Among the basic things that determine the validity of the contract in accordance with syariah is how the ijab (offer) and qabul (acceptance) is carried out in the e-commerce contract. With regard to the formation of contracts in e-commerce, there are two different opinions on the basis of the difference where both this opinion stems from the difference in determining the start of consent in e-commerce transactions. The opinions expressed are based on pervious studies related to the establishment of e-commerce transactions.

The first opinion said the e-commerce consent starts when the seller makes an offer through the product listing in their website that announced the ijab. The ijab will continue until there are buyers who are interested to buy the item. This means that as long as the website is not opened by the buyer, then the ijab is considered non-exist as the buyer is yet to know about the offers. When the buyer is satisfied with the item, he/she can select the item to be purchased and it will appear in the shopping cart. When buyer is ready to pay, he/she can click on checkout link or button and continue with providing the payment information. After that, the system will automatically send a purchase order to the seller in term of email or SMS or any means available in the system. The purchase order is considered as the qabul from the buyer and thus completed the contract [12]. According to the first opinion, the ijab begins when the buyer knows the product offers from the seller and the qabul happened when the buyer agreed to buy the product by sending a purchase order to the seller.

The second opinion said the ijab of e-commerce begins with a request from buyers who wants to buy a product, while the qabul happens when the seller agree to sell the product. According to this school of thought, the existence of the e-commerce website is an invitation or solicitation to any interested buyers to submit their offer. The ijab begins when the buyer fills in the order form with details required by the seller and sends the offer to the seller through email or SMS or any means selected by the seller. While qabul happens when the seller agreed to sell the product after satisfied with the contract details. However, based on the author's own experiences of buying products on e-commerce, the determination of the start of the contract of e-commerce is actually depends on the buying and selling process which is usually determined by the seller. To determine the formation of the agreement in the e-commerce, one must understand the process of buying as it is the basis of determining the consent.

The Contract of E-Commerce: Another Syariah issue that arises in E-Commerce is related to the type of contract applicable in the e-commerce, whether the contract is done through verbal communication, writing, actions or gestures. As the e-commerce contract take place digitally
where the buyers interact with the seller through computer screen and can be printed, therefore the e-commerce contract occurs is in a writing form [13].

Written contract is a form of contract which has been discussed by the Fiqh scholars since long time ago [14]. Written contract is legitimate in Islamic commercial law as a way to record the will of the two contracting parties whether both of them are able to speak or only one, or whether both are at a same place or in two different places [15]. Written contract between the two parties who are not at the same place is as legitimate as a verbal contract pronounced by people who are present at the same place (face to face) [16]. On this basis, the members of Islamic jurisprudence have issued a general method [17] which is

الكتابة كالخطاب

Meaning: Writing is similar to a conversation

What is important in any contract is the need that arises from the two people who would like to make a contract. The need is an internal matter that can only be disclosed with external indicators comprises of words, deeds, writing and gestures [18]. The need is important because it forms the basis of the concept of pleasing and consent as said by Allah (s.w.t)

يأتيباً الذين حاجواً لا تأكلوا أموالكم ببضائعكم إلا أن تكون نجارة عن تراضكم ولا تقولننقلوا الفسكل إن الله كان بكم رحمٌ

(Al-Quran, al-Nisa’, 4 : 29)

Meaning: Oh you who believe, do not use other people’s property in a wrong way, except by business (sale) with an agreement between you.

According to [19], written contract is allowed in the Syariah governance as long as it meets two conditions namely mustabinah and marsumah. Mustabinah means the writing is permanent when it is written on a medium that can be preserved such as paper, board, ground, wood and metal. The written contract is not valid if it is written on sand, water or air. While marsumah means the contract is written on a medium which is commonly practiced by people today and is sufficient when the letter contains the receiver’s names and sender’s signature [20].

