

ROLE OF SUKUK AL-MUDARABAH FOR FINANCING A PROJECT AND STIMULATING ISLAMIC CAPITAL MARKET

Dr. Chaibou Issoufou¹, Prof. Dr. Abdul Razak Abdul Hadi²

¹Senior lecturer, Department of Economics and Law, Universiti Kuala Lumpur (UniKL) Business School (UBIS), Email: issoufou@unikl.edu.my

²Deputy Dean, International, Industrial & Institutional Partnership (IIIP), Universiti Kuala Lumpur (UniKL), Business School (UBIS), Email: abdrazak@unikl.edu.my

ABSTRACT:

This paper explores role and importance of *Sukuk al-Mudarabah* in Islamic capital movement and its suitability for financing projects which individuals are not ready to provide capital for them. *Sukuk al-Mudarabah* is the most popular *Sukuk* in *Sukuk* market which has been structured to provide funds for the big projects which need huge amount of capital. This paper aims to analyze the nature, salient features and the process of *Sukuk al-Mudarabah*. The paper uses qualitative methodology which is based on the four prominent schools of *fiqh* and views of some contemporary scholars. The paper examines to what extent the suitability of *Sukuk al-Mudarabah* to finance a project due to the crucial role that it plays in providing funds for the projects. It was found in this paper that *Sukuk al-Mudarabah* plays a significant role in Islamic capital market particularly *Sukuk* market.

Keywords:

Role of *Sukuk al-Mudarabah*, Islamic Capital Market, *Sukuk al-Mudarabah*, Process of *Sukuk al-Mudarabah*

Article Received: 18 October 2020, Revised: 3 November 2020, Accepted: 24 December 2020

INTRODUCTION

Sukuk al-Mudarabah is one of the crucial financial instruments that can provide capital for an individual to conduct his business activities or can finance a project that does not have enough capital for its financial activities. Therefore, having *Sukuk al-Mudarabah* contract between a capital providers and expert people, who do not have capital, can create job opportunities for the unemployed, and provide profit for capital providers. This can play a vital role in the growth of the economy of a country and its capital market development. Nowadays with development of the world, an individual, or a company alone, may have difficulty to have successful investments without having other individuals, or companies to share with so that they can produce many things together that an individual, or a company cannot be able to do solely. As a result of this, one can say that *Sukuk al-Mudarabah* transaction plays a crucial role in the development and expansion of economies all over the world, because many people, or companies can join together to conduct

their business based on *Sukuk Mudarabah* contract. For instance, a group of people can collect their capital and give it to an expert to conduct business on the total capital. A capital provider also can distribute his capital to many experts to invest it. This method of investment can attract savings fund to be invested in the investment of a project. It can be also participation for investors in the public interest (*Maslahah*) of the country, which assists the government to complete its financial obligations towards the citizens.

ROLE OF SUKUK AL-MUDARABAH FOR FINANCING A PROJECT AND STIMULATING THE CAPITAL MARKET

Sukuk al-Mudarabah is defined as certificates that represent an amount that is given to a manager of a project in order to active the project and realize profit from it.¹ In other words *Sukuk al-*

¹Hasan 'Abdullah al-'Amin, *Sanadat al-Muqaradahwa Sanadat al-Istithmar* paper presented at Fiqh Academy Conference that held at Jeddah, Majallat Majma' al-Afiqh al-

Mudarabah can be defined as “a form of partnership in profit whereby one party provides capital and the other party acts as an entrepreneur who solely works with the capital”.² In the *Mudarabah* project, the capital providers are considered as the investors who are called *Arbab al-Amwal* and the manager, or entrepreneur who is called the *Mudarib*. The profit that derived from the investment of the project is distributed between the investors and the manager with exact portions that were agreed upon in advance. For instance, 70:30, 60:40, 50:50 respectively. If there is any loss, or damage in the project, the *Sukuk* holders (capital providers) are responsible for it, unless there is clear evidence that it is due to carelessness, or a misconduct of the *Mudarib*. In this case, the *Mudarib* is responsible for the loss, or the damage that happened to the project.

From the aforesaid, it can be observed that, in *Sukuk al-Mudarabah* transaction, the manager of the project needs capital for his project. In order to do so, he may resort to issuing certificates that have equal value and offer them for subscription to obtain capital for the project. Therein, the investors provide him with the capital to finance the project. In relation to the capital that they provide, they will get the certificates that represent their ownership over the underlying asset of the *Mudarabah* project. These certificates represent the value of the principal amount of the capital that is contributed by the capital providers. As a result of this, one can define *Sukuk al-Mudarabah* as certificates that represent ownership over underlying assets that are exposed for investment. Wherein, the *Mudarib* manages the project and shares with the capital providers in the profit that is derived from the investment of the project, with specific portions that agreed upon prior to the commencement of the project.

Based on this, the capital providers have right on *Mudarib* to invest the capital of *Mudarabah* according to their instructions, terms and conditions. In this respect, it can infer that, there are two types of *Mudarabah* i.e. unrestricted and restricted *Mudarabah*. Unrestricted *Mudarabah* which is a form of *Mudarabah* contract wherein the *Mudarib* has absolute authority to invest the capital, or properties of the *Mudarabah* anywhere, in whatever he can see that benefit may be derived from the investment.³

Restricted *Mudarabah* is to confine the investment of the *Mudarabah* capital and the authority of the *Mudarib* to specific conditions and rules which the *Mudarib* must comply with. For example, the capital provider may stipulate to the *Mudarib* to not travel with the principal amount of the capital outside of the country in which the *Mudarib* resides. He may also have a stipulation on the *Mudarib* to invest the capital in a specific market, or merchandise, or to sell and buy from a particular person.⁴

In reference to specification of the *Mudarib* to take a position the capital of *Mudarabah* in specific merchandise, Malik and Shafi'i jurists are of the view that, it is not permissible for the capital provider to restrict the investment of the *Mudarabah* capital to specific merchandise. The reason is that, this restriction will prevent the *Mudarib* from the objective of *Mudarabah*, which is to change the investment of the capital from merchandise to merchandise in order to gain profit, which is the subject matter of a *Mudarabah* contract.⁵ However, Hanbali and Hanafi jurists are

³Al-Mawardi, Abu al-Hasan, 'Ali bin Muhammad bin Habib, *Min usul al-Iqtisad al-Islami, Al-Mudarabah*, DirasahwaTahqiqwaTa'aliq, 'Abdul-Wahab al-Sayyid Hawas (Egypt: Dar al-al-Ansar, 1983), 134-135

⁴Ibid.

