



CONSUMER PROTECTION UNDER SHARIAH LAW IN ISLAMIC RELIGIOUS TOURISM



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ABSTRACT

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Consumer protection mentions about safeguards against wrongful conduct by service providers that adversely affect consumers. In Malaysia, the field that seems to be ignored is the protection of Muslim tourists in Islamic religious tourism industry. Despite the fact that the Islamic religious tourism service is important and Hajj and Umrah travel package is regularly used by consumer in Malaysia. The number of complaints in relation to this service continued to increase annually. In fact, the complaints against the Hajj and Umrah travel agents were the highest in the Tribunal list of filed services case. The aim of this article is to examine the rules and principles under the Shariah law that gives protection to consumers in the Islamic religious tourism. The legal study conducted was indeed qualitative in nature. Being so, this study collects relevant data which related to consumer protection under Shariah law in Islamic religious tourism. The discussion focuses on the Shariah laws and references are made to the thoughts of four scholars in Islam. The study suggests that there is a need to amend the consumer protection for Muslim tourists in Islamic religious tourism. Malaysia should adopt Shariah principles into consumer protection of Muslim tourists guideline and legislation so as to strengthen the protection of consumer in Islamic religious tourism industry.

Contribution/ Originality: This study contributes by filling a gap in the knowledge regarding consumer protection and Shariah law on one hand and Islamic religious tourism in Malaysia and Muslim tourists' protection on the other hand.

1. INTRODUCTION

The term Shariah means "a comprehensive set of rules based on Islamic teachings that should regulate the general and private aspects of life". Consequently, it has become one of the most broadly used religious legal framework in the world together with other legal systems which are common law and civil law. Shariah law is made or formed from four different sources and it does not contain a single code of law. The main sources of Shariah law are the Qur'an and the *Sunnah* (teachings of prophet Muhammad s.a.w). The other two additional sources are *Ijma'* (consensus among Muslim Jurist) and *Qiyas* (legal analogy). Shariah covers various aspects of human life (Qur'an, 5:3), including Islamic religious tourism industry (Ab Rahman & Laderlah, 2018). In Islam, among the first human being rights that received attention was the protection of consumers interests. Consumer welfare, rights and protection also has been given considerable attention in Islam under the Qur'anic verses and the teaching of prophet Muhammad s.a.w, for example in a breach of legal transaction between seller and buyer of services. It is because consumer protection are the most essential elements of Muslims dealing with one another. The duties imposed to

the mankind can be divided into two. The first is “the rights of man which regulate the relationship between two parties according to their wills” and the second one is “the rights of Allah in which the law provides duties owed to other persons”. Both of these duties existed in order to protect consumers in all circumstances especially when they are parties to the business transaction. The rights and obligations of an individual towards other people are stressed hardly in Islam. The examination of the consumer rights need to be done from various aspect including, the *Aqad* (any activities related to transaction), the ethical aspects and the spiritual aspects of the transaction (Bakar, 2008). It is very important for any individuals to trade with fairness in business transaction. The consumers at large will get the benefit from the trustworthiness and truthfulness values especially when they are parties in the business transactions or merely persons who consume services. The values in Shariah are different compared to the man-made obligations where the Shariah duties exist with strong foundations. The notion in Shariah is based on the oneness of Allah and the god-consciousness (*Al-taqwa*). Without this notion, it is difficult for the human being to understand about the obligations that arise from the transaction rules and principles which are mostly derived from the divine guidance.

1.1. Why Does Shariah Law Concentrate on Consumer Protection?

Generally, a consumer can be defined as “any person who buys goods or services which have been paid for under any system of payment” (Joon & Yusoff, 2016). The concept of consumer protection usually refers to “the protection of consumers' rights through laws and policies designed to protect them against unfair business practices” (Collin, 2004; Hamidah, 2018). It also refers to safeguards against misconduct and wrongdoing acts by services provider that unfavorably affect consumers. Shariah law has given an outstanding care to the consumer protection subject because the consumers might become a victim to various kinds of tricks, such as fraud or cheating where the consumer may be induced to purchase services upon misleading information provided by the service providers. The field of consumer protection under Shariah law has received full attention and consideration and it has encouraged the service providers to conduct a permitted (*halal*) form of business as a means of financial gain. highlighted that by supporting an individual to take part in permissible business, it is indirectly has protected the consumer who is the most important element in any kind of transaction. Any actions that is not good to the consumers in a transaction are purely disapproved by Shariah whereas on the other hand it promotes any practices that guarantee the protection of consumer welfare and interests. As a matter of fact, Islam has taken a great action to stop business practices that violate the consumers' basic rights. In addition, Qur'anic verses also motivate every person to work with high self-efficacy for the whole society.

