Șukūk al-Muḍārabah and Application of Third-Party Guarantee

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Abstract

This paper explores the importance of Șukūk al-Muḍārabah in Islamic capital movement and its suitability for financing projects which individuals are not able to provide capital for them. Șukūk al-Muḍārabah is the most popular Șukūk in Șukūk market which has been structured to provide funds for the big projects which need huge amount of capital. This paper analyses the nature, salient features, and the process of Șukūk al-Muḍārabah. The paper uses qualitative methodology which is based on the four prominent schools of fiqh and some contemporary scholars. The paper examines to what extent the permissibility of third party guarantee in Șukūk al-Muḍārabah process due to the crucial role that this guarantee plays in protection of Șukūk transaction which exposes to risk transaction. It was found in this paper that application of third party guarantee is permissible in the Șukūk al-Muḍārabah process if it is done without charging a fee.

Keywords: Șukūk al-Muḍārabah, Process of Șukūk al-Muḍārabah, Application of third party guarantee.

1. Introduction

Șukūk al-Muḍārabah is one of the crucial financial instruments to provide capital for an individual to conduct business activities, or to finance a project that does not have enough capital for its financial activities.

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Therefore, having Šukūk al-Muḍarabah contract between a capital providers and expert people, who do not have capital, can create job opportunities for the unemployed, and provide profit for capital providers. This can play a vital role in the growth of the economy of a country. Nowadays with development of the world, an individual, or a company alone, may have difficulty to have successful investments without having other individuals, or companies to share with so that they can produce many things together that an individual, or a company cannot do solely.

As a result of this, one can say that Šukūk al-Muḍarabah transaction plays a crucial role in the development and expansion of economies all over the world, because many people, or companies can join together to conduct their business based on Šukūk Muḍarabah contract. For instance, a group of people can collect their capital and give it to an expert to conduct business on the total capital. A capital provider also can distribute his capital to many experts to invest it. This method of investment can attract savings fund to be invested in the investment of a project. The investors could also participate in the public interest (Maṣlaḥah) of the country, which assists the government to complete its financial obligations towards the citizens of the country.

2. Nature of Šukūk al-Muḍarabah

Šukūk al-Muḍarabah is defined as certificates that represent an amount that is given to a manager of a project in order to active the project and realize profit from it.\(^3\)

\(^3\)Hasan ‘Abdullah al-’Amīn, Sanadāt al-Muqāraḍah wa Sanadāt al-Istithmār paper presented at Fiqh Academy Conference that held at Jeddah, Majallat Majma‘ al-Afiqh al-Islāmī session 4 no. 4 vol. 3 (Jeddah: Majallat al-Fiqh al-Islāmī:1988), 1840
In other words, Șukūk al-Mularah can be defined as “a form of partnership in profit whereby one party provides capital and the other party acts as an entrepreneur who solely works with the capital.”

In the Mularah project, the capital providers are considered as the investors who are called Arbāb al-Amwāl and the manager, or entrepreneur who is called the Mulaarih. The profit that derived from the investment of the project is distributed between the investors and the manager with exact portions that were agreed upon. For instance, 70:30, 60:40, 50:50 respectively. If there is any loss, or damage in the project, the Șukūk holders (capital providers) are responsible for it, unless there is clear evidence that it is due to carelessness or a misdemeanor of the Mulaarih. In this case, the Mulaarih is responsible for the loss, or the damage that happened to the project.

From the aforesaid, it can be observed that, in Șukūk al-Mularah transaction, the manager of the project needs capital for his project. In order to do so, he may resort to issuing certificates that have equal value and offer them for subscription to obtain capital for the project. There in, the investors provide him with the capital to finance the project. In relation to the capital that they provide, they will get the certificates that represent their ownership over the underlying asset of the Mularah project. These certificates represent the value of the principal amount of the capital that is contributed by the capital providers. As a result of this, one can define Șukūk al-Mularah as certificates that represent ownership over underlying assets that are exposed for investment.

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^4Wan Abdul Rahim Kamil, *Structuring Șukūk*, paper presented at IBFM Workshop on Detailed Structuring of Islamic Securities (Kuala Lumpur: IBFM 2007), 9
Wherein, the Mudārib manages the project and shares with the capital providers in the profit that is derived from the investment of the project, with specific portions that agreed upon prior to the commencement of the project.

Based on this, the capital providers have right on Mudārib to invest the capital of Mudārabah according to their instructions, terms and conditions. In this respect, it can infer that, there are two types of Mudārabah i.e. unrestricted and restricted Mudārabah.

Unrestricted Mudārabah which is a form of Mudārabah contract wherein the Mudārib has absolute authority to invest the capital, or properties of the Mudārabah anywhere, in whatever he can see that benefit may be derived from the investment. ⁵

Restricted Mudārabah is to confine the investment of the Mudārabah capital and the authority of the Mudārib to specific conditions and rules which the Mudārib must comply with. For example, the capital provider may stipulate to the Mudārib to not travel with the principal amount of the capital outside of the country in which the Mudārib resides. He may also have a stipulation on the Mudārib to invest the capital in a specific market, or merchandise, or to sell and buy from a particular person. ⁶

In regard to specification of the Mudārib to invest the capital in specific merchandise, Mālik and Shāfi‘ī jurists are of the view that, it is not permissible for the capital provider to restrict the investment of the Mudārabah capital to specific merchandise.

⁶Ibid.
The reason is that, this restriction will prevent the Ṣulṭān from the objective of Ṣulṭān, which is to change the investment of the capital from merchandise to merchandise in order to gain profit, which is the subject matter of a Ṣulṭān contract.\(^7\)

However, Ḥanbalī and Ḥanafī jurists are of the view that it is permissible for the capital provider to restrict a Ṣulṭān investment to specific merchandise, if this merchandise is available in the market.\(^8\)

In a nutshell, one can say that, according to Ḥanbalī and Ḥanafī jurists, it is permissible for the capital provider to restrict the investment of Ṣulṭān capital to specific merchandise, if the merchandise can be easily found in the market. However, if it is difficult to find the merchandise in the market, then it is not permissible for the capital provider to restrict the investment of Ṣulṭān capital to such merchandise. The reason for that is this restriction may not lead to making a profit, which is the main thrust of the Ṣulṭān contract from that specific merchandise.

In addition to that, the restriction of the Ṣulṭān to sell and buy from a particular person, is disputed between the Mālik and Shafi‘ī jurists, as well as the Ḥanbalī and Ḥanafī jurists.

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The former group is of the view that this type of *Mudarabah* contract is void. In this case, the *Mudarib* deserves a similar wage that is in relation to his work on the capital. In other words, in this case, the *Mudarabah* contract will convert to a leasing contract, wherein the *Mudarib* deserves a consideration in respect of his work.\(^9\) On the other hand, the latter group is of the view that it is permissible for the capital provider to restrict the investment of the *Mudarabah* capital with a particular person.