⁵Ibn Rushd, Abu al-Walid Muhammad bin Ahmad bin Muhammad bin Ahmad bin Rushd al-Qurtubi al-Andalusi, *Bidayat al-Mujtahid waNihayat al-Muqtasid* Tanqihwatashih Khalid al-'Attar, Taba'hJadidahwaMunaqahahwaMusahahah, vol. 2 (Bairut Dar al-Fikr, 2001), 192-193. See also 'Abdullah bin Hijazi bin Ibrahim al-Shafi'i al-Azhari, *Hashiyat al-Sharqawi'alaTuhfat al-ttulab bi Sharh Tahrir Tanqih al-*

Islami session 4 no. 4 vol. 3 (Jeddah: Majallat al-Fiqh al-Islami:1988), 1840

²Wan Abdul Rahim Kamil, *Structuring Sukuk*, paper presented at IBFM Workshop on Detailed Structuring of Islamic Securities (Kuala Lumpur: IBFM 2007), 9

of the view that it is permissible for the capital provider to restrict a *Mudarabah* investment to specific merchandise, if this merchandise is available in the market.⁶

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

In addition to that, the restriction of the *Mudarib* to sell and buy from a particular person, is disputed between the Malik and Shafi'i jurists, as well as the Hanbali and Hanafi jurists. The former group is of the view that this type of *Mudarabah* contract is void. In this case, the *Mudarib* deserves a similar wage that is in relation to his work on the capital. In other words, in this case, the *Mudarabah* contract will convert to a leasing contract, wherein the *Mudarib* deserves a consideration in respect of his work.⁷ On the other hand, the latter group is of the view that it is permissible for the capital provider to restrict the investment of the *Mudarabah* capital with a particular person. The reason being that the restriction of the other contracts to certain specifications is permissible; therefore, it is permissible for the capital provider to restrict a *Mudarabah* investment to a specific trader that the

Mudarib will deal with during the period of the *Mudarabah* contract.⁸

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

Another issue is that the restriction of the *Mudarabah* investment to a particular place, such as a specific market in the country. Malik jurists are of the view that it is not permissible for the capital provider to restrict the *Mudarabah* investment to a specific market. If the *Mudarib* obliges himself to follow this restriction, the contract is void.⁹ However, the Majority of Muslim jurists are of the view that it is permissible for the capital provider to restrict the investment of the *Mudarabah* capital to a specific market in the country. This view is the preferable view of this dispute because the *Mudarib* can invest the capital in the market without any difficulty to gain profit from the investment.¹⁰ As we can see nowadays, a market can be full of any merchandise that the traders need. They can buy and sell from the same market without any burden on them, and they can make huge profits from their merchandise in the same market. Therefore, it is permissible for a capital provider of a *Mudarabah* investment to restrict the *Mudarib* within a specific market to trade the capital of the *Mudarabah* in that market (to buy and sell from it). However, it is the best if the capital provider makes the investment unrestricted *Mudarabah*. Thus, this will open further opportunities of investment for the

Libab, Abu, Yahya Zakariyah al-Ansari ma' Taqir al-sayyid Mustafa bin Hanafi al-dhahabi al-Misri 'ala Hashiyat al-Shaykh al-Sharqawi vol. 3 1st edition (Bairut: Dar al-Kutub al-'ilmiyyah, 1997), 222.

⁶Ibn Qudamah, Abu Muhammad, 'Abdullah bin Ahmad bin Muhammad bin Qudamah al-Muqdasī, *al-Mughni* 'ala Mukhtasar, Abu al-Qasim 'Umar bin Husain bin 'Abdullah bin Ahmad al-Khiraqi, vol. 5 (Beirut: 'Alam al-Kutub, nd), 68-69.

⁷Ibn Rushd. 192-193 See al-Mawardi, 135

⁸Ibn Qudamah, 68-69. See al-Kasani, *Bada'i al-Sana'i 'Fi Tartib al-Shara'i'*, Tabah Jadidah, Haqahawa Kharraja 'Aditha 'ala Thuluth Nusakh Kha'liyah, Muhammad 'Arman bin Yasin Darwish, vol. 5 (Bairut: Dar Ihya' al-Turath al-'Arabi, Mu'asasah al-Tarikh al-'Arabi, 2000), 137-141

⁹Ibn Rushd

¹⁰Al-Mawardi, Abu al-Hasan, 134-135, See also al-Kasani, Ibn Qudamah

Mudarib, so he can invest the capital anywhere and in any merchandise in which there is a possibility to gain profit from.