1.2. Islamic Religious Tourism and the Need for Shariah Laws for Muslim Tourists Protection in Malaysia

Religious motivated travel in the form of pilgrimage is not new, as it has been practised before the Holy Bible and Qur'an. In addition, Islamic religious tourism (Hajj and Umrah travel industry) are regarded to be the biggest religious tourism gathering. There are about 12 million pilgrims coming to the holy cities of Makkah and Madinah every year. The number of pilgrims are expected to rise to 17 million in 2025 (Al Arabia, 2012). Also, as Malaysia had the large number of Muslim populations, the government provided the huge amount of pilgrims. This projected increase will create a huge demand for travel agencies that offer Hajj and Umrah services in Malaysia. However, there are always a number of complaints about this Islamic religious tourism service every year. When there are too many choices of travel package providers, it is more likely for the customers to fall for fraud package. The increasing number of complaints in Islamic religious tourism industry confirmed the allegation that the services are assailable to illegal practices such as fraud and cheating. News about Malaysian being cheated by travel agents of Islamic religious tourism are not new. Like a recurrent disease, this problem happens to appear every year in the last 10 years. Although the reports of such illegal practices likes fraud, cheating and misconduct are often published, the tragedies are continuing to increase. Although the relationship between religion and tourism has been

addressed in the literature, but there is lack of publications in the area of Islamic religious tourism in the context of consumer protection. Malaysia is considering as an Islamic state, however, the discussion on consumer protection in Islamic religious tourism continued to be ignored. To overcome this problem, Malaysia has the option to prepare a guideline by following the rules and principles of Shariah law. The Shariah teachings control the exercise of Islamic religious tourism with the intention to conform with the higher objectives of the Shariah that uphold five goals; the preservation of religion, the safeguard of life, safeguard of the mind, protection of lineage and preservation of property. Islamic scholars have stated that all the five necessities which are agreed by the religions are ingredients without which Muslims cannot live and prosper. In Shariah law, the specific term for consumer protection does not appear in any *Fiqh* books in its exact words. However, Shariah law do provides the complete principles and rules for consumer protection in diverse chapter of *Fiqh* for example contracts, *Gharar* (uncertainty), *Khiyar* (options), *Daman* and *Hisbah*. The reason is that when the basic principles of Shariah law are applied the aim of consumer protection will be automatically served. Therefore, Shariah law concepts including rules and principles for the protection of Muslim tourist's interests are recognized in detail. It is analysed on how the Shariah law considered illegal practices such as fraud and cheating in Islamic religious tourism service. Many verses from the Qur'an and the teachings of prophet Muhammad s.a.w is quoted in this respect. Shariah view of consumer protection are discussed from the perspective of Muslim tourist protection in Islamic religious tourism industry. The protection available to consumers in Islamic religious tourism is primarily stressed. Furthermore, the ways to implement Shariah principles of consumer protection are identified. Finally, the article has been concluded with the need for an inclusive consumer regulation that is strictly founded on the Shariah law principles.

2. RESEARCH METHODOLOGY

This is a qualitative study which involves content analysis of legal materials. Therefore, this legal study adopted library based research and critically analysed all relevant materials, data and information from the library. A search of books, online databased and google scholar relating to consumer protection under Shariah law in Islamic religious tourism was undertaken. Materials on Shariah principles on consumer protection of Muslim tourists was critically assessed and analyzed. The method of content analysis was also applied in assessing all Shariah rules and principles on consumer protection in Islamic religious tourism.

3. PROTECTION FOR CONSUMER IN ISLAMIC RELIGIOUS TOURISM UNDER SHARIAH LAW

Under Shariah law, Qur'anic command and the prophet Muhammad s.a.w teachings controlled the consumer protection with strict conditions and obligations. The Islamic religion gives an attention to the relationship of service providers with the consumers by giving a comprehensive way for carrying out business and providing fair protection for consumer welfares. The right of a seller to gain profit need to be balanced with the need of the buyer whether the business dealing affects the rights of the consumer. Shariah has strictly forbid all trade and business transaction that may cause damage and harm to the service providers or consumers.