The reason being that the restriction of the other contracts to certain specifications is permissible; therefore, it is permissible for the capital provider to restrict a *Mudarabah* investment to a specific trader that the *Mudarib* will deal with during the period of the *Mudarabah* contract.\(^10\)

From the dispute of Muslim jurists on this issue, it can observe that it is permissible for the capital provider to restrict the investment of the *Mudarabah* to a specific trader, if such a trader is someone who people used to trade with, and was beneficial for them. Otherwise, it is not permissible for the capital provider to restrict the *Mudarabah* investment with a specific trader.

Another issue is that the restriction of the *Mudarabah* investment to a particular place, such as a specific market in the country. *Malik* jurists are of view that it is not permissible for the capital provider to restrict the *Mudarabah* investment to a specific market. If the *Mudarib* obliges himself to follow this restriction, the contract is void.\(^11\)

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\(^9\) Ibn Rushd. 192-193 See al-Māwardī, 135


\(^11\) Ibn Rushd
However, the Majority of Muslim jurists are of view that it is permissible for the capital provider to restrict the investment of the Muḍārabah capital to a specific market in the country. This view is the preferable view of this dispute because the Muḍarīban invest the capital in the market without any difficulty to gain profit from the investment. As we can see nowadays, a market can be full of any merchandise that the traders need. They can buy and sell from the same market without any burden on them, and they can make huge profits from their merchandise in the same market.

Therefore, it is permissible for a capital provider of a Muḍārabah investment to restrict the Muḍarīb within a specific market to trade the capital of the Muḍarīban in that market (to buy and sell from it). However, it is the best if the capital provider makes the investment unrestricted Muḍārabah. Thus, this will open further opportunities of investment for the Muḍarīb so he can invest the capital anywhere and in any merchandise in which there is a possibility to gain profit from.

3. Essential Features Of Șukūk al-Muḍārabah

In Șukūk al-Muḍārabah transaction the issuer is considered as the Muḍarīb, the subscribers are considered as the capital providers who are Șukūk holders. The realized fund that they provide to active the project is Muḍārabah capital which is entirely belonging to the Șukūk holders. They are owners of undivided portion in the Muḍārabah capital, and the profit is divided among them according to percentage of everyone in the capital.

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12 Al-Māwardī, Abū al-Ḥasan, 134-135, See also al-Kāsānī, Ibn Qudāmah
In the Mu'tarabah project, Şukuk holders are considered as the owners of the Mu'tarabah capital and the benefits that are derived from investment of the capital are divided among them, according to each person's percentage of ownership in the capital that is contributed to active the project after deducting the Mu'araibs portion. The owners of Şukuk al-Mu'tarabah have the right to receive their capital at the end of the project, and portion of the profits as agreed before the investment of the capital. After the subscription is closed in the specified period of the time that is required, the Şukuk holders have the right to sell their Şukuk in secondary market at their discretion.

In Şukuk al-Mu'tarabah investment, the Şukuk holders are not allowed to claim any fixed interest. This is because there is no interest taking from the investment of Mu'tarabah.\(^\text{13}\)

Furthermore, it was mentioned in Fiqh Academy resolution, which was held on 6-11 February, 1988 at Jeddah, that for Şukuk al-Mu'tarabah transaction to be in conformity with the principles of Islamic law, the Şukuk should represent undivided portions of ownership in the project. This ownership should continue from the beginning of the project until its end. The Şukuk holders have all rights and disposal that are recognized by Islamic law in the contracts, such as contract of sale. The performance of the contract of Şukuk al-Mu'tarabah should be based on the conditions of the contracts that are specified in the prospectus of issuance, whereby the subscription is considered as an offer, and the acceptance is considered as an agreement of the other parties to subscribe in the investment.

\(^{13}\) Wan Rahim, 9
In Şīkh al-Muḍārabah contract, the principal amount of the capital, and the
distribution of the profit must be known to the contracting parties, and conditions of
the issuance must be in conformity with the principles of Islamic law.14

In view of the foregoing features of Şīkh al-Muḍārabah, it can be observed
that, in Şīkh al-Muḍārabah transaction, the receiver of the proceeds of the
subscription of the Şīk, that is exposed for investing and financing the project, is
the Muḍārib (entrepreneur). He does not own anything in the project, except what he
has contributed to purchase some Şīk in the project. Based on this, he is the capital
provider for those Şīk that he has bought, and the Muḍārib who is sharing in the
profit according to his proportion that is specified in the prospectus of the issuance.
His ownership in the project is limited to his contributed proportion in the project.

The received proceeds of the Şīk that are subscribed and assets of the
project are safekeeping assets in his hand. He does not guarantee any loss, or damage
that may happen to the principal amount of the capital of the project, or profit, unless
it is one of the causes of guarantee that is recognized by Islamic law. It is only in this
case that he is liable for the loss, or the damage that happened to the Muḍārabah
properties.

Therefore, it is obvious that in the Şīk al-Muḍārabah project; the project is
financed by Şīk holders and entirely belongs to them. The issuer of Şīk al-
Muḍārabah is only a trustee to manage the project; he does not guarantee any loss, or
damage that happens to the capital, or profit. If there is a loss, or damage to the
project, the Şīk holders are solely responsible for it.

14Fiqh Academy Resolution, no. (5) d 4/08/88 on Şīk al-Muḍārabah, Majallah Majma’ al-Fiqh al-
Islāmī, session 4, no.4 vol.3 (Jeddah: Majma’ al-Fiqh al-Islāmī, 1988), 2162
Sūkūk al-Mudarabah should be negotiable instruments after the period that is specified for the subscription is mature. This negotiability deems to be at the disposal of the owner of the asset with taking into consideration that, if the properties that are contributed to the Mudarabah project are still financial assets after the subscription and before conducting the investment, then the negotiability of the Sūkūk al-Mudarabah is considered as an exchange of currency for currency, and therefore, the rule of exchange of currency should be applied to it. Hence, if the properties of the Mudarabah are debts, the rules of negotiability of debts should be applied to the negotiability of the Sūkūk al-Mudarabah. If the properties of the Mudarabah are different types of assets, for instance, money, debts, real estates and usufructs, it is permissible to negotiate Sūkūk al-Mudarabah according to an agreed price provided that most of the properties of the investment are corporeal assets and usufructs.\textsuperscript{15}

Negotiability of Sūkūk al-Mudarabah in the stock markets is according to the circumstances of exposure, and requirements of the management of the contracting parties.

