

***Şukūk al-Muḍārabah* and Application of Third-Party Guarantee**

Chaibou Issoufou¹ & Umar A. Oseni²

Abstract

This paper explores importance of *Şukūk al-Muḍārabah* in Islamic capital movement and its suitability for financing projects which individuals are not able to provide capital for them. *Şukūk al-Muḍārabah* is the most popular *Şukūk* in *Şukūk* 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 *Şukūk 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 *Şukūk al-Muḍārabah* process due to the crucial role that this guarantee plays in protection of *Şukūk* transaction which exposes to risk transaction. It was found in this paper that application of third party guarantee is permissible in the *Şukūk al-Muḍārabah* process if it is done without charging a fee.

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

1. Introduction

Şukūk 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.

¹ Senior Lecturer, Department of Islamic Finance, University Kuala Lumpur (UniKL) Business School (UBIS), Malaysia. Email: issoufou@unikl.edu.my

² Associate Professor, Department of Civil Law, Faculty of Law, International Islamic University Malaysia. Email: umaroseni@iiu.edu.my

Therefore, having *Şukūk al-Muḍārabah* 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 *Şukūk al-Muḍārabah* 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 *Şukūk Muḍārabah* 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 (*Maşlahah*) of the country, which assists the government to complete its financial obligations towards the citizens of the country.

2. Nature of *Şukūk al-Muḍārabah*

Şukūk al-Muḍārabah 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

³Ḥasan '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, *Şukūk al-Muḍārabah* 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.”⁴

In the *Muḍārabah* project, the capital providers are considered as the investors who are called *Arbāb al-Amwāl* and the manager, or entrepreneur who is called the *Muḍārib*. 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 *Şukūk* holders (capital providers) are responsible for it, unless there is clear evidence that it is due to carelessness or a misdemeanor of the *Muḍārib*. In this case, the *Muḍārib* is responsible for the loss, or the damage that happened to the project.

From the aforesaid, it can be observed that, in *Şukūk al-Muḍārabah* 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 *Muḍārabah* 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 *Şukūk al-Muḍārabah* as certificates that represent ownership over underlying assets that are exposed for investment.

⁴Wan Abdul Rahim Kamil, *Structuring Şukūk*, paper presented at IBFM Workshop on Detailed Structuring of Islamic Securities (Kuala Lumpur: IBFM 2007), 9

Wherein, the *Muḍārib* 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 *Muḍārib* to invest the capital of *Muḍārabah* according to their instructions, terms and conditions. In this respect, it can infer that, there are two types of *Muḍārabah* i.e. unrestricted and restricted *Muḍārabah*.

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

Restricted *Muḍārabah* is to confine the investment of the *Muḍārabah* capital and the authority of the *Muḍārib* to specific conditions and rules which the *Muḍārib* must comply with. For example, the capital provider may stipulate to the *Muḍārib* to not travel with the principal amount of the capital outside of the country in which the *Muḍārib* resides. He may also have a stipulation on the *Muḍārib* 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 *Muḍārib* 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 *Muḍārabah* capital to specific merchandise.

⁵Al-Māwardī, Abū al-Ḥasan, 'Alī bin Muḥammad bin Ḥabīb, *Min Uṣūl al-Iqtiṣād al-Islāmī*, *Al-Muḍārabah*, *Dirāsah wa Taḥqīq wa Ta'alīq*, 'Abdul-Wahab al-Sayyid Ḥawās (Egypt: Dār al-Anṣār,1983), 134-135

⁶Ibid.

The reason is that, this restriction will prevent the *Muḍārib* from the objective of *Muḍārabah*, 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 *Muḍārabah* contract.⁷

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

In a nutshell, one can say that, according to ḥanafī and ḥanbalī jurists, it is permissible for the capital provider to restrict the investment of *Muḍārabah* 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 *Muḍārabah* 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 *Muḍārabah* contract from that specific merchandise.

In addition to that, the restriction of the *Muḍārib* to sell and buy from a particular person, is disputed between the Mālik and Shāfi'ī jurists, as well as the Ḥanbalī and Ḥanafī jurists.

⁷Ibn Rushd, Abū al-Walīd Muḥammad bin Aḥmad bin Muḥammad bin Aḥmad bin Rushd al-Qurṭubī al-Andalusī, *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid* Tanqīh wa taṣāḥiḥ Khālid al-'Aṭṭār, Ṭaba'h Jadīdah wa Munaqaḥah wa Muṣaḥaḥah, vol. 2 (Beirut Dār al-Fikr, 2001), 192-193. See also 'Abdullah bin Ḥijāzī bin Ibrāhīm al-Shāfi'ī al-Azharī, *Ḥāshiyat al-Sharqāwī 'alā Tuḥfat al-ṭṭulāb bi Sharḥ Taḥrīr Tanqīh al-Libāb*, Abū, Yaḥyā Zakariyah al-Anṣārī ma' Taqrīr al-sayyid Muṣṭafā bin Ḥanafī al-dhahabī al-Maṣrī 'alā Ḥāshiyat al-Shaykh al-Sharqāwī vol. 3 1st edition (Beirut: Dār al-Kutub al-'Ilmiyyah, 1997), 222.

