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iSHAR
ملتقى علماء الشريعة الدولي
International Shariah Scholars Roundtable

STUDIES AND RECOMMENDATIONS INTERNATIONAL SHARIAH SCHOLARS ROUNDTABLE (3)

Organised by Bank Rakyat

Held at the Marriott Hotel in Putrajaya
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Multaqa Ulama Al-Shariah Al-Duali (3)

Marriot Hotel, Putrajaya
29-30 October 2019

Assalamualaikum Warahmatullahi Wabarakatuh

Bank Rakyat is indeed privileged to organise this international roundtable which represents part of our endeavours to strengthen further Islamic finance as a credible, dynamic and resilient financial industry in the global financial system.

We feel extremely honoured to have brought together much-respected Shariah scholars and intellectuals from around the globe for a series of in-depth roundtable discussions on selected Shariah issues and challenges encountered within the Islamic finance industry.

This book is aimed at publishing the resolutions on International Shariah standards resulting from these discussions as a reference for scholars, practitioners and interested parties, all for the gain of the global industry. We further hope to inculcate a culture of Corporate Social Responsibility (CSR) within the Islamic banking industry through organizing events that benefit not only the ummah but also society.

The success of Bank Rakyat's International Shariah Scholar Roundtable ("iSHAR") 2019 is a testimony of how rapid and successful Islamic banking and finance had grown over the years. While the overall development of Islamic banking and finance for more than four decades has been evolutionary, the pace has intensified in recent years, with some total global financial assets estimated to be around USD2 trillion.

The same goes for the growth of Muslims, currently, there are approximately 1.8 billion Muslims in the world today, making up around 24% of the world's population, or just under one-quarter of humankind. By 2030, this number is expected to increase to 2.2 billion. The worldwide Islamic community is spread over 200 counties.

The future augurs well with bright growth prospects for the industry which is now becoming more globally integrated. Islamic finance has now gained wide acceptance as a form of Islamic intermediation even in Non-Muslim countries.

Moving forward, the Islamic banking sector in some major markets, among which is Malaysia, will continue to expand in wider economic sectors. In these jurisdictions, as the focus will increasingly be on regulatory sophistication and prudential supervision, market participants are likely to turn more innovative in product structuring and customer service strategies amid heightened competition.

Islam enjoins harmony in all aspects of our lives so it becomes incumbent upon us to make collective efforts towards international collaboration and cooperation. It is towards this end that Bank Rakyat has gathered together honoured Shariah scholars with a wealth of knowledge and experience from all over the world so we can work together to establish the much-needed harmonization of practices. We are confident that as we share our knowledge we shall come to a positive outcome of agreement and resolution.

Notwithstanding the challenges that exist and surely lie ahead, given the value proposition of Islamic finance, the industry will likely expand further globally thanks to collaborative platforms such as this. Insha-Allah.

This roundtable shows that Bank Rakyat is on the right track in seeking a solution for the nation’s overall well-being. Events such as these are fertile grounds for experts of various fields to impart knowledge, share best practise and seek workable solutions that can be immediately implemented for the betterment of all.

I am equally glad that Bank Rakyat had come together to organise this biannual roundtable which enabled us to discuss the subject of Shariah issues with regards to Islamic banking and Finance.

I am sure, with all the speakers and scholars present, we are now more equipped and wiser in pursuing our Shariah resolutions issued that may close the gap between Shariah standards applied in various jurisdictions while harmonizing its implementation.

Thank you.

Wabillahi Taufik Walhidayah Wassalamualaikum Warahmatullahi Wabarakatuh.

Bismillah al-Rahman al-Rahim

Al-Salam ʻalaykum wa rahmatullah wa barakatuh

All praise is for Allah, and prayers and peace be upon the Master of the Messengers and upon all his family and companions. As the nature of life has developed, the material requirements of human beings have also developed. Islamic finance came to meet the needs of humanity, and it has surpassed conventional finance. Islamic finance is a dynamic subject in terms of its continuous quest to meet the needs of the market while adhering to the fundamentals of the flexible Sharīʻah. To ensure that society understands this development, it needs programs to create awareness and disseminate knowledge in society.

Since its establishment 65 years ago, Bank Rakyat Malaysia has had many distinguished achievements in developing the Islamic financial industry and setting standards for it in Malaysia. The Bank has played its commercial and social role to expand the supremacy of Islamic finance in the local market and beyond. Sensing its social role, the bank's management decided to make an advocacy effort to educate the community about adhering to the requirements of the Sharīʻah in financial and banking business. This has been done by organizing various activities in the form of conferences, workshops, academic lectures and publications that deal with relevant issues. By the gracious invitation of His Excellency, the Chairman of Bank Rakyat, Bank Rakyat has organized the third International Shariah Scholars Roundtable in 2019.

It was attended by a select group of Sharīʻah scholars and senior representatives of the regulatory and supervisory authorities of the financial and banking industry, as well as accounting and legal institutions, higher education institutions, and other stakeholders of the Islamic finance sector. This blessed conference has become a fine precedent set by Bank Rakyat Malaysia to discuss arising current and future issues under the slogan "Coordination of Sharīʻah Opinions on Contemporary Financial Transactions".

This conference was held for lofty goals, the most important of them being:

1. Deepening the discussion in order to issue unified decisions on contemporary issues in Islamic banking;
2. Issuing recommendations that will serve as a reference for workers, researchers and stakeholders in the Islamic banking sector;

3. Attempting to coordinate between theoretical understanding of Sharīʿah and the applications of theory in Islamic banking at the international level;
4. Implementing the social responsibility of the Bank towards the society by developing the knowledge base regarding the applications of Islamic banking.

The researchers and scholars who participated in the roundtable discussion include:

1. Shaykh Walīd bin Hādī, Chairman of the Conference
2. Shaykh Dr. ʿAbd al-Sattār Abū Ghuddah
3. Shaykh Dr. Nizam Yaqoubi
4. Shaykh Dr. Muhammad ʿAbdul Raḥīm Sultan al-ʿUlamāʾ
5. Shaykh Dr. ʿAbd al-ʿAzīz Khalīfah al-Qaṣṣār
6. Shaykh Dr. ʿIṣām al-ʿAnzī
7. Shaykh Dr. Mūsā Muṣṭafā al-Quḍāh
8. Shaykh Dr. Ismāʿīl Halitoglu
9. Shaykh Dr. Aznan Hasan
10. Shaykh Datuk Dr. Mohd Daud Bakar
11. Shaykh Prof. Mohamad Akram Laldin
12. Shaykh Dr. Azman Mohd Noor
13. Shaykh Dr. ʿAbd al-Raḥman al-Saʿdī
14. Shaykh Dato' Setia Mohd Tamyes Abd Wahid
15. Shaykh Dato' Dr. Mohd Azmi Omar
16. Shaykh Dr. Abdullaah Jalil
17. Shaykh Burhanuddin Lukman
18. Shaykh Dr. Mohammad Zaini Yahaya
19. Shaykh Wan Rumaizi Wan Husin
20. Shaykh Md. Yunus Abdul Aziz
21. Shaykhah Prof. Dr. Engku Rabiah Adawiah
22. Shaykhah Dr. Shamsiah Mohamad
23. Shaykh Dr. Suhaimi Mohd Yusuf
24. Shaykh Mohd Zamerey Abd Razak

The roundtable discussion identified nine topics as starting points for discussion and dialogue, and the General Secretariat of the Conference assigned one of the attendees to write on each topic. After deliberation, discussion and dialogue to delve deeper into the issues involved in each topic, and to summarize the views of the scholars and their reasoning in support of them, the agreed decisions were recommended. Some decisions were postponed, which in the opinion of the participants need to be studied in depth.

The topics of the Third Conference were as follows:

1. **The *Muḍārib's* Guarantee against Currency Depreciation**
2. **Early Settlement Fee**
3. **Zakat on the *Muḍārib* and Its Impact on Zakat on the Bank**
4. **Changing the Stipulation of the Waqf Donor**
5. **The Sharīʿah Characterisation of Investment Agency**
6. **Taking a Fee to Safeguard a Pledge**
7. **Borrowing Money for the *Muḍārabah* Fund**
8. **The *Fiqh* Solution to Changing the Profit Rate in *Murābaḥah***
9. **The Turkish Experience in Buying and Selling Gold**

Bank Rakyat Malaysia is pleased to present to researchers and stakeholders in Islamic finance the research papers presented at the Conference and the resolutions issued at it.

On behalf of the eminent attendees, we express our deep appreciation of Bank Rakyat Malaysia's invitation to us to attend the Conference. We would also like to thank the organizers for their efforts, with special thanks to Shaykh Mohd Zamerey Abd Razak, Head Shariah Compliance at the Bank, for his continuous efforts to ensure the success of the Conference. We thank everyone who worked with him, and we ask Allah, the Blessed and Exalted, to reward us.

The Chairman of the Conference

Shaykh Walīd bin Hādī

1.st topics

The *Muḍārib's* Guarantee against Currency Depreciation

His Eminence Shaykh Walīd bin Hādī
His Eminence Dr. ʿAbd al-Sattār Abū Ghuddah

The First Topic

The *Muḍārib's* Guarantee against Currency Depreciation

Forum Chair: Walīd bin Hādī

If the two parties agree that the *muḍārabah* will be in euros, for example, then there are three scenarios:

First: They agree not to convert to another currency—in which case the capital provider runs the risk of currency depreciation—and the *muḍārib* does not guarantee by a stipulated condition, although it is permissible for him to voluntarily, not by stipulation, donate from his own money, not from the project's funds.

Second: They agree to convert to the project fund's currency; so it is as if the *muḍārabah* was initiated using the project fund's currency. However, [this is not allowed] according to the Mālikī jurists; thus, it would be converted to *qirāḍ al-mithl* (comparable profit share) to prevent the combination of currency exchange and a profit-sharing contract. Ash·hab disagreed [with the other Mālikīs], saying that it is permissible to combine them, given that the contract contains two things, each of which is permissible separately, and he denied that Mālik prohibited it.

Al-Dasūqī said:

> Ash·hab's opinion is more evident conceptually, even if it goes against the more well-known opinion, which—along with the prohibition of combining currency exchange with sale—forbids combining it with any of the other contracts that cannot be combined with a sale. One [scholar] referred to them as follows: "The contracts we have prohibited with a sale are six....They are combined in the [acronym] J-Ṣ M-SH-N-Q: *jaʿl, ṣarf, musāqāh, shirkah, nikāḥ and qirāḍ*; the prohibition of these is confirmed."

Third: The two parties do not mutually agree on anything, but the *muḍārib* receives the money in a currency other than the project fund's currency and then converts it to the project fund's currency. In this scenario, he is liable for anycurrency depreciation because he disposed [of the money] without permission; thus, he transgressed by doing something that was not allowed for him. This is because *muḍārabah* is based on agency, and the agent may

not dispose of the money of his client without his permission. This [rule] does not contradict unrestricted *muḍārabah*, which gives permission to invest using the client's currency, not the permission to change his currency without his permission.

The issue here is the incompatibility of *muḍārabah* and a guarantee; thus, if the *muḍārib* gives a guarantee, the contract is vitiated (*fāsid*). When this happens, [the *muḍārib*'s share] is converted to the reasonable market wage (*ujrat al-mithl*) according to the majority of scholars. According to the Mālikī jurists, [it is converted] to the reasonable profit share in the market (*qirāḍ al-mithl*).

The First Topic

The *Muḍārib*'s Guarantee against Currency Depreciation

His Eminence Dr. ʿAbd al-Sattār Abū Ghuddah

The principle regarding funds pooled for investment is that they should be in a specified currency, as it is not conceivable to create a single fund that includes more than one currency. Whoever wants to invest in a fund must present the amount in the fund's currency, even if it means converting his currency into the fund's currency at his expense, and he would bear liability for any later difference in the currency with which he entered. It is not permissible for the *muḍārib* or the manager of the company (or one of the partners) to guarantee against a change in currency value.

The [AAOIFI] standard on trading in currencies specified that it is prohibited for one of the parties in a partnership to undertake to bear a change in currency value:

> It is not permissible for one of the partners in Musharakah or Mudarabah to be a guarantor for the other partner, to protect the latter from the risks of dealing in currencies. However, it is permissible for a third party to volunteer being a guarantor for that purpose, provided this guarantee is not stated in the contract.[1]

What is the ruling if the investor presents a currency different from the investment fund currency, and the *muḍārib* changes the amount to the project currency; then, at the end of the *muḍārabah* a loss occurred due to a change in the value of the currency? Is the *muḍārib* liable for the difference in currency value?

I adopt what was affirmed and illustrated by the Honorable Chair of the forum on this issue, while supplementing some of what was stated in his depiction of this topic.

His Eminence wrote:

> If the two parties agree that the *muḍārabah* will be in euros, for example, then there are three scenarios:

[1] AAOIFI, *Sharīʿah Standards*, Standard 1, p. 56, item 2/9/3.

First: They agree not to convert to another currency—in which case the capital provider runs the risk of currency depreciation—and the *muḍārib* does not guarantee by a stipulated condition, although it is permissible for him to voluntarily, not by stipulation, donate from his own money, not from the project's funds.

Second: They agree to convert to the project fund's currency; so it is as if the *muḍārabah* was initiated using the project fund's currency. However, [this is not allowed] according to the Mālikī jurists; thus, it would be converted to *qirāḍ al-mithl* (comparable profit share) to prevent the combination of currency exchange and a profit-sharing contract. Ash-hab disagreed [with the other Mālikīs], saying that it is permissible to combine them, given that the contract contains two things, each of which is permissible separately, and he denied that Mālik prohibited it.

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> Ash-hab's opinion is more evident conceptually, even if it goes against the more well-known opinion, which—along with the prohibition of combining currency exchange with sale—forbids combining it with any of the other contracts that cannot be combined with a sale. One [scholar] referred to them as follows: "The contracts we have prohibited with a sale are six....They are combined in the [acronym] J-Ṣ M-SH-N-Q: *jaʿl, ṣarf, musāqāh, shirkah, nikāḥ and qirāḍ*; the prohibition of these is confirmed."

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The issue here is the incompatibility of *muḍārabah* and a guarantee; thus, if the *muḍārib* gives a guarantee, the contract is vitiated (*fāsid*). When this happens, [the *muḍārib*'s share] is converted to the reasonable market wage (*ujrat al-mithl*) according to the majority of scholars. According to the Mālikī jurists, [it is converted] to the reasonable profit share in the market (*qirāḍ al-mithl*).

The First Supplement

1. Regarding his statement: "…it is permissible for him to voluntarily, not by stipulation, donate from his own money, not from the project's funds"

❖ It should be added: The volunteering must be outside the *muḍārabah* contract, and the *muḍārib* cannot offer an undertaking to do so, even without a stipulated condition, because an undertaking is an acceptance of obligation or a promise, and the Sharīʿah standard contains a prohibition of that.

2. **Confusion**: Regarding the incompatibility of the guarantee with *muḍārabah*.

❖ The guarantee here is not an absolute guarantee against natural loss, which is the guarantee that is incompatible with *muḍārabah*.

The guarantee here is a liability arising from transgression; it is the violation of what the capital provider wanted, which is the investment—in the fund's currency. Therefore, the *muḍārib* must either decline to accept and return the amount to the one who provided it or inform him what he will do and get his approval. Since he violated this, he has transgressed and must compensate, which is the ruling on violation by the *muḍārib*.

2nd topics

Early Settlement Fee

His Eminence Shaykh Walīd bin Hādī
His Eminence Dr Nizam Yaqoubi

The Second Topic

Early Settlement Fee

Forum Chair, Walīd bin Hādī, and Dr Nizam Yaqoubi

Consuming the property of others improperly is prohibited, but scholars differed about certain scenarios. Their differences of opinion are based on *taḥqīq al-manāṭ* (whether the effective cause of the prohibition is present in those cases).

One of these controversial cases involves taking compensation for forgoing a right such as the right of pre-emption. The basis of the dispute is the analogy drawn between it and the compensation [given to the husband] for *khulʿ* (divorce requested by the wife). The majority consider *khulʿ* to be an exchange [contract] for [a right the husband] attained by [way of] compensation, whereas pre-emption is not a right that the possessor attained by [way of] compensation. Imam Mālik said that *khulʿ* is the cessation of the ownership [of a right]; therefore, it is [also] permissible to take compensation for the cessation of the right of pre-emption.

Another [controversial case] is taking compensation for a commitment; Mālik permitted a wife to pay her husband compensation to not marry another wife along with her. This compensation is not in exchange for the commitment; rather, it is compensation for restricting the husband. The restriction is a benefit sought by the wife; therefore, it is permissible to take compensation for it.

Another [controversial case] is taking compensation for a guarantee by itself. Some have reported scholarly consensus that it is prohibited. That is because a guarantee is an act of decency that is rewarded in the hereafter, and worldly reward will not be combined with reward in the hereafter. That is why the Ḥanafīs allow a person to take back a gift but exclude from that the charity given to a poor person and the present given to a close relative (*maḥram*). The reason they give is that the objective of such acts is reward in the hereafter, which was attained, so there can be no retraction. They said the standard rule would indicate the permissibility of taking back charity given to a rich person; however, they prohibited it on

the basis of juristic preference (*istiḥsān*) because one may seek reward in the hereafter by giving charity to rich people.

Māwardī reported that Is·ḥāq considered a fee permissible for [offering] a guarantee. That is because two things are required of a guarantor:

First: paying money to the creditor, and it is not permitted to take compensation for that because it is a loan to the seeker of the guarantee. With regard to this aspect, Is·ḥāq agrees with the rest of the leading scholars in prohibiting any increment, which makes it a matter of consensus (*ijmāʿ*).

Second: the effort expended by the guarantor in going to the creditor and paying the amount of the guarantee. In consideration of this expenditure of effort—or the possibility of it, in that the guarantor restricted himself to be ready to execute this purpose—it is permissible to take compensation for the expenditure of effort, not for the guarantee itself. Therefore, the difference of opinion concerns *taḥqīq al-manāṭ* (realization of the effective cause of the prohibition). The evidence that the difference of opinion is based on this is Māwardī's explanation:

> If he requested a guarantee of him for a fee paid to him, it would not be permissible, and the fee would be invalid. That is different from what Is·ḥāq said because the fee would only be deserved in return for work, and a guarantee is not work. Therefore, no fee is deserved for it.

His statement "a guarantee is not work" explicitly indicates that the effective cause of the prohibition is taking compensation for the guarantee in and of itself. If the compensation is for the work that accompanies the guarantee, it is then permissible.

Some may say that the Ḥanbalīs identified the effective cause of prohibiting compensation for a guarantee to be that it is a loan with added benefit [for the lender]. The answer to this is that the prohibition would be only from this aspect of consideration; i.e., prohibiting compensation for the loan, not for the accompanying work. The evidence for this is the expense entailed in making the loan; it is the obligation of the borrower. Thus, if any work is involved, it is permitted to take a fee for it, and there is no difference of opinion about that. Thus, the requirement of some contemporary [authorities] that the fee be returned to the debtor in case the letter of guarantee is paid out is far from correct.

Some may say that the scenario falls under the rubric of a sale combined with a loan (*bayʿ wa salaf*), which is prohibited. The answer to this is that the prohibition only applies to a stipulated combination. In the absence of stipulation, the Shāfiʿīs allow a fee that exceeds the going market rate whereas the majority prohibit it because it raises the suspicion of a loan with added benefit [for the creditor]. That was the practice during the first decade in the history of Islamic banking. Now, however, the practice is in accord with the Shāfiʿī view, which is also one opinion in the Ḥanbalī School.

Therefore, if we know that the compensation in the preceding scenarios of commitment is in exchange for a benefit sought [by the other party], taking compensation from the debtor in consideration of his undertaking not to settle early does not fall under that rubric. It only has another consideration, which I call the juristic "as if". It is found in the books of jurists with the phrasing, "It is as if…" The aspect of consideration is that fees for which there is no corresponding work, like the case before us, either accompany debt-generating contracts or do not.

If they accompany [a debt-generating contract], we would consider them as part of the profit because they are incorporated into them. It is as if the bank said to the debtor, "My profit is 5%, for example, and I get 2% extra if you settle early." Thus, it is as if the bank said, "My profit is 7%," and all that is involved here is that the bank phrased it differently. It did not use the term 'profit'; it used the term 'penalty for early settlement'. The two parties agreed to this percentage of 5% with an additional 2% incorporated into it, and whether the 2% is called a penalty or profit doesn't change the reality of it. That is because what is a penalty for the customer is a profit for the bank, and the bank is allowed to forgo it if the customer does not settle early, and there is no forbidden element in it. There is no difference between the bank promising to forgo a stipulated portion of the profit if the customer fulfils the condition and the customer undertaking to pay it if the condition is not fulfilled.

Some may say that this "as if" [methodology] will lead to permitting a penalty for late payment because it too would be included in [the profit]. The response would be that any financial consideration for a delay in payment is absolutely impermissible because it would be consideration for the delay, which is explicit *ribā*. As for the case we are discussing, it is an increase in the profit; and it could be said to be [compensation] for harm. If there is overall permissibility of taking compensation for harm, it is permissible to consider "as if" in it. On the other hand, there is overall impermissibility of taking compensation for a delay in

payment; therefore, it is impermissible to consider "as if" in it. There is therefore a difference between this overall category and that overall category.

This distinction brings us to the second type of fee, which is one that is not accompanied by a debt-generating contract; for example, an amount taken as security in case the promisor fails to keep his promise. In this case we would refer to the rules regarding harm. The settled opinion is that it is permissible to take compensation for actual damages; however, the actual practice with regard to hedging is that it is permissible to take the stipulated amount. For example, if a hedger promises to buy a metal with a 2% profit margin and then fails to do so, he would be liable for the stipulated [profit] without consideration of the actual resulting loss. That is because the actual loss from breaking a promise to buy metals is trivial. The angle of reasoning for this ruling is that there is overall permissibility of taking compensation for harm, and the contracting parties in this case agreed from the beginning that the amount of harm would be a certain percentage. It thus resembles the consent of both parties to valuation at a value other than the actual value. In order to avoid litigation to settle the damages, the two parties agreed to use the sale as a means to achieve the objective. When the customer declined to effectuate the means, the bank referred back to the stated [profit] detached from the means. If the customer does not consent to the stated [profit], he will resort to litigation to arrive at a judgment based on the rules of damages.

This extrapolation of earlier juristic opinions is supported by the Ḥanbalī opinion permitting [the seller] to take ownership of the down payment (*ʿurbūn*) in case the [buyer] does not pay the remainder of the price. That is because the seller suffered loss from reserving the merchandise and losing the opportunity [to sell it to others]. The fact that their view is based on the opinion of a Companion does not negate it involving an effective cause or wisdom. And the fact that their opinion applies to cases where a sale agreement has been concluded does not negate the existence of overall similarity. Similarity does not require equivalence in every aspect. And what was said about the penalty for delay applies equally here.

In light of the distinctions detailed here, the rule for a commitment fee and other fees can be known.

3rd topics

Zakat on the *Muḍārib* and Its Impact on Zakat on the Bank

His Eminence Shaykh Walīd bin Hādī
His Eminence Dr. Azman bin Mohd Noor

The Third Topic: Zakat on the *Muḍārib*, and Its Impact on Zakat on the Bank

Forum Chair: Walīd bin Hādī

The Ḥanbalīs are of the view that the *muḍārib* does not have to pay zakat until one year has passed since possessing the money. Muwaffaq [Ibn Qudāmah] says: "As for the *muḍārib*, he does not have to pay zakat on his share until he distributes [the profit], at which time [observation of] a *ḥawl* (passage of one lunar year) would start anew."

The Shāfiʿīs, however, consider the *ḥawl* to start for the *muḍārib* when profit is generated and not from the time of distribution. For example, whatever appears in the first month [of this year], zakat is to be paid for it in the first month of the next year. The profit generated is known by liquidation. So, according to the Shāfiʿīs, the zakatable asset pool depends on when the general assembly is held.

It is well known that the Ḥanafīs add any profits earned to [the *niṣāb* (the minimum amount on which zakat is payable) during] the *ḥawl* that starts when the *niṣāb* is first achieved. And the case in point applies to their opinion. If the bank receives money on the basis of reverse *murābaḥah* rather than *muḍārabah*, then the debt is deducted from the zakatable assets. The point here is to identify the debtor in the reverse *murābaḥah*, whether it is the shareholder or the pool of funds.

If it is only the shareholders, then there is no zakat on them. This is particularly applicable to the experience in Malaysia, where the investment accounts have been replaced by reverse *murābaḥah* accounts. On the other hand, if it is the pool of funds, this is reflected by subtracting the debt from the zakatable assets of the depositors as well. This will be further discussed in another topic of the conference.

The Third Topic: Zakat on the *Muḍārib*, and Its Impact on Zakat on the Bank

Dr. Azman bin Mohd Noor

Introduction

Muḍārabah is an Islamic contract based on partnership between an owner of capital and an entrepreneur. It is an economic idea based on investment cooperation between owners of capital and experienced agents. It is also a method for attracting investment accounts, absolute and restricted, and deploying [the funds].

In this context, Ibn Qudāmah notes, "Indeed, people are in need of *muḍārabah* because dirhams and dinars increase only by way of turnover and business. And not everyone who has money is good at business, and vice versa. Therefore, *muḍārabah* is needed by both, so Allah legalized it to satisfy both parties' needs." [2]

The general rule is that zakat is due on all wealth that has reached the *niṣāb* and a complete *ḥawl* has passed since possessing it. In this topic, the *muḍārib*'s involvement in the equation adds a new meaning to the process. Is what the *muḍārib* earns subject to zakat when it reaches the *niṣāb* or, alternately, when it gets distributed? Also, can it be added to the original capital so that all of it is treated as one amount? This is at the juristic level.

The *muḍārabah* funds in banks are considered one of their main types of funds, and the bank is considered a *muḍārib*. So, how is the zakatable wealth calculated, and how is the *niṣāb* calculated? And what is the impact of the juristic disagreement on the zakat that is due on the bank as *muḍārib*?

[2] Ibn Qudāmah, *Al-Mughnī*, 5:135.

The Research Problem

Jurists, while treating the issue of zakat on *muḍārabah*, addressed the zakat of the *muḍārib*, which is the role the bank plays in Islamic banking. They held different views about zakat on the *muḍārib* in terms of its timing and even whether it is obligatory on him. Islamic banks have expanded the use of *muḍārabah* contracts, whether absolute or restricted. Jurists need to create a clear method of zakat calculation and to identify when the *ḥawl* begins. Does the juristic disagreement in identifying the beginning of the *ḥawl* have an impact on the bank client or not? This paper discusses the juristic dimension of this issue and the effect of the juristic disagreement on the current practice in Islamic banks. Also, it addresses the accounting dimension in calculating zakat according to actual and constructive liquidation.

***Muḍārabah*: Definition and Types**

Linguistically, *muḍārabah* is taken from *al-ḍarb fī al-arḍ*: to travel across the land seeking provision.[3] Iraqis call it *muḍārabah*, taken from *al-ḍarb fī al-arḍ*. Allah says, "…and others traveling through the land (*yaḍribūna fī al-arḍ*) seeking of Allah's bounty" (73:20). Alternatively, it might be from the following: *ḍaraba kul wāḥid minhumā fī al-ribḥ bi-sahmin* (each of them takes part of the profit).

The people of Hijaz called it *qirāḍ*, taken from 'cutting'. It is said: *qaraḍa al-fa'r al-thawb* (the mouse cut the cloth [by gnawing it]). The owner of money cuts (takes out) a sum from it and gives it to the *muḍārib*. Later on, the owner cuts a sum from the profit and gives it to the *muḍārib*.[4]

Technically, *muḍārabah* is when the owner of the capital gives it to the *muḍārib* to trade on his behalf, and the profits are shared according to an agreed-upon formula.[5]

Muḍārabah is a type of trust contract; since the *muḍārib* acts as a trustee, he is not liable for the *muḍārabah* capital unless he violates the terms of the trust contract by transgressing upon

[3] Rāzi, *al-Ṣiḥāḥ*, 1:544.
[4] Ibn Qudāmah, *Al-Mughnī*, 5:135.
[5] Ibid., 5:17.

the capital, or by negligence in managing it, or by violating the terms and conditions of the *muḍārabah* contract. In any of these cases, the *muḍārib* is liable for the capital.[6]

The capital provider may obtain sufficient and appropriate guarantees from the *muḍārib*, provided that the capital provider does not enforce these guarantees unless it is proven that there has been misconduct, negligence or breach of the *muḍārabah* contract.

***Muḍārabah* Terms**

1. *Rabb al-māl*: the capital provider

2. *Muḍārib*: the one who invests the capital

3. Capital: the sum of money provided by the owner to the *muḍārib*

4. Business enterprise: the actions taken by the *muḍārib.*

5. Profit: the goal of *muḍārabah*; it is the sum of money additional to the capital that is shared between the capital owner and the *muḍārib*.

Jurists state that neither party is entitled to earn profit until the owner has received his initial capital in full. They consider profit to be the sum of money additional to the capital, which is why they refer to the profit as the shield of the capital.

***Muḍārabah* Is a Type of Partnership**

Ibn Taymiyyah and Ibn Qayyim of the Ḥanbalī School argue that *muḍārabah* is not a type of *ijārah* (hiring of labour); thus, it is not accurate to say that it does not conform to the rules [of *ijārah*]. Instead, *muḍārabah* is a type of partnership, since the capital owner's aim is not the *muḍārib*'s labour per se but, rather, the profit he earns.

[6] See the Islamic Fiqh Academy Resolutions, No. 30 (5).

In *muḍārabah*, both contracting parties share profit and loss. If there is profit, they share it; and if there is none, they share the loss; the *muḍārib* loses his effort, while the capital owner loses his money. Therefore, *muḍārabah* is permitted on the basis of sound analogy. It is legalized on the basis of analogy with *mushārakah*, in which knowledge of the value offered and the value accepted is not a requirement. There is nothing in Sharīʿah that goes against analogy.[7]

Types of *Muḍārabah*

Muḍārabah contracts are divided into unrestricted and restricted *muḍārabah*.

The unrestricted *muḍārabah* contract: is a contract in which the capital provider permits the *muḍārib* to administer the *muḍārabah* operations without any restrictions. In this case, the *muḍārib* is given wide discretionary powers on the basis of trust and the business expertise he has acquired. An example of unrestricted *muḍārabah* is when the capital provider says, "Do business according to your expertise." However, no matter how much discretion is given in unrestricted *muḍārabah*, it must be exercised only in accordance with the interests of the parties and the objectives of the *muḍārabah* contract, which is making profit. Therefore, the actions of the *muḍārib* must be in accordance with the business customs related to *muḍārabah* investment, as well as with Sharīʿah rules.[8]

The restricted *muḍārabah* contract: is a contract in which the capital provider restricts the actions of the *muḍārib* to a particular location or to a particular type of investment, as the capital provider considers appropriate, but not in a manner that would unduly constrain the *muḍārib* in his operations.[9]

Models of unrestricted *muḍārabah* in banks: savings accounts, accounts subject to notification of withdrawal, and term accounts. No conditions are imposed on the bank, and it is free regarding how to invest these accounts.