In addition to that, the issuer, or other party, can perform the negotiability of the Sūkūk, either by announcement, or by offer to the public during a specific period of time in which the purchase of the Sūkūk is obliged with a specific price. In this case, it is preferable for the issuer to get advice from experts in order to specify the price according to the pace of the market, and the circumstances of the financial centre of the project.\textsuperscript{16}

\textsuperscript{15}Ibid. 2162-2163
\textsuperscript{16}Ibid. 2163
It is not permissible to include in the contract of \textit{S\textU{u}k\textU{k} al-Mu\textU{d}arab\textU{a}} a provision that the principal amount of the capital, or a portion of the profit is guaranteed by the \textit{Mu\textU{d}arib}. If the contract is concluded on that explicitly, or implicitly, the contract is a contract of loan, not a contract of \textit{Mu\textU{d}arab\textU{a}}. Therefore, the rules of a loan contract should be applied to it, and it is not permissible to pay any superfluous amount on it. Furthermore, it is not permissible to include in the contract of \textit{S\textU{u}k\textU{k} al-Mu\textU{d}arab\textU{a}} that it is obliged to sell back the \textit{Mu\textU{d}arab\textU{a}} assets to the issuer; even it is a pending condition or future condition.

However, it is permissible to include in the contract of \textit{S\textU{u}k\textU{k} al-Mu\textU{d}arab\textU{a}} that there is a promise to sell back the \textit{Mu\textU{d}arab\textU{a}} asset. In this case, the sale contract will be concluding on the price that will be assessed by experts. In case the promise is not fulfilled, and it amounts to damage to the other party, the promisor is obliged to compensate the damage that happened to the other party according to the rules and principles of guarantee in Islamic law. It is not permissible to include in the contract of the \textit{S\textU{u}k\textU{k}} any provision that amounts to the company to take a specific portion of the profit. If the contract includes that (or the contract of the \textit{S\textU{u}k\textU{k}} is concluded on that), then the contract is void.\textsuperscript{17}

In addition to that, it is not permissible to stipulate in the contract of the \textit{S\textU{u}k\textU{k} al-Mu\textU{d}arab\textU{a}} that there is a specific amount for \textit{S\textU{u}k\textU{k}} holders, or the project. The subject matter of division is the profit that is derived from the investment, not the principal amount of the capital. This profit can be determined by assessing the assets of the project in currency, and what exceeds the principal amount of the capital is the profit that will be distributed between the \textit{S\textU{u}k\textU{k}} holders and the \textit{Mu\textU{d}arib} according to the conditions and terms of the contract that agreed upon.

\textsuperscript{17}Ibid. 2163-2164
The calculation of the profit and loss of the project should be done publically at the disposal of the Ṣukūk holders.\textsuperscript{18}

It is permissible in Islamic law, to mention in the prospectus of issuance that there is a specific portion which will be deducted either from the portion of the Ṣukūk holders, or from the proceeds of the project, which is distributed to the Ṣukūk holders at the end of every period of assessment of the properties of the project into money. This deducted portion will be deposited in a particular reserve fund in order to face or recover any loss, or damage that may happen to the principal amount of the capital, or any shortfall.

It is permissible to mention in the contract of the Ṣukūk al-Mudārabah that there is a third party who promised to provide a voluntarily guarantee with a specific amount for compensation of any loss, or damage that may happen to the project. This promise is a separate commitment from the contract of the Mudārabah. In other words, the fulfillment of the promise is not a condition to execute the contract of Ṣukūk al-Mudārabah and rules, conditions and terms of the contract are not based on it. It is not permissible for Ṣukūk holders to cancel the contract, or prevent them from fulfilling their contractual obligations because the third party did not fulfill his promise.

As a result of this, they are also not going to fulfill their contractual obligations because this promise is considered as a condition to execute the contract of Ṣukūk al-Mudārabah.\textsuperscript{19}

\textsuperscript{18}Ibid. 2164
\textsuperscript{19}Ibid.2164-2165. For detailed information on Ṣukūk al-Mudārabah, see recommendations of the Fiqh Academy (OIC) at the same Majallah, 2005-2008
From the foregoing, it could deduce that Şukūk al-Mudarabah transaction is very different from the other Şukūk transactions in terms of investment and management of the Mudarabah project. In the Şukūk al-Mudarabah transaction, the Mudarib (issuer) is not liable for any loss or damage that may happen to the project, unless it is due to his negligence and mismanagement. Only the capital providers (Şukūk holders) are liable for any loss or damage that may happen to the project because they own the project, while the Mudarib is only the trustee to manage the project. Therefore, for the Şukūk al-Mudarabah contract, in order to be in line with the principles of Islamic law, the abovementioned essential features should be observed while concluding the contract and issuing the Şukūk.

4. Process of Şukūk Al-Mudarabah

Şukūk al-Mudarabah has various processes such as structure, circulation in the market, retrieval from the investors, and termination of the Şukūk transaction.

4.1 Structure of Şukūk Al-Mudarabah

In the Şukūk al-Mudarabah structure, the Mudarib (the issuer or entrepreneur) provides entrepreneurship. He issues Şukūk al-Mudarabah to signify that the capital providers are participants in the Mudarabah project. The profit that is derived from the Mudarabah investment is paid to the investors. At the maturity period of the investment of the project, the Mudarib will repurchase the asset based on the purchase agreement that was undertaken by him previously. The proceeds that are derived from the sale of the asset are used to pay the Şukūk holders (investors) their principal amount of the Şukūk.²⁰

²⁰ Wan Rahim, 9
From the above-mentioned structure of Šukāk al-Muṭarabah, one can say that the structure of Šukāk al-Muṭarabah seems to not be in conformity with the principles of Islamic law. This is because, at the maturity of the period of the project, the Muṭalīb who is only a trustee to manage the project, will buy back the asset of the Muṭarabah project, and pay the capital providers, or investors (Aḥāl al-Amwāl) their principal amount of the capital that they have paid to finance the Muṭarabah project.

The investors provide capital for the project and receive profit from the project, and at the end of the investment of the project, their principal amount of the capital that they provide to bankroll the Muṭarabah project is returned to them and the asset will be returned to the Muṭalīb who is only on reliable to run the project. It could also extract from the structure, that the asset does not belong to the investors (Šukāk holders), it is a loan that the Muṭalīb has taken from them to bankroll the project, which includes payment of the profit on the amount that was taken from them.

The profit from the investment that is paid to the investors seems to be a profit that is derived from the loan, which is not permissible in Islamic law. In other words, the profit that is paid to the investors is interest charged on the loan, which Muslim jurists unanimously agree on its prohibition in Islamic law.

On the other hand, what is well known in a Muṭarabah contract is that the asset, or the project is entirely belonging to the capital provider, and the Muṭalīb is only the trustee to manage the project. Therefore, based on the foregoing structure of Šukāk al-Muṭarabah, it is obvious that the structure of Šukāk al-Muṭarabah is not in accordance with the principles of Islamic law. Because of this, there is a need to find out the proper structure that is in line with the principles of Islamic law.
4.1.1 Application of Third Party Guarantee in Structure of Ṣukūk Al-Muḍārabah

A third-party guarantee in an investment of Muḍārabah capital is a third party that is separate from the capital provider and the Muḍārabah. He has no relation to the Muḍārabah project, or the contracting parties of the Muḍārabah. This third party can be an individual, a company, or a government. In this regard, contemporary Muslim jurists unanimously agree that it is permissible for this third party to guarantee voluntarily the principal amount of the capital, or a portion of the profit of the Muḍārabah investment without returning to the contracting parties for reimbursement.

