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LEGAL ISSUES IN E-WALLET PRACTICES

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ABSTRACT

E-Wallet has been applied in Muslim and non-Muslim jurisdictions in many parts of the world including Malaysia, China, India, and Korea. The application is widely used and has raised questions with regard to legal and *shariah* issues. This paper aims to analyse specifically, legal issues affecting e-wallet practices. This paper adopted a qualitative

research approach. The data collected include document reviews, ethnographical interviews and observations. This study found several legal issues related to e-wallet inter alia, an unclear position on the liability of board directors of e-wallet operators, breach of mandate and exclusion of liability of e-wallet operators. As e-wallet is important as an enabler to increase financial inclusion, it is important to address the legal issues on e-wallet to enhance good governance and best practices of e-wallet in Malaysia. The findings from this paper can be used as a basis for policymakers including scholars in the formulation of guidelines on legal and *shariah* compliance of e-wallets.

Keywords: E-wallet, *shariah* contract, legal issues, Islamic finance.

INTRODUCTION

Over the years, rapid technological advances has led to concerns regarding current views on issues which requires accelerating legal and *shariah* decisions to keep pace with the advancements. The current 4th Industrial Revolution (4IR) brings forth the idea of artificial intelligence (AI), the Internet of things (IoT) and other technologies which have gradually seeped into every aspect of our daily lives and which requires analysis from legal and *shariah* perspectives. On top of that, Islamic funds have increased over the years and various innovative products are being introduced for the benefit of consumers (Md. Nor et al., 2017).

The 4IR has also concurrently revolutionized various sectors including banking and Islamic finance. The current technological advancements has compelled experts in *muamalat* and Islamic finance to explore and respond to related issues raised by society. The surge in digital transformations is reflected in new lifestyles including how money is transacted. Traditionally, the purchase of goods can only be performed by exchanging goods with fiat money. Today, in the era of 4IR, new systems are being introduced which will eventually disrupt or replace traditional methods. This new exchange method has revolutionized the purchase of products with a click of the button.

Based on the Financial Sector Blueprint 2011–2020, Bank Negara Malaysia (BNM) (2011) has decided to increase the effectiveness of the national payment system. One of the plans is to achieve 200 e-payment transactions per capita in 2020. This plan is a clear signal

that BNM is currently very serious about digitalizing the Malaysian economy. An increasing rate of smartphone penetration in Malaysia is one of the factors for e-wallet usage among Malaysians. In addition, the cost-saving factor encourages e-wallet offerings and usage. For example, the payment method using quick response (QR) code reduces the need for a terminal system for point of sale (POS), and thus reduces infrastructure costs.

Statistical data from electronic payments by volume and value of transactions (BNM, 2020b) indicated that the rate of mobile banking usage has drastically increased from 13.6 million users in 2011 to 2.2 billion users in 2018. As a result, the volume of cheque issuance decreased to 42 percent in 2011 (Wei & Peng Tsu, 2018).

The current data also shows that there is an increasing number of e-wallet issuance in Malaysia. The number of registered non-bank e-money issuers increased from 25 issuers in 2016 to 44 issuers at the end of 2018 (Wei & Peng Tsu, 2018). This trend indicated issuers' interests in providing e-wallet services.

These scenarios indicate the need for a comprehensive study on e-wallet and its implementation from legal and *shariah* perspectives to protect users and providers from being involved in any process that does not comply with *shariah* law. This is because the essence of Islamic finance is the prohibition of *riba* and *gharar* (Seyadi, 2015).

CONCEPTUAL FRAMEWORK OF MONEY AND E-MONEY

The literature survey showed that major studies have been conducted on e-money and e-wallet from marketing perspectives. As the usage of e-wallet is becoming globally significant, including in Malaysia, most of the current studies have been focused on market awareness, acceptance and adoption of e-wallet (Andrew et al., 2019; Teoh et al., 2020). Studies in this area adopted the extended unified theory of acceptance and use of technology (UTAUT2). The focused variables include perceived security and behavioural intention. There are very limited studies on e-wallet concepts and practices conducted from Islamic perspectives. A study by Zulni and Achiria (2020) conceptually discussed e-wallet practices from the perspective of Islamic business ethics. The study conceptually constructed e-wallet

practices based on four axioms, namely unity, justice or balance, free will and responsibility.