⁸Ibn Qudāmah, Abū Muḥammad, 'Abdullah bin Aḥmad bin Muḥammad bin Qudāmah *al-Muqdasī, al-Mughnī* alā Mukhtaṣar, Abū al-Qāsim 'Umar bin Ḥusain bin 'Abdullah bin Aḥmad al-Khiraqī, vol. 5 (Beirut: 'Ālam al-Kutub, nd), 68-69.

The former group is of the view that this type of *Muḍārabah* contract is void. In this case, the *Muḍārib* deserves a similar wage that is in relation to his work on the capital. In other words, in this case, the *Muḍārabah* contract will convert to a leasing contract, wherein the *Muḍārib* 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 *Muḍārabah* 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 *Muḍārabah* investment to a specific trader that the *Muḍārib* will deal with during the period of the *Muḍārabah* 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 *Muḍārabah* 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 *Muḍārabah* investment with a specific trader.

Another issue is that the restriction of the *Muḍārabah* 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 *Muḍārabah* investment to a specific market. If the *Muḍārib* obliges himself to follow this restriction, the contract is void.¹¹

⁹Ibn Rushd. 192-193 See al-Māwardī, 135

¹⁰Ibn Qudāmah, 68-69. See al-Kāsānī, *Badā'ī'al-Ṣanā'ī' Fī Tartīb al-Sharā'ī'*, Ṭaba'ah Jadīdah, Ḥaqāhā wa Kharraja 'Ādīthā 'alā Thuluth Nusakh Khāliyah, Muḥammad 'Armān bin Yāsīn Darwīsh, vol. 5 (Beirut: Dār Ihyā'a al-Turāth al-'Arabī, Mu'asasah al-Tārīkh al-'Arabī, 2000), 137-141

¹¹Ibn 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 *Muḍārib* can invest the capital in the market without any difficulty to gain profit from the investment.¹² 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 *Muḍārib* within a specific market to trade the capital of the *Muḍārabah* 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 *Muḍārib*, 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 *Ṣukūk al-Muḍārabah*

In *Ṣukūk al-Muḍārabah* transaction the issuer is considered as the *Muḍārib*, the subscribers are considered as the capital providers who are *Ṣukūk* holders. The realized fund that they provide to active the project is *Muḍārabah* capital which is entirely belonging to the *Ṣukūk* 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.

¹²Al-Māwardī, Abū al-Ḥasan, 134-135, See also al-Kāsānī, Ibn Qudāmah

In the *Muḍārabah* project, *Ṣukūk* holders are considered as the owners of the *Muḍārabah* 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 *Muḍārib*'s portion. The owners of *Ṣukūk al-Muḍārabah* 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 *Ṣukūk* holders have the right to sell their *Ṣukūk* in secondary market at their discretion.

In *Ṣukūk al-Muḍārabah* investment, the *Ṣukūk* holders are not allowed to claim any fixed interest. This is because there is no interest taking from the investment of *Muḍārabah*.¹³

Furthermore, it was mentioned in *Fiqh* Academy resolution, which was held on 6-11 February, 1988 at Jeddah, that for *Ṣukūk al-Muḍārabah* transaction to be in conformity with the principles of Islamic law, the *Ṣukūk* should represent undivided portions of ownership in the project. This ownership should continue from the beginning of the project until its end. The *Ṣukūk* 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 *Ṣukūk al-Muḍārabah* 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 *Ṣukūk 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 *Ṣukūk al-Muḍārabah*, It can be observed that, in *Ṣukūk al-Muḍārabah* transaction, the receiver of the proceeds of the subscription of the *Ṣukūk*, 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 *Sukūk* in the project. Based on this, he is the capital provider for those *Ṣukūk* 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 *Ṣukūk* 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 *Ṣukūk al-Muḍārabah* project; the project is financed by *Ṣukūk* holders and entirely belongs to them. The issuer of *Ṣukūk 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 *Ṣukūk* holders are solely responsible for it.

¹⁴Fiqh Academy Resolution, no. (5) d 4/08/88 on *Ṣukūk al-Muḍārabah*, Majallah Majma' al-Fiqh al-Islāmī, session 4, no.4 vol.3 (Jeddah: Majma' al-Fiqh al-Islāmī, 1988), 2162

Şukūk al-Muḍārabah 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 *Muḍārabah* project are still financial assets after the subscription and before conducting the investment, then the negotiability of the *Şukūk al-Muḍārabah* 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 *Muḍārabah* are debts, the rules of negotiability of debts should be applied to the negotiability of the *Şukūk al-Muḍārabah*. If the properties of the *Muḍārabah* are different types of assets, for instance, money, debts, real estates and usufructs, it is permissible to negotiate *Şukūk al-Muḍārabah* according to an agreed price provided that most of the properties of the investment are corporeal assets and usufructs.¹⁵

Negotiability of *Şukūk al-Muḍārabah* 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 *Şukūk*, either by announcement, or by offer to the public during a specific period of time in which the purchase of the *Şukūk* 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.¹⁶

¹⁵Ibid. 2162-2163

¹⁶Ibid. 2163

It is not permissible to include in the contract of *Şukūk al-Muḍārabah* a provision that the principal amount of the capital, or a portion of the profit is guaranteed by the *Muḍārib*. If the contract is concluded on that explicitly, or implicitly, the contract is a contract of loan, not a contract of *Muḍārabah*. 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 *Şukūk al-Muḍārabah* that it is obliged to sell back the *Muḍārabah* assets to the issuer; even it is a pending condition or future condition.