Models of restricted *muḍārabah* in banks: is based on the bank's investment of the clients' money as per their requests regarding the type of investment or the specified period.

[7] Ibn Qayyim, *Iʿlām al-Muwaqqiʿīn ʿan Rabb al-ʿĀlamīn*, 1:384-385.
[8] AAOIFI Sharīʿah Standards, *Muḍārabah* Standards, 219.
[9] Ahmed Shawki Suleiman, Al-Makhātir al-Murtabiṭah bi Ṣīghat al-Muḍārabah wa Āliyyat al-Ḥadd minhā, kenanaonline.com/users/ahmed0shawky/posts/732067

The Status Quo of *Muḍārabah* in Islamic Banks

Initially, the theoretical conception of Islamic banks lay in changing the relationship between depositors and the bank from a creditor/debtor relationship to *muḍārabah*, whereby the bank became the partner and agent of the depositors in the investment of their money. Likewise, the borrowers' relationship with the bank was to move from a creditor/debtor relationship to *muḍārabah*, whereby the bank became their partner; i.e., the capital provider (*rabb al-māl*).[10]

Muḍārabah in its traditional formula is difficult to apply in the modern era. Hence, there have been efforts to evolve this formula to suit banks' nature (as legal personalities) and maximize benefit from the principle of sharing while avoiding usury. [The intent is] to solve many of the current economic problems such as inflation, monopoly and misdistribution of wealth.

This situation has helped in:

1. acceptance of the principle of banks [engaging in] participatory [financing], and the approval of investment accounts by Islamic banks;

2. making Islamic banks an investment and development tool in that *muḍārabah* has shifted investment from an individual process to a collective one.

Essentials of the Contract in Banking *Muḍārabah*

The contract has various forms, depending on the relation between the bank and the party interested in investment. Investment account holders provide money to the bank to deploy it, whether in the form of a savings account, an investment deposit, or an investment certificate. The parties to the *muḍārabah* contract are:

The investment account holders (capital providers)
The Islamic bank (entrepreneur)

[10] Yāsirī, *ʿAqd al-Muḍārabah fī al-Maṣārif al-Islāmiyyah* (Dār al-Manāhij li al-Nashr wa al-Tawzīʿ), p. 150.

First: Jurists' Views on Zakat on the *Muḍārib* and Its Impact on Zakat on Islamic Banks

Jurists' views regarding zakat on the *muḍārib* are very detailed [with various rulings for various cases], and they are reflected in [the issue of] zakat on shareholders and depositors in the *muḍārabah* portfolios. The question of whether zakat is obligatory on the *muḍārib* is related to another question:

Is the *muḍārib* entitled to profit when it is generated or not?

The *muḍārib* is the working partner in *muḍārabah*. If profit is generated from the trading and *muḍārabah*, does the *muḍārib* become the owner of his profit share immediately upon realization of the profit, or after distribution?

Jurists' Views:

The Ḥanafīs: Zakat on *muḍārabah* money is to be paid by the capital provider and the *muḍārib*, each on what he owns. The capital provider pays on his principal as well as his profit share, and the *muḍārib* pays on his profit share after he possesses it (if the conditions of zakat are met).

Sarakhsi says, "As for the *muḍārabah* wealth, the owner has to pay zakat on his initial capital and his profit share. The *muḍārib* has to pay on his profit share after possessing it, if it reaches the *niṣāb*, or when his other property plus the profit share reaches the *niṣāb*. That is view [of the School]."[11]

The Mālikīs: The Mālikīs have two basic views, similar to the Shāfiʿīs:

The zakat of all the money is to be paid by the capital provider, whether he is a manager along with [the *muḍārib*] or the *muḍārib* is the only manager.
The capital provider has to pay zakat only on his initial capital and his own profit share.[12]

Regarding the *muḍārib*'s profit from the *muḍārabah*, the Mālikīs state that in both cases zakat for a single year is due on the *muḍārib*'s profit share after the distribution has occurred.

It is to be noted here that the time period is identified as a *ḥawl*, and it is important that there be distribution.

[11] Sarakhsī, *Al-Mabsūt*, 3:331.
[12] ʿAbdarī, *Al-Tāj wa al-Iklīl*, 3:66; *Ḥāshiyat al-Dasūqī ʿalā al-Sharḥ al-Kabīr*, 4:407.

Ḥaṭṭāb Ruʿaynī says:

Zakat shall be paid on the present *muḍārabah* by the capital provider whether he participates in the management or [it is done only by] the *muḍārib*…that is, the capital provider in *muḍārabah* has to pay zakat for it every year, whether both of them are managers or [just] the *muḍārib*. The apparent meaning is that he pays zakat on all the money. However, what is understood from Ibn Yūnus' statement is that [the owner] pays zakat on the capital and his own profit share. Ibn Yūnus states, "He pays zakat on the capital and his profit share. He does so from his own money and does not take it out of the capital."[13]

In *Ḥāshiyat al-Dasūqī ʿalā al-Sharḥ al-Kabīr,* it is stated:

Zakat shall be paid on the present *muḍārabah* by the capital provider; i.e., for every year before distribution, whether both the *muḍārib* and owner are managers or only the *muḍārib*. However, in the first [scenario] the capital provider calculates the capital in his possession and in the possession of the *muḍārib*, as well as the capital owner's profit share; then he pays zakat on all of that. In the second [scenario], the capital provider calculates what is in the possession of the *muḍārib*: the capital and the capital owner's profit share, and pays zakat on both of them. As for the *muḍārib*'s profit share in the two cases, zakat for one year is due on it after the [profit] distribution.[14]

In this context, Ibn Rushd notes:

There is no difference among them that the *muḍārib* only takes his profit share after the capital has been liquidated, and that if he incurs a loss and then trades again and gains profit, the loss has to be compensated from the profit.[15]

Hence, one may conclude that:

The general principle in private *muḍārabah* is that for every independent bilateral contract the profits are calculated after the capital has been returned to the owner, and the profit is not distributed and the share is not known until the capital has been fully liquidated; i.e., converted to cash.[16]

It is clear from this that the Mālikīs have two approaches: (i) zakat is to be paid on all of the wealth, the capital and profit, by the one who manages it; (ii) the capital is separated from the profit.

[13] Ḥaṭṭāb, Mawāhib al-Jalīl fī Sharḥ Mukhtaṣar al-Khalīl, 6:205.
[14] *Ḥāshiyat al-Dasūqī ʿalā al-Sharḥ al-Kabīr*, 4:406.
[15] Ibn Rushd, *Bidāyat al-Mujtahid*, 2:237.
[16] Wahbah Zuhayli, *Al-Fiqh al-Islami wa al-Adillatuh*, 7:5065.

The Shāfiʿīs: There are two views in the Shāfiʿī School [regarding timing]; according to one, profit is possessed when it is generated.[17] Further, Shāfiʿī has two views regarding zakat on the *muḍārabah* wealth:

1-[The capital provider] has to pay zakat on all the trade merchandise because he owns it. The *muḍārib* has no obligation to pay zakat on any of it until he gives the capital back to the *rabb al-māl* and they share the profit based on their mutual agreement.

2- The commodity is valuated along with its [expected] profit. The capital owner pays zakat on the capital and his profit share. Zakat on the *muḍārib*'s share of the profit remains in abeyance until the zakat conditions are met.

Shāfiʿī states in *Al-Umm*:

Assume someone gave 1000 dirhams to another for *muḍārabah*. The *muḍārib* bought with it a commodity worth 2000, and a *ḥawl* passed before he sold it. Two views are held: one is that zakat is to be paid on all of the trade merchandise because it is the property of the capital owner. The *muḍārib* does not have to pay zakat on any of it until he gives the capital back to the *rabb al-māl* and they share the profit based on their mutual agreement….The same goes if he sold it after the *ḥawl* passed or sold it before the *ḥawl* but the money was not distributed until after the *ḥawl*. If the *muḍārib* sold it before the *ḥawl*, delivered the capital to its owner, shared the profit, and the *ḥawl* passed, zakat is due on the capital and the profit of the owner. No zakat is due on the *muḍārib*'s share because he earned money on which a *ḥawl* has not yet passed while in his possession.[18]

Imam Shīrāzī clarifies the difference of opinion thus:

Assume someone gives 1000 dirhams to another for *muḍārabah* on the condition that they will share the profit equally. After that, a *ḥawl* passes and the capital becomes 2000. [The issue] is based on when the *muḍārib* possesses the profit? There are two views: 1- after distribution; 2- when the profit is generated. If we hold the first view, the owner has to pay zakat on the capital and the profit…however, if we hold the second view, the owner has to pay zakat on 1500—and distribute it as we mentioned—and the *muḍārib* has to pay zakat on 500…[19]

Nawawī prefers the first view, that the *muḍārib* possesses the profit only after distribution. Therefore, the owner has to pay zakat on the capital and the profit. He says (may Allah have

[17] Shāfiʿī, *Al-Umm*, 2:52.
[18] Shāfiʿī, *Al-Umm*, 2:52.
[19] Shīrāzī, *Al-Muhadhdhab*, 1:161; see Nawawī, *Al-Majmūʿ*, 6:70.

mercy on him), "The preferred view is that the *muḍārib* possesses his profit share only after distribution. If we hold that the *muḍārib* possesses his profit share only after distribution, the owner must pay zakat on the capital and the profit because he owns all of it."[20]

The two Shāfiʿī views are based on the question: When does the *muḍārib* possess profit: after distribution, or upon generation of the profit?

The Ḥanbalīs: The Ḥanbalīs also have differing views. Ibn Rajab says in *al-Qawāʿid*:

Does the *muḍārib* possess profit once it is generated or not? Abū Khaṭṭāb only mentioned one narration [from Imam Aḥmad:] that he owns it when it is generated. However, most [Ḥanbalī scholars] mention two narrations; one: he owns it when it is generated, and this is the well-known opinion. According to the second narration, he does not possess the profit unless distribution [has occurred]. This was supported by Qāḍī [Abū Yaʿlā] in his dissenting opinion about *muḍārabah*. The possession of profit takes place after distribution in the view of the Qāḍī and like-minded scholars. Others (like Ibn Abī Mūsā) argue that possession occurs upon complete calculation. This was affirmed by Abū Bakr ibn ʿAbd al-ʿAzīz and was explicitly stated by Imam Aḥmad.

One of the fruits of this difference is whether the *ḥawl* for the *muḍārib*'s profit share starts before distribution. If it is held that he does not possess it without distribution, then the *ḥawl* does not start before it. On the other hand, if it is said he possesses the profit when it is generated, [the question arises]: does the *ḥawl* start before the possession is secured, or does it not start without secure possession?[21]

Buhūtī prefers the view that no zakat is due before distribution. He notes:

No zakat is due on the *muḍārib*'s profit share before distribution, even if it is possessed; i.e., even if we say it is possessed when it is generated. That is because of the lack of secure possession. Thus, the *ḥawl* does not start before the profit is secured by distribution or what is treated like it. The owner, nevertheless, pays zakat for his profit share, as well as the capital, because he possesses the profit once generated and because it is auxiliary to his capital. However, the situation with the *muḍārib* is different.[22]

To sum up, the majority of jurists are of the opinion that the *muḍārib* possesses his profit share after it has been distributed, not when it is generated.

[20] Nawawī, *Al-Majmūʿ*, 6:71.
[21] Ibn Rajab Hanbali, *Al-Qawāʿid*, 392.
[22] Buhūtī, *Kashshāf al-Qināʿ ʿan Matan al-Iqnāʿ*, 5:26.

Jurists Who Hold That Profit Possession Takes Place after Its Generation and That Zakat Is Due on It

It is mentioned that the majority of jurists hold that the *muḍārib* possesses his profit share as soon as it is distributed. However, there is a view in the Shāfiʿī and Ḥanbalī schools that the *muḍārib* possesses his profit share as soon as it is generated. Here are a few of their texts:

1- **In the Shāfiʿī School:** Shāfiʿī states in his book *Al-Umm*:

Assume someone gave 1000 dirhams to another for *muḍārabah*. The *muḍārib* bought with it a commodity worth 2000, and a *ḥawl* passed before he sold it. Two views are held: one is that zakat is to be paid on all of the trade merchandise because it is the property of the capital owner. The *muḍārib* does not have to pay zakat on any of it until he gives the capital back to the *rabb al-māl* and they share the profit based on their mutual agreement….The same goes if he sold it after the *ḥawl* passed or sold it before the *ḥawl* but the money was not distributed until after the *ḥawl*. If the *muḍārib* sold it before the *ḥawl*, delivered the capital to its owner, shared the profit, and the *ḥawl* passed, zakat is due on the capital and the profit of the owner. No zakat is due on the *muḍārib*'s share because he earned money on which a *ḥawl* has not yet passed while in his possession.[23]

2- **In the Ḥanbalī School**

The Ḥanbalī Ibn Rajab gave a summary of the difference among Ḥanbalīs and referred to two narrations: one that the *muḍārib* possesses profit once it is generated (the well-known opinion), the other: he does not own it without distribution. Then he noted:

[Regarding commencement of] the *ḥawl* on the *muḍārib*'s profit share starting before distribution: If it is held that he does not possess it without distribution, then the *ḥawl* does not start before it. On the other hand, if it is said that he possesses the profit when it is generated, [the question arises]: does the *ḥawl* start before the possession is secured, or does it not start without secure possession?

A Summary of Jurists' Views

First, jurists have no differences that the owner has to pay zakat on his capital and profit share, and that the *muḍārib* has to pay zakat on his profit share after distribution and the completion of a *ḥawl* cycle. This is on the condition that the capital owner and the *muḍārib* are eligible to pay zakat.

[23] Shāfiʿī, *Al-Umm*, 2:52.

Second, the point of difference:

Scholars hold three different views about who has to pay zakat, and when, on profit that has been generated when a complete *ḥawl* cycle has passed on it but it has not yet been distributed.

1-If profit is generated and a complete *ḥawl* has passed but it has not yet been distributed, then the owner has to pay on the capital because it is his property and because the *muḍārib* does not own his share of the profit until it has been distributed; he does not yet own it when it is first generated.

2- The *muḍārib* possesses his profit share as soon as it is generated. Thus, when the *ḥawl* has passed, he must pay zakat on his profit share, and the owner must pay zakat on the capital and his profit share. However, these scholars differ about the time that zakat must be paid after the *ḥawl* has passed if the profit has not yet been distributed.

3- The *muḍārib* does not have to pay zakat as soon as the *ḥawl* has passed if the profit has not yet been distributed. That is, he does not have to pay zakat unless the profit has been distributed and the owner has received his capital and his profit share, even if the period is lengthy.

It is stated in *Al-Mawsūʿah al-Fiqhiyyah al-Kuwaytiyyah*:

Profit distribution is not valid unless the capital is delivered to the owner. Proof of this consideration is taken from the Prophetic *ḥadīth* that states, "The example of a person who performs prayer is like that of a merchant. The latter does not receive his profits until he receives back his initial capital. Likewise, the former is not rewarded for supererogatory deeds until he performs all obligatory acts of worship."[24] This *ḥadīth* is a proof that profits are an increase over the principal, which is not considered or distributed until the principal is delivered to its owner.[25]

Likewise, if the capital remains in the *muḍārib*'s hands, then the ruling of the *muḍārabah* remains as is. If we validate the distribution of profit [on those terms], it means the subsidiary [the profit] has been distributed before the principal, which is not permissible. Furthermore, if the distribution is invalid and what is in the *muḍārib*'s hands perishes, then what they

[24] Narrated by Bayhaqi in *al-Sunan*, from ʿAlī ibn Abī Ṭālib's *ḥadīth*. There is a weak narrator in it.
[25] *Al-Mawsūʿah al-Fiqhiyyah al-Kuwaytiyyah,* 48-74.

distributed is the capital. In this case, the *muḍārib* has to return from it what completes the capital.

The Impact of This Juristic Difference on the Payment of Zakat

[Regarding] the *ḥawl* of the *muḍārib*'s profit share starting before distribution:

If it is held that he does not own it without distribution, then the *ḥawl* does not start before distribution. However, if it is held that he owns the profit as soon as it is generated, then the *ḥawl* starts (whether before or after he securely possesses it) by different means:

The *ḥawl* does not start before secure possession, with no disagreement on this point. Security is established through distribution or full accounting. So, upon either of these two procedures the *ḥawl* starts, and this was explicitly stated by Imam Aḥmad.
If we argue that the *muḍārib* possesses the profit as soon as it is generated, then the *ḥawl* starts immediately upon it.

If we argue that possession is not established before security, then the *ḥawl* does not start. However, if we argue that possession is established without security, then (based on one view), the *ḥawl* starts before it. But the preferred view is that the *ḥawl* does not start. The owner has to pay zakat on the capital as well as his profit share, and the *ḥawl* starts when the profit is generated. As for the *muḍārib*'s share of the profit, the *rabb al-māl* does not have to pay zakat on it.[26]

The Reason for the Difference of Opinion

The difference among jurists stems from the question: does the *muḍārib* possess his profit share after the profit is gained or after distribution?

Imam Shīrāzī explains:

Assume someone gives 1000 dirhams to another for *muḍārabah* on the condition that they will share the profit equally. After that, a *ḥawl* passes and the capital becomes 2000. [The issue] is based on when the *muḍārib* possesses the profit? There are two views: 1- after distribution; 2- when the profit is generated.

[26] Muhammad Zuhayli, *Al-Qawāʿid al-Fiqhiyyah wa Taṭbīqātuhā fi al-Madhāhib al-Arbaʿah*, p. 1006.

If we hold the first view, the owner has to pay zakat on the capital and the profit…however, if we hold the second view, the owner has to pay zakat on 1500—and distribute it as we mentioned—and the *muḍārib* has to pay zakat on 500…[27]

In addition, an aggregate of rules indicate that wherever property exists zakat exists too, and no consideration is given to whether the wealth is called *muḍārabah* or *mushārakah*. For example, Allah says, "Take alms of their wealth" (al-Tawbah: 103).

It may be that consideration of another principle caused jurists to refrain from prescribing zakat on all that is called property: that a worker expends effort, and this effort requires compensation. And this compensation often does not reach *niṣāb*. Therefore, no zakat is due on a person regarding his slave or horse, and by extension, on his effort.

According to AAOIFI's Sharīʿah Standards, (*Muḍārabah* Standard):

The *muḍārib* is entitled to the profit share as soon as it is generated, and he possesses it when liquidation or valuation takes place. And it becomes binding only after distribution. The conditions for the profit's distribution are its generation, mutual agreement to distribution, and return of the capital to the owner. Most jurists allow distribution of the profit without the capital in case the *muḍārabah* is ongoing.[28]

The Proofs of Those Who Hold That Profit Becomes Owned When It Is Generated

1-As the condition is valid, what comes from it is valid too; i.e., to have a profit share. When the profit exists, he should own it on the basis of the condition. This is similar to one who tends another's trees for a share of the fruit; he owns his share of the fruit once it appears. Also, by analogy, [this condition is like] all valid conditions in other contracts.[29]

2-The profit is owned; therefore, it must have an owner, and it is agreed among all jurists that the capital owner never owns the profit share [of the *muḍārib*]. This requires that the profit share be owned by the *muḍārib*.[30]

3-Since the *muḍārib* has the right to ask for distribution, he owns his profit share in the same way that a partner in *shirkat al-ʿinān* (limited partnership) does. There is nothing to prevent him from owning it and it being considered protection [a buffer] for the capital, like the

[27] Shīrāzī, *Al-Muhadhdhab*, 1:161; see Nawawī, *Al-Majmūʿ*, 6:70.
[28] AAOIFI, *Sharīʿah Standards*, *Muḍārabah* Standard, p. 223.
[29] Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 6:87, 93.
[30] Ibn Qudāmah, *Al-Mughnī*, 7:165.

owner's profit share. This [consideration explains why] he does not have an exclusive right to his profit.[31]

4-By analogy, it is like *musāqāh* (crop sharing) in that the profit is possessed when it generated.[32]

5-By analogy, the *muḍārib* is like the owner of the capital, who possesses his profit share as soon as it is generated.[33]

The Proofs of Those Who Hold That Profit Is Established after Distribution

If the *muḍārib* owns the profit, this means the profit belongs to him, and the *muḍārib* would be a partner to the owner, like a partner in *shirkat al-ʿinān* (limited partnership).[34]

The basic rule is that a person who is entitled to compensation for his work does not get it until after the work is completed and [the product is] delivered. In this context, when someone says to another, 'If you sew this cloth, you will get one dinar,' he will not be entitled to the dinar until after the work is done and the product delivered.[35]

Muḍārabah is a non-binding contract, and there is no precise parameter for the labour involved. Thus, he does not own the compensation unless the work is finished, like *juʿālah* (remuneration for a completed job).[36]

If the *muḍārib* uses the capital to buy two slaves, and the value of each of them [if sold] would equal the entire capital, and the capital provider then frees them, the capital provider is not obliged to compensate the *muḍārib*. This indicates that the *muḍārib* does not own the profit when it is generated.[37]

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[31] Ibid.
[32] *Sharḥ al-Bahjah*, 3:291.
[33] Bājī, *Al-Muntaqā*, 5:155; Dr. Abdullah ibn Mubarak Āl Sayf, *Matā yamlik al-ʿĀmil hiṣṣatahu min al-Ribḥ,* (11/1/ 2015), Al-Alouka website. Retrieved 1/9/2019.
[34] Ibn Qudāmah, *Al-Mughnī*, 7:165.
[35] Bājī, *Al-Muntaqā*, 5:155.
[36] Ibid.
[37] Ibn Mufliḥ, *Al-Mubdiʿ*, 5:31.

The delay in taking ownership of the profit is for protection of the capital before the distribution.[38]

Zakat on the *Muḍārib*'s Profit from an Accounting Point of View

Before going through the calculation of zakat on the *muḍārabah* capital and its profits, we will first define the concept of the return on the *muḍārabah* deposits and explain how this return is calculated and distributed between the *muḍārabah* deposit owners and the bank [in its capacity] as *muḍārib*.

In article 6/8 of the conceptual framework for financial reports of Islamic financial institutions, approved by the Board of Directors of the Accounting and Auditing Organization for Islamic Financial Institutions at its meeting No. 37 held on July 22, 2010, it is mentioned that the return on investment accounts is the share of the net result that goes to the owners of investment accounts during the period covered by the financial statements of the Islamic financial institution. The return on investment accounts is considered an allocation of investment profits and losses that have been accumulated for the owners of investment accounts as a result of their contribution to the investment activities of the Islamic financial institution.

To know how to allocate the return of the various sources of invested funds, we will first look at the ways the bank's money is invested and then at the practical methods used by banks to calculate the profits and distribute them. Then, we will give an example of the *muḍārib*'s profit and the method for calculating its zakat.

Investment of the Islamic Bank's Funds

The Islamic bank may separate the investments of its funds from the investments of the *muḍārabah* deposit owners' funds. In this case, there are no accounting problems related to calculating the share of each party in their share of the realized and distributable profits.

But in most cases, Islamic banks mix their funds (shareholder funds + current deposits + savings accounts) with the funds of *muḍārabah* deposit account holders. In this case, the bank

[38] Ibid. See Dr. Abdullah ibn Mubarak Āl Sayf, *Matā Yamlik al-ʿĀmil Ḥiṣṣatahu min al-Ribḥ,* (11/1/ 2015), Al-Alouka website. Retrieved 1/9/2019.

needs to separate the profits from the investment of its own funds from the profits of the *muḍārabah* deposit holders. The process of separation of the two profits is as follows:

a. The bank's financial management receives a year-end statement that shows the actual balance of each of the different deposit accounts on an annual basis (total current account balance, total savings account balance, *muḍārabah* deposit account balance, capital stock available for investment).
b. The bank deducts specific percentages from the balance of each type of deposit to face the risks of withdrawals, and these go to the central bank as a mandatory reserve.
c. After deduction, the result is the balance available for investment in each type of account.
d. The Financial Department has a statement of the actual total balance invested during the year. (Let us suppose 100,000,000).
e. After that, the actual invested balances for each deposit account are calculated, as shown in the following table :

1	2	3	4	5
Source of funds	**The actual balance of the deposits (1)**	**Investment ratios (2)**	**The balance available for investment 1x2**	**The actual balance invested during the year**
Current Accounts	20,000,000	70%	14,000,000	9,589,014
Savings accounts	25,000,000	90%	22,500,000	15,410,959
Muḍārabah deposits	50,000,000	100%	50,000,000	34,246,575
The bank's own funds (its capital)	60,000,000	100%	60,000,000	41,095,890
Total	**155,000,000**		**146,000,000**	**100,000,000**

Once the actual invested balance of all deposits is calculated as shown in Column No. 4, the bank identifies the profit share of each deposit by dividing the actual invested balance of deposits by the total amount of the actual invested balance during the year. Then, all is multiplied by the distributable profit according to the following formula:

$$\text{Profit of } \textit{muḍārabah} \text{ deposit holders} = \text{distributable profits} \times \frac{34{,}246{,}575}{100{,}000{,}000}$$

Methods of calculating the profits of *muḍārabah* deposits and how to distribute them between the bank and the deposit holders.

There are two accounting methods for Islamic banks to calculate the dividends distributed between the bank, as the *muḍārib*, and the *muḍārabah* deposit holders:

The first method: the bank counts its revenues from investment operations, banking services and other income sources. Then, all administrative expenses, various debt allocations, depreciation, etc. are deducted. The net profits are divided between the bank and the *muḍārabah* deposit holders according to the size of the funds of each. After that, the bank's share, as *muḍārib*, is deducted from the profits of the *muḍārabah* deposit holders in return for its management of investment operations.

The second method: The bank separates investment operation revenues from banking service revenues and other revenue sources. In this case, revenues from banking services and from current accounts as well as savings accounts investments should return to the bank (the shareholders). Obversely, the bank bears all administrative expenses and allocations of the component debt and the asset depreciation. These are deducted from the bank's profits. The revenues from investment operations are distributed between the bank as *muḍārib* and *muḍārabah* deposit holders, according to the size of the funds of each. The bank's share as *muḍārib* is deducted from the return of the *muḍārabah* deposit holders.

2. An Example of Zakat on the *Muḍārib*'s Profit Share When It Is Generated

Banks calculate profits on a monthly, quarterly, semi-annual or annual basis according to the nature of the term of the *muḍārabah* deposit contract in order to distribute *muḍārabah* profits between the bank, as the *muḍārib*, and the *muḍārabah* deposit holders.

In this example, we assume that the period of the *muḍārabah* deposit is two years and the dividends are due at the end of the two years (12/31/2017).

Thus, the profit calculation is conducted on an annual basis. We assume that at the end of the first year (2016) the bank has profits of RM 10,000,000 from the actual investment of 100,000,000, as shown in the table above. Let us assume that the agreed profit distribution ratios between the bank, as the *muḍārib*, and the investment deposit holders are 60% for the bank and 40% for *muḍārabah* deposit holders. Thus, profits are allocated on the various deposits mentioned in the table above as follows:

The amount of distributable profits generated at the end of the year = 10,000,000

Current account funds = $10{,}000{,}000 \times \frac{9{,}589{,}014}{100{,}000{,}000}$ = RM 958,901.40

Savings account funds = $10{,}000{,}000 \times \frac{34{,}246{,}575}{100{,}000{,}000}$ = RM 1,541,095.90

Muḍārabah deposit funds = $10{,}000{,}000 \times \frac{15{,}410{,}959}{100{,}000{,}00}$ = RM 3,424,657

Shareholders' funds = $10{,}000{,}000 \times \frac{41{,}095{,}890}{100{,}000{,}00}$ = RM4,109,589

The bank's total profits before the distribution of *muḍārabah* profits =

Profits from current account funds + profits from savings account funds + profits from shareholders' funds =

4,109,589 + 1,541,095.9 + 958,901.4 = RM 5,675,342.5

Zakat on the bank's profits before *muḍārabah* profits are distributed is

5,675,342.5 x 2.5775% = RM146,282

This is in case profits are calculated when they are generated and without waiting for a *ḥawl* to pass (which is what is tacitly approved by AAOIFI Accounting Standard No. 9).

Distribution of *Muḍārabah* Profits

The *muḍārabah* profits distributed between the bank, as the *muḍārib*, and the *muḍārabah* deposit holders are an estimated RM 4,324,657.50. This is according to the percentage agreed in the *muḍārabah* contract between the bank and the *muḍārabah* deposit holders, which is 60% for the bank, as the *muḍārib*, and 40% for the *muḍārabah* deposit holders. Thus, the bank's profit as the *muḍārib* is 4,324,657.50 x 60% = RM 2,594,794.50.

The bank's total profit after the distribution of *muḍārabah* profits at the end of the first year = 5,675,342.5 + 2,594,794.5 = RM 8,270,137.

Zakat on the bank's profits after the *muḍārabah* profits have been distributed is thus

8,270,137 x 2.5775% = RM 213,162.78.

This is in case profits are calculated when they are generated and without waiting for a *ḥawl* to pass (which is what is tacitly approved by AAOIFI Accounting Standard No. 9).

1. **An Example of Zakat on the *Muḍārib*'s Profit Share Once the Profit Is Possessed**

We assume the bank, at the end of 2017, liquidated all *muḍārabah* investments and that the amount of profit from liquidation is RM19,000,000. We assume that the amount of profits generated at the end of 2016 amounted to RM10,000,000 as a result of investing the amount of RM100,000,000. RM10,000,000 in profits was possessed at the end of 2017, while the amount of RM 9,000,000 in profits remained as a debt to the bank (not possessed yet). In this case, the zakat calculation runs as follows:

	Profits generated	Possessed profits	Zakat
2016	8,270,137	zero	zero
2017	7,767,123	8,270,137	zero
2018			213,162.78

It is noted that for profits generated at the end of 2016, zakat was paid at the end of 2018. That is because their actual possession took place at the end of 2017.

The View of the Majority of Jurists, Who Consider the Date of Profit Distribution to Be the Beginning of the *Ḥawl*, and the Current Practice

It is noted that the accounting procedures for zakat calculation do not fully take into account a *ḥawl* cycle from profit generation date. What happens is that zakat is calculated at the end of each fiscal year after the accounts have been closed and the result of the bank's business (profit or loss) comes out.

In contrast, some scholars argue that a complete *ḥawl* should pass on the dividends distributed at the end of the year in order for zakat to become obligatory upon them. Thus, zakat would become due on the bank's total profit amount—after distributing the *muḍārabah* profits—of RM 8,270,137 at the end of the second year after it was generated.

The following table shows zakatable assets at the end of each year according to AAOIFI accounting practice compared to the view of the majority of jurists, who hold that zakat on the *muḍārib* should be calculated after constructive liquidation.

