

Guarantee Obligations in Commercial Transactions in Islamic Jurisprudence

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Abstract

Guarantee has been an essential element among the parties of commercial transactions among people. Islamic jurisprudence pays a special attention to these transactions as they are basic in human life and development. Islam has organized these commercial relationships in a way that guarantees the right of both parties in this process. The researcher found out that it is permissible to take the fee on the letter of guarantee if it is covered by the customer. The bank, in the case where the letter of guarantee is covered, will pay the customer's dues from the customer's money in the bank, not from the bank's money. The guarantee in this case does not turn into a loan with an increase, so there is no good reason left to say that it is forbidden. Moreover, people's persistent need for this guarantee calls for implementing it in our lives.

Keywords: Bank, Customer, Guarantee, Letter of Guarantee, Money, Transaction

Introduction

The jurists paid attention to the jurisprudential rules because it is easy to learn and understand them as well as their branches, sub rules, implications, and the consequent regularity of the Islamic system (Al-Shayyab, 2015, p. 10). Had the jurisprudential rules not been in Islam, the jurisprudential rulings would have been scattered branches that contradict their appearances, even if they agreed in their intrinsic meaning. For this reason, many scholars have praised jurisprudential rules and their place in the legal sciences to prevent intruders from prejudicing people and sabotaging different transaction (Lutfi, 2020, p. 25). Imam Al-Qarafi - may Allah have mercy on him - said: "these rules are important in jurisprudence; they have a great benefit to the extent that they magnify the value of the jurist and show the majesty of jurisprudence. They clarify and reveal methods of fatwa. Whoever concentrates on the sub rules and without considering the general rules, the sub rules will create contradictory perspectives. He who masters jurisprudence with its general rules will not have to memorize most of the details, because they are included in those general rules". Imam Ibn al-Subki said: "The seeker of knowledge, and whoever wants to reach the highest position in perception and ratification, to endorse the Islamic rules; to refer to them when he

faces ambiguity, to carry out the method of *ijtihad*, and then confirm these rules by abundantly memorizing the sub rules to root them in the mind. In this way, they become fruitful with limitless benefits. As for exerting the maximum efforts to memorize the sub rules without knowing their origins, and organizing the sub rules without understanding their implications, then the seeker of knowledge will not be satisfied, nor will any other scholars within this field".

First: Commercial mortgage

Mortgage has already been defined in Islamic jurisprudence. Islamic jurisprudence only defines a type of mortgage as a security in commercial transactions. In this regard, it deals with the mortgage as a guarantee in commercial transactions in Islamic jurisprudence in terms of its legitimacy, implications, and the importance of considering it as a commercial transaction.

Mortgage is legitimate in the Qur'an and the Sunnah

Allah says in the holy Qur'an: "And if you are on a journey and cannot find a scribe, then let there be a pledge taken (mortgaging)".

This holy verse is evidence of the legitimacy of the mortgage on travel. Jurisprudence also permits the mortgage without being on a travel. This verse is limited about mortgaging while on travel because Muslims understand that it is legitimate while at home from other verses and Sunnah. Aisha, peace be upon her, narrated that the Prophet Mohammed, may Allah's prayers and peace be upon him, bought food from a Jew on a deferred date, and he mortgaged an iron shield. Another narrative states that the prophet passed away and his shield was still mortgaged to a Jew for thirty *saa'* of barley.

In fact, the legality of the mortgage in Islamic jurisprudence is based on the fact that the purpose of the noble Sharia rules is to mitigate the hardship and facilitate life for the Muslims. Since the material conditions in general do not settle in a state, so people live between richness and poverty. Therefore, if financial matters are getting difficult for a Muslim, he may resort to a legitimate loan. In exchange for that, there is a pledge, which is a guarantee for the owner of the money (the creditor). There are significant and useful interests here, so the mortgagor benefits from the money to fulfil his needs and mitigate grief and anguish upon his soul. According to the Islamic jurisprudence, if any party is harmed by the other in this transaction, it can prove that and even get compensated (Bahr, 1998, p 239-240).

The mortgagee is assured that his money is safe, and if his intention is good, he will be rewarded, benefits will also return to the community, business will expand, people will exchange love and trust, and the spirit of cooperation and interdependence will prevail among the members of the Muslim community.