However, it is permissible to include in the contract of *Şukūk al-Muḍārabah* that there is a promise to sell back the *Muḍārabah* 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 *Şukūk* 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 *Şukūk* is concluded on that), then the contract is void.¹⁷

In addition to that, it is not permissible to stipulate in the contract of the *Şukūk al-Muḍārabah* that there is a specific amount for *Şukūk* 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 *Şukūk* holders and the *Muḍārib*, according to the conditions and terms of the contract that agreed upon.

¹⁷Ibid. 2163-2164

The calculation of the profit and loss of the project should be done publically at the disposal of the *Şukūk* holders.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 *Şukūk* holders, or from the proceeds of the project, which is distributed to the *Şukūk* 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 *Şukūk al-Muḍārabah* 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 *Muḍārabah*. In other words, the fulfillment of the promise is not a condition to execute the contract of *Şukūk al-Muḍārabah*, and rules, conditions and terms of the contract are not based on it. It is not permissible for *Şukūk* 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 *Şukūk al-Muḍārabah*,¹⁹

¹⁸Ibid. 2164

¹⁹Ibid.2164-2165. For detailed information on *Şukūk al-Muḍārabah*, see recommendations of the Fiqh Academy (OIC) at the same Majallah, 2005-2008

From the foregoing, it could deduce that *Şukūk al-Muḍārabah* transaction is very different from the other *Şukūk* transactions in terms of investment and management of the *Muḍārabah* project. In the *Şukūk al-Muḍārabah* transaction, the *Muḍārib* (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 *Muḍāribis* only the trustee to manage the project. Therefore, for the *Şukūk al-Muḍārabah* 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-Muḍārabah*

Şukūk al-Muḍārabah 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-Muḍārabah*

In the *Şukūk al-Muḍārabah* structure, the *Muḍārib* (the issuer or entrepreneur) provides entrepreneurship. He issues *Şukūk al-Muḍārabah* to signify that the capital providers are participants in the *Muḍārabah* project. The profit that is derived from the *Muḍārabah* investment is paid to the investors. At the maturity period of the investment of the project, the *Muḍārib* 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 *Şukūk al-Muḍārabah*, one can say that the structure of *Şukūk al-Muḍārabah* seems to not be in conformity with the principles of Islamic law. This is because, at the maturity of period of the project, the *Muḍārib*, who is only a trustee to manage the project, will buy back the asset of the *Muḍārabah* project, and pay the capital providers, or investors (*Arbāb al-Amwāl*) their principal amount of the capital that they have paid to finance the *Muḍārabah* 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 *Muḍārabah* project is returned to them and the asset will be returned to the *Muḍārib* 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 (*Şukūk* holders), it is a loan that the *Muḍārib* 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 *Muḍārabah* contract is that the asset, or the project is entirely belonging to the capital provider, and the *Muḍārib* is only the trustee to manage the project. Therefore, based on the foregoing structure of *Şukūk al-Muḍārabah*, it is obvious that the structure of *Şukūk al-Muḍārabah* 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 *Muḍārib*. 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.

²¹Ḥusain Ḥāmid Ḥassān, *Ḍamān Ra'as al-Māl aw al-Ribḥ fi Ṣukūk al-Muḍārabah aw Sanadāt al-Muḍārabah*, paper presented at Fiqh Academic conference at Jeddah, Majallah Majma' al-Fiqh al-Islāmī (Jeddah: Majma' al-Fiqh al-Islāmī, 1988), 1875-1876. For further information on third party guarantee in *Muḍārabah* contract and its application in Islamic banking see Muḥammad 'Abdul-Mun'im 'Abū Zaid at 135-137

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

4.2 Circulation of *Şukūk Al-Muḍārabah*

Circulation of *Şukūk al-Muḍārabah* 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 *Şukūk al-Muḍārabah* before starting the operation of the *Muḍārabah* 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 *Şukūk* 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, *Şukūk al-Muḍārabah* can be circulated after starting the operation of the project if most of the properties of the *Muḍārabah* 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 *ribĒ* transaction or uncertainty at all.

