

## **Guarantees in *Ṣukūk* between Sharī‘ah Objectives and Contract Conditions**

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**ABSTRACT.** Guarantees offered for *ṣukūk* in Islamic finance have become a problematic issue of discussion. From the authors’ perspective, the issue should be approached from two aspects: one considering the required conditions for the validity of contracts and the other considering the Sharī‘ah objectives. This research aims to emphasize the necessity of considering the objectives of contracts from a Sharī‘ah perspective before judging their validity; particularly with regard to guaranteed *ṣukūk*. To achieve this goal, the research employs two methods: one descriptive and the other analytical as well as critical. The research has concluded that it is not permissible to stipulate holding the *ṣukūk* issuer liable neither for the *ṣukūk* nominal values nor for a predetermined amount of profit; that the idea of holding the *ṣukūk* issuer responsible based on considering him a joint *muḍārib* is not founded on solid evidence; that it is not permissible for the *muḍārib*, partner, or *wakīl* to be committed to give loan to *ṣukūk* holders when the actual return for *ṣukūk* is less than expected; that, in some of their applications, *ṣukūk* based on lease ending with ownership involve the impermissible *‘īnah* transaction; that guarantees in *ṣukūk* contradict Sharī‘ah rules when the issuer undertakes to purchase the *ṣukūk* assets at their nominal values at the end of the *muḍārabah*, *mushārahah*, or *wakālah*; and that the criteria to assess Islamic *ṣukūk* on the basis of Sharī‘ah objectives can be divided into: criteria related to the motive, criteria related to the contract structure, and criteria for the outcomes of implementing the product.

**Keywords:** *Ṣukūk*, Guarantee, *Maqāṣid al-Sharī‘ah*, Objectives, Validity, Securitization.

**KAUJIE Classification:** K13

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## 1. Introduction

Muslim jurists often tend to judge the validity of contracts by considering the fulfillment of their required conditions. Therefore, a jurist may judge a contract to be valid based on its apparent wording and formula, though it inherently contravenes Sharī'ah objectives regarding this particular contract. Another contract may be judged to be invalid due to lacking one condition, although it fulfills some of the Sharī'ah objectives.

In the modern Islamic banking industry, there is a need to reassess a number of financing practices in order to identify their Islamic orientation and to what extent they are in conformity with the spirit and objectives of the Sharī'ah after considering the regulations based on which such contracts have been judged to be valid or invalid.

To consider the conditions required for the validity of contracts in isolation from their Sharī'ah objectives has created portentous problems in Islamic financial transactions. A given contract may apparently fulfill such conditions but may fail to fulfill its objective as prescribed by the Sharī'ah. This poses a serious question about whether Islamic banking is on the right track and whether the current contracts in these banks conform to and accomplish Sharī'ah objectives as well as the objectives of an Islamic economy.

*Ṣukūk*, in particular, are widely seen as Islamic alternatives for usurious traditional bonds. The most significant privilege bonds have is their being securities of low risks, since they guarantee both the capital and the profit. Therefore, the issue of providing guarantees for *ṣukūk* is quite problematic and requires more investigation from two aspects: one considering the required conditions for the validity of contracts and the other considering Sharī'ah objectives that aim to achieve public interests.

This paper seeks to answer the following questions:

1. What does the term “guarantees in *ṣukūk*” mean?
2. Do Sharī'ah objectives have any effect on the validity of contracts including guarantees in *ṣukūk*?

3. How can guarantees in *ṣukūk* be assessed based on the juristic principle that “meanings and intents, not just words, are to be considered”?

The research aims to:

- (a) Explain the concept of “guarantees in *ṣukūk*”.
- (b) Highlight the necessity of considering contracts’ objectives from a Sharī'ah perspective before judging their validity.
- (c) Activate the consideration of the juristic principle that “meanings and intents, not just words, are to be considered”; particularly with regard to guaranteed *ṣukūk*.

## 2. Literature Review and Research Methodology

The researchers have not found a comprehensive study that covers the different aspects of the issue under discussion, although there are studies that have dealt with certain aspects.

In 2015 Asyraf Wajdi Dusuki published in JIBM a paper titled *Do Equity-Based ṣukūk Structures Fulfil the Objectives of Sharī'ah (Maqāṣid al-Sharī'ah)?*, in which he also adopted Sharī'ah objectives as a criterion to judge financial contracts. However, he focuses more on equity-based *ṣukūk*, whereas our paper extends the discussion to various kinds of *ṣukūk*. Dusuki argues that some innovations which try to achieve the same economic outcome as conventional instruments distort the vision of Islamic economics based on justice and equitability. The overemphasis on form over substance leads to potential abuse of Sharī'ah principles in justifying certain contracts which are contradictory to Sharī'ah objectives.

In his research submitted to the *Islamic Ṣukūk Symposium* at King Abdulaziz University, Jeddah (2010), al-Shareef discussed the problems facing Islamic *ṣukūk*. An important issue he raised is guaranteeing the value of *ṣukūk* and their returns. But he did not cover all related types and only focused on third party guarantee. This research, however, deals with all types of guarantee and considers them from the perspective of Sharī'ah objectives. Al-Shareef concludes that the third-party guarantee is not

permissible, from a *Sharī'ah* perspective, unless voluntarily provided by a completely independent party.

In a paper published in 2013, in the Saudi Magazine of Fiqh Association, titled *al-Dhamanat fi al-Shukūk al-Islamiyyah*, al-Umrani dealt with the most important forms of guarantee suggested for Islamic *shukūk*, but he did not focus on the impact of *Sharī'ah* objectives on judging such forms as this research intends to do. The researcher concludes that guarantees in *shukūk* are not permissible because they contradict *Sharī'ah* principles.

Abdulazeem Abozaid, in his *Naḥwa shukūk Islāmiyyah Haqiqiyyah*, (2010), tackled a number of issues related to the issuance and negotiability of *shukūk* aiming to reach a *Sharī'ah*-compliant, *ribā*-free *shukūk* structure that guarantees their perpetuity as a vital tool in Islamic finance. According to Abozaid, the current applications of guaranteed *shukūk* involve contraventions of *Sharī'ah* principles.

In 2010, Abdulbari Mash'al presented a paper titled *Al-Shukūk al-Islamiyyah Ru'yah Maqasidiyyah* in a seminar held by King Abdulaziz University on Islamic *shukūk*. In this paper, he suggested the following ways to make the guarantee provided by an independent third party acceptable from a *Sharī'ah* perspective:

- (i) In *amānah* (trust-based) contracts, the third party should offer to guarantee the established debt for no return;
- (ii) In *ḍamān* (liability-based) contracts, the binding promise to guarantee given by the third party should be for compensating the loss or the loss along with a portion of the profit;
- (iii) The binding promise should be to guarantee to buy the assets for a predetermined value; provided that *īnah* (purchase with instant resale) be avoided.