The large number of Shariah rules and principles focus on the consumer protection in Islamic religious tourism. Shariah law has given considerable concern to legitimate earning, mutual consent, truthfulness, fulfilling business obligations and transparency in dealings. In order to find out which principles under Shariah law provides the protection to the consumer of Hajj and Umrah travel services, it is important to study the types of service in Shariah law which is applicable to Islamic religious tourism service. The following discussion determine the types of service in Islam accorded to Islamic religious tourism service.

A. Types of Services under Shariah Law

The services in Shariah law can be divided into a few types. Every type of service is regulated by special rules. *Istisna'* is the first type of service existed under Shariah law. It is known as “the giving of the order to a workman to make a definite thing with the agreement to pay a definite wage or price of that thing when made” (BNM, 2014). Another type of services is the *Ijarah* (contract of hire). It is “a hire of a workman to do a job, a sale of usufruct and includes a contract for rendering services”. Under the *Ijarah*, service provider can be categorised into two types. First is the *Ajir Khass* (private hire) in which “the worker is employed to work for the hirer alone”. The second type is *Ajir Mushtarak* (common hire) in which “the worker is not restricted to work for anyone other than hirer” (BNM, 2018). The rationale of identifying the rules and principles that govern *Istisna'* and *Ijarah* because they will be used to evaluate the degree to which Shariah law gives protection to the consumers. For each type, there are several principles to safeguard the rights of consumer. Therefore, the discussion in this article is only limited to a contract of hire (*Ijarah*) since it is the type of services under Shariah law which applicable to Islamic religious tourism industry.

B. Islamic Religious Tourism Service (The Contract of Hire (Ijarah) under Shariah Law)

A contract of hire means “a contract of using the benefits in return for a consideration” (BNM, 2018). It was agreed by the scholars of the four schools which are Shafie, Maliki, Hanafi and Hanbali. Islamic religious tourism is categorised under the contract of hire as it involved the sale of service. However, the issues arise is whether the service which is intangible can be associated with property and therefore worth for protection. According to Imam Shafie, service can be associated with tangible goods since it could be retrieved like good though it could not be measured. Maliki supported the opinion by Imam Shafie in which they have considered service as property since it has monetary value and accordingly compensation for its damage is reasonable.

Nevertheless, the problem with this type of contract is that during the time of the formation of contracts the offered service does not exist. This makes the buyers in the harmful situation as they cannot evaluate the services when they enter into the transactions. There are two opinions about this issues. First, the opinion of minority groups stated that a hire contract is illegal as it is a contract of non-existent things. The benefits are not available during the period of the conclusion of the agreement and later leads to *Gharar* (uncertainty). Second is the opinion of majority Muslim jurists. They considered hire transaction permissible through *Istihsan* (preference). This is because the transaction has been in customary use and there is the need for it in the society. Furthermore, although the subject matter of offered service do not exist when signing the contract, commonly it can be retrieved at a later time. One of the example in Hajj and Umrah travel package, where a person makes an agreement with the travel agent to buy the Umrah service on an agreed price of RM6590, this is where the valid contract is formed. After the person make a full payment of the package price, then the travel agent performs the offered service, then the contract is concluded. Ibn Qayyim has also stated that it is sufficient if it can be shown that it can be retrieved in the future to make the contract valid. The non-existence in the contract will be eliminated once the hirer begins to perform. For these reasons, the jurists have recognised the contract of hire.

Majority of Islamic scholars have acknowledged the necessity for this kind of contracts, but they recognised the existence of *Gharar* (uncertainty) in this hire transaction. Nevertheless, they have viewed that the uncertainty in hire transaction is *Gharar Yasir* (tolerable) and the demand for its validity is greater from the uncertainty itself. Therefore, they have formulated several rules to combat the existence of uncertainty and consider that though the rules cannot completely eliminate uncertainty, however, they believe that the rules can reduce the uncertainty to the absolute minimum and serve the purpose to protect consumers in the Islamic religious tourism.

C. The Rule to Eradicate Uncertainty (Gharar) in the Contract of Hire (Ijarah) under Shariah Law

It is a requirement under Shariah law that every *Rukn* (essential pillars) in the contract of hire need to be determined clearly. Failing of which will lead to *Gharar* and the consumers will be at risk. Generally, for the hire

transaction to be considered as valid, there are three essential elements that require to be clear and precise. Among them are the nature of the service, the time limits of the service and the price.

i. Precise Determination of the Service

The requirement for the hire contract is specifying the nature of the service. The parties need to precisely describe and determine the nature of the service and how they are going to perform it. Hanafis in the opinion that there is no such requirement in a hire contract, however, they give options of cancellation to consumers upon receiving the service. This will provide adequate protection to consumer.