Second: Letter of Guarantee

Contemporary jurists differed about the legal adaptation of the letter of guarantee. Some of them considered it a guarantee, some of them considered it an authorization, some of them made it a royalty, and some of them consider it an innovative form with characteristics that distinguish it from other contracts. Different penalties have been imposed on any party that fails to fulfil this letter, such as fine and imprisonment (Ibrahim, 2014, p 174-176).

Adapting the Letter of Guarantee as a Guarantee

This trend believes that "the guarantee is based on warranty, where we find that the Maliki, Shafi'i, and Hanbali jurists use the word guarantee in the sense of warranty. This adaptation seems to be consistent with the definition of guarantee in the jurisprudence of the four imams. The Hanafi school defines guarantee as "the combining the obligation of both of the debtor and the debtee in a debt."

The Maliki school defines it as "the rightful entailment of others' obligations." While the Shafi'i jurisprudence defines it as "guarantee in Sharia is to adhere to a fixed right in the responsibility of others, or to bring someone has guaranteed asset. The contract by which this is achieved is called guarantee, in which the guarantor is called warranter".

The Hanbali jurisprudence defined it as ""joining the obligation of the guarantor to the obligation of the guaranteed person in the commitment to the right." Since guarantee is one of the permissible contracts in Islamic jurisprudence, many of the jurists went to adapt the letter of guarantee as a warranty because there is a congruence between the meaning of the letter of guarantee and the guarantee. They both have the same purpose: to ensure and strengthen the debtor's credit position in the face of the warranted person.

The letter of guarantee is the contract of guarantee known impliedly in Islamic jurisprudence in name and meaning. The definitions of the jurists for the contract of guarantee are consistent with the definition of the letter of guarantee in its essence and its pillars. As for the provisions contained in the definitions of letters of guarantee that are in excess of what was stated in the definitions of the jurists, they have an origin in Islamic jurisprudence which sues any breach of the stability of this transaction (Rizk, 2012, p. 191).

With regard to the bank's relationship with the beneficiary, the bank guarantees the right of the beneficiary, whoever his person is, and the bank may guarantee the beneficiary without obtaining the customer's consent. This is evidence of establishing the guaranteed contract, meaning that the guarantee arises within the guarantor's relationship with the creditor, regardless of the satisfaction of the guaranteed person. This highlights the independence of the bank's relationship with the beneficiary from the bank's relationship with the customer.

Adapting the Letter of Guarantee as an Authorization

Authorization, according to the Hanafi school of thought, is defined as: "A person will establish another in place of himself in a known action."

According to the Shaafa'is, it is the authorization given by a person who has money to another person to act on behalf of him within what the owner accepts to be done in his life".

As for the Hanbalis, it is "an authorization that enables someone to act on behalf of someone in what is permissible in the rights of the Almighty Allah and the rights of human beings".

By presenting the different definitions of authorization in jurisprudence, it is clear that they agree that authorization is allowing people to act on behalf of others. Some add a condition that does not require the death of the authorizer to activate the authorization.

We have seen that some contemporary jurists consider the letter of guarantee as a kind of Authorization, as "the customer submits a request to the bank, in which he authorizes the bank to deliver the letter of guarantee to the beneficiary on his behalf, and to fulfil its amount at the first claim from the latter within a specific period, as the customer is the authorizer, and the bank is the agent that implements the work entrusted to it, which is to present the letter of guarantee to the beneficiary. This is a well-known and permissible behaviour in Islam.

Thus, the basis of the bank's obligation arising from the letter of guarantee is the authorization contract, and this obligation is original and independent of the debtor's obligation". It is worth mentioning that the penalties imposed on the party that fails to achieve its duties varies according to the law, Legislation, and judge's opinion (Al-Qadi, 2013, p. 245).

Adapting the Letter of Guarantee as an Updated Transaction

There is a contemporary jurisprudential trend that does not consider the letter of guarantee an authorization, guarantee, or royalty, or that it combines guarantee and authorization, but rather considers the letter of guarantee an innovative type of commercial transaction that "falls within the framework of unnamed contracts because some contracts known in Islamic jurisprudence do not apply to them".

This perception and vision of this trend stems from the fact that "commercial transactions have broadened their horizons and branched out, and established their types and diversity according to commercial custom that contracting parties stipulate, until new contracts have been made to the extent that people's imposed conditions that expanded the distance between new contracts and their origins which are mentioned in the books of jurisprudence. Even if we endorse the invalidity and corruption of those contracts with those conditions, people would suffer from inconvenience and distress, economic activities in the markets would be paralyzed, and commercial relations between people would be cut off.