A legal written contract does not start when the person is writing the letter, but it starts as soon as it is received and read by the recipients. That is the moment where the writing is taken into account, as the sender is considered to have made an offer and the recipient is deemed to have accepted the offer [20]. However, if the person did not make any acceptance after reading the contract in the first time, but decided to read it again afterwards and make an acceptance, then the contract would be accepted. Reading the letter for a second time shows that there is a repetition of consent [21].

Qualification of the Contracting Parties: The qualification of the contracting parties is another issue that determines the legitimacy of purchasing contract according to Syariah governance. The discussion of the contracting parties is a major topic discussed at length by Fiqh scholars, where they have different opinions in determining the pillars of contract.

According to the majority of the Fiqh members comprising Maliki, Shafi’i and Hanbali, the pillars of the contract consists of three which are those who are contracted (seller and buyer), the subject of the contract (product) and the sighah of contract (ijab and qabul) [22-24]. While, Hanafi believes that there is only one pillar in contract which is the sighah of contract [25].

However, even though there is a dissent among the Fiqh members regarding the pillars of the contract, they do agree to declare the three things (seller and buyer, products and sighah) as the basis (muqawwamat) of a contract because the contract is not valid unless all three of these things are present [26].

To enable a contract to be approved by the Islamic legislation, a person who makes the contract must be qualified to perform the contract. According to [16], the persons who are doing the contract must be an adult, rational and mature or also known as Rasheed. The meaning of Rasheed is someone who has the knowledge in managing the property and he/she must also be a pious in t religion [23]. This means that if he is a man who can manage the property but immoral, then he will not be considered as Rasheed. This view is in contrast to other schools’ views where they said that immorality does not affect the eligibility of a person as long as he knows how to manage the property [16].

Regarding contract that is involving children, the legislation is divided into 2 categories namely children who are (i) mumayyiz and (ii) not mumayyiz. Mumayyiz refers to the age at which a child can discern between right and wrong. For contract which involves children who are not yet mumayyiz, the Fiqh scholars agreed that
the buying and selling is not valid, unless the products are low in value [19]. While for contract which involve children who are mumayyiz, Hanafi, Maliki and Hanbali agreed that it is valid but the children are not bounded with the contract, except with the consent of their guardian [22-25]. In addition, the Hanbali School said that mumayyiz children require consent from the guardian before dealing with any contract [24].

In contrast, Shafi’i school said that the person who makes a contract should have been baligh and sane. Baligh means the person had reached the age of puberty. According to Fiqh scholars on the age of puberty, the majority specifies the age must be 15 years old and above for men and women. While Imam Abu Hanifah specify the age of puberty for boys of 18 years old and for women is 17 years old. Imam Malik in one of his opinion defined age of puberty as 18 years or older, while in his second opinion as 17 years old [19]. Considering the rules of baligh, Shafi’i school said that a contract is not valid if it is made by children because children are considered not yet matured and have not reach the age of puberty. Based on these two streams of opinion, the opinions from the Shafi’I school of thought is more stringent because it requires that a person must be an adult compared to others’ opinion which stating that the contract made by children who have not reached their puberty is valid as long as they have the consent from their guardians.

As the e-commerce contract involved two parties that are unlikely to know each other then it becomes difficult for the seller to ensure the identity of the buyer and vice versa. One of the solution which are commonly used in today’s e-commerce practice, is using an electronic registration form on the website to be filled by the buyer which includes his personal details such as the name of the buyer, age, mailing address, email address and telephone number. The personal details that are required by the seller may vary between different e-commerce sites. Among the factors that influence the differences is the form of the products offered. For products that need to be sent physically, the buyer has to at least state his name and address.

For example, Amazon (http://www.amazon.com), one of the biggest e-commerce sites available, requires those who want to buy books through their online shop to register their name and e-mail. In their privacy notice, Amazon said it does not sell products for purchase by children, but only to adults. If the buyer is under 18 years old, they have to use their e-commerce facility with the involvement of their adult guardians. This requirement is intended to ensure that only that who are eligible and are adult enough has the right to do business with the company therefore to avoid fraud. This requirement is consistent with all the opinion of the Fiqh scholars in relation to the age of puberty because it is the highest age of puberty among the opinions.