This third party can encourage people to invest their money in this kind of investment to develop the economy of the country. This kind of guarantee is allowed since there is nothing against the principles of Islamic law for the third party to voluntarily guarantee the principal amount of the Muḍārabah project, or a specific portion of the profit. This is because it is a voluntary guarantee in which ignorance or uncertainty does not affect the contract at all.21

In a nutshell, one can say that the application of a third-party guarantee in a Muḍārabah investment is permissible in Islamic law provided that it is done voluntarily. On the other hand, it is not permissible if it is done with consideration; because it violates the principles of a valid Muḍārabah contract that is in accordance with the principles of Islamic law and the principles of Islamic law pertaining to the guarantee.

Based on this, it is obvious that application of third party guarantee in the structure of Şukuk al-Mudarabah is permissible provided that it is done voluntarily without any consideration in relation to the guarantee explicitly, or implicitly.

### 4.2 Circulation of Şukuk Al-Mudarabah

Circulation of Şukuk al-Mudarabah refers to its compatibility for sale and purchase in the stock market after the subscription has been closed in the primary market. This circulation should be conducted in accordance with the principles of Islamic law. As a result of this, it is not permissible to circulate Şukuk al-Mudarabah before starting the operation of the Mudarabah project because the principal amount of the capital of the project is still in the form of currency.

This is because, in this case, the circulation of Şukuk is tantamount to the sale of currency to currency with an additional amount, and on deferred payment, which is not permissible in Islamic law to do so. However, Şukuk al-Mudarabah can be circulated after starting the operation of the project if most of the properties of the Mudarabah project are corporeal assets and usufructs. For instance, 51% of the properties of the project are corporeal assets and usufructs. In this case, the sale of the properties of the project is the sale of the properties by currency on the spot in which there is no ribā transaction or uncertainty at all.

Nevertheless, Şukuk al-Mudarabah cannot be circulated if most of the assets of the project are debt transactions on deferred payment because this transaction is not allowed in Islamic law to be transacted.\(^{22}\)

\(^{22}\)Wahbat al-Zuhailli, al-Mu‘amalât al-Māliyyah al-Mu‘āsharah: Buhūth wa Fatāwā wa Ḥulūl (Dimashq: Dér al-Fikr 2008), 226-227
Furthermore, it is not permissible for issuer of the Sukūk al-Muḍārabah to guarantee the principal amount, or a portion of the profit for investors because this would convert the Sukūk al-Muḍārabah transaction to a loan transaction wherein any benefit derived from the loan is ribā, which is forbidden by clear texts of Islamic law. In all circumstances, the issuer must register the circulation of the Sukūk wherein the Sukūk represents the transfer of the asset from one party to another in its records in the name of the Sukūk holders. 23

In view of the aforesaid circulation of Sukūk al-Muḍārabah some rules and principles should be observed in the contract of the Sukūk Muḍārabah project, so that the investment will be conducted without any conflict with the sacrosanct principles of Islamic law that are required to be in the contract of Sukūk al-Muḍārabah.

Since circulation of Sukūk al-Muḍārabah is selling the Sukūk to other party. Muslims jurists unanimously agreed on this practice of Muḍārabah. As Muḍārabah was practised by nations before Islam, and with the advent of Islam, it was also recognised by Islam. The Companions of the Prophet (S.A.W) utilized it, and it has been practiced up to date. It is still carried out by people (Muslim and non-Muslim) all over the world. This shows that there is no qualm in the legitimacy of the Muḍārabah contract. As Allāh says in the Qur’ān “and others are travelling in the earth seeking the bounty of Allāh.” 24

In a Muḍārabah contract, the Muḍarib is travelling from country to country trading with the capital of the Muḍārabah to earn profit from the investment of the capital.

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24 Sūrat al-Muzammil verse 20
In another verse, Allāh says, “If you have performed the Friday prayer, disperse in the earth and search for the bounty of Allāh.” In a Mūḍārabah contract, the Mūḍārib is seeking the earnings by travelling from place to place to invest the capital in the business sphere to gain profit from the capital.

In the Sunnah, it was mentioned in the life history (Sīrah) of the Prophet (S.A.W) that the Prophet himself had travelled to Syria, before his Prophethood, with the properties of Khadijah bin Khuwaylad25 (may Allāh be pleased with her) as a Mūḍārib. When he had become a Prophet, he recognised this as a lawful way of business.”26 In another vein, it was stated by Ḥakīm bin Hizām (may Allāh be pleased with him) that “if he has been given a Mūḍārib an amount as capital of a Mūḍārabah; he stipulated on the Mūḍārib to not trade with an animal, or enter into a sea, or get into a valley.

If the Mūḍārib violates one of these conditions; the Mūḍārib will guarantee the money in case of any damage, or loss that may happen to the capital”.27 This statement shows that a Mūḍārib must follow the terms and conditions of the Mūḍārabah contract.

25 Khadijah was the first wife of the Prophet (S.A.W), he has married her before the Prophethood, and she has 40 years and the Prophet (S.A.W) has 25 years. Khadijah, so she is older than Prophet by 15 years. She was wealthy woman in Makkah who hired men to trade with her properties and concluded a contract of Mūḍārabah with them. When she heard about trustworthy, honesty and faith of the Prophet (S.A.W), she asked him to travel with her properties to al-Shâm as a Mūḍārib accompanied with her servant Maysarah. When Allāh S.W.T has sent the Prophet S.A.W as a messenger to the people; she was the first woman that believed in the message of the Prophet (S.A.W), and supported him (S.A.W) physically and financially.

26 Sīrah Ibn Hishām, vol. 1, 203........

If he goes beyond the terms and conditions that are stipulated in the contract, then he is liable for any damage or loss that may be happened to the principal amount of the *Mudarabah*. It was also stated by ‘Ali (may Allah be pleased with him) that, “in a *Mudarabah* contract, the loss is borne on the capital, and the profit is according to the agreement between the contracting parties.”\(^{26}\) This means that in a *Mudarabah* investment, any loss is borne by the capital provider, and any profit is shared between the *Mudarib* and capital provider according to the portion that agreed upon.

The foregoing verses and statements show that *Mudarabah* is permissible in Islamic law, and it is a legitimate business contract, wherein the profit is shared between the contracting parties. In the case of any damage, or loss that may happen to the investment, it is the liability of the capital provider. The *Mudarib* does not guarantee any damage, or loss that may happen to the investment. However, if the *Mudarib* has gone beyond the terms and conditions of the *Mudarabah* contract, he is liable for any damage, or loss that may happen to the investment of *Mudarabah* project.

### 4.2.1 Application of Third Party Guarantee in Circulation of *Šu‘ūk Al-Mudarabah*

Muslim jurists agree that the guarantee of a *Mudarabah* investment is on the capital provider. The *Mudarib* does not guarantee any damage, or shortfall that may happen to the investment of the capital, unless it is due to his negligence and transgression, or a violation of the valid conditions that are stipulated in the contract.