Shabnam Mokhtar published a paper in the ISRA Journal (2011), titled *Application of Wa'd in Equity-Based shukūk: Empirical Evidence*, in which she aimed to provide empirical evidence on actual application of *wa'd* in equity-based *shukūk* in the market to answer a question whether the purchase undertaking guarantees the principal in equity-based *shukūk*.

Our research is grounded on the existing papers and studies on the subject and employs two approaches: one descriptive and the other analytical as well as critical. The former is used to present the opinions of a variety of Muslim jurists and also to describe the issue of *shukūk* as applied in Islamic banks. The latter is used to analyze juristic opinions and their applications to the issue under discussion and also to criticize wrong applications, if any.

### 3. The Concept of Guarantees in Islamic *Shukūk*

Though the term *shukūk* (sing. *shakk*) has been used by Arabs, it is not originally an Arabic word. Arab lexicographers classify *shakk* as an Arabicized word that likely has a Persian origin meaning a financial certificate. (Ibn Manzur, 1414H, 10:457) These certificates represent financial obligations originating from trade or other commercial activities.

Technically, *shukūk* are defined by AAOIFI (Accounting and Auditing Organization for Islamic Financial Institutions) as

certificates of equal value representing undivided shares in ownership of tangible assets, usufruct and services or (in the ownership of) the assets of particular projects or special investment activity, however, this is true after receipt of the value of the Sukuk, the closing of subscription and the employment of funds received for the purpose for which the Sukuk were issued. (AAOIFI, 2015, p. 468)

The process of issuing such securities is known as *taškīk*. The word *tawwīq* (securitization) is frequently used as synonymous to *taškīk*. The OIC's International Islamic Fiqh Academy (hereafter referred to as IIFA) defines it as "the issuance of negotiable securities based on a profitable investment project" (Magazine of the IIFA, 2004, vol. 2, p. 309).

*Shukūk* represent common shares in the ownership of assets dedicated for investment, be they properties, usufructs, services or a mixture of these along with moral rights, debts and cash. They do not represent debt on the issuer for the holder. Consequently, the holder of a *shakk* owns a share in the assets, not only in profits, and is a partner with other holders of *shukūk* who enjoy the same status. *Shukūk* are issued based on a *Sharī'ah*-compliant contract and with *Sharī'ah* regulations governing their issuance and negotiability. *Shukūk* holders share profits, as agreed upon in the

prospectus, and also share loss, according to the percentage of *ṣukūk* each one possesses. The idea of Islamic *ṣukūk* is meant to adopt the same underlying principle of partnership in Islamic finance; that is, “entitlement to profit depends upon the corresponding liability for loss” (Muhaysin, 2009, pp. 17-18).

### 3.1 Differences between *Ṣukūk* and Traditional Bonds

*Ṣakk*, just like a stock, represents a share in the ownership of project assets or a private investment activity. Thus, the right of the *ṣakk* holder is determinate in the very assets of the project or the company, whereas a bond represents a debt on the issuing company and is not related to determinate assets.

Moreover, a bond holder is not directly affected by the company activities or by its fiscal situation because he/she deserves the nominal value of the bond at specified dates plus the predetermined interest. The *ṣakk* holder, however, is affected by the results of the project activities and shares the risks. He/she shares the profits of the project and suffers the losses, if any, as well.

From the abovementioned, one remarks that the Islamic *ṣukūk* are securities of equal denominations representing common shares in the ownership of properties (*a' yān*), usufructs, services, or a private investment activity. Traditional bonds, one the other hand, depend on interest-based loans. Thus, Islamic *ṣukūk* depend on the existence of legitimate assets upon which the process of securitization is based and which generate income and the investors own these assets in accordance with their shares (Abdul Aziz, 2009, p. 6), unlike the case with traditional bonds which depend on interest-based loans.

### 3.2 Shari'ah Regulations for the Process of Securitization

The process of securitization has to abide by the following restrictions and regulations (AAOIFI, 2015, p. 316; al-Shareef, 2009, p. 7).

**First:** The securitized assets must be permissible in Shari'ah and valid for securitization without getting involved into prohibited transactions such as *ribā* and *gharar* (an element of uncertainty or ambiguity). It is not permissible, for example, to securitize debts generated by interest-based loans, because *ribā* and its offshoots have the same ruling.

**Second:** The *ṣakk* shall represent ownership of a common share in the project for which the *ṣukūk* are issued. This ownership continues from the beginning of the project to its end. The *ṣukūk* holders enjoy all rights authorized by the Shari'ah for the owner including the right to sell, give as a gift, inherit, etc., taking into account the fact that *ṣukūk* represent existing assets of the project, be they tangible, intangible or debts.

**Third:** The contract conditions shall be determined by the prospectus. The “offer” shall be expressed by subscription to these *ṣukūk*, while “acceptance” shall be expressed by the approval of the issuing company – unless the prospectus states that it shall represent the “offer” itself, in which case the subscription shall represent the “acceptance”.

The prospectus shall include all information required by the Shari'ah in the contract represented by the *ṣakk*; namely, the exact information about the capital, the distribution of profits, and the specific conditions for that issuance – provided that all conditions are in conformity with Shari'ah rulings.

**Fourth:** The *ṣukūk* shall be negotiable after the elapse of the period determined for subscription, since this has already been permitted by the partners. The following conditions are to be taken into consideration:

- (a) If the capital collected after subscription and before taking action is still in a monetary form, the negotiability of *ṣukūk* shall be a sort of money exchange and thus Shari'ah rulings for currency exchange are to be applied, including equality of the exchanged values and their immediate deliverance in the contract session.
- (b) If the capital turns into debts, then Shari'ah rulings of dealing with debts becomes applicable to the negotiability of *ṣukūk*.
- (c) If the capital turns into mixed assets of money, debts, properties (*a' yān*), and usufructs, then it is permissible to circulate the *ṣukūk* according to the agreed-on price provided that the majority of the assets in this case are properties and usufructs.