ESSENTIAL FEATURES OF SUKUK AL-MUDARABA TRANSACTION IN ISLAMIC CAPITAL MARKET

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

In the *Mudarabah* project *Sukuk* holders are considered as the owners of the *Mudarabah* capital and the benefits that are derived from investment of the capital are divided among them, according to each person's percentage of ownership in the capital that is contributed to active the project after deducting the *Mudarib*'s portion. The owners of *Sukuk al-Mudarabah* have the right to receive their capital at the end of the project, and portion of the profits as agreed before the investment of the capital. After the subscription is closed in the specified period of the time that is required, the *Sukuk* holders have the right to sell their *Sukuk* in secondary market at their discretion. In *Sukuk al-Mudarabah* investment the *Sukuk* holders are not allowed to claim any fixed interest. This is because there is no interest taking from the investment of *Mudarabah*.¹¹

Furthermore, it was mentioned in *Fiqh* Academy resolution, which was held on 6-11 February, 1988 at Jeddah, that for *Sukuk al-Mudarabah* transaction to be in conformity with the principles of Islamic law, the *Sukuk* should represent undivided portions of ownership in the project. This ownership should continue from the beginning of the project until its end. The *Sukuk* holders have all rights and disposal that are

recognized by Islamic law in the contracts, such as contract of sale. The performance of the contract of *Sukuk al-Mudarabah* should be based on the conditions of the contracts that are specified in the prospectus of issuance, whereby the subscription is considered as an offer, and the acceptance is considered as an agreement of the other parties to participate in the investment. In *Sukuk al-Mudarabah* contract, the principal amount of the capital, and the distribution of the profit must be known to the contracting parties, and conditions of the issuance must be in conformity with the principles of Islamic law.¹²

In view of the foregoing features of *Sukuk al-Mudarabah*, it can be observed that, in *Sukuk al-Mudarabah* transaction, the receiver of the proceeds of the subscription of the *Sukuk*, that is exposed for investing and financing the project, is the *Mudarib* (entrepreneur). He does not own anything in the project, except what he has contributed to purchase some *Sukuk* in the project. Based on this, he is the capital provider for those *Sukuk* that he has bought, and the *Mudarib*, who is sharing in the profit according to his proportion that is specified in the prospectus of the issuance. His ownership in the project is limited to his contributed proportion in the project. The received proceeds of the *Sukuk* that are subscribed and assets of the project are safekeeping assets in his hand. He does not guarantee any loss, or damage that may happen to the principal amount of the project, or profit, unless it is one of the causes of guarantee that is recognized by Islamic law. It is only in this case that he is liable for the loss, or the damage that happened to the *Mudarabah* properties. Therefore, it is obvious that in the *Sukuk al-Mudarabah* project; the project is financed by *Sukuk* holders and entirely belongs to them. The issuer of *Sukuk al-Mudarabah* is only a trustee to manage the project; he does not guarantee any loss, or damage that happens to the capital, or profit. If there is a loss, or damage to

¹²Fiqh Academy Resolution, no. (5) d 4/08/88 on *Sukuk al-Mudarabah*, Majallah Majma' al-Fiqh al-Islami, session 4, no.4 vol.3 (Jeddah: Majma' al-Fiqh al-Islami, 1988), 2162

¹¹ Wan Rahim, 9

the project, the *Sukuk* holders are solely responsible for it.

Sukuk al-Mudarabah should be negotiable instruments after the period that is specified for the subscription is mature. This negotiability deems to be at the disposal of the owner of the asset with taking into consideration that, if the properties that are contributed to the *Mudarabah* project are still financial assets after the subscription and before conducting the investment, then the negotiability of the *Sukuk al-Mudarabah* is considered as an exchange of currency for currency, and therefore, the rule of exchange of currency should be applied to it. Hence, if the properties of the *Mudarabah* are debts, the rules of negotiability of debts should be applied to the negotiability of the *Sukuk al-Mudarabah*. If the properties of the *Mudarabah* are different types of assets, for instance, money, debts, real estates and usufructs, it is permissible to negotiate *Sukuk al-Mudarabah* according to an agreed price provided that most of the properties of the investment are corporeal assets and usufructs.¹³

Negotiability of *Sukuk al-Mudarabah* in the stock markets is according to the circumstances of exposure, and requirements of the management of the contracting parties. In addition to that, the issuer, or other party, can perform the negotiability of the *Sukuk*, either by announcement, or by offer to the public during a specific period of time in which the purchase of the *Sukuk* is obliged with a specific price. In this case, it is preferable for the issuer to get advice from experts in order to specify the price according to the pace of the market, and the circumstances of the financial center of the project.¹⁴

It is not permissible to include in the contract of *Sukuk al-Mudarabah* a provision that the principal amount of the capital, or a portion of the profit is guaranteed by the *Mudarib*. If the contract is concluded on that explicitly, or implicitly, the

contract is a contract of loan, not contract of *Mudarabah*. Therefore, the rules of a loan contract should be applied to it, and it is not permissible to pay any superfluous amount on it. Furthermore, it is not permissible to include in the contract of *Sukuk al-Mudarabah* that it is obliged to sell back the *Mudarabah* assets to the issuer; even it is a pending condition or future condition. However, it is permissible to include in the contract of *Sukuk al-Mudarabah* that there is a promise to sell back the *Mudarabah* asset. In this case, the sale contract will be concluding on the price that will be assessed by experts. In case the promise is not fulfilled, and it amounts to damage to the other party, the promisor is obliged to compensate the damage that happened to the other party according to the rules and principles of guarantee in Islamic law. It is not permissible to include in the contract of the *Sukuk* any provision that amounts to the company to take a specific portion of the profit. If the contract includes that (or the contract of the *Sukuk* is concluded on that), then the contract is void.¹⁵

In addition to that, it is not permissible to stipulate in the contract of the *Sukuk al-Mudarabah* that there is a specific amount for *Sukuk* holders, or the project. The subject matter of division is the profit that is derived from the investment, not the principal amount of the capital. This profit can be determined by assessing the assets of the project in currency, and what exceeds the principal amount of the capital is the profit that will be distributed between the *Sukuk* holders and the *Mudarib*, according to the conditions and terms of the contract that agreed upon. The calculation of the profit and loss of the project should be done publically at the disposal of the *Sukuk* holders.¹⁶