They also agree that the Muḍārib is a trustee on the investment of the Muḍārabah capital; he does not bear any liability towards catastrophe and loss that may happen to the investment because of something which is beyond his capability.

However, if the damage, or loss, or shortfall that happened to the investment of Muḍārabah capital is caused by him, then he is liable for that, and in this case, he has to guarantee any damage, or loss that happened to the investment of the Muḍārabah capital.

The issue that may arise pertaining to the guarantee in the Muḍārabah contract is that if the contracting parties (capital provider and Muḍārib) stipulate guarantee of principal amount, or a portion of the profit on the Muḍārib while concluding the contract. In this respect, the Majority of Muslim jurists are of the view that it is not permissible to stipulate a guarantee of the Muḍārabah investment on the Muḍārib in Muḍārabah contract. In this regard, Malik adds to say that, if the contract of a Muḍārabah is concluded on the stipulation of guarantee of principal amount of the investment on the Muḍārib this stipulation is not in accordance with the principles of Muḍārabah, as practised by Muslims before. Based on this, if the capital provider stipulated guarantee of principal amount of the capital of the Muḍārabah on the Muḍārib, the Muḍārabah contract is void. The capital provider will take an extra amount of the profit because of the guarantee that has been stipulated on the Muḍārib. As a fact of this, it is not permissible to do so in Islamic law.

In addition, there are two different points of view on to what extent the effect of the stipulation of a guarantee would have to be in a Muḍārabah contract. The first view is that of Majority of Muslim jurists i.e. Malik, Shafi'i and Ḥanbali. They are of the view that both of the stipulation and contract of Muḍārabah are void (bāṣil).
The reason is that the stipulation of a guarantee on the Mu'ārib will amount to superfluous uncertainty on the Mu'ārib because he will imagine that he may benefit from the investment, or may not. If he benefited from the investment; he would take his portion of profit. Nevertheless, if there is a loss in the investment; the Mu'ārib will lose his effort in addition to a part of his money in relation to the guarantee.

This is because, he is going to guarantee the loss that happened to the investment of the Mu'ārah. Hence, they say that the stipulation of the guarantee in the Mu'ārah is usually accompanied with an additional amount for the capital provider in the profit. This is because a portion of the Mu'ārib which is in the profit will be less than his portion in case there is no guarantee stipulated on him. Thus, in this case, the amount of the guarantee is a part of the profit that is derived from the investment, which is sharing between the capital provider and Mu'ārib. Therefore, this stipulation of the guarantee is void. What is more is that the contracting parties do not know how much the guarantee will cost, and this will lead to ignorance of the portion of each party in the profit, which is the subject matter of the Mu'ārah contract. It was known that the condition of the valid Mu'ārah contract is that the portion of profit of each party must be known to the parties before conducting the operation of the Mu'ārah, otherwise the Mu'ārah contract is void.

However, Ḥanafi jurists are of the view that if the capital provider stipulated in the contract of Mu'ārah that the loss is borne by the Mu'ārib, this stipulation is void, but the contract of Mu'ārah is valid. This is because the loss is a part of the Mu'ārah property, which should be borne by the capital provider only.

30 Ibid.
In addition, they say that stipulation of the guarantee does affect the ignorance of the profit, which is the subject matter of the *Mudarabah* contract. Therefore, the contract of *Mudarabah* cannot be void because of this stipulation. As a result of the fact of this, stipulation of the guarantee of the principal amount of the *Mudarabah* contract, or a part of the profit, or loss on the *Mudarib* is not in conformity with the principles of Islamic law.\(^{31}\)

From the foregoing, the preferable view is that of the Majority of Muslim jurists. For the reason that the stipulation of the guarantee of the principal amount of the capital of the *Mudarabah* investment, or loss in the investment, will convert the contract of *Mudarabah* to a loan contract, wherein any benefit derived from it is tantamount to a *riba* transaction, which Muslim jurists unanimously agree that it is prohibited by Islamic law. Besides, the investment of the *Mudarabah* is not in line of the *Hadith* of the Prophet (S.A.W) that forbids any profit without taking liability of risk of the investment (*Nah*ī (S.A.W) *an rihāli* *ms lamya/mu*).\(^{32}\)

The issue that may arise is that, is it permissible for the *Mudarib* to voluntarily guarantee the principal amount of the capital of the *Mudarabah* investment without any stipulation on him to do so. The answer to this issue is that only Imam Malik says that, it is permissible for the *Mudarib* to guarantee voluntarily the principal amount of the capital of the *Mudarabah* investment by an analogy to the permissibility of the safe keeper to guarantee voluntarily what is trusted property in his hands after the contract is concluded.

\(^{31}\)Ibid. 79-80

\(^{32}\)Ibid
Based on this, it is permissible for the *Muḍārib* to voluntarily guarantee the principal amount of the capital of the *Mulārābah* after the contract is concluded, even though the origin in the *Mulārābah* contract is that the principal amount of the capital is trusted property in *Mulārāb*’s hands.\(^{33}\)

However, the voluntary guarantee of the principal amount, or portion, or profit, or any loss of the *Mulārābah* investment from the *Muḍārib* may lead to a bribe to make the investment of a *Mulārābah* remains in his hands for a long period. It may also lead to a disguised *ribā* transaction, if the principal amount of the capital of the *Mulārābah* or any profit, or loss is guaranteed by the *Muḍārib*.

In a nutshell, one can say that it is not permissible for a *Muḍārib* to guarantee the principal amount of the capital, or a portion of the profit, or a part of the loss voluntarily because this will take out the *Mulārābah* contract from its initial form to a hidden *ribā* transaction, or bribe. As a result of this fact, it is not permissible for the *Muḍārib* to guarantee voluntarily the principal amount of the capital, or a portion of the profit, or loss of the *Mulārābah* investment in any circumstance for the aforesaid reasons.

### 4.3 Retrieval of *Ṣūkūk* Al-*Mulārābah*

Retrieval of *Ṣūkūk* al-*Mulārābah* is selling the *Ṣūkūk* to the issuer whereby the *Ṣūkūk* will return into the same investment fund. According to Muḥammad Taqī Uthmānī, this retrieval of *Ṣūkūk* al-*Mulārābah* from the *Ṣūkūk* holder is permissible in Islamic law.

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This is because it is permissible in Islamic law for the 
Mudarib to buy from the capital provider, and the capital provider to buy from the 
Mudarib. In other words; it is permissible in Islamic law to conduct a contract of sale between the capital provider and the Mudarib during a Mudarabah period.

However, the capital provider exclusively owns the assets of the Mudarabah project; the Mudarib does not own anything in the Mudarabah project except his portion of profit that agreed upon if profit is realized from the investment of the project. Once the capital of the Mudarabah project is converted to commodities and assets in the project, and the Mudarib wants to retrieve the Sukuk from the capital provider; the transaction will be conducted on a sale’s contract in which the capital provider will sell his Sukuk to the Mudarib.