In the situation where the service provider performs more than the agreed service as stated in the contract. For instance, when the Muslim tourists buy an Umrah package without including *Ziyarah* but the *Umrah* travel agent add it into the itinerary without permission. The jurists including Imam Shafie grant Muslim tourists the *Khiyar* (option) to choose between proceed with the contract or to revoke it. If the Muslim tourist wants to accept the additional service, it is on the *Umrah* travel agent's expenses. The service provider must inform the consumer about the additional service. Without the permission, service providers will have entitled nothing as the payment for his service. Similarly, when the service provider performs contrary to the contract, the same rules applicable. The consumer can decide to either claim for the money or continue with the service and pay the already agreed price.

The right of the purchasers prevailed when the disparity of the service rendered is in relation to its quality. The consumer will entitle to a *Khiyar* (option) either to demand compensation or continue with the service and pay the equivalent cost. The rulings of Shariah law provide the benefit to the consumers in which they can select the redresses that they want using the right of *Khiyar* (option). Any performance which is contrary to the agreements amounts to disobedience which is a wrongful act and the service provider must make compensation.

In addition, the other issues that needs to be considered is whether the service providers can sub-contract others to perform the service. The service provider cannot employ others to do his work. It is necessary to work on it himself and in the case he has let another to perform it, he must make compensation if it is different from the agreed contract. The obligations of the service providers will depend on the promises made by the contracting parties. In order to protect consumers, Shariah rulings have emphasized on the importance of making clear of the obligations in the contract to avoid uncertainty. As stated in the Qur'an, 5:1 "Fulfill all contractual obligation".

Other requirement under the contract of hire is that the parties must be able to perform the contract. If the Hajj and Umrah travel agent failed to provide services as written in the pamphlet, it is clearly a breach of this Shariah principles. Therefore, the contract is void if service providers promises to do unrealistic service as the subject matter is considered uncertain. This ruling again will protect consumers since it deters the service provider to promise everything including those beyond his capability in order to secure a contract.

ii. Precise Determination of the Time Limits of the Service

Fixing the period of time is another obligation in the contract of hire. It is important in Islamic religious tourism service as the Hajj has a specific time to be perform. The jurists have two opinions in relation to the matter on whether the contracting parties can stipulate both service and the period simultaneously in the same agreement. The first opinion from Malikis, Shafies and Imam Hanafi have agreed that these two condition cannot be put together. They emphasized that putting together two conditions in the same contract will lead to uncertainty since there is doubt whether the subject matters of the contract are the stipulated time or the service itself. Uncertainty in all contracts is not allowed for consumer protection. However, the second opinion from Abu Yusuf and Imam Ahmad have allowed these two conditions to be put together as it will not lead to uncertainty since the obligation in the contract is the service that need to be done which must be precisely determine. Putting the period in the contract is only to encourage the service provider to perform the contract according to the specific time for Hajj and Umrah which is better for consumer. If the service provider fails to allow Muslim tourists to perform Hajj and

Umrah on the stipulated date, they have the right of option either to rescind or affirm the agreement. Both jurist have their own arguments and both opinions provide protection to consumers.

iii. Precise Determination of the Wages

A group of Muslim scholars maintain that the wage must be fixed by the agreement, failing which the written agreement become null and void. The types of currencies must also be clearly specified. This is because the wage is a consideration in the contract of service like the price of goods under the sale contract. Prophet Muhammad s.a.w has been reported to say, "He who hires a person should inform him of his wages". This rule has been practiced in Islamic religious tourism industry as there is a minimum indicator prices at RM4900 for Umrah Standard Economic Package. This type of standard is to protect Muslim tourists from fake Umrah travel services. It becomes a concern as this issue promotes the Maslahah, if the rule about the matter is not available it will develop the problems to the consumers as well as to the Umrah service providers. General rule provides that the wages must be clearly ascertained, however, Ibn Taimiyyah agreed that the contract is still valid even though the parties say nothing about the price as long as there is mechanism to ascertain it without much difficulty. It is in line with the provision in the *Majallah Al-Ahkam Al-Adliyyah* in which it states that if a person employs an employee without stating the wage and the daily wage is not known, he pays a wage equivalent to the work, in which reference is made to the price of similar services that are offered in the industry.