Nevertheless, *Şukūk al-Muḍārabah* 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

²²Wahbat al-Zuhailī, *al-Mu'āmalāt al-Māliyyah al-Mu'āṣarah: Buḥūth wa Fatāwā wa Ḥulūl* (Dimashq: DĒr al-Fikr 2008) , 226-227

Furthermore, it is not permissible for issuer of the *Ṣukūk al-Muḍārabah* to guarantee the principal amount, or a portion of the profit for investors because this would convert the *Ṣukūk 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 *Ṣukūk* wherein the *Ṣukūk* represents the transfer of the asset from one party to another in its records in the name of the *Ṣukūk* holders.²³

In view of the aforesaid circulation of *Ṣukūk al-Muḍārabah* some rules and principles should be observed in the contract of the *Ṣukūk 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 *Ṣukūk al-Muḍārabah*.

Since circulation of *Ṣukūk al-Muḍārabah* is selling the *Ṣukūk* 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 *Muḍārib* is travelling from country to country trading with the capital of the *Muḍārabah* to earn profit from the investment of the capital.

²³Majallah Majma' al-Afiqh al-Islāmī session 4 no. 4, vol. 3 (Jeddah: Majallat al-Fiqh al-Islāmī:1988), 2163

²⁴Sūrat 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 *Muḍārabah* contract, the *Muḍārib* 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 *Muḍārib*. When he had become a Prophet, he recognised this as a lawful way of business."²⁶In another vein, it was stated by Ḥakīm bin Hizām (may Allāh be pleased with him) that "if he has been given a *Muḍārib* an amount as capital of a *Muḍārabah*; he stipulated on the *Muḍārib* to not trade with an animal, or enter into a sea, or get into a valley.

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

²⁵Khadijah 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 *Muḍārabah* 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-Shām* as a *Muḍārib* 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.....

²⁷Al-Shawkānī, Muḥammad bin 'Alī bin Muḥammad al-Shawkānī, *Nayl al-Awtār min 'aḥādīth Sayyid al-Akhyār Sharḥ Muntaqā al-Akḥbā*, vol. 5 (Beirut: Dār al-Jalīl, 1973), 393. See also Sublah al-Salam, vol. 3, 915

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 *Muḍārabah*. It was also stated by ‘Alī (may Allāh be pleased with him) that, “in a *Muḍārabah* contract, the loss is borne on the capital, and the profit is according to the agreement between the contracting parties.”²⁸ This means that in a *Muḍārabah* investment, any loss is borne by the capital provider, and any profit is shared between the *Muḍarib* and capital provider according to the portion that agreed upon.

The foregoing verses and statements show that *Muḍārabah* 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 *Muḍarib* does not guarantee any damage, or loss that may happen to the investment. However, if the *Muḍarib* has gone beyond the terms and conditions of the *Muḍārabah* contract, he is liable for any damage, or loss that may happen to the investment of *Muḍārabah* project.

4.2.1 Application of Third Party Guarantee in Circulation of *Ṣukūk Al-Muḍārabah*

Muslim jurists agree that the guarantee of a *Muḍārabah* investment is on the capital provider. The *Muḍarib* 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.

²⁸ Abū Bakar, ‘Abdurazāq bin Hamām al-Ṣan’ānī, *Al-Muṣanif*, Taḥqīq , Ḥabīb al-Raḥmān al-‘Azamī vol. 8, 1st edition (Bairut: Maktab al-Islāmī, 1970), 248

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 *Muḍāribah* 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, Mālik adds today 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. Mālik, Shafi'ī and Ḥanbalī. They are of the view that both of the stipulation and contract of *Muḍārabah* are void (*batil*).

The reason is that the stipulation of a guarantee on the *Muḍārib* will amount to superfluous uncertainty on the *Muḍārib*, 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 *Muḍārib* 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 *Muḍārabah*.²⁹ Hence, they say that the stipulation of the guarantee in the *Muḍārabah* is usually accompanied with an additional amount for the capital provider in the profit. This is because a portion of the *Muḍārib* 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 shared between the capital provider and *Muḍārib*. 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 *Muḍārabah* contract. It was known that the condition of the valid *Muḍārabah* contract is that the portion of profit of each party must be known to the parties before conducting the operation of the *Muḍārabah*, otherwise the *Muḍārabah* contract is void.³⁰

However, Ḥanafī jurists are of the view that if the capital provider stipulated in the contract of *Muḍārabah* that the loss is borne by the *Muḍārib*, this stipulation is void, but the contract of *Muḍārabah* is valid. This is because the loss is a part of the *Muḍārabah* property, which should be borne by the capital provider only.

²⁹Ṣafīyyah ‘Abdul-‘Azīz al-Sharqāwī, *al-Takyīf al-Sharī Lisharikāt al-Muḍārabah al-Islāmiyyah wa al-‘Āthār al-Mutarabah ‘alayhā*, (Egypt: Dār al-Nahaḍah al-‘Arabiyyah, 1991),78

³⁰Ibid.

