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**of**  
***Tadamon Islamic Bank***  
**Book 2**

**Rules and Regulations of Guarantee in Fiqh & Law**  
**(Second Edition)**

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## **Second Edition Introduction**

In view of the big rush on the first edition of the Guarantee Book issued by Tadamon Islamic Bank, the bank administration decided to republish this book and revise it in a way that suits the changes that cropped up in the banking arena.

Accordingly, the Guarantee Book has been produced in its new form after having been revised along with the addition of the law for bank mortgaged money realization 1990 besides the statements contained in Companies' Ordinance, 1925 in respect to entity body equitable mortgage.

We really hope that this edition would be a positive addition in the series issued by Tadamon Islamic Bank and that it would meet the requirements of all researchers and parties concerned in this field.

General Manager: Tadamon Islamic Bank

## **First Edition Introduction**

Debts have become a major element in contemporary economic activities which is not restricted to banks only as its impact extends also to countries, governments, establishments, organizations, companies and individuals. These debts could take the shape of payment of cash sums or deferred sale or any related financing transactions.

However, irrespective of the form of the transaction, a debt will ensue on the liability of one party to the other. This liability may expire or become restricted to a specific degree of responsibility that it does not exceed. Besides the party involved may turn to be evasive or fail to settle the payment.

In all these cases the debt may end by being classified as a bad debt. Thus creditors are keen to document their debts by legal insurances either by consolidating another liability to that of the debtor by way of supporting it and replacing in case it was corrupted or showed a failure, or through suspending the debt against a specific sum to claim back the debt in case the debtor fails to meet his obligation. A guarantee is a legal and legitimate means recognized by main when man knew at an early age cash transactions as this was in fact one of its very elementary requirements. We have been so instructed by the Holy Qur'an when we were asked to document the debt in writing and through other means. The Almighty said: 'and if you are on a journey and cannot find a scribe, then a security deposit (should be) taken. And if one of you entrusts another then let him who is entrusted discharge his trust (faithfully) and let him fear Allah, his Lord ....'. The concept of guarantee developed and branched till it became an independent science with its own rules and regulations. Therefore, in consideration to the importance of the principle of guarantee to economic activities at large and

those of banking in particular, Tadamon Islamic Bank has given it extra attention in pursuance of promoting scientific research as regard Islamic banking issues targeting enriching and bringing the experiment to fruition.

Thus the Bank administration undertook the task of assembling and analyzing the scientific and legal material to various types of guarantee and standardizing them to the actual status of the experiment. Thus it produced this book, which we hope will satisfy the needs of all those interested in economic activities be it commercial or banking debtors or creditors or even researches in all matters relating to guarantee and debt s documentation.

May Allah reveal to us all, the righteous path.

Salah Ali Abu Enaga

General Manager: Tadamon Islamic Bank

## **Guarantee**

This is a study on the issue of guarantee that does not exceed stating the conditions of guarantee agreed and differed upon in the opinion of old scholars indicating the points of strength in each argument wherever possible.

We hope this will be an adequate satisfactory effort, at least at present. We look forward to completing the analytical side of the issue and covering the jurisprudential dimension to the large expansion in the size of transactions from the one side and its wide spread over the vast limits from the other sides. All this in the light of the old status and the expected requirements necessitated by current variations in respect to emphasis or amendments or changes for guarantee conditions. We wish to come back to complete this after having conducted preliminary studies relating to remaining topics:

### **Definition of Guarantee:**

Guarantee, or warranty - has been defined as consolidating one liability to another in claiming the rights. These rights could be a debt, kind or self<sup>(1)</sup>.

A guarantee requires, according to the above definition, the existence of constant right, or one that is liable to be to one person against another. Subsequently, a third party volunteers to guarantee the payment of these rights if the second person fails for one reason or another to settle these rights. The major elements of guarantee are:

**1. The guarantor:** this person volunteers to guarantee to meet the rights, thus, his liability is consolidated to that of the original party in claiming the rights. In this sense, he is deemed as guarantor, sponsor, bearor and warrantor, all used with the same meaning.<sup>(2)</sup>

**2. The party guaranteed:** He is called also the original party and the debtor and he is the one that the rights are constantly assigned to his liability. <sup>(2)</sup>

**3. The party benefiting from the guarantee:** He is the owner of the rights and is also called the claimant since he is claiming his rights.

**4. The item guaranteed:** this represents the rights guaranteed.

#### **Types of Guarantee:**

Constant rights or that liable to or for the party benefiting from the guarantee against that guaranteed is restricted for the purposes of the word guarantee to:

1. Guaranteeing the debt: which represents the right assigned to the liability of a debtor.
2. Capital Asset Guarantee: which represents handing over a capital asset if it is present or something similar or its value if obsolete.
3. Personal Guarantee: Which is also known as a face guarantee and calls for bringing forward the debtor to a judicial panel if needed. He must pay whatever fine is assessed against him. <sup>(3)</sup>
4. It is a guarantee of the object of the contract by stipulating its price if it is what fell due.

The majority of scholars of Islamic scholars used the two expressions, warranty and guarantee, as having the same meaning, but the Shafiiyah and Hanabla made distinction between the two. They specified warranty for the 'self guarantee' only and used guarantee for all the others. To them, self guarantee meant money or cash guarantee. In many cases, other terms are used for such concepts as 'bearing', 'liability' and 'bail'. Accordingly, we shall be using the two expressions guarantee and warranty to mean the same capital asset.

Since guaranteeing money is the principal issue we shall subject it to study in this research whether the money was a debt or kind taking into consideration that when the expression guarantee is used it should be understood that this refers to money guarantee.

Al Kharashi's footnote stated: the word bear in the derivation of " I bear " or liable or warrantor and bailor and for me or to me and related it to money as probable or even evidence. What is meant by the unrestricted is that which was not restricted by cash or a particular aspect or intention as if something specific was intended it would be deemed as mentioned in the record.<sup>(4)</sup>

### **Guarantee Legality Evidence:**

The fuqaha were unanimous as regards acceptance of the concept of guarantee on the whole. They stated the under-mentioned proofs on the legality of guarantee.

#### **A. The Qur'an:**

1. Jacob said, never will I send him with you until you given me a promise (i.e. oath) by Allah that you will bring him (back) to me, unless you should be surrounded (i.e.) overcome by enemies." And when they had given their promise he said, "Allah, over what we say is Witness.

(Surah Yousif: 12: 66).

2. They said, "We are missing the measure of the King. And for he who produces it is (the reward of) a camel's load, and I am responsible for it."

(Surah Yousif (12:72)

Bin Abbas said: A liable party that is a guarantor.

#### **B. Sunna**

1. Salma ibn Al Aqua' was quoted to have said that they were sitting with the Prophet (pbuh) when a funeral was brought and they requested the Messenger of Allah (pbuh) to hold the prayer for the deceased. The Prophet

(pbuh) asked if the deceased had left anything. They answered no. Then he asked if he had a debt pending against him. They answered, ‘Three dinars.’ Then the Prophet (pbuh) said, ‘Hold the prayer for your companion.’ Then Abn Qatada remarked, ‘Hold the prayer for him, Oh Prophet, and I will answer for this debt.’ And so the Prophet (pbuh) prayed for him. In the version of Al Nisaie and ibn Maja, Abu Qatada then said, ‘I guarantee him.’  
(5)

2. Abi Saeed was quoted to have said, ‘We were with the Messenger of Allah (pbuh) attending a funeral and when it was asked by the Prophet (pbuh), ‘Is there any debt pending against your companion?’ They answered, ‘Yes two dirhams.’ Then the Prophet (pbuh) said, ‘Hold the prayer for your companion.’ Then Ali (may Allah be pleased with him) said, ‘Oh Prophet, (pbuh) these two are my responsibility and are warranted by me.’ The Prophet (pbuh) then stepped forward to perform prayer and turned to Ali and said, ‘Allah bless you for what you did for Islam, and may Allah release your pledge as you did to that of your brother. Any Muslim who released the pledge of this brother, Allah would certainly release his on the Day of Resurrection.’ Then some of them said, ‘Is that to Ali in particular or to Muslims in general?’ The Prophet (pbuh) said, ‘Surely this for all Muslims.’  
(6)

3. Jabbar was reported to have said, ‘A man died so we had him washed, embalmed and dressed him for the grave. Then, we brought him before the Prophet (pbuh) to hold a prayer for him. Then, the Prophet (pbuh) took a step and said, ‘Is there a debt pending against him?’ We said, ‘Two dinars.’ Then, he and Abu Qatada assumed responsibility for the sum. We made towards the Prophet (pbuh) and Abu Qatada said, ‘The two dinars are warranted by me.’ Then the Prophet (pbuh) said, ‘Allah has settled the rights

of the creditor and set the deceased free of any obligation towards him?’ He said, ‘Yes.’ Then, he held the prayer for him and asked one day later, ‘What is the situation of the two dinars.’ Abu Qatada then said, ‘He died only yesterday.’ Then he returned on the following day and said, ‘I paid them.’ And the Prophet (pbuh) said, ‘Now you have relieved and soothed his skin.’<sup>(7)</sup>

4. Jabir was reported to have said, “The Prophet (pbuh) used to never hold a prayer for a dead man with a debt pending against him. A dead man was once brought and the Prophet (pbuh) asked, ‘Is there a debt pending against him? They said, ‘Yes, two dinars’. Then the Prophet (pbuh) said, ‘Hold a prayer for your companion.’ Then Abu Qatada said, ‘These are warranted by me, Oh Prophet.’ Then the Prophet (pbuh) held a prayer for him. And when Allah granted revelation to the Prophet (pbuh), He said, ‘I am more deserving to a Muslim than himself, so whoever left a debt behind, it's against me and whoever left some money behind, it's for his heirs.’”<sup>(8)</sup>

These sayings (hadith) emphasize the need to settle the debts against a man by way of preserving the rights of others and indicating the sacredness of these rights in Islamic legislation, in this regard, it is the right of the creditor. The fact that these sayings stressed the debt of the deceased in particular – as illustrated by the author of 'Muntaqa Al-Akhbar'. (The chapter of guaranteeing the debt of the ruined deceased), this does not indicate that it is not allowed to practice guarantee in cases other than these. What needs to be pointed out in this case in particular is the fact that it is the case which exemplifies the need and the wisdom behind guarantee more than any other. It relates to meeting the rights against a man since the deceased leaving behind some rights that require settlement and partly alive as well, could enable the creditor to claim back his rights from them in one way or another.

If the Islamic legislation does not allow dropping the rights from a deceased who died penniless, it is only natural that it should not be dropped from someone who died rich or who is still alive.

And whenever there is a right to be claimed, it could be guaranteed; so guaranteeing the person alive or a rich deceased is only natural. Accordingly, the last hadith is in fact rather general.

5. The Messenger of Allah (pbuh) said, “A guarantor is in fact a debtor.”<sup>(9)</sup> and the person assuming liability as earlier mentioned is the guarantor.

**C. Unanimity:** Trust is a major factor of the factors transactions. In many cases, a person may deal with a person with whom he does not have previous experience in transacting and thus does not know he is committed to honor his pledge and he has reason to doubt this. Hence, the way capital assets are such a person would need to feel assured as regard his rights through someone who knows the indebted and trusts his financial integrity. Guarantee, therefore, is one of the ways of verification that is called upon by the interest of the group and the stability of transactions. Hence, Muslims unanimously agreed on accepting resorting to it and adopting its practice.<sup>(10)</sup>

#### **The Form of Guarantee-:**

Like all contracts in Islamic jurisprudence, no specific form is conditioned in guarantee. It is in fact conducted in any way that conveys the concept of guaranteeing linguistically or conventionally. Of the well known expressions used is, guaranteed, warranted, answered for and I am a warrantor, a bearer beside the use of the word guarantee and tailor. And also the expression, I owe you and indebted to you or the like whether a meaningful gesture or a piece of writing.<sup>(11)</sup> Guarantee could be carried out in fulfillment, suspending or as a supplement.

**Fulfillment:** This is the basic practice in contracts and that is by holding the contract leading to its requirement immediately such as saying: I guarantee to you your debt against so and so.

It is worthy mentioning that when holding the contract in a fulfillment form, the guarantee goes side by side with the rights in respect to date of settlement, deferment and installing besides other qualities.

**Suspending:** This deals with suspending guarantee depending on the occurrence of some probable event or the non-occurrence of this in future. An example of this is when you say I guarantee you what you owe so and so if he perishes. Also when you say to someone, if you offer so and so a loan, I would guarantee your rights. This is exemplified in the Qur’anic verse: “For whoever comes with a camel, I will be his guarantor.”

**Supplementing:**

This represents carrying over the guarantee to some time in the future such as saying if Ramadan comes, I shall guarantee you your debt against so and so or I warrant what so and so assigned against you to be met by myself or equally so to what you give as a loan to so. This type of guarantee is acceptable as it has been supplemented to the condition of the guarantee. <sup>(12)</sup>.

Every contract is concluded on full compatibility of acceptance to the act of guarantee. This is the basic procedure as regard guaranteeing.

However, Abu Yousif of the Hanafiyah said, "Acceptance is not a basic pillar of guarantee and that is one of the two sayings of Al-Shafi. This means according to them that the guarantee is held and becomes committed on the guarantor, even without the acceptance of the guaranteed party or the party benefiting from the guarantee. This viewpoint is based as it seems on the grounds that the guarantee is merely a voluntary act and they adopted as an evidence to support this the hadith of the deceased's debt earlier quoted as the

acceptance of the creditor was not reported in these sayings. A guarantee is also a commitment to submit a claim and not assuming possession and hence acceptance is not conditioned for concluding it.

Those setting acceptance as a condition keep saying that a guarantee is not merely a commitment as it implies the ideas of acquisition. This could not be concluded without both acceptance and the positive response in the same way as the concept of selling. <sup>(13)</sup> The viewpoint of those setting as a condition could be argued on the grounds that the majority of scholars do not set acceptance of the guarantee party as a condition in order for the guarantee to be sound as will be mentioned later in the condition in order the guarantor.

However, it should be pointed out that there are two types of guarantee: A guarantee that is merely volunteering. In this type, the guarantor is committed to pay the debt with no intention of resorting to the party guaranteed. But in the second type of guarantee, the guarantor volunteers to pay the rights but with the intention to resort to the party guaranteed to claim the settled amount as if the guarantor gave the sum as a loan to the party guaranteed. In order that the guarantor may be able to claim back the sum, he has paid, it is a must that the party guaranteed and the party benefiting on the guarantee should both accept the arrangement agreed upon. Perhaps in the light of this explanation we can understand the idea behind the difference over acceptance.

### **The Conditions of guarantor:**

#### **The Guarantor:**

The first basic requirement in a guarantor is that he should be fully eligible which is manifested by being an adult, sane and fully mature. <sup>(14)</sup> Thus, no warranty is held for a youth or an insane person what so ever as a guarantee

is a voluntary contract and these are not qualified for a voluntary action. The scholars are of the opinion that a guarantee is acceptable from those qualified for voluntary actions be it a man or women. Ibn Qudama said, “The guarantee of anybody who is free to discharge of his possession as he likes whether it was a man or a women as it is a contract intended to deal with money so it is acceptable from women the same as the act of selling.<sup>(15)</sup>

The Malikiya stated that a guarantee is deemed valid from a woman though it is not considered effective except within the limit of one third of her possession if she was married. Endorsing what exceeds one third of the possessions of a wife depends on her husband. If the husband endorses it, the exception is approved or else it was annulled. The Malikiya consider that a husband has a share in the possession except within the limit of one third and what ever except that depends on the permission granted by the husband. The same applies to a person with a fatal illness, the pledge should be fulfilled with the limit of one third of his possessions and what ever exceeds that must be endorsed by his heirs.<sup>(16)</sup>

The guarantee offered by a mature youth is not deemed acceptable on the whole as it is a financial commitment of no benefit to him similar to volunteering. However, The Malikiya allow that if the youth is granted permission to engaged in trading through if interdicted right to evident abuse, such a guarantee is deemed acceptable but is lifted.

In order the guaranteed becomes sound and valid it must be conducted with the consent and approval of the guarantor. If he was forced to conclude the guarantee, it becomes invalid.<sup>(17)</sup>

### **The Guaranteed Party:-**

This is conditioned by:

1. It should be well known that the sum against so and so is fully warranted. In this regard from a jurisprudence viewpoint, most fuqaha state the knowledge, permission, or consent of the party guaranteed is not set as a condition since the guarantee is properly carried out.