Another question that needs to be considered is when the consumers' duty to pay wages will arise, either after the formation of the contract or after the performance of the service. Maliki scholars and Imam Hanafi agreed that the responsibility to pay wages will not arise from the contract itself. The wages can be paid to the employee step by step according to the gradual acquisition of the benefits, unless the contract stipulated full payment. Both parties can make agreement to postpone the payment with the condition that this must be clearly stipulated in the agreement. If there is no such stipulation, they were in the opinion that the payment should be made gradually depending on the service performance. However, the provision in the *Majallah Al-Ahkam Al-Adliyyah* provides that the right to pay arises on the work being done. In a famous narration, the prophet Muhammad s.a.w had stated, "Give a servant his fee before his sweat dries up". This ruling is good for consumers since the obligation to pay wages only arise after the services have been gradually acquired and not on the completion of the written agreement. The consumers have room to evaluate the service before tendering any payment.

In addition, other rule relate to the wages is that it should not be attached with any condition since it will make the contract uncertain. The majority of the jurists nullified the contract with the conditions. This rule gives the protection to the consumer as it can eradicate *Gharar* in the transaction. *Gharar* in whatever events is not favourable for consumers such as in the situation where they are not certain which price is binding on them. By making the transaction as void will encourage the parties to clearly define all the terms in the agreement to avoid any dispute in the future. The next part then describes which principles and rules of Shariah law deal with consumer protection. It indicates a few features of consumer protection that have been written and mentioned in the Qur'an and *Sunnah*. Derived from these sources, the rules and principles that most pertinent to the consumer in Islamic religious tourism are:

3.1. Protection of Muslim Tourists as Consumer under Shariah Law of Fair Contract

Shariah law has covered the issue of consumer protection from various perspective, it emphasized which parts of the laws that are most relevant to consumer protection by giving the attention to the mutual consent of the parties, transparency in dealings, and fulfillment of the agreements and contract. Fairness in contract refers to situation where contract terms reflects balance of legal interests for both contracting parties. In other words, it occurs when there is equality in term of rights and obligations between the service provider and consumer. In contrast, unfair terms are contract that are cause an imbalance of interests and responsibilities between contracting

parties. In unfairness, Qur'an condemns all unfair activities. The following examples of Qur'anic verses emphasis on the importance of fairness in business transactions. For instance,

“O you who believe! Eat not up your property among yourselves unjustly except it be a trade amongst you by mutual consent” (Qur'an, 4:29).

“And eat up not one another's property unjustly (in any illegal way), nor give bribery to the rulers (judges before presenting your cases) that you may knowingly eat up a part of property of others sinfully” (Qur'an, 2:188).

Both verses urge and encourage service providers to deal with a good types of business Also, it is contended that the travel agent must avoiding any dubious transaction. The primary objective of conducting business in Islam is to encourage fair business among the service providers and to supply services to the society who was in need of Hajj and Umrah services. Therefore, service providers especially Hajj and Umrah travel agents need to follow these guides because it will lead their business to be in line with the rules of Islam.

According to this present day issues that cause trouble to the consumers of Islamic religious tourism, it is apparent that in a written agreement between service providers and the Muslim tourists, the terms and conditions stated in the agreement should be clear and precise as well as the rights and liabilities of the parties can be determine (Hamidah, 2018). Thus, it is considered unfair when a standard agreement come together with exemption clauses which have the effect of restricting the service provider or travel agent from certain liabilities. In addition, service provider is the one who is responsible in preparing the written contract, therefore the tendency of the service provider to consider the terms which are more favorable to them is high. The result of such terms may be biased to the buyers who have no ability to change the agreement. This kind of act is highly forbidden in Islam. In fact, Shariah law has given priority to consumer welfare and interests. The agreements contain an exemption clauses are not accepted and be consider as void as it against the knowledge and intention of the parties involve at the time of the *Aqad*. This is particularly on the buyer who might not be aware of the effects of accepting to the exemption clause. Shariah law gives the attention on the mutual consent between the parties, so that it protects the consumers from the early steps of the formation of contract. This has been mentioned in the Qur'anic verse which stated, “O you who believe! Eat not up your property among yourselves unjustly except it be a trade amongst you by mutual consent” (Qur'an, 4:29). This verse supports that any agreement created between the contracting parties, there must be the condition of the mutual consent. The dealing is regarded as legally binding and valid if the element of mutual consent between the parties has been established. Thus, the Hajj and Umrah travel agents cannot charge an excessive fees for the agreed service unless the Muslim tourists as consumer give a consent to it. The general rules of contract in Shariah law which are mutual consent and gainful exchange need to be fulfill by both parties; the travel agent and Muslim tourist in Islamic religious tourism service.