In addition, they say that stipulation of the guarantee does affect the ignorance of the profit, which is the subject matter of the *Muḍārabah* contract. Therefore, the contract of *Muḍārabah* 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 *Muḍārabah* contract, or a part of the profit, or loss on the *Muḍārib* 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 *Muḍārabah* investment, or loss in the investment, will convert the contract of *Muḍārabah* to a loan contract, wherein any benefit derived from it is tantamount to a *ribā* transaction, which Muslim jurists unanimously agree that it is prohibited by Islamic law. Besides, the investment of the *Muḍārabah* is not in line of the *Ḥadīth* of the Prophet (S.A.W) that forbids any profit without taking liability of risk of the investment (*Nahā (S. A. W)an ribiḥ mā lam yuḍman*).³²

The issue that may arise is that, is it permissible for the *Muḍārib* to voluntarily guarantee the principal amount of the capital of the *Muḍārabah* investment without any stipulation on him to do so. The answer to this issue is that only Imam Mālik says that, it is permissible for the *Muḍārib* to guarantee voluntarily the principal amount of the capital of the *Muḍārabah* 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.

³¹Ibid. 79-80

³²Ibid

Based on this, it is permissible for the *Muḍārib* to voluntarily guarantee the principal amount of the capital of the *Muḍārabah* after the contract is concluded, even though the origin in the *Muḍārabah* contract is that the principal amount of the capital is trusted property in *Muḍārib's* hands.³³

However, the voluntary guarantee of the principal amount, or portion, or profit, or any loss of the *Muḍārabah* investment from the *Muḍārib* may lead to a bribe to make the investment of a *Muḍārabah* 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 *Muḍārabah* 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 *Muḍārabah* 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 *Muḍārabah* investment in any circumstance for the aforesaid reasons.

4.3 Retrieval of *Ṣukūk Al-Muḍārabah*

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

³³Ibid, 81-82, for details on guarantee in *Muḍārabah* contract and its practice in Islamic banking see Muḥammad 'Abdul-Mun'im 'Abū Zaid, *Taṭwīr Nizām al-Muḍārabah fī al- Maṣārif al-Islāmiyyah* 1st edition 2000 at 126-134

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

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

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

The question may arise is that whether the retrieval of the *Ṣukūk al-Muḍārabah* will be conducted at the face value of the *Ṣukūk*, or at market value? To answer this question, Taqī Uthmānī says, it is obliged in the retrieval of the *Ṣukūk al-Muḍārabah* 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 *Muḍārabah* investment that will be distributed between the capital provider and the *Muḍārib* according to the portion that agreed upon.

³⁴ Muḥammad Taqī 'Uthmānī, paper presented at Fiqh Academic conference that held at Jeddah, Majallat Majma' al-Afiqh al-Islāmī session 4 no. 4, vol. 3 (Jeddah: Majallat al-Fiqh al-Islāmī :1988), 1858

If the contract of the retrieval is concluded on the condition that the capital provider will sell the *Şukūk* at the face value when the *Şukūk* 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 *Şukūk al-Muḍārabah* at the face value, but it is obliged to retrieve it at the market value, so that the retrieval of *Şukūk al-Muḍārabah* will be in line with the principles of Islamic law.³⁵

From the foregoing, the retrieval of the *Şukūk 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 *Şukūk* 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 *ribĒ*, which is forbidden by the axiomatic texts of Islamic law.

4.3.1 Application of Third Party Guarantee in Retrieval of *Şukūk Al-Muḍārabah*

Muslims jurists unanimously agree that guarantee of the principal amount of *Muḍārabah* project is on the *Şukūk* 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 *Şukūk al-Muḍārabah* is selling back the *Şukūk* 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 *Şukūk al-Muḍārabah*, and has no relation with any of the contracting parties, to guarantee the price of the retrieved *Şukūk* for the *Şukūk* holders and delivery of the *Şukūk* to the *Muḍārib* 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 *Muḍārib*, or *Şukūk al-Muḍārabah* project.³⁶

From the abovementioned, it is obvious that the application of third party guarantee is allowed in the retrieval of *Şukūk al-Muḍārabah* provided that it will be done voluntarily without any charge of a fee.

4.4 Termination of *Şukūk Al-Muḍārabah*

Termination of *Şukūk al-Muḍārabah* can be done by selling the *Şukūk* to other party, or to the *Muḍārib* himself wholly, or partially. Hence, *Şukūk al-Muḍārabah* contract can be terminated by termination of the period of the *Muḍārabah* contract that is agreed between *Şukūk* holders and the *Muḍārib*.

³⁶Husain Hāmid Ḥassān, 1875

In Islamic law, it is permissible for *Şukūk* holder to sell his all *Şukūk al-Muḍārabah* to the *Muḍārib*, or to anyone he wishes. In case *Şukūk* holder sold the all *Şukūk* to the *Muḍārib*, or anyone, then the contract of *Şukūk al-Muḍārabah* is terminated between him and the *Muḍārib*.³⁷

However, in case the *Şukūk* holder sells a part of *Şukūk al-Muḍārabah* to the *Muḍārib*, then the *Muḍārib* will become a partner of the *Şukūk* holder with the part that is sold to him. In other words, if the capital provider sold a part of the *Şukūk* to the *Muḍārib*, the part that is sold to *Muḍārib* is entirely belonging to the *Muḍārib*; any profit that is derived from the investment of that part is exclusively belonging to the *Muḍārib*. He is only obliged to distribute the profit that is derived from the rest of the *Şukūk* 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 *Muḍārib* immediately. This is because; it is not allowed to continue the *Muḍārabah* contract on the entire project until the period of the *Muḍārabah* is expired³⁸

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

³⁷Taqī 'Uthmānī, 1862-1863.

