

Analysis of Qabd Element in Contra Trading from Sharia Perspectives

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Abstract

Qabd is one of the most important elements of a transaction. The implication of the qabd element in a transaction leads to the transfer of asset custody and the ability to use the asset. In the investing instrument of contra trading, qabd is one of the elements questioned by the scholars about uncertainty of when the qabd is occurred. This is due to the instrument allows investors to start selling shares starting on the day the transaction (T-day) occurs, while the handover or possession (qabd) of the commodity into the investor's account will only occur on the last day of the transaction (T+3). Therefore, this article aims to analyze the implementation of qabd elements in contra trading instruments based on the views of the fuqaha in detail. The study is qualitative using the content analysis approach. The findings of this study found that the status of application qabd in contra trading instruments is dependent on the time of stock sales. Furthermore, this study will add scientific findings to the scholars out there on the qabd element in its special investment deals on contra trading instruments.

Keywords: Possession; Contra Trading; Investment; Shariah compliance

Introduction

The stock investment market is a component of a country to spur and upgrade the structure of economic branding to a better level as the economic acceleration is the factor of the sustainability of a nation's development. Stock investment serves as a financial intermediary that invests in investments from resources and groups that have excess capital to invest in financial institutions (Syarifah & Azizi 2005). Therefore, the investment capital will be channeled to the economic sector and will trigger the economic growth (S.Mishkin, 2007).

Looking at the importance of the stock market investment, there is a dumping of conventional investment instruments that do not adhere to the shariah guidelines. Conventional investment instruments are now become sharia-compliant instrument such as sukuk as a result of the efforts of the authorized parties to improve the instrument. In addition, the great promotions voiced by the Malaysian government to strengthen the Islamic financial component in terms of products and services should be commended (Ariff & Rosly 2011; Balala 2011). Furthermore, the ultimate goal of a transaction is to respond to the call of Allah SWT which promotes seeking His sustenance at the same time getting his servants (MuhamadZuhaili& Ahmad Dahlan 2017). Therefore, the mechanisms that are applied in a transaction must be based on Shariah criteria.

Among the criteria that must be taken into account before investing are avoiding prohibited criteria such as usury, gambling and engaging in *gharar* elements (Securities Commission, 2006; Saeed&Habib Ahmed 2014). Similarly, the *qabd* element must also be emphasized as the Prophet (pbuh) states in his hadith that prohibits the sale of something which is not in possession. Therefore, this article will discuss more about the *qabd* element in the stock investment instrument ie contra trading from the perspective of syarak.

This article is divided into five sections; the first part discusses on the concept of qabd in general. The second part talks about the proposition that defines the qabd element in the transaction. The next part discusses the views of the scholars regarding *qabd*. The fourth part discusses the implementation of *qabd* elements in contra trading and lastly, the final part analyzes the implementation of *qabd* elements in contra trading.

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1.1 The Concept of *Qabd*

Qabd is derived from the Arabic word "*qabaḍayaqbiḍu*" which means taking, grasping, holding, controlling, and mastering (IbnManzur 2003). While according to ISRA (2018), *qabd* is the possession over a particular asset, either physically or constructively. Islamic banker (2018) stated *qabd* is taking over commodities in an exchange transaction. Next, the more general sense *qabd* is to take something with the palm (IbnManzur 1988). *Qabd* according to Qal'ahji (1985) is the acceptance that permits the dealing or morals of the property received. According to al-Kāsāni (1998), *qabd* means the ability to deal with the received commodity.