	2016	2017	2018	2019
Zakatable assets according to AAOIFI accounting practice	RM 8,270,137	RM 7,767,123	zero	zero
Zakatable assets according to the majority of jurists	zero	zero	RM 8,270,137	RM 7,767,123

Conclusion:

The study has highlighted the opinions of various jurists regarding the date that the *ḥawl* begins for calculating when zakat becomes due on the profits of the *muḍārib*, whether it is the time of profit generation or its distribution. The study also addressed zakat calculation on *muḍārabah* profits as practised by Islamic banks in comparison with the view of the majority of jurists, who hold that zakat does not become due on the *muḍārib* until after profit distribution. The study concluded that there is a gap between the market practice and the majority view of scholars in terms of the time that zakat becomes due on the *muḍārabah* profits. The applied practice is closer to the view of some Shāfiʿīs and Ḥanbalīs who say that zakat is due once the profit is generated. The practise of Islamic banks is to immediately deduct the zakat percentage at the end of the fiscal year in which the profit was generated without waiting for a complete *ḥawl* cycle to pass on it.

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4th topics

Changing the Stipulation of the Waqf Donor

His Eminence Walīd bin Hādī
His Eminence Dr. ʿAbd al-Sattār Abū Ghuddah

The Fourth Topic

Changing the Stipulation of the Waqf Donor

Forum Chair, Walīd bin Hādī, and His Eminence Dr. ʿAbd al-Sattār Abū Ghuddah

Most jurists are of the opinion that it is not permissible to change the stipulations of the waqf donor (*wāqif*) based on the fact that the endowment text is like the text of the Lawgiver with regard to understanding its indications and the necessity of implementing it. Shaykh al-Islam [Ibn Taymiyyah] took the view that it is so with regard to understanding its indications not with regard to the necessity of implementing it. Thus, it is permissible to alter the stipulation of the waqf donor (*wāqif*) in consideration of benefit to what is more beneficial when the beneficiary of the waqf is a category, not specific persons. The evidence for this is [analogy] with a person who vows to perform *ṣalāh* in Jerusalem; it is permissible for him to perform it in Makkah. A vow is an act of obedience, and it was shifted in this case from a scenario of less reward to one of greater reward. Waqf bears a similarity to a vow. If, however, it is dedicated for a specific beneficiary, it is not permissible to shift it to another because it is the right of a particular person and is thus specific to them.

This is what the Honorable Chairman of the Conference has resolved and clarified. I have adopted what he mentioned with the addition of the detailed distinctions of the Hanafi School regarding alteration of the stipulated conditions of the waqf.

There is a difference depending on who issues the change in the stipulated condition. It may be the *wāqif* himself after having composed the waqf deed, or it may be the waqf manager (*nāẓir*), or it may be the authority that supervises *awqāf*. An exception is when the *wāqif* authorizes the *nāẓir* to alter [the conditions]. This is by way of the ten stipulated conditions mentioned by those who have written about waqf in the classical and contemporary era. That includes the author of this brief article, in the book *Fiqh wa Muḥāsabat al-Waqf*, published quite a while ago by the General Secretariat for Waqf in Kuwait. I copied what I wrote earlier for review. I adopted Its opinion previously because of the flexibility it offers regarding the conditions of waqf when circumstances change and there is a manifest benefit in altering [the conditions]. These ten conditions have a bearing on the ruling for any stipulated condition, and they do not affect the basis waqf. For some of them (1-2), the judge would be involved,

and I would suggest that all of them be linked to the approval of a judge so that the benefit is realized.

The Ten Conditions

The conditions that a *wāqif* is allowed to stipulate are ten:
1) an increase or
2) decrease in salaries;
3) inclusion of new beneficiaries who were not previously included;
4) exclusion of some beneficiaries;
5) bestowal [of an additional amount] on some beneficiaries;
6) disentitlement of some beneficiaries;
7) altering certain conditions;
8) altering waqf assets; for example, building houses on agricultural land, or converting a residential building to a shop;
9) *istibdāl* (selling the waqf in order to acquire a replacement for it);
10) *badal* (acquiring another asset and turning it into a waqf in place of the [first] and appending it to it);
11) specification (*takhṣīṣ*); and
12) giving preference (*tafḍīl*).
They are usually called the ten conditions even though there are twelve of them.

1-2 Increase and Decrease

If the *wāqif* stipulated for himself in the waqf deed the right to increase or decrease the benefits of the beneficiaries or the wages of those taking care of mosques or schools, etc., he has a right to act as per the stipulation; however, no one who takes charge of the waqf after him has the right to increase wages unless the *wāqif* stipulated that right for them. Nevertheless, the judge has the right to increase wages if the amount set by the *wāqif* becomes insufficient and the judge fears that the objectives of the waqf will go unrealized because its workers quit their jobs due to the low pay and no replacements can be found for them.

3-4 Preference and Specification

If the *wāqif* stipulates that preference be given to certain beneficiaries over others, the condition is valid and permissible to implement. If it is not implemented until he dies, the revenue shall be divided between the beneficiaries equally. Likewise, if he stipulates that certain beneficiaries shall receive all of the waqf revenue for a certain period—say, one year—it is valid, the revenue shall be exclusively for the specified party for that year, and the rest shall not receive any of it. When the period expires, the *wāqif* will have the right to specify it for anyone else he chooses.

5-6 Bestowal and Disentitlement

The *wāqif* has the right to stipulate for himself the right to bestow all or part of the revenue of his waqf to some of the entitled beneficiaries mentioned in the waqf deed or to others, and he has the right to distribute among all of them equally. He also has the right to rank them. If he does anything of the sort during his lifetime, the same arrangement should be followed [after his death] since his intent is manifest in it. If, however, he dies before ever implementing this stipulation, no one else has a right to implement it unless he stipulated it for them. Likewise, he has the right to stipulate for himself the right to deny all or some of the beneficiaries [from receiving the revenue] of his waqf.

7-8 Inclusion and Exclusion

The *wāqif* has the right to stipulate for himself in the waqf deed the right to [later] include others along with the beneficiaries mentioned in the waqf deed. He also has the right to exclude some of the beneficiaries mentioned in the waqf deed and to [later] include whomever he excluded and exclude anyone he had included. If he stipulated any of those [options], he has the right to act in accord with what he stipulated. Whoever takes over the management of the waqf has no right to act in accord with any of that unless he stipulated it for them.

9-10 Alteration (*Taghyīr*) and Replacement (*Tabdīl*)

These are the last two of the ten conditions that some waqf donors made it a habit to stipulate for themselves. When both of these conditions were mentioned together in a waqf deed, *tabdīl* was construed to mean changing the [function of the] waqf asset. For example, if it was a residential building, it would be permissible, based on this condition, to change it to a shop or warehouse or bathhouse or garden plot, etc. *Taghyīr* was construed to mean a change in the conditions stipulated in the waqf deed. Based on that, he could completely change any of the conditions he had stipulated in the waqf deed; he could increase [the entitlement of] whomsoever he willed or reduce [the entitlement of] whomsoever he willed. He could reserve the entire revenue of the waqf for whomsoever he willed for as long as he lived or for a specified period, and he could change the ranks and shares of the beneficiaries.

11-12 *Istibdāl* and *Badal*

Istibdāl refers to sale of a waqf asset in order to buy another, while *badal* refers to the trade of a waqf asset for another.

If a *wāqif* stipulates any of these "ten conditions" for himself in his waqf deed, one of three scenarios will unfold:

Scenario One: he stipulates that for himself. In this case, he alone is permitted to act in accord with his stipulation and within the limits of the wording.

Scenario Two: he stipulates that for someone else. In this case, the stipulation is also effective for the *wāqif*. That is because the basic principle is that any condition the *wāqif* stipulates for someone else is also established for the *wāqif*, even if he does not explicitly mention it for himself. That is because the other person did not acquire the right to act in accord with the condition except by way of the *wāqif*.

Scenario Three: he stipulates that for himself and for another in conjunction with him. In this case, the other person is not permitted to act in accord with the stipulation unilaterally. Likewise, the *wāqif* is not allowed to act without the input of the aforementioned agent.

If a person who has been given a stipulated right—whether the *wāqif*, or the *nāẓir*, or someone else—acts in accord with the stipulation once, he has no right to repeat it unless the

wāqif has stipulated in the waqf deed that the person with the stipulated right can repeat it whenever he wills.

Further explanation of *istibdāl* will come in section six when discussing the expenses arising from the destruction or replacement of waqf assets.

The subject of all the aforementioned stipulations, such as *tabdīl* and *taghyīr*, is the distribution of the waqf revenue, not authority over the waqf. If the *wāqif* stipulates such authority for another party, that party has no right to alter the conditions of authority over the waqf and has no right to exclude any party whom the *wāqif* has identified as having management authority over the waqf although he would have the right to exclude that person from entitlement to the waqf revenue.

The General Principles and Rules That Must Be Considered Regarding the Ten Conditions

Regarding the Ten Conditions and any other conditions like them, all of the following principles and rules must be considered:

None of these conditions shall be given consideration unless they are recorded in the waqf deed. The *wāqif* is allowed to stipulate any of these conditions, and other conditions like them, for himself and for others such as the *mutawallī* (trustee manager), etc. If the *wāqif* has stipulated for another party authority to change any of the conditions, that other party shall only have that authority during the lifetime of the *wāqif*. If the right has been stipulated to change a condition or sell waqf property and replace it with another property, the right can only be exercised once—whether it was stipulated for the *wāqif* or another party—unless it was stipulated for whenever the party wills. The rights mentioned in the Ten Conditions, and any other conditions like them, shall become void if the right holder renounces them.

5.th topics

The Sharīʿah Characterisation of Investment Agency

"(Wakālah bi al-Istithmār)"

His Eminence Shaykh Walīd bin Hādī
His Eminence Dr. ʿAbd al-ʿAzīz Khalīfah al-Qaṣṣārh

The Fifth Topic

The Sharīʿah Characterisation of Investment Agency (*Wakālah bi al-Istithmār*)

Forum Chair: Walīd bin Hādī

The investment agency contract is being widely used. The research problem is:

If we say that investment agency is an *ijārah* (hiring) contract, then it is not valid for the bank to be a private hiree (*ajīr khāṣ*) because it is not rewarded on the basis of time spent. Nor can it be a hiree offering services to the public in general (*ajīr mushtarak*) because such a hiree is a guarantor [against losses]. As a result, there would be no difference between a loan and investment agency in terms of guarantee, which would lead to a disturbance in rules and contractual norms. Additionally, the basis of a hiree offering services to the general public is that the hiree works on tangibles; he doesn't convert them [to cash] by buying and selling.

If we say that the rules of [the investment agency contract] are derived from the case of a slave who is authorised to trade, the jurists opined that he is not entitled to a portion of the profit he earns on behalf of his principal or master.

If we say it is *jiʿālah* [an exchange contract for a known or unknown task that is difficult to precisely determine and for which compensation is due only upon completion of the work], that is not a binding contract.

If we say it is *ijārah ʿalā al-balāgh* [a hiring contract in which the hirer must pay the expenses incurred to accomplish the task], the contract is binding, but the remuneration is only due if the [stipulated] result is accomplished.

The point here:

In light of the above, what is the suitable characterisation of investment agency?

If the contract does not include any form of remuneration but the incentive, it is not valid to say that the agent is volunteering his work. Instead, it should be subsumed under the *jiʿālah* contract as per the third characterisation above.

Based on the above, if an incentive is stipulated in the investment agency contract, then it is a *jiʿālah* contract, and there are differences of opinion as to whether it is binding. However, if the contract is considered a promise of a gift (*hibah*), then the contract is not binding. Thus, failure to fulfil the promise would not require any [compensation] other than the actual damage or the promised amount, depending on what is determined in this symposium. If the contract stipulates a fee and an incentive, then what is the characterisation that accommodates both of them in light of the above-mentioned issue?

The Sharīʿah Characterisation of Investment Agency

Dr. ʿAbd al-ʿAzīz Khalīfah al-Qaṣṣār

Praise be to Allah, Lord of the worlds, and prayers and peace be upon our master Muḥammad, his family and companions.

The Sharīʿah has a concern for the investment of wealth; it encourages it and forbids the stockpiling of wealth. Investment is considered a tool for increasing production to seek an increase in Allah's sustenance. Additionally, investment is considered a legitimate means to implement the rules of Allah and His objective in creating mankind. It is also a means for mankind to carry out the primary mission of existence: worshiping Almighty Allah. Allah, the Exalted, says:

﴿ وَمَا خَلَقْتُ الْجِنَّ وَالْإِنْسَ إِلَّا لِيَعْبُدُونِ ﴾ [الذاريات: 56].

And I did not create the jinn and mankind except to worship Me. [Al-DhÉriyÉt: 56]

Today, an important financial contract that is widely applied in the practices of Islamic banks is investment agency (*wakālah bi al-istithmār*). The juristic opinions that support this contract vary, and, despite it widespread application, the juristic characterisation of the investment agency contract is still under discussion amongst specialists. I have been commissioned, by the gracious invitation of the academic committee of the symposium, to write about the juristic classification of the investment agency contract.

I present a *fiqhī* conceptualization of this issue to the specialists and those interested in the science of Islamic finance for the purpose of a jurisprudential discussion aimed at reaching the appropriate *fiqhī* view that meets the desired Sharīʿah requirements.

God grants success!

First, we shall briefly review the concept of investment agency for the reader to have an idea about the aspects of the topic before engaging in the juristic characterisation of the investment agency contract.

***Wakālah* (agency):** is one party's delegation of another party to act on his behalf in what can be a subject matter of delegation.[39]

Types of *Wakālah*: agency within the context of financial transactions in Islamic banks can be categorised into two types:

First: Restricted Agency

Restricted agency is agency in which the principal limits the agent in the actions he can undertake by virtue of it. The meaning of restriction is what the principal stipulates in addition to the universally observed restrictions. Examples include restricting the agent to [deal with] one specific type of commodity or [limiting him to] a specific time frame or a specific characteristic. Thus, the agent's authority to act is restricted. He will be obligated to buy based on the specifications stipulated by the principal. Another case is when the principal restricts his agent to a certain minimum selling price. If the agent does not abide by the stipulation, he will be considered to have violated the terms of the agency. The agent will, thus, be considered a transgressor and violator [of the contract].

Second: Absolute Agency

Absolute agency, on the other hand, is when the agency agreement is not subject to a condition, related to a timeframe, or limited by a restriction. In other words, it is agency that is not restricted by any limitations; therefore, the agent has the freedom to act within the obligations of the agency contract and in a manner that serves the interests of the principal without contradicting the prevailing customary practices.

The point of absolute agency is that the acts of the agent should not cause harm to the principal. As such, it is impermissible for the agent in absolute agency to sell for a price less than the market value or the estimated valuation of professionals or to buy for a price higher than that. It is, likewise, impermissible to do anything else that is not in the best interest of the principal.

[39] AAOIFI, *Sharīʿah Standards*, Standard No. (23) p. 621; cf. Ibn Ḥajar Haytamī, *Tuḥfat al-Muḥtāj fī Sharḥ al-Minhāj,* (Dār Iḥyāʾ al-Turāth al-ʿArabī), 5:294-5. The latter phrased it thus: "A person authorising another to perform on his behalf during his lifetime what can be a subject matter of delegation."

The Concept of Investment Agency

The Sharīʿah standard on investment agency defines investment agency as: appointing another person to invest and grow one's wealth, with or without a fee.[40]

Forms of Its Application

The investment agency contract is being applied in Islamic banks based on various resolutions that permit such kind of contracts. AAOIFI's Sharīʿah Standard Number (46) on investment agency has established such permission. The standard mentions various forms of its application. Section 3-3 of Standard (46) indicates that it is permissible for investment agency to be restricted to a particular type of investment or a specific place, or by other restrictions. It is also permissible for it to be unrestricted while being limited by customary practices and the principal's best interest.[41]

Amongst the Forms of Its Application

First: absolute investment agency for a fixed fee, or for a fixed fee and an incentive fee. This contract is widely applied in portfolio management, including stock portfolios and real estate portfolios.

Second: absolute investment agency with an expected profit; any excess profit will belong to the agent as a performance incentive. This kind of agency is being used in investment accounts based on the principle of agency and also in working capital financing.

Features of Investment Agency

Investment agency is distinguished by the fee that is normally charged for it, unlike the general *fiqhī* concept of agency, for which the norm is that no fee is charged for the agency. As such, since investment agency is linked to profit-seeking institutions, even if no fee was specified to begin with, it will be calculated based on the prevailing market fee. The standard on investment agency states:

If the fee was not specified in the contract and the agent customarily charges a fee as is normal practice in institutions, then the agent will be entitled to a fee which is prevalent in the

[40] AAOIFI, *Sharīʿah Standards*, Standard Number (46), p. 1121.
[41] Ibid.

relevant markets. This also applies when the agent does not complete the task required after starting and realizing returns that are beneficial to the principal.[42]

It is stated in the Standard on Agency and the Acts of an Uncommissioned Agent (Fodooli):

Paid agency is permissible in Sharīʿah, whether the remuneration is explicitly stipulated in the contract or ascertained in accordance with the customary practices, as when the agent does not provide such service except for remuneration.[43]

Investment agency is binding and not optional. The standard on investment agency states:

Investment agency contracts, whether remunerated or unremunerated, are binding on institutions because they are invariably fixed term contracts in which both parties agree not to terminate within a specified period.[44]

The Essential Nature of the Investment Agency Contract

Classifying It as an *Ijārah* (Hiring) Contract

A group of scholars opined that investment agency takes the rulings of *ijārah* (hiring) contracts in general if it is performed for a fee. This is the opinion of the AAOIFI Sharīʿah Standards. The Standard on Agency and the Acts of an Uncommissioned Agent (Fodooli) states: "When agency is paid, it falls under the Sharīʿah rulings on *ijārah*."[45] It stipulates in the Sharīʿah basis of Standard (46):

The basis for differentiating between investment agency and agency in general is that the former is in order to increase wealth, and it is similar to *muḍārabah* and *mushārakah* in this respect. However, the difference between investment agency and *muḍārabah* and *mushārakah* is that investment agency is a form of *ijārah*.[46]

Additionally, the standard stipulates that it will become binding on both parties through an undertaking not to void the contract. The basis for the binding nature as stated in the Standard is that:

…it is entered into for a specific period; i.e., there is an agreement between the counterparties that neither of them can unilaterally dissolve the contract except in certain circumstances specified in the contract.[47]

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[42] Ibid.
[43] Ibid., Standard No. 23, p. 614.
[44] Ibid.
[45] AAOIFI, *Sharīʿah Standards*. The Standard on Agency and the Act of an Uncommissioned Agent (Fodooli) No. 23. p. 390, Section 4:2:b.
[46] Ibid., Standard No. 46, p. 1154.
[47] Ibid.

Perhaps most of those who focused on the existence of compensation in the contract consider it to be *ijārah*. This is the common view of this kind of contracts, based on the legal maxim:

" الأصل في العقود للمعاني".

"The basic consideration in contracts is their meanings."

Ibn Juzay stated:

Agency is permissible with or without a fee. If the agency is for a fee, then it assumes the rulings of *ijārah* contracts. However, if it is without a fee, then it is a voluntary act from the agent. Additionally, the agent has the right to discontinue being an agent unless otherwise stipulated by the principal.[48]

An Objection

There is a Sharīʿah issue in the characterisation of investment agency as an *ijārah* contract. This is because in the application of some types of investment agency the agency fee is the excess above a certain percentage of profit attained. The profit rate might not be more than the agreed upon percentage. It may also be more or less. This violates the principle of *ijārah* that stipulates fixing the agency fee according to the consensus of jurists.

Ibn Rushd (the grandfather) said:

Agency is permissible in exchange for a fee or without it. If it is performed for a fee, it is then a binding *ijārah* contract on all parties. It is only permissible if the fee is determined, the duration is specified, and the scope of work is known. If agency is not for a fee, then it is a voluntary act by the agent, and the agent is bound to whatever condition he accepts.[49]

That said, if the compensation is invalid, then the agent is entitled to the fair value in exchange for his efforts. [Buhūtī] said in *Kashshāf al-Qināʿ*:

It is invalid to appoint someone as an agent in exchange for an unknown compensation because the consideration is invalid. However, the acts of the agent [on behalf of the principal] are valid because of the general approval [of the principal]. In this case, the agent is entitled to the comparable market fee because he acted in exchange for a compensation that was not given to him.[50]

It should be noted that the Sharīʿah Standard on Agency and the Acts of an Uncommissioned Agent (Fodooli) permitted that case. It states:

[48] Ibn Juzayy, *Al-Qawānīn al-Fiqhiyyah*, p. 216.
[49] Ibn Rushd, *Al-Muqaddimāt al-Mumahhidāt*, 3:58-59.
[50] Buhūtī, *Kashshāf al-Qināʿ ʿan Matan al-Iqnāʿ*, 3:489.

Remuneration for agency may be any gain in excess of a specific amount of output of the operation, or a share of the output; for example, when the principal specifies a certain selling price and any excess earned is considered the agency fee.[51]

This issue is similar to an issue that was discussed amongst the classical jurists. That is: the Sharīʿah ruling on delegating a person to sell an item for a specific price whereby any excess earned would belong to the agent. The jurists had two different opinions on this issue:

The first opinion: it is impermissible. This was the view of the majority of scholars, including the Ḥanafīs, Shāfiʿīs, Mālikīs and others.

Ibn Mundhir said:

They disputed with regards to a man giving another man a dress or other [items] to sell for a specific amount and whatever he makes on top will be his [as agent]. This was allowed by a group [of scholars]. It was narrated from Ibn ʿAbbās, and it is also the opinion of Ibn Sīrīn, Aḥmad and Is·ḥāq. Aḥmad said: "This is similar to *muḍārabah*." It was disliked by Nakhaʿī, Ḥammād, the Kūfī [Abū Ḥanīfah] and Sufyān Thawrī.

Ibn Qudāmah said:

If a dress is handed to a man and he is told: "Sell it for such and such amount, and whatever you make above that is yours," it is valid. Aḥmad explicitly stated so in a narration from Aḥmad ibn Saʿīd. It was also narrated from Ibn ʿAbbās, and it was also the opinion of Ibn Sīrīn and Is·ḥāq. It was disliked by Nakhaʿī, Ḥammād, Abu Hanīfah, Thawrī, Shāfiʿī and Ibn Mundhir.[52]

It was stated in Sharbīnī's commentary on *Al-Ghurar al-Bahiyah*:

An example of it is when the owner tells a person: "Sell this [item] for me for this price, and whatever you make in excess will belong to you." If the owner refuses to pay the excess afterwards, then the other party is not entitled to anything. That is because this is neither an invalid contract nor a valid one.[53]

The second opinion: It is permissible. This is narrated from Ibn ʿAbbās—may Allah be pleased with them both, and it is also the opinion of the Ḥanbalīs—being one of the issues wherein they disagreed with the other three major *fiqh* schools—and of a group of the Tābiʿīn.

[51] AAOIFI, *Sharīʿah Standards*. The Standard on Agency and the Act of an Uncommissioned Agent (Fodooli) No. 23. p. 390, Section 4:2:5.
[52] Ibn Qudāmah, *Al-Mughnī*, 8:71.
[53] Anṣārī, Z.M. *Ḥāshiyat al-Sharbīnī ʿalā Al-Ghurar al-Bahiyah fī Sharḥ Al-Bahjah al-Wardīyah*, 3:311.

There Are Some Differences That Should Be Noted

What the Ḥanbalīs and those who agreed with them permitted is the sale of a specific item: "Sell this dress." However, the form of investment agency is: "Deal with this money for such and such period. If the profit exceeds such and such value, then the excess belongs to you."

The task of selling is not a binding contract on the agent. This is apparent in the Ḥanbalīs' discussion of it; for example, their comparing it to *muḍārabah*, which they consider a non-binding contract. As such, it is more similar to a *jiʿālah* contract than to an *ijārah* contract.

On the other hand, investment agency in this case is a form of hiring: a binding contract for a certain period whereby the agent is not allowed to unilaterally void it. This [method of remuneration] would increase the extent of *gharar* (ambiguity) and *jahālah* (ignorance).

The Mālikī scholars stated that such a case comes under the rubric of *ijārah* contracts. [Mālik] said in *Al-Mudawwanah*:

Muḍārabah is not that you give your friend some commodity, whatever it may be, then you determine the reward you will give him for the work he does for you by saying: "Whatever profit attained beyond this amount will be shared between you and me." This is not a *muḍārabah* contract. Instead, it is a kind of an invalid *ijārah*. The explanation is that it is as if you hired him to sell your commodity on your behalf, and for that he is entitled to half of the profit realised [from the sale]. As such, if he did not make a profit, his labour would go unrewarded.[54]

There are some scholars who considered this closer to a *muḍārabah* contract. Ibn Ḥajar said: "This is more similar to the case of a *muḍārib* than the case of an agent."[55]

Another Issue

Another issue regarding the characterisation [of investment agency] as an *ijārah* contract is that agency can either be limited to a certain time period or not. The Ḥanafīs prohibited the agency contract for buying and selling if it is not limited to a [defined] term. In *Badāʾiʿ al-Ṣanāʾiʿ* by Kāsānī of the Ḥanafī School:

It is impermissible for someone to hire a person to sell and purchase on his behalf without specifying the period. This is due to the ambiguity in the amount of the usufruct in the selling and buying. However, if he specified the period by hiring him for, say, a month to buy and sell on his behalf, then it is permissible. This is because the usufruct has become known by clarifying the period. It was narrated from some Companions (may Allah be pleased with them) that they said: "We used to sell in the markets of Madinah, and we called ourselves brokers. The Messenger of God (peace be upon him) came to us, addressing us with the best

[54] Mālik, *Al-Mudawanah*, 3:630.
[55] Ibn Ḥajar, *Fatḥ al-Bārī*, 4:451.

of names, and said: 'O you group of merchants, your selling involves vain talk and lies, so purify it with charity.'" A broker is one who buys and sells on behalf of another for a fee. Its mention here is interpreted as being for a specified period.[56]

In some forms of the application of investment agency, the period is unspecified; for example, in investment accounts and investment deposits based on the principle of investment agency which are applied in some Islamic banks.

Additionally, the general objective of the *ijārah* contract differs from that of investment agency even if they share similarities in some forms and issues. The nature of investment agency is to take money for trade and make profits for both parties on the basis of general authorisation using wording similar to that of the agency contract. On the other hand, *ijārah* was legislated in order to sell usufruct. The objective of investment agency, in many of its forms, is for one person to authorise and delegate another as an agent to act in a way that will bring some benefit to [the principal] by investing, dealing with and turning over money.

Characterising the Investment Agency Contract as the Fee of a Middleman in Exchange for a Percentage of the Price

Some specialists in Islamic finance are of the opinion that the investment agency contract can be characterised as the fee of the middleman—the broker—in exchange for a percentage of the price. The Ḥanbalīs[57] and some Mālikīs permitted it. They permitted specifying the middleman's fee as a percentage. Tusūlī said:

…That consideration can be used as the basis for a ruling on the middleman's fee of, say, 2.5% of the price. The author of *Al-Miʿyār* explicitly permitted it in the section on issues arising in partnership. Their main evidence for this is that the original status of transactions and all types of trades and earnings is permissibility. Moreover, the terms of the Prophet's (pbuh) dealing with the people of Khaybar was that they pay half of its yield of fruits or crops.[58]

This indicates that the fee as a percentage of the price is permissible. The *ḥadīth* strengthens the original status of permissibility and supports it.

[56] Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ fī Tartīb al-Sharāʾiʿ*, (Dār al-Kutub al-ʿIlmiyyah, Beirut, 1986, 2nd edition), 4:183-184.
[57] Ibn Qudāmah, *Al-Mughnī*, 5:466.
[58] Tusūlī, *Sharḥ al-Tuḥfah*, (Dār al-Kutub al-ʿIlmiyyah. Beirut, 1998), 2:299.

However, this characterisation calls for scrutiny because the fee of the middleman is not payable unless a sale occurs. Thus, it is known during the sale because the price becomes known. This is unlike the fee in investment agency, which is specified as an expectation within the contract. The knowledge of the actual amount is dependent on the liquidation at the end of the term, which is unknown [at the time of the contract].

Further, estimating the price at which the broker will sell is possible and relatively easy. It is similar, from this perspective, to a sale at the current market price. That is not the case in investment agency.

Characterising it as a *Jiʿālah* Contract

Some Islamic finance specialists are of the opinion that investment agency can be characterised as a *jiʿālah* contract. This is because the work in investment agency is unspecified, as is the amount of work done by the agent, if the agency is absolute. Still, the agent is entitled to the compensation for the agency work.

Such characterisation can still be objected to. This is because *jiʿālah* is not binding from the worker's perspective, unlike the investment agency contract, which creates certain obligations in case of transgression, negligence and shortcomings.

Also, the fee amount in some applications of investment agency is unknown at the beginning. Jurists require that the reward amount in *jiʿālah* be determined in the beginning before doing the task. The reward is binding on the party offering the reward whereas [the work] is not binding on the worker. *Jiʿālah* is a contract that involves *gharar* (ambiguity) but is permitted as an exception to the original ruling [of impermissibility]. The author of *Al-Dhakhīrah* states:

> It is permitted for a sale to be combined with an *ijārah* contract but not with *jiʿālah*. This is because *jiʿālah* is a contract that involves *gharar* (ambiguity), which means that the sale will be [tainted by] *gharar*. That is not so with *ijārah*. It is also not permitted to mix *jiʿālah* with *ijārah*.[59]

[59] Qarāfī, *Al-Dhakhīrah fī Furūʿ al-Mālikīyyah* (Dār al-Kutub al-ʿIlmiyyah, 2001), 5:43-49.

However, in investment agency the fee or profit is not determined in some applications, such as the profit in the form of investment agency in which the agent is entitled to any profit above a certain profit rate.

Characterising It as a Promise of a Gift (*Waʿd bi al-Hibah*):

Some Islamic finance specialists are of the opinion that the contract of investment agency can be characterised as the promise of a gift. [In this explanation] the agent volunteers his work and is promised a gift from the principal if he makes a certain profit.

The objection to this is that if it is said to be a promise of a gift then the contract is not binding. Failing to fulfil the promise would only be compensated by the actual amount of harm caused or the stipulated amount. If the contract did not include anything but an incentive fee, then it is not correct to say that the worker (the agent) is volunteering his work. Rather, the worker has entered into a *jiʿālah* contract whereby he is not entitled to the fee unless the required [result] has been achieved.

Furthermore, it can be argued that most of the activities of financial institutions are performed to seek profit. Such institutions are unlikely to work for free since their objective is to attain interests and profits, not to offer donations or gifts. Thus, it cannot be expected that the agent would voluntarily work in the interest of the principal unless he anticipates attaining some profit thereby. As a result, gift (*hibah*) in its *fiqhī* form does not constitute a suitable *fiqhī* characterisation for all aspects of the investment agency contract.

Choosing [the Proper Characterisation]

In my opinion, the research on this topic should start from the original status of permissibility in transactions. It was approved in the science of legal maxims that the original status of the sale contract is permissibility, as was stated by Imam Shāfiʿī, Ibn Rushd, Ibn Taymiyyah and others. This principle makes it, when looking into the characterisation, the main focus of the topic.