#### 4. Financing Formulas Used in Islamic Banks

As *ṣukūk* have turned from being real investment tools to be financing tools and both *mushārahah* (partnership) and *muḍārahah* (profit-sharing) contracts in Islamic financial institutions have turned to be financing contracts, concerns have been raised about the legitimacy of such activities and their techniques; particularly, in terms of guaranteeing assets and their returns. These issues will be dealt with as follows:

##### 4.1 Holding the *Ṣukūk* Manager Liable for the Nominal Value of the *Ṣakk*

One of the first techniques used in some *ṣukūk* issuances was the issuer's commitment to guarantee the capital of *ṣukūk* for their holders or to buy the assets of *muḍārahah ṣukūk*. The *ṣukūk* manager would provide a feasibility study for the project indicating the expected returns, and if the project then suffers a loss, he becomes obliged to provide evidence that the loss is not a result of his negligence or due to deception he exercised on the investors. If he fails to provide such evidence, he becomes liable for compensation; for Prophet Muhammad (the peace and blessings of Allah be upon him) said,

The hand (of a taker) shall be responsible for whatever it has taken [unjustly] until it pays it back. (Ibn Hanbal, 2001, 33:277, *ḥadīth* no. 20086; Abu Dawood, 2009, 5:414, *ḥadīth* no. 3561)

However, holding the investment manager responsible for the capital – until the opposite is proven – should be restricted by the following conditions (Abozaid, 2010, p. 126):

- (a) The investment manager should not have stated, with the approval of the shareholders, that he does not have to prove his innocence of any loss taking place.
- (b) The agreement contract should specify the causes of loss for which the investment manager will not be responsible, such as sudden turmoil in the market, financial crisis, disasters, etc.
- (c) An independent external referee, with necessary commercial experience and *Sharī'ah* knowledge, should be referred to in such cases so as to decide whether the investment manager is responsible for the loss or not.

- (d) The manager's liability has to be restricted to the case of his inability to vindicate himself and to actual losses that took place and negatively affected all partners.

Hence, it is not permissible for the *ṣukūk* manager to guarantee the nominal value of *ṣukūk*, for it is not permissible to hold the *muḍārib* responsible for the capital of *muḍārahah* except in cases of his negligence or transgression. If a condition is made to this effect in the contract, it will render the *muḍārahah* to be a form of loan. Similarly, to make such a condition in the *ṣukūk* contract deprives Islamic *ṣukūk* from their most distinctive characteristic of being legitimate investment instruments and admits them into the circle of conventional bonds. Real ownership in Islamic *ṣukūk* only materializes when the *ṣakk* holder has actual possession, which allows him to reap profits and suffer losses. (al-Shareef, 2010, p. 273)

A resolution prohibiting this practice has been issued by the IIFA. It is stated in the resolution no. 178 (19/4), "The *ṣukūk* manager is a trustee and is not to be held liable for the *ṣakk* value unless he commits transgression or negligence or contravenes the conditions of *muḍārahah*, *mushārahah*, or *wakālah* (agency contract) in the investment process"<sup>(1)</sup>.

The AAOIFI *Sharī'ah* Board also stated,

The prospectus must not include any statement to the effect that the issuer of the certificate accepts the liability to compensate the owner of the certificate up to the nominal value of the certificate in situations other than torts and negligence nor that he guarantees a fixed percentage of profit. (AAOIFI, 2015, pp. 477-478)

Accordingly, it is not permissible to stipulate holding the *ṣukūk* issuer liable for either their nominal values or a predetermined amount of profit, be that in the form of undertaking, commitment, or a binding promise made on his part, because such a condition turns the contract to be a loan contract and renders the *muḍārib* to be a liable debtor instead of a trusted agent.

(1) Resolutions of the IIFA in its 19<sup>th</sup> session in Sharjah UAE, 1430/2009; see: <http://www.iifa-aifi.org/2300.html>

#### 4.2 Holding the *Ṣukūk* Issuer Responsible based on His Being a Partner

When the idea of joint *muḍārabah* was raised in Islamic banking, the main goal was to hold the bank responsible based on considering it a joint *muḍārib* in analogy with the joint employee. Since the issuing company, in the case of Islamic *ṣukūk*, procures the subscription revenue through a group of investors who provide the capital and then the company reinvests the collected capital in financing a number of projects, the idea of holding the issuing company responsible appeared on the basis of considering it a joint *muḍārib* in analogy with the case of the joint employee who is undeniably responsible. Quotations from a group of scholars were cited in support of this view. For example, in *Bidayat al-Mujtahid*, one reads:

There is no disagreement among these famous jurists from different countries that if the worker (*muḍārib*) gives the capital of *qirād* (i.e. *muḍārabah*) to someone else, he shall be held liable for any loss; and if there are profits, he shall deserve a [share] as stipulated. The [other] worker deserves [also a share] as stipulated by the one who has given him the capital and thus he has to give him his share out of the remaining money. (Ibn Rushd, 2004, 4:26)

So, as long as the issuer of *ṣukūk* invests the capital by way of joint *muḍārabah*, he becomes responsible for the investors' money in his possession.

However, this idea can be discussed in the following points:

**First:** The idea of joint *muḍārabah* isn't much different from simple *muḍārabah* and its related rulings and regulations. Jurists have talked about simple *muḍārabah* as well as collective *muḍārabah*, where a group of persons pay the capital to one and the same *muḍārib*. Thus, to make the case of joint *muḍārabah* analogous to collective *muḍārabah* seems more reasonable than to make it analogous to the case of joint employee. The following points prove the invalidity of making the joint *muḍārib* analogous to the joint employee:

- (a) This analogy is based on a controversial ruling. Scholars have differed over the validity of holding the joint employee responsible. Hence,

the ruling of the original case is not established enough to make other cases analogous to it, which renders the analogy invalid.

- (b) The point in holding the joint employee responsible is the probability of his acting in a careless and negligent way. This case obviously differs from the nature of workflow in financial institutions which are based on exactitude, accuracy, partnership in investments, and unity of interests.
- (c) The capital in both private and joint *muḍārabah* is liable to profit and loss unlike the capital in the case of the joint employee which is not liable to loss.
- (d) In the case of the joint employee, the work is done in return for a determined wage, while the return for work in the case of *muḍārib* is a percentage of an uncertain profit. This difference, thus, renders the analogy false.
- (e) This analogy necessitates holding all trustees responsible in all kinds of contracts including *wadī'ah* (safekeeping/trust) and *wakālah* (agency contract). This also indicates the invalidity of the analogy.

**Second:** Regarding Ibn Rushd's statement quoted above, it actually refers to emergency cases that do not go with the main principle or conform to the general rule. In addition, the context of the statement refers to the case where the worker acts without permission from the capital provider, though such permission is necessary.

This makes it clear that the idea of holding the *ṣukūk* issuer responsible based on considering him a joint *muḍārib* is not based on solid grounds. Sharī'ah texts have laid down the principle that the *muḍārib* is not to be held responsible except in the cases of transgression and negligence. Sharī'ah rulings also indicate that, in restricted *muḍārabah*, the *muḍārib* is to be held responsible when he contravenes the restrictions; that is, when restrictions and regulations are added to the *muḍārabah* contract to preserve the capital against transgression and negligence, by stating, for example, that the *muḍārib* may not borrow from the capital or may not give it to another *muḍārib*, or similar restrictions.