Additionally, Shariah law has stressed that the terms and conditions in the agreement must be clear and both parties can understand it, as a consequence, if there is any doubt and ambiguity in the contract, the consumer has the right to end the contract. The parties to the contract are advised to make a record about the agreement and any transactions or deals in front of the witnesses instead of depending an oral contract only. Also, the doubt and uncertainty between the parties can be reduced. Furthermore, Shariah law also concentrating on the clarity and transparency of contracts and agreements. Every Muslims are ordered to carry out their promises toward other parties. There are some verses in the Qur'an stating about the importance of fulfilling the promises. Among the example from the Qur'anic verse are that:

“O ye who believe! fulfill (your) obligations” (Qur'an, 5:1) and another example is that “And come not near to the orphan's property except to improve it, until he attains the age of full strength. And fulfil (every) covenant. Verily, the covenant will be questioned about” (Qur'an, 17:34).

Muslims people especially consumers are obligatory to have their business dealings and transactions in transparent manner and absolutely free from ambiguity (Mannan, 1970). Thus, Shariah law demands the terms and

conditions of the contract to be drafted in clear and understandable language. It is also require certainty in making rights and obligations.

3.2. Protection of Muslim Tourists as Consumer under Shariah Law of Fraud

In regard to mischief from service providers, Islam prohibits any transactions that closely related with any form of dishonest and fraudulent practices during or after the time of purchasing. Shariah laws have disallowed any dubious trade that rely on vague conditions. Therefore, Shariah law emphasized that in a situation where the fraud, cheating, force or wrong advertisement has been exercised toward the consumer in a business transaction, then, the deals can be cancelled straight away. The Qur'an says, "And when they have to give by measure or weight to (other) men give less than due' (Qur'an, 83:3). The said verse can serve as an example in promoting Hajj and Umrah travel packages, if the service provider purposely manipulates the advertisement in brochure to gain more sales or profits and consumers feel dissatisfied with the services, therefore, the dealings can be considered as void. In such circumstance, the service providers are expected to compensate the consumers and mitigate any losses suffered by them. Therefore, transaction that contain of fraud have been forbid in Shariah law as this may allowed an individual of being able to accumulate wealth by doing something bad to others. Shariah law urges service providers to supply a good quality services at a reasonable prices and free from any wrongful conduct. Additionally, Shariah law enforces a complete requirement for its followers to practice their own business, in providing services. Furthermore, Islam obliged the service provider to complete the works which he has agreed to perform using of his best ability, but as mankind are blessed with different skills and talents, the levels of productivity is expected to be different. It is supported by the saying of the prophet s.a.w that "If any of you undertakes to do any work, Allah loves to see him do it well and with efficiency". Any type of fraud, cheating, and deception are condemned by the Qur'an. Muslims are ordered to enter into a transaction that is exactly free from uncertainty. If force, pressure, cheating, fraud or wrong advertisement have been used in business by one of the parties to the contract, the transaction cannot proceed. The business transactions between both parties need to be clean, clear, honest and just. The goal is to protect the seller and buyer from common unfairness and consequent conflicts.

3.3. The Obligation of the Service Providers (Hajj and Umrah Travel Agent) under Shariah Law

As Islamic religious tourism falls under the category of *Ijarah*, any damage caused by the fault of *Ajir Mushtarak* either on purpose or through negligence, he will be responsible for it (Majallah Al-Ahkam al-Adliyyah, 609). When the fault or negligence causes loss of value of the services, compensation becomes necessary (Majallah Al-Ahkam al-Adliyyah, 607-608). Imam Shafie stated that if the nature of services perform by service provider is different from contract, he will be liable for the damage unless it is proven that he does his work in the most efficient manner (Al-Shafie, 1982). The service provider will be responsible irrespective of whether the service is performed with the knowledge of the consumers or not. The service provider cannot allow other people to perform the service which is in his charge, without his approval. Afterward if the problem arises due to the work done by other people, the service provider is responsible for it. Also, a service provider will be liable if he intentionally breaches any terms stated in the contract as it will consider to an unlawful act (Majallah Al-Ahkam al-Adliyyah, 608).