If we want to shed light on the maxim that the original status of contracts is permissibility and validity, we find that the scholars expressed this with the most explicit statements. An example is what was reported by Shaykh al-Islam Ibn Taymiyyah who said:

The basic principle here is that nothing is prohibited of the transactions that people need except what the Qurʾān and the Sunnah indicate to be prohibited. Additionally, there are no acts of worship that bring one closer to Allah except those which the Qurʾān and the Sunnah indicate have been prescribed. This is because the religion is what is prescribed by Allah, and the prohibited is what is prohibited by Allah, as opposed to [the approach of] those whom Allah has condemned for prohibiting under the religion of Allah what Allah did not prohibit, for associating with Him what He has revealed no sanction for, and for making part of the religion what Allah did not authorise. O Allah guide us to permit whatever You have permitted, to prohibit whatever You have prohibited, and to make the region whatever You have prescribed.[60]

He also said:

The original status of contracts and conditions is permissibility and validity. Nothing is prohibited or void except by the indication of Sharīʿah evidence that it is prohibited or void. This is the correct view, based on the indications of the Qurʾān, the Sunnah, consensus, and [rational] consideration, along with the presumption of continuity (*istiṣ-ḥāb*) and because of the lack of evidence to the contrary.

As for the Qurʾān, Allah S.W.T. says:

﴿ يَا أَيُّهَا الَّذِينَ آمَنُوا أَوْفُوا بِالْعُقُودِ ﴾

"O you who have believed, fulfill [all] covenants" [Al-Māʾidah:1].

Contracts are covenants.

Allah S.W.T. also says:

﴿ وَإِذَا قُلْتُمْ فَاعْدِلُوا وَلَوْ كَانَ ذَا قُرْبَىٰ وَبِعَهْدِ اللَّهِ أَوْفُوا ﴾ [الأنعام: 152].

"When you speak, be just, even if it concerns a relative; keep any promises you make in God's name. This is what He commands you to do, so that you may take heed" [Al-Anʿām:152].

Allah also says:

﴿ وَأَوْفُوا بِالْعَهْدِ إِنَّ الْعَهْدَ كَانَ مَسْئُولًا ﴾

"Honour your pledges: you will be questioned about your pledges" [Al-Isrāʾ: 34].

[60] Ibn Taymiyyah, *Majmūʿ al-Fatāwā*, 28:386.

Thus, Allah S.W.T. has ordered that contracts be honoured, and this is generic. He also ordered to fulfil the covenant of Allah and pledges. This includes whatever a person obligates himself [to do].

The purpose of the contract is that it be fulfilled. As such, if the Lawgiver has ordered [honouring] the purpose of contracts, this indicates that their original status is permissibility and validity. The opinions of the Companions affirm this; for example, the statement of ʿUmar (may Allah be pleased with him): "The details of rights are found in the stipulated conditions."[61]

From this perspective, I believe that there is no Sharīʿah objection to treating the contract of investment agency as a new stand-alone contract with similarities to many nominate contracts of Islamic jurisprudence. The scholars named a group of contracts that have similarities with other contracts, and there is no evidence in Sharīʿah to support the categorical prohibition of contracts and conditions; only what has been proven to be prohibited in particular.

One of the benefits of this rule is that contracts are not limited to the nominate financial contracts in Islamic jurisprudence. Instead, *ijtihād* can be practiced to infer new contracts from the general principles of *fiqh*, Sharīʿah evidence and Islamic legal maxims. The ruling as to whether or not a [particular] contract is permissible will be based on its terms and conditions.

Shaykh Dr. ʿAlī Muḥiyuddīn Qarahdāghī says:

This issue is called the extent of contractual freedom in Islamic jurisprudence. The jurists have differed in their opinion regarding it. The majority of the jurists are of the opinion that the default ruling in contracting is permissibility and that people are free to create new contracts as long as they do not contradict Sharīʿah texts.[62]

As such, there is no objection from the Sharīʿah perspective to the investment agency contract —as applied nowadays—being similar to more than one nominate contract in *fiqh*. There are a number of *fiqh* texts that provide evidence that a contract might have similarities with multiple nominate contracts and that it might take more than one ruling from different perspectives. An example is what has been approved regarding the *istiṣnāʿ* contract, which takes multiple *fiqh* rules from multiple contracts that have similarities with its objective. This

[61] Ibn Taymiyyah, *Majmūʿ al-Fatāwā*, 29:133, abridged.
[62] ʿAfānah, Ḥ. *Yas'alūnak*, p. 130.

principle and rule can be applied to the investment agency contract. Such *fiqhī* similarities have been combined in a new named contract which is investment agency.

Qāḍī Ḥusayn from the Shāfiʿī School said:

Musāqāh [tending trees for a share of the fruit] has similarities with other contracts in the sense that it is an undertaking of liability for future work that does not become void upon the death of the worker. It is similar in this respect to the *salam* contract, which does not become void upon the death of the forward seller, which took that similarity from the spot sale. Additionally, *musāqāh* is a binding contract that entails consideration for work; it is similar in that to the *ijārah* contract and thus requires specification of the time period.[63]

Sarakhsī of the Ḥanafī School said regarding an issue:

If [a person] claimed that he has a right in a house that is in the possession of a man, and the latter settled with him by offering the service of a particular slave for a period of a month, it is permissible….The explanation is that such a contract from one perspective is similar to *ijārah* in the sense that usufruct is owned in exchange for a consideration. From another perspective, the contract is similar to a will in the sense that attaining the usufruct does not require a consideration. Thus, due to its similarities with an *ijārah* contract, we said that he has the right to settle [the commitment] through another *ijārah*. Also, due to its similarities with a will, we said the contract will not be void by death [of the slave] and its value shall replace the physical asset [the dead slave]. This is because the objective of this contract is to prevent dispute between them, which is compulsory as much as possible in the beginning and in the end, and also due to the corruption that could be caused by prolonging such dispute. The reason why the plaintiff has the right [to get the fair value in case the slave died] is because of the change [that happened in the consideration] not because the right of a guarantee. This is because the right of a guarantee will not be applied on a usufruct until it is being utilised.[64]

Shaykh Muḥammad Fāsī from the Mālikī School said: An agreement with a doctor or a [Qurʾān] teacher can be of two types. If a time period is specified, then it is an *ijārah* contract. If it is subject to getting healed or to memorising the whole Qurʾān, or a [specified] part of it, then it is a *jiʿālah* contract.[65]

The jurists' statements above can be applied to our issue. The investment agency contract can bear similarities with all the related nominate contracts in Sharīʿah but be independent in its characterisation and ruling. This is due to the justification mentioned above regarding the permissibility of creating new contracts based on the legal maxim "The original status of contracts is permissibility."

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[63] Subkī, (n.d.), *Fatāwā Al-Subkī*, (Dār al-Maʿrifah, Beirut), 1:420-422.
[64] Sarakhsī, *Al-Mabsūṭ*, (Beirut: Dār al-Maʿārifah, 1993), 20:145-147.
[65] Mayyārah, *Al-Itqān wa al-Iḥkām fi Sharḥ Tuḥfah al-Ḥukkām (Sharḥ Mayyārah)* (Cairo: Matbaʿat al-Istiqāmah), 2:106-108.

This can further be supported by the fact that transactions are based on taking into consideration interests, reasons and public need. This is because they are related to a large group of people, which calls for the need to make things easy for them. One of the attributes of *fiqh al-muʿāmalāt* (the jurisprudence of financial transactions) is that it is rationally understandable, the effective causes [of its rulings] are known, and its objective is clear. Thus, whatever brings benefits, removes harm, is in line with the Sharīʿah objectives and free of what is clearly prohibited, is permissible. This is even if its format and form differ from how things were during the classical era; because the purpose of transacting is to achieve its objectives not to simply go through the motions.[66]

This attribute is useful with regards to the importance of modernisation, innovation and development in transactions in a way that realizes people's interests. Shāṭibī inferred that transactions enjoy this attribute with a number of items of evidence. He states:

The Lawgiver has gone to considerable length in explaining the effective causes and wisdom in legislation related to *ʿādāt* (acts done primarily for worldly benefit). Effective causes frequently involve suitability, [traits] which if presented for rational appraisal would be received with approval. We can understand from this that the Lawgiver intended us to follow the meanings and not to halt at [the wordings of] texts. This is unlike the category of *ʿibādāt* (acts of devotional worship), for which the opposite is known to be true. Mālik (may Allah be merciful with him) expanded in this regard as he called for the principle of public interest (*al-maṣāliḥ al-mursalah*) and the principle of *istiḥsān*. It was reported that he said *istiḥsān* comprises nine-tenths of knowledge.[67]

This basic ruling of permissibility and acceptance is further confirmed by a statement of Imam Shāfiʿī (may Allah be merciful with him). Although the ruling is regarding sales, it applies to [financial] transactions in general. He said:

The basic rule of all sale transactions is that they are all permissible if conducted with the mutual acceptance of the contracting parties who have legal authority over what they are transacting except what the Prophet (pbuh) forbade and what is tantamount to what He prohibited. We approve anything other than that based on what we described of the permissibility of sale in the Book of Allah.[68]

[66] See: ʿAfānah, Ḥ. *Bayʿ al-Murābaḥah li al-Āmir bi Shirāʾ*. Electronic copy.
[67] *Al-Mawsūʿah al-Fiqhiyyah al-Kuwaytiyyah*, 12:210-211.
[68] Shāfiʿī, *Al-Umm* (Beirut: Dār al-Fikr, 1990), 3:3.

Zaylaʿī of the Ḥanafī School confirms this concept mentioned by Shāfiʿī, saying:

> We do not recognise that the prohibition of sale transactions is the original state; rather, the original state is permissibility. Prohibition, if confirmed, can only be established by evidence that requires it. This is because wealth is created to be exchanged. Thus, the door to acquiring it is open and permitted unless particular evidence stipulates otherwise.[69]

Ibn Taymiyyah says:

> Contracts are among the ordinary actions and behaviours. They are what people are accustomed to do in their lives to get what they need. The basic principle for them is that they are condoned, not prohibited. This principle shall be considered to apply to everything unless there is evidence for prohibition. Therefore, performing [such contracts] may be either permitted or condoned; for example, [involving] things that have not been prohibited. The consideration in this regard is people's interest, and permissibility accompanies it wherever it is found.[70]

Conclusion

The investment agency contract is a new independent contract that takes the essential form of the Sharīʿah contract of *wakālah*. It is to act on behalf of another to attain the interest of the principal. It also has similarities with various nominate contracts, such as *muḍārabah*, which contains the essence of *wakālah*, whether restricted or absolute, and comprises conversion [of merchandise into money] by means of buying and selling. It also has similarities with the *ijārah* contract in the form of determining the compensation and the nature of its existence. It also has similarities with the brokerage contract in the delegation of jobs in a particular manner and for a known fee or whatever exceeds a certain price. Further, it has similarities with conditional *hibah* (gift) or the promise of a gift in the form of an incentive. Nonetheless, based on all of the above, I believe that investment agency contract can be considered as a new, independent contract that has similarities with various Sharīʿah contracts such as *ijārah*, conditional *hibah*, brokerage fee and other nominate contracts. As such, the Sharīʿah rulings are combined through a contractual master agreement based on mutual acceptance among the parties. This is because acceptance is the basis of contracts as long as the contract does not include anything that would cause it to become void such as unacceptable lack of information (*jahālah*), *gharar* (ambiguity) and *ribā*. Allah S.W.T. says:

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[69] Zaylaʿī, *Tabyīn al-Ḥaqāʾiq* (Dār al-Kitāb al-Islāmī, second edition), 4:85-88.
[70] Ibn Taymiyyah, *Majmūʿ al-Fatāwā*, 29:150.

﴿ يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَأْكُلُوا أَمْوَالَكُم بَيْنَكُم بِالْبَاطِلِ إِلَّا أَن تَكُونَ تِجَارَةً عَن تَرَاضٍ مِّنكُمْ ﴾

"O you who believe, do not consume one another's property unjustly; rather, exchange it through trade by mutual consent" [Al-Nisāʾ: 29].

Ibn Kathīr explains Allah's statement: "rather, exchange it through trade by mutual consent" saying:

The exception (إِلَّا) is discontinuous. It is as if He said: Do not deal with unlawful means to attain wealth. Instead, deal using lawful transactions based on the mutual consent of the seller and the buyer; employ them as the means to attain wealth.[71]

Since [investment agency] is an independent contract, we need to observe some Sharīʿah controls so that this contract does not include elements that invalidate financial contracts. Among such controls is not guaranteeing the profit or the principal so that this does not cause the contract to become a *ribā*-based contract.

The following are some of the recommendations of a research symposium to govern the investment agency contract:

The Guidelines for Using Investment Agency Contracts in Islamic Banks

The agent in the investment agency contract has the right to take money as an agent and to offer an index of expected profit whereby any excess profit will be for it as an incentive. If the agent was unable to invest outside the common investment pool in the bank, it can invest in that pool with permission from the principal allowing it to mix his money with the agent's fund (the general investment pool). That said, if the agent invested in the pool, the profit share of the principals shall be equivalent to the share of other depositors in the pool. The agent has the right to pay, from his own money, the difference between the expected profit and the realised profit from the pool. The agent must not combine the profit earned as a *muḍārib* with the fee earned as an agent.

If a company sought financing as an investment agent and it incurs debts and operational costs, it has the right to enter into an investment agency contract with the institution whereby the bank or institution effectively becomes a partner in all of the company's assets. The profit

[71] Ibn Kathīr, *Tafsīr Ibn Kathīr* (Beirut: Dār al-Qalam), 1:378.

is divided between the financing institution (the principal) and the company based on the capital contribution of each party or based on whatever they agree on as a profit rate. The agent will then earn the agreed fee along with its incentive, if applicable, for any excess above a certain amount of profit. It is permissible for the two parties to agree that the distributed profit be based on the net profit or gross profit. In case of the latter, the agent will be considered to have donated the expenses.

There is no Sharīʿah objection to the investment agent investing the agency capital in a particular project or a private activity that it keeps in an independent account. This is considered as a restriction by the principal on the agent, which is permissible in Sharīʿah. The investment agent is not allowed to utilise the agency capital in settling its debts and financial commitments if the principal is not a partner in all the assets. This is because the revenue in this case will become akin to the prohibited interest.

There is no Sharīʿah objection to the agent making payments to the principal as per the expected profit account provided that [the differences] are settled upon the actual or constructive liquidation [of the project]. In such case, the principal shall return the excess if the earned profit is less than the expected profit. Similarly, the principal shall be entitled to the rest of the earned profit if the amount he took is less [than the actual profit]. This is because the accounts were provisional. If the agency made losses, the losses shall be borne by the principal if the agent did not transgress nor was negligent nor violated the terms of the agency.[72]

This is what Almighty Allah made it possible for me to explain. Any conclusions I reached that are correct are from Allah alone. Whatever is not is from myself and due to my limited understanding, and Allah and His messenger are innocent of it.

Allah grants success. Our final prayer is: Praise be to Allah, Lord of the worlds, and may Allah's prayers and peace be upon our Master Muḥammad and his family and companions

[72] Among the resolutions of the Dirāsāt Symposium of 2009.

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6.th topics

Taking a Fee to Safeguard a Pledge

His Eminence Shaykh Walīd bin Hādī
His Eminence Dr. ʿAbd al-Raḥman al-Saʿdī
His Eminence Dr. ʿAbd al-ʿAzīz Khalīfah al-Qaṣṣār

Topic Sixth

Taking a Fee to Safeguard a Pledge

Forum Chair: Walīd bin Hādī

The provision needed to maintain the existence of the pledge, including any expense required for that purpose, is the responsibility of the pledgor because it is his property.

If the reason for the pledgor's debt is a loan, and the pledgee requests a fee to safeguard the pledged asset and it is included in the [loan] contract: it is prohibited because of the prohibition of combining a sale and a loan (*bayʿ wa salaf*); otherwise, it is permissible, according to the majority, for a reasonable wage, and unreservedly [permissible without any restriction on the fee] according to the Shāfiʿī jurists.

The question is: is the form that is being practiced in Malaysia embedded in the contract or outside it?

Taking a Fee to Safeguard a Pledge

His Eminence Dr. ʿAbd al-Raḥman al-Saʿdī

In the Name of Allah, the Most Gracious, the Most Merciful.

Praise be to Allah, Lord of the worlds, and prayers and peace be upon the most honourable of the prophets and messengers, our Prophet Muhammad, his family and all his companions. Thenceforth:

This is a brief research regarding the ruling on taking a fee to safeguard pledged assets, an applied study of a product in Malaysia, which I wrote in response to a kind request from Bank Rakyat, to be presented at the International Sharīʿah Scholars' Forum, which will be held from 29-30 October 2019 in Malaysia under the title: New Developments in Contemporary Financial Transactions.

I ask Allah Almighty to make it beneficial, and to make it an accepted contribution for Him. Truly, He is All-Hearer, Ever Near.

Preface

The jurists discussed the issue of the expenses of the pledged asset, including the expense related to safeguarding the pledged asset. The majority of jurists ruled that the provisions of the pledged asset are to be borne by the pledgor; for example, animal feed, the watering of trees, harvesting fruits and drying them, remuneration for the place of preservation and the guard, the grazing of livestock and the shepherd's wages, and so on. This is based on the Prophet's (pbuh) statement: "The pledge does not leave the ownership of the one who has pledged it; he bears its expenses, and its yields belong to him."[73] Because it belongs to him, he must bear what is needed to preserve the pledge.[74]

[73] Bayhaqī, *Al-Sunan al-Kubrā*, 6:39; Dāraquṭnī, *Sunan al-Dāraquṭnī*, 3:33; Ibn Ḥibbān, *Ṣaḥīḥ Ibn Ḥibbān*, 13:258.
[74] Buhūtī, *Kashshāf al-Qināʿ*, 3:333; Ramlī, *Nihāyat al-Muḥtāj*, 4:279; Qalyūbī, *Ḥāshiyat al-Qalyūbī*, 2:275; Dasūqī, *Ḥāshiyat al-Dasūqī*, 3:251; Ṣāwī, *Bulghāt al-Sālik*, 2:120.

The Ḥanafī jurists said: What is needed for the benefit of the pledge itself or is auxiliary to it, such as animal feed, the shepherd's wages, and watering the garden, is the responsibility of the pledgor. As for what is needed to safeguard the pledged asset, such as shelter for cattle and the fee for safekeeping, these are the responsibility of the pledgee because the pledged asset is being detained for him.[75]

What appears to be the preferred view is the opinion of the majority of jurists. That is because the asset is the property of the pledgor; he gets its yield and bears its liabilities; thus, he must bear what is needed to sustain the pledge.

Having clarified this, what is the ruling if this fee is paid to the pledgee when the debt is caused by a loan? Does the prohibition of combining a sale and a loan apply to it or not?

It appears—and Allah knows best—that the issue of combining the pledge safekeeping fee with the loan is included in the issue of combining a sale and a loan. Therefore, what applies to the scenarios of combining a sale and a loan would apply to it.

Based on this, I shall clarify the issue of combining a sale and a loan and its various forms because the issue of taking the fee for safekeeping the pledge is based on it.

The Texts Relevant to the Question

Noble Prophetic texts have been narrated prohibiting the combination of a loan and a sale, including:

1. ʿAbd Allāh ibn ʿAmr quoted the Messenger of Allah (pbuh) as saying:

«لَا يَحِلُّ سَلَفٌ وَبَيْعٌ، وَلَا شَرْطَانِ فِي بَيْعٍ، وَلَا رِبْحُ مَا لَمْ يُضْمَنْ، وَلَا بَيْعُ مَا لَيْسَ عِنْدَكَ»

"A loan combined with a sale is not allowed; nor are two conditions relating to one transaction; nor is profit arising from something one does not take liability for; nor is selling what is not in your possession."[76]

[75] Ibn ʿĀbidīn, *Al-Ḥāshiyah*, 5:3.
[76] Abū Dāwūd, *Sunan Abū Dāwūd*, 4:182; Ḥākim, *Al-Mustadrak ʿalā al-Ṣaḥīḥayn*, 2:17.

2. ʿAbd Allāh ibn ʿAmr reported that he said: "Messenger of Allah, we hear *ḥadīths* from you. Do you allow us to write them?" He said: "Yes." The first thing that was written was the letter of the Prophet (peace and blessings be upon him) to the people of Makkah, which contained:

«لَا يَجُوزُ شَرْطَانِ فِي بَيْعٍ وَاحِدٍ، وَلَا بَيْعٌ وَسَلَفٌ جَمِيعًا، وَلَا بَيْعُ مَا لَمْ يُضْمَنْ...»

"Stipulating two conditions in one sale is not allowed; nor is a loan combined with a sale; nor a sale of what one bears no liability for."[77]

The Meaning of the Loan and Sale Mentioned in the *Ḥadīth*

There is no disagreement among the jurists that what is meant by *salaf* in this *ḥadīth* is a loan,[78] just as the jurists decided that the *ḥadīth* is not limited to the combination of a loan and a sale; rather, it extends in general to all exchange contracts because they share the same meaning as a sale, as mentioned in *Mawāhib al-Jalīl*: "No exchange contract can be combined with a loan."[79] The jurists followed up on determining the meaning of the *ḥadīth* until it became a legal maxim prohibiting the combination of exchange contracts and charitable contracts by stipulation. Shaykh al-Islam Ibn Taymiyyah (may Allah have mercy on him) said: "The comprehensive meaning of the *ḥadīth* is that an exchange contract and a charitable contract cannot be combined. This is because that donation is only because of the exchange; it is not an absolute donation."[80]

The Case of a Loan Contract Combined with an Exchange Contract

The combination of a loan contract with an exchange contract can be divided into three scenarios, which I will address in the following sections:

[77] Nasāʾī, *Sunan al-Nasāʾī al-Kubrā*, 5:53; Ibn Ḥibbān, *Ṣaḥīḥ Ibn Ḥibbān*, 10:161.
[78] See Sarakhsī, *al-Mabsūṭ*, 14:36; Dasūqī, *Ḥāshiyat al-Dasūqī*, 3:66; Māwardī, *Al-Ḥāwī al-Kabīr*, 5:351; Ibn Ḥanbal, *Masāʾil Aḥmad ibn Ḥanbal bi riwāwat Ibn Rāhawayh*, 6:2634.
[79] Ḥaṭṭāb *Mawāhib al-Jalīl*, 6:146; ʿUlaysh, *Minaḥ al-Jalīl*, 4:501.
[80] Ibn Taymiyyah, *Majmūʿ al-Fatāwā*, 29:69.

The First Section

Combining a Loan Contract with an Exchange Contract by a Stipulation in the Contract

Form: One of the two contracts is stipulated in the other; so he will not sell it except on the condition that [the other party] lends to him, or he will not lend to him except on the condition that [the other party] sells to him.

It is in two cases:

The first: A means to undue advantage is readily apparent; for example, he lends to him on the condition that he will rent usufruct from him for more than its [normal] rental.

The second: There is a stipulation between the two parties without partiality; for example, he lends to him on condition that he will rent usufruct from him for its [normal] rental.

As for the first case: it is the combination of a loan with a sale in the contract as a means to undue advantage and, thus, prohibited by the consensus of Muslims. Ibn Qudāmah said:

If he sells it on the condition that [the buyer] will give him a loan, or the buyer stipulates that condition on him, it is forbidden and the sale is invalid. This is also the view of Mālik and al-Shāfiʿī , and I do not know of any differing opinion.[81]

Al-Nawawī (may Allah have mercy on him) said: "If he lends to him on the condition that he pledges something to him, the benefit of which goes to the lender, the loan is invalid."[82] Ibn Taymiyyah (may Allah have mercy on him) said: "If he lends him ten on the condition that he will rent his store for more than the fair price, this is not permissible according to the consensus of the Muslims."[83]

As for the second case: it is the combination of a loan with a sale by a stipulation in the contract but without advantage. The Ḥanafīs,[84] Mālikīs,[85] Shāfiʿīs[86] and Ḥanbalīs[87] agreed that a stipulated combination of a loan and an exchange contract is absolutely prohibited.

[81] Ibn Qudāmah, *Al-Mughnī*, 4:177.
[82] Nawawī, *Rawḍat al-Ṭālibīn*, 3:302.
[83] Ibn Taymiyyah, *Majmūʿ al-Fatāwā*, 30:162.
[84] Qāri, *Mirqāt al-Mafātīḥ*, 6:79; Shalabi, *Ḥāshiyat al-Shalabī ʿalā Tabyīn al-Ḥaqāʾiq*, 4:54.
[85] Nafrāwī, *Al-Fawākih al-Dawānī*, 2:144.
[86] Shāfiʿī, *Al-Umm*, 5:42; Māwardī, *Al-Ḥāwī al-Kabīr*, 5:352.
[87] Ruḥaybānī, *Maṭālib Ulī al-Nuḥā*, 3:73.

Indeed, some jurists conveyed consensus on that. Ibn ʿAbd al-Barr said: "The scholars unanimously agree that if anyone sells on the condition that he will make or receive a loan, the sale is null."[88] Ibn Qudāmah (may Allah have mercy on him) referred to these two cases, saying:

> If it is stipulated in the loan that he will rent his house, or sell him something, or that the borrower shall loan it again, it is not permitted. That is because the Prophet (peace and blessings be upon him) forbade *bayʿ wa salaf*....If the condition is that he will lease the house to him for less than its fair rent, or that he will lease a house of the lender for more than its fair rental, or give him a gift, or do a job for him, it is even more prohibited.[89]

Some contemporary (scholars) held that it is permissible to combine a loan with an exchange contract if there is no partiality for the lender in the loan, even if it is by a stipulated condition in the contract.[90] This opinion was attributed to Ibn Taymiyyah (may Allah have mercy on him),[91] and the Sharīʿah Board of Al Bilad Bank adopted it.[92] They used the following as evidence for it:

The first evidence: The object of the prohibition mentioned in the *ḥadīth* is whenever there is partiality for the lender in the loan and the intention of the lender was to profit from the loan and he made this transaction a cover for that. Shaykh al-Islam Ibn Taymiyyah (may Allah have mercy on him) said, after mentioning the *ḥadīth* prohibiting *bayʿ wa salaf*: "And this is only—and Allah knows best—that he sold him something and loaned him because he increases the price for the sake of the loan, so the loan comes with an increment, and that is usury."[93]

The second evidence: The Sharīʿah permitted the pledgee to utilize the pledge in accord with the amount he spent on it, as mentioned in the *ḥadīth* of Abū Hurayrah (may Allah be pleased with him) that Allah's Messenger (peace be upon him) said: "One can ride the pledged animal for what one spends on it while it is pledged, and one can drink the milk of a milch animal for what one spends on it while it is pledged. And the expenditure is on the one who rides and drinks."[94]

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[88] Ibn ʿAbd al-Barr, *Al-Tamhīd*, 17:90; cf. Bājī, *Al-Muntaqā*, 5:29; Qarāfī, *Al-Furūq*, 3:405.
[89] Ibn Qudāmah, *Al-Mughnī*, 6:437.
[90] They include Dr. Muhammad Elgari and Dr. Yusuf Shubayli. See: Elgari, *Tijārat al-Hāmish*, pp. 23-5; and Shubayli, *Al-Khadamāt al-Istithmāriyyah*, 2:454.
[91] Ibid.
[92] *Al-Ḍawābiṭ al-Mustakhlaṣah min Qarārāt Hayʾat al-Bilād*, Parameter 595, p. 181.
[93] Ibn Taymiyyah, *Bayān al-Dalīl ʿalā Buṭlān al-Taḥlīl*,
[94] *Ṣaḥīḥ al-Bukhārī*, 2:88, *ḥadīth* no. 2377.

If the pledgee benefited from it when the debt was a loan, it is considered combining a loan with a benefit bearing a resemblance to an exchange [contract].[95]

This other opinion, which allows the stipulated combination of a loan and an exchange contract without partiality, is strong—and Allah knows best—because the prohibition came to block the means by which the lender would benefit from the loan. Thus, if the combination of a loan and a sale does not bring any undue benefit to the lender, then there is no apparent cause for objection, and Allah knows best.

[95] See: Shubayli, *Al-Khadamat al-Istithmariyyah*, 2:455.

The Second Section

Combining a Loan Contract with an Exchange Contract without a Stipulation in the Contract, with Partiality[96]

The jurists differed regarding the ruling on partiality in the combination of a loan and sale. They had two opinions:

The first view: It is not permissible to combine a loan with an exchange contract if there is partiality, even without a stipulation in the contract. This is the view of the Ḥanafī[97] and Ḥanbalī[98] jurists, and Ibn Taymiyyah narrated it from most scholars.[99]

The second view: It is permissible to combine loan with an exchange contract without a stipulation in the contract, even if there is partiality. It is the view of the Shāfiʿī School.[100]

The latter formulated this view based on their jurisprudential doctrine, which is that transactions are not affected by intentions and motives unless they appear in the contracts. Shāfiʿī said in that regard (may Allah have mercy on him):

The principle I adopt for every contract that is outwardly valid is that I do not rule it to be invalid on the basis of suspicion or a habitual practice among the counterparties. I approve it on the basis of manifest validity, and I dislike that they would have an intention which, if it were made manifest, would nullify the sale.[101]

It is mentioned in the commentaries of Sharwānī and ʿAbādī on Haytamī's *Tuḥfat al-Muḥtāj*, "It is known that a contract is nullified when the [invalid] condition is in the contract. If, however, they mutually agree to this and no condition is stipulated in the contract [itself], then there is no nullification."[102]

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[96] *Muḥābāh*: charitable contribution intentionally included in an exchange contract. See: Ḥammād, N. (2008), *Muʿjam al-Muṣṭalaḥāt al-Māliyyah wa al-Iqtiṣādiyyah fī Lughat al-Fuqahaʾ*, p. 404.
[97] See: Ibn Māzah, *Al-Muḥīṭ al-Burhānī*, 8:115.
[98] See: *Masāʾil Aḥmad ibn Ḥanbal,* as narrated by his son *Ṣāliḥ*, 3:40.
[99] See: Ibn Taymiyyah, *Majmūʿ al-Fatāwā*, 30:162.
[100] See: Shāfiʿī, *Al-Umm*, 3:75; Sharwānī, *Ḥawāshī al-Sharwānī ʿalā Tuḥfat al-Muḥtāj bi Sharḥ al-Minhāj*, 5:75.
[101] See: Shāfiʿī, *Al-Umm*, 3:75.
[102] Sharwānī, *Ḥawāshī al-Sharwānī*, 5:47.

Evidence for the first view: The increment in the exchange contract is considered to be the forbidden usury. That is because if someone lends a person 1000 and sells him a commodity [normally] costing 500 for 1000, there is no reason for the payment exceeding the good's fair price other than the loan. It is as if he lent 1000 and got back 1500, so it is a loan bringing benefit [to the lender]. This indicates that if it had not been for the loan the borrower would not have accepted the high price for the good.[103]

Evidence for the second view: The default state in transactions is permissibility and validity, and the prohibition in the *ḥadīth* is applicable when there is stipulation of a condition. This is according to the Shāfiʿī maxim that acts [are judged based] on the outer form while intentions and objectives are left to Almighty Allah.