Therefore, in this circumstance, it is obliged to apply the rules of a sale’s contract to the retrieval of the Sukuk al-Mudarabah in order to be in conformity with the principles of Islamic law.34

The question may arise is that whether the retrieval of the Sukuk al-Mudarabah will be conducted at the face value of the Sukuk, or at market value? To answer this question, Taqi Uthmānī says, it is obliged in the retrieval of the Sukuk al-Mudarabah to be done at the market value. Then, if the market value is more than the face value, the difference between the two values is considered as a profit of the Mudarabah investment that will be distributed between the capital provider and the Mudarib according to the portion that agreed upon.

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34 Muḥammad Taqi 'Uthmānī, paper presented at Fiqh Academic conference that held at Jeddah, Majallat Majma’ al-Afiq al-Islāmi session 4, no. 4, vol. 3 (Jeddah: Majallat al-Fiqh al-Islāmi:1988), 1858
If the contract of the retrieval is concluded on the condition that the capital provider will sell the Șukūk at the face value when the Șukūk is retrieved; this condition is not in accordance with the principles of Islamic law. This is because the condition is against the principles of a Muḍārabah contract in which the assets of the project exclusively belong to the capital provider, who has right to sell his assets at any price he wishes. Therefore, it is not permissible to retrieve Șukūk al-Muḍārabah at the face value, but it is obliged to retrieve it at the market value, so that the retrieval of Șukūk al-Muḍārabah will be in line with the principles of Islamic law.35

From the foregoing, the retrieval of the Șukūk al-Muḍārabah in order to be in compliance with the principles of Islamic law, it should be exercised at the market value without any condition to sell back the Șukūk at the face value. Thus, this will convert the Muḍārabah contract to a loan contract, wherein any profit that is derived from the investment of the Muḍārabah is benefited from the loan.

It is not permissible for the capital provider to take it because it is considered as ribâ, which is forbidden by the axiomatic texts of Islamic law.

4.3.1 Application of Third Party Guarantee in Retrieval of Șukūk Al-Muḍārabah

Muslims jurists unanimously agree that guarantee of the principal amount of Muḍārabah project is on the Șukūk holders. The Muḍārib is not liable for guarantee of any damage that may occur to the project unless it is due to his negligence, or transgression. Indeed, the retrieval of Șukūk al-Muḍārabah is selling back the Șukūk to the Muḍārib. Muslims jurists agree that, it is permissible for the Muḍārib to buy from the capital provider, and the capital provider to sell to the Muḍārib.

35Ibid. 1860-1861
As a result of the fact of this, in Islamic law, it is permissible for a third party who is not involved in the sale contract to guarantee the contractual rights and obligations for the contracting parties; in case they are not able to fulfill their contractual rights and obligations. For instance, guarantee of the price of sold item for the seller, or guarantee of delivery of the sold item to the buyer.

Based on that, it is permissible for a third party who is not involving in the retrieval of the $\text{S}\text{u}\text{k}\text{a}k$ $\text{a}l$-$\text{M}\text{u}\text{d}\text{a}r\text{a}b\text{ah}$ and has no relation with any of the contracting parties, to guarantee the price of the retrieved $\text{S}\text{u}\text{k}\text{a}k$ for the $\text{S}\text{u}\text{k}\text{a}k$ holders and delivery of the $\text{S}\text{u}\text{k}\text{a}k$ to the $\text{M}\text{u}\text{l}\text{a}r\text{i}b$ in case they are not able to fulfill their contractual rights and obligations to each other. This is because there no any principle in Islamic law that prohibits this guarantee if it is done voluntarily without any consideration physically, or financially. This third party can be individual, or a company that has no relation with the capital provider, or $\text{M}\text{u}\text{l}\text{a}r\text{i}b$ or $\text{S}\text{u}\text{k}\text{a}k$ $\text{a}l$-$\text{M}\text{u}\text{d}\text{a}r\text{a}b\text{ah}$ project.\textsuperscript{36}

From the abovementioned, it is obvious that the application of third party guarantee is allowed in the retrieval of $\text{S}\text{u}\text{k}\text{a}k$ $\text{a}l$-$\text{M}\text{u}\text{d}\text{a}r\text{a}b\text{ah}$ provided that it will be done voluntarily without any charge of a fee.

4.4 Termination of $\text{S}\text{u}\text{k}\text{a}k$ Al-$\text{M}\text{u}\text{d}\text{a}r\text{a}b\text{ah}$

Termination of $\text{S}\text{u}\text{k}\text{a}k$ Al-$\text{M}\text{u}\text{d}\text{a}r\text{a}b\text{ah}$ can be done by selling the $\text{S}\text{u}\text{k}\text{a}k$ to other party, or to the $\text{M}\text{u}\text{l}\text{a}r\text{i}b$ himself wholly, or partially. Hence, $\text{S}\text{u}\text{k}\text{a}k$ Al-$\text{M}\text{u}\text{d}\text{a}r\text{a}b\text{ah}$ contract can be terminated by termination of the period of the $\text{M}\text{u}\text{l}\text{a}r\text{i}b$ contract that is agreed between $\text{S}\text{u}\text{k}\text{a}k$ holders and the $\text{M}\text{u}\text{l}\text{a}r\text{i}b$.

\textsuperscript{36}\textregistered H\textcopyright s\textring u\textregistered s\textxhook e\textregistered i\textregistered n\textregistered H\textregistered a\textregistered m\textregistered i\textregistered d\textregistered H\textregistered a\textregistered s\textregistered s\textregistered a\textregistered n\textregistered, 1875
In Islamic law, it is permissible for Ṣuḵk holder to sell his all Ṣuḵk al-Muḏarabah to the Muḏarib to anyone he wishes. In case Ṣuḵk holder sold the all Ṣuḵk to the Muḏarib anyone, then the contract of Ṣuḵk al-Muḏarabah is terminated between him and the Muḏarib.\(^{37}\)

However, in case the Ṣuḵk holder sells a part of Ṣuḵk al-Muḏarabah to the Muḏarib then the Muḏarib will become a partner of the Ṣuḵk holder with the part that is sold to him. In other words, if the capital provider sold a part of the Ṣuḵk to the Muḏarib the part that is sold to Muḏarib is entirely belonging to the Muḏarib; any profit that is derived from the investment of that part is exclusively belonging to the Muḏarib. He is only obliged to distribute the profit that is derived from the rest of the Ṣuḵk between him and the capital provider based on the portion that agreed upon. Therefore, ownership over the part that is terminated will be transferred to the Muḏarib immediately. This is because; it is not allowed to continue the Muḏarabah contract on the entire project until the period of the Muḏarabah is expired.\(^{38}\)

From the aforesaid, it is observed that termination of Ṣuḵk al-Muḏarabah can be done by selling the all Ṣuḵk to other party, or Muḏarib. There is no qualm that when Ṣuḵk holders sell their Ṣuḵk wholly to anyone, they wish; the contract of Muḏarabah is terminated. If the Ṣuḵk holders sell a part of their Ṣuḵk to the Muḏarib, in this case termination of the Ṣuḵk is occurred only on the part that is sold to the Muḏarib. The Muḏarabah contract will be remained on the part that is not sold to the Muḏarib and any profit which is derived from that part is divided between the Ṣuḵk holders and Muḏarib according to the portion that they agreed upon.