An assessment of the current practices of e-wallet from legal and *shariah* perspectives is essential to fulfil the needs of businesses and for Muslim users to comply with *shariah*. A quick and solid analysis of the current practices of financial products and innovations using *shariah* principles is important to provide ideal guidelines (Naim et al., 2016a, 2016b). Product innovations should suit *shariah* principles and practicality aspects in terms of legal practices and other requirements (Ariff & Rosly, 2011). The same position is similar to any guidelines and parameters that support those practices. It is argued that *maqasid shariah* should become the framework for any innovation in Islamic banking (Dusuki & Bouheraoua, 2011; Mohammad & Shahwan, 2013). In this context, it is perhaps relevant to fintech development. Following this route, the preservation of wealth is categorized under five *dharuriyyat* (preservation of faith or religion, preservation of life [*Nafs*], preservation of intellect [*'Aql*], preservation of lineage or progeny [*Nasl*] and preservation of wealth or property [*Mal*]). In addition, Dusuki and Bouheraoua (2011) added that the preservation of wealth can be achieved through: (i) protection of ownership, (ii) acquisition and development, (iii) protection from damage, (iv) circulation and (v) value protection.

This elaboration suits any issues related to current developments in Islamic banking and finance, including e-wallet applications. The protection of rights and thus the preservation of owners' rights under the agency contract (*wakalah* contract) should be reflected in e-wallet operations. E-wallet providers (as agents) should manage the duty and trust given by the principal, in a way that can benefit the principal. The BNM *shariah* standard on *wakalah* highlights some concerns on this contract, which are as follows:

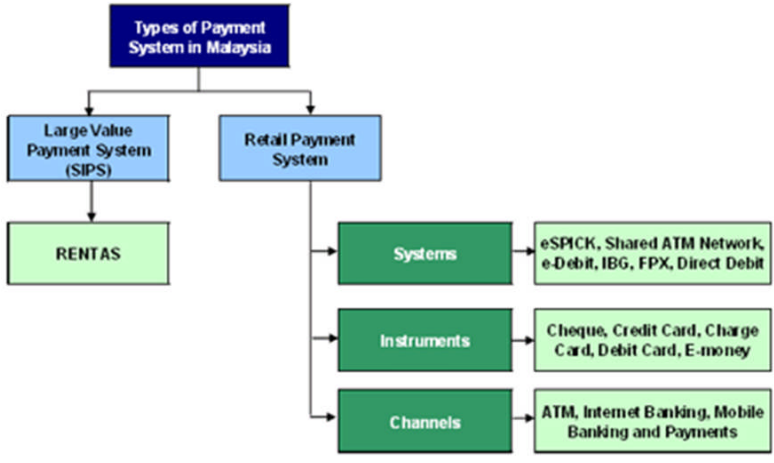
i. The subject matter of the *wakalah* contract must be *shariah*-compliant.
ii. The subject matter of the *wakalah* contract must be determined upfront by the principal, made known to and accepted by the agent.

The *shariah* requirements of the contract treatment (from the aspects of pillars and conditions of the contract) should be adopted in e-wallet practices, which aims to achieve *maqasid shariah.*

Retail Payment System Framework in Malaysia

Figure 1

Retail payment system framework which includes customer to customer, customer to provider and provider to provider transactions.



Source: BNM (2019b)

It is a trend among Islamic scholars to analyse various current financial developments to clarify Islamic guidance on these matters. One such study is by Ashraf and Hussain (2011) who discussed the role of *mudarib* in *mudarabah* as practised in the Islamic banking system. Naim et al. (2016a) examined the burden of proof in Islamic financial products. In another study, Naim et al. (2016b) related the concepts of *daman*, *taqsir*, and *ta'addi* in trust-based contracts (*'uqud al-amanat*).

Similarly, there have been many studies by scholars analysing current commercial practices from the legal point of view as it is integral to ensure its conformation with the law. Among researches in this area include studies by Mohammed et al. (2014), Buang (2017), Md. Nor et al. (2019) and Iskandar and Abdul Aziz (2017).