It is permissible in Islamic law, to mention in the prospectus of issuance that there is a specific portion which will be deducted either from the portion of the *Sukuk* holders, or from the proceeds

¹³Ibid. 2162-2163

¹⁴Ibid. 2163

¹⁵Ibid. 2163-2164

¹⁶Ibid. 2164

of the project, which is distributed to the *Sukuk* holders at the end of every period of assessment of the properties of the project into money. This deducted portion will be deposited in a particular reserve fund in order to face or recover any loss, or damage that may happen to the principal amount of the investment, or any shortfall.¹⁷

From the foregoing, it could be deduced that *Sukuk al-Mudarabah* transaction is very different from the other *Sukuk* transactions in terms of investment and management of the *Mudarabah* project. In the *Sukuk al-Mudarabah* transaction, the *Mudarib* (issuer) is not liable for any loss or damage that may happen to the project, unless it is due to his negligence and mismanagement. Only the capital providers (*Sukuk* holders) are liable for any loss or damage that may happen to the project because they own the project, while the *Mudarib* is only the trustee to manage the project. Therefore, for the *Sukuk al-Mudarabah* contract, in order to be in line with the principles of Islamic law, the abovementioned essential features should be observed while concluding the contract and issuing the *Sukuk*.

PROCESS OF SUKUK AL-MUDARABAH TRANSACTION IN ISLAMIC CAPITAL MARKET

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

1.1 Structure of Sukuk Al-Mudarabah

In the *Sukuk al-Mudarabah* structure, the *Mudarib* (the issuer or entrepreneur) provides entrepreneurship. He issues *Sukuk al-Mudarabah* to signify that the capital providers are participants in the *Mudarabah* project. The profit that is derived from the *Mudarabah* investment is paid to the investors. At the maturity of period of the investment of the project, the *Mudarib* will repurchase the asset based on the purchase

agreement that was undertaken by him previously. The proceeds that are derived from the sale of the asset are used to pay the *Sukuk* holders (investors) their principal amount of the *Sukuk*.¹⁸

From the above-mentioned structure of *Sukuk al-Mudarabah*, one can say that the structure of *Sukuk al-Mudarabah* seems to not be in conformity with the principles of Islamic law. This is because, at the maturity of period of the project, the *Mudarib*, who is only a trustee to manage the project, will buy back the asset of the *Mudarabah* project, and pay the capital providers, or investors (*Arbab al-Amwal*) their principal amount of the capital that they have paid to finance the *Mudarabah* project. The investors provide capital for the project and receive profit from the project, and at the end of the investment of the project, their principal amount of the capital that they provide to bankroll the *Mudarabah* project is returned to them and the asset will be returned to the *Mudarib* who is only reliable to run the project. It could also extract from the structure, that the asset does not belong to the investors (*Sukuk* holders), it is a loan that the *Mudarib* has taken from them to bankroll the project, which includes payment of the profit on the amount that was taken from them. The profit from the investment that is paid to the investors seems to be a profit that is derived from the loan, which is not permissible in Islamic law. In other words, the profit that is paid to the investors is interest charged on the loan, which Muslim jurists unanimously agree on its prohibition in Islamic law. On the other hand, what is well known in a *Mudarabah* contract is that the asset, or the project is entirely belonging to the capital provider, and the *Mudarib* is only the trustee to manage the project. Therefore, based on the foregoing structure of *Sukuk al-Mudarabah*, it is obvious that the structure of *Sukuk al-Mudarabah* is not in accordance with the principles of Islamic law. Because of this, there is a need to find out the

¹⁷Ibid.2164-2165. For detailed information on *Sukuk al-Mudarabah*, see recommendations of the Fiqh Academy (OIC) at the same Majallah, 2005-2008

¹⁸ Wan Rahim, 9

proper structure that is in line with the principles of Islamic law.

1.2 Circulation of Sukuk al-Mudarabah in Islamic Capital

Circulation of *Sukuk al-Mudarabah* refers to its compatibility for sale and purchase in the stock market after the subscription has been closed in the primary market. This circulation should be conducted in accordance with the principles of Islamic law. As a result of this, it is not permissible to circulate *Sukuk al-Mudarabah* before starting the operation of the *Mudarabah* project because the principal amount of the project is still in the form of currency. This is because, in this case, the circulation of *Sukuk* is tantamount to the sale of currency to currency with an additional amount, and on deferred payment, which is not permissible in Islamic law to do so. However, *Sukuk al-Mudarabah* can be circulated after starting operation of the project if most of the properties of the *Mudarabah* project are corporeal assets and usufructs. For instance, 51% of the properties of the project are corporeal assets and usufructs. In this case, sale of the properties of the project is the sale of the properties by currency on the spot in which there is no *riba* transaction or uncertainty at all. Nevertheless, *Sukuk al-Mudarabah* cannot be circulated if most of the assets of the project are debt transactions on deferred payment because this transaction is not allowed in Islamic law to be transacted.¹⁹

Furthermore, it is not permissible for issuer of the *Sukuk al-Mudarabah* to guarantee the principal amount, or a portion of the profit for investors because this would convert *Sukuk al-Mudarabah* transaction to a loan transaction wherein any benefit derived from the loan is *riba*, which is forbidden by clear texts of Islamic law. In all circumstances, the issuer must register the circulation of the *Sukuk* wherein the *Sukuk* represents transfer of the asset from one party to

another in its records in the name of the *Sukuk* holders.²⁰

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

Since circulation of *Sukuk al-Mudarabah* is selling the *Sukuk* to other party. Muslims jurists unanimously agreed on this practice of *Mudarabah*. As *Mudarabah* was practised by nations before Islam, and with the advent of Islam, it was also recognised by Islam. The Companions of the Prophet (S.A.W) utilized it, and it has been practiced up to date. It is still carried out by people (Muslim and non-Muslim) all over the world. This shows that there is no qualm in the legitimacy of the *Mudarabah* contract. As Allah (S.W.T) says in the *Qur'an*, "and others are travelling in the earth seeking the bounty of Allah."²¹ In a *Mudarabah* contract, the *Mudarib* is travelling from country to country trading with the capital of the *Mudarabah* to earn profit from the investment of the capital. In another verse, Allah (S.W.T) says, "If you have performed the Friday prayer, disperse in the earth and search for the bounty of Allah." In a *Mudarabah* contract, the *Mudarib* is seeking the earnings by travelling from place to place to invest the capital in the business sphere to gain profit from the capital.