The Preferred Opinion

The preferred view—and Allah knows best—is the first view. Knowing the intentions of legally competent people does not stop at their expressions and words but, rather, is known by the contextual signs and recognized indications. If those intentions come to be known by any acceptable method, they are taken into account and the ruling is based on them. The exclusion of objectives and intentions, and judging people only on their apparent actions and statements, leads to confusion, chaos, and distress, which is more difficult for people when they relate to money and goods, which are hard for them to let go of.[104]

[103] See: Ibn Māzah, *Al-Muḥīṭ al-Burhānī*, 8:115, 10:351, quoting *Taklifat al-Qarḍ*.
[104] Rūkī, *Qawāʿid al-Fiqh al-Islāmī min Khilāl Kitāb al-Ishrāf ʿalā Masāʾil al-Khilāf*, p. 179.

The Third Section

Combining a Loan Contract with an Exchange Contract without a Stipulation in the Contract, and without Partiality and Collusion

The jurists differed regarding the combination of a loan and an exchange contract without stipulation, partiality or collusion. They had two views:

The first view: It is forbidden to combine a loan and an exchange contract even if there is no condition, partiality, or collusion. This is the view of some Mālikī jurists,[105] and it is the accepted view of the Ḥanbalī School.[106]

The second view: It is permissible to combine a loan and an exchange contract if there is no condition, partiality, or collusion. This is the view of the Ḥanafīs,[107] Mālikīs,[108] and Shāfiʿīs,[109] and a view in the Ḥanbalī School.[110]

Evidence for the first view: The statement of the Prophet (peace and blessings be upon him):

«لَا يَحِلُّ سَلَفٌ وَبَيْعٌ...»

"A loan and a sale are not allowed..."[111]

The implication of the evidence: The wording of the Prophet (peace and blessings be upon him) is general in prohibiting the combination of a loan and an exchange contract. It thus includes combinations with and without a stipulated condition.

Evidence for the second view: the default state in financial transactions is permissibility unless there is evidence for a prohibition [of something in particular]. The object of prohibition [in this case] is when the combination of a loan and an exchange contract brings an exclusive benefit for the lender, as previously explained.

[105] Khalīl, *Mukhtaṣar Khalīl*, p. 155.
[106] Buhūtī, *Kashshāf al-Qināʿ*, 8:146.
[107] Zaylaʿī, *Tabyīn al-Ḥaqāʾiq*, 4:54.
[108] Kharashī, *Sharḥ Mukhtaṣar Khalīl*, 5:54.
[109] Shāfiʿī, *Al-Umm*, 5:42.
[110] Mardāwī, *Al-Inṣāf*, 12:351.
[111] Abū Dāwūd, *Sunan Abū Dāwūd*, 4:182; Ḥākim, *Al-Mustadrak ʿalā al-Ṣaḥīḥayn*, 2:17.

The Preferred Opinion

After presenting the views of the jurists on this issue, the weightier opinion—and Allah knows best—is that it is permissible for a loan to be combined with an exchange contract if there is no stipulation, partiality, or mutual agreement indicating that the benefit derived by the lender from the exchange contract was intended. [Permissibility] is due to the absence of the effective cause of the prohibition.

The Ruling on Taking a Fee to Safeguard a Pledge

Based on the above discussion, the prohibition contained in the *ḥadīth* of the Prophet (peace and blessings be upon him) regarding the combination of *bayʿ wa salaf* (a loan and an exchange contract) includes two scenarios:

The first: a stipulated combination of a loan and sale with the presence of partiality.

The second: combination of a loan and sale without stipulation but with the presence of partiality.

Accordingly, if the pledgee (the lender) takes a fee in exchange for safeguarding the pledge, and this fee is more than the fair fee (*ujrat al-mithl*), and partiality is present in the form of a benefit in exchange for the loan, then it is not permissible. This is because of the maxim: any loan that brings benefit to the lender is *ribā* (interest).

If the fee taken by the pledgee (the lender) is similar to the fee for safeguarding property without a loan, in this case the suspicion of *ribā* is negated because the fee is in exchange for safeguarding the wealth, not in exchange for the loan.

An Applied Study of Taking a Pledge Fee in Some Islamic Banks in Malaysia

First: The Scenario of the Issue

The Islamic bank lends the client an interest-free loan (*qarḍ ḥasan*) and stipulates that the loan be secured with gold pledged with the bank, and the Islamic bank takes a fee from the customer for safeguarding this pledge (gold). Note that the fee the bank takes is similar to the fee taken from those who deposit gold without a loan, but it is higher than the market fee (outside the banking sector).

Second: The Sharīʿah Ruling

In order to pronounce the [Sharīʿah] ruling on this scenario, it is necessary to know the *manāṭ al-ḥukm* in it. In other words: to know what has an effect on its ruling. Accordingly, I say:

1. The loan here is on the condition that it be secured with a pledge of gold, and this is fine; the lender is allowed to request the securing of the loan with a pledge.

2. It is established in Sharīʿah that the pledgee (the lender) may not use the pledged asset without compensation, and the Islamic bank in the aforementioned scenario does not benefit from the pledged asset (gold), so this scenario does not come under this prohibition.

3. The Islamic bank requires the borrower (the customer) to pay a fee in exchange for the bank safeguarding the pledged (gold). Here, the loan contract was combined with an exchange contract by a stipulation. In fact, the banking sector always combines two contracts in one contract arrangement, with each of them dependent on the other. Here we need to consider: Does the combination of the two contracts in this scenario entail partiality or not?

Since the Islamic bank takes a fee similar to the fee charged to someone who deposits gold without a loan, it could be said that there is no partiality in this case. This is if we say that what is meant by reasonable fee (*ajr al-mithl*) is what is considered a reasonable fee in the rest of the banking sector.

However, if we say what is meant by reasonable fee is the reasonable fee in the market, which is called in financial custom ‘the market price’, then the bank in this case is not taking

the reasonable fee, but taking much more than it, and here the presence of partiality becomes evident.

This is strengthened by the following:

1. People's interest in depositing gold in the bank is very, very negligible, as someone working in the Malaysian banking sector informed me. Most people deposit their gold in the market because the fee there is much cheaper than the bank's fee. This strengthens the presence of the bank's intention to benefit from the loan.

2. A further indicator is that the Islamic bank does not accept in exchange for a loan a pledge other than gold, even if the pledged property is more valuable than gold (such as a building worth ten times the value of gold) because it will not be able to take a fee to safeguard a building.

3. A further indicator is that, if the value of gold depreciates significantly—for example, by more than half—the bank will not ask customers to change the pledge, even though banks usually require customers to provide additional pledges in the event the value of the pledge decreases. This strengthens the suspicion that the fee taken for safeguarding the pledge is for more than just securing the loan.

The evidence and circumstances presented above regarding the bank's dealings in this matter make the researcher **incline to the view that the Islamic bank should not take a fee for safeguarding the pledge (gold) except for the actual cost of the safeguarding**, and this is what was decided by the Islamic Fiqh Academy and the Sharīʿah Board of AAOIFI.

It is stated in the resolution of the Islamic Fiqh Academy from its third session, held in Amman, Jordan, 8-13 Safar 1407 AH: "First: It is allowed to charge a fee for services related to a loan. The said fee should be within the limit of the actual expenses."[112]

[112] Resolution No. 13 (1/3).

Sharīʿah Standard No. 57 regarding 'Gold and the Parameters for Dealing with It', **explicitly states the requirement that the fee taken should be according to the actual cost for the case in question:**

5/4/2: The person accepting the deposit has the right to take a fee in exchange for safeguarding the gold, whether the fee is a lump sum or a percentage of the value of the deposited gold. If the deposited gold is a guarantee for a loan in the depositor's liability, the fee must not exceed the actual cost of safeguarding the gold.

And peace and blessings be upon our Prophet Muhammad, his family and all his companions.

Taking a Fee to Safeguard a Pledge

His Eminence Dr. ʿAbd al-ʿAzīz Khalīfah al-Qaṣṣār

Praise be to Allah, Lord of the worlds, and prayers and peace be upon our leader Muhammad, his family and all his companions. Thereafter.

The Sharīʿah has given due regard to the issue of securing contracts in order to protect rights from denial and disavowal. The Almighty said in the verse of debt:

> O you who believe, when you transact a debt payable at a specified time, put it in writing, and let a scribe write it between you with fairness. A scribe should not refuse to write as Allah has educated him. He, therefore, should write. The one who owes something should get it written, but he must fear Allah, his Lord, and he should not omit anything from it. If the one who owes is feeble-minded or weak or cannot dictate himself, then his guardian should dictate with fairness. Have two witnesses from among your men, and if two men are not there, then one man and two women from those witnesses whom you like, so that if one of the two women errs, the other woman may remind her. The witnesses should not refuse when summoned. And do not be weary of writing it down, along with its due date, no matter whether the debt is small or large. That is more equitable in Allah's sight, and more supportive as evidence, and more likely to make you free of doubt. However, if it is a spot transaction you are effecting between yourselves, there is no sin on you should you not write it. Have witnesses when you transact a sale. Neither a scribe should be made to suffer, nor a witness. If you do [something harmful to them], it is certainly a sin on your part. Fear Allah; and Allah will teach you, and Allah knows all things (Sūrah al-Baqarah: 282)

All of this is evidence of the permissibility of securing [debts], which includes the pledge. An important issue that has arisen today is the ruling on taking a fee to safeguard the pledge, and I have been instructed by a kind invitation from the academic committee of the conference to write about this topic.

I am placing a *fiqhi* conceptualization of this issue in the hands of the respected specialists and stakeholders in Islamic finance scholarship in order to reach a sound juristic judgement.

Allah is the best enabler.

To begin with, I would like to review the concept of *rahn* (pledge) and briefly mention its types so that the reader can visualize the aspects of the topic before entering into the ruling on taking a fee to safeguard a pledge.

The Definition of *Rahn*

Lexically: constancy and permanence. It is said about water that it is *rāhin*, meaning: still and enduring; a blessing is '*rāhinah'* meaning: permanent and constant. It is also used to mean detention; as in the verse: "Every human being will be held in pledge (*rahīn*) for whatever he has earned " [Sūrah al-Ṭūr: 21].

In Sharīʿah: to make a financial asset security for a debt which will be paid off from it or from its price if the debt cannot be paid back.[113]

According to Ḥanafī jurists: holding something for a right, such as debt, which can be fulfilled from it.[114]

The debtor is called the pledgor, the lender is called the pledgee, and the thing that matches the debt is called the pledge (*rahn* or *marhūn*).

Pledge Types

Jurists divided *rahn*, according to the subject matter, into a pledge of real estate and a pledge of movable property. Contemporary legists look at collateral by a new consideration—which may have its roots in the jurisprudential schools in their various applications. Collateral in law is divided into two types: charge and pledge.

First Type:

A charge is a contract whereby the creditor gains a right over a particular piece of real estate, according to which he has precedence over ordinary creditors and creditors of junior rank to him in fulfilling his right from that property, no matter who has physical possession of it.[115]

This was approved by contemporary jurists because the official registration of the charge is tantamount to possession; likewise, [physical] possession, in the opinion of some eminent jurists, is not considered an essential element of the [*rahn*] contract.

It should be noted that the charge creates a right for the creditor over the particular asset on which the charge has been placed without possession of the asset being transferred to the

[113] *Al-Mawsūʿah al-Fiqhiyyah al-Kuwaytiyyah*, 23:175-6; Fayyūmī, *Al-Miṣbāḥ al-Munīr*, R-H-N.
[114] Ibn Nujaym, *Al-Baḥr al-Rāʾiq*, *Sharḥ Kanz al-Daqāʾiq*, 8:469.
[115] Article 971 of the Kuwaiti Civil Code.

creditor's hand; it remains in the possession of the debtor/pledgor. [This arrangement] only applies to real estate.[116]

Second Type

A pledge: is a contract in which a person is obliged, as a guarantee of a debt owed by him or others, to deliver to the creditor an in-kind right that entitles the creditor to withhold the thing until the debt is paid. This creditor gets precedence over ordinary creditors and creditors of junior rank in claiming his right from this thing, no matter who has possession of it.[117]

This is what the majority of jurists affirm; it requires the possession and custody of the pledged asset and applies to real estate and movable property.

The pledge applies to real estate and movable property. It is a consensual contract, according to which the creditor retains the right to retain the pledged asset until the debt is paid, or to have it retained by a third party, called a trustee, who is entrusted with the possession of the pledged asset. Thus, the pledge requires the transfer of possession of the pledged asset from the debtor/pledgor to the hand of the pledgee/creditor, or to the hand of the trustee, and this asset is retained until the right is fulfilled.

If possession is taken of the pledged property and it is in the hands of the pledgee or in the hands of the trustee, is it possible to collect a fee for safekeeping and any other expenses?

If we want to address the ruling on taking a fee for safeguarding the pledge, perhaps the closest topic that can guide to such a ruling is what jurists discussed regarding the issue of expenditure on the pledge. Therefore, I will start in this paper by talking about this issue and other similar issues, extrapolated rulings and detailed jurisprudential issues.

[116] D.B. Mutayri, "Rahn al-ʿAqār Rasmiyā: Dirāsah Fiqhiyyah Muqārinah bayn al-Fiqh wa al-Qānun al-Kuwaytī," *Majallat Jāmiʿat al-Shāriqah li al-ʿUlum al-Sharʿiyyah wa al-Insāniyyah* Vol. 4, no. 2, June, 2007.
[117] Article 1027 of Kuwaiti Civil Code 45.

Pledge Expenditure

Jurists divide expenditure into two types: the first is obligatory for the existence of the pledged asset, and the second is obligatory for safekeeping the pledged asset.

The majority of jurists consider the provision that is essential to sustain the pledge to be the responsibility of the pledgor—for example, fodder for animals, watering of trees, harvesting fruits and drying them—and also what is essential to preserve the pledge; for example, the fee for the place of preservation, the guard, the grazing of cattle, the shepherd's wages, and so on. This is based on the statement of the Prophet (peace and blessings be upon him): "The pledgor does not lose ownership of the pledge; he bears its expenses, and its yields belong to him."[118] Also, it is his property, so whatever is needed to sustain it will be obligatory on him.[119]

Some jurists consider the safeguarding fee to be complementary to ensuring the existence of the asset, even if it is not a major factor for its existence. As Shaykh Zakariyyā al-Anṣārī said:

> The provision of the pledge upon which its existence depends is the responsibility of (the owner); for example, the fee to retrieve a runaway slave, the fee for watering trees, the expenses of the slave and his clothes, and others (even the fee for the secure location if it is not provided charitably by the one who has its possession). He will be compelled to provide that in favor of the pledgee for the preservation of the pledge, and because of the [Prophetic] text, "The pledgor does not lose ownership of the pledge; he bears its expenses." Dāraquṭnī narrated this and classified it as *ḥasan* (good); Ḥākim too narrated it and he graded it *ṣaḥīḥ* (authentic).[120]

Therefore, the majority of jurists decided that if the pledged asset needs a provision such as watering the trees in pledged agricultural land, or if the pledge needs to be preserved and guarded, then the rent for the place of preservation and guarding is on the pledgor because Prophet (peace and blessings be upon him) said: "The pledgor does not lose ownership of the

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[118] Bayhaqī, *Al-Sunan al-Kubrā*, 6:39; Dāraquṭnī, *Sunan al-Dāraquṭnī*, 3:33; Ibn Ḥibbān, *Ṣaḥīḥ Ibn Ḥibbān*, 13:258.
[119] Buhūtī, *Kashshāf al-Qinā'*, 3:333; Ramlī, *Nihāyat al-Muḥtāj*, 4:279; Qalyūbī, *Ḥāshiyat al-Qalyūbī*, 2:275; Dasūqī, *Ḥāshiyat al-Dasūqī*, 3:251; Ṣāwī, *Bulghāt al-Sālik*, 2:120; *Al-Mawsū'ah al-Fiqhiyyah al-Kuwaytiyyah*, 23:187-8.
[120] Anṣārī, *Asnā al-Maṭālib*, (Dār al-Kitāb al-Islāmī), 2:169.

pledge; he bears its expenses, and its yields belong to him." Also, because it is his property, whatever is needed to sustain it will be obligatory on him.[121]

And because it is a type of maintenance expenditure, it will be the pledgor's responsibility as in the case of food. And because the pledge is the property of the pledgor, its lodging and preservation are on him, as it is for [property that] is not pledged. So if someone returns a runaway slave, the fee for doing so is on the owner, and likewise if [the slave] needs medical treatment. And if the pledge is fruit and needs watering or harvesting, etc., it is on him. The same goes for herding cattle and the like, such as feeding them, and the pollination of date trees, and if any increased [expenditure] is required, it is on the pledgor; and if he refuses, he will be forced by the judge.

Mardāwī stated in *Al-Inṣāf*: "Its provision is on the pledgor, as is the shroud [of a pledged slave] if he dies, also the rental fee for its storage if it needs to be stored, without any dispute."[122]

The Shāfiʿī and Ḥanbalī texts unequivocally stated that, and it is what is understood from the statements of the Mālikīs. It is mentioned in *Al-Muntaqā: Sharḥ al-Muwattaʾ* by Bājī:

If a pledged well collapses, its renovation is on the pledgor. It is narrated by Yaḥyā ibn Yaḥyā Ibn Qāsim in *Al-ʿUtbiyyah*, and its meaning is in *Al-Mudawwanah*. If the pledgee is forced to pay tax (*kharāj*) on pledged land and the land is actually designated for *kharāj*, the pledgee shall claim reimbursement from the pledgor. If it is not actually designated for *kharāj*, then he shall not claim anything from the pledgor because it is an act of injustice. Likewise for storing the pledge, if it is something that is stored, it is on the pledgor. If it is not something the storing of which is normally on the pledgor, such as cloth or a slave, then no fee shall be charged for it. This is narrated by ʿĪsā from Ibn Qāsim in *Al-ʿUtbiyyah*. Ibn Qāsim and Ash-hab said in *Al-Majmūʿah* that if the pledgor did not order him to rent it out, then he cannot do so. It is narrated in *Al-ʿUtbiyyah* that Ibn Qāsim heard from Mālik that the pledgee shall handle the leasing of the pledge with the permission of the pledgor; likewise, anyone who is put in possession of it shall handle that with the permission of the pledgor.

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[121] Dasūqī, *Ḥāshiyat al-Dasūqī*, 3:251; Ṣāwī, *Bulghāt al-Sālik*, 2:120; Ramlī, *Nihāyat al-Muḥtāj*, 4:279; Qalyūbī, *Ḥāshiyat al-Qalyūbī*, 2:275; Mardāwī, *Al-Inṣāf*, 5:159.

[122] Mardāwī, *Al-Inṣāf* (Beirut: Dār Iḥyāʾ al-Turāth al-ʿArabī,), 5:159. Buhūtī said:
"The provision of the pledge, including food, clothing, shelter and security guard (and his shroud and funeral expenses if he dies, and the warehousing fee if it is warehoused and) the fee (for watering it and pollinating it and pruning it and harvesting it and herding cattle) that is pledged (and retrieving a slave who runs away, and fees for medical treatment for illness or injury or circumcision shall be borne by the pledgor, based on what Saʿīd ibn al-Musayyib narrated from Abū Hurayrah (may Allah be pleased with him) that the Prophet (peace and blessings be upon him) said, "The pledgor does not lose ownership of the pledge; he bears its expenses, and its yields belong to him." Reported by Shāfiʿī and Dāraquṭnī, who said the chain of narration is continuous and acceptable. Also, because he is the owner of the pledge, its expenses are his responsibility…" Buhūtī, *Kashshāf al-Qināʿ*, (Beirut: Dār al-Fikr & ʿĀlam al-Kutub, 1982/1402), 3:339.

The angle of reasoning for the first view is that the pledge contract and its placement in the hands of the pledgee requires that he be in charge of the pledge, because that is not for the pledgor since his authorization of [the pledgee] excludes himself from [managing] the pledge. It is, however, not allowed that pledging [the asset] should cause the loss of the yield, so the pledge contract requires that its rental be managed by the one who is its custodian.
The angle of reasoning for the second view is that the pledge contract does not require the safekeeping of the pledged asset by the pledgee. That will only be so for the pledgee with the permission of the pledgor. Once he gives him the permission for safekeeping, it doesn't mean he can also take charge of its rental and utilize it except with [the pledgor's] permission. The pledge contract only gives him the right to prevent the pledgor from doing that, just as the pledge contract gives him the right to prevent the pledgor from safekeeping the pledged asset.[123]

It is understood from this that the principle is that the expenses of storage and safekeeping shall be borne by the pledgor for those things that are customarily stored. There is no doubt that this varies for different things and in accord with variations over time and in the nature of the pledged item.

As mentioned before, the Ḥanafī jurists disagreed, as they made safekeeping one of the requirements of the pledged asset, and this is in the interest of the pledgee because he retains it. Therefore, he must safeguard it. Hence the Ḥanafī jurists said: what is needed to safeguard the pledged item, such as cattle shelter and the safekeeping fee, is to be borne by the pledgee because the pledged asset is being retained for him. As for what is needed for the benefit of pledge itself or auxiliary to it, such as animal feed, shepherd's wages, and watering an orchard, these are to be borne by the pledgor.[124]

The rent of the house in which the pledge is kept is on the pledgee, as is the fee of the custodian, because he is liable for the pledge. If the pledgor stipulated that the pledgee pay remuneration for preserving the pledge, the pledgee has no right to any [fee].[125]

As stated in *Murshid al-Ḥayrān* (Article 892):

The expenses necessary to safeguard and defend the pledge shall be on the pledgee. The expenditures necessary for its expenses, such as its upkeep if it is real estate property or watering of land and pollinating of trees and all that is related to its repair and existence, will be on the pledgor. For whatever is obligatory on one of them, in case the other pays it, if he did so by the order of the judge, who made it a debt owed to him by the [party ultimately

[123] Bājī, *Al-Muntaqā: Sharḥ al-Muwaṭṭa'* (Cairo: Dār al-Kitāb al-Islāmī, 2nd ed.), 5:255.
[124] *Al-Mawsūʿah al-Fiqhiyyah al-Kuwaytiyyah*, 23:187. Ṭaḥāwī said: "What is needed for the benefit of the pledge itself or what is auxilliary to it, such as watering an orchard, is borne by the pledgor. And what is needed to safeguard the pledge shall be borne by the pledgee because it is being retained for him.
[125] Zaylaʿī, *Tabyīn al-Ḥaqāʾiq*, (Cairo: Dār al-Kitāb al-Islāmī, 2nd ed.), 6:68; ʿAbādī, *al-Jawharah al-Nayyirah*, (Egypt: al-Matbaʿah al-Khayriyyah, 1322H), 1:235.

liable for the payment], he may claim reimbursement from him for it. If he pays it without the judge's order, then he acted as a voluntary donor, and he cannot claim from the other anything he paid.[126]

However, Abū Yūsuf (may Allah have mercy on him) of the Ḥanafī School opted for the view that the shelter fee is on the pledgor, similar to the expenditure [to maintain its existence], because he sought its conservation. Also in this category (making the expenses on the pledgor) is the fees paid as reward for [retrieving] a runaway slave if he/she was entirely the guarantee [for a debt]. That is because possession for the fulfilment of a right was established on the subject matter, and it was necessary to resume possession for the fulfilment of the right in order to [eventually] return him/her to the owner. Hence, it is part of the expense of the return; so it will be on him.[127]

It is clear from the aforementioned that the Ḥanafī jurists consider safekeeping to be the responsibility of the pledgee; therefore, he is not entitled to take a fee for safekeeping since preservation is one of the requirements of the pledge, and it is the obligation of the pledgee. Therefore, the expenses necessary for preserving the pledge are the responsibility of the pledgee, according to the Ḥanafī jurists, since holding and retaining it are the rights of the pledgee, and safekeeping it is obligatory upon him; therefore, the expenditure will be on him as well. Examples of it include the fee of the guard, the fee of the safe place, etc.

To summarize what was mentioned before, the jurists have agreed that the expense and provision required to maintain the existence of the pledge are the responsibility of its owner, the pledgor. That is because the Lawgiver has appointed the return and liability for the pledgor, based on the statement of the Prophet (peace and blessings be upon him): "The pledgor does not lose ownership of the pledge; he bears its expenses, and its yields belong to him," meaning [the pledgee] does not become the owner, and the pledgor shall bear its expenses.

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[126] Qadri Pasha, *Murshid al-Ḥayrān ilā Maʿrifat Aḥwāl al-Insān*, (Egypt: al-Matbaʿah al-Amīriyyah, 1937), p. 148.

[127] Ibn Nujaym, *Al-Baḥr al-Rāʾiq*, *Sharḥ Kanz al-Daqāʾiq* (Cairo: Dār al-Kitāb al-Islāmī, n.d.); Zaylaʿī, *Tabyīn al-Ḥaqāʾiq*, 6:68.

However, they differed, having two opinions, regarding the type of expense the pledgor must bear.

The Ḥanafī jurists hold that the expenses are distributed between the two parties according to two considerations: on the pledgor in that he is the owner of the asset, and on the pledgee in that he has a duty to safeguard it. Thus, all the expenses necessary for the benefit and continued existence of the pledged asset are on the pledgor because it is his property. And all that are for the safekeeping of the pledged asset are on the pledgee because it is being held for his benefit, so all that follows from that will be obligatory on him. And because the fee is provision for safekeeping, it is on him.

As for the majority of jurists (the Mālikīs, Shāfiʿīs and Ḥanbalīs), all the expenses and provisions of the pledge are on the pledgor, whether for the purpose of maintaining the existence of the asset or for the purpose of guarding and treating it, because of the *ḥadīth*: "The pledgor does not lose ownership of the pledge; he bears its expenses, and its yields belong to him."

Selection [of the Preferred Opinion]

After mentioning the statements of jurists and the arguments in support of each view, I choose the majority view, which is that safekeeping is one of the responsibilities of the pledgor, and accordingly it is permissible to take a fee to safeguard a pledge. This is based on the following:

First: In addition to what the majority of jurists have inferred, the reality of the pledge is that it leaves the possession of the pledgor. This requires that the attribute of possession be transferred from the pledgor to the pledgee. When the pledge was in the possession of the pledgor, it was the possession of ownership; he was entitled to its returns and responsible for its expenses. When the pledge is moved to the pledgee's possession, the possession becomes a type of trust possession.

Perhaps the closest example of trust possession to the pledgee's possession of the pledge is *wadīʿah* (deposit for safekeeping), as the pledged asset in the hands of the pledgee is like a deposit for safekeeping. The Shāfiʿī and Ḥanbalī jurists have the view that the pledged asset is a trust in the hands of the pledgee; thus, no part of the debt will be waived by its

destruction except in the case of transgression or negligence by the pledgee. Saʿīd ibn al-Musayyib narrated from Abū Hurayrah (may Allah be pleased with him) that the Prophet (peace and blessings be upon him) said, "The pledgor does not lose ownership of the pledge; he bears its expenses, and its yields belong to him." Also, if [the pledgee] were made liable, people would refrain from doing it for fear of the liability, which would cause the breakdown of the credit system, which would entail great harm. Also, it is security for a debt; therefore, it is not guaranteed, like an increase in the debt, except in the case of transgression and negligence.[128]

Based on the hypothesis that the pledge is in the hands of the pledgee like a deposit as per the above-mentioned characterization—that the pledgee's possession is possession on trust—it could be said that the basic principle is that the deposit is a voluntary donation contract. As such, there is no requirement of a consideration for the benefit provided; however if the acceptor of the deposit (such as the bank) stipulates a fee or safeguarding for it, the condition is valid, and the contract would become binding according to the majority of jurists. It is stated in *Majallat al-Aḥkām*:

The thing deposited for safekeeping is a trust in the possession of the person receiving it. Consequently, if it is destroyed or lost due to no fault or negligence of the person keeping it, there is no necessity to make good the loss. It is only if it has been deposited for safekeeping for a fee, and was destroyed or lost due to a cause—like theft—which could have been avoided, that the loss must be made good.[129]

And thus some Mālikī jurists opted that the fee is not consideration for guarding it but is consideration for the place it is kept.[130]

Second: Taking the fee for safekeeping of the pledge does not come under the rubric of a loan that results in a benefit [for the lender] as the fee for safekeeping of the pledge is independent of the contract, and the intention of the contracting parties was not directed toward it initially; rather, the pledge contract is one of those secondary contracts that are intended as security [for debts].

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[128] Ibn ʿĀbidīn, *al-Ḥāshiyah*, 5:309 passim; Dasūqī, *Ḥāshiyat al-Dasūqī*, 3:253 passim; Sharbīnī, *Mughnī al-Muḥtāj*, 2:136-7; Buhūtī, *Kashshāf al-Qināʿ*, 3:341; *Al-Mawsūʿah al-Fiqhiyyah al-Kuwaytiyyah*, 13:280.
[129] *Majallat al-Aḥkām al-ʿAdliyyah*, Item 777.
[130] Ṣāwī, *Ḥāshiyat al-Ṣāwī maʿa al-Sharḥ al-Ṣaghīr li al-Dardīr*, 3:566.

Third: The commercial practice today is that the pledged asset entails a cost for its safekeeping, which constitutes an increased burden on the pledgee; i.e., the creditor who provides the financing to customers. If the burden is placed on the pledgee, which in the commercial scenario is the bank, this will lead to the disruption of economic activity and meeting customers' needs by giving them the financing needed to meet various economic requirements. This is especially so if a third party such as a trustee is appointed [to safeguard]; the safekeeping service will not be free of charge. For all these [reasons], there is no objection to taking a fee for safekeeping the pledged asset.

This is what Allah Almighty has enabled me to explain. If what I have concluded is correct, it is from Allah alone; and if there is anything other than that, it is from myself and my limited understanding, and Allah and His Messenger are free from it.

Allah is the enabler of success. And our final supplication is, "Praise be to Allah, the Lord of all the worlds." And may Allah's mercy and blessings be upon our leader Muhammad, his family and all his companions.

7th topics

Borrowing Money for the *Muḍārabah* Fund

His Eminence Shaykh Walīd bin Hādī
His Eminence Dr. ʿAbd al-ʿAzīz Khalīfah al-Qaṣṣār

The Seventh Topic

Borrowing Money for the *Muḍārabah* Fund

Forum Chair: Walīd bin Hādī

The Islamic banking practice is that current accounts are the property of the shareholders, based on the fact that the *muḍārib* shall not take on debt in addition to the *muḍārabah* capital. The jurists who take that view also take the view that the *muḍārib* shall not spend more than the available *muḍārabah* funds to purchase merchandise for the *muḍārabah* enterprise. The result is that the bank keeps the profit from the current account because it guarantees it. As for the interbank money market rate, two scenarios are present in it:

The first scenario: The bank does not take on debt; rather, it takes the funds by way of *muḍārabah*. In this case it deals with the fund provider as it deals with any other *rabb al-māl.* Alternatively, it may take the funds by way of investment agency (*wakālah bi istithmār*). In this case, if the agency fee and performance incentive enter into the fund pool, the remaining profit, after the share of the *muḍārabah* enterprise [has been deducted], go to the fund. If the fee and performance incentive enter into the shareholders' funds, it would be treated like a current account, and what is required is [to know] who benefited from the money?