The use of e-money, prepaid and e-wallet have raised *shariah* issues that require in-depth analysis. Some of the issues that are being debated among scholars are constrained by the rather limited comprehensive

studies especially on the usage of e-wallet. Therefore, all executive governmental functionaries need to play their role in enhancing the Islamic economic system (Md. Nor, 2017).

E-MONEY AND E-WALLET CLASSIFICATION

There are various terms that refer to non-traditional types of payment such as e-wallet, digital wallet, e-mobile, digital money, and e-money which are regularly being used in the context of cashless payments. These terms in particular have different meanings and are used in different contexts.

E-Money (Electronic Money)

E-money or digital money refers to digital payment instruments, which are different from physical money such as fiat money and coins (Bloomenthal, 2019). E-money is the value of money that has previously been deposited in an application and subsequently converted into digital form. The value of e-money or digital money is equal to the deposited money transferred by users.

In a broader view, e-money is relatively similar to virtual currencies and cryptocurrencies. BNM (2008) defines e-money as a payment instrument containing the value of money that is previously paid by users. E-money can be used through a card or an application for both physical and online payments (BNM, 2008).

E-money users can make payments for any purchases of goods and/or services from online merchants who receive payments via e-money. When an e-money user makes a payment, the value of e-money in a particular application (such as e-wallet or prepaid card) will be deducted directly from the outstanding balance. E-money, in a broader scope, functions through e-wallets, prepaid cards or other applications.

E-Wallet

E-Wallet is a wallet application that requires “top-up of cash money” to the application either using online banking or a prepaid card. The

transferred money will be converted into e-money and put into an e-wallet account and used to make payments via online or in person. This e-wallet acts as a replacement for the physical wallet, which allows one to save money by simply using the application without having to carry physical cash to make a transaction (Kamarulbaid, 2019).

First, e-wallets can be used through e-money. Money needs to be deposited into the e-wallet online before being converted and kept in the form of e-money which allows for any payment transaction. The value of e-money in the e-wallet is equal to the actual value of the deposited money (Kenton, 2019).

Second, in some cases, e-wallet is based on credit and debit cards. Users are not required to deposit any funds into the e-wallet. When payment for a transaction is made, the payment source comes from the user's debit card or credit card (Kenton, 2019).

Digital Wallet

Digital wallet (DW) can be defined as a system that stores information and keywords for various payment methods by users (Kagan, 2019). DW is a technology used to store payment information such as credit card numbers, debit card numbers, loyalty cards and more, digitally. They are commonly stored in the Cloud (Kagan, 2019). Money is still in the customer's bank or credit card account. Usually, the purpose of a digital wallet is to facilitate transactions without the need to issue a card so as not to be exposed to the risk of theft. Some examples of DW are Google Pay, Masterpass and Visa Checkout. DW provides both cash and cardless benefits.

Mobile Wallet

Mobile wallet (MW) is a smartphone-based app that allows users to make "tap to pay" payments to merchants and often uses the Near Field Communication (NFC) technology (Kenton, 2019). With an MW, a user pays by scanning his/her phone at the payment terminal or by scanning a QR code.

Table 1

Analysis of Different Types of E-Payment System

E-Payment System	Feature	Transaction Method	Storage Location	Information Stored
E-Money	Money deposited in an application and converted into digital form.	Online/ Internet	Cloud	Value of the same amount converted from money.
E-Wallet	Application or platform that stores e-money.	Online/ Internet	Cloud	Amount of account balance in the form of e-money.
Digital Wallet	Technology used to store payment information except e-money.	Online/ Internet	Local device & cloud	Debit card number, credit card number and loyalty card.
Mobile Wallet	Transaction system used as a medium of payment via short range wireless communication systems such as NFC.	NFC	Local device & cloud	Debit card number, credit card number, loyalty card and e-money.

Based on the discussion in the previous section, Table 1 summarizes the analysis of the four (4) types of available payment systems. Based on the table, we can understand that today's e-wallet system has already combined several features from different types of e-payment systems. In addition, it can be understood that there are operators of e-wallets that are not governed by e-money guidelines issued by BNM because they use a third-party acquirer (TPA) as a holding account.