In the *Sunnah*, it was mentioned in the life history (*Sirah*) of the Prophet (S.A.W) that the Prophet himself had travelled to Syria, before his Prophethood, with the properties of Khadijah bin Khuwaylad²² (may Allah be pleased with her) as

¹⁹Wahbat al-Zuhaili, *al-Mu'amalat al-Maliyyah al-Mu'asarah: Buhuth wa Fataawa Hulul* (Dimashq: Dar al-Fikr 2008), 226-227

²⁰Majallah Majma' al-Afiqh al-Islami session 4 no. 4, vol. 3 (Jeddah: Majallat al-Fiqh al-Islami :1988), 2163

²¹Surat al-Muzammil verse 20

²²Khadijah was the first wife of the Prophet (S.A.W), he has married her before the Prophethood, and she has 40 years and the Prophet (S.A.W) has 25 years. Khadijah, so she is older than Prophet by 15 years. She was wealthy woman in Makkah who hired men to trade with her properties and

a *Mudarib*. When he had become a Prophet, he recognised this as a lawful way of business.”²³ In another vein, it was stated by Hakim bin Hizam (may Allah be pleased with him) that “if he has been given a *Mudariban* amount as capital of a *Mudarabah*; he stipulated on the *Mudarib* to not trade with an animal, or enter into a sea, or get into a valley. If the *Mudarib* violates one of these conditions; the *Mudarib* will guarantee the money in case of any damage, or loss that may happen to the capital”.²⁴ This statement shows that a *Mudarib* must follow the terms and conditions of the *Mudarabah* contract. If he goes beyond the terms and conditions that are stipulated in the contract, then he is liable for any damage or loss that may be happened to the principal amount of the *Mudarabah*. It was also stated by ‘Ali (may Allah be pleased with him) that, “in a *Mudarabah* contract, the loss is borne on the capital, and the profit is according to the agreement between the contracting parties.”²⁵ This means that in a *Mudarabah* investment, any loss is borne by the capital provider, and any profit is shared between the *Mudarib* and capital provider according to the portion that agreed upon.

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

damage, or loss that may happen to the investment. However, if the *Mudarib* has gone beyond the terms and conditions of the *Mudarabah* contract, he is liable for any damage, or loss that may happen to the investment of *Mudarabah* project.

1.3 Retrieval of *Sukuk al-Mudarabah*

Retrieval of *Sukuk al-Mudarabah* is selling the *Sukuk* to the issuer whereby the *Sukuk* will return into the same investment fund. According to Muhammad Taqi Uthmani, this retrieval of *Sukuk al-Mudarabah* from the *Sukuk* holder is permissible in Islamic law. This is because it is permissible in Islamic law for the *Mudarib* to buy from the capital provider, and the capital provider to buy from the *Mudarib*. In other words, it is permissible in Islamic law to conduct a contract of sale between the capital provider and the *Mudarib* during a *Mudarabah* period. However, the capital provider exclusively owns the assets of the *Mudarabah* project, the *Mudarib* does not own anything in the *Mudarabah* project except his portion of profit that agreed upon if profit is realized from the investment of the project. Once the capital of the *Mudarabah* project is converted to commodities and assets in the project, and the *Mudarib* wants to retrieve the *Sukuk* from the capital provider; the transaction will be conducted on a sale’s contract in which the capital provider will sell his *Sukuk* to the *Mudarib*. Therefore, in this circumstance, it is obliged to apply the rules of a sale’s contract to the retrieval of the *Sukuk al-Mudarabah* in order to be in conformity with the principles of Islamic law.²⁶

The question may arise is that whether the retrieval of the *Sukuk al-Mudarabah* will be conducted at the face value of the *Sukuk*, or at market value. To answer this question, Taqi Uthmani says, it is obliged in the retrieval of the *Sukuk al-Mudarabah* to be done at the market value. Then, if the market value is more

concluded a contract of *Mudarabah* with them. When she heard about trustworthy, honesty and faith of the Prophet (S.A.W), she asked him to travel with her properties to *al-Shamas* a *Mudarib* accompanied with her servant Maysarah. When Allah S.W.T has sent the Prophet S.A.W as a messenger to the people; she was the first woman that believed in the message of the Prophet (S.A.W), and supported him (S.A.W) physically and financially.