The second scenario: reverse *murābaḥah*; if the debt is the liability of the shareholders, they would take all the surplus after the *muḍārabah* share. This is the practice in Malaysia; and be informed that the debts are dozens of times greater than the equity. And if the debt is the liability of the fund, it is only entitled to the *muḍārabah* share. The remainder is for the fund, and each party is entitled to his share of it, including the shareholders. That is the practice in Qatar.

Borrowing Money for the *Muḍārabah* Fund

ʿAbd al-ʿAzīz Khalīfah al-Qaṣṣār

All praise is for Allah, the Lord of the Universe, and peace and blessings be upon our master Muhammad pbuh and on his family and all his companions.

The importance of financial products in Islamic banks is quite obvious, as is the need to develop them in a way that realizes public and private benefit. One application of these products is in bank deposits and the forms they take in Islamic banks. Perhaps the earliest application of a *fiqh* method in Islamic banks was the deposit on the basis of *muḍārabah*. This form has undergone tremendous development in accord with the *fiqh* arrangements and the rules prescribed for it in Islamic banks in a way that has enhanced the status of Islamic jurisprudence and further developed it. This paper discusses borrowing money for the *muḍārabah* fund in Islamic banks and the effect that has from an accounting perspective on the established responsibilities of the depositors and shareholders. It also looks at the forms in which this is implemented in Islamic banks.

The Meaning of Taking on Debt for the *Muḍārabah* Fund

What the majority of jurists understand from the phrase "taking on debt for the *muḍārabah* fund" is that the *muḍārib*'s purchases for the *muḍārabah* enterprise exceed the *muḍārabah* capital [from the outset] or that his [later] purchases exceed what remains of the *muḍārabah* capital.[131]

The Ḥanafī scholar Kāsanī considered the taking on of debt to apply to purchases in which the payment is immediately due or deferred. It is not restricted to purchasing on credit. That is because when he purchases with what is not in his possession of that type [of wealth], he takes on debt for the *muḍārabah* enterprise without possessing [the authority to do so].[132]

[131] Qarāfī, *Al-Dhakhīrah*, 6:47; Sharbīnī, *Mughnī al-Muḥtāj*, 3:410; Mardāwī, *Al-Inṣāf*, 5:419; Ibn ʿĀbidīn, *Radd al-Muḥtār*, 5:650.
[132] Sarakhsī, *al-Mabsūṭ*, 22:178; Zaylaʿī, *Tabyīn al-Ḥaqāʾiq*, 5:69.

The Ḥanafīs also explicitly stated that if the *muḍārib* assumes a debt of cash, it is not valid. That is because it would be agency to borrow money, which is invalid. The *muḍārib* does not have the authority to take on debt as the liability of the *muḍārabah* capital provider (*rabb al-māl*); thus, the lender should seek its payment from the *muḍārib*, not from the *rabb al-māl*. That is because agency to take on debt is considered agency to borrow money, which is invalid.

The Ruling on Taking on Debt for the *Muḍārabah* Fund

The majority of jurists opine that the *muḍārabah* contract does not give the *muḍārib* the authority to take on debt as the liability of the *muḍārabah* fund. That is because such disposition is not consistent with the standard practice of merchants; therefore, the *muḍārabah* contract does not require or imply it.[133]

Jurists disagree whether the *muḍārib* has the authority to take on such debt with the explicit permission of the *rabb al-māl*. There are two opinions on the matter.

The first opinion: The Ḥanafīs, Shāfiʿīs and Ḥanbalīs hold that the *muḍārib* does not have the authority to take on debt as the liability of the *muḍārabah* fund except by the explicit permission of the *rabb al-māl*. They supported this on the basis that taking on debt [without permission] is an act that would increase the *muḍārabah* capital without the consent of the *rabb al-māl*. It would also increase the liability of the *rabb al-māl* without his consent. It would also entail disposal of other than the *muḍārabah* capital without permission.[134]

Ibn ʿĀbidīn states:

> Nor does he possess the right to lend or take on debt even if he is told, 'Act according to your judgment.' That is because these two [options] are not part of the practice of merchants. Therefore, they are not covered by the generality [of 'Act according to your judgment,'] unless the capital owner explicitly mentions them, in which case he has the authority to do them.[135]

[133] Ibn ʿĀbidīn, *Radd al-Muḥtār*, 5:650; Qarāfī, *Al-Dhakhīrah*, 6:47; Sharbīnī, *Mughnī al-Muḥtāj*, 3:410; Mardāwī, *Al-Inṣāf*, 5:419.
[134] Ibn ʿĀbidīn, *Radd al-Muḥtār*, 5:650; Sharbīnī, *Mughnī al-Muḥtāj*, 3:410; Mardāwī, *Al-Inṣāf*, 5:419.
[135] Ibn ʿĀbidīn, *al-Ḥāshiyah*, 5:650-1.

The second opinion: the Mālikīs hold that the *muḍārib* does not have the authority to take on debt as the liability of the *muḍārabah* fund even with the explicit permission of the *rabb al-māl*.

It is mentioned in *Al-Tāj wa al-Iklīl*: "It is not permitted, whether or not the *rabb al-māl* gives him permission. How could he take any profit from what the *muḍārib* assumes liability for?"[136]

Ṣāwī says:

> The *muḍārib* shall not buy—i.e., it is not permitted for him to buy—merchandise for the *muḍārabah* enterprise by deferred payment; i.e., as a debt for which the capital provider is liable, even if the capital provider gives him permission to do so. If, however, he purchases for himself, it is permitted as long as it does not preoccupy him from [his duties vis-à-vis] the *muḍārabah* enterprise. He shall not purchase for the *muḍārabah* enterprise for more than the *muḍārabah* capital, even if he uses his own funds. If he takes on debt to buy merchandise for the *muḍārabah* enterprise or purchases more than the *muḍārabah* capital, the profit is for him—i.e., the *muḍārib*—that is, the profit from that merchandise, and none of it is for the *rabb al-māl*. Likewise, any loss from it would be his liability.[137]

Kharashī says:

> The *muḍārib* is not permitted to buy merchandise for the *muḍārabah* enterprise for more than the *muḍārabah* capital. That is due to the prohibition of profiting from what one assumes no liability for. That is because the *muḍārib* is liable for the excess [expenditure] while it is part of the *muḍārabah* enterprise, which leads to the abovementioned [prohibition]. If he does so, he shall have the going market wage [for that kind of work]. If, however, he buys the excess for himself, he shall be a partner in proportion to that.[138]

I am inclined to the first view, which is that the basic rule is prohibition as long as there is no explicit permission from the *rabb al-māl* specifically allowing the *muḍārib* to take on debt. In its absence, it is not allowed. Taking on debt [without it] would be an act that increases the *muḍārabah* capital without the consent of the *rabb al-māl*; therefore, his explicit permission for that must be secured. Likewise, taking on debt [without it] would increase the liability of the *rabb al-māl* without his consent because the *rabb al-māl* would be liable for the price of the purchased goods. If we were to allow taking on debt for the *muḍārabah*, we would saddle him with an increased liability that he did not agree to. The basic rule is that the agency of the *muḍārib* is restricted by the capital given to him. Based on this, there are certain acts that the

[136] Mawāq, *Al-Tāj wa al-Iklīl li Mukhtaṣar Khalīl*, 5:366.
[137] Ṣāwī, *Ḥāshiyat al-Ṣāwī maʿa al-Sharḥ al-Ṣaghīr li al-Dardīr*, 3:698-701.
[138] Kharashī, *Sharḥ Mukhtaṣar Khalīl*, 6:216.

muḍārib in unrestricted *muḍārabah* is not allowed to do without explicit permission for them. One of them is that he is not allowed to take on debt for the *muḍārabah* fund without explicit permission. If he does take on debt, it does not apply to the *rabb al-māl*; instead, it becomes a personal debt of the *muḍārib*.[139]

The explicit permission of the *rabb al-māl* precludes what the Mālikīs mentioned of the *rabb al-māl* taking profit from what he has not assumed liability for. That is because his explicit permission is evidence of his acceptance of liability for the debt the *muḍārib* will take on.[140]

Application in Islamic Banks

Islamic banks accept funds from customers in a number of formats, including current accounts, also investment deposits and accounts based on the principle of investment agency (*wakālah bi istithmār*). That is in addition to the shareholder capital in the bank. Therefore, the general fund of such banks comprises a number of constituents, including: the shareholders' funds, funds of depositors taken on the basis of *muḍārabah*, funds in current accounts, and funds of depositors taken on the basis of investment agency. The rule varies according to the nature of each account and source. In the current practice of Islamic banks, we find that some of these funds are not considered to represent taking on debt for the *muḍārabah* fund while some are considered taking on debt. The detailed breakdown is as follows:

First: What Is Not Considered Borrowing Money for the *Muḍārabah* Fund

1. **Deposits in Accord with the *Muḍārabah* Contract**

The funds acquired from deposits and accounts based on the principle of *muḍārabah* are treated like the funds of the *rabb al-māl*. These parties have contracted with the bank on the basis that the bank shall work [with the funds] for a certain agreed percentage of the collective profit. In principle the *muḍārabah* funds are not considered a liability or a debt incurred by the bank since their nature entails the lack of liability except in cases of

[139] Zuhayli, *Al-Fiqh al-Islāmī wa Adillatuh*, p. 3948: "What a *muḍārib* is not allowed to do," in *al-Maktabah al-Shāmilah*.
[140] Muḥammad Ṭulāfaḥah, *Al-Istidānah ʿalā Amwāl al-Muḍārabah*, electronic copy.

transgression. The partnership is limited to profit only in that the *muḍārib* contributes his labor and the *rabb al-māl* contributes his capital.

2. Investment Agency (*Wakālah bi Istithmār*)

It is appointment of the bank as an agent to increase the wealth for a fixed fee or for whatever exceeds a certain profit rate earned.[141] One of the most famous formats of its application is unrestricted investment agency with an expected earning target set for the agent, and any profit exceeding that expected rate is the share of the agent (bank). This form of agency is used in investment accounts based on the principle of agency, and likewise, for the provision of working capital.

In the current application of it, investment agency is not considered to create a liability on the bank; rather, the funds acquired from this contract enter into the bank's general fund pool on the basis of unrestricted investment agency. In this case the profits earned enter into the pool as a percentage apportioned proportionally with all the other fund sources of which the general pool is composed. Of the profit earned, the expected profit rate specified in the investment agency contract goes to the principal, and anything exceeding that profit rate goes to the bank. If the bank is also a partner in the investments it executes as an agent, it also gets its share of the investment profit. This is by analogy with the case of *muḍārabah* in which the bank acts as *muḍārib* [with the funds of the *rabb al-māl*] and partner [by providing its own funds as well].

In my article "*Al-Takyīf al-fiqhī li al-wakālah bi al-istithmār*" (The *fiqh* classification of investment agency), I chose the view that the investment agency contract can be considered a new and independent contract that bears a resemblance to a number of different nominate *fiqh* contracts, including *ijārah* (labor lease), *hibah muʿallaqah* (conditional gift), *ujrat al-simsār* (brokerage for a fee), and other nominate contracts. The relevant rules collectively apply to it in accord with a master agreement to which both parties consent, since consent is the basis of all contracts as long as the contract does not include that which will render it invalid, such as inexcusable lack of information (*jahālah*), risk (*gharar*) and *ribā*.

Therefore, *wakālah bi istithmār* that complies with the parameters for it is not considered one of the forms of borrowing for the *muḍārabah* fund due to the differing contractual conditions for each contract. In the current application, the investment agency funds are considered one

[141] AAOIFI, *Al-Maʿāyīr al-Sharʿiyyah*, No. (46), p. 1143.

of the divisions of the general fund, just as the funds of depositors on the basis of *muḍārabah* are another division, and the shareholders' funds are another division.

Second: What Is Considered Borrowing Money for the Bank

1. Current Accounts

These are called 'demand accounts' in the terminology of conventional banks. They comprise funds deposited by their owners in banks with the intention of having them readily available for immediate withdrawal upon demand without having to give any type of prior notice.[142]

Some Islamic banks have used reverse *murābaḥah* as a product for individuals without having to resort to the interbank money market with its [higher] interbank rate. The overall *fiqh* classification for both is the same: they are considered liabilities of the bank. The question that arises here is whether the liability is upon the general fund of the bank with all its components, or is it only on the shareholders, whose funds comprise only one of the divisions of the bank's general fund?

If we refer to the current practice of Kuwaiti Islamic banks that practice this type of transaction, they treat the funds acquired by reverse *murābaḥah* as current accounts, such that all income earned from them is the right of the shareholders in accord with the proportion they represent of the money in the general fund.

The detailed breakdown of that is that the bank in reverse *murābaḥah* purchases a commodity on behalf of the client and then purchases it from the client with a stipulated markup. The bank then converts the commodity into cash by selling it for spot payment. The proceeds from the sale of the commodity are then placed in the general fund and invested, and [the procedure] creates a liability on the shareholders. They are the ones from whom payment will be demanded; therefore, all returns from the investment of these sums go to the shareholders. Most central banks set the legally permitted rates for this type of transaction because they comprise a liability for the banks.

From the *fiqh* perspective, in my opinion, these funds represent a direct liability on the shareholders in that it is not valid for the bank to purchase these [commodities] for the sake of the *muḍārabah* enterprise and as its liability. This is based on what we previously

[142] Ḥasan ʿAbd Allāh al-Amīn, *Kitāb al-Wadāʾiʿ al-Maṣrafiyyah al-Naqdiyyah wa Istithmārihā fī al-Islām*, p. 209.

mentioned regarding the impermissibility of [the *muḍārib*] making the *muḍārabah* enterprise indebted and that the *muḍārib* does not have the right to purchase for the *muḍārabah* enterprise an amount greater than the original *muḍārabah* capital or more than what remains of it after the work of the enterprise has begun and purchases have been made. An additional point here is that the amounts involved in these reverse *murābaḥah* purchases for the demands of the interbank money market are large; it is thus not possible to consider them as expenses of the depositors.

It is stated in *Al-Mawsūʿah al-Fiqhiyyah*:

> If the *muḍārib* takes on debt, it is his debt liability and it cannot be made the liability of the *rabb al-māl*. That is because this taking on of debt increases the *muḍārabah* capital without the consent of the *rabb al-māl*, and it also increases the liability of the *rabb al-māl* without his consent. That is because the price of what is purchased using the *muḍārabah* capital is the liability of the *rabb al-māl*. The evidence for that is that if the *muḍārib* purchases something using the *muḍārabah* capital and it gets destroyed before its delivery, the *muḍārib* refers to the *rabb al-māl* for [its replacement with] the like thereof. If we were to allow taking on debt for the *muḍārabah* enterprise, we would be imposing an increased liability on the *rabb al-māl* that he did not consent to, which is not permitted. Likewise, it is not allowed to take on debt to fix the assets of the *muḍārabah* enterprise.[143]

The Mālikī scholar Ṣāwī says:

> If he takes on debt to buy merchandise for the *muḍārabah* enterprise or purchases more than the *muḍārabah* capital, the profit is for him—i.e., the *muḍārib*—that is, the profit from that merchandise, and none of it is for the *rabb al-māl*. Likewise, any loss from it would be his liability.[144]

Based on that, all profits from these reverse *murābaḥah* transactions go to the shareholders, as is the practice in Kuwaiti Islamic banks, and they are to be treated like current accounts.

This is what Allah has facilitated for me to explain. If it is correct, it is from Allah alone, and if it is otherwise, it is from me and my limited understanding, and Allah and His Messenger are absolved of it.

Allah is the bestower of ability, and our final prayer is: all praise is for Allah. And may Allah send His peace and blessings on our Master, Muhammad, and on his family and all his companions.

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[143] *Al-Mawsūʿah al-Fiqhiyyah al-Kuwaytiyyah*, (Ministry of Awqaf and Islamic Affairs, Kuwait), 38:58-9.
[144] Ṣāwī, *Ḥāshiyat al-Ṣāwī maʿa al-Sharḥ al-Ṣaghīr li al-Dardīr*, 3:698-701.

8.th topics

The *Fiqh* Solution to Changing the Profit Rate in *Murābaḥah*

His Eminence Shaykh Walīd bin Hādī
His Eminence Dr. Mūsā Muṣṭafā al-Quḍāh

The Eighth Topic

The Fiqh Solution to Changing the Profit Percentage in *Murābaḥah*

Forum Chair: Walīd bin Hādī

It is well known that long-term [contracts] entail high risks when the *murābaḥah* profit rate is fixed. Therefore, banks have resorted to revolving *murābaḥah* to protect themselves against the [possible] harm.

The suggested *fiqh* solution is that the bank raises the *murābaḥah* profit rate and promises to forgo whatever exceeds the index. Therefore, in case the index is equal to 1%, for example, and the established [rate] is 5%, the bank will take a profit of 7%, for example, and forgo 1%. If the index rises by 0.5%, the bank will take a profit of 6.5% and forgo 0.5%. If it goes up another 0.5%, the bank will take 7%. If it goes up more than that, the bank is not allowed to take more than that because the profit rate agreed upon is 7%.

A similar judgment would be pronounced regarding an amount undertaken as a charitable donation. Thus, if the rate is 1%, for example, the bank would raise the rate and promise to forgo [a portion] if the customer pays according to schedule.

As for the profit rates posted in the bank's [accounting] system, there is nothing to prevent the actual profit being different from what is in the contract. That is because the bank's system resembles attestation, so there is no harm in changing it. The contract is a proof for litigation in case of a dispute. The same would be said about the Credit Bureau.

This transaction does not contain interest (*ribā*) or risk (*gharar*) or lack of essential information (*jahālah*) or gambling (*maysir*) or harm or oppression; therefore, it is permissible.

A Promise to Excuse the Purchaser from Part of the *Murābaḥah* Debt upon the Fulfilment of Two Conditions

Dr Mūsā Muṣṭafā al-Quḍāh

The Research Problem

Long-term financing entails a number of risks, including a decline in the value of the currency and delayed settlement of the debt. Conventional banks deal with these risks by raising the interest rate, based on indices like LIBOR. As for Islamic banks, they are not allowed to impose any increase on the client, especially in a *murābaḥah* sale. That is because any increase after the contract has been concluded and the transaction has become a debt liability upon the purchaser is a type of *ribā al-jāhiliyyah* [the type of *ribā* explicitly prohibited by the Qurʾān].

The problem can be summed up in the following two questions:

1. What is the Sharīʿah alternative to dealing with the effects of international indices on Islamic banks?
2. What is the Sharīʿah alternative for the bank to receive compensation for a customer's willful delay of debt settlement?

An illustration of the first question: The bank sells the customer a commodity using *murābaḥah*. The annual profit rate is set at 5% for a period of five years. Thus the overall profit would be 25%. If the purchase cost was 10,000 dinars, the *murābaḥah* price would be 12,500 dinars. If, say, the index goes up 0.5% during the first year, the value of the negative impact would be 50 dinars in the first year.

An illustration of the second question: The bank sells the customer a commodity using *murābaḥah*. The annual profit rate is set at 5% for a period of five years. Thus the overall profit would be 25%. If the purchase cost was 10,000 dinars, the *murābaḥah* price would be 12,500 dinars, divided into 60 monthly instalments of 208 dinars. If the customer misses one instalment during the first year, the bank would lose the opportunity to invest that amount.

An illustration of the suggestion: The *murābaḥah* profit margin is set higher than the prevalent market rate by taking into account the expected future [price movements] during the financing period. The highest anticipated *murābaḥah* price would be adopted; for example, if the prevalent *murābaḥah* price is 5% annually, and it is expected that the index will change by 2% during the financing period, the *murābaḥah* price would be calculated at 7% per year.

Here the bank would issue a promise, after the *murābaḥah* contract has been executed, to give the customer a rebate. This is based upon the agreement of scholars that it is not permitted to forgo a right before the occurrence of its cause. Therefore, it would only be a promise [at this point].

In both cases the subject of the rebate promise would be the added component of the price; i.e., 2%, and it would be contingent upon two conditions. The first is that the index adopted as the measure of change does not exceed the overall value of the debt. This first condition is to deal with the change in the index rate. The second condition is that the customer will pay all the instalments on time. This condition is to deal with the late-payment penalty.

When the payment period is almost finished and the customer has almost completed the instalments, the bank would undertake a squaring of accounts between the amount actually paid and [the amount resulting from] the index rate adopted by the bank. If what the bank has received is less than the calculated result, the bank would continue to collect what remains of the debt owed to it by the customer, and there would be no rebate because one of the two conditions has not been fulfilled. However, the bank is not allowed to take any additional amount from the customer. If the amount the bank has received is equal to the calculated result, the first condition of the rebate has been fulfilled. It then remains to see if the second condition has been fulfilled in order for the bank to implement the rebate and excuse the customer of the difference.

The second condition would be fulfilled if the customer has not missed the payment of any instalment at its appointed time. If they did miss any payments, the bank would calculate the compensation for its missed opportunity and give the customer a rebate for the difference.

Previous Efforts on the Issue

The following was presented at the Forum on *Murābaḥah* with a Variable Profit, convened by Albilad Bank in Saudi Arabia on December 16, 2009 in Riyadh.

Shaykh Dr. Yousef Shubaili (pp. 59-60):

His eminence, as a matter of discussion and response, presented a set of solutions to confront long-term financing problems, including, "the bank's commitment to deduct what exceeded the market profit rate in the event that the customer committed to pay on time". He said that the Sharīʿah Board of Albilad Bank and the Sharīʿah Board of Qatar Islamic Bank adopted this method.

Then he mentioned the evidence for the permissibility of this method, which is:

1. The basic principle regarding conditions in contracts is that they are valid, based on the general import of the Prophet's statement (may Allah's peace and blessings be upon him): "Muslims abide by their terms."[145]
2. The undertaking to reduce [the amount] here is not a stipulation to discount the debt in the event of its early settlement because the debtor deserves the reduction even if he did not settle early. The discount is an incentive for the customer to adhere [to the payment schedule]. It comes under the rubric of *jiʿālah* (remuneration for accomplishing a defined task). It is similar to doubling the wage in a hiring contract as an incentive; for example, to say: 'If you sew the dress today, you will get a dirham, and if you sew it by tomorrow, then you get half a dirham.' A group of scholars has stated that it is valid.[146] There is no usury, deception or ignorance in this matter in that it results in knowledge.

Then his eminence presented the difficulties posed by this method:

1. This commitment is similar to the commitment to discount debt for early settlement. Regardless of the Sharīʿah ruling for that, most contemporary *fiqh* councils prohibit discounting debt for early settlement.[147]
2. Many companies will not accept registering a higher profit on them than the market rate even if the bank commits itself to reducing it.
3. This action is not acceptable from a marketing point of view.

[145] *Sunan Abū Dāwūd*, 3:304, no. 3594. The *ḥadīth* is *ṣaḥīḥ* by considering all its *isnāds*.
[146] Ibn Nujaym, *Al-Baḥr al-Rāʾiq*, 8:35; *al-Kifāyah*, 8:71; Ibn Qudāmah, *Al-Mughnī*, 6:334.
[147] Islamic Fiqh Academy of the OIC, Resolution No. 66 (2/7).

Shaykh Dr. Abdul Sattar Abu Ghuddah (pp. 160-1)

His eminence mentioned in his comment on the research of Dr. Yousef Shubaili (*Murābaḥah* with a variable profit), what he called an alternative under [a different] principle. It is as follows: "Selling at a specified price, and a gift contract for a portion of the deferred price contingent upon a price change or on a certain index. This is whether the portion is specified or is also linked to an indicator, based upon some juristic schools permitting both contingency and [quantitative] ignorance in a gift.

His eminence stated that he made this proposal to the Sharīʿah Supervisory Board of Al Hilal Bank, and the Board ended up accepting it on the condition that "the *murābaḥah* not be linked with the contingent gift contract," and that was in the fourth meeting minutes, numbered 15/186/11/2009.

His eminence adds:

> There is no [Sharīʿah reason to] prevent the combination of a sale and a contingent gift contract. That is because the contingent condition makes the contract that it entered upon as if it was nonexistent; thus there is no actual combination. The buyer's disposal here by means of various contracts and behaviors, such as sale or debt transfer,...causes forfeiture of the contingency. That is because one of the conditions for it to take effect is that its locus remain, and its leaving his ownership takes the rule of destruction….This is known in a sale with the option of annulment—which is stronger and more prominent than a contingent condition. [The option] is forfeited by any disposal that transfers ownership.

His Eminence Shaykh Dr. Sami Suwailem (p. 128)

His eminence mentioned among the alternatives to "*murābaḥah* with variable profit" what he called fixing the upper limit, and [mentioned] that this formula is present and applied in some Islamic banks. Its basis is that [the price of] "the deferred payment sale be fixed at the higher margin according to the prevailing expectations when contracting; then the margin is reduced according to what the two parties agree to at the time. If the reduction is not agreed upon, the two parties will return to the contract."

His Eminence Shaykh Dr. Yousef Shubaili's discussion of what was presented by the two Shaykhs (Abu Ghuddah and Suwailem)

He said that this method leads to "*murābaḥah* with variable profit" because the result is that the bank will not take from the client any more than the prevailing profit margin in the market at the time of payment. However, this method has a more serious problem than "*murābaḥah* with variable profit", which is that it may be used as a means to take penalties for delayed payment. That is because the rebate is contingent upon [timely] payment; thus, if he does not pay [on time], the agreed-upon margin will be taken in full without any rebate. [That is] different from the method of "*murābaḥah* with variable profit", for in [the latter] there can be no increase on the existing margin at the time of payment.

Subject: The ruling on forgiving part of the debtor's debt in exchange for early payment/ Fatwa No. 2392

Question:

I wrote a person a check for a thousand dinars, and I paid eighty dinars of it to him. The owner of the check then said: "Pay seven hundred in cash, and I will forgive the rest; otherwise, I will bring the matter to court." What should I do?

Answer:

A check is called *ṣakk* in the Arabic language. Perhaps this word is of Arabic origin. Its nature is that a person who owes a debt to another person writes a document in which he recognizes that debt. Almighty Allah has commanded Muslims to do so in order to protect their rights from loss, saying: "O Believers, when you contract a debt for a fixed term, you should put it in writing" (Al-Baqarah: 282). And He ordered witnessing of the debt.

The debt may be current (i.e. payment is due at the present time without delay), or it may be deferred (i.e., payment is due after a certain period). In this question, it was not clear whether the debt is current or deferred. But the problem is that the one who wrote the check has no balance in the bank. This is a crime in the established laws, and punishable by law, while if it was a bond for the amount, it would not be required to have a balance in the bank. Creditors ask for a bank check as a way to pressure the debtor to pay the debt at the appointed time. Here the debt was a thousand dinars, so he gave him a check; then he paid 80 dinars of the

debt, and 920 dinars remained. [The creditor] was supposed to wait until the time to pay the installments, but he did not do so. He wanted to collect (700) dinars instead of (920) and forgive (220) dinars. He waives something of his right in exchange for early payment and forces the debtor to do so by threatening to submit the matter to the court.

If the debt is deferred, and he wants by this method to speed up the payment of the debt, it is what the jurists call the issue of 'discount and hasten' (*ḍaʿ wa taʿajjal*). In other words, the debtor says to the creditor: "Reduce the debt, and I will expedite your payment." And if the debt is not postponed, it is a kind of conciliation in which some debt is forgiven in exchange for non-procrastination.

In the first case, the Shāfiʿī jurists said: It is a rebate of part of the debt, contingent upon accelerated settlement. It is as if he told him: "I will forgive you part of the debt if you hurry up in paying the rest." It is not valid to make the rebate contingent upon a condition. The debtor may expedite the payment because the term is in his interest, and he may waive this interest, and the creditor may accept this acceleration. Likewise, the creditor's waiver of some of his right, i.e., the discharge of some of the debt, is permissible, but it does not take place if it is made contingent upon a condition. Here the creditor stipulated expedited payment of part of the debt as a condition for forgiveness of the other part; therefore, the discharge (*ibrāʾ*) was invalid.

If the debtor were to pay some of the debt and [the creditor] were to forgive the rest, the settlement would be valid and the rebate would be valid, and the relationship between them will have ended. But if the debtor pays some of the right and the creditor does not agree to acquit him of the rest, there is nothing to take the creditor to court for. That is, the debtor cannot use the power of the judiciary to compel him to discharge the remainder. However, he is morally sinful because he broke the promise, and given that [the debtor] expedited the settlement in anticipation of the rebate but did not receive the rebate, he may recover what was paid if the debt was deferred as is postulated in the [presentation of the] issue, and the creditor's threat to take him to court is unjust.

The summary of the answer to the first case is:

If the debt is deferred and the debtor pays some of it for fear of litigation and the creditor forgives him of the rest, the rebate is valid, the settlement is valid, and the creditor is sinful. That is because he forced the debtor to pay before the term if the debt was deferred for a

known time, and there is nothing on the debtor because he did not oppress anyone, and this is not classified as usury; rather, it is a waiver of some of one's right.

In the second case (i.e. if the debt is current), the creditor is demanding his right, and his coercion of the debtor is not coercion to do what is not required. If the debtor pays some of the debt and the creditor forgives him for the rest, then the settlement is valid and the discharge is valid and there is no sin on either of them. However, the creditor missed out on the blessing of the supplication of the Prophet (may Allah's blessings and peace be upon him): "May Allah have mercy on a servant who is magnanimous in his selling, magnanimous in his purchasing, magnanimous in his settlement [of debt], and magnanimous in seeking payment" (Ibn Ḥibbān). He also missed the blessing of acting in accord with the statement of Almighty Allah: "And if he is hard-pressed, give him respite" (Al-Baqarah: 280), and he did not give him respite.

Fatwas of His Eminence Shaykh Nuh Ali Salman (Transaction Fatwas / Fatwa No. 26)

The Most Important Issues Included in the Format of This Issue

The format of the issue includes a set of issues that must be presented, even if briefly, in an attempt to form a sound juristic opinion, the most important of which are the following:

The first issue: Is it permissible to give rebate of an unknown amount?

The second issue: Is it permissible to make the rebate contingent upon a future condition?

The third issue: Is it permissible for the debt relief to be made contingent on the condition that some of it be paid?

The fourth issue: Is it valid to give a rebate before the existence of its cause?

The First Issue: Is It Permissible to Give Rebate of an Unknown Amount?

The promise of rebate is made contingent, when making it, on two conditions, each of which makes it impossible to predict the amount of the rebate; therefore, the amount of the rebate at the time of the promise is unknown, although it becomes known when the two conditions are met. This then calls for research into the extent of permissibility of a rebate of an unknown amount.

Scholars have two views on whether it is required that a rebate be of a known amount.

The first view: It is not required that it be known. Those who took this view were the Ḥanafīs,[148] the Mālikīs,[149] and the Ḥanbalīs.[150] They consider it correct to give a rebate of an unknown amount and attribute, even if it is not impossible to know.