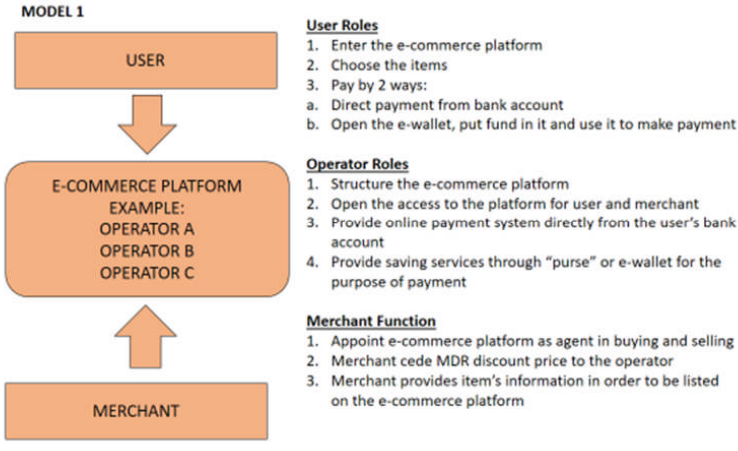
Based on the analysis of the four types of e-payments and their distinctive features, it has raised some questions that this research needs to address especially on the legal issues affecting existing e-wallet business models. Therefore, this study aims to analyse legal issues affecting existing e-wallet business models.

EXISTING E-WALLET MODELS IN THE MARKET

The application (apps) functions as a virtual sales centre where interested merchants place their goods in the virtual sales centre (Shopee, 2020). Users can browse through the application to select their choice of goods. Users can make payments directly through online banking via FPX (debit or credit card) or pay by e-wallet. A purse (e-wallet) payment can only materialize when the buyer opens a virtual account in the application and puts a certain amount of money into it (Yau, 2019). The merchant on the other side opens an account at a virtual point of sale for the purpose of payment. The merchant offers a 'merchant discount rate' (MDR) to the operator. The operator generates revenue through the MDR. For example, if MDR is 2 percent of the price of goods sold and the cost of sale is RM100, then the dealer will receive only RM98. As of December 2020, this study found that there are various models of e-wallet being practised in the market. One of the models is in the following model chart:

Figure 2

First Model



Source: Author

Operator S confirmed that their operating model is similar to this model except there is no merchant discount rate (MDR) applied by the merchants as the operator absorbs the merchants' charges. This

was revealed during a focused group discussion regarding post-research findings with the operators' representatives.[1] On the other hand, observations revealed that operator B's operation is the same as this model as payments to the merchants could be made via a bank account and the user's e-wallet. They also provide their own e-shopping platform for both, the user and merchant.

Legal Aspects of E-Wallet

Constitutionally speaking, banking and finance are under the federal jurisdiction (Md. Nor, 2012). Banking and finance institutions borrow money from depositors and extend credit to clients. The relationship between the bank and the client is merely a creditor and debtor relationship as in the judgement of the case of *Forley v Hill (1848) 2 HLC 28*. Thus, the essence of conventional banking is money borrowing and lending with interest in disguise. Islamic banking and finance are free from the element of *riba, gharar* and *maysir*. In this regard, the relationship between the bank and the customer is based on an underlying contract that the two parties enter into. The financial intermediary in Islamic banking is on a different footing as compared to its conventional counterpart that is by virtue of *mudarabah, musharakah* and *wakalah* contract.

Today, we can see the credit transfer business being conducted by banks via mobile banking and non e-money (electronic money) issuers. This indicates that Malaysians are migrating to electronic payments (e-payments) system (BNM, 2018). As of December 2020, there are 48 non-bank e-money issuers (BNM, 2020a) *inter alia* AEON Member Plus Card, Lazada Wallet, Boost, ONECARD/1PA, GrabPay, and XOX eWallet.

Some of the applications that are being developed to support online transactions are e-money, prepaid top-up and e-wallet. In simple terms, e-money is a payment instrument that contains a monetary value that is paid in advance by the user to the e-money providers. This advance payment is transferred either through purse or e-wallet applications provided by application providers (BNM, 2016). The Guideline on Electronic Money (E-Money) of Central Bank of

[1] A focused group discussion on findings of the study was held by the research team with representatives of e-wallet companies at Universiti Utara Malaysia Kuala Lumpur (UUMKL) on 10th of March 2020.