Al-Dirdeer said:

A guarantee is deemed acceptable without securing the permission of a guaranteed party. Al Mutati said: some scholars set as a condition that the guarantee must be with his permission and consent so it became a habit with those of the indebted party by writing: So and so agreed to her on behalf of so and so with his consent or response to his orders such and such.<sup>(18)</sup>

Al Nawawi said: His consent is not set as a conditioned by overall agreement as settling his debt without his permission is allowed since preference is given to offering him guarantee.<sup>(19)</sup>

Ibn Qudama said: They guaranteed party and the sum guaranteed should not be necessarily known. However, Al Qadi said: They should be known so as to determine if the guaranteed party is worth of such a favour in the first place and also to specify the sum guaranteed in order to be dully settled.<sup>(20)</sup>

We mentioned earlier that there are two types of guarantee. One type is purely a voluntary action in which the guarantor commits himself to initially pay the rights and then actually fulfill his pledge without resorting to the party guarantee to make any claim. This is merely contribution and a favour in respect to the fact that the guarantor volunteers to pay the rights if the original party fails to do so. However, he resorts to the originally involved party regard the sum paid. Apparently it is not a must that no awareness, permission or

consent is required in regarding to the first type but it is a condition for the second type of guarantee. Accordingly, since Bank transactions most commonly deal in the second type of guarantee all the above aspects should be set as a condition as regard the party guaranteed.

2. The guarantee is deemed sound for every body who is committed or expected to be committed to answer for some financial rights towards the others whether the party guaranteed is dead or alive resourceful or ruined, present or absent and irrespective of being worthy to receive a voluntary donation or not. However, if a guarantor who warrants some one not worthy of donation such as a youth or some insane person, he has no right to resort to them claiming the sum he had paid.

Abu Hanifa however, proved an exception to this by saying that guarantee of a ruined diseased is not acceptable. Accordingly, he set as a condition that a party guaranteed should be capable of delivering the guaranteed sum either in person or done on his behalf. The pretext of Abu Hanifa is that a debt in fact is the actual act. A deceased person is incapable of performing any act thus any financial bail is actually dropped in the same way as a person is guaranteed for a debt whereas no debt is claimed from him. On the other hand if a person with good assets died, he would be able to make a settlement through his deputy. The same applies if he died leaving a guarantor behind who would act on his behalf in paying back the required rights. Abu Hanifa also said that the pledge of a diseased person has been disrupted beyond recovery so that there is no debt left to be guarantee is, in fact, consolidation one pledge to another in claiming a

settlement and here there is no pledge to which that of a guarantor could be combined.

The two companions commented on the opinion of the majority of scholars stating that death does not contradict with retaining a debt as the debt is a sum supported by a verdict and it does not lack capability to hold good. Accordingly, it continues to remain in the case of resourceful deceased person until a guarantee become valid to claim it and also a bail remains after some one dies in a ruined status leaving a guarantor behind. It is acceptable to relieve such a person of his debt and make a contribution him. The two companions supported their argument by the two sayings (hadith) of Ali and Abu Qatada who warranted a debt of a deceased person who left nothing to settle this debt and the Prophet (pbuh) urged them to offer him a bail. <sup>(21)</sup>

It seems that the dispute over this issues is only procedural as the majority of scholars and Abu Hanifa fully agree as regard allowing repaying the debt in voluntary contribution and by way of relieving a ruined deceased person and that this is good for him as stated in the hadith in this connection. However, this settlement can be regarded as a contribution or a relief or warranty according to the majority of scholars whereas it can not be described with guarantee according to Abu Hanifa.

### **The Party Guaranteed:**

The party guaranteed should satisfy the following conditions:

1. It should be specifically known since if he was anonymous the justification for the guarantee will not be realized and that is documentation. However, some one of the opinion that the consent of the party guaranteed is not a condition for making a guarantee valid. Abu Hanifa and Mohammed stated that this consent should be secured

adapting a pretext that the guarantee requires asserting a person's possession and this will not be attained except through the consent of the party guaranteed or that of someone acting on his behalf in semblance to selling and purchasing. This is in fact the opinion we sided with earlier and stated that it is inline with current banking transactions. And as the party guaranteed normally seeks securing a guarantor, he should, the way capital assets are, realize the status of the guarantor and his readiness and potentials to fulfill the pledge in question as he is the party with evidently the most interest in this contract and thus it has be conducted with his full awareness and consent.

2. The guarantor must be present at the location where the guarantee is convened. <sup>(22)</sup>

**The Guaranteed Item:**

The guarantee is deemed valid in all financial rights that are bound for settlement or liable to be and those other rights that are bound for settlement such as rent, selling value in duration fees.

The guaranteed item is conditioned by:

It should be guaranteed on the original party whether it was a debt or in kind. The debt is known and well defined which is the sum pledged by the indebted party.

**There are two types:**

The first type: the capital assets guaranteed by some are under his control such as forced kind and received kind if the selling transaction was corrupted and a cause for suspicion. These kinds are guaranteed through some one that are under his control so their guarantee is deemed valid.

The second type includes capital assets received on trust basis such as loan, charge, leased kind companies cash money or speculation (Mudarabah). These kinds are not guaranteed by a person in full control of them as long as he is committed by the rules and conditions of entrusted charge. Since these are not guaranteed by someone falling into his hands, it is not valid to have them guaranteed. However, they could, by chance, be guaranteed in case the person entrusted with the charge or infringed upon the kinds in his charge or showed some negligence in its safe keeping. If one or more of these emergencies affected the contract of charge, an entrusted person becomes a guarantor and hence the guarantee of the kinds entrusted to him becomes valid.

**Ibn Qudama, commenting on capital assets:**

As for entrusted items such as a charge, leased kind, partnership, speculation and capital assets in kind paid to a butcher or tailor, if these are guaranteed with no violation affecting them, it is not acceptable to have them guaranteed, as they are not guaranteed by someone under his control. And the same applied to his guarantor, again, if he had them guaranteed and committed a violation in respect to them. For Ahmed (Allah bless his soul) said, “It is apparent that it indicates the validity of the guarantee,” as he pointed out in the report of Al Athrum in connection to a man who accepts clothes from people and who was told by another man to hand over his clothes and he would be his guarantor. Then Ahmed addressed the man saying, “He is a guarantor to what he actually paid him,” meaning if he committed a violation or the item was corrupted through his own doing. According to this, if an item was damaged without neglect from his side or through his own making, a guarantor is not committed to anything as stated above. However if the damage was done through his own doing or through

his negligence, he has to guarantee them and his guarantor is so committed as well, since these are guaranteed against a person controlling them and hence had to be guaranteed in the same manner as a forced item and loans. This is in fact the guarantee of that which is not yet right and we consider it acceptable. <sup>(23)</sup>

2. A guarantee is deemed valid whether the item guaranteed is known or unknown.

Al Kasani said:

“A guaranteed item is deemed valid whether it was known or unknown in the same way as a man guaranteed in respect to what another party owes him and it is acceptable as well to whatever is attained from a selling transaction as ignorance of the size of a guaranteed item does not render the guarantee invalid. The Almighty said: <sup>(24)</sup>

72. They said: "We miss the great beaker of the king; for him who produces it, is (the reward of) a camel load; I will be bound by it." (Yousif: 72)

Al Kharashi said:

A guarantee is deemed valid in respect to something unknown so if a person said to another that he could offer a debt to a third party and he would guarantee the sum handed to him as a debt in this case he would be committed to settle the sum in question. However, whoever expressed commitment to guarantee someone indebted upon his request to some other person by one hundred, has the option to go back in his word before the transaction is held, whether partly or in full. But he would be deemed as a guarantor in respect to the portion covered by the transaction. The guarantee is also acceptable even if the position of the party guaranteed is not known as the regard his status or financial standing Ibn Arafa said: Failing to know the status of a guaranteed party is no reason for prevention by unanimous

agreement. However, if a point was raised that a guarantee involves resorting which is impossible when the matter relates to an unknown party, the answer would be in the affirmative through he would go back to claim what person had actually paid not what is guaranteed and what was paid is known.<sup>(25)</sup>

Ibn Qudama said:

The speech of Al-Khargi provides evidence as regards the validity of guaranteeing an unknown party when saying what you had given is pledged by me. Commenting in this connection, I offer you guarantee to the sum you owe to so and so or whatever is demanded from him or the sum established by definite evidence or that sum he admits you owe him. In this case, the guarantee is deemed valid. This viewpoint was endorsed as well by Abu Hanifah and Malik whereas Al-Shafi stated that such a guarantee is not valid as it is a financial commitment and could not hold good if unknown such as the price in a solid item. In this regards, we have the saying of the Almighty: "for whoever comes bearing a camel..." Also, there is the generalization contained in the saying of the Prophet (pbuh) "A guarantor is equally a debtor" and as it is a commitment of a pledged right that could not be compromised, it is deemed valid though unknown in a similar way as a solemn vow.<sup>(26)</sup>

It is worth noting:

- a. That the Malikiyyah tried to restrict unleashing the guaranteed of the unknown as observed in the convention in such as occasion as mentioned in the statement of Al Kharshi when saying: Should the commitment be restricted according to the treatment a guaranteed party is subjected to or not necessarily to be restricted by this. However, it seems restricting fully redeeming the guarantee to agree

with the convention and taking into account the potential of the original party is the best approach to be adopted.

- b. As understood from the same text above, the guarantor is entitled to go back in his guarantee before the original party guaranteed commences pursuing the transaction. And as a guarantee is a voluntary action, the person involved may give up before a commitment ensues.
- c. Ibn Qudama stated that Al Shafi considers the guarantee of the unknown is unacceptable. It was stated in " Rawdat Al Talibeen" one of the Shafiyah books that they do not stick to one statement in claiming that such a guarantee is unacceptable. For example, If some one guarantees that which is not right and is bound to by virtue of a loan or selling transaction or the like two ways are applicable:

The first is to determine explicitly incorrectness of the procedure as it a document and should not precede the act of the rights becoming binding such as a testimony. This is a relatively new approach. According to the old one, it is deemed valid as need may call for it. Guaranteeing the unknown has two ways the same as that which is not yet right. If we choose to deemed it as valid, a condition for this is that it should be possible to bring it to one's awareness by saying I guarantee the value of what you have sold to so and so while he is ignorant of it since coming to know it is quite easy.<sup>(27)</sup>

3. A guarantee could be deferred for a specific or unknown point of time though it is conditioned in differing it to an indefinite point of time that this estimation should be feasibly acceptable.

Al Kasani said:

In the case deferring the guarantee to an unknown point of time that was analogous to people's life span, such as harvest and Eid feast and the like, a

guarantee to such points of time is acceptable in the viewpoints of our companions. But it is deemed unacceptable with Al Shafi on the grounds that this is a contract to an indefinite point of time and thus is invalid in the same way as a selling transaction. The way we see it, this not excessively unspecific as to be covered by guarantee as a contract is not rendered unacceptable only because no specific point of time is known but because this could lead to a dispute through advancing and delaying. And not knowing specifically the limit of advancing or delaying does not lead to a dispute in terms of guarantee as in one contract something could be pardonable whereas it is not in another. Furthermore, a guarantee is deemed acceptable by convention and guarantees to these points of time are conventional.<sup>(28)</sup>

4. The last condition is that the guaranteed item in question should be within the guarantor's ability to settle so that the contract would suit its objective. This is intended to safe guard resorting to applying Allah's restrictive ordinance, penalties and all other commitments and personal punishments that the original party should bear and that can not be endured by some one else<sup>(29)</sup>

### **Conditions of a guarantee:**

A guarantee has several conditions, here under are some of them:

1. Ascertaining authorization of the owner of the rights to claim from the guarantor the sum he guaranteed to pay on behalf of the original party. Ibn Qudama said, "If a guarantee proved to be valid, a guarantor is committed to pay the sum guaranteed and the party guaranteed is entitled to claim the required settlement." We know of no disagreement over this and that is the essence of the concept of guarantee as proven by the words of the Prophet (pbuh), "and a guarantor is a debtor as well."<sup>(30)</sup>

This condition applies to all types of guarantees and differs only according to the type of commitment. A guarantor is required to settle a debt for which the original party is guaranteed obliged and not the guarantor. Thus, it is one debt but is claimed from two. A guarantor of an item in kind is required to hand over the guarantee of kind if it is still safe and sound and to deliver its like or its equivalent value if it has already expired. A guarantor for self guarantee is required to bring the guaranteed party in person and if he failed to do so, he would be ordered to settle the commitment demanded from the party guaranteed.

2. The majority of scholars is of the opinion that the owner of the rights may claim his rights from whoever he chooses be it the original party guaranteed or the guarantor. It is said that Imam Malik adopts the opinion of the majority of scholars though it is said that he went back on this viewpoints and said: “A guarantor is not committed to appear if the original party guaranteed willingly showed up and the rights were conveniently claimed from him.” Similarly, the rights are claimed from an indebted person if he was absent, it proved feasibly possible to pin down his fortune, and it was possible to make a settlement from it without any difficulty. However, if he was present but showing an aggressive attitude or if he was absent and locating his fortune was not attainable or this was possible but with considerable difficulty, the guarantor would be required to settle the rights as it would be unfair that some one present should be non – existing.

The Malikiya came forth as a pretext to this opinion that a guarantee is actually a document and the claimed right can not be realized from it except when it is rendered impossible to claim it back from the original party guaranteed in the same way as a mortgage. The pretext against this considers

that the claimed right became attached to the guarantor's liability by virtue of the guaranteed contract. <sup>(31)</sup>

However, nowadays some of the Malikiya do not believe that a guarantor should be asked to settle the claim until it becomes practically impossible to have the rights settled by the original party guaranteed.

Some of the elderly followers of Al Hanafia considered that the guarantee through debt requires that the original debt is to be imposed on the guarantor and the claim is to be made accordingly and thus the guarantor is claimed when demanded to settle a debt he is obliged for and not the original party. The original party is also demanded to settle a debt he is obliged to and not the guarantor and hence a debt is governed by the number of claims made. Al Shafie believed that this hinders the validity of kind and self guarantee as this condition can not be fulfilled in guarantees other than that of a debt.

Some went even further: Ibn Abi Laila and Abu Thur said, and Ibn Shibrma was reported to have said: A guarantee is similar to a transfer document in that it necessitates relieving the original party of any rights claimed from him and supported their argument by the hadith of Abi Saeed earlier quoted. They added the saying proved that the party guaranteed is relieved from liability by virtue of the guarantee. And as it is one debt if it was assigned to the liability of a second party it follows that the first one is relieved.

However, the majority of scholars took another side regarding all this as we mentioned earlier in that they gave the party entitled for the rights the option to direct his claim to whoever he wished the original party or the guarantor unless the guarantee is conditioned by relieving the original party from any obligation so it becomes a moral obligation. <sup>(32)</sup>

Abu Baker Abdul Aziz tried to compromise these two viewpoints and said:

A person alive is not relieved of liability simply on securing a guarantee. Though for a deceased person, there are two versions in this regard. It is true that the previous hadith tackled the issue of guaranteeing the debt of a deceased who was bankrupt. Even this saying did not claim a deceased person is relieved just on holding a guaranteed contract becoming free of liability depending on finalizing the settlement of the rights as understood from the hadith of Gabir and the saying: the soul of a believer keeps pending by his debt.

Relieving the original party guaranteed from another side is in conflict with the essence of the concept of guarantee, which is in fact consolidating one liability to another. Consolidation means that the rights are still pending with the liability of the original party, the guarantee from a third angle is a document reflecting the rights and the document does not transfer the rights from the original party. It is also permissible to link the same right with two locations by way of realizing further documentation such as linking a mortgagor's liability as well <sup>(33)</sup>.

3. A claim for fulfillment of a right could be made when the appointed date falls right and when the owner of the right in question is entitled to claim settlement from the original party guaranteed or the guarantor. If either of them made the settlement all are relieved of any obligation. Again they are both relieved if the guarantor transferred the party guaranteed to another person or if the owner of the right relieved the original party of his obligation. However, if he relieved the guarantor he would be relieved alone. As a rule a claim falls right when a right is right but a deferred right brings closer the death and bankruptcy of a guarantor. In this case, the settlement is made from him or his heirs as long as the original party is around and well fixed.

The entitled rights also bring closer the death of the original party if he left behind a settlement to be made but if he did not, a guarantor need not be approached until the specified date falls right. <sup>(34)</sup>

Accordingly, a guarantor is released of the commitment of a bail when a settlement is made whether through him or the original party guaranteed and that is because the authorization to make a claim was meant to finalize a settlement so if that was done the objective has been attained and thus the requirement of the contract is over. Also, A guarantee is ridden from being relieved of it and through transfer as mentioned earlier. <sup>(35)</sup>

4. A guarantee is always associated with each condition of its members as long as the condition is valid. Al Shafe said, “If the guarantee was made on a condition, the debtor would be entitled to deal with the guarantor according to the condition made to him and not according to what was unconditional.” <sup>(36)</sup>

If the owner of a right set a condition to the guarantor to claim his rights if he so wishes from him or from the debtor, his condition is deemed useful and valid as widely accepted. He is entitled to address his claim to the guarantor even if the party guaranteed is present and quite resourceful. The same applies to the person who volunteers with a guarantee in the six defined cases:

1. Hard circumstances,
2. Easy circumstances
3. Absence,
4. Presence,
5. During life time, and
6. After death.

If however if the guarantor set a condition to the owner of the right in question not to claim the debt except after the death of the debtor, he had to have his condition honoured. <sup>(37)</sup>

If a debt that is done but deferred is guaranteed, it is deemed acceptable but would be right for the party guaranteed. Ibn Abbas reported that a man owed a debtor ten Dinars during the era of the Prophet (pbuh) and the man addressed him saying that he had nothing to give him. The other man said that he was never going to part away from him till he settled the debt or brought him a guarantor. Then he took him to the Prophet (pbuh) and the Prophet (pbuh) said: How long would you allow him The man said: One month. Then the Prophet (pbuh) said I will guarantee him. It is worth mentioning that a right could be deferred as it starts to become right if the contract was concluded by the acceptance of the party guaranteed which is in fact the beginning of the right becoming right for the guarantor and hence it could be only deferred even if it was for the party guaranteed. <sup>(38)</sup>

5. It is permissible to have a right guaranteed on behalf of one person by two or more. If the guarantors were many, each of them becomes liable for his share by dividing the rights entitled as long as it lends itself to division – over their number, that is, unless there is a condition that dictates otherwise. Then the condition is to be applied. The guarantor may set as a condition that some act as guarantors for the others and the debt's owner may impose that on them. In such a case, he is at liberty to prefer the rich to the hard up, the present to the absent, the person alive to the deceased. However, if there was more than one guarantor with no condition, each will be liable for his share only.