#### 4.3 Undertaking to Purchase *Shukūk* Assets by way of *Ijārah* (Lease) Ending with Ownership

The lessee in this case undertakes to purchase the leased property for a predetermined value at the end of the contract term. This formula is one of the instruments used to guarantee the capital of *shukūk* issued for leased properties. The *shakk* holder pays the *shakk* value and the issuer guarantees its repayment through undertaking to purchase the leased property at its nominal value at the time of amortization or repayment. This issue involves two cases (Abozaid, 2010, pp. 129-131):

- (a) The first case is when the *shukūk* manager himself is the first seller of the property and then he becomes the lessee by way of a lease ending with ownership contract. This way both the capital and the profit are guaranteed. The *shukūk* manager, who has first sold the property, undertakes to pay the remaining rental installments, in the case of breaking/ discontinuing the lease contract for any reason. In this financial structure the lessee, who have been financed through *shukūk* subscription, is required to guarantee for the subscribers (i.e. the *shukūk* holders) the issuance revenue along with an additional profit, since the total rental is always more than the issuance revenue. Therefore, this kind of guarantee is not permissible.
- (b) The second case is when the seller of the leased asset, who will become the lessee through a lease ending with ownership contract, is someone else totally independent of the *shukūk* manager. The capital and profit are guaranteed here for the *shukūk* holders by an independent party. The value of the leased asset might become less than the totality of the remaining installments and the lessee may end the contract after a short period from its beginning; and thus, the guarantor suffers great loss.

The IIFA issued resolution no. 110 (12/4) concerning the lease ending with ownership as well as the lease *shukūk* and decided the permissibility of lease ending with ownership with the following conditions<sup>(2)</sup>:

- (i) There have to be two contracts totally independent from each other with respect to the time of their conclusion; provided that the sale contract follows the lease contract. Or there has to be a promise for the lessee to become the owner at the end of the contract period. In this regard 'Option' and 'Promise' stand on equal footing in terms of their *Sharī'ah* rulings.
- (ii) There has to be a genuine desire from the two parties to conclude the lease contract and not just to use it as a mere veil for the sale contract.
- (iii) The leased property should be guaranteed by the owner and not by the lessee. In this sense, the owner should bear any damage that is not caused by misuse or negligence of the lessee. The lessee has to bear nothing if such damage has made the property completely useless.
- (iv) If the contract includes insurance of the property, such insurance should be in accordance with Islamic rulings and at the expense of the owner alone.
- (v) Throughout the lease period the contract should be under *Sharī'ah* rulings on *ijārah*, whereas *Sharī'ah* rulings on ownership should be observed when the ownership of the property is shifted to the lessee.
- (vi) The cost of maintenance, excluding operational expenses, should be borne by the lessor throughout the lease period.

However, in some of their applications, *shukūk* based on lease ending with ownership involve *īnah* (purchase with instant resale) transaction, which is not permissible, according to the majority of scholars. *īnah* is involved in this formula of *shukūk* because the seller of the securitized property repurchases it through lease ending with ownership based on a prior agreement. Thus, the property returns to him with a higher price than the original one for which he sold it first, which is the very essence of *īnah*. The seller of the property has received cash money for selling a property that actually remains with him and then later he pays a higher price for it to the same buyer based on a prior agreement. This is the very essence of *īnah* (Abozaid, 2010, p. 138).

(2) Resolutions of the IIFA in its 12<sup>th</sup> session held in Riyadh, 1421/2000; see: <http://www.iifa-aifi.org/2061.html>

Though the formula of lease ending with ownership is basically acceptable and the IIFA adopted its permissibility, such application that involves *īmah* turns it into a disguise for usurious loan. This can be further supported by the following points:

*First*, in this formula the lessor, who had purchased the asset from the lessee, practically makes the lessee bear the cost of insurance for the leased property along with other basic maintenance costs that usually landlords bear. Therefore, the rental is divided into three parts: (i) invariable/fixed rental, which is equal to the cost of purchasing the leased asset from its owner who will be the lessee; (ii) variable rental, which is the profit given to the lessor above the purchase cost and which is practically based on the current interest rate when the rental is due; (iii) added rental, which includes such expenses as the costs of basic maintenance. The lessor makes the lessee bear these costs through adding them to the rental of the next rent period (Abozaid, 2010, p. 139).

Thus, it becomes clear that the lessor makes the lessee bear what he himself has to spend on his property and that he does not bear the consequences of a real ownership, which indicates that the leasing here is not a real one. Even in the case when the leased property suffers damages, the insurance company pays the value of the damaged property and the installments of the insurance is paid by the lessee, which means that the insurance company really represents the lessee in payment. Obviously, the guarantor here is the lessee himself.

*Second*, in most cases of lease ending with ownership, the lessee pays rental that is higher than the market rental rate for the leased usufruct. In other words, what is paid is not only a rental but a portion of the price as well. This indicates that the real intent is to purchase the property not to use its usufruct, which means that the subsequent lease contract is not a real one but actually a purchase contract. It is, moreover, preceded by a prior agreement to purchase from the same person with a lesser price. Thus, the prohibited *īmah* transaction materializes here (Abozaid, 2010, p. 140).

#### 4.4 The *Ṣukūk* Manager Lends *Ṣukūk* Holders when Actual Profit is Less Than Expected

In most cases of issuing *ṣukūk*, the *ṣukūk* manager is practically committed to lend *ṣukūk* holders in one of the following two cases:

- (a) When there is no profit for the activity in which the *ṣukūk* revenue was invested at the date determined to distribute profits.
- (b) When profits are less than expected for the *ṣukūk* holders in one period of distribution (al-Jarhi & Abozaid, 2009, p. 131).

Thus, the *ṣukūk* manager is committed to lend *ṣukūk* holders the amount that fulfills the profit expected in the date specified for distributing profits and then, later on, the *ṣukūk* manager should reclaim this loan from upcoming profits or from *ṣukūk* assets, if there are no profits. In this latter case, the *ṣukūk* manager purchases the existing *ṣukūk* after their amortization in their nominal value in addition to the amount deducted in fulfillment of the loan, after the nominal value has decreased due to this deduction.

It is noteworthy that the *ṣukūk* manager's undertaking to give this loan in order to complete the expected profit, which is determined on the basis of interest rate at a certain period of profit distribution, coincides with the *ṣukūk* holders' commitment to give up extra profits during this period for the *ṣukūk* manager.