Malaysia 2008 provides the definition of e-wallet, purse and prepaid. E-Wallet is an application that can be used to facilitate online commercial transactions by crediting some amount of money into the e-wallet ("Malaysia's top e-wallets," 2018). In other words, e-wallet is an alternative to the physical wallet. It can be used to store money using a mobile application without the need to bring cash to perform commercial transactions. Prepaid refers to the top-up system that is credited through telecommunication providers. Prepaid can be used to purchase airtime or any other transactions (Kamarulbaid, 2019).

Definition of Electronic Money

Electronic money is the digital money stored in an e-wallet. Financial Services Act 2013 (FSA, 2013) defines electronic money as a payment instrument whether tangible or intangible that: (a) stores funds electronically in exchange for funds paid to the issuer; and (b) is able to be used as a means of making payment to any person other than the issuer. That is to say, BNM recognizes electronic money as an enforceable legal tender. Open-loop and electronic money service providers are required to obtain license from BNM. Open-loop means e-money can be spent or transferred to any third party apart from the providers themselves. Thus, questions arise with regard to the operation of e-wallet providers, as follows: (a) whether e-wallet providers obtain electronic money license; (b) whether e-wallet providers fulfil legal requirements; (c) whether e-wallet providers who have no license as providers, use a third party via "merchant acquiring business" to offer e-wallet services.

Licensing Requirements

As far as licensing requirements are concerned, any person who wants to operate a payment system or issue a designated payment instrument, should obtain approval from BNM as set in Division 1 of Part 1 of Schedule 1 of the Financial Services Act 2013 and Schedule 1 of the Islamic Financial Services Act 2013, and Section 11 of FSA 2013 and Section 11 of IFSA 2013 to operate the designated payment instrument. For those who intend to provide merchant acquiring services, they need to comply with Section 17 of IFSA 2013 (BNM, 2020d). There are various sections of FSA 2013 with regard to licensing *inter alia* Section 9 (Application for Authorisation), Section

12 (Requirements on Minimum Capital Funds or Surplus of Asset Over Liabilities), Section 26 (Application, Annual Renewal Fees and Levy Contributions), Section 47 (Power of Bank to Specify Standards on Prudential Matters), Section 60 (Fitness and Propriety Criteria), Section 64 (Record Keeping) and Section 125 (Safeguarding of User of Fund) (PC Research, 2019). According to Section 17 (1) of FSA 2013, no person shall conduct a registered business unless he/she has submitted such documents or information as may be prescribed by BNM. In violation of Section 17 (1), one shall be liable to imprisonment for a term not exceeding eight years or to a fine not exceeding RM25 million or both. Therefore, e-wallet business in Malaysia is heavily regulated and all e-money issuers need to comply with all requirements set by BNM.

METHODOLOGY

This study adopted a qualitative research approach. The main data collection consisted of document reviews, interviews, observations and expert group discussions (Sekaran & Bougie, 2016). Content analysis and descriptive analysis were used in analysing data. Since this is a relatively new practice in the market, the study collected data from libraries by way of appropriate books, journals and other publications, and from recognized websites that discussed some of the issues related to technological devices. Data were also gathered from websites and applications of e-wallet operators. The researchers also conducted observations through non-participative and participative observations by subscribing to various e-wallets to have a better understanding of the subjects of the study.

This study employed the method of ethnographic interviews. Ethnography is understood as a type of qualitative research which uses a combination of observation and participation. Normally, it focuses on activities to understand complex behaviour without any strategies to limit inquiry. Interviews are not necessarily structured (Lebar, 2007, p. 95).

This type of study has a few characteristic features such as a strong emphasis on exploring and a tendency to work primarily with "unstructured" data. It is also beneficial in investigating a small number of cases and can be used to analyse verbal descriptions and explanations.