³⁸Taqī 'Uthmānī, 1862-1863. See also Fatāwā Dā'rat al-Bunūk al-Islāmiyyah , Fatāwā al-Muḍārabah no. 0579 <http://www.ibisonline.net/Shariah/Fatwa.aspx?Fatwa=37648> retrieved on 13th May 2012

4.4.1 Application of Third Party Guarantee in Termination of *Şukūk Al-Muḍārabah*

There is no dissenting opinion among Muslims jurists that, in the *Muḍārabah* contract, the *Muḍārib* is not liable for any damage that may happen to the principal amount of *Muḍārabah*, or any shortfall to the profit; unless it is a fact of negligence, or transgression from him. Hence, termination of *Şukūk al-Muḍārabah* can be done by termination of the period of *Muḍārabah* contract, or by selling the *Muḍārabah* properties to the *Muḍārib*, 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 *Şukūk al-Muḍārabah*, 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 *Şukūk al-Muḍārabah* to guarantee voluntarily on behalf of the *Şukūk* holders and the *Muḍārib* 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

³⁹Ibid. 1876

Based on this, the application of third party guarantee is permissible in the termination of the *Ṣukūk al-Muḍārabah* 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 *Ṣukūk Al-Muḍārabah*

In the contemporary practice of *Ṣukūk al-Muḍārabah*, the *Muḍārib* 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 (*Arbab amwāl*) for the *Muḍārabah* 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 *Ṣukūk* represent monetary units and the principal amount of every participant in the project. Moreover, the *Ṣukūk* represents the undivided portion in the project after the subscription is closed.

The ownership in the project is not limited to the *Ṣukūk* themselves, but to the financial portion that the *Ṣukūk* 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 *Muḍārabah* contract.

The participation in the subscription to bankroll the project by buying the *Şukūk* is considered as an acceptance for the offer of the *Şukūk*. 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 *Muḍārib* 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 *Şukūk 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 *Şukūk al-Muḍārabah* holders, who are considered as capital providers, may change from time to time because of the circulation of the *Şukūk* in the stock market.

Furthermore, in the contemporary form of practice of *Şukūk al-Muḍārabah*, in which the *Muḍārib* solely specifies the issuance of the *Şukūk*, 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 *Şukūk*, the proceeds of the *Şukūk al-*

⁴⁰Husain Hāmid Ḥassān, *Ḍamān Ras al-Māl aw al-Ribḥ fī Şukūk al-Muḍārabah aw Sanadāt al-Muqāraḍah*, paper presented at Fiqh Academic conference that held at Jeddah on 6-11 February, 1988, *Majallah Majma' al-Fiqh al-Islāmī* no. 4 session 4 vol. 3 (Jeddah: Majma' al-Fiqh al-Islāmī 1988), 1869 -1870

Muḍārabah represent the principal amount of the capital that belongs to the *Ṣukūk* holders.

The *Muḍārib* 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 *Ṣukūk* holders will transfer to those properties because the project consists of those properties.⁴¹

From the foregoing, it could be observed that in contemporary *Ṣukūk al-Muḍārabah* practice, the *Muḍārib* is the only person reliable to manage the project. This is because he issues the *Ṣukūk* to seek capital to finance the project, while the *Ṣukūk* holders do not perceive the content of the prospectus, and they do not know each other. As a result of this, the *Muḍārib* 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 *Ṣukūk al-Muḍārabah* practice; the *Ṣukūk* 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 *Ṣukūk*.

6. Overall Application of Third-Party Guarantees In *Ṣukūk Al-Muḍārabah*

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

⁴¹ Ibid

However, according to a classical *Muḍārabah* contract that is in conformity with the principles of Islamic law; the *Muḍārib* is the manager of the project in favour of the capital providers. In *Ṣukūk al-Muḍārabah* investment, the *Muḍārib* 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 *Ṣukūk al-Muḍārabah*. The *Ṣukūk* 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 *Muḍārib* is not binding to follow the rules that impede him from the investment of the principal amount of the *Muḍārabah* capital, and he is not entitled to guarantee any loss, or damage that may happen to the investment of the *Muḍārabah* project, unless it is due to his negligence and transgression.⁴²

Nevertheless, it is permissible to include in the prospectus of the *Ṣukūk al-Muḍārabah* that there is a third party who promises to guarantee voluntarily the principal amount of the *Muḍārabah* 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 *Ṣukūk al-Muḍārabah*.

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.

⁴²Hāmid 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.⁴³

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 *Şukūk al-Muḍārah* for *Şukūk* 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 *Muḍārib* 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 *Şukūk al-Muḍārah* 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.⁴⁴

Notwithstanding, there are two groups of views on the application of a third-party guarantee in *Şukūk al-Muḍārah* 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.