Similarly as it is possible to have a number of guarantors, a guarantor may be guaranteed by another guarantor as the right in question has been

assigned to his liability and thus his guarantee is valid as all other rights. The guarantee is considered valid even if it was serialized and the guarantor is committed in the same way as his guarantor. The right is assigned to all liability and whoever settles it relieves all <sup>(39)</sup>.

**Resorting Authorization:**

If the guarantor made the settlement, he could resort to the original party if the guarantee was initiated on his command because the guaranteed as mentioned earlier is order by the party guaranteed. On making the settlement, the guarantor became as some one offering a loan to the original party and acting as his deputy in offering the settlement to the claimant. Still the following is conditioned in resorting authorization:

1. The guarantee should be finalized by the authorization of the party guaranteed, as the concept of a loan can not be realized with out his permission. Otherwise, he should not be approached for any claim according to the majority of scholars, though Malik said an approach could be made.

The majority of scholars considered the guarantee made without being ordered by the party guaranteed is mere volunteering.

2. A guarantee should be made by a valid permission and that is by the permission of a party who could possibly make a self testimony admitting a debt. In such a case the youth and insane could not be approached for settlement as their permission to finalized a guarantee is not deemed valid and offering them a loan is not linked with a guarantee.

3. Paying the sum to the claimant and a guarantor cannot return for settlement before a payment is made.

4. The original party should not have a debt against the guarantor equivalent to that he had paid, hence the two debts shall be dropped as a clearing. <sup>(40)</sup>

Someone went into debt saying that a person who made a settlement without the intention to resort to claim back that he had paid, should not return to claim back any capital asset. As for someone who made a settlement with the intention of resorting, he would be falling under four possibilities:

1. The guarantee should be made as per the request of the party guaranteed, the settlement should be made in response to his order, and hence the guarantor may resort to claim back the sum settlement by general agreement.
2. To guarantee by his order and make the settlement without it, he is entitled to resort for making a claim though the Shafiyah say he should not resort for making a claim.
3. To guarantee without his order and make a settlement by his order and in this case, he could resort for making a claim.
4. To guarantee and make a settlement without his order two versions were reported: one is to resort with a claim for the settlement made and that is Malik's view – point, the second is not to resort claiming back any capital asset and that is the viewpoints of Abu Hanifa and Shafie.

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## **Mortgage**

Linguistically mortgage is linked with the idea of obstruction as when it is said mortgage something if it remained or stayed in fixed status in this connection Allah says: 'To every soul what it has earned.'

Definition of mortgage as per terminology used by the fuqaha.

1. Hanafiya: mortgage means laying hands on something of financial value against a certain right or rights to be claimed back from it such as debt. <sup>(42)</sup>

2. Malikiya: mortgage is the act of someone selling an item availing something liable for sale even if he set as a condition a document indicating specific right <sup>(43)</sup>.

3. Al Shafiya: mortgage is assigning financed kind like a debt to be claimed from it where settling it is rendered impossible. <sup>(44)</sup>

4. Al Hanabla: mortgage is the money turned into a document linked with a debt as to be claimed from its value if it proved impossible to claim it from the indebted party <sup>(45)</sup>.

5. Al Shiya': It is the document of a debt. <sup>(46)</sup>

The object of the mortgage as understood from these definitions cannot be anything except a debt in respect to Shafiya Hanabla and Shiyat. However, for the Hanafiya and Malikiya, since the object of mortgage could be a debt it is possible to be in kind because the word "right" states in their definitions cover the debt and the kind. There is also a difference in the outlook of Hanafiya and Malikiya regarding defining the types that can be mortgaged. Al Hanafiya believe in restricting this possibility to the kind guaranteed by itself (such as an item – taken by force in the hand of the party taking it by force, the dowry in the hand of a bridegroom – and releasing allowance in the hand of a wife).

The Malikiya believe in the acceptability of the mortgaged object being kind guaranteed by itself or by another if absent.

Al Hanafiya stated in their definition that the mortgaged item should be held under the control of the mortgagee and the mortgagor has no right to claim it back and not even benefit from it though the permission of the mortgagee is secured.

The Shafiya disagreed to that as they grant permission to the mortgagor to claim back the mortgaged item even by force if necessary. Also the Malikiya

and Hanabla disagreed with the Hanfiya as they allow claiming back the item mortgaged in order to benefit from it through by permission of the mortgaged.

Judging by the definition of the Malikiya it could be taken that the mortgaged item, as it could be a capital asset that is agreed upon among the fuqaha, is a debt and they also allow a mortgage with the element of risk contrary to other Imams. <sup>(47)</sup>

### **The evidence legalizing mortgage <sup>(48)</sup>**

The evidence legalizing mortgage is stated in the Holy Book, Sunna and unanimity

#### **A. The Holy Book**

The Almighty said: “And if you are on a journey and cannot find a scribe, then a security deposit (should be) taken. And if one of you entrusts another, then let him who is entrusted discharge his trust ( faithfully ) and let him fear Allah.” (Surah Al Baqara: 283)

Allah explained the procedure to be pursued in case a scribe was not available and pointed out that the alternative is mortgage.

#### **B. Sunna:**

It was reported that Sayda Aisha (Allah bless her) said that the Prophet (pbuh) bought some food from a Jew, with payment deferred to a specific date. He mortgaged him an iron shield. And in another version it was quoted by her to the effect that the Prophet (pbuh) died with his shield mortgaged to a Jew against thirty two handfuls of barley. (Neel Al Awtar 5:263)

This hadith indicated that mortgage is acceptable and furthermore it shows that mortgage was in fact practiced by the Prophet (pbuh) as the Prophet (pbuh) did not trade any capital asset unless it was legitimate and the least degree of legality is that it should be permissible.

### **C. Unanimity:**

The Muslims believed unanimously that mortgage is permissible during travel through it was disagreed as regards to its acceptability in a stabilized urban society.

#### **The pillars for a mortgage contract:**

The pillars for convening a mortgage according to the majority of scholars are as follows:

**Mortgagor:** He is the debtor who presents the item mortgaged.

**Mortgagee:** He is the creditor taking the mortgaged item for reassurance.

**Mortgaged item:** It is the capital asset submitted by the mortgagor debtor to the mortgagee creditor mortgaged against the debt.

**The form:** This represents agreement and acceptance or anything to that effect that shows satisfaction towards the conditions of convening a mortgage.

Each pillar has certain conditions that have to be met in order for the mortgage contract to be valid which are as follows:

#### **The conditions of the parties (the mortgagor and the mortgagee)**

1. It is conditioned that the parties should be sane as a mortgage contract should not be convened with someone insane or an immature youth and that is by agreement even though there was disagreement regarding the immature youth.

a) The Hanafiya say: A youth authorized to trade may act as a mortgager or mortgagee since these activities are within the scope of trade.

b) The Sha'fiya and Hanafiya said a mature youth is not allowed to act as a mortgager or mortgagee in line with the Almighty, "Make trial of orphans until they reach the age of marriage; if then ye find sound judgment in them, release their property to them." (Surat al-Nisaa: 6)

The gracious verse indicates that Allah, the Supreme, conditioned handing over the possessions of a youth by the realization of two qualities; being an adult and reaching the age of maturity and linking the matter by these two qualities stresses their significance. Thus, if they are not inherent or one of them is lacking follows the absence of ensuing conditions. It is also said that a discriminating youth is not accountable which makes him similar to an indiscriminate youth and thus the way he discharges capital assets is unacceptable.

c) The Malikiya said being an adult and reaching the age of maturity are part of the conditions obligatory to mortgage but are not conditions for its validity. So according to this, the mortgage is valid though it depends on the endorsement of the guardian of the youth and if endorsed, it is deemed valid or otherwise it becomes invalid. <sup>(49)</sup>

## **2. Conditions of the Item Mortgaged<sup>(50)</sup>**

The fuqaha agreed that the conditions of the item mortgaged are the same as those set for an article displayed for sale. Thus, whatever could be sold could be mortgaged with some exceptions. Accordingly, it is conditioned in the item mortgaged to be sums of money of unsuspected source characterized by purity and usefulness within one's ability for being delivered to the hands of the mortgagee. Additionally, it should be in kind though the Malikiya deemed it acceptable to mortgage debt by debt on the initial grounds that that is possible to subject it to sale.

The Hanafiya added some conditions in respect to the item mortgaged distinguishing it from that which is mortgaged pointing out that the item mortgaged should be owned and that the item mortgaged should be outstandingly defined and independent from that which is not a mortgaged item. Also what cannot be mortgaged but can be sold is the utility, according

to some other than the Malikiya, of that which could be mortgaged, but not sold, e.g. a borrowed item or fruit before starting to ripen or the green plant.

### 3. **The conditions of the sum mortgaged against**<sup>(51)</sup>

- a) According to the Hanafiya: It should be an immediately guaranteed debt as the value of a sale or a debt deemed as immediately guaranteed as a promised debt or a self guaranteed kind and that is the kind that should be replaced by it's like if it expired if it was analogous or it's value if it was a value based item such as that usurped in the hand of a usurping party.
- b) According to the Malikiya:
  - (i) It should be a debt that could be claimed back from the mortgage in question.
  - (ii) The debt should be obliging or liable to be so but not committing for being handed over in the location.
  - (iii) The item mortgaged against should be a guaranteed kind that lends itself easily to be hidden
- c) Al Shafiya:
  - (i) The item mortgaged against should be a constant debt
  - (ii) It should be known to the contracting parties
  - (iii) The debt should be obliging or liable to be so.

### **Conditions of the Form:**<sup>(52)</sup>

The form is made up of two parts, one is positive intention and the other is called acceptance. These two are conditioned by the following:

- 1- The positive intention and acceptance should be compatible.
- 2- The positive intention should be linked to the acceptance.
- 3- The positive intention should be maintained till acceptance is finalized.

### **Laying of hands on the mortgaged item by mortgagee.** <sup>(53)</sup>

If the mortgaged item is an estate the fuqaha agree that laying of hands on it is manifested in enabling the mortgagee to lay hands on the mortgaged item as receiving the item cannot be visualized otherwise.

However if the mortgaged item is a mobile article the fuqaha have three opinions in respect to laying hands on it.

- 1- Regarding receiving the mobile Article that was mortgaged in capacity form, weighed or counted should be estimated and mobilized thus that was mortgaged as in capacity form should be so dealt with that which was weighed should be weighed and that which was counted should be counted. This is the viewpoints of the Shafiya and Hanabla.
- 2- In laying hands as the mobile Article, mobility is enough and not releasing alone and the same applies for that which requires estimation or that which does not. This is the opinion of Ibn Hazm and Abu Yousif.
- 3- Regarding laying hands on the mobile Article, release is enough as in case of a realty. This is the viewpoint of Al Hanafiya.

### **The condition of laying hands on the item mortgaged,** <sup>(54)</sup>

The fuqaha have three viewpoints on the condition for laying hands on the item mortgage. <sup>(54)</sup>

1. Receiving is an obligatory condition for convening mortgage. Contract by mortgage. However, before laying hands the contract could be valid but not committing that is it is possible to back out from it. This is the opinion of Al shafiya and it is likely so for Hanabla and some of the Hanafia.
2. Laying hands is a condition for validity of mortgage. So unless it is received the contract will not be valid and its impact will not

ensue. This is the new point of the Hanafiya majority of scholars and Ibn Hazam.

3. The mortgage is deemed valid as soon as the contract is convened. However, receiving is a condition for finalizing it. Accordingly if the mortgage became ruined before receiving, the mortgage and the reset of the a debtor are deemed the same and the former has no privilege over them. This is the opinion of the Malikiya and this was reported as well from Al Hanabla.

### **Continuity of Laying Hands <sup>(55)</sup>**

1. Al Hanafiya, Al Malikiya and Hanabla majority of scholars consider that authentication in mortgage requires that a mortgaged item should continue to be reserved under the hands of mortgage or those of the one acting on his behalf till debt settlement and the mortgage has no right to claim it back so as to benefit from it.
2. The Shafiya, Zahiriya and some Hnabla believe that the mortgaged kind could be claimed back for benefiting from it in a way that renders it beyond the realm of his possession.
3. Some Hanafiya and some Shafyia are of the opinion that a mortgagee could benefit from a mortgaged item though some think otherwise. Al Hanabla, Malikiya and some Shafiya deemed it permissible to be benefit from it in cases other than debt. <sup>(56)</sup>

### **Mortgage Conditions <sup>(57)</sup>:**

#### **Mortgage conditions in respect to mortgage guarantee:-**

The fuqaha are of the opinion that if a mortgage expired or underwent any discrepancy through the fault of the person in charge of it, in this case it shall be guaranteed on infringement basis.

However, the fuqaha disagreed if a mortgage expired but without any shortcoming or infringement from the side of the mortgagee, for example if this was a result of a heavenly catastrophe.

The question raised here is if the mortgage would be guaranteed against the mortgagee or would it be an object entrusted to him and thus its expiry would be against the mortgagor. In this connection the fuqaha have three opinions:

The difference among the fuqaha is attributed to the concept of mortgage as seen by each group and the way they regard the end realized by mortgage.

1. The Shafiya, Hanabla and Zahiriyah think that the debt has become attached to the mortgage estate with the purpose of securing a settlement. The mortgagee has a privileged right over the mortgaged item of all debtors. The hand of the mortgagee is deemed entrusted with the item mortgaged.
2. Al Hanafiya: They believe the mortgage is reserved by debt and that the command of settlement is constant in respect to it and the hand of the mortgagee is that of what is guaranteed and thus the guarantee of the mortgage is absolute.
3. Al Malikiya: They distinguish between that which you can absent yourself from and cannot be hidden such as realty.

Thus, that which could be hidden is controlled by the mortgagee on guarantee basis whereas that which can not be hidden would be under the hand of the mortgagee as an entrusted item.

**The amount which a mortgaged item is to be guaranteed by** <sup>58</sup>.

There was disagreement between the fuqaha who believe in the guarantee in respect to the amount for guaranteeing the item mortgaged and that was grouped into three opinions.

1. Nothing should be guaranteed to the other whether the debt fell short, was exceeding, or equal to the item mortgaged. This viewpoint is adapted by Shuriah, Al Hanabla and Al Nakhie.
2. The mortgaged item is to be guaranteed by less than its value and that debt. If the mortgaged item expires while its value is equal to the debt becomes no longer, committing to the mortgagee and neither resorts to the other for any settlement. If the value of the mortgaged item is more than the debt, the debt is dropped and nothing is claimed from mortgaged in return to the excess in the value of the mortgaged item in respect to the debt. However, if the value of the mortgage is less than the debt, a value equal to that of the mortgage would be knocked off the debt and hence the mortgagor shall pay to the mortgagee the value in excess. This is the viewpoints of Omer, Abudulla bin Masoud and Abu Hanifa along with his two companion.
3. The mortgagee guarantees the mortgaged item against its value no matter how much and that is the opinion of Ibn Omer Ishag bin Rahawi and Zafar. If the value of the mortgaged item exceed that of the debt mortgagee would meet the increase favour of the mortgagor (owner of the mortgaged item).

Attachment of the debt to the mortgaged item and its accessories: There is no disagreement between the fuqaha in that the debt is attached to what it has been mortgaged by in addition to the accessories of the mortgaged item related to it. However, they disagreed in its attachment to the accessories of the item mortgaged but un related to it.

1. Al Shafiya, Zahiriya, Abu Thur and Ibn Al Munzir are of the opinion that the debt does not relate to anything of the unattached increase.
2. Al Hanabla believe in including of all related and unrelated increase.

3. Al Hanafiya include the increase guaranteed from the original such as milk, wool and the offspring.
4. Al Malikiya include the offspring only.