To investigate the practices of e-wallet operators in Malaysia, the researcher personally participated in the practice as a customer of a few e-wallets. To further examine their practices, besides observations and researcher participation, interviews were conducted with the following:

i. E-wallet operators, both listed and unlisted with BNM. A listed operator is a company that receives approval for e-money license from BNM while an unlisted operator is a company that operates by means of a white label. The guidelines (BNM, 2008) used the term issuer of e-money instead of e-wallet operator. From the definition in the aforementioned documents, an operator refers to any person who is responsible for payment obligations and assumes liabilities for e-money being issued.
ii. Malaysia Digital Economy Corporation (MDEC) as it is tasked with organising and leading Malaysia's digital economy. This entity is well acquainted with e-wallet growth and its related issues in Malaysia as it works closely with operators and is sometimes involved in direct communication with them. In accordance with E-Money Guidelines (BNM, 2008), a merchant of e-wallet refers to any person that accepts e-money as payment for their goods and/or services. The e-wallet operator whenever stating the merchant similarly refers to the same terminology.
iii. Users. The user refers to any person to whom the e-money has been issued or any person who uses e-money to make payments for purchases of goods and/or services (BNM, 2008).
iv. Regulators (Bank Negara Malaysia and Securities Commission of Malaysia).

The study followed the ethnographic interview method by assisting participants to suggest reasons behind the e-wallet practices, since an ethnographic interview entails conducting a series of friendly conversations in which the interviewer slowly introduces new elements to assist participants to respond to questions. Hence this study has chosen a closed, fixed-response interview where all interviewees were asked the same type of questions and asked to choose answers from among the same set of alternatives (Lebar, 2007, p. 121).

To check the validity and the reliability of the questions, the researcher conducted pilot interviews with two experts to obtain their views on

the content of the questionnaire. The questions were amended in accordance with their recommendations to ensure appropriateness and clarity.

At the final stage of the study, to validate the legal issues on existing e-wallet practices, the research team conducted two expert group discussions. The first discussion was with BNM and the second discussion, with the e-wallet operators although not all the operators were able to attend. All findings were presented to them in order to elicit their views and verifications.

FINDINGS ON LEGAL ISSUES RELATED TO E-WALLET

Although the e-wallet business in Malaysia is heavily regulated, this research found that there are several legal issues with regard to the application of e-wallet:

(1) Liability of Board Directors of E-Wallet Operators

The liability of the e-wallet operators should be clearly manifested and stated in the Guideline on Electronic Money (E-Money) issued by BNM. The Board Directors of e-wallet operators shall adhere and comply with Company Act 2016 [2] requirements as the Guideline on Electronic Money only mentioned the liability of the user and merchant. This is clearly stated in the following paragraph:

9.3 vii - User's and merchant's liability for damaged, lost, malfunctioned, or stolen e-money instrument or value, and fraudulent transaction, including illegal reload of e-money.[3]

(2) Extension of Credit and Interest Payment

The Guideline on Electronic Money (E-Money) issued by BNM clearly states the prohibition of extending credit and interest to users. Is the practice of granting vouchers, lucky draws, coins, rebates, etc. among the indirect interest payment to users? This practice may violate the e-money guideline of BNM by virtue of paragraph 12.1 (iii). The paragraph states that:

[2] Company Act 2016, Section 23
[3] Guidelines on E-Money, Item 9.3 (vii).

An issuer of e-money shall not:-
13.1(iii) extend credit to the user, or pay interest or profit on the e-money balances, or anything else that would add to the monetary value of the e-money. [4]

As such, the user of e-money should not expect some return when they put their money in an e-wallet though they know that their money will be invested by the e-wallet provider in an interbank money market and such. Besides, the prohibition of extension of credit and interest payment to users, it is to combat the activities of online scammers and the like. In contrast, the practice of *hibah* can be applied in the *takaful* industry (Azhar & Md. Nor, 2019).

(3) Charging of Fee

The issue of charging a fee to users and merchants may trigger non-approval from BNM if no clear permission is stated. For instance, the MDR which is the rate usually charged by the operator to a merchant for payment processing services whenever transactions for products and/or services occur may go against BNM Guidelines (BNM, 2008). As paragraph 9.3 stipulates:

9.3 An issuer of e-money should provide clear terms and conditions for the use of the e-money, which should be made available through various channels, including the issuer's website, brochures and registration form (user's and merchant's copy). The issuer must obtain acknowledgement from its users and merchants prior to their participation in the scheme.

The details should include, but not limited to the following:

i. Type of payments that can be made with the e-money;
ii. All applicable fees and charges;
iii. Availability of user's statement;
iv. Procedure for reporting lost or stolen e-money and lodging.