⁴³Ibid. 1875

⁴⁴Ibid.1876 -1877

Therefore, what is not guaranteed on the principal, like principal amount of the *Muḍārabah* 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 *Muḍārib*. They are of the view that a third-party guarantee is a means to *ribā* transaction; therefore, it is obliged to forbid it by applying the Islamic legal maxim, “blocking the means”.⁴⁵

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-Taṣaruf*) is permissibility”; therefore, it is permissible for the third party, who is not a capital provider, or *Muḍārib*, to guarantee voluntarily any loss, or damage that may happen to the capital of the *Muḍārabah*, or to the profit.⁴⁶

From the foregoing, one can say that the application of a third-party guarantee in *Ṣukūk al-Muḍārabah* 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 *Muḍārib*. 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 *Ṣukūk al-Muḍārabah*, in case there is any loss, or shortfall that may arise to the investment of the *Ṣukūk al-Muḍārabah*.

⁴⁵Yūsuf ‘Abdullah al-Shubailī, *al-Khidmāt al-Istithmāriyyah fī al-Maṣarif wa al-ḥkāmuḥā fī al-Fiqhī al-Islāmī*, vol. 2 (Beirut: DĒr Ibn al-jawzī , 2005), 141

⁴⁶Ibid.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 *Şukūk al-Muḍārabah*, as practiced presently in the stock markets, this practice violates completely the rules and principles of the classical *Muḍārabah*, which is recognized by Islamic law. The *Şukūk al-Muḍārabah* contract is different from other *Şukūk* 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 *Şukūk al-Muḍārabah* 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 *Muḍārib* unless it is due to his negligence, or mismanagement for the *Muḍārabah* project.

The project entirely belongs to the capital providers; the *Muḍārib* 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 *Şukūk* holders can sell their *Şukūk* at market price, or at any agreed price to anyone they want. They are not obliged to sell back their *Şukūk* to the *Muḍārib* at the face values of the *Şukūk*. If there is any provision in the prospectus of the issuance of the *Şukūk* that says, at the end of the project, the *Şukūk* must be sold to the *Muḍārib* at the face values, this provision will convert the *Şukūk al-Muḍārabah* contract to a loan contract with an interest charge, which is completely forbidden in Islamic law.

In *Şukūk al-Muḍārabah* transaction, the *Muḍārib* is only an agent on behalf of the *Şukūk* holders to manage the *Muḍārabah* 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 *Muḍārib*, then the contract violates the principles of Islamic law, which are required to be in the contract of a *Muḍārabah* project.

Pertaining to circulation of the *Şukūk al-Muḍārabah*, it is as other *Şukūk*, where in the properties of the project, or most of them, must be real estate properties, usufructs, lands, so that the *Şukūk* 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 *Şukūk* 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 *ribā* transaction. The *Şukūk* holders can terminate their *Şukūk* transaction at any time they want without any condition, because in a classical *Muḍārabah* 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 *Muḍārib*, and has no relation with the investment of the *Muḍārabah* 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 *Ṣukūk al-Muḍārabah* if it is done voluntarily without any consideration.

References

- 'Abdullah bin Ḥijāzī bin Ibrāhīm al-Shāfi'ī al-Azharī.(1997).*Ḥāshiyat al-Sharqāwī 'alā Tuḥfat al-ṭṭulāb bi Sharḥ Taḥrīr Tanqīḥ al-Libāb*, Abū, Yahyā Zakariyah al-Anṣārī ma' Taqrīr al-sayyid Muṣṭafā bin Ḥanafī al-dhahabī al-Maṣrī 'alā Ḥāshiyat al-Shaykh al-Sharqāwī vol. 3 1st edition Bairut: Dār al-Kutub al-'Ilmiyyah.
- Al-Māwardī, Abū al-Ḥasan, 'Alī bin Muḥammad bin Ḥabīb.(1983). *Min Uṣūl al-Iqtisād al-Islāmī, Al-Muḍārabah*, Dirāsah wa Taḥqīq wa Ta'alīq, 'Abdul-Wahab al-Sayyid Ḥawās. Egypt: Dār al-Anṣār.
- Al-Kāsānī. (2000). *Badā'ī'al-ṣanā'ī' Fī Tartīb al-Sharā'ī'*, Ṭaba'ah Jadīdah, Ḥaqāhā wa Kharraja 'Ādithā 'alā Thuluth Nusakh Khaṭīyah , Muḥammad 'Arnān bin Yāsīn Darwish, vol. 5 (Bairut: Dār Iḥyā'a al-Turāth al-'Arabī, Mu'asasah al-Tārīkh al-'Arabī.
- 'Alī Aḥmad al-Sālūs. (1988).*Sandāt al-Muqāraḍah wa al-Istithmār*, paper presented at Fiqh Academic conference that held at Jeddah on 6-11 February,1988, Majallah Majma' al-Fiqh al-Islāmī no. 4 session 4 vol. 3 Jeddah: Majma' al-Fiqh al-Islāmī.
- Al-Shawkānī, Muḥammad bin 'Alī bin Muḥammad al-Shawkānī. (1973).*Nayl al-Awtāf min 'ahādīth Sayyid al-Akhyār Sharḥ Muntaqā al-Akḥbā*, vol. 5 (Beirut: Dār al-Jalīl.
- Abū Bakar, 'Abdurazāq bin Hamām al-ṣan'ānī. (1970).*Al-Muṣanif*, Taḥqīq ,Ḥabīb al-Raḥmān al-'Aẓamī vol. 8, 1st edition Bairut: Maktab al-Islāmī
- Fiqh Academy Resolution.(1988). (no. (5) d 4/08/88 on *Ṣukūk al-Muḍārabah*, Majallah Majma' al-Fiqh al-Islāmī, session 4, no.4 vol.3 (Jeddah: Majma' al-Fiqh al-Islāmī.
- Fatawā Dā'rat al-Bunūk al-Islāmiyyah , Fatawā al- Muḍārabah no. 0579
<http://www.ibisonline.net/Shariah/Fatwa.aspx?Fatwa=37648> retrieved on 13th May 2012
- Islamic Bonds (Ṣukūk): Its Introduction and Application,
<http://aboobarza.wordpress.com/2008/10/17/islamic-bonds-sukuk-its-introduction-and-application/>, retrieved 23 June 2012