**Expenditure on the mortgaged item <sup>(59)</sup>**

The fuqaha' majority of scholars except Hanafiya believe that expenditure on the mortgaged item is obligatory on the mortgagor. Al Hanafiya say that whatever is needed for the mortgaged item to remain in good condition is to be met by the mortgagor and whatever required for the mortgaged item as relating to expenses for preserving and maintaining it is be met by the mortgagee.

**What renders mortgage invalid:**

Mortgage becomes invalid if the conditions are not holding good or if the mortgagor is dispensed with the mortgage in a way that eliminates possession by the mortgagor or if the mortgagee annulled the contract and returned the mortgaged or released the mortgagee of his debt.

## **Mortgage in Sudanese Law**

No comprehensive theory of mortgage was stated in the Sudanese law before the issuance of Civil Transaction Law 1984. The Sudanese law used to be based on English law, Convention and Islamic Sharia and some legislation Civil Procedures Law, 1974 and 1987, Land Settlement, and Registration, 1925 that states miscellaneous by-laws to control incidents with no integrated unified theory. In Civil Transactions Law, 1984, has assigned a full chapter for discussing kind insurance through it discussed insurance mortgaged and inequity mortgaged.

We shall address in this research mortgage in Sudanese law in accordance with the first and second sections of the twenty first chapter of Civil Transactions Law, 1984, in additions to the Land Settlement and Registration Law, 1925, and the law for banks mortgaged money realization law 1990.

### **First: Insurance Mortgage:**

It was defined by Civil Transaction Law, 1984, in Article 727 as ‘A contract by virtue of which a creditor can obtain a realty assigned for settling a debt in kind authorizing him to surpass other normal creditors and those following him in the set degree for claiming settlement of his rights from the value of that realty in whatever hand it was.’

The law took this definition from Arabic laws of French origin and there is no Islamic legislative origin for the insurances mortgagee as the Islamic legislation does not known only accept inequity mortgage.

Wahdan believes that insurance mortgage is in conflict with collection condition stated in the Qur’anic verse ‘O you who have believe, when you contract a debt ..... write it down .... And if you can not find a scribe, then a security deposit’<sup>(60)</sup> (Surah El Baqara: 282)

Some of the fuqaha believe it is not in conflict with Islamic legislation as collection or receiving is not one of the pillars of mortgage contract or because registration is in the same capacity of collection. It becomes evident from this definition that insurance mortgage has the following features:

**1. Realty Right: -**

This gives a mortgagee creditor all the advantages of a right to capital assets so that he comes before normal or late creditors Furthermore, it gives him the right to follow a realty in the hands to which ownership has been newly transferred. <sup>(61)</sup>

**2. Right to follow the debt:**

This goes side by side with the debt in existence or non existence so if commitment ceased, the mortgage was inevitably annulled. However, the mortgage may precede the debt on condition that the debt should be settled as agreed upon before the mortgage.

**3. A right not liable for sectionalization:**

If part of the debt was settled, the realty continued to guarantee the rest of the debt and the claim for mortgage shall not be divided; i.e. if it went to the heirs of the owner, each heir became responsible for part of the debt whereas the part owned by an heir remained mortgaged in all the debt.<sup>62</sup> This is in accordance with Article 727 of Civil Transaction Law, 1984.

**Registration of mortgage insurance:**

The Transactions Law stipulates in Article 728 that ‘The mortgage insurance shall not be convened except after having been registered’. This text comes in agreement with Article 60 of Settlement and Registration Law, 1925 which stipulates the following.

‘The privilege will be deemed complete when the registrar records the details of the privilege in the register book’. The mortgagor shall meet the

expenses of the mortgage contract unless it was agreed otherwise, Article 728.

Accordingly, an unregistered mortgage is considered incomplete as per this Article and in fact not convened according to Article 728 of Civil Transaction Law, 1984. In all cases, it is considered invalid and of no impact as expressed in Article 28 of Land Settlement and Registration Law.

**The condition of insurance mortgage:**

**a) Mortgagor condition:**

In addition to the general eligibility conditions stated in Article 53-62 of the Transactions Law in which Article 729 (1) of the same law indicates that it applies on the mortgagor, the law has set two other special conditions, which are:

1. The mortgagor should be the owner of the mortgaged realty. Accordingly, it is not allowed to mortgage the property of others save in two exceptional cases mentioned by the law and which are:

The first: If the original owner provided him with an endorsed document.

The second: If the court gave permission to a trustee to mortgage the rights of a child or minor for a third party for a debt against the minor and the trustee.

2. The mortgagor must be the debtor to the sponsor of the debtor and hence, the law in this way had approved the legality of the practice pursued in respect to the action of the realty owner to deputize another person which is the debtor or his sponsor to mortgage the realty against a debt claimed from him.

**B. The mortgaged item conditions:**

**First:** It should be realty as it is not permissible to mortgage movable items on an insurance mortgage basis. Article 738 of the Transaction Law has

excluded the movable item that could be registered such as vehicles, ships and planes. These were allowed to be mortgaged as insurance mortgage includes the accessories of realty such as buildings and planted trees. It also includes movables fixer in the realties. The law called it (realities by assigning) this also includes constructions erected after concluding the contract.

**Second:** It should be already erected and existing at the time of executing the mortgage. This is provided by having registration certificate issued from lands registrar office.

**Third:** it should be realty that is liable for dealing with or a right in kind relating to the realty.

The wording in Article (26) of the Transaction Law defined realty by describing it as (every capital asset that is stable in a fixed place from which it can not be mobilized without being damaged or having its structure changed). Anything other than that is movable. It is impossible to visualize. According to this definition, realty would include anything other than the plot, the buildings or planted trees in it.

The law permitted mortgaging the right in kind related to the realty in all cases. However, it did not permit mortgaging realty all though as it specified realty that could be mortgaged (by stating that it's the realty that is possible to deal with) though the law did not specify what realty is nor did it name the department responsible for explaining the sound way of dealing with realty. It seems the matter is left to the local authorities and land authorities to decide on that.

Fourth: the realty should be adequately specified. Article 735 of Civil Transactions Law, 1984 has endorsed mortgage of a common shares and hence a common share has been considered adequately specified and that is

the opinion of the majority of scholars. However Al Ahnaf believed that its not permissible to mortgage share as it is not possible to receive the common share portion.

**C. Conditions of the mortgaged against:**

The law has permitted the mortgaged against that is the object of the mortgage to be a debt or something in kind. A debt could either be a constant pledged debt or answered by promise. Consequently the law does not set as a condition a specified date for the debt to take place as it could be before conducting the mortgage or after it. There is no disagreement between the fuqaha as regard permissibility of the mortgaged as a debt that is before or after mortgage. As for promised debt, Al Hanabla and shafiya believe that it is not permissible to conclude a mortgage because of it. However Abu Hanifa and Malik think that is permissible and the Sudanese Civil Transaction Law adopted their viewpoint in Article 736.

**D. Implicit conditions in Sudanese law insurance mortgage contract:**

There are three conditions included in the contract accordance to the law though not explicitly stated and unless it was agreed otherwise.

1. Contact expenses are to be met by the mortgagor.<sup>62</sup>
2. The mortgagor shall repair all buildings constructed on the realty and continue to do so wherever need arises.<sup>63</sup>
3. The mortgagee has the right to enter the mortgaged realty by himself or through deputy during convient times

With the purpose of inspecting buildings current conditions:

There are three other conditions deemed contained in the contract through not stated explicitly. Any agreement held contrary to them is deemed invalid.

- 1) The mortgage includes all annexes of mortgaged realty and realties by assignment and all other construction introduced to the mortgage after concluding the contract. <sup>(65)</sup>
- 2) The mortgage is entitled to run his realty and obtain all ensuing yielding still the date of exploitation by force on settlement and then the yield is in corporate to the expropriated realty. <sup>(66)</sup>
- 3) The mortgagor is free to deal with the mortgaged realty in every way provided that this does not affect the rights of the mortgagee. <sup>(67)</sup>

**The expiry of insurance mortgage:**

The insurance mortgage shall expire for one of the following six reasons:

- 1) At the expiry of the commitment by virtue of which it is authenticated by Article 759 of Civil Transactions Law, 1984. <sup>(68)</sup>
- 2) If the mortgage realty was sold as per prevailing laws and its value was paid to mortgagee creditors. <sup>(69)</sup>
- 3) If mortgaged realty ownership was transferred to the mortgagee or mortgage right was transferred to the mortgagor. <sup>(70)</sup>
- 4) If the creditor waved the mortgage by virtue of a documented. <sup>(71)</sup>
- 5) If the prescription period expired on the debt documented by mortgage. <sup>(72)</sup>
- 6) If the object of the mortgage perished. <sup>(73)</sup>

However, the mortgage does not expire by the death of the mortgagor or mortgagee but it remains pending with the heirs.

There is, however, a complementary condition for the expiry of the mortgage stipulated by Article 66 of the Law for Land Settlement and Registration which states that mortgage expiry does not become complete in all cases expect when the registrar cancels off the privilege granted from the record book.

## **Second: Equitable mortgage:**

The well known mortgage that was addressed in books of fiqh is equitable mortgage. Some even say that the only mortgage that is legitimately permissible is equitable mortgage and that it is not allowed to finalize any mortgage without taking possession and that is in view of the words of the Almighty “And the mortgage is a thing possessed.”

Most of those showing acceptance to insurance mortgage claim it is permissible because ownership is conditional. For them equitable mortgage is the origin and so it provides standardization.

However, in current Sudanese life the prevailing mortgage governed by legislation and convention is the insurance mortgage.

The law knows only that equitable mortgage is conversation and local. However, the Civil Transactions Law introduced a new type of equitable mortgage in Sudan and i.e. the registered equitable mortgage. So, there are two types of equitable mortgage both of which are approved by law.

### **1. Indigenous Possession Mortgage:**

It is a mortgage established in the areas where a land registration system applied before the year 1970<sup>(72)</sup> in unofficial documents and which is not normally registered like a mortgage, though it is acceptable from the date of establishing it if it was valid. It became evident in this type of mortgage that there is a mortgagor, mortgagee and a debt guaranteed by the mortgaged realty. Approval by the law of this type of mortgage is in consideration to the interest of the mortgagor and mortgagee and the social circumstances of the country<sup>(73)</sup>.

The national equitable realty mortgage is quite common in the different districts Sudan particularly because registered realty mortgage is not dealt with among the small peasants.

Article 62 of Lands Settlement and Registration Law, 1925 states legal endorsement of national equitable mortgage once it is finalized. However, law does not permit settling mortgaged realty on national equitable mortgage to the mortgage creditor as the mortgage can not be transferred to any other transaction.

This legal rule that is in violation the prevailing tradition finds considerable supporting Islamic legislation. Law has given the national equitable mortgage all advantages and features insurance mortgage in respects to:

1. The mortgage expires when the duration elapses and the payment of claimed rights as per mortgage.
2. In case there is no specific duration for the expiry of the mortgage:
  - a. The mortgage shall expire at the time of the expiry of a warning duration not less than three months and after payment of right sums as per mortgage.
  - b. In case there is no specified duration for the expiry of the mortgage, or the realty was an agricultural stretch of land, the mortgage shall expire at the expiry of a warning period not less than three months, after the elapse of an adequate duration of time for the harvest of any crop planted before the expiry of period and after payment of the right sum in accordance with the mortgage contract. However, national equitable mortgage is difficult to introduce banks that demand registration and note taking to confirm rights.

## **2. Registered Possession Mortgage:**

This was established by the Civil Transactions Law, 1984, which developed a whole chapter for it and explained its conditions. Article 782 of the Transactions Law stipulated the following:

Realty equitable mortgage is not deemed effective as regard others unless it has been registered at the department legally authorized for registration beside the ownership mortgage creditor. In order to strike the required harmony between this Article and the law for land settlement and registration 1925, it is very essential to understand for the approval of this law of the national registry that this is deemed as an exception of Article 782 pertaining to the Civil Transactions Law for the 1984.

Equitable mortgage contrary to insurance mortgage covers the movable and plots a like and it is conditioned registration if it was a realty and not conducted on national basis in accordance with the law for land settlement and ownership along with providing a contract configuring the occurrence of mortgage and indicating its conditions. And as the law set as a condition registration of equitable mortgage, it has also allowed setting the condition ownership incase of registered insurance mortgage. This is because the law has considerate the contract and convention a basis principle for establishing the mortgage and left it to the two parties choose the recognized conditions that suit them.

### **Rules of Equitable Registered Mortgage and Its Impact**

The law gave contractees the entire freedom for preparing the mortgage contact that suits them and considered the contract the foundation for registered equitable mortgage. However, the law imposed on the contractees two conditions relating to the expenses and expenditure. Any agreement contrary to the conditions is deemed invalid. These two conditions are:

1. Expenses required for repair and maintenance of the mortgaged item in addition to relevant taxes should be deducted from realty yielding or its value when sold.

2. Mortgage contract expenditure and that of its implementation is deemed guaranteed by the item mortgaged. A part from that, the two parties are entitled to set as a condition whatever they deem convenient taking into account that the contract governs the relationship between them on registration.

The law has applied on registered equitable mortgage the same impact and advantages of insurance mortgage thus the creditor mortgagee acquires an inseparable ensuing asset realty right. The creditor mortgagee also surpasses other creditors in having his dues settled from the value of the realty in whatever hand it is controlled.

**Expiry of the registered equitable mortgage:**

The ways of the expiry of equitable mortgage have been specified in Sudanese law in Article 798 of Civil Transaction Law, 1984 together with Article (66) of Lands Settlement and Registration Law, 1925. According to the two Articles, the registered equitable mortgage expires in any of the following cases:

1. If the documented debt was settled (taking into account the rights acquired in good intention through legal means during the period mortgage is effective).
2. If creditor mortgagee waived his right in the mortgage explicitly or by impaction. It should be noted that in case of insurance mortgage this is not approved unless it was an authenticated waiving whereas in case of any form of waiving is accepted even if this was by gesture or implication.
3. If the object of mortgage expired.
4. In case ownership of mortgage was transferred to the mortgagee.

It is worth mentioning that Companies Law, 1925 has stated in Article 102 of it that it is imperative to register securities presented from entity personalities whether these were mortgaged on insurance mortgage basis at commercial registrar office in Ministry of Justice and that is during twenty one days from date of convening the contract. The ensuing impact from failure of registration is that in case of liquidation of the company, the mortgage money that is unregistered at general commercial registrar's office loses its capacity as a privileged debt and the creditor mortgagor becomes a normal creditor.

This is a brief display of mortgage theory in Sudanese law according to the amendments and additions that cropped up after issuance of Civil Transaction Law, 1984.

Perhaps the reader agrees with me that Civil Transactions Law was successful in equitable mortgage theory in the Sudanese law in line with the regulations of Islamic legislation along with legalizing several Sudanese conventions prevailing in the field of mortgage.

### **The law of bank mortgaged Assets Sale:**

In this part of the book we address the Law of Bank Mortgage Assets Sale, 1990. We begin with the explanatory memorandum issued alongside the law and which stated:

“The Civil Procedures Law, 1983 organizes the procedures and claims of realty mortgage and turns it into original authority to court. Practical experimentation has proven that these procedures are lengthy and quite complicated, which caused considerable waste of money of banks operating in Sudan that is guaranteed through mortgage whether these securities were realties or moveable. This consequently affected the performance and work progress in banks.”

Accordingly, it was decided to legislate law especially tailored for mortgaged sales to banks. We state hereunder the main characteristics of this draft law:

a. The rules of this law shall prevail in case of their conflict with the rules of any other law to the extent that removes this conflict between them (Article 3). The law is to be applied on assets mortgaged to banks operating in Sudan whether they belong to the public or private sector before it is put into effect even if any relevant procedures were presented before the courts.

b. Article (5) stipulated that the bank is entitled, after warning the mortgagor in writing for a month, to make the settlement to arrange for sale of mortgaged assets after the expiry of that period if date appointed for payment of the sum guaranteed by mortgagee and the mortgagor deferred the payments or failed to settle any other due payments. Assets as per rules of Article (2), shall include realties and movable assets.

c. Both Articles 6 and 7 stipulated some procedures for selling realties and movable assets. Article 6/1 stipulates that the bank shall undertake selling mortgaged realty provided that the basic price for that realty is a sum not less than the value of the amount for which it is mortgaged or the actual value whichever is greater.

The same article indicated the manner for conducting the sale by auction, ownership transfer and dispensing with the yield of selling mortgaged realty and looking into the possibility of submitting a civil claim in order to obtain any remaining sums in the debt as a result of selling mortgaged realty.

As for selling movable assets, Article (7) (1) stipulated that they should be held by the bank and immediately sold in an open auction provided that the basic price is a sum not less than the mortgaged amount or the actual value, whichever is greater.

The rest of the items addressed the manner of conducting the sale and dispensing with its outcome. The bank granted by virtue of Article (7) paragraph (3). The authority of administering reservation on movables wherever they were with the purpose of selling them in accordance to the law. Enclosed is the law for banks mortgaged money realization for Appendix 1 in this book.