²³ Sirah Ibn Hisham, vol.1, 203

²⁴ Al-Shawkani, Muhammad bin ‘Ala bin Muhammad al-Shawkani, *Nayl al-Awtar min ‘ahadith Sayyid al-Akhyar Sharh Muntaqa al-Akhba*, vol. 5 (Bairut: Dar al-Jalil, 1973), 393. See also Sublah al-Salam, vol. 3, 915

²⁵ Abu Bakar, ‘Abdurazaq bin Hamam al-San‘ani, *Al-Musanif*, Tahqiq, Habib al-Rahman al-‘Azami vol. 8, 1st edition (Beirut: Maktab al-Islami, 1970), 248

²⁶ Muhammad Taqi Uthmani, paper presented at Fiqh Academic conference that held at Jeddah, Majallat Majma‘ al-Afiqh al-Islami session 4 no. 4, vol. 3 (Jeddah: Majallat al-Fiqh al-Islami :1988), 1858

than the face value, the difference between the two values is considered as a profit of the *Mudarabah* investment that will be distributed between the capital provider and the *Mudarib* according to the portion that agreed upon. If the contract of the retrieval is concluded on the condition that the capital provider will sell the *Sukuk* at the face value when the *Sukuk* is retrieved; this condition is not in accordance with the principles of Islamic law. This is because the condition is against the principles of a *Mudarabah* contract in which the assets of the project exclusively belong to the capital provider, who has right to sell his assets at any price he wishes. Therefore, it is not permissible to retrieve *Sukuk al-Mudarabah* at the face value, but it is obliged to retrieve it at the market value, so that the retrieval of *Sukuk al-Mudarabah* will be in line with the principles of Islamic law.²⁷

From the foregoing, the retrieval of the *Sukuk al-Mudarabah*, in order to be in compliance with the principles of Islamic law, it should be exercised at the market value without any condition to sell back the *Sukuk* at the face value. Thus, this will convert the *Mudarabah* contract to a loan contract, wherein any profit that is derived from the investment of the *Mudarabah* is a benefit that derived from the loan. It is not permissible for the capital provider to take it because it is considered as *riba*, which is forbidden by the axiomatic texts of Islamic law.

1.4 Termination of *Sukuk al-Mudarabah* Transaction

Termination of *Sukuk al-Mudarabah* can be done by selling the *Sukuk* to other party, or to the *Mudarib* himself wholly, or partially. Hence, *Sukuk al-Mudarabah* contract can be terminated by termination of the period of the *Mudarabah* contract that is agreed between *Sukuk* holders and the *Mudarib*. In Islamic law, it is permissible for *Sukuk* holder to sell his all *Sukuk al-Mudarabah* to the *Mudarib*, or to anyone he wishes. In case *Sukuk* holder sold the all *Sukuk* to

the *Mudarib*, or anyone, then the contract of *Sukuk al-Mudarabah* is terminated between him and the *Mudarib*.²⁸

However, in case the *Sukuk* holder sells a part of *Sukuk al-Mudarabah* to the *Mudarib*, then the *Mudarib* will become a partner of the *Sukuk* holder with the part that is sold to him. In other words, if the capital provider sold a part of the *Sukuk* to the *Mudarib*; the part that is sold to *Mudarib* is entirely belonging to the *Mudarib*; any profit that is derived from the investment of that part is exclusively belonging to the *Mudarib*. He is only obliged to distribute the profit that is derived from the rest of the *Sukuk* between him and the capital provider based on the portion that agreed upon. Therefore, ownership over the part that is terminated will be transferred to the *Mudarib* immediately. This is because; it is not allowed to continue the *Mudarabah* contract on the entire project until the period of the *Mudarabah* is expired.²⁹

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

CONTEMPORARY PRACTICE FOR *SUKUK AL-MUDARABAH* TRANSACTION

In the contemporary practice of *Sukuk al-Mudarabah*, the *Mudarib* can be an individual, or a

²⁸Taqi'Uthmani, 1862-1863.

²⁹Taqi'Uthmani, 1862-1863. See also Fatawa Da'rat al-Bunuk al-Islamiyyah, Fatawa al-Mudarabah no. 0579 <http://www.ibisonline.net/Shariah/Fatwa.aspx?Fatwa=37648> retrieved on 13th May 2019

²⁷Ibid. 1860-1861

company, or a corporation that can analyze economically the activities of the project. Then, he, or it can expose an offer to the public, or some financial corporations to finance a project. Those financiers are considered as capital providers (*ArbabAmwal*) for the *Mudarabah* project. The acceptance of the offer is a form of prospectus of issuance that describes the project, such as the capital that is required for carrying out the project and a portion for the capital providers in the profit, as well as the method of management. The capital that is required for the project will be divided into portions, or monetary units. The issuing *Sukuk* represents monetary units and the principal amount of each participant in the project. Moreover, the *Sukuk* represents the undivided portion in the project after the subscription is closed. The ownership in the project is not limited to the *Sukuk* themselves, but to the financial portion that the *Sukuk* represents in the project. There are certificates that recognize the owners' rights in the project, and represent the possession of the undivided portion in the project. All the certificates represent an offer that is required for the *Mudarabah* contract. The participation in the subscription to bankroll the project by buying the *Sukuk* is considered as an acceptance for the offer of the *Sukuk*. The statement of financial analysis that is prepared for the project must be a true statement. If it is discovered that the statement which was mentioned in the prospectus of issuance is not true; in this case, the *Mudaribis* are obliged to guarantee any loss that may happen to the project pertaining to false statement.³⁰

It is obvious from the aforesaid that, in the contemporary practice of *Sukuk al-Mudarabah*; the contracting parties are not gathering at the session of the contract to discuss the terms and

conditions of the *Mudarabah* contract, type of activities and nature of the project, as well as authority of the *Mudarib*, and his portion in the profit. In addition to this, the contracting parties do not know each other at all. This is because *Sukuk al-Mudarabah* holders, who are considered as capital providers, may change from time to time because of the circulation of the *Sukuk* in the stock market. Furthermore, in the contemporary form of practice of *Sukuk al-Mudarabah*, in which the *Mudarib* solely specifies the issuance of the *Sukuk*, the offer, the terms and conditions of the *Mudarabah* contract; the capital providers do not have an opportunity to discuss terms and conditions of the contract. They only have opportunity to accept, or reject the offer. Based on this, the *Mudaribis* are solely responsible for truth of the statement and information about the prospectus of issuance. Nevertheless, after selling the *Sukuk*, the proceeds of the *Sukuk al-Mudarabah* represent the principal amount of the project which belongs to the *Sukuk* holders. The *Mudaribis* are only a trustee who is the safe keeper and manager of the project. When the project starts operating, and the money is transferred to merchandise, machines and buildings, then the ownership of the *Sukuk* holders will transfer to those properties because the project consists of those properties.³¹