The resolution of the IIFA implicates the prohibition of this case by stating that it is not permissible for the *muḍārib*, partner, or the *wakīl* to be committed to lend *ṣukūk* holders when the actual return for *ṣukūk* is less than expected, which leads to a combination of loan and sale or a loan with interest. However, it is permissible to create a reserve out of the profits to redress potential shortfalls<sup>(3)</sup>.

The issuance of such commitment raised Shari'ah-based objections, because the relation between the *ṣukūk* manager and the *ṣukūk* holders is based on a commutative, not donative, contract. It is not permissible to combine a loan with a commutative contract due to the textual prohibition of combining a sale contract with a loan.

The problem here is that the difference between *ṣukūk* and usurious bonds becomes nearly nothing. The capital is guaranteed through the commitment to repurchase it at the nominal value. The *ṣukūk* manager undertakes to pay the expected return determined

(3) Resolution no. 188 (20/3) of the IIFA in its 20<sup>th</sup> session held in Algeria, 2012/1433H; see: <http://www.iifa-aifi.org/2348.html>



by the interest rate either from the actual profit or as a loan from him and the *ṣukūk* holders give up any extra profit above the expected profit determined by the interest rate. This, in turn, does not conform to the spirit, principles, and rulings of the *Sharī'ah* (al-Jarhi & Abozaid, 2009, p. 34).

Should the *ṣukūk* represent real investment that is based on real loss and profit, involve no guarantee, and stand for real ownership of the assets, it could have been possible to overlook the issue of the *ṣukūk* manager's commitment to give a loan at the shortage of actual profit in return for the *ṣukūk* holders' giving up any extra profit. This could be justified on the basis that the reason for prohibiting the combination of a commutative contract with a loan is the prospect of making prior agreement to increase either the sold item or the price so that the lender could benefit from the loan (for example, the lender may sell the borrower something that is worth 50 for 60), which would not be plausible here (al-Jarhi & Abozaid, 2009, p. 35).

#### 4.5 *Ṣukūk* Guaranteed by a Third Party

One of the outstanding ideas suggested in banks and Islamic financial institutions as a solution, is to have a third party to guarantee the *ṣukūk*. This idea was applied with the first experience of issuing *ṣukūk*. Having a third party to guarantee the *ṣukūk* may take two forms (al-Umrani, 2013, p. 247).

##### 4.5.1 A Third Party Voluntarily Undertakes to Guarantee the *Ṣukūk*

This form has become widely applied. It was suggested for the *muḍārabah ṣukūk* in the 1408H session of the IIFA. The third party could be an individual, a company, a corporation, or, often, a government that aims to encourage people to contribute to and participate in investment projects within the development plan, since many investors might refrain from participating in the absence of guarantees. This commitment involves no intention to reclaim what is paid from the guaranteed party nor is it a guarantee for remuneration on the part of the issuer or the *ṣukūk* subscribers.

Contemporary scholars have two opinions regarding such a third-party commitment on voluntary basis:

The first opinion is adopted by a group of contemporary scholars, including Taqī al-Deen al-Uthmani, who maintains the impermissibility of guaranteeing the capital for investors whether the guarantor is the investment agent or a third party. In support of their opinion, they argue that (al-Uthmani, 2003, p. 213):

- (a) Scholars are in agreement that when someone guarantees something on behalf of another, he has to guarantee what the original person is liable for, as in the case of guaranteeing a loan or the price in a sale contract. Similarly, all that the original person may not be liable for may not be guaranteed by someone else, as in the cases of *wadī'ah* and the capital of *muḍārabah* (Ibn Qudamah, 1968, 4:402-403; al-Mirghinani, 1970, 3:92; al-Shirbini, 1994, 3:205).

However, this condition was laid down to protect the original person; for a guarantor may not guarantee something for which the original person is not liable and then ask for a compensation. The case here is different, for the third party makes this pledge purely on voluntary basis (al-Umrani, 2013, p. 248).

- (b) A guarantee offered by a third party is a means to get involved in *ribā* and thus it should be prohibited to block such means to evil. For if a third party should guarantee the original debt, he may also guarantee a percentage of the profit and thus the door for *ribā* will become wide open (al-Umrani, 2013, p. 248).

However, the third-party guarantee, as explained in IIFA's resolution, does not necessitate the permissibility of guaranteeing profits. Moreover, it is not conceded that this will be a means to *ribā* as long as there is a third party foreign to the contract as in the case of *tawarruq* (Islamic Monetization).

The second opinion is adopted by another group, including Sami Hamoud, who maintain the permissibility of a third-party pledge in *muḍārabah* contract, with independent personality, to donate a sum of money to compensate for any loss that may afflict the investors' properties. This is the opinion adopted by the IIFA<sup>(4)</sup> along with a number of *Sharī'ah* boards in Islamic banks. The following are their evidences:

(4) Resolution no. 30 (4/3) of the IIFA in its 4<sup>th</sup> session held in Jeddah, 1988/1408H; see: <http://www.iifa-aifi.org/1713.html>

- (i) Safwan ibn Umayyah related that the Messenger of Allah (the peace and blessings of Allah be upon him) borrowed a coat of mail from him on the day of the battle of Hunayn. He asked: Are you taking them by force, Muhammad? Prophet Muhammad (the peace and blessings of Allah be upon him) replied, “No, it is a borrowed item with a guarantee [to return it]”. (Ibn Hanbal, 2001, 24:12-14, *ḥadīth* no. 15302; Abu Dawood, 2009, 5:414-415, *ḥadīth* no. 3562)

Here the Messenger (the peace and blessings of Allah be upon him) made a pledge to guarantee the borrowed item, though in principle he is a trustee. The capital of *muḍārabah* could be analogous to the borrowed item, since both are trusts in principle (Hamoud, 1408H/1988).

It is argued, however, that if this inference were true, it would be permissible for the investment agent in *muḍārabah* to guarantee the capital, if a condition is made to this effect, just like the borrower. In fact, the *ḥadīth* is beyond the point of dispute, because the issue here is about the third party not the borrower. Thus, this is a false analogy and such inference is actually irrelevant. A guarantee for a borrowed item does not lead to any prohibited consequence unlike the case with *muḍārabah*, because the borrowed item has to be returned anyway without any deficiency, while the investment agent in a *muḍārabah* contract takes the capital to invest it and if a condition is made to hold him responsible, it will turn into a debt for increment, which is a typical type of *ribā* (al-Shubaili, 2002, 2:40).

But, in response, it can still be argued that the point here is to highlight the permissibility of guaranteeing the capital not the profit.