**A legal memorandum on securities:**

This refers to the documents that reassure a creditor of the payment of his debt whether it was a realty, movables, utility or other or from some person other than the debtor in case he failed or refused to pay his debt. Originally the bank is a debtor to others by virtue of its function as a financing establishment but the bank can not possibly deal with others by only trusting their credibility.

Thus, securities remain accompanying to all transactions investment except in respect to those that by their nature are deemed self security. If a person considers available securities in practice, it would be noticed that they are two- fold.

**First – asset securities:**

These take the shape of a right confirmed to the creditor on a specific sum from which the debt could be paid when failure occurs in settling it. Asset securities could be linked to realties as well as to movables. As for a realty it has been defined by Civil Transaction Law, 1984 in Article 26 as everything that can not be transferred without damaging it or changing its structure. Any dues other than that are considered movables. Therefore it is possible to say that stretches of land, building, trees, huge machineries are realties that could be mortgaged on the same conditions as those of realties like assets

securities for debts As for movables, those can not be mortgaged except in two cases:

**The first:** A movable item should be registered at the department concerned in case registration is required like vehicles and ships according to the statement contained in Article 738 of Civil Transaction Law, 1984.

**The second:** The moveable item should be under the custody of the mortgagee by virtue of asset insurance contract. In this case, asset insurance shall be concluded by realty mortgage or by mortgaging the movable and bringing it to one's ownership. Now we shall tackle the conditions and procedures of each transaction in some detail.

**a. Realty Mortgage:**

We mentioned earlier that realties liable for mortgage include estates, building, trees or huge machineries accommodated on the ground. And all these things are related to the ground and can not be erected otherwise, generally the mortgage applies to the land and the things on it. Thus we are not going to separate the mortgage procedures each part individually.

**Types of Mortgage:**

There are two types of mortgages:

**Insurance Mortgage:**

Section One Chapter Twenty One of Civil Transactions Law, 1984 was devoted to this type of mortgage. It was defined as a contract by virtue of which the creditor takes over a reality signed for meeting his debt on an asset right, which enables him to surpass creditors and those following him in degree in getting his rights from the price of that reality and without affecting his ownership except if the debtor is settling his debt and that is the most prevailing type of mortgage.

**Equitable mortgage:**

It was defined in Article 766 of the law as retaining sums of money in the hands of the creditor or those of an equitable party as a security for a right that could be settled of form it all or part of it by surpassing all creditors. It is believed that this type of mortgage could be more common in movables rather than reality.

**Types of mortgaged items: -**

We mean by this real estate and realty. It talks about objects of the mortgage that could be divided by considering a number of aspects from the viewpoint of use. These are divided into agricultural land, housing land and investment lands. According to the law, all these assets are liable for mortgage though the practical outcome varies for each and it always beneficial to the mortgagee to find access to housing and not agricultural land for mortgaging as agricultural lands are exposed to new elements that may render it into housing lands. If the mortgagor's ownership is stripped, and the land is registered to another eligible applicant by virtue of Lands Settlement and Registration Law or another land ownership stripping law, the mortgagor owner may receive some compensation on another plot lacking commitments and reservations of the previous stretch of land. Thus, the mortgagee will lose his asset security and his debt will become exposed. Apart from that, determining the value of agricultural land that is needed before mortgage to assess the sum against which it is guaranteed is in fact the specialization of soil experts as it includes estimating soil fertilization, soil duration span and other elements that may affect the value as a whole. This involves extra cost to the mortgagor or mortgagee. Besides, the estimation may not be precise and the land may lose its value during the mortgage period. Therefore, for all these reasons it is advisable that a

creditor should not accept mortgage of an agricultural land wherever mortgage of residence land was readily available.

As for investment lands, these require certain controls or conditions such as approval of the investment department which grants the lands in case mortgage is convened and implementation becomes effective.

This is from the side of utilization, pertaining to ownership, lands are of two types free held and lease held lands though the latter could be mortgaged on condition of securing approval of lands manager, which shall be detailed later. In case of having finalized mortgage there is no difference between free held or lease held land as closing down mortgage or selling the item mortgaged is a procedure that is conducted in accordance with Civil Procedure Law, 1983 and the law for banks mortgaged money realization, 1990.

#### **Mortgage Procedures: -**

Mortgage is convened by virtue of a normal mortgage contract and then it is registered in the record book for mortgage plots at lands registration office in the city where the land is located. Mortgage registration is a basic factor for holding it and that is to meet the requirements of the law for lands settlement and registration and the law for civil transaction, which dictate registration in order to preserve the right of the mortgagor creditor regarding his privilege and depriving others of acquiring later on affecting the item mortgaged.

#### **Acquiring the Last Rights Upon a Mortgaged Item**

The mortgagor should in case of mortgage of lease held lands obtain the approval of the land manager as regard the mortgage or else registration will be rendered impossible and the mortgage becomes invalid. This approval could be obtained by filling a form known as 3A form in which the

mortgagor shall explain the reason for mortgage and the relationship between mortgagee and mortgagor. The form shall be presented to parties concerned to decide approval or rejection of mortgage. If approved, registration will be concluded and so lease held land would be the same as free held lands as to the procedures that may crop up. In case the mortgagor debtor fails to pay his debt, the matter will be taken to the court in accordance to the text contained in the second section of the sixth chapter of Civil Procedure Law, 1983 or the Law for Banks Mortgaged Asset Sale, 1990 that makes no distinction between mortgages of free or leasehold ownership.

The second issue in mortgage procedure is that parties concerned are to meet some registration fees to be deducted from the guaranteed sum according to the mortgage. Again, there are some fees equal to the first when mortgage is released. That is why a mortgage is considered as a security of high costs that is to be incorporated to the debt of the debtor. This adds to the financial burden since a mortgaged contract is prepared as security for a particular commercial operation. If it was liquidated and the client wished to delve into another transaction, he has to undo the first mortgage and mortgage the plot once more to the bank or make a second mortgage on it after paying new fees required. Mortgage is regarded as a suitable security for clients who wish to do business with the bank on a large scale and for a long duration, i.e. more than one operation, and hence mortgage the realty on an open mortgage basic as a security for all the transactions and debts of the mortgagor to the mortgagee. In this case, the mortgagor shall not need to renew the mortgage after each operation as the mortgage shall remain valid for all transaction till redemption of the mortgage. It is advisable to prepare all mortgage contracts as an open guarantee so that if the mortgagor wished

to arrange for one transaction he could redeem the mortgage with the same procedures fees as if it was a specific mortgage and if he chose to continue dealing with the open mortgage, he has to meet considerable fees.

The drawback of implementation of mortgage according to Civil Procedures Law, 1983 is that the procedures for payment of the debt from it are very lengthy. This is because a whole month should elapse after the guaranteed debt due date and then the creditor should warn the debtor to pay the sum against him according to Article 124, civil procedure 83. Then another month elapses from the date of the first warning when the creditor submits a claim for selling the realty mortgage. Then a court warns the mortgagor to pay the sums claimed from him within six months or else the court would order selling the realty. If the six months passed and the mortgagor did not pay the debt, then the order for selling the realty would be issued. By adding these months together, we find that the realty would not be sold or the mortgage closed except after eight months had elapsed from the date the debt is due for settlement. However, if one overlooked this delay, a mortgage is considered one of the strongest securities for preserving the right of a creditor as it is attached to a realty in asset and not to the liability of a person. Therefore, if the mortgage debtor died or went bankrupted, the right of a mortgage creditor remained constant as manifested by the realty that is permanent and non-perishable.

It is worth mentioning that in the law for banks mortgaged money realization, 1990, the mortgagor debtor is warned for one month after which the mortgage sum is sold according to legal procedures, which as earlier mentioned are markedly briefly.

**b. Registered movables mortgage:**

We mentioned earlier that registration is a basic pillar for convening a mortgage in respect to movables, which the law set as a condition to have them registered. Accordingly, it is very difficult to imagine mortgaging any sums of money that are not liable for registration. So, it is possible to agree on mortgaging vehicles, ships, planes or the like as these must be registered to confirm their registration as a proof to confirm their ownership. In a mortgage it is possible to register ownership with full details by the name of the mortgagee creditor. If these mortgaged movables were availed of comprehensive insurance against their actual value they could be a security for the debts. This is because insurance eliminates the risk of perishing and assigns to it the relatively everlasting quality required in a mortgaged item. However, if there is no insurance, this will be a shaky security that needs in itself a guarantee.

**c. Goods Ownership Security:**

a This is the mortgage received that was mentioned in the Qur'an. The Almighty said: "If you were traveling and you did not find a scribe, then a received security". (Baqara: 288)

This type of mortgage is the least convenient guarantee to a debtor as it does not enable him to benefit from the goods that he bought if it was the object of the mortgage. It provides also less guarantee to the creditor if the contract stipulated common sharing as the debtor may dispense with the goods contrary to the contract, thus the security goes and the debt remains a long with civil liability. The debtor may not be criminally sued on a trust betrayal basis if the goods were jointly owned, as the debtor is dispensing with his own possession in violation of the contract.

## **Second: Personal Securities:**

This is a right that is confirmed to the creditor on the liability of the guarantor by virtue of a specific sum. Personal securities are considered means for paying back a debt on the failure of a debtor. However, it might be futile unless the guarantor was a resourceful person capable of meeting his commitment. If he refuses to implement what he has promised, he will be forced to do so through a civil claim except in case of issuing a cheque, as in this case he could be criminally sued as per Article 179 of the Criminal Law, 1991. Guarantees are divided into two types:

### **a. Warranty Definition:**

Sudanese law did not know before 1984 a distinctive status for warranty in civil transactions. It was commonly used in criminal procedures and particularly face guarantee in which the guarantor commits himself to bring the culprit any time as required by the court and thus the accused is released waiting for trial. According to this warranty if we tried to analyze the warranty documents for civil debts, we shall find it very similar to routine contracts. In exception to the general rule, the Sudanese law did not state explicitly on the warranty document and its regulations except after the issuance of Civil Transaction Law, 1984, which assigned the first section of Chapter Eighteen for the guarantee conditions and defined in Article 484 as a contract by virtue of which one person consolidates his pledge to that of another in implementing some commitment agents him. (The law considered warranty a contract though technically it is not as the contract was defined in Article 33 of the law as follows:

A contract is a positive commitment issued from one of the two parties showing acceptance of the other in a way that reflects its effect on the subject contracted upon. The positive response is linked to acceptance

whereas the warrantor becomes committed on merely being aware of the positive response unless it was not turned down. This was mentioned in Article 485/1, which reads: It is enough to conclude a warranty and put it into effect if acceptance of the warrantor was secure unless it was turned down by the warrantee since a warrantee has the right to respond. However, if he remained silent, it will be taken as an acceptance.

This was disputed among the fuqaha. Besides, a warranty does not impose exchangeable commitments on the two parties but it is an individual standard commitment on the procedural contract which was known in Sudanese law and which was taken from the general English law. In our opinion we think that a warranty is worthy of being classified as a personal insurance document.

### **Parts of a Warranty Contract:**

A warranty is divided in the Civil Transactions Law, 1984 into three major parts:

**First:** Debt warranty or financial warranty and that is the commitment of the warrantor to pay the sum against the warrantee whether it was a debtor financial obligation with or without a condition.

**Second:** Face warranty in which a warrantor commits himself to bring the warrantee at the appointed time as per request of the person benefiting from the warranty. If he failed to do so, the court is entitled to order him to pay a sum equivalent from the warrantee. This is the type that was and still is practiced in criminal law contracts. The appropriate text in this regard was mentioned in criminal procedures law and as it was repeated in Civil Transaction Law. It follows that it has become applicable on civil transactions also.

**Third: warranty by commitment to a specific date:** this is a newly introduced type of warranty that is manifested in a commitment to pay sale value when it is due. It is quite similar as regard conditions and impact to the first type as it is not more than being warranty to be committed financially to the seller.

**Warranty Validity Conditions:**

The law observes two major elements in warranty contract, which are:

**Firstly:** The warrantor: he must be worthy of volunteering for by being fully eligible not subject to interdiction. The warranty of a youth or an insane is not accepted. However, the warranty of someone with a fatal illness is deemed valid within the limit of one third and the will controls apply on it though it is not acceptable if he was indebted with a debt that dominates his possessions.

**Secondly:** The item warranted: it should be warranted against the original party and it is not allowed to warrant the original party in all cases. so if there is no commitment against the original party from the start, the obligation of the warrantor is annulled and hence the warranty becomes invalid. However, the law did not consider the warrantee nor did it set his approval or awareness as a condition for the warranty. Thus, he could be warranted without his approval or knowledge. In case he was warranted without his request or approval, the warrantor has no right to claim the sum he has paid on his behalf but he may resort to the warrantee if the warranty was conducted upon his request or approval.

The law prohibited some types of warranty that take a dual nature as regard warrantor commitment. This is, for example, when the seller's deputy warrants the purchase against the value of what he sold him: the law stipulated on some types of this warranty such as the guardian on a youth

possession and the care – taker of trust money. It is not clear if these cases were quoted in a restrictive manner or for analogy purpose.

### **Warranty Expiry:**

The commitment of a warrantor ends in normal cases by settlement of the debt or handing over the warranted item and hence by the creditor relieving the debtor or his warrantor of the debt. The warrantor is also relieved by the sale value of his warranty under the following conditions:

- a. if the sale was annulled,
- b. it fell due
- c. it was given back due to a defect, or
- d. if the warrantor or the debtor reconciled the creditor on part of the debt, so that their liabilities would be freed of the rest or
- e. if the creditor died and his inheritance was limited to the debtor,

In the last case, the warrantor would be relieved or again if the warrantor or the original party referred the creditor with the warranted debt by part of it to another and was accepted by the party transferred to and the party transferred against. Again there is the case of cancellation of commitment of warranted items. The commitment also expires in some exceptional cases such as on the failure of the creditor to claim his dues from the debtor and take necessary measures against him within six months from date of warning of the warrantor to him that is if the creditor did not submit a security to the warrantor.

### **Cheque guarantees:**

These are the guarantee of a debtor to himself. This occurs when a debtor issues a cheque with the date due for the settlement of the debt. If the cheque was returned, the creditor is entitled to report the matter to the police by virtue of Article 179 of the Criminal Law, 1991. The debtor would then be

arrested and shall not be released unless he pays the sum equivalent to the cheque value or an endorsed cheque or a letter of guarantee as per Article 107 of the Criminal Procedure Law, 1991. One of the drawbacks of this type of guarantee is the embarrassment some creditors encounter by sending their clients to prison. Also in case of the bankruptcy of a debtor or his death, the debt remains a normal debt like other debts as it has no security in assets. In conclusion, these have been some of the guarantees available to creditors with all their pros and cons.

Irrespective of the evaluation of the letter of guarantee, there is no disagreement between contemporaries on receiving commission in return for issuing the letters of guarantee because it is a banking service offered by the bank like other services presented against certain fees paid. This is no issue of disagreement and it is so obvious that it does not require an investigation.

**Payment in return for guarantee itself:**

As for receiving an extra amount of payment on guarantee expenses, i.e. a payment in return for offering the guarantee as a service by the guarantor, there is in fact considerable disagreement among contemporary fuqaha.

We shall address very briefly in the lines hereunder the prevailing theory up till now and then we shall follow that by the findings of this research.

It has become now very evident that the letter of guarantee is nothing but a type of guarantee or warranty through money. It obliges a guarantor to bear the commitment pertaining to the pledged guarantee or any part of it in case the guaranteed party failed to settle it on time and according to its conditions.

However, the majority of scholars of the fuqaha state that the guarantee should be purely a favour and as it is a voluntary act and as a favour, it is not permitted that the guarantor should take any payment for it.

Al Hatab narrated about Al Abhari, no guarantee is allowable for a payment as guarantee is a favour and a benevolent deed in the same way that this is not allowable for fasting or praying as it is not directed to a worldly gain.

Malik said: No blessing on a guarantee for a payment <sup>(73)</sup>

Ibn Arafa narrated about Al Al Akhami: A guarantee for a payment as not permissible. Also Ibn Al Qattan reported from the narrated in unanimity. <sup>(74)</sup>

Al Dirdeer said: As for a strait forward guarantee for a payment, there is no dispute over its prevention because the legislator had it that the guarantee and the loan are done only for the sake of Allah and accepting a compensation for them is ill-gotten gain. <sup>(75)</sup>

Al Tabari narrated that if a man guaranteed another man against a sum claimed from him for another man in return for a certain payment he specified for him by the party guaranteed. The guarantee in this case is invalid and the guarantor is not emitted for the guaranteed party by anything if he guaranteed whatever he guaranteed on condition of presenting a payment for the indebted party or the guarantor (this is also the opinion of Abu Hanifa and his companions). <sup>(76)</sup>

Texts express all through that taking a payment for the guarantee is not permissible. Moreover, as the letters of guarantee are a type of guarantee and warranty this verdict applies to them and consequently no payment should be taken for the guarantee since it is considered a guarantee.