According to al-Mawsu'ah al-Fiqhiyyah (1988) and Musa (2012), the term *qabd* refers to the possession of an item and someone has the ability to use it. In a holistic perspective, *qabd* is a type of act in the form of a person's surrender to a person who causes a person to indulge into something. The important elements which are needed when implementing *qabd* element are as follows (Hussein 'Azeemi et.al 2013):

- a. *Qabiḍ*: is the party who transferred goods to him
- b. *Muqbiḍ*: the party who transfers the ownership of goods to the *qabiḍ*
- c. *Maqbud*: are commodities and objects

1.2 DISTRIBUTION OF *QABD* TYPES

Generally, the act of buying and selling will involve the transfer of property whether the commodity is movable or immovable property (al-Kāsāni 1986; Ulayyash 1989; al-Nawawī 2002 & IbnQudāmah 1985). *Qabd* is usually in accordance to the current practice (custom) in the terms of ownership and control over a commodity (Hammad 1993). *Qabd* is the most important element for both parties who have contractual transactions, whether in a physical possession or constructive possession (Lahsasna 2014)

The discussion on physical possession (*qabḍhaqiqi*) have been discussed in detail by the scholars, while constructive possession (*qabḍhukmi*) is not mentioned in any turathic book as there has been no complicated transaction as it is now. However, the use of the term *qabḍhukmi* is currently accepted by scholars as it coincides with the principles set forth by earlier scholars. Thus, the scholars (Sawas 2000; Securities Commission 2006; Izz Abdul Salam 2000; Qurafi t.th) divided *qabd* into three types, among which are:

i. *QabḍHaqiqi* (physical/ legal possession)

Qabḍhaqiqi is defined as the physical transfer of a commodity as it is practiced according to custom (Hussein 'Azeemi et.al 2013). Some examples of *qabḍhaqiqi* are the practice of buying and selling of movable commodities (*manqul*) where there is a consumption of such commodities. Immovable commodities (*'iqar*) are also considered to be *qabḍhaqiqi*, for example, when the action of the original owner of a home evacuated the premises and handed over the keys to the buyer of the house. Another example of *qabḍhaqiqi* is immovable commodity (*'iqar*) in the administration of modern real estate ie the change of the original owner's name to the new owner. *Qabḍhaqiqi* is also known as full ownership or legal ownership of which officially renamed the ownership (Ahmad Khilmy et.al 2014).

ii. *Qabḍhukmi* (constructive possession/beneficial ownership)

Qabḍhukmi is defined as a non-vested property transfer (Hussein 'Azeemi et.al 2013). *Qabḍhukmi* is also known as *qabḍma'nawi* which means beneficial ownership (Ahmad Khilmy et.al 2014). According to Al-Zuhayliyy (2011), *qabḍhukmi* is everything that leads to ownership of goods and permits the use of commodity which is based on the local common practices without having to hold it (commodity) in the hands or hold legal ownership. It can be concluded that *qabḍhukmi* (beneficial ownership) is contrary to legal ownership.

Although *qabḍhukmi* is not similar to *qabḍhaqiqi*, but the current scholars regard the role of *qabḍhukmi* is equal to *qabḍhaqiqi* (Hussein 'Azeemi et.al 2013; Ahmad Khilmy et.al 2014; OIC 1990). This is due to the difficulties and harms that lead to the necessity of using *qabḍhukmi* (beneficial ownership) in a transaction primarily involving investment-linked and murabahah transactions (Hammad 2001). It coincides with the fiqhiyyah methodology compiled by the ulama, namely المشقة تجلب التيسير (Abdul KarimZaidan 2014) which means the hardship begets facility. Hammad (2001) states that the discussion of past scholars about *qabḍhukmi* is not discussed in their writings, but it is found that the concept of *qabḍhukmi* has been described by them to be practiced. Thus, Majma' al-Fiqh al-Islami in the 53rd resolution (4/6) requires some transactions to use *qabḍhukmi* (Ahmad Khilmy et.al 2014). Although, Bank Negara Malaysia's Shariah Advisory Council (MPS BNM) has

recognized *qabḍhukmi* or beneficial ownership but there are criticisms expressed by scholars on the issue (al-Amine 2011). They claimed that they are in conflict to the concept of ownership outlined by Shari'ah.

In rejecting of the allegations, Nik Abdul Rahim et.al (2015) poses the question of how the sale and purchase of *bay bithamanājil* (BBA) and *murabahah* is carried out if *qabḍhukmi* or beneficial ownership is said contrary to the Shariah. In addition, this *qabḍhukmi* also occurs in contract of *al-ijarahthumma al-bay'*, which beneficial ownership is given to the lessor (bank). Therefore, the issue of *qabḍhukmi* is still being discussed by scholars about the extent of its validity according to Maqāṣid.