- (ii) Jabir (may Allah be pleased with him) reported that the Prophet (the peace and blessings of Allah be upon him) would not offer funeral prayer upon a man who owed a debt. A deceased person was brought to him [to offer prayer] and he asked, “Does he owe any debt?” They said, “Yes, he owes two Dinars”. He said, “Pray upon your companion [but I shall not]”. Abu Qatadah said, “I will pay them off,

O Messenger of Allah”. Then he prayed upon him. (al-Bukhari, 2001, 3:96, *ḥadīth* no. 2295; al-Naysaburi, 1991, 3:1237, *ḥadīth* no. 1619)

Here the Messenger (the peace and blessings of Allah be upon him) allowed a third party to pay the debt. By analogy, a third party can voluntarily guarantee the *ṣukūk* in a *muḍārabah* contract (al-Umrani, 2013, p. 250).

- (iii) A donation to guarantee given by a third party in *muḍārabah* contract bears no difference from any other kind of donation. If donating money is permissible, a donation to guarantee is, a fortiori, also permissible (al-Umrani, 2013, p. 250).

The resolution no. 30 (4/3) of the IIFA decided,

There is nothing in Sharī‘ah preventing the inclusion of a statement, in the prospectus or the *muḍāraḍah* certificates, concerning a promise made by a third party, totally unrelated to the two parties of the contract in terms of legal personality or financial status, to donate a specific amount, without any counter benefit, to meet losses in a given project, provided that such commitment should be independent and not correlated to the *muḍārabah* contract, in the sense that the enforcement of the contract is not conditional to the fulfillment of the promise. Hence, neither the shareholder nor the *muḍārib* may invoke this clause to void the contract or renege on their commitments alleging that the said commitment made by the third party had been duly taken into consideration in the contract<sup>(5)</sup>.

Clearly the resolution allows a guarantee made by a third party with the following conditions:

1. The third party has to be totally independent, in terms of legal personality and financial status, from the two parties of the contract.
2. The promise made by the third party has to be in the form of a donation to compensate losses in the capital.
3. The commitment made by the third party has to be independent of the *muḍārabah* contract.

(5) Resolution no. 30 (4/3) of the IIFA in its 4<sup>th</sup> session held in Jeddah, 1988/1408H; see: <http://www.iifa-aifi.org/1713.html>

Accordingly, a guarantee made by a third party is not valid in the following cases:

- (a) When a holding company guarantees one of the affiliated companies or vice versa, because total independence is not achieved in this case.
- (b) When the guarantee is made by a special purpose company created by the issuer to guarantee the issuance, regardless of the legally registered name of the owner of such a special purpose company.
- (c) When a state or its central bank guarantees an issuance issued by one of its ministries or governmental institutions or vice versa; because although the issuer is one ministry and the guarantor is another ministry, or the central bank, they all eventually represent one state. (al-Umrani, 2013, p. 250)

However, when reflecting on the practical applications of the third-party guarantee in a number of Islamic banks and financial institutions, one can notice inaccurate observance of these restrictions and regulations insomuch that it becomes clear that the third party is not completely independent of the issuer in terms of legal personality and financial status.

For example,

- (i) In the recommendations of the economic symposium held between the IIFA and the Islamic Development Bank in 1411H, it was permitted for a bank to guarantee what it sells to the affiliated investment fund, which it runs on the basis of *muḍārabah*, though the bank could be one of the largest shareholders in the fund (Magazine of the IIFA, 1992, vol. 1, pp. 534-535).
- (ii) In the recommendations of the 6<sup>th</sup> Islamic Economy Symposium held by the Baraka Islamic Bank, permission was given for the Bank branch in Jeddah to guarantee the investors' funds in Baraka Bank in London branch, if the laws in the country of the guaranteed bank requires such guarantee (Dallah al-Barakah, 2001, p. 79-80).
- (iii) AAOIFI identified the independence of the third party, which pledges the guarantee in favor of the guaranteed party, as possessing no more than 50% of the latter or having no more than 50% possessed by it (AAOIFI, 2015, p. 331).

It is remarkable, however, that these applications do not fully achieve the independence of the third party as mentioned in IIFA's resolution.

Therefore, one may conclude that:

- A. There are applications that do not abide by the regulations mentioned in the resolution of the IIFA, which gives weight to the opinion that disallows this practice, since the party that pledges the guarantee is not totally independent of the guaranteed party. This, in turn, necessitates that the worker guarantees the capital.
- B. A third-party guarantee has practically little chance to take place, as in the case when a government intends to support certain activities and encourage investors to invest in them through guaranteeing to bear any potential loss. In such a case, the regulations required by IIFA's resolution are fulfilled and thus permissibility gains weight. However, this solution has practically little chance to be implemented and therefore is not suitable for the problem of guaranteeing *shukūk*; for usually no third party would volunteer to be the guarantor unless it has some interest in the transaction (al-Shubaili, 2002, 2:54; al-Umrani 2013, p. 253).

#### 4.5.2 A Third Party Undertakes to Provide Guarantee for a Return

If, in *shukūk* investments, a third party guarantees the capital or both the capital and the profits on the basis of commercial insurance, the majority of contemporary scholars deem this transaction impermissible. To this effect a resolution was issued by the IIFA<sup>(6)</sup>. This practice involves illicit consumption of people's wealth as well as excessive *gharar* (an element of uncertainty or ambiguity) in the contract, for which reasons it is prohibited.

### 5. The Impact of Intentions and Conditions on the Guarantee Contract in *Shukūk*

Islamic *shukūk* was meant to be an investment instrument governed by *Sharī'ah* regulations and rules. However, the practical applications of this financial instrument have involved breaches of some *Sharī'ah* rules as a result of laxity in abiding by the conditions

(6) Resolution no. 9 (2/9) of the IIFA in its 2<sup>nd</sup> session held in Jeddah, 1985/1406H; see: <http://www.iifa-aifi.org/1596.html>

and regulations laid down to govern the issuance of *ṣukūk*, which has rendered their usage more formal than real. One finds, thus, no big difference between *ṣukūk* and traditional bonds (al-Shareef, 2010, p. 274).

### 5.1 Guarantees in *Ṣukūk* Contradict Sharī'ah Rules

Guarantees in *ṣukūk* contradict Sharī'ah rules when the issuer undertakes to purchase the *ṣukūk* assets at their nominal values at the end of the *muḍārabah*, *mushārahah*, or *wakālah* period on the basis of separating the contract personality from the personality of the *muḍārib*, partner, or agent in investment.

Moreover, most of the issued *ṣukūk* have acquired the same characteristics of usurious bonds since the profits of the project are distributed in certain percentage based on the interest rate. To justify this, an article is added to the contract stating that if the actual profit of investment exceeds that threshold, the extra amount should be paid to the manager as an incentive and, in return, the manager is obliged to pay any difference between the actual profit and that percentage to the *ṣukūk* holders and then reclaims it either from the surplus that exceeds the interest rate at later periods or from lowering the price of the existing assets when the *ṣukūk* are amortized (al-Uthmani, 2009, p. 4).