Subject Matter (Product): There are two issues that arise in respect of the products that are sold through e-commerce; (i) visibility and (ii) the existence. E-commerce involve purchase contract of unseen (invisible) products where buyers did not see the physical products but rather based on pictures and descriptions. This matter had been extensively discussed among Fiqh scholars which results in different opinions.

According to Hanafi School, although the buyer did not see the products, the purchase is legitimate and he/she has the khiyar right to proceed with the contract or to cancel upon receiving the physical product, regardless whether the products meet their expectation or otherwise [17]. The School of Maliki also said that the sale of unseen product is legitimate but the seller is required to describe detail information regarding the product in the contract. Once the buyer received the product, they must be examined in order to avoid any fraud. If the product are not similar with the descriptions provided before the contract, the buyer have the right to cancel the contract [22]. But if the description is accurate, then the buyer is bounded to the contract made. Hanbali agreed with Maliki in which they said it is a legal transaction as long as the products are described in detail [24].

On the other hand, according to Shafi’i school, it is illegitimate to sell the unseen products, even if both seller and buyer physically present at the same time during the contract binding. The main reason given by Shafi’I scholar is the concern of the validity of the product (to avoid fraud). However the school of Shafi’i also provides a second opinion which says that the contract of an unseen product is legal, provided that an accurate description of the product is available and the buyer is given the khiyar right upon receiving the physical product.

Amazon sells their books online by listing all the choices complete with the price, publisher's name, the type of book whether hardcover, paperback or digital, year of publication, number of pages letters, serial
numbers and several other relevant details. Their practices are considered in accordance with the opinion of Hanafi, Maliki, Hanbali and the second opinion of Shafi’i.

The remaining concerns regarding the product involve in e-commerce is whether the product offered are already in seller’s possession (ready stock) or will only be obtained when the seller had received the order. Amazon had categorised the availability of the products using several terms:

- In stock which indicates that the products is available and ready to be sent to buyer
- Temporarily out of stock which means that the item is currently not in stock but it is available for ordering.
- Not yet published/released or available for pre-order which means that it will be shipped to buyer after the release date passes and the item is made available for shipment.
- Currently unavailable which means that the item is currently not available for ordering, and it may not be in stock again.
- Usually ships in 1-2 days or 2-3 weeks which means that the item will be ordered from a distributor and is expected to be prepared for shipment within 1-2 days or 1 to 2 weeks of the order.

The contract that is made on products that are not available, or yet to be ordered from other distributor had raised another issue of unavailable products (ghayr mawjud) during the contract. The same situation also common when dealing with fresh or perishable products like vegetables, where the seller does not contain the products unless the buyers have placed their orders. The aim is to ensure the freshness and quality of the products delivered to the buyer [27].

In connection with the sale of products that is not present while the contract is made, the Fiqh scholars agreed with two main opinions. According to the first opinion which is the majority, the legitimate condition to sell a product is it must be available and will not be allowed if the product is not yet in sellers’ possession [26]. The basis of this opinion is according to the prohibition of Rasullullah (p.b.u.h) in the following Hadith:

(تَبْنِيَّتُ النَّارِ) أَوَّلَ دَهْرٍ عَنَّ أَسْتَيْلَةً أَمْ عُبْدَتْ اَلْ

Meaning: Do not sell products that have not existed. (Hadith by al-Tirmidhi).

However, buyers are allowed to purchase products through another type of contract called the bay al-salam [26].