\(^{37}\) Taqī ‘Uthmānī, 1862-1863.
4.4.1 Application of Third Party Guarantee in Termination of Ṣukūk Al-Mudārabah

There is no dissenting opinion among Muslims jurists that, in the Mudārabah contract, the Mudārib is not liable for any damage that may happen to the principal amount of Mudārabah, or any shortfall to the profit; unless it is a fact of negligence, or transgression from him. Hence, termination of Ṣukūk al-Mudārabah can be done by termination of the period of Mudārabah contract, or by selling the Mudārabah properties to the Mudārib, or to anyone else.

Therefore, since in Islamic law there is no provision that abstains a third party who is not involving in the contract of a transaction to guarantee for the contracting parties their rights and obligations in case they are not able to fulfill them. For this reason, it is permissible for a third party who is not involving in the contract of Ṣukūk al-Mudārabah, and has no any relation with the contracting parties, to guarantee any right, or obligation for the contracting parties if they are not able to fulfill their contractual rights and obligations to each other.

This third party can be a government of a country which has no relation with the project of Ṣukūk al-Mudārabah to guarantee voluntarily on behalf of the Ṣukūk holders and the Mudārib any contractual right, or obligation when they are not able to fulfill their contractual rights and obligations. The government can provide a specific budget as guarantee for this kind of project in order encourage the capital owners to invest their capital in this type of the project that the benefit will be back to the public at large.\[39\]

\[39\]Ibid. 1876
Based on this, the application of third party guarantee is permissible in the termination of the \textit{Şukūk al-Muḍarabah} in case the contracting parties are not able to fulfill their contractual rights and obligations. However, this third party guarantee should be done voluntarily without taking any fee on the contracting parties explicitly, or implicitly.

5. Contemporary Practice Of \textit{Şukūk Al-Muḍarabah}

In the contemporary practice of \textit{Şukūk al-Muḍarabah}, the Muḍariban can be an individual, or a company, or a corporation that can analyze economically the activities of the project. Then, he, or it can expose an offer to the public, or some financial corporations to finance the project. Those financiers are considered as capital providers (\textit{Arbāb amwal}) for the \textit{Muḍarabah} project. The acceptance of the offer is a form of prospectus of issuance that describes the project, such as the capital that is required for carrying out the project and a portion for the capital provider in the profit, as well as the method of management.

The capital that is required for the project will be divided into portions, or monetary units. The issuing \textit{Şukūk} represent monetary units and the principal amount of every participant in the project. Moreover, the \textit{Şukūk} represents the undivided portion in the project after the subscription is closed.

The ownership in the project is not limited to the \textit{Şukūk} themselves, but to the financial portion that the \textit{Şukūk} represents in the project. There are certificates that recognize the owners’ rights in the project, and represent the possession of the undivided portion in the project. All the certificates represent an offer that is required for the \textit{Muḍarabah} contract.
The participation in the subscription to bankroll the project by buying the șukāk is considered as an acceptance for the offer of the șukāk. The statement of financial analysis that is prepared for the project must be a true statement. If it is discovered that the statement that was mentioned in the prospectus of issuance is not true; in this case, the Mulārib is obliged to guarantee any loss that may happen to the project pertaining to false statement.40

As a result of this, it is obvious that, in the contemporary practice of șukāk al-Muḍārabah, the contracting parties are not gathering at the session of the contract to discuss the terms and conditions of the Muḍārabah contract, the type of activities and the nature of the project, as well as the authority of the Muḍārib and his portion in the profit. In addition to this, the contracting parties do not know each other at all. This is because șukāk al-Muḍārabah holders, who are considered as capital providers, may change from time to time because of the circulation of the șukāk in the stock market.

Furthermore, in the contemporary form of practice of șukāk al-Muḍārabah, in which the Muḍārib solely specifies the issuance of the șukāk, the offer, the terms and conditions of the Muḍārabah contract; the capital providers do not have an opportunity to discuss the terms and conditions of the contract. They only have opportunity to accept, or reject the offer. Based on this, the Muḍārib is solely responsible for the truth of the statement and information about the prospectus of issuance. Nevertheless, after selling the șukāk, the proceeds of the șukāk al-

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Mu'darabah represent the principal amount of the capital that belongs to the Sukuk holders.

The Mu'darib is only a trustee who is the safe keeper of the project. When the project starts operating, and the money is transferred to merchandise, machines and buildings, then the ownership of the Sukuk holders will transfer to those properties because the project consists of those properties.\textsuperscript{41}

From the foregoing, it could be observed that in contemporary Sukuk al-Mu'darabah practice, the Mu'darib is the only person reliable to manage the project. This is because he issues the Sukuk to seek capital to finance the project, while the Sukuk holders do not perceive the content of the prospectus, and they do not know each other. As a result of this, the Mu'darib is solely responsible for any false information, or default in the prospectus, which results any damage, or loss in the project? In a nutshell, one can say that in the current Sukuk al-Mu'darabah practice; the Sukuk holders are not liable for any damage, or loss that may happen to the investment of the project, if the damage, or the loss is due to wrong information that is given in the prospectus. This is because they do not have an opportunity to see the content of the prospectus of the issuance of the Sukuk.

6. Overall Application of Third-Party Guarantees In Sukuk Al-Mu'darabah

It is well known that in the Sukuk al-Mu'darabah contract, the Mu'darib is the issuer who the Sukuk issued in his favour. He manages investment of the Mu'darabah project on behalf of the Sukuk holders; he does not own anything in the project except what he has subscribed to buy some Sukuk in the project.

\textsuperscript{41} Ibid
However, according to a classical Mu entrar contract that is in conformity with the principles of Islamic law; the Mu entra is the manager of the project in favour of the capital providers. In S uk uk al-Mu entra investment, the Mu entra can be an individual, a corporation, a bank, or a company. He or it is the one who, or which decides the performance of the investment of the project in the appropriate way that can be suitable for the investment of the S uk uk al-Mu entra. The S uk uk holders do not share and restrict him to take any decision, with the exception of the rules of Islamic law that are included in the prospectus of issuance. In all circumstances, the Mu entra is not binding to follow the rules that impede him from the investment of the principal amount of the Mu entra capital, and he is not entitled to guarantee any loss, or damage that may happen to the investment of the Mu entra project, unless it is due to his negligence and transgression.

Nevertheless, it is permissible to include in the prospectus of the S uk uk al-Mu entra that there is a third party who promises to guarantee voluntarily the principal amount of the Mu entra capital, or a portion of the profit, in case of a shortfall. This third party is separate from the contracting parties and is not involved in the investment of S uk uk al-Mu entra.