Next, the situation in which *qabḍhukmi* takes place in a transaction is as follows (Hussein 'Azeemi et.al 2013):

- a. *Muqasah*: the concept of zero repayment is that when A wants to buy a car from B of RM 50 000, but at the same time B has an outstanding debt with A of RM 25 000, then B is only eligible to receive a payment of RM25,000 from A.
- b. *Itlaf*: the damage to the commodity i.e, when a person has the intention to buy a commodity commodity then the damage to the buyer is paid to the buyer then the buyer has to pay the price of the item and *qabḍ* is considered perfect without the agreement (Hussein 'Azeemi et.al 2013; Al-Farfur 2014).
- c. Previous action: the first acting concept that shows *qabḍ* takes place earlier, when someone rents a house and has already begun the first *qabḍ*. Then the house was sold to the tenant, and then *qabḍhukmi* had taken place.

iii. *Qabḍ* which is recognized by the Sharia

Qabḍ which is recognized by Sharia refers to *qabḍ* which is allowed through the principles of Sharia. For example the goods found (*luqatah*) or the loot by the rulers because they are prohibited goods. Such conditions are considered to be legitimate ownership according to Sharia (Hussein 'Azeemi et.al 2013).

2.1 QABD FROM AL-QURAN AND AS-SUNNAH

The *qabḍ* foundation is based on al-Quran and as-Sunnah is as follows:

2.1.1 Al-Quran

Qabḍ is one of the most important elements in a transaction. Therefore it can be seen that the Qur'anic verses and Hadiths emphasize the importance of the existence of *qabḍ* elements in a transaction. Here is the Qur'anic argument that emphasizes *qabḍ* elements in a transaction:

فرهان مقبوضة

It means: There must be a hold on hold (Al-Quran, al-Baqarah 2: 283).

The Qur'anic verses show that guarantees must be something that can be held. As the opinion of Imam Syafie and other scholars who make the verse as a proof to the warranties must be in the hands of the pawning (IbnKathir 1994).

2.1.2 Sunnah

Furthermore, the hadith which was stated by Rasulullah saw regarding the importance of *qabḍ* (ownership) is clear:

حدثنا قتيبة حدثنا هشيم عن أبي بشر عن يوسف بن ماهك عن حكيم بن حزام قال : أتيت رسول الله صلى الله عليه وسلم فقلت ياتيني الرجل يسألني من البيع ما ليس عندي أبيع له من السوق ثم أبيعته قال لا تتبع ما ليس عندك

The Judge bin Hizam narrated: "I came to the Messenger of Allah (pbuh) and said:" A man came to me and asked me to sell something that I did not have, can I buy him from the market and then sell it to him? He said: "Do not sell anything that is not yours.(al-Tirmizi, Sunan al-Tirmizi. Kitab Al-Buyu' 'an Rasulullah saw. Bab Ma Jaa Fi Karahiah Bai' Ma Laisa Indak)

The hadith above states not to sell goods that are not in possession because there is no right over a person to hand over such goods as the goods are not in possession, such as selling flying birds and selling fish that are in the water (al-Tirmidhi 2006).

3.1 Islamic Scholars' View on *Qabḍ*

Thescholars' views on *qabḍ* in turathic books can be distributed into four main opinions (Al-Farfur 2014) namely: First opinion: This opinion consists of mazhab Hanafi, the second opinion of Abu Yusuf and some of Hanbali's opinions. They require all kinds of removable goods (*manqul*) which are necessary to *taqabudh* without contradiction except land (*'iqar*) which requires the *qabḍ* element (al-Zuhayliyy 2013; al-Sarkhasi 1989).