The second opinion, which is well known among the members of the Hanbali school including Ibn Qayyim and Ibn Taymiyyah, does allow the sale and purchase of products whether it is already in seller’s possession or not, as long as the characteristics of the products are described in details in the contract and no deceit occurs [19]. Such opinion is based on the saying of Rasullullah (p.b.u.h) which prohibited anyone to purchase products that are not present to prevent the occurrence of fraud and the fear of any contentious. If an item is not available, but will be available in the future and can be delivered, then the contract is valid as the deception has vanished [14].

In general, the two different opinions are not conflicting. Although the first opinion prohibits the sale and purchase of products that do not yet exist, there is an alternative using the bay as-salam contract. Referring to the process of buying a book from the Amazon website, the offer starts when the company listed the book for sale which contains details of the book, including books that are not currently available in their stock. Assuming the details given for the product is accurate, the contract of purchase for ghayr mawjud products in Amazon.com is legitimate according to Hanbali’s school. The only concern left is whether the common way of purchasing the product can be considered as bay as-salam or not.

Referring to the common practice in today’s business activities, a buyer who wishes to buy an item will start by making an order to the seller. Then the seller will process the order and after satisfied, particularly on the payment, the seller will deliver the products to the buyer after which the purchase is considered complete. An order means a request made to acquire products [28]. Based on this scenario, the type of contract involve in e-commerce today is referring to bay as-salam irrespective of whether the products ordered is already available or not. Therefor the contract offers by Amazon is considered legitimate as it resembles bay as-salam concept.

Current Situation: To further clarify the Syariah governance issues in e-commerce, this paper analyses the process of purchasing books from two online bookstores in Malaysia which are Kinokuniya (https://malaysia.kinokuniya.com) and Mphonline (http://www.mphonline.com).
The E-Commerce Process of Kinokuniya

![E-Commerce process at Kinokuniya Malaysia online book store.](image)

Based on the figure above, the process of buying a book at the Kinokuniya website begins when the buyers opened the company’s website and order the desired books. Books ordered will be included in the shopping cart together with the price and shipping costs. At the bottom of the shopping cart, the buyer should confirm details of who will pay the bills and to whom the shipment will be made. Next, the purchaser shall specify the payment method and if the buyer chooses to pay by using a credit card, he must indicate the details such as credit card number, the three digit security code, expiry date and the name of the bank that issued the card. The process ends when the buyer clicks the My Order Confirm button.

Once the company received the order, the company will declare the order confirmation number where this number will be used as a reference when buyers want to make any inquiries about the order. At this stage, the company has not yet processed the buyer's payment details in which the company said buyers will receive an electronic mail (e-mail) from the company which requires the buyer to verify the information attached.

On the same day, the buyer will receive an e-mail from the company as a confirmation of his order. The e-mail contains the following details: (i) order number, (ii) customer number, (iii) the serial number of the book, (iv) book title, (v) quantity and price of book, (vi) shipping costs, (vii) the total cost, (viii) name and address of the person who will receive the order. Confirmation of order from the company is very helpful to the buyer in ensuring the agreed price to avoid any error in quotation. The company will not charge the buyer's credit card until the buyer confirms the order.

To confirm the order, the buyer must reply an e-mail to the company with the following details: (i) the name written on the credit card used for payment, (ii) full name of the bank that issued the credit card, (iii) three security code number after sixteen credit card number located at the back of credit cards, (iv) billing address of the credit card holder and (v) full name of person who will receive the order. Based on this purchasing process, formation of contract only begins when the seller send e-mails to the buyer where the e-mail contains the ijab (offer) of the seller. The completion of contract occurs when the buyer confirms the qabul (acceptance) by replying to the seller’s e-mail with the details required. In conclusion, the formation of contracts in e-commerce carried out by Kinokuniya occurs at the end of the purchase process. The detail description of the books provided by the Kinokuniya website is adequate in ensuring the legitimacy of the product offered, although the buyer had not see the physical item upon agreeing with the contract. The contract is also valid no matter whether it is ready in stock or yet to be acquired by the seller. Regarding the khiyar right, Kinokuniya had a clear statement in their website terms and condition in section (6) Acceptance of Products:

“In so far as the Products are books are sold as perfect unless otherwise expressed; if upon collating any should prove defective the Buyer shall be at liberty to take or reject them provided they are returned within 7 days after the conclusion of the sale.”