From the foregoing, it could be observed that in the contemporary *Sukuk al-Mudarabah* practice, the *Mudaribis* are the only person reliable to manage the project. This is because he issues the *Sukuk* to seek capital for financing the project, while the *Sukuk* holders do not perceive the content of the prospectus, and they do not know each other. As a result of this, the *Mudaribis* are solely responsible for any false information, or default in the prospectus, which results in any damage, or loss in the project. In a nutshell, one can say that in the current *Sukuk al-Mudarabah* practice; the *Sukuk* holders are not liable for any damage, or loss that may happen to the investment of the project, if the damage, or the

³⁰Husain Hamid Hassan, *Daman Ras al-Mal aw al-Ribh fi Sukuk al-Mudarabah aw Sanadat al-Muqaradah*, paper presented at Fiqh Academic conference that held at Jeddah on 6-11 February, 1988, *Majallah Majma' al-Fiqh al-Islami*. 4 session 4 vol. 3 (Jeddah: Majma' al-Fiqh al-Islami 1988), 1869 -1870

³¹ Ibid

loss is due to wrong information that is given in the prospectus. This is because they do not have an opportunity to see the content of the prospectus of the issuance of the *Sukuk*.

DISCUSSION AND CONCLUSION

It is axiomatic that the structure of the *Sukuk al-Mudarabah*, as practiced presently in the stock markets, this practice violates rules and principles of the classical *Mudarabah* structure, which is recognized by Islamic law. The *Sukuk al-Mudarabah* contract is different from other *Sukuk* contracts; it has its own rules, terms and conditions that should be followed in the contract in order to be in conformity with the principles of Islamic law. In *Sukuk al-Mudarabah* contract that is in accordance with the principles of Islamic law, the principal amount of the capital providers, or a portion of the profit, is not guaranteed by the *Mudarib* unless it is due to his negligence, or mismanagement for the *Mudarabah* project. The project entirely belongs to the capital providers; the *Mudarib* is only entitled to the agreed portion of the profit in case profit is derived from the investment of the project. At the end of the period of the project, the *Sukuk* holders can sell their *Sukuk* at market price, or at any agreed price to anyone they want. They are not obliged to sell back their *Sukuk* to the *Mudarib* at the face values of the *Sukuk*. If there is any provision in the prospectus of the issuance of the *Sukuk* that says, at the end of the project, the *Sukuk* must be sold to the *Mudarib* at the face values, this provision will convert the *Sukuk al-Mudarabah* contract to a loan contract with an interest charge, which is forbidden in Islamic law.

In *Sukuk al-Mudarabah* transaction, the *Mudarib* is only an agent on behalf of the *Sukuk* holders to manage the *Mudarabah* project in the appropriate way of investment. If there is any condition in the contract, or in the prospectus of issuance, that there is a specific amount of the principal amount, or a portion of the profit, which is guaranteed by the *Mudarib*, then the contract violates principles of Islamic law, which are

required to be in the contract of a *Mudarabah* project. Pertaining to circulation of the *Sukuk al-Mudarabah*, it is as other *Sukuk*, wherein the properties of the project, or most of them, must be real estate properties, usufructs, lands, so that the *Sukuk* can be circulated in the stock market in accordance with the principles of Islamic law. If the properties of the project are still in the form of currency, in this case, circulation of the *Sukuk* must be in accordance with currency circulation in which the transaction must be on the spot, hands to hands, equal to equal. Any delay, or taking a superfluous amount of the transaction is tantamount to a *riba* transaction. The *Sukuk* holders can terminate their *Sukuk* transaction at any time they want without any condition, because in a classical *Mudarabah* contract that has transpired, it is permissible for the capital provider to terminate the contract at any time he wants.

REFERENCES

- [1] Abdullah bin Hijazi bin Ibrahim al-Shafi'i al-Azhari. (1997). *Hashiyat al-Sharaawi 'ala Tuhfat al-ttulah bi Sharh Tahrir Tanqih al-Libab*, Abu, Yahya Zakariyah al-Ansari ma' Taqirir al-sayyid Mustafa bin Hanafi al-dhahabi al-Misri 'ala Hashiyat al-Shaykh al-Sharqawi vol. 3 1st edition Bairut: Dar al-Kutub al-'ilmiyyah.
- [2] Ali Ahmad al-Salus. (1988). *Sandat al-Muqaradahwa al-Istithmar*, paper presented at Fiqh Academic conference that held at Jeddah on 6-11 February, 1988, Majallah Majma' al-Fiqh al-Islami no. 4 session 4 vol. 3 Jeddah: Majma' al-Fiqh al-Islami.
- [3] Abu Bakar, 'Abdurazaq bin Hamam al-San'ani. (1970). *Al-Musanif*, Tahqiq, Habib al-Rahman al-'Azami vol. 8, 1st edition Bairut: Maktab al-Islami.
- [4] Al-Kasani. (2000). *Badi'i al-Sana'i Fi Tartib al-Shara'i*, Taba'ah Jadidah, Haqahawa Kharraja 'Aditha 'ala Thuluth Nusakh Khatiyah, Muhammad 'Arnan bin Yasin Darwish, vol. 5 (Bairut: Dar Ilya'a