### **Letters of guarantee with partial or whole coverage.**

A letter of guarantee could be with or without coverage and that with coverage, its coverage could be whole or partial.

Accordingly, the fuqaha regarded the letter of guarantee that has whole or partial coverage if they combine warranty and deputization as it is a warranty in respect to its origin and it is a deputization since the party

guaranteed has paid the value of the guarantee wholly or partially. Hence, the guarantor becomes a deputy acting on his behalf in the relationship that governs the guarantee with the guarantor because it is through him that the guarantee shall settle his commitments. In addition, since this relationship includes deputation and guarantee at the same time and it is known that no payment should be taken for a guarantee but in deputation it is permissible to take a payment for it. Accordingly, it is allowable to take a payment for a letter of guarantee with coverage.

Ibn Qudama says:

It is permissible to deputize someone with or without an assigned payment. The Prophet (pbuh) deputized Anis to perform execution and to Erwa to buy a goat and Omer and Abu Rafie in marriage fornication without assigning the payment. He used to send his workers to collect alms and assigned commission for them. <sup>(77)</sup>

Ibn Jazie says: deputation is permissible with or without payment. If it was against a payment, it would be in the same status as that of rents and if it was for no payment, it would be a favour bestowed by the deputy. <sup>(78)</sup>

As it is allowed from a legislative view point to receive a payment for acting as a deputy, in the same way it is possible to take payment for the guarantee if it was covered wholly or partially. What is meant here by payment is that which is extra to bank expenses. In addition, the Sharia Control Board fatwa for Faisal Islamic Bank stipulated the following:

It is not permissible for the bank to take any payment in the cases where the letters of guarantee are not covered if this payment was against the letter of guarantee as it would be receiving payment for warranty, which is prohibited as warranty is one of voluntary contract.

Al Hatah said: there is no disagreement as regards prohibiting guarantee for payment since legislation dictated that guarantee and loan should not be done except for the sake of Allah with no compensation and taking compensation is ill – gotten gain. Ibn Abdeen justified this: the prevention is one to the fact that a guarantor has given a loan if he sets a condition to the party the loan is claimed from making an extra payment and guaranteeing the like, he has the conditioned receiving extra payment over what he offered as a loan and this is interest. <sup>(79)</sup>

It was stated in Islamic Bank Scientific and Practical Encyclopedia: “In view of this type of banking transactions, that is letter of guarantee and referring it to legislative contracts contained in fiqh books, it could be attributed to two types of contracts addressed by the fuqaha. These are warranty and deputation and taking payment for deputation is permissible in Islamic legislation. This means that if the guarantee was covered wholly or partially, it is permissible to take payment for it and if it was not covered, it is not permissible to take payment for according to this fiqh.

**The second school:**

There are those who think it is permissible to take payment on the guarantee itself whether it was with or without a cover. These are divided into two:

A group believes that it is permissible to take payment against the warranty on the ground that some fuqaha permitted taking payment in return for the guarantee which requires making some effort from the side of guarantor even if little. This opinion was adopted and developed by Islamic banks scientific and practical encyclopedia, which states the following:

If we say that it is permissible to take payment for warranty on the grounds that some fuqaha allow taking payment against guarantee as it involves in some effort even if this was merely walking or moving about. The

development of economic life made some fuqaha think of some justifications for permitting taking payment in return for the guarantee. Al Hythami stated that the one who is unjustly imprisoned if he addressed a person capable of freeing him saying that (if you free me, I'll give you so and so provided that there is an effort that meets the payment conventionally).

In the footnote of Al Sharwani: it was stated as a fatwa that it is an allowed payment and accepting its compensation is legal.

Al Nawawi reported the speech of Al Gafal about the person who would like to use him against a payment to go to the land of the sultan and make a petition on behalf of the man using him.

He continued to say that he uses him to go to such and such location and follow up his condition in the grievance gathering and follow up his affair before the man he needs hence the payment become pardonable as the duration is known though the procedure involves shallowness.

It was reported that Al Shafie said:

It is not a bribe to pay money to some one who addresses the Sultan for example on something allowable as this is a permissible payment.

In the footnote of Disogie, Abu Ali Al Munawi said: "The status of preventing taking payment though powerful if a position if a person can protect others through his power without walking or moving. The speech of Al Musanf and Zee Al Hahaja is restricted by that regarding his power and position, for example if " Zaid "was respected because of a powerful position and was accordingly respected, it is permissible that this should receive payment from Zaid.

And if Ibn Arafa said it is permissible to hand over a farm when pressing need arises if he provides protection through his weapons

though if protection is secured by his position nothing should be given as this will be the price of a powerful position.

The explanation of this is that the price of wealth and a strong position was prohibited as it is the same as receiving payment for performing a duty and one should not agree with others blindly. Abu Abdul Gawni was asked about the price of a strong position and he answered with the following text: Our scholars differed as regard the value of a powerful position. Some considered it fully illegal, some others considered it altogether undesirable and some went into details in this connection if the are in a powerful position made considerable effort and needed some expenses and traveling about. he may take an equivalent payment as this is permissible or else it is unlawful and prohibited. In the same way, Abu Abdullah Al Abdoos reports about the person protecting people in frightening locations and receiving payment return. His response was that this is permissible if he is extremely powerful.

This talk was sound in respect to taking payment for treatment by Qur'an. Ibn Taimiya said that there is nothing against taking a payment for treatment by Qur'an and Ahmed stated that too. if it was allowable to receive payment for treating people from the book of the all Almighty while the one conducting this treatment does not make any effort to be mentioned, so why not take a payment in the operation of the letter of guarantee which requires work and effort. <sup>(81)</sup>

By referring to these texts and quantities it was found out that they are true as for whether they support permissibility of taking payment for the letter of guarantee as per the belief of the authors of the encyclopedia. or not. This we shall elaborate on soon.

B) The second team is of the opinion of permissibility of the payment since the undertaking contained in the letter of guarantee enhances the weight of the commitment of the client guaranteed and so the letter of guarantee becomes a respectable deed that justifies taking a payment or commission against it.

This opinion was endorsed by Mohammed Bagir Al Sadr, which he displays as follows:

“As for the undertaking of the bank and its guarantee to the condition according to the request of the contractor, the contractor will be guaranteeing to what the bank will lose to this undertaking. In this case, the bank would be entitled to demand from the contractor the value the bank paid to the party to which the letter of guarantee has been addressed to its interest. Thus, the bank has the right to take a commission on the letter of guarantee on the undertaking contained on this letter enhances the value of contractor's commitments. Accordingly, it will be a respectable piece of work that makes it possible to impose a payment or commission on it from that person.”<sup>(82)</sup>

This is the summary of what was mentioned as regard permitting or not permitting taking a payment and guarantee in general and letters of guarantee in particular.

**The claim that guarantee is merely a favour:.**

The idea of not taking a payment on the guarantee or warranty was because the guarantee or warranty is purely a voluntary action and a favour and so no payment should be taken for it. This claim has been highly recognized from a fiqh point of view. However, it seems in fact not really so, and since it is not a clear-cut pretext in its essence or concept, it is not strong enough in subject matter.

A) For example, Al Abhari compared warranty to prayer and fasting in that no payment is taken in either. It is true prayer and fasting are obligatory for an adult slave to perform to Allah and it is a duty that the slave is rewarded on performing and shall be penalized if he did not do them both in this life and the hereafter for this negligence. As we know, prayer and fasting are an obligation to all adults whereas warranty is not obligatory to anyone. In fact a warranty is a favour and a voluntary act as they say. Therefore, we do not know what is the similarity and what is the reason or wisdom to judge them on equal footing.

It seems in fact, that there is a disproportionate rather than a proportionate line of resemblance between the two. Therefore, if the payment was denied in prayer and fasting because they are obligatory, it should be permissible in the guarantee and none else as it is not obligatory for a human being. The guarantee party may need this work and may not find someone to volunteer to do it and so hires some person to do it in order not to lose the chance and have his interest and utility negatively affected: In the words of Al Disogie in the Encyclopedia.

“This supports that the power and strong position and consequently the guarantee is obligatory, and so it can be compared to prayer and fasting.” However, rather immediately he negated this by saying: “The price of a powerful position was deemed illegal as it involves taking a payment for performing a duty and a person should not follow others blindly.”

Though we understand that prayer is originally performed as a duty, it is allowed to encourage a person to pray and fast by offering him material benefit. This is not prohibited and may even be desirable.

b) On the other hand Al Dirdeer says: “The legislator made the guarantee utilizing a powerful position and loans not to be done except for Allah and

prohibited taking payment against them and considered this as interest and every loan that led to a utility is interest. This expression it is true in respect a loan though – as far as we know no legislative statement was mentioned prohibiting compensation in a guarantee or a powerful position.

On the contrary, majority of scholars of fuqaha allow receiving material compensation or the like in many types of volunteering and even in the most private of these such as on denotation.

Donation is the base for volunteering contract the public permitted compensation in it which is known as the reward donation.

Ibn Rashed says “As for reward donation, it was an issue for disagreement as it was deemed permissible by Malik and Abu Hanifa whereas it was prohibited by Alshafie.....”.

Abu Juzai says regarding types of donation “The third is reward donation provided that the person donated to should reward him and it is permissible contrary to Al Shafie..”<sup>(84)</sup>

Al Haskafie says: “A donation legislatively appropriating an item free if charge that is without compensation as not to avail a compensation is a condition”.

Ibn Abdeen said: “It is presented with out a compensation condition though the idea of compensation condition except for sale or rent”.

Originally a donation should be voluntary, a favour and free of charge though it could be above that according to the public for a material compensation.

If this was true of a donation, which is the basic drive in voluntary acts, it follows that it should be even more permissible in things other than it.

The same act could be part of a compensation act and voluntary contracts at the same time. Deputation is the clearest example of this duplication Ibn

Juzai “Deputation is permissible with or with out a payment if it was for a payment it would be considered as a rent if it was with out a payment. It would be a favour from the deputy.”

The statement of Abu Qudama in this seems indicated by Ibn Juzai *as* mentioned earlier. So, it becomes very clear that judging payment for guarantee as not permissible on the grounds that it is one of the voluntary contracts is a classification not supported by any evidence since it became clear that the fact that contract or acting on voluntary basis does not negate compensation. All there is to it is that the compensation is not a condition in it as stated by Ibn Abddeen but if compensation was set as a condition, this is permissible.

We should draw attention here that most of the acts practiced prevailing in our society today that are done voluntarily and that are deemed as a demonstration of cooperation in the Muslim society such as subscriptions in happy and sad occasions, all these are based on the essence of reward donation, i.e. donations with compensation. However, it is true that the compensation was not conditioned; it is a stable favour. We know that straightforward favour is the same as the conditioned.

We hope we have been successful in explaining that though guarantee is of the voluntary contracts this does not contradict with taking compensation or payment for it as supported by legislation and fiqh concepts.

In reply to the justification of Ibn Abdeen that taking payment on guarantee is considered realizing a utility and which came in his previous statement as part of the consultative (Fatwa) of Faisal Islamic Bank stating that it is not permissible to take payment on guarantee as the guarantor is a donor to the party guaranteed. So if he set as a condition the payment along with

providing the like only it will be like making an extra payment to the loan which is interest.

In answer to that, we say a guarantee is not a loan. We believe no one considered the guarantee as known in the concept of letters of guarantee and Sudanese law. It is a commitment to settle the sum against the liability of the party guaranteed when the appointed time is due and when the guaranteed fails to conclude the settlement as required.

The loan on the other hand is not convened added to a specific point of time or pending on a condition the way it is in the guarantee. It is true if the time was due and the party guaranteed failed to make settlement the guarantor has the right to claim settlement for the dues. So if he made the claim and the other made the settlement he would be meeting his commitment directly towards the claimant without involving the party guaranteed. He should fulfill this commitment even if he fully realized the poverty or death of the party guaranteed. If we consider it a loan, he has no opening in giving him a loan if payment time is due. Again if we say it is a loan, it was not given as a loan to the party guaranteed who died leaving nothing in his inheritance for the settlement. All these explanations negate the idea of a loan from beginning to end.

Still if the guarantor met the commitment according to the guaranteed contract, he could resort with his claim to the party guaranteed if that was possible, though it is a return that resulted from implementation of the previous commitment and not from a loan between the guarantor and the party guaranteed.

In conclusion, we say the guarantee contract is a contract of reinsurance and not a loan contract. Even if it resembled a loan in one aspect, it differed from it in many aspects. The original drive in reinsurance contracts is seeing the

party guaranteed meeting his obligation by making the required settlement. The exception is implementing the commitment according to the reassurance contract though we judge by the majority of scholars not the exception – accordingly, taking a payment for the guarantee does not fall under the prohibitions of each loan involving utility and thus it is interest since the guarantee is not a loan.

These are three pretexts on which fuqaha as regard not allowing taking payment for warranty. It became clear to us that these pretexts are not strong enough to provide an evidence for this judgment so what made these fuqaha to be led into this and endorse this view point?

We believe what led them to that and pushed them to adopt this viewpoint is the practical prevailing convention as transactions were very few and were contracted in limited markets executed by people who know one another. Transactions did not expand and become complicated to – day in respect to the size of work the geographical extent in away that makes it sometimes imperative for a man to deal with some people inside and outside his part of the world without knowing them. In fact, transactions could often take place through correspondence.

Even in deputation it seems the prevailing convention is to consider it a voluntary contract and when people's convention developed commercially, deputation was introduced by assigning a payment little by little till it became to day quite common.

This is the same convention which made people not to justify taking payment for teaching Qur'an and legislation subjects and when people dedicated their time to that and it became a profession, it was approved without the least embarrassment. This is the same convention that led the Hanifya not to consider utility money though the majority of scholars

disagreed with that. The guarantee is but one of these dealings on which fiqh pursued the track of the convention. And as convention has changed greatly today, there is no option other than to look into the issue of guarantee to arrive at the visualization that suits the need and interest of the Moslem group.

One of the proofs that show the absolute incorrectness of the judgment stating that taking payment for the guarantee is not allowed is that some fuqaha permitted some forms of receiving payment for the guarantee by way of coping with necessities of transactions that confronted them. One example of this is what appeared to Al Hatab:

1. The explanation indicates that if the creditor gave the indebted something often answering a guarantor. This was approved by Malik Ibn Al Gasim, Ashahab and others, though Ashahab in Al Utibia stated that it is not permissible and also that it was classified as undesirable. Al Lakham8i, and others said that permissibility is more evident <sup>(87)</sup>.
2. Ibn Gazi said if the payment was from the creditor to the indebted it would be acceptable. It is even more acceptable if it was given from some other party <sup>(88)</sup>.
3. For Ibn Al Gasim in Al Utibia there is no objection to say take these ten dinars and give me against what you owe me a guarantor and mortgage. In one of Malik's saying this is not permissible. <sup>(89)</sup>
4. Ashahab reported Mohamed said whoever had ten dinars against a man for an appointed time and chose to knock off before repay is due two dinars so as to give him by the remainder a mortgage or a guarantor, this is deemed acceptable but Ibn Al Gasim said that this is unacceptable. Al Lakhami explains that assigning a guarantor is

intended as a safeguard against the bankruptcy of the indebted when the time falls due – and so it has to be delayed and charging the guarantor with what was deposited is like: Put and make haste <sup>(90)</sup>.

These texts reflect in one way or another that it is allowable for the indebted party to the present a warrantor with the sum claimed from him. However, there are variations between these scholars as regard permissibility not and also with variations among those supporting in respect to degree of permissibility.

But why did they allow receiving compensation to the indebted. The way they see it the guarantee is still a contribution contract – but why did they make it acceptable to the indebted and not to the guarantor who undertakes the responsibility?

5. Mohammed was quoted by Malik, Ibn Al Gasim, Ashahab and others to have said: Whoever said to a man leave aside your debt against so and so and I'll answer with the rest for another point of time. No objection to that as he is entitled to take it by his right immediately. Ashahab reported permissibility and undesired ability. Malik said in Al Utbiya: 'it is not valid as it is just like some one saying give me ten dirham and I guarantee the rights. Guarantee in this way is prohibited and the first is sound and clear cut.'<sup>(91)</sup>

Here the guarantor says to the creditor leave aside your debt against so and so and I'll guarantee you the rest to some other point of time. This is acceptable though it is like the first examples quoted the utility is involved though conditioned by the guarantor, However it goes to the benefit of the party guaranteed. All these examples indicate payment to the guarantor though instead of moving from the party guaranteed to the guarantor, the compensation moved from the party benefiting from the guarantee to the

guaranteed and also it involves purchasing from the side of the creditor to the guarantee with a compensation.

If this was allowable here with part of the debt in return for the guarantee so why isn't it allowable there?

**Taking a payment with a cover and prohibiting it without one:**

Some of the diligent scholars as we saw in the encyclopedia and the believe on salutation (Fatwa) of asset Faisal Sudanese Bank that it is permissible to take payment for the guarantee if the letter of guarantee is covered wholly or partially. They prohibited taking payment for the letter of guarantee if there was no cover. They supported their argument as mentioned earlier by stating that the letter of guarantee if covered includes a guarantee and deputation and since it is permissible to take a payment for deputation it is permissible to take a payment for the letter of guarantee as a whole.