The prevailing opinion of those former jurists does not lead to restricting transactions for people because the large number of those, who prevented the fulfilment of the contract until the evidence is established, expanded the evidence proving the permissibility of contracts until they included all or most of the transactions that take place, so that people would not be in inconvenience. Islamic jurisprudence calls for judges not to be embarrassed by their judgements to achieve stability and justice in the community (Ramses, 1991, p. 145). Most of them decide some or all of the following principles: custom, approval, and public interests. However, a distinction must be made between the types of letters of guarantee as follows

- **Fully Covered Letter of Guarantee**

According to this guarantee, the bank obtains warranties, from the customer, whose value is equivalent to the amount stated in the letter of guarantee, whether they are cash, commercial or financial papers, or goods. Which makes the role of the bank a service party, thus the credit character is not fulfilled in this process.

The Islamic jurisprudence considers it permissible, in addition to the permissibility of the bank to charge a commission in return for that on the basis of the lump-sum wage within the limits of the similar wages. The point here relates to a mere banking service for which the bank deserves a fee. This process is achieved on the basis of authorization as one of the Sharia contracts, which may be paid with or without remuneration, given the bank's relationship with the customer through the issuance of the bank's letter of guarantee for the customer's account, and the latter in return deposits an amount of money equal to the value of the letter.

In this way, the bank acts on behalf of the customer in fulfilling the obligation towards the beneficiary, which is what the Islamic Fiqh Academy decided in one of its decisions when it said "if the letter of guarantee is covered, then the relationship between the requester of the letter of guarantee and its source is the authorization. This authorization is valid with or

without remuneration, with the guaranteed relationship remaining in favor of the recipient who is sponsored.

- **Partially Covered Letter of Guarantee**

The letter of guarantee is partially covered when the bank obtains an amount ranging between 10%- 30% of the value of the customer, which is available on a current account in the bank. This is achieved if the customer's commercial reputation allows the letter to be guaranteed by the bank for the value of the cover. This form is the most common from a practical perspective.

The prevailing trend in Islamic jurisprudence is to consider this type of letter on the basis of "agency and guarantee together," so that the bank is considered an authorized agent on behalf of the customer in the covered part and a guarantor on his behalf in the uncovered part. Professor Al-Salous says about this type of letters of guarantee. The customer has a relationship of authorization and guarantee together, so he is an agent with regard to the covered part and a guarantor with regard to the remaining part. Since the fee of authorization process is acceptable, it is permissible to take the fee for issuing this type, based on the agency in the covered part, which is a contract of agency and guarantee together (Ahmed, 2019). It is permissible for the bank to take a fee in this case because it is on the basis of agency, and it is permissible with or without a fee." In fact, the letter of guarantee that is not completely covered is the subject of juristic consensus. They agree that it represents the guarantee known to them. It is the obligation of the guarantor towards others regarding what he needs financially.

For this reason, they do not allow taking fees on the guarantee, which prevents Islamic banks from issuing this type of letters in exchange for a wage. But some contemporary jurists permitted taking the wages on the guarantee and issued fatwas accordingly, while some others, who are the vast majority, among the jurists, they are the dominant group adhered to the rule of fees in the guarantee as decided by the old jurists.

Third: Documentary credits

A documentary credit is defined as "a written undertaking issued by a bank at the request of an importer in favor of a supplier, in which the bank undertakes to pay the sums due to the supplier for goods to the importer who requested the opening the credit when the supplier submits documents conforming to the terms of credit. Documentary credits provide a great service in commercial transactions based on credit and trust and achieve common interests between the supplier and the importer.

For the supplier, he has the guarantee by means of the documentary credit that he will receive the value of the goods that he has contracted to export as soon as the documents for shipping the goods are presented to the bank that notified him of the arrival of the credit. Regarding the importer, he also guarantees that the bank that opened the credit will not pay the price of the goods contracted to be imported except after submitting the shipment documents for the goods in a completed manner of the conditions contained in the documentary credit.

Not everyone who applies to open a documentary credit is accepted by the bank, except after examining his condition and the extent of his ability to pay. The bank usually takes a quarter of the value of the letter of credit. To guarantee its remaining part of the amount, it sends the documents for shipping the goods in the name of the local bank. The bank can take

possession of the goods and he holds it if the buyer, requesting credit, delays paying the remaining amount (Saqr, 2009)

In the case of importing a commodity from abroad, but the owner of the import request does not wish to pay its price before receiving it and making sure that it conforms to the agreed terms and specifications. In order for the buyer to guarantee the right of the supplier, the buyer obtains from one of the accredited banks in his country a letter of credit for the necessary amount to pay for the goods in favour of the supplier.