- Ibn Rushd, Abū al-Walīd Muḥammad bin Aḥmad bin Muḥammad bin Aḥmad bin Rushd al-Qurṭubī al-Andalusī. (2001). *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid Tanqīh wa taṣḥīḥ* Khālīd al-'Aṭṭār, Ṭaba'h Jadīdah wa Munaqāḥah wa Muṣaḥḥah, vol. 2 Bairut Dār al-Fikr.
- Ibn Qudāmah, Abū Muḥammad, 'Abdullah bin Aḥmad bin Muḥammad bin Qudāmah *al-Muqdasī*. (nd). *al-Mughnī 'alā Mukhtaṣar*, Abū al- Qāsim 'Umar bin Ḥusain bin 'Abdullah bin Aḥmad al-Khiraqī, vol. 5 Beirut: 'Ālam al-Kutub.
- Ḥusain Ḥāmid Ḥassān. (1988). *Ḍamān Ras al-Māl aw al-Ribḥ fī Ṣukūk al-Muḍārabah aw Sanadāt al-Muqāraḍah*, paper presented at Fiqh Academic conference that held at Jeddah on 6-11 February, 1988, Majallah Majma' al-Fiqh al-Islāmī no. 4 session 4 vol. 3 Jeddah: Majma'al-Fiqh al-Islāmī.
- Ḥasan 'Abdullah al-'Amīn. (1988). *Sanadāt al-Muqāraḍah wa Sanadāt al-Istithmar* 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.
- Muḥammad bin 'Aṣmat Bajtish. (2005). "*Ṣukūk al-Muḍārabah wa Taṭbīqātuhā fī al-Maṣārifi al-Islāmiyyah*" Master Dissertation, International Islamic University.
- Muḥammad 'Abdul-Mun'im 'Abū Zaid. (2000). *Taṭwīr Nizām al-Muḍārabah fī al-Maṣārif al-Islāmiyyah* 1st edition.
- Muḥammad Taqī 'Uthmānī. (1988). paper presented at Fiqh Academic conference that held at Jeddah, Majallat Majma' al-Afiqh al-Islāmī session 4 no. 4, vol. 3 Jeddah: Majallat al-Fiqh al-Islāmī.
- Rafiq Yūnus al-Maṣrī. (1988). *Sanadāt al-Muqāraḍah*, paper presented at Fiqh Academic conference that held at Jeddah on 6-11 February, 1988, Majallah Majma' al-Fiqh al-Islāmī no. 4 session 4 vol. 3 Jeddah: Majma'al-Fiqh al-Islāmī.
- Ṣafiyyah 'Abdul-'Azīz al-Sharqāwī. (1991). *al-Takyīf al-Shar'ī Lisharikāt al-Muḍārabah al-Islāmiyyah wa al-'Āthar al-Mutarabah 'alayhā*, Egypt: Dār al-Nahaḍah al-'Arabiyyah.
- Wahbat al-Zuhailī. (2008). *al-Mu'āmalāt al-Māliyyah al-Mu'āṣarah: Buḥṭh wa Fatāwā wa Ḥulūl* (Dimashq: Dār al-Fikr).
- Wan Abdul Rahim Kamil. (2007). *Structuring Ṣukūk*, paper presented at IBFM Workshop on Detailed Structuring of Islamic Securities Kuala Lumpur: IBFM.
- Yūsuf 'Abdullah al-Shubailī. (2005). *al-Khidmat al-Istithmariyyah fī al-Maṣārif wa al-ḥikāmah fī al-Fiqh al-Islāmī*, vol. 2 Beirut: Dār Ibn al-jawzī.