Their argument: It is the waiver of a right or a pure waiver, like emancipation or divorce, which are implemented with or without full knowledge. Thus, if he absolved him of one of two debts, the waiver is valid. But the Ḥanbalīs said: If the debtor conceals the debt from the creditor for fear that if the creditor knows the [amount of the] debt he would not absolve him, and the creditor is ignorant of it, the rebate is invalid. That is because it entails beguilement of the giver of the rebate and it is possible to avoid it.

The second view: It is required that it be known. That was the Shāfiʿīs' view in the new *madhhab.*[151] A rebate is invalid when it is unknown, whether the ignorance is with regard to type, amount, or attribute.

Their argument: A rebate is a conveyance of property and thus requires consent, and how can there be consent with ignorance?!

According to them, the way to make a rebate valid by freeing it of ignorance is to absolve him of more than the expected amount. If he does not know whether [the debtor] owes him five or ten, he should absolve him of eleven.

Accordingly, the solution in our issue would be for the bank to promise the client a rebate of the full amount that corresponds to the increase in the prevailing *murābaḥah* price; i.e., the promise is for a rebate of 2%.

Exceptions to the invalidity of an unknown rebate are:

1. The waiver of a blood-money payment in the form of camels is valid, even if the attributes are unknown, because the ages and number are known; therefore, their attributes would be referred to the majority of camels in the country.
2. If he absolves him after his death, it is valid with ignorance because it is a will.

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[148] *Takmilat Ibn ʿĀbidīn*, 2:182-3.
[149] Dardīr, *Al-Sharh al-Kabīr maʿ Ḥāshiyat al-Dusūqī*, 3:411.
[150] Buhūtī, *Kashshāf al-Qināʿ*, 4:336.
[151] Sharbīnī, *Mughnī al-Muḥtāj*, 2:202, passim; Qalyūbī, *Ḥāshiyat al-Qalyūbī*, 2:326, passim.

The Second Issue: Is It Permissible to Make the Rebate Contingent upon a Future Condition?[152]

Since the promise of rebate in our issue is contingent on a condition and appended to the future, it requires clarification of the jurists' opinions regarding this:

Scholars have two views on the issue:

The first view: That is not permitted. It is required for its validity that it be immediately executed. This is the opinion of the Ḥanafīs, Shāfiʿīs and Ḥanbalīs.[153]

Their argument: because a rebate carries the meaning of conveyance of ownership, and conveyance does not accept contingency. Contingency is only legitimate in a pure waiver of right.

As for contingency upon a condition:

1. If it is contingent on a condition that already exists, it takes the ruling of an executed [rebate].
2. If it is on an appropriate condition, such as: "If I am owed a debt by you, or if I die, then you are absolved of it," it is permissible by consensus. The evidence for it is the statement of the Companion Abu al-Yusr to his debtor: "If you find the means to pay, then pay; otherwise, you are absolved." No one objected to that. Included in this is the Ḥanafī position regarding absolution from a guarantee or a transfer of debt in a situation where the creditor says to the guarantor: "If you pay me the debt tomorrow, you will be absolved of the guarantee." If he does pay it the next day, he would be absolved of it.
3. If he makes it contingent on death, it is valid in the view of the Ḥanafīs and Ḥanbalīs because it has the meaning of a bequest, and a bequest of absolution from debt is permissible.

[152] Contingency on a condition means linking the existence of one thing to the existence of another. [The absence of the condition] would prevent the contract from taking effect.

[153] *Takmilat Fatḥ al-Qadīr*, 7:41, passim; Ḥaskafī, *Al-Durr al-Mukhtār*, 4:146; *Takmilat Ibn ʿĀbidīn*, 2:330; *Al-Fatāwā al-Hindiyyah*, 4:378, 384; Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 6:45, 50, 118; Dasūqī, *Ḥāshiyat al-Dasūqī*, 2:307, 4:89, 99, 100; ʿUlaysh, *Fatḥ al-ʿAlī al-Mālik*, 1:229, 322, 335; Suyūṭī, *Al-Ashbāh wa al-Naẓāʾir*, p. 152; Nawawī, *Al-Majmūʿ*, 10:100; Qalyūbī, *Ḥāshiyat al-Qalyūbī*, 2:292, 3:45, 83, 310, 4:368; Buhūtī, *Kashshāf al-Qināʿ*, 3:305, 4:337; Ibn Qudāmah, *Al-Mughnī*, 4:483, passim, 5:564; Sharbīnī, *Mughnī al-Muḥtāj*, 2:66.

4. If the absolution from debt is made contingent on a condition recognized by custom, it is not permissible in the Ḥanafī School, although it is permissible according to some Ḥanafīs.

The second view: It is permissible to make absolution from debt contingent on a condition without restriction. That was the Mālikī position.[154]

Their argument: Because it has the meaning of waiving a right.

The Third Issue: Is It Permissible for the Debt Relief to Be Made Contingent on the Condition That Some of It Be Paid?

This has various scenarios; the first is:

1. The absolution is issued on the condition that the remainder be paid. This is not allowed according to the majority, but it is permissible according to the Mālikīs, as indicated in the ruling on contingency.

2. The absolution is issued free of any condition; for example, if the debtor acknowledges the debt he owes, and the creditor says: "I have absolved you of half or a third of it, so give me the rest," the absolution is valid by consensus. That is because it is accomplished, not suspended or bound by a condition, and the absolver is voluntarily waiving some of his rights. And it has been authentically reported that the Prophet (may Allah's blessing and peace be upon him) said to Kaʿb: "Forgo half of your debt."[155]
3. The absolution is issued on the condition that the rest be paid; for example, when someone who is owed a thousand says to [the debtor]: "I have absolved you of five hundred, provided you pay me the remainder."

The jurists have two opinions about this scenario:

The first: It is permissible. This was the position of the Ḥanafīs, Mālikīs and Shāfiʿīs. That is because it is payment of part and absolution of the rest. The Shāfiʿīs stipulated that the terms 'absolution' and 'conciliation' be combined in the pronouncement in order to make it a form of conciliation. However, it does not need acceptance, given the pronouncement of absolution.

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[154] Dasūqī, *Ḥāshiyat al-Dasūqī*, 2:307, 4:89, 99, 100; ʿUlaysh, *Fatḥ al-ʿAlī al-Mālik*, 1:229, 322, 335.
[155] *Ṣaḥīḥ al-Bukhārī* and *Ṣaḥīḥ Muslim*.

The second: It is not permissible. This was the Ḥanbalī position, because he absolved some of the right in exchange for the rest of it, so it as if he exchanged some of his right for some of it.

The Fourth Issue: Is It Valid to Give a Rebate before the Existence of Its Cause?

The jurists agreed that absolution is invalid before its cause exists,[156] as it is meaningless to waive something that doesn't exist; therefore, the discharge is only a promise.

In our issue: The cause of the absolution is the establishment of the debt as the liability of the *murābaḥah* purchaser, and it occurs after the *murābaḥah* sale contract has been executed; thus, the absolution may not be issued before that.

In this case, the bank will issue a promise of rebate before the *murābaḥah* contract is signed, and it will be made contingent on what we mentioned previously.

And all praise is for Allah, the Sustainer of the universe.

[156] See Zuhayli, *Al-Fiqh al-Islāmī wa Adillatuh*.

9.th topics

The Turkish Experience in Buying and Selling Gold

His Eminence Walīd bin Hādī
His Eminence Dr. Ismāʿīl Halitoglu

Topic Ninth

The Turkish Experience in Buying and Selling Gold

Forum Chair: Walīd bin Hādī

Gold is called *tibr* before it is crafted and *sabīkah* (bullion) if impurities are removed from it and it is given a shape. It is called *maṣūgh* (crafted), *ḥily* (jewelry) *mashghūl* (processed) if it has been worked by a goldsmith, and *maḍrūb* if it is turned into coins.

Gold is considered fungible (*mithlī*) if it has not been crafted; it is considered non-fungible (*qīmī*) if it has been crafted but lacks standardized attributes. It may be particular (*muʿayyan*) even if it is a common share [of particular gold], or it may be a debt (*dayn*) if it is from a loan.

The methods of identifying it include bullion numbers, or marks and attributes that distinguish it from other samples, or certificates of ownership that indicate this, even if it is a common share by specifying the percentage of that common share.

There is no ambiguity regarding the permissibility of selling an identified specimen on the condition that the price is received [immediately].

As for *qarḍ* (loan), it is the provision of property to one who makes use of it and returns a replacement for it,[157] whether it is fungible or non-fungible. If it is fungible, such as what is sold by measure or weight, or gold or silver coins, its equivalent [amount] must be returned. It is also permissible to return the same [item loaned], and the lender must accept it if it has not become defective. If it has developed a defect, he is not obliged to accept it, and in that case its equivalent must be returned, even if its price has increased or decreased, as in the case of a *salam* sale. It is stated in *Al-Inṣāf:* "There is an opinion that he must return the value if the price decreases."[158] Ibn ʿĀbidīn said "[The borrower] is obliged to return the value of what he borrowed in dirhams (silver coins) on the day of the sale and receipt; that is the opinion chosen for the fatwa [of the Ḥanafī School]."[159] It is stated in *Ḥāshiyat al-Rawḍ al-*

[157] Ḥāshiyat al-Rawḍ al-Mirbaʿ, 5:36.
[158] Mardāwī, *Al-Inṣāf fī Maʿrifat al-Rājiḥ min al-Khilāf*, 5:127
[159] Ibn ʿĀbidīn, *Ḥāshiyat Radd al-Muḥtār*, 5:269

Mirbaʿ: "Shaykh al-Islām Ibn Taymiyyah and Ibn Qayyim are in favor of returning the value"[160]

The argument for this opinion is that depreciation is a defect; therefore, accepting it is not mandatory, similar to wheat that has gotten wet.

If the similar [coin] is lacking, meaning he is unable to provide it, then it becomes imperative to return its value on the day it became impossible [to return that coin]. That is because it is the day when it was an obligatory financial obligation on him. According to another opinion of [Ibn Taymiyyah], he is liable for its value on the day he received it.

If something is not fungible and not valid to be the subject of a forward sale (*salam*), such as jewels and the like, which do not have standardized attributes, the value on the day of receipt must [be returned]. In case it is valid to be the subject matter of a forward sale, then the value on the day of the loan [contract] is obligatory. This opinion is emphatically affirmed in *Al-Tanqīḥ* and *Al-Muntahā* while *Ghāyat al-Muntahā* emphatically affirmed that it is mandatory to return the value on the day the loan is received, even if what is loaned is not valid to be the subject of a forward sale.

Based on the previous detail, it is permissible to lend gold in the current account, irrespective of whether the gold is fungible or non-fungible, [in the latter case] having been altered by workmanship and not of standardized attributes. If it is fungible, [the lender] deserves the equivalent. If he deposits one thousand grams in the current account, he can take back the equivalent, not what he actually deposited. He can sell [his deposit] to the bank/debtor/borrower, and it is called an exchange (*ṣarf*) of debt for a commodity; i.e., the money that is deposited in the current account in exchange for the gold being sold. After the bank's accounting for the transaction is confirmed and it becomes possible to dispose of it, the constructive possession in the exchange transaction (*ṣarf*) is completed, and then it becomes a loan.

[160] *Ḥāshiyat al-Rawḍ al-Mirbaʿ*, 5:43.

If the gold has been processed, the workmanship could be undone by the owner [by melting it], or he could authorize the bank to do it for a fee. It would then take the ruling of a fungible good. Alternatively, if the workmanship persists, then the previously mentioned ruling on the loan of a non-fungible item would apply. It is also permissible to sell it to the bank, in which case it is an exchange (*ṣarf*) of debt for a good.

The Turkish Experience in Buying and Selling Gold

His Eminence Dr. Ismāʿīl Halitoglu

In the name of Allah, the Beneficent the Merciful

All praise is due to Allah; we praise Him, seek His help and forgiveness, and seek refuge in Allah from the evil of our souls and the evil of our deeds. Whoever is guided by Allah cannot be led astray by anyone, and whoever is led astray [by the will of Allah] cannot be guided by anyone. I bear witness that there is no deity worthy of worship except Allah alone, without partner, and I bear witness that Muhammad is His servant and messenger. May Allah's blessing and peace be upon him, his family, and his companions.

To proceed: the Sharīʿah is valid for every time and place, encompassing all aspects of life. It left no provision unaddressed, either by explicit or indicative evidence, and by means of comprehensive principles or detailed rulings on specific matters.

The wisdom of Almighty Allah dictated that new cases and issues would arise which are not specifically addressed by textual evidence. These are to be referred to general textual evidence and Sharīʿah principles in order to determine the Sharīʿah rulings for them.

Among those issues are developments and unprecedent issues related to gold and silver. The clarification of their Sharīʿah rulings requires referring them to Sharīʿah principles and texts. Modes of dealing in both of them—including their sale, purchase and possession—have changed. This is especially the case for Islamic banks, wherein dealing in gold and silver began to spread along the lines of dealing in fiat money, as in current and investment accounts, in addition to investing in gold and silver.

We, in this humble research will look at the experience of Turkish banks in dealing with gold by focusing on the gold-related products of Kuveyt Turk Bank. These include current accounts, investment accounts, and the sale of gold through automated teller machines (ATMs), whether the possession is constructive or physical, and their practical steps. We present this for discussion so as to contribute to the research, invite comments and take the opinions of Islamic jurists and scholars who are specialists in this field.

We ask Allah to inspire us with what is correct, protect us from error, and guide us to what is good and righteous. How excellent the patron, the enabler and the granter of help.

First, we shall review some concepts particular to [Sharīʿah] rulings on gold.

The Definition of Gold

Gold is the well-known precious metal. It is originally a fungible good sold by weight. It is one of the commodities to which the rules of *ribā* apply, and the rulings of exchange (*ṣarf*) apply to it.[161]

Gold may be *tibr*, *musāgh*, *sabīkah* or *madrūb*; it may be fungible or non-fungible, as it may be specified or a debt [liability].

1. Tibr

Lexically, it refers entirely to gold. In another opinion, it could be of gold, silver, or any of the substances of the earth, such as copper, brass, glass, and other things that are extracted from minerals, before they are smelted and used.[162]

The technical meaning does not differ from the lexical meaning. Technically, *tibr* also refers to gold and silver before they are minted as coins. If they are minted, they are called *ʿayn* (tangible money). *Tibr* may also be used to refer to other minerals such as copper, iron and lead, but it is mostly used to refer to gold. In the opinion of some scholars, *tibr* is originally used for gold but is used secondarily and metaphorically for others.[163]

2. Al-Maṣūgh

Lexically, *ṣāgha* means to shape, mold or fashion….*Ṣiyāghah* is the craft of jewelry-making from silver, gold and the like. Well-crafted speech is called *ḥasan al-ṣiyāghah*.[164] Technically, a *ṣawwāgh* is a silversmith or goldsmith.[165]

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[161] AAOIFI, *Al-Maʿāyīr al-Sharʿiyyah*, p. 1329.
[162] Ibn Manẓūr, Lisān al-ʿArab. 4:88; Fārābī, Al-Ṣiḥāḥ Tāj al-Lughah wa Ṣiḥāḥ al-ʿArabyyah, 2:600; Rāzī, Mukhtār al-Ṣiḥāh, p. 4.
[163] Fayūmī, Al-Miṣbāḥ al-Munīr, p. 172; Ibn Athīr, Al-Nihāyah fī Gharīb al-Ḥadīth wa al-Athar, 1:179; Saʿdī Abū Ḥabīb, Al-Qāmūs al-Fiqhī Lughatan wa Iṣṭlāḥan, p. 48.
[164] Rāzī, *Mukhtār al-Ṣiḥāh*, p. 180, Majmaʿ al-Lughah, *Al-Muʿjam al-Waṣīṭ*, p. 529.

3. Sabīkah

Lexically: *sabīkah* is the singular form; the plural is *sabīkāt* and *sabāʾik*.

Sabīkah is an ingot of gold or silver cast in a known shape, such as bars and the like. Some said: any rectangular piece of metal.[166] *Nasīk* is said to be gold; it may also be used to refer to silver. Ibn Aʿrābī said: "*Nusak* [means] silver bars; each bar is called a *nasīkah*. A devout worshiper is called a *nāsik* because he purifies himself of the impurities of sins just like an ingot is refined of impurities."[167]

Technically: *nasīkah* is a pure silver ingot (*sabīkah*).[168]

4. Ḍarb

Dār al-Ḍarb: the place where metal currency is minted by the government, including: *fils*, a type of minted currency from [minerals] other than gold and silver. *Wariq* are the coins minted from silver.[169]

5. Mithlī

[Lexically,] *mithl* (pl. *amthāl*): similar, equivalent; the similarity between the *mithl* and the original is in all attributes. [Technically:] *mithlī* is that for which the exact equivalent can be easily obtained.[170] In another opinion: *mithlī* is something the like of which is available in the market without any significant disparity.[171] According to Nawawī: *mithlī* is what is sold by measure or weight and can be the subject matter of a forward sale (*salam*).[172]

6. Qīmī

Qīmī: an adjective derived from *qīmah* (price). It is—according to the Shāfiʿīs—the opposite of fungible; for example, animals and agricultural products and things sold by number where there is considerable variation [between individual items]; also, what is sold by weight when dividing it would cause loss. It also includes gold and silver that have been crafted.[173]

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[165] Barkatī, *Al-Taʿrīfāt al-Fiqhiyyah.*
[166] ʿAbd. Ḥamīd ʿUmar*, Muʿjam al-Lughah al-ʿArabiyyah al-Muʿāṣirah*, 2:1030
[167] Ibn Manẓūr, *Lisān al-ʿArab*, 10:499.
[168] Saʿdī Abū Ḥabīb, *Al-Qāmūs al-Fiqhī Lughatan wa Iṣṭlāḥan*, p. 352,
[169] Ibid., p. 378; Barkatī, *Al-Taʿrīfāt al-Fiqhiyyah*; Fayūmī, *Al-Miṣbāḥ al-Munīr*, p. 2:655.
[170] Qalʿajī, Muḥammad Rawwās, *Muʿjam Lughat al-Fuqahāʾ*, p. 404.
[171] Barkatī, *Al-Taʿrīfāt al-Fiqhiyyah*, p. 194.
[172] Nawawī, *Taḥrīr Alfāẓ al-Tanbīh*, p. 193.
[173] Saʿdī Abū Ḥabīb, *Al-Qāmūs al-Fiqhī Lughatan wa Iṣṭlāḥan*, p. 311.

Qimī: non-fungible, in *fiqh* terms, it is something for which no equivalent can be found in the market, or it can be found but with a significant disparity in the price.[174]

7. Mushāʿ

Lexically, *mushāʿ*: common, shared, vague and unspecified.[175]

Technically: *mushāʿ* is that which contains common shares.[176] In another opinion: It is a share distributed in every part of a thing, or a calculated share that is neither specified nor separated.[177] In another opinion: The right established in every part of a thing.[178]

8. Qarḍ

Lexically: *qarḍ* means to cut, because the lender takes part of his money and gives it to the borrower. It is a sum of money he gives him to be paid back.[179]

Technically: a special contract entailing the payment of fungible property to another on the condition that he will pay back its exact equivalent.[180] Therefore, the loan contract is concluded on something having an equivalent, such as what can be measured by volume or weight or can be counted with no significant disparity [between individual items]. Therefore, it is not permissible to conclude a loan contract on subject matter without exact equivalents such as agricultural products and what is sold by number but has great disparity. That is because there is no way to require the return of the same item or the return of the value since it will lead to dispute due to the difference in value; different valuators are bound to differ in their valuation of such items. It follows then that returning the exact equivalent becomes mandatory in this case. Based on that, its permissibility is restricted to things having an exact equivalent.

It is permissible to return the same item if it is available and has not changed or become defective. In this case the lender is obliged to accept it if it is fungible because [the borrower] returned it with the [exact] attributes of [the lender's] right. Therefore, he is obliged to accept it as in a *salam* contract, even if its price has changed, even by depreciation. Mardāwī said:

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[174] Barkatī, *Al-Taʿrīfāt al-Fiqhiyyah*, p. 179; Qalʿajī, *Al-Taʿrīfāt*, p. 374.
[175] Majmaʿ al-Lughah, *Al-Muʿjam al-Waṣīṭ*, 1:504.
[176] Barkatī, *Al-Taʿrīfāt al-Fiqhiyyah*, p. 206.
[177] Qalʿajī, Muḥammad Rawwās, *Muʿjam Lughat al-Fuqahāʾ*, p. 430
[178] Ibid., p. 268.
[179] Ibn Manẓūr, *Lisān al-ʿArab*, 7:217.
[180] Kāsānī, Badāʾiʿ al-Ṣanāʾiʿ fi Tartīb al-Sharāʾiʿ; Saʿdī Abū Ḥabīb, Al-Qāmūs al-Fiqhī Lughatan wa Iṣṭlāḥan, p. 300.

"In one opinion, he is obliged to accept the value if the price declines."[181] Ibn ʿĀbidīn said: "According to Abū Yūsuf, it is mandatory to return its value on the day he received it, and this is the opinion accepted for fatwa [in the Ḥanafī School]."[182]

But if it changes or becomes defective, such as wheat that gets wet or musty, then he does not have to accept it because he would have to incur loss, as it is less than his right. The same applies if the loan is base-metal coins or silver coins that the ruler has prohibited people from using in transactions, whether people have all agreed to stop transacting with it or not. That is because it is like a defect, so he does not have to accept it.[183]

In *Al-Inṣāf*, [the author] added: "He is entitled to the value at the time of the [conclusion of the] loan contract. This is the opinion of the [Ḥanbalī] School and is authoritatively asserted as such in *Al-Irshād*."[184]

The Shāfiʿī scholar Māwardī said:

If the [subject matter of the] loan becomes defective while in the possession of the borrower, and the loan was of something requiring return of the exact equivalent, the lender would have a choice. He could either take back what he loaned with the defect and without compensation, or he could receive the equivalent without defect. If the loan was of something that requires return of the value, [the lender] is allowed to return what was loaned with its defect along with compensation for the defect.[185]

It is permissible to make a loan of *fulūs*[186] because it is sold by number without significant disparity [between individuals], like walnuts and eggs. If he borrowed *fulūs* and it is subsequently no longer accepted in transactions, [the borrower] is obliged to pay the exact equivalent [of the same coin] according to Abū Ḥanīfah (may Allah have mercy on him). But in the opinion of both Abū Yūsuf and Muhammad [ibn Ḥasan Shaybānī] (may Allah have mercy on them), he is obliged to return its value. That is because the obligation in a loan contract is to return the equivalent, which he is unable to do. That is because what was received was a price (money), and this function has been invalidated due to *kasād* (lack of

[181] Mardāwī, *Al-Inṣāf fī Maʿrifat al-Rājiḥ min al-Khilāf*, 5:217.
[182] Ibn ʿĀbidīn, *Ḥāshiyat Radd al-Muḥtār*, 5:163.
[183] Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ fī Tartīb al-Sharāʾiʿ*, 7:395.
[184] Mardāwī, *Al-Inṣāf fī Maʿrifat al-Rājiḥ min al-Khilāf*, 5:127.
[185] Māwardī, *Al-Ḥāwī al-Kabīr*, 5:355.
[186] Editor's note: the term *fulūs* was originally used to refer to base-metal coins. It is now used to refer to fiat money.

acceptance of it in transactions). Thus, he cannot return the equivalent [amount of the same coin] so he is obliged to return the value.[187]

If the equivalent [coin] can no longer be found, the borrower is required to pay the value on the day it became unavailable. That is because it then became a financial obligation. It is as if he borrowed fresh dates, and later they could not be found in people's possession; in this case, he is required to pay their value.[188]

If it is a non-fungible good and is not valid to be the subject matter of a *salam* contract; for example, jewels and other items having non-standardized attributes, what must be paid is the value on the day of its collection. That is because its value is volatile over a short period, depending on whether the number of those interested in it are few or many. As a result, the lender will incur a loss when it depreciates while the borrower will incur a loss when it appreciates greatly. If it is something that can be the subject matter in a forward sale, it is mandatory to return the value on the day the loan contract was concluded.[189]

9. Qabḍ

Lexically: *qabḍ* of something means to receive it. *Qabḍ* also means the opposite of *basṭ*, to extend. When it is said that something is in your *qabḍ*, or *fī qabḍatika*, it means it is in your possession.[190]

Technically: *qabḍ* of something means to receive it: to take it in hand so as to be able to dispose of it.[191]

Qabḍ is the completion of receipt; originally, it meant to collect by hand, but the borrowed, extended meaning refers to receipt of something even if the hand is not literally considered, as in: I received the house from so-and-so; i.e., I took possession of it.[192]

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[187] Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ fī Tartīb al-Sharāʾiʿ* 6, 7:395 ; Buhūtī, *Kashshāf al-Qināʿ*, 3:315.
[188] Ibid.
[189] Buhūtī, *Kashshāf al-Qināʿ*, 3:315.
[190] Ibn Manẓūr, *Lisān al-ʿArab*, 7:213; Rāzī, *Mukhtār al-Ṣiḥāh*, p. 246.
[191] Qalʿajī, Muḥammad Rawwās, *Muʿjam Lughat al-Fuqahāʾ*, p. 366.
[192] Manāwī, *Al-Tawqīf ʿalā Muhimmāt al-Taʿrīf*, ed. ʿAbd al-Ḥamīd Ḥamdān, p. 267.

How Is Receipt Realized?

Receipt is effected by obtaining [something] physically or legally, and the manner by which things are received depends on their circumstances and varying norms with respect to what is considered to be something's receipt. Physical receipt is achieved by delivery by hand, while legal receipt takes place constructively by removing impediments to access and enabling [the recipient] to dispose of [the item], even if there is no physical receipt.[193]

General Rulings on the Receipt of the Counter-values in the Ṣarf Contract

It is stated in the resolution of the Islamic Fiqh Academy of the Organization of Islamic Cooperation:

After reviewing the research papers received by the Academy on the subject of receipt (*qabḍ*), its forms, especially the unprecedented ones, and its rulings; and after listening to the discussions conducted with respect to the papers, the following is decided:

First: The receipt of properties may be physical, as in the case of receipt by hand, or the weighing or measuring of foodstuff, or transport and transfer to the possession of the recipient. It may also be achieved constructively and legally by removing impediments to access and enabling [the recipient] to dispose of [the item], even if there is no physical receipt. The manner by which things are received depends on their circumstances and on varying norms regarding what constitutes receipt of something.

Second: Among the forms of legal receipt recognized by Sharīʿah and custom:

1. The bank's recording of an amount of money in the customer's account in the following cases:
   a. If an amount of money is deposited into the customer's account directly or by bank transfer.
   b. If the customer concludes an immediately effective *ṣarf* (exchange) contract between him and the bank by purchasing one currency with another for the customer's account.
   c. If the bank—by order of the customer—deducts an amount from his account in favor of another account in another currency in the same bank or another for the benefit of the customer or another beneficiary, the banks must observe the rules of the *ṣarf* contract in Islamic law.

A delay in the bank's recording of the amount in the customer's account shall be forgiven when the beneficiary is able to actually receive it within the periods recognized by custom in the transacting markets. This is on the condition that the beneficiary is not allowed to dispose of the currency during the forgiven period until after the bank records the amount as being available for withdrawal.

[193] AAOIFI, *Al-Maʿāyīr al-Sharʿiyyah*, p. 59.

2. The check is received if it has a withdrawable balance in the currency in which it is written when it is paid and booked by the bank.[194]

Rulings on the Sale of Gold

1. Exchange of gold for gold

Islamic jurists use the term *al-naqdayn* (the two forms of cash) for gold and silver, whether in the form of ingots, nuggets, jewelry, or minted as gold or silver coins. That is why they stipulated the *niṣāb* (minimum amount) and *naqd* (cash) as conditions for the obligation of zakat on buried treasure (*rikāz*).[195]

Ṣarf

The sale of one medium of exchange for another is called *ṣarf.*

Ṣarf has several lexical meanings, including:

1) *Takhliyah*: to release.
2) *Infāq*: to spend.
3) *Bayʿ*: to trade, as in trading gold for silver coins. A *ṣayrafī* or *ṣayraf* or *ṣarrāf* is a moneychanger.[196]

Technically, *ṣarf* is the sale of one medium of exchange for another medium of exchange, whether of the same type or a different type. It therefore includes sale of gold for gold, silver for silver, and gold for silver.[197]

Conditions of *Ṣarf*

1. *Tamāthul* (Symmetry)

Sale of gold for gold is permissible, on condition that they are equal in weight and without regard to quality and age, and on the condition that each party receives their counter-value as required by

[194] Organization of Islamic Cooperation, Islamic Fiqh Academy, Decisions and Recommendations of the Council of the International Islamic Fiqh Academy, sessions 2-19, reviewed by Aḥmad Abd al-Ḥalīm, General Secretariat of Endowments, Shāriqah, 2011, p. 199.
[195] Ramlī, *Nihāyat al-Muḥtāj ilā Sharḥ al-Minhāj*, 3:98.
[196] Fayūmī, *Al-Miṣbāḥ al-Munīr*, p. 1:338; Zayāt, *Al-Muʿjam al-Wasīṭ*, p. 513.
[197] Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ fī Tartīb al-Sharāʾiʿ* 5:215.

the Sharīʿah. Therefore, a differential exchange of gold for gold is forbidden,[198] based on the statement of the Prophet (may Allah's blessings and peace be upon him): "Do not sell gold for gold except by equal exchange, or silver for silver except by equal exchange."[199]

2. *Taqābuḍ* (Receipt [of the Counter-values])

Differential sale of gold for silver is permissible; i.e., there is no requirement that the amounts be equal. Likewise sale of gold for fiat money is permissible at any agreed price. This is provided the receipt required by the Sharīʿah is fulfilled in both cases, based on the statements of the Prophet (may the blessings and peace of Allah be upon him):

1) "Gold for gold and silver for silver, like for like, equal for equal, hand to hand (on the spot)."[200]
2) "Silver for silver, like for like, weight for weight, and gold for gold, like for like, weight for weight. Whoever increases, it is usury."[201]

Sale of *Muʿayyan* (Particular)

Gold is particular even if it is jointly owned. Or [it may be] a debt if it is [a right generated] from a loan.

Among the methods of designating gold are: ingot numbers, signs and descriptions that distinguish them from others, or certificates indicating ownership, even if it is jointly owned, by specifying the percentage [of ownership], or by the number of grams that he owns in the current account with specified attributes of the gold.[202]

[198] AAOIFI, *Al-Maʿāyīr al-Sharʿiyyah*, p. 1329.

Rulings

A particular specimen of gold may be sold on condition that the counter-value is received.

Dealings in gold are of many forms, the most important of which are:

The First Form

Spot buying and selling, whether the two contracting parties are in the same place or in two different places and conclude the contract through modern means of communication such as phone, telex, or the internet, with the legal receipt [of the countervalues] taking place in accordance with the manner indicated previously and without disposing of it by selling or offering it as gift before being allowed to dispose of it. This form is permissible in Sharīʿah.

The Second Form: Document-based Buying and Selling

This happens when a quantity of gold is purchased from the bank, entered in the customer's account and paid for, but the bank holds the gold. This form is permissible in Sharīʿah if the purchased quantity is well-defined in a manner that distinguishes it from other gold and it becomes the property of the buyer, who is enabled to dispose of it.