This third party can be a company, or an individual who induces the investors to invest their funds in such specific activities of investment. It can also be a private corporation that aims to encourage saving funds to be part of this kind of invested project. This private corporation can collect funds voluntarily to guarantee any loss, or damage that may happen to the investment. Thus, there is nothing wrong in Islamic law to guarantee voluntarily a specific amount of the principal amount of the capital, or a portion of the profit of the investment.

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42 Ḥāmid Ḥassān, 1870-1871
Furthermore, the third party can stipulate that his guarantee is limited to the loss, or damage that may happen to the principal amount of the capital, or the profit of the investment.\footnote{Ibid. 1875}

In addition to that, it is permissible for the government, as a third party, to announce that there is a commitment to guarantee voluntarily the principal amount of the capital, or a portion of the profit of the Sukk\textsuperscript{a} al-M\textsuperscript{a}rah for Sukk\textsuperscript{a} holders for a specific project of investment. The prospectus of issuance should include that this announcement of the guarantee is a voluntarily guarantee from the government. In this case, the government does not guarantee the M\textsuperscript{a}rib\textsuperscript{a} because this guarantee is a voluntarily guarantee without any cause that amounts to make it a binding guarantee on the government. It is preferable that the government specify a voluntarily budget to guarantee the principal amount of the capital of the Sukk\textsuperscript{a} al-M\textsuperscript{a}rah project, or the profit of the projects that are in the public interest. This can be done in case there is any loss, or damage that may happen to these kinds of projects. This budget can play a sacrosanct role of balancing between various activities of investment in the country.\footnote{Ibid. 1876 - 1877}

Notwithstanding, there are two groups of views on the application of a third-party guarantee in Sukk\textsuperscript{a} al-M\textsuperscript{a}rah from contemporary scholars. The first group is of the view that it is not permissible for a third party to guarantee voluntarily the principal amount of the capital, or a portion of it. This is because Muslims jurists unanimously agree that a guarantee is permissible in what is guaranteed on the principal, such as a loan, usurped property.
Therefore, what is not guaranteed on the principal, like principal amount of the \textit{Mu'ārabah} capital, it is forbidden in Islamic law to guarantee such a kind of thing either from a third party, who is not involved in the investment, or from the \textit{Mu'ārib}. They are of the view that a third-party guarantee is a means to \textit{riba} transaction; therefore, it is obliged to forbid it by applying the Islamic legal maxim, “blocking the means”.\footnote{Yūsuf ‘Abdullah al-Shubailī, \textit{al-Khidmāt al-Iṣtithmāriyyah fi al-Maṣarif wa al-hkāmuḥā fī al-Fiqh al-Islāmī}, vol. 2 (Beirut: Dēr Ibn al-jawzī, 2005), 141}

On the other hand, the second group is of the view that it is permissible for a third party who is separate from the investors, or manager of the investment to guarantee with a specific amount to recover the loss, or damage that may occur to the properties of the investors, or investment itself. It is also permissible for this third party to guarantee the principal amount of the capital, or a portion of it. Their view is based on the Islamic legal maxim, “the origin in disposal (al-Tawāfu) is permissibility”; therefore, it is permissible for the third party, who is not a capital provider, or \textit{Mu'ārib} to guarantee voluntarily any loss, or damage that may happen to the capital of the \textit{Mu'ārabah}, or to the profit.\footnote{Ibid. 144}

From the foregoing, one can say that the application of a third-party guarantee in \textit{Sūkūk al-Mu'ārabah} is permissible, if it is done voluntarily from the other party that is not involved in the investment, and has no relationship with the contracting parties, neither capital provider nor \textit{Mu'ārib}. In addition to this, it is permissible for the government of a country to guarantee voluntarily the principal amount of the capital, or a portion of the profit of investment of the \textit{Sūkūk al-Mu'ārabah}, in case there is any loss, or shortfall that may arise to the investment of the \textit{Sūkūk al-Mu'ārabah}.\footnote{Ibid. 144}
This is because this guarantee can encourage investors and savings fund holders to invest their funds in this kind of project that is in the public interest, which creates job opportunities for citizens who are jobless.

7. Conclusion

It is axiomatic that the structure of the Şukāk al-Mu‘ārahah as practiced presently in the stock markets, this practice violates completely the rules and principles of the classical Mu‘ārahah, which is recognized by Islamic law. The Şukāk al-Mu‘ārahah contract is different from other Şukāk contracts; it has its own rules, terms, and conditions that should be followed in the contract in order to be in conformity with the principles of Islamic law. In Şukāk al-Mu‘ārahah contract that is in accordance with the principles of Islamic law, the principal amount of the capital providers, or a portion of the profit, is not guaranteed by the Mu‘ārib unless it is due to his negligence, or mismanagement for the Mu‘ārahah project.

The project entirely belongs to the capital providers; the Mu‘ārib is only entitled to the agreed portion of the profit in case profit is derived from the investment of the project. At the end of the period of the project, the Şukāk holders can sell their Şukāk at market price, or at any agreed price to anyone they want. They are not obliged to sell back their Şukāk to the Mu‘ārib at the face values of the Şukāk. If there is any provision in the prospectus of the issuance of the Şukāk that says, at the end of the project, the Şukāk must be sold to the Mu‘ārib at the face values, this provision will convert the Şukāk al-Mu‘ārahah contract to a loan contract with an interest charge, which is completely forbidden in Islamic law.
In Șukak al-Mulárabah transaction, the Múlárib is only an agent on behalf of the Șukák holders to manage the Múlárah project in the appropriate way of investment. If there is any condition in the contract, or in the prospectus of issuance, that there is a specific amount of the principal amount, or a portion of the profit, which is guaranteed by the Múlárib, then the contract violates the principles of Islamic law, which are required to be in the contract of a Múlárah project.

Pertaining to circulation of the Șukak al-Mulárabah, it is as other Șukak, where in the properties of the project, or most of them, must be real estate properties, usufructs, lands, so that the Șukak can be circulated in the stock market in accordance with the principles of Islamic law. If the properties of the project are still in the form of currency, in this case, the circulation of the Șukak must be in accordance with currency circulation in which the transaction must be on the spot, hands to hands, equal to equal.

Any delay, or taking a superfluous amount of the transaction is tantamount to a ribá transaction. The Șukak holders can terminate their Șukak transaction at any time they want without any condition, because in a classical Múlárah contract that has transpired, it is permissible for the capital provider to terminate the contract at any time he wants.

Moreover, it is permissible for a third party to guarantee voluntarily the principal amount of the project, or a portion of the profit, if this guarantee is exercised without taking any benefit, either monetary, or physical. This third party must be separate from the capital providers and Múlárib and has no relation with the investment of the Múlárah project to be in conformity with the principles of Islamic law.
As a result of this, one can conclude this study by saying that application of third party guarantee is permissible in the structure, circulation, retrieval, and termination of *Sukūk al-Mudarabah* if it is done voluntarily without any consideration.

References