Konikuniya customer had a right to return the defective product within 7 days after receiving the product. Their practices are considered in accordance with the opinion of the Maliki School where buyer can cancel the contract if the product is not accordance with the descriptions. Regarding the qualification of the contracting parties, Kinokuniya also had a clear statement in their website terms and condition in section (1) Agreement:
“1.1.2 You are at least 18 years old and have the necessary legal capacity, right, power and authority to agree to these Website Conditions;”

This term is in accordance with all the opinions of all the Fiqh scholars, where 18 years old is the highest puberty age among the different opinions.

The E-Commerce Process of MPHonline:

Based on the figure above, the beginning process of buying a book at the MPHonline is the same as in the Kinokuniya where the customers have to sign up for an account to enable them to purchase the books. The next process such as selecting a book and filling out the delivery details are also the same between the two companies. The differences start with the payment process, when the actual payment is done as soon as the buyer completed the banking approval process without any notification from the seller. The seller will then process the order and proceeds with the delivery of the book.

Although there are differences in the purchasing process, but the formation of the contract are similar specifically in terms of the practice of ijab and qabul between the seller and buyer. At Kinokuniya, the ijab happened when the seller send an email for the purchase confirmations while the qabul happened when the buyer reply the email together with the details required. Whereas at MPHonline, the ijab happened when the company offer their books for sale in the website listing, while the qabul happened when the buyer completed the payment process.

Based on the implementation of MPHonline e-commerce transactions above, the purchase contract is legitimate as it does meet the ijab and qabul characteristics. MPHonline clearly explain the khiyar right of the buyer in their return policy statement:

“We will accept returns from customers for purchases sent back and received by us within 7 days of receipt of the shipment on the following conditions: Incorrect or defective item(s) delivered; and the items returned to us are in its original condition.”

This policy is similar to what offered by Kinokuniya where the buyer can cancel the contract if the product is proven defective of incorrect.

Regarding the qualification of the contracting parties, there is no statement of evidence on the MPHonline website related to minimum age required to be a buyer. However, complete the order process, the buyer have to make the payment using several methods including Credit Card, Maybank2U, CIMB Clicks and PayPal. All these methods required the buyer to be at least 16 years old or above. Hence, a child who tries to buy a book from MPHonline will eventually need consent from an adult guardian. Therefore the contract is legit according to the schools of Maliki, Hanafi and Hanbali but not according to Shafi’i.

CONCLUSION

The issues of Syariah governance in terms of the validity of e-commerce contract, the form of contract that occurs, the qualification of the contracting parties and the product status are important principles in ensuring the legitimacy of the business activity according to Islamic commercial law.

The process of ijab (offer) and qabul (acceptance) in e-commerce happened during the order, payment and delivery process through the web system. The ijab and qabul of e-commerce contract can happened...
between from buyer to seller or from seller to buyer depending on the procedures provided by the web system.

Based on the discussion by the Fiqh scholars on the law of contracts for an unseen product, both Kinokuniya and MPHonline are inline with the opinion of Malikischools where buyer can return the product in the case of fraud and defective. This is because the buyer have the khiyar right in which they can choose whether to continue or not with the contract if the product is defective. Regarding the qualification of contracting parties, Kinokuniya’s rule of allowing buyer of age 18 years old and above is in accordance to all the Fiqh scholars. While MPHonline’s policy is only accordance with Maliki, Hanafi and Hanbali but not Shafi‘i.

These principals are outlined in the Syariah governance for the purpose of protecting the right of both buyer and seller, either through e-commerce of traditional transactions. A published policy which follows the majority opinions of the Fiqh scholars should be initiated to ensure the best protection for both buyer and seller in e-commerce activities.

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