### 5.2 Why *Ṣukūk* Applications Divert from their Sharī'ah Objectives?

The following observances have been remarked as reasons for the diversion of *ṣukūk* application from Sharī'ah objectives:

1. Islamic banks seek to issue such a *ṣakk* that (al-Sa'ati, 2010, p. 11):
  - (a) Represents a debt, not a share in ownership.
  - (b) Is prone to credit risk only and is protected against other risks, including market risk.
  - (c) Is circulatable, though it is a debt *ṣakk*.
  - (d) Is not affected by the issuer's credit risks.
  - (e) Is not affected by the bankruptcy of the issuer.
  - (f) Has a fixed return that is known or linked to a known index, such as LIBOR index.
  - (g) And above all, is in conformity with Sharī'ah regulations.
2. The use of financial engineering has led to paying more attention to terms and forms, in order to create a structure for *ṣukūk* that apparently fulfills Sharī'ah conditions for financial instruments, than the actual objectives of these instruments that may contradict Sharī'ah objectives. These *ṣukūk* do not represent common shares in the ownership of properties or usufructs. They are rather asset-backed or asset-based debt *ṣukūk*. Asset-backed *ṣukūk* are such *ṣukūk* where ownership of the properties and usufructs is transferred from the *ṣukūk* issuer to the special purpose unit he owns, which in turn issues *ṣukūk* to be sold to the investor; and thus, the investor owns a common share in these assets. However, this ownership is only formal (i.e. on paper only) and is not even acknowledged by courts. On the other hand, asset-based *ṣukūk* use properties and usufructs as mortgages to guarantee bonds' interests and pay back their values. Such mortgages, however, are not enough to protect the investor since the issuer undertakes to purchase the properties at their nominal values at the end of the *ṣukūk* periods. However, in the case of bankruptcy, the issuer will not be able to repurchase the properties and thus the *ṣukūk* holders will join other creditors to claim the nominal values of their *ṣukūk* (al-Sa'ati, 2010, p. 21).
3. The complicated legal formulas of *ṣukūk* assert that they are actually debt bonds that bear no real difference from usurious bonds. Inaccurate perception of these formulas on the part of their users and the investors as well as Sharī'ah committees, who have been confused by the *fiqh* terms used in the issuance preamble, and the thought that such Islamic structure would protect them against loss and failure, are among the reasons for such diversion.
4. Islamic *ṣukūk* should represent common ownership in properties and usufructs and their owners should be made to bear both loss and profit. Moreover, the issuer should not be

committed to pay profits (interests) or pay the *ṣakk* value; for this should depend on the revenues, on the one side, and market value of the properties, on the other side. But the rescheduling of *shukūk* debts affirms that they represent debts, not real ownership. Therefore, there is a big gap between structures and objectives of the *shukūk* (al-Sa'ati, 2010, p. 21).

### 5.3 Criteria to Assess Islamic *Shukūk* on the Basis of *Sharī'ah* Objectives

A number of contemporary scholars have given criteria through which Islamic *shukūk* can achieve their *Sharī'ah* objectives. These criteria are based on assessing how Islamic *shukūk* products fulfill *Sharī'ah* objectives with regard to contracts, in terms of motive, structure, and outcome.

Thus, these criteria can be divided into three categories (Mash'al, 2010, pp. 7-8):

#### 5.3.1 Criteria related to motive

1. Focus should not be on the formality of contracts alone to validate them without paying attention to the product fulfillment of *Sharī'ah* objectives.
2. Subterfuges should be avoided. *Fatwā* committees should make sure that the product structure is free from any underlying subterfuge that may render *Sharī'ah* objectives futile. The creation of Islamic *shukūk* products should aim to fulfill the actual needs in a direct way without much complications in structure or measures.
3. All aspects of the transaction, in terms of *Sharī'ah* conditions and requirements, should be clear and comprehensive. Rights and commitments should be well documented, according to *Sharī'ah*-compliant ways of documentation, such as writing down, witnesses, and mortgages in order to avoid future disputes and quarrels and to protect the capital against loss (Mash'al, 2010, p. 9).

#### 5.3.2 Criteria Related to Contract Structure

1. Harmony between the product identity and the intention behind its application requires that the product structure, composition, and documents should clearly express the fulfillment of

critical elements that practically affect the legitimacy of the product and negate formality of the transaction. These include, for example, asserting real ownership and its consequent actual ability to take action, highlighting possession and its consequent responsibility to take the risk that the property may suffer, and stressing the characteristics of partnership, in the case of partnership, in terms of bearing loss, if any, and providing no guarantee for the profit.

2. *Ribā* has to be avoided. This criterion should be the essential difference between Islamic and conventional banking. It is not meant here to focus only on the absence of *ribā*, but to establish the product on such *Sharī'ah* bases that make Islamic banking and finance stand distinctive. It goes contrary to *Sharī'ah* objectives to circumvent direct *ribā* through creating products with structures of compound contracts that eventually materialize in the same usurious mechanisms and produce the same results, in terms of accumulating and multiplying debts on the debtor and achieving the same direct usurious profits for the bank.
3. Entitlement to profit depends upon the corresponding liability for loss. This invaluable principle constitutes the essential difference between Islamic and traditional finance. It has always been a compelling argument against those who cast doubt on Islamic banking; particularly after a number of contemporary juristic opinions have practically eliminated other differences and contributed to opening the door wide for claims of similarity between Islamic and traditional banking and to emptying this rule of its content by adopting *fiqh* opinions that led to minimizing the responsibility of ownership and transferring actual possession into a formal one.

The alternative of *ribā* that underlies *Sharī'ah*-compliant transactions is to share loss and profit. Based on this rule, the original *Sharī'ah* formulas from which Islamic financial products are derived fall into three categories: (a) kinds of *sharikah* (partnership or company) including *muḍārabah*, *musāqāh* (irrigation

contract), and *muzāra'ah* (sharecropping); (b) forms of lease contract; and (c) future sales, such as *murābahah*, *musāwamah* (bargaining), *salam* (an upfront-payment forward sale) and *istiṣnā'* (commissioned manufacture). Within each category, there are other degrees necessitated by the detailed conditions of each product that can reduce sharing loss to zero and enhance chances of profit-gaining to the level of guaranteeing it.

Therefore, designing the structure and composition of *ṣukūk* on the basis of partnership better reflects the outcome of this rule than designing them on the basis of future sale and lease that resemble, in their practical outcomes, usurious debts.