(4) Exclusion of Liability

The existence of exclusion of liability clause by e-money operators in their terms of use is not in line with Section 29 of Contract Act

[4] Guidelines on E-Money, Item 13.1 (iii).

1950.[5] E-Wallet providers should not exclude their liability via terms and conditions of e-wallet. This can be seen in the Federal Court case of *CIMB Bank Berhad v Anthony Lawrence Bourke & Anor*[6] whereby the Islamic bank was prohibited from putting an exclusion clause in their contract with clients in their Islamic banking documentation as it violated Section 29 of the Contract Act 1950. Regarding the issue, Che Hashim (2019) calls for an exclusive act upon the unfair contract terms and conditions as the Contract Act 1950 is deemed insufficient to offer rights protection for contracting parties with an unequal stance in bargaining.

(5) Breach of Mandate

The existence of e-money operators who provide other e-wallet platform services such as for the payment of other utility bills contradicts the mandate after getting the e-money license.

(6) *Shariah* Compliance Position of Trust Account/Deposit Account

There are two categories of e-money schemes which are large e-money schemes and small e-money schemes.

A large e-money scheme refers to an e-money scheme whereby (i) the purse limit is more than RM200 and the maximum limit is RM1500 or whatever amount approved by BNM or, (ii) the outstanding liability of e-money for a conservative six months amount to 1 million or more.[7] The balance maximum amount for an unverified account is RM500 and RM1500 for a verified account. These accounts will be frozen in the event there is no transaction for 12 months (Razer Support, 2020).

The accumulated fund from e-money shall be kept in a trust account/ deposit in a licensed financial institution (BNM, 2019a). This account is bounded by the Trustee Act 1949.

The fund in the trust account can only be used for:

a. Return to user;
b. Payment to merchant.

5 Contract Act 1950, Section 29.
6 [2018] 1 LNS 1887
7 Guideline on E-Money, Item 5.1.9.

Any revenue earned from the investment of the trust account shall only be used for item 10.2 (b), Guidelines of E-Money unless the funds are in excess of the total outstanding e-money liabilities.[8] The operator of the e-money is prohibited from paying interest or profit on the e-money balance or anything else that could add to the monetary value of the e-money as stated in Item 10.2 (b), Guidelines of E-Money.[9] This paper found that the current Guideline on Electronic Money (E-Money) does not provide a requirement that a particular trust account should be opened at an Islamic financial institution. Therefore, some operators have used conventional trust accounts as part of their operations.

This was uncovered by the researcher through a personal interview with the representatives of e-wallet operators on the issue of trust accounts. When queried on the type of trust account opened by the company, Operator G replied, "It is conventional." Operator D also stated, "Conventional (trust account)." A similar response came from representatives of Operator S when they said, "It is conventional," although they are considering to adopt the Islamic trust account.

Only Operator E has started to include Islamic trust accounts in managing users' funds as they responded, "Yes, (our trust account is only Islamic account)." Hence, it can be concluded that most of the respondents did not have Islamic trust accounts in their system and this has resulted in various non-compliance *shariah* issues at the fund management level.

Trust Account

The Islamic Financial Services Act 2013 states that the issuance of approved payment instrument shall maintain at all-times one or more accounts for different customers at a licensed financial institution separate from its own account.[10]

The Guideline on Electronic Money (E-Money) contains provisions with regard to the protection of user funds, and it is largely dependent on the scheme. Item 10.2 of the Guidelines provides that:

8 Guidelines on E-Money, Item 10.2(b).
9 Ibid.
10 Islamic Financial Services Act 2013, Section 125 (1) (b).

(a) The trust account shall be established in accordance with the Trustee Act 1949.

(b) The funds can only be used for the following:

(i) Refund to users; and
(ii) Payment to merchants.

(c) The funds may only be invested in high-quality liquid ringgit assets which are limited to deposits placed with licensed institutions; debt securities issued or guaranteed by the Federal Government and BNM, Cagamas debt securities, and other instruments as may be specified by the Bank;

(d) The payment for any costs, charges and expenses incurred in connection with the administration of the trust account can be made from the trust account only if the balance in the trust account after deduction of costs, charges and expenses is sufficient to cover all outstanding e-money liabilities;

(e) The issuer shall submit to the bank a copy of the trust deed upon the establishment of the trust account.