This opinion states that the possession of goods before selling to others are a legitimate legal sale (al-Qurthubi 2011). In addition, the *qabḍ* element is required on the item which can be changed (*manqul*) without *khilaf* and it is based on the prohibition on the sale and purchase of goods that are not owned because of *gharar*. The prohibition is due to the existence of *gharar* element (al-Zuhayliyy 2013). While the selling of irrevocable item (*'iqar*) is allowed before the transition (*qabḍ*) occurs, (al-Zuhayliyy 2013) it is based on the concept of *Istihsan* applied in the sale and purchase contract. The second opinion: This opinion is comprised of mazhab Maliki, the history of Imam Ahmad, Abu Thaur and Auza' Iwhom specialize in all kinds of foods that can be weighed and measured. Therefore, anything related to food that can be weighed and measured is the element of *qabḍ* (al-Zuhayliyy 2013).

al-Jazairi (2012) also expressed the same opinion that all foods that can be weighed such as wheat and fruits need to be *taqabudh*. These scholars excluded *qabḍ* elements against food that can not be measured or weighed, or bought wholesale. This opinion states that *qabḍ* should exist when it is transacts with all types of food whether the food is *ribawi* items or not. This is based on the hadith narrated by Ibn 'Abbas and Ibn 'Umar by the Messenger of Allah said:

من ابتاع طعاما فلا يبيعه حتى يقبضه

Which means: Whoever buys food, and then he should not sell it until he receives it completely.

(al-Bukhari, *Sohih Bukhari*, Kitab al-Buyu', Bab Bay Al-To'am Qabla an Yuqbadwa Bay' Ma Laisa 'Indak).

However, Ibn Wahb (Ibn Juzayy t.th) stated that non-*ribawi* items can be sold before the handover is complete (*qabḍ*). The third opinion: Opinion consists of mazhab *Syāfiyy*, some of the scholars of *Hanbaliyy*, Muhammad and Zufar and some *tabi'in* states that all kinds of merchandise require the submission (*qabḍ*) (al-Zuhayliyy 2013; Ibn Qayyim t.th). al-Jazairi 2012; Abdullah Muhammad Ath-thayyar et.al 2009 also states that it is illegal to conduct transactions on commodities that cannot be transferred.

Based on the above statement in mazhab *Syāfiyy*, *qabḍ* of the goods before being sold is a legal requirement for the sale and purchase. This opinion was also presented by al-Tsauri and narrated by Jabir bin Abdullah and Ibn Abbas r.a (al-Qurthubi 2011). The argument and the conclusion of the opinion of mazhab *Syāfiyy* is based on the words of the Prophet (pbuh):

حدثنا أزهري بن مروان قال حدثنا حماد بن زيد و حدثنا أبو كريب حدثنا اسماعيل ابن علي قال حدثنا أيوب عن عمرو بن شعيب عن أبيه عن جده قال "قال رسول الله صلى الله عليه وسلم لا يحل بيع ما ليس عندك ولا ربيع ما لم يضمن

That is to say: It is not lawful to buy and pay debts, non-halal benefits from unwarranted and non-halal goods selling items that are not in your hands.

(Ibn Majjah, *Sunan Ibn Majjah*, Kitab al-Tijarat. Bab Nahi 'an Bai' Ma Laisa Indakwa 'an Ribh Ma Lam Yadman)

Based on the hadith, Imam Syafie argues that *qabḍ* is a condition that the buyer has a right to certain property and sells the goods which are not yet owned including the act of selling the goods which is not yet incurred. The last opinion: This opinion is comprised of mazhab *Hanbali* that states that it is not possible to sell any goods or food that can be weighed or measured prior to handover (*qabḍ*) as it is prohibited. It is supported by al-Jazairi (2012) in his writings which implies Imam Abu Hanifah's opinion which *qabḍ* elements are compulsory in every item or food that can be weighed and measured. The prohibition on selling before it is transferred is based on the existence of the *gharar* element (al-Zuhayliyy 2013). We can not measure, weigh and quantify the goods or foods that are allowed to sell the goods before accepting them (Ibn Qudamah (n.d)).