Based on the previous details with respect to a loan, it is permissible to loan gold in the current account, whether the gold is fungible or non-fungible; i.e., it has been subjected to workmanship that renders it unique. If it is fungible, he has a right to the equivalent. If the customer deposits one thousand grams (1000 g) in his current account, he is entitled to retrieve the equivalent, not what he deposited. He may sell to the bank, which is the debtor. This is referred to as an exchange (*ṣarf*) of a debt for a tangible asset; i.e. the money deposited in the current account in lieu of the sold gold. After the bank has recorded the transaction and made the funds available [for the accountholder] to dispose of, the receipt has been effected in the exchange, and it then becomes a loan (of *naqd*).[203]

If the gold is processed, then the [effect of] workmanship could be eliminated by the owner [melting it down], or the bank could be delegated to do so for a fee. In that case it would take the ruling of fungible [gold] at that time. Or it may remain crafted, in which case it would

[203] AAOIFI, *Al-Maʿāyīr al-Sharʿiyyah*, p. 1342.

take the ruling of a loan of a non-fungible item as was previously detailed. It is permissible to sell it to the bank, in which case it would be *ṣarf* of a debt for a tangible asset.

Gold Transactions in Turkey

In Turkey, gold-related transactions in banks were started in 2006 by Kuveyt Turk Participatory Bank, which started with current accounts and then diversified in the issuance of gold-related products that distinguished the bank. As a result, the bank has been dubbed globally as the Gold Bank. Kuveyt Turk Bank offers the widest range of gold products and services in Turkey through a variety of products such as gold grams, a quarter [lira of] gold, gold bars, and a gold cheque, making it the pioneer in the banking services sector with respect to gold trading.

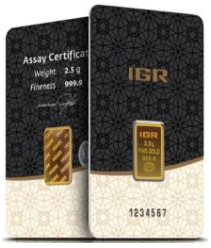
Other banks then began to deal with gold as well but limited their offerings to current accounts only. Some offer investment accounts but do not allow the customer to receive what he bought of gold if it is less than a specified amount, which is one kilogram (1000 grams), and some of them stipulate absolute non-delivery.

Gold Products of Kuveyt Turk Participatory Bank

1. *Grams of Gold*
    1) The Kuveyt Turk Bank (the leader in banking services in gold trading) offers a gram of gold with the guarantee of the Istanbul Gold Refinery.
    2) The gold grams provided by the Kuveyt Turk Bank with the guarantee of the Istanbul Gold Refinery are prepared for savings account holders who wish to invest in gold or to offer gifts.
    3) Gold grams are available in all branches of the Kuveyt Turk Bank according to the following options: 1, 1.5, 2.5, 5, 10, 20, 50, 100 grams...
    4) The percentage of purity of gold grams is the international standard of 995/1000.
    5) The possibility of buying by real delivery (hand to hand) is available through the customer service windows, as well as purchase by legal delivery or for the sake of the customer.

6) You can valuate the gold grams that you have in the *mushārakah* account in gold with gold and get profits.
7) The Kuveyt Turk Bank gold that you have purchased, or other gold issued by the Istanbul Gold Refinery, can then be purchased by the bank's branches unless the original packaging of gold is damaged, or it can be sold to goldsmith shops if desired.

1 gram



2.5 grams

5 grams

10 grams

100 grams

2. *A quarter of a golden lira*

1) The quarter golden lira occupies a traditional and essential place in Turkey as it is gifted at weddings, circumcisions, parties and family events, and it is now available at Kuveyt Turk Bank.
2) The quarter golden liras from Kuveyt Turk Bank are produced in the quarter class by the General Directorate of Coin Minting and Printing of Financial Stamps in the Republic of Turkey. They have a purity of 22 carats and weigh 1.75 grams.
3) You can engage in savings by opening a quarter-golden-lira account and you can take physical possession from the branches of the Turkish Bank of Kuwait or the bank's ATMs, if you so desire.
4) Golden liras of the quarter class from Kuveyt Turk Bank can be deposited in any account the customer wishes.
5) The client can transfer golden liras of the quarter class between the accounts of Kuveyt Turk Bank as gifts or loan payments.

A Quarter of the lira :

3. *Gold Bars*

Kuveyt Turk Bank is distinguished in the gold market by production of unique gold bars designed by the Bank. The bars bearing Kuveyt Turk Bank's mark are produced by Argor Heraeus SA3, which is considered one of the most respected gold bullion producers in the world. The weight of the gold bar is 1 kg, and its purity is 0.995.

1) Kuveyt Turk Bank's gold bars are the first and only gold bars that have been produced by the design of a Turkish bank.

2) They are in compliance with the London Bullion Market Association (LBMA) standards.

Kuveyt Turk Bank is distinguished in gold bullion as:

3) It is the first and only Turkish bank to become a member of the London Bullion Market Association (LBMA).
4) It is the correspondent bank for the precious metals and gemstones market in Istanbul Stock Exchange (BIST).
5) In 2013, it was ranked first in the precious metals market of Istanbul Stock Exchange in terms of annual trading volume among all members of Istanbul Stock Exchange.
6) The bank has had a higher annual trading volume in the precious metals market of the Istanbul Stock Exchange since 2011.
7) It is the leader with regard to foreign trade volume in gold bars in Turkey.

4. The Golden Cheque

1) The best gift you can give your loved ones is the golden cheque.
2) The golden cheque is a product that represents real gold according to the amount specified on it.
3) The gold cheque can be exchanged for real gold, or gold can be deposited into one's account.
4) The golden cheque can be purchased using Turkish liras, dollars or gold in one's account.
5) You do not necessarily have to be a customer with the Kuveyt Turk Bank in order to carry out this process.
6) The golden cheque provides financing, especially when wanting to give golden gifts to others.

7) This cheque can only be accessed by the person whose name is written on the golden cheque.

5. The Golden Transfer

1) You can now transfer gold from one account to another without any security concern.
2) Through a gold transfer, the customer can transfer the gold in his account, which may either be grams or bullion.
3) The person in whose name the transfer was issued may receive the gold on the same day from the branches in the form of grams or bullion.
4) A person can pay off his debt using gold or move his gold to the desired place easily and comfortably without security concerns.
5) Gold is transferred without charge.
6) Gold transfers are available for grams and gold bars, as well as gold liras of the quarter category.

6. Instructions for Gold Transactions

Gold transaction orders allow the customer and investor to give automatic instructions for buying or selling gold from the accounts, whereby the automatic purchase or sale orders are executed when the prices reach the level specified in the instructions for them. Just as automatic instructions can be created for buying or selling foreign currencies, they can also be created to do so for precious metals.

1. It is possible to know the previous instructions and cancel instructions that have not yet been executed.
2. Instructions may be given once or for certain periods.

7. *Send Gold via Mobile Phone*

This product combines actual gold and technology, and is one of the most innovative gold products in the enterprise. To take advantage of this product, a person does not need to be a customer of Kuveyt Turk Bank. Nothing is required of the person besides:

1. Downloading the "Send Gold" application on one's mobile phone.
2. Choosing the gold he wants to buy with his credit card issued (one-time withdrawal).
3. Writing the recipient's name and his personal mobile phone number.
4. Sending an SMS to the recipient with a special reference code.
5. The recipient can go to any bank branch or ATM of the bank, enter the reference code that was sent to him by SMS, and withdraw the gold sent to him.

8. *Gold Days*

Gold ornaments can be deposited (white and yellow gold of all carats; for example, quarter gold lira, half gold lira, gold lira, bracelets, necklaces ...) on certain dates to the accounts, based on the percentage of purity of 24-carat gold, in all branches of Kuveyt Turk Bank.

1. Gold jewelry is examined by experts from the Istanbul Gold Refinery.
2. The deposit is made to the account at a purity of 995/1000.
3. Deposits of gold in the gold current accounts or the gold investment accounts will occur five days after the clearance process, whereupon it can be disposed of.

9. Gold Teller

Kuveyt Turk Bank is the only one offering this product, which combines the real or legal receipt of gold and technology and is also one of the bank's most innovative gold products. There is no other ATM from which you can buy gold beside Kuveyt Turk Bank's ATM. A person can buy gold from the bank through an ATM, whether by credit card, or directly from their account, or using cash. The gold is received immediately through a special window allocated for gold in the machine, if the gold purchased is in the category of 1 gram or 1.5

Gold Exchange Operations in Participatory Banks (Kuveyt Turk Participatory Bank as a Model)

Banks in Turkey engage in the purchase and sale of gold to clients, whether they are individuals or banks or companies, and whether the gold is fungible or non-fungible, and whether it is for investment or for gift offering. In Turkey grams of gold are presented [as gifts] for weddings, circumcisions and childbirths. As a result, banks are working to issue products for gold transactions that are appropriate for all of these uses. These transactions are as follows:

First: The Gold Current Account

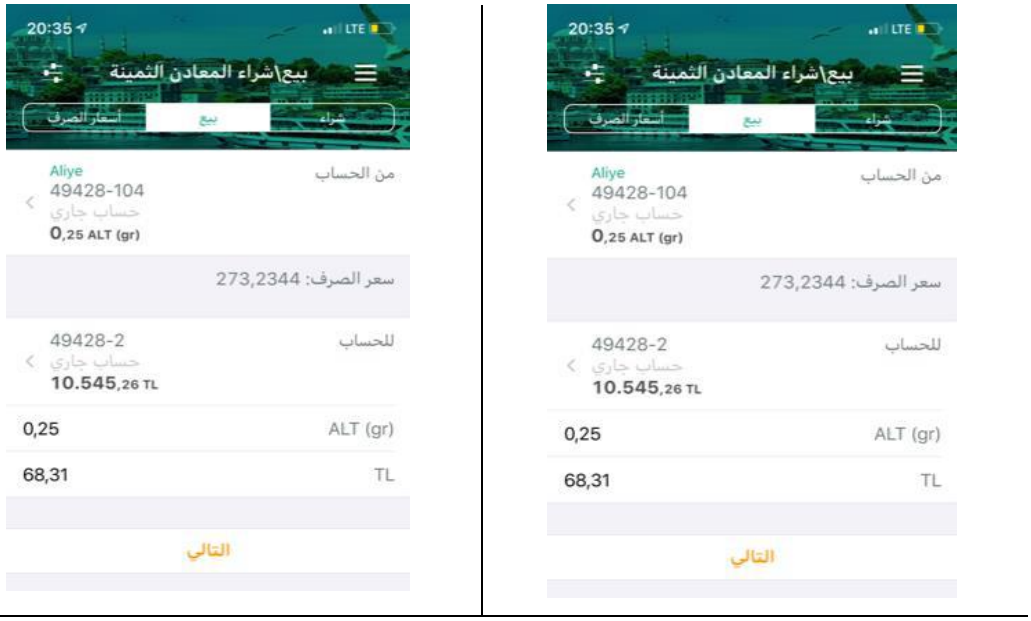
1. Buying from the bank and selling back to the bank

The bank owns a quantity of gold and offers it for sale to any interested customer after enabling them to open a gold current account just as they have current accounts of fiat money. Based on this, the customer can then buy the gold from the bank. When the customer wants to buy gold from the bank, he either buys through the internet branch by conducting the exchange with the bank himself, where he determines the amount of gold he wants to buy and the account from which the counter-value (price) will be withdrawn; then the exchange is executed. The counter-value is instantly deducted from his cash account in favour of the bank, and the amount [of gold] he bought is recorded in his gold account. It enters into his ownership as a common share [of the gold held by the bank] and becomes a debt owed by the bank. He is also allowed access to it, so that if he wants to retrieve it, he can do so from the branch, or he can transfer it to another account, or sell it back to the bank.

The following diagrams show how the operation is performed:

The First Process: Buying Gold

The Second Process: Selling Gold



If you click on the approval icon, the sale or purchase process takes effect. The gold is transferred to the customer's account and the price is transferred to the bank in the event of purchase, or vice versa in the case of sale.

The Conditions

1. The bank does not sell or buy anything but 24k gold.
2. The bank must own the gold before selling it to customers.
3. The customer must be able to receive gold if he so desires, no matter how small or large the amount, except for extremely small quantities that cannot be delivered; in that case, the alternative is exchange [from gold to fiat money].

Note:

Regarding this point, many banks in Turkey stipulate that the customer cannot receive it if it is less than one kilogram as previously indicated.

2. Spot Sale to the Bank:

The customer can conduct a spot sale of the gold he owns—provided that it is a fungible; i.e. 24-carat, and issued by the bank itself; i.e., it has the seal of the bank or of the Istanbul Gold Refinery (İAR)—at the agreed price (the price of that day) provided that the original packaging has not been altered.

3. Depositing in a Current Account with the Bank

Customers can also deposit in their current account what gold they have, which may be either:

- Fungible, which can only be 24-carat and having the seal of the bank or of the Istanbul Gold Refinery on it. In this case it is deposited into his account with the bank directly, and he has the right to recover its equivalent, not the same gold deposited, whenever he likes, just as with fiat money. And he is allowed to sell to the bank the debtor. This is called an exchange of a debt for a tangible asset, as previously mentioned.
- Or it could be non-fungible; i.e., subjected to craftsmanship, that is, jewelry. In this case it is not deposited directly; instead, the client turns in the gold he owns to the refinery, which the bank stands surety for, to purify the gold for a fee and then present it to the bank. The process is carried out according to the following steps:

1. The bank announces specific days to collect gold through its branches.
2. An expert from the refinery comes to the branch of the bank.
3. The client presents his gold to the expert, who informs him of the amount of pure gold he will receive after the purification.
4. The bank opens a gold current account for the customer.
5. The bank provides a document concerning the amount of gold that will be placed in the client's account, but he can only dispose of it after five days. This is the period after which the bank will receive the pure gold from the refinery.
6. After five days, the customer can dispose of the gold he owns, which is then treated like fungible property because it has become 24-carat gold.

7. Because the customer deals with the bank and does not know the refinery, the bank stands surety for the refinery vis-à-vis the customer. Accordingly, if that company does not deliver the gold within the specified period, the bank will pay the customer the required amount of gold.

4. The Quarter-lira Account

It is a current account for gold of the quarter-lira category, having a purity of 22 carats and weighing 1.75 grams, which has a special status in Turkey. Anyone who wants to open an account of this type can directly deposit in the account a quarter golden lira, if it bears the Bank stamp or the Istanbul Gold Refinery stamp, via one of the bank's branches. It is subjected to the same rule as fungible properties; he has the right to receive the equivalent not the same item, whether from one of the bank's branches or from one of its ATMs, and he has the right to sell it to the debtor bank. It is then an exchange of a debt for a tangible asset, as was previously mentioned.

The advantage of this account is that a quarter-golden lira remains as is and is not melted down; rather, it is sold and bought according to its attributes when it was minted, which are standardized, since all specimens are identical in weight and quality. It is thus a loan of a fungible good.

Second: The Investment Account

The gold investment account is the first type of account that generates profits from gold without interest (ribā), as it provides account holders with the opportunity to save and profit.

The investment of gold deposited in the account in the commercial sector of the bank is evaluated on the basis of a muḍārabah contract. The account holder is the fund provider while the bank is the partner who manages the fund [through investment]; profit [is shared] according to the agreement, and the loss, if any, is borne by the fund provider. However, gold investment opportunities are limited as it cannot be sold on credit, nor is it a medium of exchange that can be used to buy goods in the market. Therefore, its profit rate is also low.

Among the opportunities utilized by the Kuveyt Turk Bank to invest in gold are:

1. Muḍārabah, with senior jewelers (wholesalers), where gold bars are offered to goldsmiths as capital for them to mint and sell as jewelry; then the profit is distributed according to the rate agreed upon, after returning the capital (the gold bars).
2. Exchange of gold for currency, whether liras or dollars, which the central bank seeks for reserves. The gold is deposited in the central bank in place of currencies; the currencies are traded, and the profits realized are changed into gold and distributed to the pool of gold investment account holders.
3. Gold is deposited into this account the same way that it is deposited in the current account. The gold may be pure, and the person may deposit it himself or buy it from the bank and deposit it in his investment account, or it may be crafted, in which case it has to be refined first and then deposited into the investment account.

Third: Buying and Selling Gold with a Credit Card

All banks in Turkey sell gold via credit or debit cards. As for credit cards, participatory banks do not allow sales on credit or sale on instalments as conventional banks do.

The gold standard issued by the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) stated that it is permissible to pay for gold with a debit card or a credit card with deferred deduction, even if the gold seller is the card-issuing bank.

However, the [AAOIFI] standard overlooked an important point, which is, if the seller bank is the issuer of the card, the price will be deferred until the customer pays the debt he owes, which is the date of the deduction.

Kuveyt Turk Bank sells gold to its customers using their credit cards, whether from goldsmiths, or from the bank's ATMs, or from electronic shopping sites that deposit gold in the buyer's account. Receipt [of the gold] may be either physical or constructive. Physical receipt is from a jeweller or from an ATM while constructive receipt is by recording it in his account if the purchase is from an electronic shopping site or from an ATM, if the customer wants what he bought to be recorded in his account.

. . .

In order to avoid the point referred to above in the standard, if the seller bank is the issuer of the card, AAOIFI stipulated that the bank in this case deposit the amount that the bank has guaranteed to the card holder's account as a lender. This should then be immediately withdrawn from the customer's account and placed in the bank's account as payment for the gold, and the buyer should be enabled to collect the gold immediately, either physically or constructively.

Fourth: Ṣukūk al-Ijarah Priced in Gold

To support the Turkish economy, the state issued ṣukūk al-ijārah that were priced in gold for purchase only by citizens, in order to invest the gold stored in homes. Its structure is briefly as follows:

1. The State Treasury Department issues a ṣukūk on its assets, which is ṣukūk ijārah.
2. The ṣukūk are sold for gold to citizens only, and if the gold is in the form of jewelry, citizens are not charged the purification fees.
3. The return is determined in Turkish liras based on the gold price index on the day the rental is due.
4. Citizens have the right to early redemption.
5. The Treasury offers citizens a binding undertaking on its part to purchase these ṣukūk in case a citizen wishes to sell.
6. In case of early redemption, the intermediary bank buys the ṣukūk from citizens who wish to sell in Turkish lira according to the gold price index, and the bank is entitled to either immediately sell to the Treasury or hold it until the final redemption date while taking advantage of its return.
7. Upon the final redemption of the *ṣukūk*, its holders will have the choice between redemption in pure 24-carat gold or the amount of crafted gold he paid. The citizen must inform the bank of his desire a week before the redemption date.

This is what Allah; the Almighty has made easy for me to compile within this short period. I express my gratitude to Allah, the Exalted, for making it easy.

Our last invocation is that all praises are due to Allah, the Lord of the worlds, and may the peace and blessing of Allah be upon our leader, Muhammad, his family and all his companions.

FINDINGS AND RECOMMENDATIONS

Held at the Marriott Hotel in Putrajaya

01-02 Rabiul Awal 1441 AH – 29-30 October 2019 AD

Resolution regarding the first topic: The *Muḍārib's* Guarantee Against Currency Depreciation (Dr Abdul Sattar Abu Ghuddah)

If the capital provider (*rabb al-māl*) of the *muḍārabah* venture authorizes the manager (*muḍārib*) to convert his currency to the currency of the asset pool: it is permissible. If he does not appoint him: it is not permissible for him to convert it, and the *muḍārib* must guarantee against the risk of currency depreciation because he has transgressed. The *muḍārabah* is not voided by this guarantee because it is not an absolute guarantee.

If the central bank authorizes the opening of accounts in different currencies, the bank bears no liability unless the bank changes the currency without the client's permission or authorization.

If the central bank does not so authorize and there is only one asset pool, then it is not guaranteed because there is customary permission from the customer for currency conversion.

If there are portfolios dedicated to certain currencies, the client bears the risk of decline.

Resolution regarding the second topic: Changing the Stipulation of the Waqf Donor (Dr Abdul Sattar Abu Ghuddah)

It is permissible to change the condition of the endower and shift the beneficiary from the charitable purpose he designated to another charitable purpose if the designated recipient ceases to exist or function, or due to a weightier interest, according to the ruling of the responsible authority. That is because the intention of the endower is to do good and obtain a reward, and this policy will realize it for him. Shaykh al-Islam Ibn Taymiyyah permitted shifting from the less virtuous to the more virtuous as the Prophet (peace be upon him) instructed a person who had vowed to pray at al-Masjid al-Aqsa in Jerusalem to pray instead at the Sacred Mosque in Makkah. The endowment overseer must take into account the interest of the endower first, with the approval of the competent authority, if any, or with a valid fatwa.

Resolution regarding the third topic: A Certificate of Deposit (CD) As A Replacement for Tawarruq (Dr Abdul Sattar Abu Ghuddah)

The established practice is predicated on the view that it is permissible to securitize the assets of Islamic banks by issuing sukuk upon them, and the Standard on Debts did not give consideration to the percentage of physical assets. Based on that, it is permissible for the Islamic bank to sell a share of its *muḍārabah* asset pool to an investor and issue him an ownership certificate and call it a certificate of deposit (CD). He would then have the choice to continue holding it and receiving dividends or to sell it in the open market, or the bank could redeem it at a price that both parties agree to. Since the *muḍārabah* asset pool is constantly changing, there is no objection to redemption at a price lower than the original value. That is because the change of attributes is treated like a change of physical assets; therefore, the issue of *bayʿ al-ʿīnah* (buyback sale) and reverse *ʿīnah* are not relevant. The requisite for all of this is the permission of the central bank, the establishment of ownership and all that it legally entails for the purchasers of these certificates, and disclosure of the accounting treatment.

Resolution regarding the fourth topic: Buying and Selling Between Sister Companies Without Consideration of The Percentage of Co-Ownership (Dr Abdul Sattar Abu Ghuddah)

It is permissible for an independent company (having its own legal identity) to buy from or sell to another independent company (having its own legal identity) even if both companies have a single owner, and there is no need to take into consideration the percentage of common ownership. This is by analogy with the Ḥanafī School's view that it is permissible for the capital provider (*rabb al-māl*) of a *muḍārabah* venture to purchase the *muḍārabah* capital. This is because, according to the terms of the *muḍārabah*, he is the owner of the capital but does not have the right to dispose of it. The latter is the right of the *muḍārib*, who is not the owner. Based on that, the *rabb al-māl* is treated like an outsider and third party vis-à-vis the *muḍārabah* venture. This is also supported by the Ḥanbalī view permitting the same once the profit of the *muḍārabah* venture becomes known, as it indicates that the *muḍārabah* capital has become mingled with the profit, and there is no need to take into consideration the percentage of each. If that is permissible between two parties, then there is a greater reason for it to be permissible with the existence of an intermediary. It is also permissible for the other company to offer a guarantee for the sister company, taking into consideration the principles of corporate governance. This permission excludes loans between the companies for lowering tax obligations and legal requirements when both companies are fully owned by the same owner.

Resolution regarding the fifth topic: Early Settlement Fee (Dr Nizam Yaqoubi)

1. [Sharīʿah] prohibitions and the reasoning for the rulings are presumed to apply to newly arising situations. That includes fees imposed in banking. If they accompany exchange contracts, they are considered to be included in the profit. If the bank separates the profit from the fees due to market considerations, that does not alter the substance of the ruling: it is profit and is not categorized as *ribā* or gambling or *gharar*.

2. Taking compensation for the guarantee has been permitted by some contemporary jurists based on what was reported from Is-ḥāq that he permitted charging a fee for one's reputation. He permitted it without qualification, even without the expenditure of effort, and that is also one view within the Mālikī School. It is valid to conceive of it as being for actual effort or for the commitment to exert effort if need be. Therefore, the fee is for an intended usufruct. Those who explained the prohibition as being due to the possibility that the guarantee will turn into a loan permitted keeping the fee if the letter of guarantee does not end up with payment by the guarantor, and they prohibited keeping the fee if the guarantor has to pay. For them the locus is the absence of the act; however, if it is accompanied by the act, there is no basis for refunding the fee. Whether the fee must be equivalent to the prevalent market rate or can exceed it, this is based on the disagreement between the majority of jurists and the Shāfiʿī School regarding the coincidental occurrence of a sale and a loan without stipulation. Many financial institutions apply the Shāfiʿī opinion in their operations.

3.Stipulating a fee for early settlement is permissible based on the customer entering into the transaction on the basis of a profit of, say, 7%. [The bank agrees to] forego 2% in case there is no early settlement, so the profit rate would be 5%. In case he settles early, the rate would return to 7%. This is [allowed] because it is all agreed to at the beginning of the contract; he agreed to it, and there is no *ribā* or *gharar* in it. In fact, Ibn al-Qayyim said, "Not every *gharar* is a cause of prohibition." The only prohibited form is *gharar* that leads to dispute. As for simple hesitation between two possible prices in a manner that will not lead to dispute, there is nothing prohibited about it. Therefore Ibn al-Qayyim permitted a deal comprising two possible prices with the choice being left to the buyer. He criticized those who prohibited it, saying:

> The most farfetched interpretation is of those who interpret the *ḥadīth* to mean a sale for either 100 by deferred payment or 50 spot. There is no *ribā* here, nor *jahālah* (ignorance), nor *gharar* (uncertainty), nor gambling, nor anything else that would render the transaction invalid. He gave him the choice of whichever price he prefers. This is no more farfetched than giving him the choice for three days, after the sale has been concluded, to either confirm the sale or annul it.

4. The Symposium advises raising the profit rate along with a promise to forego the increase if the customer does not settle early, in order to preclude the harm of litigation.

5. The bank is permitted to charge fees in case of full or partial early settlement (……) corresponding to the costs and expenditures that that imposes on it. The participants of the Symposium offered two views on this. Some said charging a fee is permissible on the condition that it is a flat fee. Others considered it permissible as either a flat fee or a percentage.

Resolution regarding the sixth topic: Taking A Fee to Safeguard A Pledge (Dr Abdul-Rahman al-Sa'di)

It is not permissible to take a fee greater than the actual cost of safeguarding the pledged item for an interest-free loan because it entails the combination of a loan and a sale in the contract itself, even if the rate charged is the going market rate. That is a matter of agreement between the four jurisprudential schools, based on the manifest meaning of the *ḥadīth*. Its permissibility has been reported from Shaykh al-Islam Ibn Taymiyyah, that is, when the fee does not exceed the market rate. This is based on identifying the reason for the prohibition to be that it will lead to preferential treatment, and that is negated in this case. This view has been adopted by some contemporary scholars.

If they are not combined [contractually], the Shāfiʿī School allows it without qualification, and the Ḥanafī and Mālikī Schools allow it on the condition that the price is the market rate. It is not permitted under any circumstances by the Ḥanbalī School.

The reasoning of those who allow it unconditionally is that they interpret the *ḥadīth* to refer to the combination by stipulation. They see the two contracts to be independent; therefore, the combination of a sale and loan has not occurred.

The reasoning of those who absolutely prohibit it is the manifest meaning of the *ḥadīth*, which indicates any combination of a sale and loan.

The reasoning of those who make a distinction is the negation of the effective cause, which is the suspicion of a loan that brings added benefit to the lender.

Banks must make sure that there is no condition in the loan contract in case the pledged item is safeguarded for a fee, or some other format; also, the fee for safeguarding the pledged item shall not exceed the actual cost of safeguarding the pledged item.

Resolution regarding the seventh topic: Zakat on The *Mudārib* and Its Impact on The Zakat on The Bank (Dr Azman Mohd Noor)

Jurists studied the issue of zakat on a *muḍārabah* venture, and they dealt with the zakat duty of the *muḍārib*, which is the role the bank plays in Islamic finance. They had distinctly differing views about the time the *ḥawl* calculation starts for the zakat duty of the *muḍārib*. The Ḥanafīs held that the *muḍārib* pays zakat on the profit at the same time he pays zakat for the rest of his wealth and does not calculate a separate *ḥawl* for the *muḍārabah* profit. The Ḥanbalīs held that he shall calculate a separate *ḥawl* for the *muḍārabah* profit. This dispute would be ended by a statute that obliges the banks to pay zakat, or by the existence of authorization [from the investment account holders]. The Symposium advises adoption of the Ḥanafī opinion because of its benefit to the poor.

Resolution regarding the eighth topic: The *Shariah Charecterisation* of Investment Agency (Dr 'Abdul 'Aziz al-Qassar)

The investment agency contract (*wakālah bi istithmār*) bears a resemblance to a number of contracts such as authorization to conduct transactions on behalf of the principal, hiring of services, *muḍārabah*, conditional gift, and *jiʿālah* (an exchange contract for a known or unknown task that is difficult to precisely determine and for which compensation is due only upon completion of the work). It is considered a newly developed contractual form, although some consider it a contract that already has a name in *fiqh*. It is permissible to be done for a fee or for no fee, and there is no objection to the agent receiving an incentive.

Resolution regarding the ninth topic: Incurring Debt on Behalf of a *Muḍārabah* Venture (Dr 'Abdul 'Aziz al-Qassar)

Postponed for further research

Resolution regarding the tenth topic: The Turkish experience in buying and selling gold (Dr Ismail Halitouglu)

1. It is permissible to buy gold when it is specified. The ways of specifying it include assigning a serial number or insignia or attributes to each ingot that distinguish it from any other ingot, and ownership certificates that indicate as much, even it is a specified percentage share of undivided joint ownership. This is on the condition that the price is delivered immediately.

2. It is permissible to buy a specified number of grams of gold on the condition that the price is delivered immediately. The buyer has the choice to take physical possession of his gold or to have the bank hold it for safekeeping – after specifying it by ingot number or by whatever else distinguishes it from other gold – and record it in his account.

3. It is permissible to buy a specified number of grams of gold possessed by the bank and record it in the customer's current account. In this case, the delivery will be constructive.

4. It is permissible to use a certain weight of gold as capital for a *muḍārabah* venture. The *muḍārib* will sell it, appraise its currency value, and distribute the resulting profit between the two parties. Then the *muḍārib* will buy gold when the *muḍārabah* venture ends. If there is a loss, the capital provider will bear it and will receive a lesser weight of gold than the capital he contributed.

Resolution regarding the eleventh topic: The *Fiqh* Solution to Changing the Profit Rate in *Murābaḥah* (Dr Musa al-Qudah)

It is permissible to fix a profit margin in *murābaḥah* that is higher than the market rate such that the pricing of the profit margin would be based on the expectations of the future during the financing period. Thus, the highest expected *murābaḥah* price would be adopted. For example, if the common *murābaḥah* price is 5% annually, and it is expected that it will rise by 2% during the financing period, the *murābaḥah* price would be set at 7% annually. The bank would issue a promise to the customer that if the index price does not increase above what it was at the time the contract was signed, the bank will forego the expected increase. It is also permissible for it to be done as conditional *ibrāʾ* as is the practice in Malaysia as per the fatwa of the Shariah Advisory Council of the Central Bank of Malaysia.

This is with respect to the *fiqh* principles involved. Practitioners must make clear the way it will be applied and the accounting mechanism for calculating the profit according to each bank and what is approved by their respective Sharīʿah committees.

The forms of *ibrāʾ* found in contemporary practice are sometimes applied in stages and sometimes at the end of the contract.