This research found that the e-wallet operator could take a commission from the investment profit provided it is clearly stated in the trust deed as opined by two experts during the interview (Md. Isa, personal interview, February 27, 2020).[11] Operator E said, "If it (profit plus the trust fund) exceeds your liability and other expenses, then you can take it (profit) as yours." Operator S said, "Yes (we benefited from floating income)." Operator S added that, "Yeah, there's overnight interest (from the trust fund)."

Operator D stated, "We do not get (significant) income from trust account." Operator E added, "Very much smaller," indicating an insignificant amount of returns. This trust account will remain as long as the operator of the e-wallet remains to use it (Instapay, 2020).

[11] Interview with Maybank Manager, Kangar Branch and Tetuan Roshidah Osman & Partners on 27 February 2020.

Deposit Account

The small e-money scheme refers to companies with (i) a purse limit not exceeding RM200 and (ii) outstanding e-money liability that does not exceed RM 1 million.

The collected funds from small e-money schemes need to be kept in a deposit account in a licensed financial institution, under a separate account. The money in this deposit account can only be used for the purpose of payment to users and merchants. The money in the deposit account basically cannot be invested in other assets except for bank deposit. Profits from the investment shall be used to pay users back and as payment to merchants.

This research revealed that some of the e-money issuers are from financial institutions (BNM, 2020a). The public is more confident with e-wallets issued by financial institutions. In the event of insolvency among e-wallet operators, users who used an e-wallet from the affected financial institution(s) will be protected by the Deposit Insurance Scheme (PIDM) as compared to an individual company.

(7) The Position of E-Wallet upon the Death of an E-Wallet User

Companies do not have clear and adequate mechanisms to deal with unclaimed money in the event of a user's death or in a comatose state. Operator D replied, "Follow the bank's process." Operator E gave a similar response, "We can replicate the bank's model. There must be death certificates, framework on the beneficiary and whatnot." In the meanwhile, Operator N stated, "On the event of death, I'm not sure how that is treated as well." Dormant e-wallets are subject to the Unclaimed Monies Act 1965.

(8) Fraudulent Transaction and Data Theft

E-Wallets are also subject to the Multimedia Act 1998, Financial Services Act 2013, Personal Data Protection Act 2010, Anti Money Laundering Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (Hacking, Scammer and all). There was a reported case on e-wallet transaction fraud. In this case, the victim made a payment to buy e-wallet bitcoins. The transaction used a bitcoin

address as the intermediary in the digital money transfer. While the seller showed proof of the transaction, the victim did not receive the credits he paid for (Yuan Meikeng, 2019). In addition, there was also a reported case on data theft. In this case, the e-wallet account was compromised when the victim realized that the account balance had been reduced. After checking, money was transferred to a suspicious e-wallet address without the user's authorization (Yuan Mei Keng, 2019).

Furthermore, an expert group discussion with BNM on the aforementioned issues showed that a few of the issues will be dealt with for the next amendment of the guideline as the Guideline was issued in 2008 (Interview with BNM, 2019 March 5). Similarly, the discussion in the expert group consultation with the operators revealed that they were not aware of the issues (Focused group discussion with seven operators of e-wallet, 2020 March 10). Based on the above analysis, although the e-wallet business is heavily regulated, it still triggers legal issues that need to be addressed by regulators. The rights of e-wallet users need to be protected and the funds need to be managed in a *shariah*-compliant manner.

CONCLUSION

With the advancement of technology, many transactions are being made online. One of the mechanisms is to make payments via an e-wallet whereby it replaces the physical purse. In other words, one can make a payment without physical money and purse. Most of the e-wallet providers are governed by BNM under the E-Money Guidelines 2008. This study found several legal issues related to e-wallet, *inter alia,* an unclear position on the liability of board directors of e-wallet operators, including breach of mandate and exclusion of liability of e-wallet operators. As e-wallet is a vital instrument which serves as an enabler to increase financial inclusion, it is important for the study to address the legal issues on e-wallet to enhance the practice and governance of e-wallet in Malaysia. The findings from this paper can be used as a basis for policymakers and scholars in formulating comprehensive guidelines for legal and *shariah* compliance of e-wallets. Therefore, there is an urgent need that further research be carried out on various e-wallet models in the market including *shariah* related issues.

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