- al-Turath al-‘Arabi, Mu’asasah al-Tarikh al-‘Arabi.
- [5] Al-Mawardi, Abu al-Hasan, ‘Ala bin Muhammad bin Habib. (1983). *Min Usull al-Iqtasad al-Islami, Al-Mudarabah*, DirasahwaTahqiqwaTa‘aliq, ‘Abdul-Wa‘lab al-Sayyid Hawas. Egypt: Dar al-Ansar.
- [6] Al-Shawkani, Muhammad bin ‘Ali bin Muhammad al-Shawkani. (1973). *Nayl al-Awtarmin ‘ahadith Sayyid al-AkhyarSharhMuntaqa al-Akhba*, vol. 5 (Bairut: Dar al-Jalil.
- [7] Bilan, Y., Hussain, H.I., Kot, S., Haseeb, M. and Jermisittiparsert, K. (2020) Sustainability and Economic Performance: Role of Organizational Learning and Innovation, *Engineering Economics*, 31 (1), 93-103.
- [8] FatawaDa’rat al-Bunuk al-Islamiyyah , Fatawa al- Mudarabah no. 0579 <http://www.ibisonline.net/Shariah/Fatwa.aspx?Fatwa=37648> retrieved on 13th May 2019
- [9] Fiqh Academy Resolution. (1988). (no. (5) d 4/08/88 on *Sukuk al-Mudarabah*, MajallahMajma’ al-Fiqh al-Islami, session 4, no.4 vol.3 (Jeddah: Majma’ al-Fiqh al-Islami.
- [10] Hasan ‘Abdullah al-’Amin. (1988).*Sanadat al-MuqaradahwaSanadat al-Istithmar* paper presented at Fiqh Academy Conference that held at Jeddah, MajallatMajma’ al-Afiqh al-Islami session 4 no. 4 vol. 3 Jeddah: Majallat al-Fiqh al-Islami.
- [11] Husain Hamid Hassan. (1988). *Daman Ras al-Mal aw al-Ribh fi Sukuk al-Mudarabah aw Sanadat al-Muqaradah*, paper presented at Fiqh Academic conference that held at Jeddah on 6-11 February, 1988, MajallahMajma’ al-Fiqh al-Islami no. 4 session 4 vol. 3 Jeddah: Majma’al-Fiqh al-Islam.
- [12] Hussain, H.I., Kamarudin, F., Mohamad Anwar, N.A., Nassir, A.M., Sufian, F., Mang Tan, K. (2020), Impact of Country’s Governance Dimensions on Bank Revenue Efficiency: Overview on Middle East, Southeast Asia, and South Asia Countries, *Transformations in Business & Economics*, 19 (1), 191-228.
- [13] Hussain, H.I.; Slusarczyk, B.; Kamarudin, F.; Thaker, H.M.T.; Szczepańska-Woszczyna, K. (2020) An Investigation of an Adaptive Neuro-Fuzzy Inference System to Predict the Relationship among Energy Intensity, Globalization, and Financial Development in Major ASEAN Economies. *Energies*, 13, 850.
- [14] Ibn Qudamah, Abu Muhammad, ‘Abdullah bin Ahmad bin Muhammad bin Qudamah al-Muqdasī. (nd). *al-Mughni ‘ala Mukhtasar*, Abu al- Qasim ‘Umar bin Husain bin ‘Abdullah bin Ahmad al-Khiraqi, vol. 5 Beirut: ‘Alam al-Kutub.
- [15] Ibn Rushd, Abu al-Walid Muhammad bin Ahmad bin Muhammad bin Ahmad bin Rushd al-Qurtubi al-Andalusi. (2001). *Bidayat al-Mujtahid waNihayat al-Muqtasid* Tanqihwatashih Khalid al-‘Attar, Taba‘ahJadidahwaMunaqahahwaMusahah ah, vol. 2 Bairut Dar al-Fikr.
- [16] Islamic Bonds (Sukuk): Its Introduction and Application, <http://aboobarza.wordpress.com/2008/10/17/islamic-bonds-sukuk-its-introduction-and-application/>, retrieved 23 June 2019
- [17] Muhammad ‘Abdul-Mun‘im ‘Abu Zaid. (2000). *Tatwir Nizam al-Mudarabah fi al- Masarif al-Islamiyyah* 1st edition.
- [18] Muhammad bin ‘AhmatBajatish. (2005). “*Sukuk al-MudarabahwaTatbiqatuhi fi al-Masarifi al-Islamiyyah*” Master Dissertation, International Islamic University.
- [19] Muhammad Taqi ‘Uthmani. (1988). paper presented at Fiqh Academic conference that held at Jeddah, MajallatMajma’ al-

- Afiqh al-Islami session 4 no. 4, vol. 3
Jeddah: Majallat al-Fiqh al-Islami.
- [20] Rafiq Yunus al-Misri. (1988). *Sanadat al-Muqaradah*, paper presented at FiqhAcademic conference that held at Jeddah on 6-11 February,1988, MajallahMajma‘ al-Fiqh al-Islami no. 4 session 4 vol. 3 Jeddah: Majma‘al-Fiqh al-Islami.
- [21] Safiyyah ‘Abdul-‘Aziz al-Sharqawi (1991). *al-Takyif al-Shar‘iLisharikat al-Mudarabah al- Islamiyyahwa al- 'Athar al-Mutarabah 'alayha*, Egypt: Dar al-Nahadah al-‘Arabiyyah.
- [22] Wahbat al-Zuhaili. (2008). *al-Mu‘amalat al-Maliyyah al-Mu‘ Sarah: BuhuthwaFatawawaHulul* (Dimashq: Dar al-Fikr.
- [23] Wan Abdul Rahim Kamil. (2007). *Structuring Sukuk*, paper presented at IBFM Workshop on Detailed Structuring of Islamic Securities Kuala Lumpur: IBFM.
- [24] Yusuf ‘Abdullah al-Shubaili. (2005). *al-Khidmat al-Istithmariyyah fi al-Masarifwaalhkamuha fi al-Fiqhi al-Islami*, vol. 2 Beirut: Dar Ibn al-jawzi.