4.1 Execution of *Qabḍ* Elements in Contra Trading

Contra trading is one of the investment instruments that is not discussed in any turathic book because it is a new investment instrument. Literally, contra trading is a word derived from the English word which means the difference between sales and purchases (MohdSalleh 1996).

In other words, contra trading is the action of investors buying stocks at a low price and selling those stocks at a high price when the market goes up (al Walid 2007).

This transaction involves the purchase of stocks without having enough money in the account (Zaharuddin 2016) and investors do not require issuing any capital (Azlin Alisa & Nurulllyana 2018) to buy shares instead of depending only on the capital to be issued by the broker. This method of trading merely depends on the assumptions and guesses that the stock price will rise in the market. If the market price rises then the investor will gain the profit from the result of the purchase price, if the market price falls below the purchase price then the investor will get a counterweight loss (Azlin Alisa & Nurulllyana 2018).

The investment instrument involves 4 working days (T + 3) including day of transaction (T-day). Purchase of shares commences on the first day of the transaction known as T-day where investors will receive a transaction receipt as a proof of purchase (Noor Suhaida & Burhanuddin 2016). During the T + 3 periods, the investor may start selling shares to a third party and must complete the share purchase payment (Ashraf Ali 2016; Abdullah Alwi et.al 2005). The last time that the investors are allowed to sell the shares is at 12.30 pm on the last day of the transaction (T + 3).

However, the shares will only be credited into the investor's account on the last day of the transaction (T + 3) at 10.00 am. The issue arises when the investor starts selling shares on T, T + 1, or T + 2 while qabḍ only occurs on the last day of the transaction (T + 3). Overview of contra trading on the Malaysian Stock Exchange is generally summarized as follows:

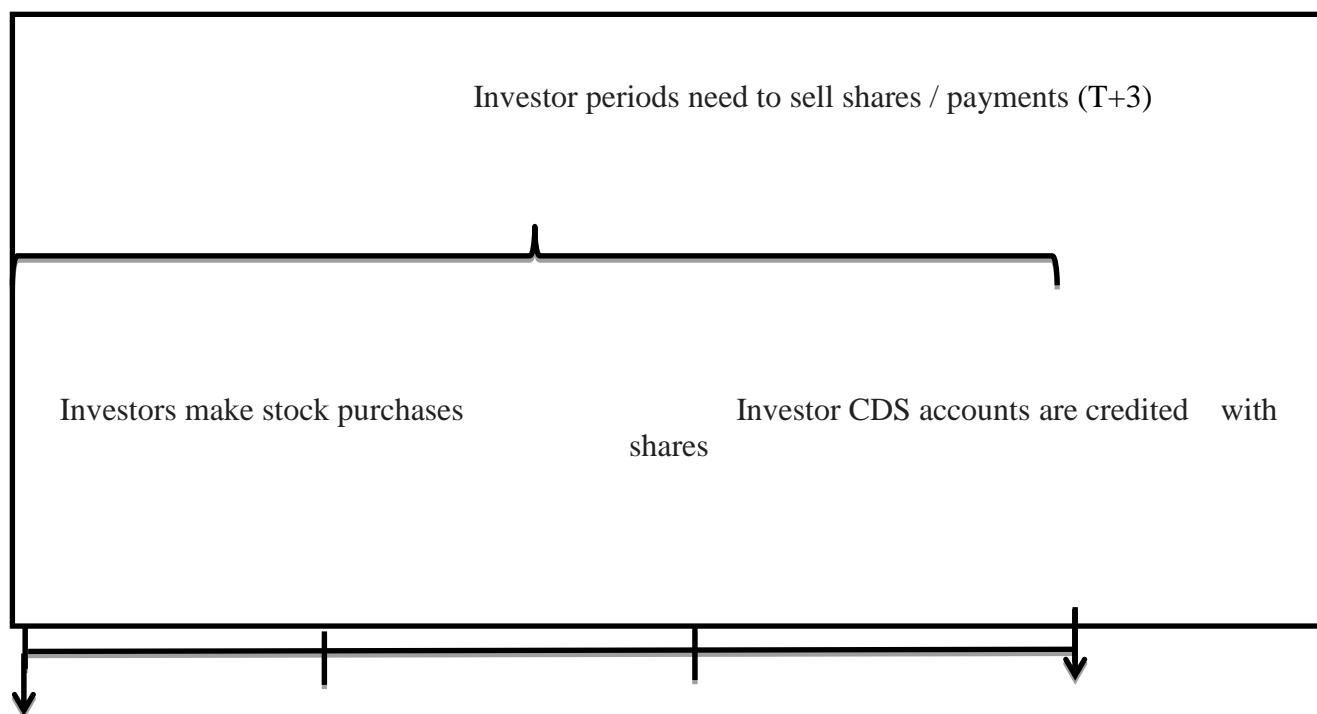


Figure 4.1 Summary of the implementation of qabḍ elements in contra trading (Noor Suhaida & Burhanuddin 2016)

Figure 4.1 Summary of the implementation of qabḍ elements in contra trading (Noor Suhaida & Burhanuddin 2016)

The above diagrams illustrate the uncertainties in the performance of qabḍ in contra trading when an investor can start selling shares to the third parties starting on the first day of the transaction (T) while the submission of shares

will only take place on the last day of the transaction (T + 3). If the investor sells the shares on T, T + 1 or T + 2, then the *qabḍ* element, then the issue arises when the transaction occurs.

Analysis of Qabḍ Elements in Contra Trading

This study concludes that the implementation of *qabḍ* in contra trading can be divided into two situations:

The first situation: If the investor sells shares to third parties on the last day (T + 3) after 10.00 am before 12.30 pm, where the investor's account is credited with stock commodities then the transaction is calculated to meet the Islamic guidelines in terms of *taqabudh* legally. This can be proven based on the contra trading trip (Noor Suhaida & Burhanuddin 2016). Therefore, the researcher sees this situation does not have any problem from the point of handover (*qabḍ*) because it fulfills all conditions from the point of ownership before the sale or when the delivery of the commodity. The second situation: If the investor begins to sell the shares to third parties before the day of receipt of shares (T + 3), ie on T, T + 1, or T + 2, then, the transaction is deemed not valid because the investment instrument is only considered as a means of investing solely for profit and profitability (Zaharuddin 2009).

However, the parameters of ownership which is proposed by Nik Abdul Rahim et al (2017) stipulated that any contractual transaction must be documented in the form of documents or agreements in order to avoid any malpractice and fraud. Akram Laldin (2013) also agrees on the importance of documenting any contractual transaction as it has a positive impact on the proving of a transaction. The relevance of the above statement is significant with the implementation of contra trading instruments whereby on the first day of the transaction (T-day) the investor will be given a receipt or a contract note that records all transaction details in detail such as transaction date, name and commodity code number, quantity of commodity, commodities, total full and final payment dates for commodities and full payment dates (Noor Suhaida & Burhanuddin 2016).

Based on the proof of transaction in the form of receipts in contra trading instruments, this situation leads to the proving of complete delivery of the commodity. Though there is doubt about the time of execution of the *qabḍ* if the investor sells the shares on the day the transaction occurs while the commodity will be credited into the investor's account only on the last day of the transaction (T + 3).

Conclusion

This study concludes that *qabḍ* element is an essential element that must exist in a contractual transaction. This is supported by the argument of the hadith of Rasulullah SAW and views of the fuqaha. Therefore, it can be said that the status of *qabḍ* element in contra trading instrument is subject to the time of selling the shares. Whereby in the first situation, the delivery of shares is considered *hukmi* because it has fulfilled the shari'ah rulings. On the other hand, the second situation shows that there is no *qabḍ* either *hukmi* or *haqiqi* because the delivery of shares occurs only at the last day while the investors have sold the shares starting on the day of the transaction takes place.

Hence, this study will be an initiative to the scholars in the field of muamalat in particular, to do deeper study in order to improve current contra trading transaction to become one of Shariah-compliant instruments. This study also suggests that other issues that arise in contra trading are emphasized by scholars and stakeholders to continuously improve gradually from time to time.

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