This principle shows that a customer requesting a letter of guarantee from Tadamon Bank for example in view of this commitment to Kuwaiti Financing house within one million dollars for six months, such a client could offer a payment if the letter was covered wholly or partially. That is when he pays to the bank all the value of the guarantee or part of it and remain in the bank thus it make use of it till the time falls due, the bank could take a payment with excepted jeopardy in case of full coverage and the danger becomes less if the incase of partial coverage. In case, no coverage is secured the danger increases and the bank is deprived of taking a payment. But why is this illogical is crimination? It is said when a client pays the value of the guarantee or part of it, he becomes a deputy and it is permissible to take payment for a deputation. Thus the guarantor shall remain a deputy in the guarantee on the installment are to be paid by the guaranteeing party through deputation when the party guaranteed pays an installment as when

the installment is paid in advance, and actually there is no distinction between the two cases. In both cases, the bank, the guarantor, shall act as mediator through which the commitment is to be implemented if the payment is permissible in the first it should be so in the second. Accordingly, we do not see any real distinction between the two pictures to make it acceptable in the first and not acceptable in the second.

In fact, to deem it permissible in the first case is contrary to any logic. In this way, all pretexts in our estimation are supported by those siding with prohibition for taking payment on letters of guarantee are utterly rejected. But what about the arguments of those in favour of permitting taking payment?

**The arguments of those who based permissibility to take payment according to its acceptability in the case of the powerful position.**

The general texts in Islamic fiqh state that it is not allowed to take payment on being of a powerful position and on guarantee either. However, a team of contemporary fuqaha stated that its is acceptable to take payment in the case of someone with a powerful position based on the statements of some old scholars. However, the sayings of these scholars state that there are conditions for this. So is guarantee the same as having a powerful position that is as they saw guarantee compensation sound and reasonable since the guarantee on the powerful position and the guarantee come down from the same idea. The person with a good reputation that is based on his fulfillment for his commitments is generally the one acceptable as for as guarantee is concerned and thus he has good image appreciated by others and hence they accept his word. Therefore, the powerful position and guarantee have the same sense.

However, all the texts mentioned by those holding this opinion don't support their argument as they all discuss something material. Either a specific work and hence approval an unspecified task and hence a payment in return. In fact there is a negation for payment on having a powerful position unless it was related to implementing *a* piece of work and thus payment would be for work and not for the powerful position. So the texts used as supporting arguments do not lead to acceptability of receiving payments for having a powerful position and hence the guarantee. We cite this general example for what we have stated:

It was mentioned in the footnote of Disogie:

Abu Abdul Gawari asked about the price of having a powerful position and he answered by the following: Our scholars disagreed about evaluation of having a powerful position. Some endorse prohibition, others are undecided. Some say that if the person with a powerful position needed some expenses for enduring some hardships and traveling about he may take a payment equivalent to that as it is permissible or it is prohibited. <sup>(92)</sup>

This second group believes other than that the guaranteeing operation is a decent service presented by the guarantor and which enhances the value of the commitment of the party guaranteed. And as it a respectable piece of work that this considered of value legislatively and it is permissible to take payment in return. This is sound reasoning from our viewpoint supported by the following:

1. The Hanfiya, Hanabla and Zaidia have permitted the partnerships of holders of powerful positions. This is a partnership that does not depend on money work but depends on the powerful position of partners and the confidence of people in their fulfillment of their commitments. it is by confidence only that they deserve profit. that is

why those who go for prohibition protest against the idea of permitting formation of powerful position holders partnership on profit deserved only through money or work and here neither money nor work is involved. the other group claimed that it is permissible to consider holding a strong position and ensued commitment a reason for gain so why not become a reason for receiving payment in letters of guarantee.

Ibn Rushd says:

The partnership of holders of powerful positions according to the Malik and Al Shafie is invalid where Abu Hanafia think it is permissible. These partnerships depend on liabilities with no craftsmanship or money. The argument of Malik and Shafie is that partnership depended on money or work and both are lacking here. The other drawback is that each partner compensates the other by a gain not supported by craftsmanship or a definite work. However, Abu Hanifia believes it is some asset of work and so it is permissible to form a partnership according to it <sup>(93)</sup>.

Ibn Juzia says (as for the partnership of holders of powerful positions, it is required that the partners participate with no money or work so it is a partnership of liabilities so that if they buy something it is under their liabilities and if they sold it they split the gain between them. This partnership is not permissible contrary to what Abn Hanafia says. <sup>(94)</sup>

2. This is supported by the fact that Islamic legislation considered guarantee one of the conditions for deserving profit: The majority of scholars, according to the saying making it a condition holding the article sold before selling it, state that it is not allowed to sell goods bought before actually holding it. They justified this by saying on receiving goods, these become in the guarantee of the seller and could

be consumed so profit becomes desired in selling a operation against the jeopardy of guarantee. Here it did not suffice the legislator by just owning the goods but put it as a condition above it becomes with his guarantee until he is permitted to sell these goods and deserves the reselling profit. This is another indicator for permissibility to take payment according to the guarantee and this makes the profit acceptable based on the guarantee.

3. The question here is whether holding a powerful position is an asset of work or not. It is evident that a powerful a sizable work and persistent effort so that it becomes full confirmed that the person involved is trustworthy and quite reliable. The responsibility of such a person towards this confidence and powerful position will be even more after he becomes eligible for the confidence of others and can not maintain this position except by more outstanding effort that is manifested in fulfilling his obligations despite all odds.

So if holding a powerful position is not work in itself, it is the outcome of responsible outstanding work. It is impossible to imagine creating a good reputation in any environment or maintaining this reputation except through work as it is the basic principle and confidence is the natural outcome. That is why Abu Hanifa pointed out, as stated by Ibn Russhd when he discussed, a powerful position by describing it as one of the tasks performed.

Accordingly, financial establishments started a long road to create a powerful position pursuing a path full of all sorts of ordeals and hard experiences from individuals and establishments. This costs considerable sums of money and much effort and losses. However, these establishments endure all that in order to build a name in the local and foreign environment because when this reputation is bulletined maintained many facial it is will

be achieved. For example, Tadamon Bank started in its relation with foreign correspondence in the field of export commerce by deducting all value of credit required from its account hence reserving it in a corresponding account to enhance this credit to the exporting party whereas the other establishments that have built a good reputation can find facilities equivalent to 1% only of credit value. Not only this, it used to deduct from its account all credit value even if the merchant bought the goods pertaining to the credit for facilities of small or large size. Tadamon Bank liquidated in the first duration considerable sums, which could have been exploited to the bank interest. However, a powerful position does not materialize without a price and this is actually the price of this representation and now that the bank has left this stage behind successfully.

It has now won the confidence of the Almighty's gift, a great number of correspondents many of whom appreciate the bank to deal with it according to the flexible condition that suits their circumstances. This is only one example to demonstrate that the banks that offer guarantees to their clients did not reach this standard without hard efforts and certainly the reputation acquired require even much more to be maintained not falling short of the effort made to cultivate this powerful position. If this highly esteemed work was evaluated money-wise and you charge some payment for it, you are actually taking a payment for a decent and respectable work.

As this bank presents the letter of guarantee to the client requesting it, it is in fact offering a much appreciated respectable service. The client could through using the guarantee of the bank surpass this through his own efforts till he builds his own representation and gain the confidence of the parties he is doing business with till he no longer needs the guarantee of others and the circle goes on so as the bank built this confidence brick by brick and as it

has spent time and money very generously, an individual may follow the same way to build his powerful position. This has its price and the payment made by the guaranteeing bank part of this price while fulfilling commitment in time and with its condition is another part.

However, we say that the guarantee is an outcome of respectable and closely evaluated work. It require in itself some material work for the party issuing the guarantee such as investigating the condition of the client and assessing his financial status and his obligation towards fulfilling his commitments along with studying the project that would be financed and also considering its economic and social feasibility. However, we do not say as the old scholars said that the guarantee is payment of the like only. A payment should be taken against the guarantee operation as a whole that part which was material and that which falls under securing a powerful position.

4. Evidence to the financial side of a powerful position *is* the condition set by many fuqaha in a guarantor and that is to be resourceful. Therefore what is intended with guarantee is not only a powerful position or mere liability of a guarantee but in fact his powerful position based on his financial reputation and his liability that is capable of fulfillment since what is meant is his resourcefulness which a powerful position and confidence are one of its characteristics. Therefore, it is pointless that some say that it is permissible to take a payment for a powerful position if the matter involves some effort and moving about, whereas payment is not allowed if there is nothing of the sort though a powerful position can never be except a utility of the utilities of work. Perhaps what distracted fuqaha to evaluate guarantee soundly is that the service performed through guarantee, though it is a noble and respectable service, it excels many valuable services. But it seems it results from an

emotional work. In fact, it is a utility of a material work. Because it is a utility, it seemed to be very subtle for fuqaha in the past. However, utility and right have come to day crystal clear so that no body denies it and cannot escape the eye of any faqhi as it used to before.

From all this we conclude the following:

- 1- The argument that volunteering and doing a favour should not be rewarded or cooperated is an invalid claim. Besides what follow as a result to that as regard considering guarantee a voluntary act and no payment permissible for it is not a sound result either. Through originally voluntary act is free and with no compensation if however, a condition was set it could be valid.
- 2- Guarantee is not a loan and so it dose not fall with in the prohibitive warning contained in the words of Prophet Mohamed (pbuh) “Any loan resulting in a utility is interest”.

According to what was explained stating that the guarantee is intended for reassurance and that a guarantee is a debtor and the comparison of a guarantee to a loan is reasonable though the difference should be observed. There is no conflict between a payment and a guarantee and none between a payment and a debt. A person hired may receive his payment and a speculator the gain from his work through he may have to pay the debt and guarantee as a result.

There are shortcomings, however. For example if a person hired to do a job showed some discrepancies and that led to a third party abusing his work tools, he is a debtor to the man hiring him and a guarantor for the value of these tools and at the some time he is entitled to resort to the offender to claim the value. This, however, does not affect the payment he deserved for his work and it cannot be legally denied.

3- If the reasons and justifications on which fuqaha based their view point to consider payment for guarantee illegal were no longer there, the natural result is that compensation for a guarantee is permissible if conditioned. In our evaluation, there is no restriction violation as guarantee is a decent respectable work that costs a guarantor some responsibility and burdens him considerably.

Besides, it is very useful for the party guaranteed and renders him a great benefit that exceeds his benefit from subjecting the project to a feasibility study from its technical and economical aspects. Thus it should be recorded as work that needs to be evaluated and deserves to initiate payment of contracting parties.

4- The fact that we say it is permissible to take compensation for the guarantee does not exclude it from volunteering contracts. In fact we prefer to consider it in general as a voluntary act and to be regarded by people practicing it as one of the factors of social cooperation that enables a man to offer a guarantee to his brother simply for the sake of Allah. This would definitely strengthen the ties of brotherhood so that it will be a part of human compensation. So this man or the other would guaranteeing if we came to need this though this does not prevent financial establishments from performing such a service voluntarily or for compensation if it has chosen to do so.

May Allah lead us to the righteous path.

**Conclusion:**

With the grace and compassion of Allah, Tadamon Islamic Bank Administration continued issuing its books specialized in tracking and organizing banking work. This edition of the book, *Rules and Regulations of the Guarantee in Fiqh and Law* has been revised and many paragraphs have been added and some legal materials were amended so as to cope with prevailing laws to – day. The most outstanding material added here is the manner this book addressed the law for banks mortgaged money realization, 1990, amendment 1993 and implementation procedures on mortgage and covering guarantee cheques and their lawful adaptation.

We are still looking forward to probing the opinion of our gracious reader who is the fulcrum of our interest target to put the material that addresses readers and clients alike in its right track with the aim of yet perfecting it and bringing it to fruitful completion, Allah willing.

May Allah lead us to the righteous path.

Fatwa and Research Administration

Tadamon Islamic Bank - Khartoum

## **Appendix No. ( 1)**

**The Law for Banks Mortgaged Asset Sales, 1990, amended 1993**

**Implementation of the Rules of the Third Constitutional Decree, 1989**

**National Salvation Revolutionary Council has approved the law stated hereunder:**

### **Chapter One:**

#### **Introductory Rules:**

##### **Name of the Law and Affective Date**

1. This law is to be called the Law for Banks Mortgaged Asset Sale, 1990 and to be put into effect from date of signing it.

#### **Interpretation:**

2. In this law unless the sequence stipulates otherwise:

(Wealth) includes realties and movables.

(Estates) includes lands of all kinds, and pertaining utilities, buildings and items permanently fixed to them. It also includes all types of constructions

(Manager) refers to the general manager of any bank or his deputy.

(The Bank) refers to any of the banks operating in Sudan, which owns mortgaged assets, and this includes any financial entity and government.

#### **Authority of the rules of this law**

3. The rules of this law shall apply in case they came in conflict with the rules with any other law till the time the conflict is no longer there.

4. Despite the rules of Article 1, this law is to be applied retrospectively on money mortgage banks even if some special procedures were commenced in this regard before law courts.

### **Chapter Two:**

#### **Banks Mortgaged Asset Sales and Procedures:**

##### **Banks Mortgaged Asset Sales**

5/1. If the time specified for the payment of the sum guaranteed to the bank arrives and the mortgagor delayed, the bank is entitled, after warning the mortgagor in writing for one month for settlement, to sell the mortgaged asset or any part of it including previous mortgages after expiry of the said warning.

2. For the purposes of Article 1, the warning is considered received by the mortgagor:

- a. If it was sent to the last work address or residence non to him or fixed to the mortgage realty where he stays, or:
- b. In case it was rendered impossible to deliver the warning as per the rules of paragraph a if it was sent by registered mail and it was not returned for not being received.

**Realities Sale Procedure:**

6/1. The bank sale mortgage realty including all other mortgages in implementation the rules of article 5 through public auction provided that the basic value of this realty should not be less than the value for which it is mortgaged or the real value specified by the bank in consultation specialized parties whichever with greater.

6./2. If no purchasing offer was made or if the offer presented was less the basic price the bank may offer the mortgaged realty another time for sale without specified a basic price.

6./3. The procedure for the public auction for sale should be stock at any stage at any before the auction was a warded in case the debtor mortgaged has paid the indebted sum and all other expenses endured by the bank in these procedures, all in cash.

6/4. When the sale was finalized in accordance with the rules of this law lands general registrar shall undertake modifying mortgaged realty record

under the name of the purchaser including all mortgages provided that no fault in reality selling procedures shall affect the purchaser's right in transferring ownership.

6/5. The value of selling mortgaged realty shall be dispensed with as follows:

- a. Settlement of selling expense.
- b. Payment of bank debts within the value of registered mortgage.
- c. The remainder of selling value, if any to be handed to mortgagee's debtor.

6/6. If the selling value obtained was not enough to the bank may sue the indebted mortgagor item, with the rest of the money through submitting a civil claim.

### **Movables seizure and selling procedures.**

6/7. In case of mortgaged movable assets the following procedures should be adhered to in seizure and selling them:

- a. If the mortgaged movables was fully under the custody of the bank shall undertake selling them in the manner stated in this law after the expiry of warranty period stipulated in Article (5).
- b. If the seizure of mortgaged movables was shared between the bank and the client, the bank may on the expiry of warning duration stated in article (5) entry of any permission where movable assets are accommodated and seize them in a way the bank deems convenient and fully put them in bank possession.
- c. If the movable assets mortgaged to the bank were completely under the control of the client, the bank is entitled to seize these movables after the expiry of warning duration mentioned in Article (5).

2. The bank shall immediately undertake selling these movables that were seized as per Article (1) through public auction provided that the base price

of the movable assets is a sum not less than mortgage value or the actual value whichever is greater.

b. If no purchasing offer was present or if the offer was less than the original value, the bank is entitled to display the mortgaged movable assets for sale another time without specifying a price for that.

c. The sale value obtained shall be dispensed with as follows:

**First:** settling expenses of seizing, storing and selling of these movable assets.

**Second:** The remainder of sale value, if any, shall be handed to the indebted mortgagor.

d. If sale revenue was not enough to settle the mortgage sum, the bank may seek to recover the remaining sum through submitting a civil seizure as stated in Article (1), the manager or his deputy may enter by force along with those whom he deems necessary to any place where seized movable assets are kept and that is during working hours of the indebted person.

The manager or his deputy is entitled to request the officer in charge entry to the permissions where the movables are located and finalize seizing them and the officer in question should respond positively to this request.

4. The banks shall stop and shall immediately undertake selling the movable assets that were seized as per Article (1).

### **Referring dispute to arbitration:**

8.1. The mortgagor may in case of any dispute between him and the mortgagee request in writing in period not exceeding one week from date of receiving states in Article (5-1) so as to refer the dispute to arbitration.