4. Prevention of *gharar* and *jahālah* (ignorance). When a transaction involves no *gharar* or *jahālah* in its constituents and conditions, no dispute will arise at the time of its execution. Therefore, attention must be paid for the inlets of *gharar* in financial transactions. (Mash'al, 2010, p. 12)

### 5.3.3 Criteria for the Outcomes of Implementing the Product

The originality and novelty of *ṣukūk* products will make them more congruous to the characteristics of Islamic banking and more distant from traditional products that have been modified and restructured to have only a Sharī'ah hue. The following points should contribute to such originality and novelty:

1. The financial product should be formulated according to the financial need. If the need is to possess the usufruct only, the direct product should be in the form of *ijārah* (leasing). If the goal is to invest properties, the product should be in the form of *mudārabah*. Thus, originality here means to relate the financial need to the suitable formula, while novelty means to make procedures easy without negligence of rights and commitments.
2. Only proper application of Islamic banking rules will make Islamic products distinguished. To be totally independent of traditional products is, undoubtedly, a desired target for Islamic financial products. Therefore, *fatwā* committees

and issuers of *ṣukūk* have to aim at achieving this target. Many of the *ṣukūk* issuances failed, according to some observers, to achieve it.

3. The real difference in financial effect between Islamic and traditional financial products will exhibit the outcome of such essential differences in reality and will achieve harmony between the applications and the foundations of Islamic banking. Any attempt to remove such difference leads to adverse results that do not conform to Sharī'ah rules and regulations and thus affects the Sharī'ah ruling of the product. Therefore, many relevant issues need to be reconsidered by taking their outcomes into consideration, since they affect the legitimacy of the product.

If we take Sharī'ah objectives into consideration, we shall find that such *ṣukūk* that have the same characteristics of traditional bonds totally contradict these objectives. The establishment of Islamic banking was not originally intended to cope with the usury system but to gradually open new horizons for Islamic banking where justice prevails, according the eternal principles of the Sharī'ah, and any resemblance to usurious transactions is avoided. Unfortunately, Islamic finance institutions have been competing to offer all the characteristics of the usury market and these products are often justified through unreasonable subterfuges (al-Uthmani, 2009, pp. 15-16).

## 6. Summary and Conclusions

The following conclusions can be drawn from the above research:

1. *Ṣukūk* are documents of equal denomination that represent common shares in the ownership of properties or usufruct or services issued under the name of their owner or their holder to confirm the financial rights and commitments of their owner in what they represent. Their negotiability abides by Sharī'ah conditions that regulate such transactions. Their owners share their profits and loss according to the percentage of *ṣukūk* each one owns.
2. The securitization process has to abide by the following regulations and restrictions:

- (a) The securitized assets must be permitted in the *Sharī'ah* and must be valid for securitization without getting involved in prohibited transactions such as *ribā* and *gharar*.
  - (b) The *ṣakk* must represent the ownership of a common share in the project for which the *shukūk* were issued to generate or finance it. This ownership continues from the beginning of the project to its end and thereupon follow all rights and acts authorized by the *Sharī'ah* for the owner.
  - (c) The contract in *shukūk* has to be established on the basis that the contract conditions are to be determined by the prospectus; that the “offer” is to be expressed by subscribing in these *shukūk*, and that “acceptance” is to be expressed by the approval of the issuing company.
  - (d) The *shukūk* have to be negotiable after the elapse of the period determined for subscription since this has already been permitted by the partners.
3. It is not permissible to stipulate holding the *shukūk* issuer liable for either the *shukūk* nominal values or a predetermined amount of profit, be that in the form of undertaking, commitment, or a binding promise made on his part.
  4. The idea of holding the *shukūk* issuer responsible based on considering him a joint *muḍārib* is not based on solid evidence. *Sharī'ah* texts indicate that the basic principle is that the *muḍārib* is not to be held responsible unless in cases of transgression and/or negligence.
  5. In some of their applications, *shukūk* based on lease ending with ownership involve *īnah* transaction, which is not permissible, according to the majority of scholars.
  6. It is not permissible for the *muḍārib*, partner, or the *wakīl* to be committed to lend any amount to the *shukūk* holders when the actual return for *shukūk* is less than expected, which leads to a combination of loan and sale or a loan with interest.
  7. Guarantees in *shukūk* contradict *Sharī'ah* rules when the issuer undertakes to purchase the *shukūk* assets at their nominal values at the end of the *muḍārabah*, *mushārahah*, or *wakālah* period.
  8. There are criteria to assess Islamic *shukūk* on the basis of *Sharī'ah* objectives. These criteria are divided into: criteria related to the motive, criteria related to the contract structure, and criteria related to the outcomes of implementing the product.

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## الضمانات في الصكوك بين المقاصد الشرعية وشروط العقد

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المستخلص. يُعد موضوع الضمانات في الصكوك الإسلامية من الموضوعات التي كثر الحديث حولها، وفي نظر الباحثين ينبغي معالجة الموضوع من جانبين: جانب يراعي الشروط المطلوبة لصحة العقود، والجانب الآخر يراعي مقاصد الشريعة الإسلامية. يهدف البحث إلى التأكيد على ضرورة مراعاة المقاصد الشرعية في العقود قبل الحكم بصحتها خاصة فيما يتعلق بالضمان في الصكوك. ولتحقيق هذا الهدف يوظف البحث منهجين: المنهج الوصفي والمنهج التحليلي والنقدي. وقد توصل البحث إلى عدة نتائج منها: عدم جواز اشتراط ضمان مصدر الصك للصكوك بقيمتها الاسمية أو أي أرباح مقدرة سلفاً، وأن فكرة تضمين مصدر الصك باعتباره مضارباً مشتركاً لا تستند إلى دليل قوي، وأنه لا يجوز للمضارب ولا الشريك ولا الوكيل أن يلتزم بإقراض حاملي الصكوك إذا انخفض الربح الفعلي المتوقع لها، وأن صكوك الإجارة المنتهية بالتمليك في بعض تطبيقاتها تنطوي على العينة المحرمة، وأن الضمانات في الصكوك تخالف قواعد الشريعة إذا التزم المصدر بشراء أصول الصكوك بقيمتها الاسمية في نهاية مدة المضاربة، أو المشاركة، أو الوكالة، وأن معايير تقييم الصكوك الإسلامية بناء على مقاصد الشريعة يمكن تقسيمها إلى: معايير تتعلق بالدوافع، ومعايير تتعلق بهيكلية العقد، ومعايير تتعلق بالنتائج المترتبة على تطبيق المنتج.

الكلمات الدالة: الصكوك، الضمان، مقاصد الشريعة، الأهداف، الصلاحية، التوريق.

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