Nevertheless, the Muslim jurists have a different opinion about the responsibilities of *Ajir Mushtarak* in the positions where there is no prove of negligence. Abu Yusuf and Muhammad Abi Layla and one view of Imam Shafie (Al-Shafie, 1982) stated that the duties of *Ajir Mushtarak* are *Daman*. They will be responsible for the bad performance of service caused by the other people's actions regardless whether there is no negligence on their part unless there is evidence to show that the negligence is caused by factors beyond their control. Imam Malik is in the opinion that the service provider will compensate all that is caused at their hand. Imam Abu Hanifah made a distinction between performance of service with the payment of wages and with no payment of wages. If he performs the works with the payment of the wages, and both contracting parties get the benefit, therefore, the

service provider is liable for any negligence. This ruling existed on the basis of *Maslahah* to protect the consumers' rights and to prevent service providers from performing the works carelessly. Similarly, Khulafa Al-Rashidin also imposed strict obligations on the services provider. According to Ibn Qudamah, the duties of *Ajir Mushtarak* depend on the performance of work and the wages given according to the work done to the consumers failing which he must be liable for it. This view clearly provides the protection to the consumers since the service provider need to be responsible based on the nature of services.

The service provider is liable for the mistake happen in the performance of service though the mistake is genuine with no evidence of bad intention. The reason is that, even though the mistake is consider as a defense, but it cannot be use as an excuse as far as the interests of consumers are concerned. Hanafi and Hanbali jurists are in the opinion that the service provider will be accountable for their mistake if the service is performed without the consumer's knowledge. According to *Majallah Al-Ahkam Al-Adliyyah*, article 706 and 707, the service provider will be responsible for the non-performance of service due to his act even done unintentionally. This is because the wages will be given according to the job's performance and it must be carry out as in the contract. Therefore, by referring to the Shariah law principles, strict obligations have been imposed on the providers of service. They will be liable for every damage that they commit irrespective whether it is purposely done or not or cause by their negligent act or by mistake. These support the statement that Shariah law provides good values on consumers' rights in their transactions.

A. Service Providers (Hajj and Umrah Travel Agent) Tortious Liability in Negligence

The tortious liabilities under Shariah laws are founded on *Daman*. It is redressed by an award of adequate damages to the aggrieved person. For the negligence, Shariah law enforces strict duties to the service providers in which all jurists of four schools of thought in the opinion that service provider will be liable for their acts of negligence (Al-Shafie, 1982). The obligation imposed to the service provider is more rigid, where the service provider is definitely responsible for the damage or injury, and inevitable accident cannot be used as a defense. The reason for this is that service provider owed an ethical and moral duty to take care of consumer's rights by performing his work to the best of his abilities. One of the example of Qur'anic verses that highlighting about this matter is:

“Worship Allah and join none with Him (in worship); and do good to parents, kinsfolk, orphans, the needy, the neighbour who is near of kin, neighbour who is a stranger, the companion by your side, the wayfarer (you meet), and those (slaves) whom your right hands possess. Verily, Allah does not like such as are proud and boastful” (Qur'an, 4:36).

In respect of the onus of proof, Shariah law observed the liability of the service provider by paying attention to the damage and loss, if the negligence is cause by his own act regardless it is done with intention or not, or he can foresee it or not, the service provider will be liable. The rationale behind this is that the liabilities in Islam is considered as 'damage liability' and not 'fault liability' or 'strict liability'. This concept of liability is very important in consumer protection matters as the consumer are only need to show the damage, on the other hand, the service providers required to prove otherwise.

3.4. Compensation for Muslim Tourists as Consumer in Shariah Law

All the parties to the contract take an effort to carry out their responsibilities to ensure that Hajj and Umrah services are running perfectly, however, there will be always a situation where dispute arise between the service provider and the consumer. Shariah law gives a better protection to the consumer's interests, rights and welfare. Hanafis and Hanbalis are in the opinions that the greater protection has been given to the consumers where they can determine the remedies that they want. The consumer can decide to take the defective services with the reduction of fee or claim for a compensation according to the differences between the price written in the contract

and the market price during the non-performance of the service (Saiful, Mahmood, & Norhashimah, 2001). This is called option for wrong description (Majallah Al-Ahkam Al-Adliyyah, 310). The priority is given to the consumer or buyer because they are the owner of the subject matter of the service and they are eligible to any financial loss or damages. Even so, the compensation claimed cannot be more than the loss incurred and it is not serve as punishment. Qur'an stated that, "The recompense for an evil is an evil like thereof; but whoever forgives and make reconciliation, his reward is with Allah" (Qur'an: 42:40).