8.2. Despite the controls of Article (5-1), the bank must stop selling procedures if the mortgagor submitted the application stated in Article (1)

and that is until the issuance of an arbitration board resolution as mentioned in Article (10-1).

**Arbitration board formation:**

9- 1 The bank shall in coordination with the mortgagor undertake formation of the arbitration board with in a period not exceeding one week from date of delivering to the bank the application stated in Article (8-1).

2. Each of the two parties shall appoint an arbitrator and the two parties shall agree to appoint a third arbitrator to be chairman to the arbitration board.

3. The party suffering injustice may, if it proved impossible to form an arbitration board as stated in Article (2), request from the Governor of the Bank of Sudan to appoint the required arbitrator provided that the governor shall not appointment within one week only at the most from date of receiving the application.

**Arbitration Board Resolution:-**

10-1/ The arbitrary board shall issue its resolution with a duration not exceeding one month from date of formation.

2/ The arbitrary board resolution shall be final and its judgments cannot be attacked or disputed before courts.

11/ The Governor of Sudan Bank may on approval of the Minister of Finance and Economic planning to issue by-laws necessary to implement the rules and regulation of this law.

issued under my signature on the fourth day of Dhul Hijjah 1410 h corresponding to the 26 June 1990.

**Lt. Gen. Omer Hassan Ahmed Al Bashir**

**Chairman of the National Salvation Revolutionary Command Council**

## **Appendix No. 2**

### **Office Circular No 17/98**

#### **Guarantees**

##### **First: Realty Mortgages:**

As the purpose of a mortgage is its implementation, if a client fails to make settlement of a mortgaged realty, it should be liable for sale. Implementation in this regard should not be conditioned by any administrative or social restrictions. Furthermore, expected sale value must cover a client's commitments toward the bank, in addition to all relative expenses incurred by the bank provided that a realties value should not be less than ..... of client commitment to the bank.

Accordingly, the following contacts should be observed:

1. Mortgage of a realty registered as a common property is not acceptable.
2. Agriculture lands should not be mortgaged and if there are any justifications that meet the requirements stated above, the application shall be routed to investment administration supported by all necessary documents for issuing appropriate resolution.
3. Lands donated for investment purposes are not acceptable unless it was exploited for the purpose it was donated for such as erecting a factory, workshop or the like and also provided it meets the above stated conditions.
4. Any realty shall be evaluated before concluding the mortgage procedure, according to market price. Evaluation of the capital shall be conducted by Tadamon Estate Co. As for evaluation outside capital, it shall be conducted by Estates Bank branches. In case there

is no branch for the bank, evaluation shall be undertaken by the engineer concerned in the local authority's premises.

5. All mortgages must be first mortgages; a second mortgage is totally unacceptable in realty or movable assets.

**Second: Goods securities**

1. The goods shall be liable sale and covers its value ..... of Bank dues expect for goods securities in question.
2. Goods shall have complete documents (import certificate, purchasing invoices ..... )
3. The goods shall be evaluated by three neutral parties specialized in the ibid field provided that all evaluation procedure shall be prepared by the concerned branch employees.
4. Checking goods validity date in comparison date resolving operation along with liability for storage, marketing prudential and degree of demanded.
5. Comprehensive insurance policy validity so that it shall be valid for a date after settling operation.
6. Non acceptability, guarantees of goods or equitant as alternative guarantees except after having the written approval of investment administration.
7. Goods are to be stored in a bank's depots and in case of branches, with storing facilities or stores insured at a bank's or company's premises. It shall adhere to modern storing practices (contractual storage) and that is in case the branch does not have stores. As alternative, other stores other than those of the client could be used after these are double checked, stamping the bank's name on it with all keys left with

the branch of the bank. Regular visits shall be made to the store as per written instructions relating to banks and responsibility.

8. Verifying clients' ownership to the goods checking the deputation for dispensing with goods.

**Third:** Vehicles and means of transportation

Vehicles on means of transportation shall not be mortgaged unless these were mortgaged to the interest of the bank at traffic police dept. They shall be mortgaged on equitable mortgage basis at banks stores by virtue of equitable mortgage contract along with having goods covered by comprehensive insurance.

**Fourth:** Guarantees supported by answering confidence in view of the weakness of such type of guarantees, it shall not be used by branches except in case it becomes practically impossible to store or transport goods under the name and supervision of the bank. and after securing approval of investment administration in writing along with observing the under state conditions:

1. The client shall be well established and deserving high confidence. The goods shall be of the type that either impossible to store separately or to be store by its if due to smallness of its size compared to other goods of the client.
2. Making surprise visits to the stores to check goods are there in the right questions and making an overall evaluation for the goods.
3. The branch shall keep all relevant legal documents in order along with reports of periodical reports and the like.

**Fifth: Letters of Guarantee**

1. No Guarantee letters shall be issued to courts.

2. No guarantee letters shall be issue to banks, or financing establishments for guaranteeing financing operations
3. Observing approval validity limits in respect to letter of guarantee.

**Sixth:**

It shall be strictly prohibited to accept personal securities irrespective of justifications presented.

**General Conditions:**

1. No financing facilities shall be granted to any client except on ensuring that the client does not have any financing facilities in any other branch.
2. In case the branch is willing to provide him with another financing facility, a new facility is prohibited if the client has an outstanding one at the said or other branch. This applies if the client has an account at one branch only.
3. Adhering to financing controls according to study conditions and not over passing them for any reason.
4. Financing facility shall not be guaranteed to any client except after ensuring that all conditions are fulfilled.
5. Approved guarantee shall not be changed except by the party that has approved it in the first place.
6. In case of establishment, companies and entity personalities the following shall be added in case of the contracts of mortgage and estate mortgage.
  - a. In case of equitable mortgage under Article (5), the following paragraph shall be added to the contract:

This contract shall be registered at the office of companies – general register in Justice Ministry according to Article 106 of

Companies Ordinance, 1925 and the second party (mortgagor) shall meet all registration costs along with registering contract and submitting it to the office of General Registrar of Companies within 21 days from registration date.

- b. In case of Estate mortgage contract under Article (8) the following paragraph shall be address to the contract:

This contract shall registered at the office of companies general register in Ministry of Justice in accordance to Article (102) of Companies Law 1925. The second party shall meet all registration fees provided that registration at the office of companies general registrar with in 21 days from registration date.

May Allah lead us to the righteous path

**General Manager**

**Salah Ali Abu Enaga**

### **Appendix No. 3**

#### **Preliminary Mortgage Contract**

This contract has been concluded between:

Firstly: Tadamon Islamic Bank to be referred to later on and for contract purposes as the First Party (Mortgagee).

Secondly: Mr. / .....the owner registering plot no ..... Hara / Block .....Town ..... to be referred to and for contract purposes as the second party (Mortgagor).

As the second party has presented to the first party plot no ..... Hara/ Block .....Town ..... to be a security for the investment transactions that .....intends to engage in with the first party.

Accordingly, the two parties have agreed on the under mentioned conditions to govern their contract:

- 1) The second party shall undertake to mortgage the above mentioned plot with its total area indicated in the registration certificate including all existing buildings and construction on a preliminary mortgage basis to the interest of the first party in return for the sum of .....SD (only..... dinars).
- 2) This mortgage shall be a guarantee to ensure that the second party undertakes paying any installments due to the first party from the second party by virtue of any contract or contracts signed by the second party with the first party in which is explicitly stated that its should be referred to this mortgage as a guarantee.
- 3) The second party has no right to take any action in the mortgage realty or the buildings erected on it by sale, demotion, mortgage or otherwise except after securing the written approval of the first party in this regard.

4) This mortgage shall not be released unless the second party pays all sums and installments due by virtue of the contracts referred to in item mentioned above

5) If the second party violates any other contract signed with the first party, the first party is entitled to sell the mortgaged realty as per this contract including all relevant buildings in order to obtain all dues claimed from the second party.

6) This contract shall be registered in accordance with Lands Settlement and Registration Act, 1926 with the second party covering all fees and ensuing expenses.

Signed by:

**For / First Party**

**for Second Party**

**Witnesses:-**

1) .....

2) .....

**Attestation**

I ..... attorney and commissioner for oaths ..... hereby certify that the parties involved in this contract after having been identified by the witnesses abovementioned and the voluntarily signed it in full awareness of its contents.

Issued under my signature and stamp on this day ...../...../.....

.....

**Appendix No (4)**

This contract has been concluded on this day .....of month .....the year.....AD. Corresponding to .....of month .....the year.....H.

First: Tadamon Islamic Bank branch .....to be referred to later and for this contract purposes by the bank as a First Party (Mortgagee).

Second: .....to be referred to later and for the purposes of this contract by the Second Party (Mortgagor).

As the second party has engaged in an investment operation (s) with the first party and thus with the sum of .....SD (only .....Dinar) and as this debt requires a guarantee, the two parties have agreed on the following conditions:

1) The second party undertook mortgaging:

Item

Type

Number

Size

Other characterizing specifications .....  
.....

Or as per attached chart which is deemed an inspirable part of this contract and that is on the basis of an equitable mortgage to the interest of the first party in return for the sum of ..... SD (only.....dinars).

2) The ownership of the moveable above stated in no (1) to the first party on signing this contract.

3) The second party is not entitled to take any action regarding the moveable mentioned in (1) above except after securing a writen approved from the first party.

4) if the second party violates any of his commitment towards the first party, the first party has the right to sell all goods mortgaged on inequity mortgage basis in order to obtain all his dues and that is according to Banks mortgaged money realization for the year 1990G.

Accordingly, the two parties have signed:

For / First part:

2) I.D.  
no .....dated .....Issued .....date.....

For / Second party:

3) I.D.....dated .....Issued.....wit  
nesses.

1- .....I.D.....dated.....Issued.....

2- .....I.D.....dated.....Issued.....

**Attestation**

I ..... attorney and commissioner for  
oaths ..... I hereby certify that the parties involved in this  
contract after having been identified by the witnesses abovementioned  
and the voluntarily signed it in full awareness of its contents.

Issued under my signature and stamp on this day ...../...../.....

.....  
.....

Lands Settlement and Registration Act, 1925.

This contract of which a copy is attached shall be registered under  
no ..... on this ..... day of month ..... the  
year ..... Plot no ..... Block ..... the town of ..... as per the  
said law clauses, fees having been received, amounting  
to ..... receipt no. .... treasury ..... on .....

## Footnotes

1. Al Kharashi – Mukhrasar Khalil.  
Al Adawi footnote 60/21 said: A guarantee is placing a right with another right. Al badie Al Sanadhi’ Al Kasani 7/3415. Al Mughani by Ibn Qadama with Al Sharh Al Kabeer said, “A Guarantee is joining a guarantor’s right to the guaranteed right.5/70”
2. Al Mugani 5/71
3. Al Kharashi 6/334
4. Al Kharashi by Ahmed and Nisai
5. Narrated by Ahmed, Bokhari and Nasie.  
The five, with the exception of Abu Da’oud, credit this story from a hadith narrated by Abu Qatada, corrected by Tirmidzhi, Muntagi El Akhabar with Niel El Awatar by Al Shokani 5/267 - 268
6. Al Muntagi with Nail Al Awatar 5/268
7. Ahmed, a hadith narrated by Abu Da’oud, Nisai and Dar Al Qatany, corrected by Ibn Hayyan and Al Hakam - Al Muntagi with Nail Al Awatar 5/265/270
8. Al Muntagi with Nail Al Awtar 5/268
9. Al Mugani 5/71
10. Rawdat Al Talbeen Abi Zaria Ibeen Ali Zakona
11. Asharh Al Sageer 3/431
12. Al Badie 7/3408
13. Al Badie 7/3407
14. Al Sharh – Al Sageer 3/432
15. Al Mugani 5/78
16. Al Kharashi 6/23
17. Al Badaie 7/3411

18. Al Sharh Al Sageer 3/434
19. Rawdat Al Talbeen 4/240
20. Al Mugani 5/71-72
21. Al Badaie 7/13412
22. Al Mugani 5/74
23. Al Mugani 5/74-77
24. Al Badaie 7/3420
25. Al Kharashi 6/24
26. AL Mugani 5/72
27. Rawdat Al Talbeen 4/244-250
28. Al Badaie 7/3407
29. Al Badaie 7/3418
30. Al Mugani 5/72
31. Al Kharashi 6/28
32. Al Badaie 7/3423
33. Al Badie 7/4324
34. Al Badaie 7/3406
35. Al Badaie 7/3425-3427
36. Al Um 3/299
37. Al Badaie 7/3407
38. Al Mugani 5/80
39. Al Kharasi 6/23,32
40. Al Badaie 7/3424
41. Al Mugani 5/86-89
42. Al Shragwi 9:2
43. Fath Al Gadaeer 1/36
44. Hashait Al Disogi 231

45. Hashiat Al shrgawi
46. Al Mugani 4:366
47. Al Lama Al Dimashgia 4:51
48. Al Shafie 19-21
49. Al Sharia 4:344
50. Al Shafie 26-27
51. ibid
52. ibid 4-1
53. ibid 54
54. ibid 68
55. ibid
56. ibid 79,129-130
57. ibid 132
58. ibid 132
59. ibid 116
60. ibid 125
61. Transaction 754 "1"
62. Article 737 Civil Transaction Law 1984
63. Article 728 (CTL)
64. Settlement Article 1925 (61)
65. Article 734 Registration 1984
66. Article 739 (21) (3) (CTL)
67. Article 739 (CTL)
68. Article 759 (CTL) 1184
69. Article 76 (CTL)
70. Article 761 (CTL)
71. Article 762 (CTL)

72. i.e. before issuance of the Settlement of Non-Registered Lands Act, 197
73. See Saeed Mohamed Ahmed, Sudanese Real Estate Properties Act, page 83
74. Al Kharashi on Mukhtasar Khalil with explanatory footnotes from Al Madwi who said, “A guarantee placing of one right by another right. 60/21Al Badie Al Sa’igh by Al kasani 7/3415. El Mugani by Ibn Qatami with Al Sharh Al Kabeer in Iltizam Al Haqq 5/70, where he said, “A guarantee is joining the guarantor’s right to the guaranteed right.”
75. Al Mugani 5/71
76. Al Kharshi 6/234
77. Al Kharashi 6/36
78. Narrated by Ahmed, Bokhari and Nasie.  
The five, with the exception of Abu Da’oud, credit this story from a hadith narrated by Abu Qatada, corrected by Tirmidzhi, Muntagi El Akhabar with Niel El Awatar by Al Shokani 5/267 - 268
79. Al Muntagi, with Niel Al Awatar 5/268
80. Ahmed, a hadith narrated by Abu Da’oud, Nisai and Dar Al Qatany, corrected by Ibn Hayyan and Al Hakam - Al Muntagi with Nail Al Awatar 5/265/270
81. Narrated by Ahmed, Abu Da’oud, Nisai and Al Muntagi with Niel Al Awatar 5/265
82. Al Mugani 5/71. He said: “It is said by Abu Da’oud and Al Tirmidzhi, who said it was a very good hadith.”
83. Rawdat Al Talbeen, by Al Imam Abi Zakaria in Sharaf Eldin El Nawawi 4/240 Al Mugani 5/70/71

84. Al Sharh Al Sageer 3/431, Al Badie 7/4034
85. Al Badie 7/3404
86. Al Sharh Al Sageer 3/432
87. Al Mugani 5/78 and also see Rawdat El Talbeen 4/242
88. Al Kharashi 6/23
89. Al Badie 3411, Al Khoraisi 6/22-23 Rawdat El Talbeen 4/241, 5/72  
& 78 Al Sharh Al Sagheer 3/551.
90. Al Sharh El Sagheer 3/434
91. Rawdat El Talbeen 4/24
92. Al Mugani 5/71-72

### **References**

1. Mawahib Al Galil 5/111

2. ibid p. 113
3. Al Sharh Al Kabeer 3/77
4. Ikhtlaf Al Fukahaa p.9
5. Al Mugani 5/210 -211
6. Gawaneen Al Ahkam Al Shariya
7. Al Fatawi Al Shariya
8. Mosuwa Al Ilmiya
9. Al mousoaa 5/488
10. Al Bank Al Rabawi in Islam p. 121
11. Bidayat El Mugtahid 2/284
12. Al Mojtahi 368
13. Hashiat Bin Abdeen 5/678
14. Gawaneen Al Ahkam 344-345
15. Mawahib El Galeel 5/112
16. Mawahib El Galeel 5/113
17. Mawahib El Galeel
18. Mawahib El Galeel
19. Mawahib El Galeel 5/113
20. Hashiat Al Dosogie 3/224
21. BIdayat El Mugtahid 2/192
22. Kwaneen Al Akham Al Shriya 2/299
23. Al Badaie 7/13412
24. Al Badaie 7/3412 Al Mugani 5/71
25. Al Mugani 5-74-77
26. Al Badaie 7/3420
27. Al Mugani 5/72
28. Rawdat El Talbeen 4/244-25

29. Badaie 7/3407
30. Badaie 7/3418
31. Al Mugani 5/72
32. Al Kharashi 6/28

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