If the supplier receives this letter of credit, he can take a check or a document for the amount owed by the buyer from one of the banks mentioned in the letter. The importer pays the supplier after receiving the documents proving the shipment of the goods assigned to him. Then the bank sends these documents, along with the check and draft, to the bank that issued the letter of credit in order to undertake the collection of the amount of money along with other expenses incurred by the transaction.

Therefore, it can be said that the documentary credit is a cash amount to be paid through a specific bank when it receives documents proving its specific commercial features. It is a bank pledge to fulfil any written commitment from the issuing bank in favour of the beneficiary, which is often the supplier at the request of the customer who is the buyer for the purpose of paying cash, accepting a check or draft, or deducting it within a specified amount in a specific period.

A documentary credit is of great importance to all parties of the process, whether the supplier, buyer or bank. There are four stages related to the documentary credit:

- Sales contract stage.
- Credit opening stage.
- The approval notification stage.
- Credit implementation stage.

The credit relationships are as follows:

- Relationship between supplier and buyer.
- The relationship between the bank issuing the credit and the buyer requesting the credit.
- The relationship between the beneficiary and the issuing bank.

Contemporary Islamic jurists consider documentary credit in more than one form. Some consider it as a guarantee based on the fact that “in the documentary credits, the meaning and elements of the guarantee, the satisfaction of the parties about the guarantee in general, and the possibility to cancel the credit with a permission. In documentary credits, the bank is the guarantor, the buyer is the guaranteed person, the supplier is the one to whom the buyer is guaranteed, and the price is the subject of guarantee. In this case, recourse is also given to the buyer for the price if the supplier agrees (Bouskaia, 2007)

It is stipulated in the guarantee that the guaranteed person shall not be discharged from the debt by mere guarantee without actual payment. Likewise, in documentary credits, the buyer is not discharged by simply guaranteeing the bank, but it is necessary to pay and clear the credit.

Some considered documentary credit a kind of authorization, based on the fact that “some forms of documentary credits, such as the revocable credit, are closer to the authorization, because it contains a non-binding promise to pay. Also, banks often do not revoke anything except when transgressing. Everything included in the obligation arising on each of the bank and the issuer, is confirmed by the documentary credit from actions carried

out by the banks in the interest of the matter, as is the case in the authorization. The authorized person does not guarantee except in the case of transgression and negligence.

Some consider documentary credit an authorization and a mortgage at the same time, based on the fact that the bank plays the role of an agent to pay the customer's debt in exchange for receiving the documents intact. With this authorization, the goods are mortgaged at the bank (the agent), so the bills of lading that represent the ownership of the goods are in the name of the bank. The customer cannot dispose until the bank changes it to the property of the customer. The credit process includes an agency and a mortgage, and the bank takes its fee for the documentary credit based on the fact that it is an agency and taking the fee for the agency is permissible according to Sharia.

There are those who believe that the documentary credit is a single process that is indivisible with what was mentioned in the Holy Qur'an regarding the obligation to fulfill contracts without specifying, so everything that is certified as a contract is obligatory to be fulfilled according to the Qur'an. The Qur'an has proven that every trade in which there is consent is permissible and both contracting parties have financial rights.

All contracts that are included as trade shall be fulfilled according to the commitment they incur. The same applies to everything similar to trade, which means that they also shall be fulfilled by analogy as long as the basis for permissibility has been achieved, which is consent. There is no dispute that documentary credit has great benefits, and it has become an urgent and important transaction for foreign trade. Here, the public interest is realized in the documentary credits because in reality it is taking into account every matter that the mind accepts, and any pure source of Sharia does not cancel or deny it.

Conclusion

After explaining the persistent need for the letter of guarantee, explaining its nature and types, reviewing the various sayings about its ruling, and discussing them in an extensive manner, the researcher found out that it is permissible to take the fee on the letter of guarantee if it is covered by the customer. The bank, in the case where the letter of guarantee is covered, will pay the customer's dues from the customer's money in the bank, not from the bank's money. The guarantee in this case does not turn into a loan with an increase, so there is no good reason left to say that it is forbidden. Moreover, people's persistent need for this guarantee calls for implementing it in our lives.

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