In respect of the issues of refunds, Shariah law accepts the returning of the items by the purchaser even the things are still in good conditions. The consumer is given *Khiyar* (option) which is three days of return policy that give time to the consumers to return back any goods to the seller, even the goods have no defect. As mentioned in one hadith by the prophet Muhammad s.a.w, "Whoever accepts back what he had sold to a Muslim, Allah will forgive his faults" (Sahih Muslim). The hadith explained that Islam allows the consumer to return the products and taking back the money form the seller, provided that it is still in the *Khiyar* period. However, in term of Islamic religious tourism services, this concept can be referred only in the situation when the evidence exists and it is proven that the services provided by the service providers was not below the standard and quality as agreed.

The next part will elaborate about the authority that was existed in Shariah law in order to exercise and use the rules and principles taken from the Qur'an and *Sunnah* to protect the right of Muslim tourists.

4. ENFORCEMENT OF SHARIAH LAW FOR THE PROTECTION OF CONSUMER (THE INSTITUTION OF HISBAH)

The institution of *Hisbah* is "a system that ensure the individuals observe righteousness in their conducts". It is to order an individual to act in good behaviour and prohibit wrongdoing. It is also known as an organization of checks and balances. There are many information in written text and history about the institution of *Hisbah* as stated in one Qur'anic verse, "Let there arise out of you a group of people inviting to all that is good, enjoining *Ma'ruf* (all that Islam order) and forbidding *Munkar* (all that Islam has forbidden)" (Qur'an, 3:104). It was also in line with Qur'anic verse that the prophet Muhammad s.a.w established *Hisbah* and selected reliable individuals as an officers in the market. The burden to carry out this job is given to *Al-Muhtasib*, where he has the responsibilities of enjoining Islamic order and forbidding evil. The protection of the consumer's interests and rights likes issued a notice about market imperfections among the responsibility of the *Muhtasib*. Any form of commercial dealing that go against the basic interests and rights of the consumers, the responsibility given to the institution of *Hisbah*. The institution of *Hisbah* has a duty to provides guidelines on how to conduct a business and trade according to the Islamic injunctions. To achieve sufficient implementation of the Shariah teachings above, there is a need to established *Hisbah* under Islamic religious tourism in order to monitor service provider and consumers. As mention in the Qur'an verse 3:104 above, its indicate the direct command from Allah about the obligations towards Islamic society by designate a number of authorized group whom is able to enforce a good bussiness conducts. The duty of enjoining good manner and forbidding the evil cannot be achieve without the involvement of person in authority. It is an obligation of the authority to implement Shariah law.

5. CONCLUSION

The above discussion shows that Qur'an provides a rigid rules and principles relating to the business ethics either in general or specific way. A Muslim service provider (Hajj and Umrah travel agent) conducting a business transaction by dealing with two parties. One of them is a mankind who are buying or selling, and the other one is Allah who act as a principal and guides the mankind in all transaction by giving a direction on how to maintain justice and equity in their dealing. It is obligatory for a Muslims to behave in an Islamic way in their transactions because Allah becomes a witness for everything in the world, "Neither you (Muhammad s.a.w) do any deed nor recite any portion of the Qur'an, nor you (mankind) do any deed (good or evil) but We are Witness thereof, when

you are doing it” (Qur'an. 10:61). For the protection of the consumers in Islamic religious tourism industry, various rulings have been provided. The Shariah law requires that all the important *Rukn* (pillars) in the contract of service need to be clearly defined which are the nature of the service, the time limits of the service and the price. Thus, the consumers must have a perfect knowledge of the transactions, other than that, they have the right of *Khiyar* (option) to nullify the contract. This article has viewed Shariah law as a possible answer to the contemporary problems relating to consumers in Islamic religious tourism. Shariah law on protection of consumer is flexible and able to meet the needs of the society. There are a lot of clear and strict guidelines on consumer protection in Islam. Because of that, it is timely for the government to take an initiative to implement the consumer protection guidelines following the concept provides by Shariah law. Malaysia should adopt these hukm into the legislation and consumer guideline so as to strengthen the consumer protection.

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