

**PART IV:  
SHARIAH ISSUES IN RELATION  
TO THE OPERATIONS OF SUPPORTING  
INSTITUTIONS IN ISLAMIC FINANCE**

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Credit Guarantee Corporation (Malaysia) Berhad (CGC) was established in 1972 with the objective of assisting small and medium businesses with no or insufficient collaterals to obtain financing from financial institutions by providing guarantee covers for the financing. CGC structures and manages guarantee schemes, specifically to assist small and medium entrepreneurs, as well as to ensure active involvement of financial institutions in the implementation of its guarantee schemes.

### **101. Shariah Concept for the Operation of Islamic Guarantee Facility by Credit Guarantee Corporation**

In view of the enhanced role of Islamic financial institutions in providing financing for small and medium enterprises, CGC proposed to offer Islamic credit guarantee facility to asset borrowers to obtain financing offered by the Islamic financial institutions. The credit guarantee facility offered is a guarantee with fee where the guaranteed party (customer) is required to pay a certain fee to the guarantor (CGC).

In this regard, the SAC was referred to on the issue as to whether the credit guarantee facility with fee offered by CGC is allowed by Shariah.

#### **Resolution**

The SAC, in its 54<sup>th</sup> meeting dated 27 October 2005, has resolved that the credit guarantee facility with fee offered by CGC for financing granted by Islamic financial institutions is permissible.

## Basis of the Ruling

The permissibility of guarantee facility with fee (*kafalah bi al-ujr*) offered by CGC is based on the following considerations:

- i. Some contemporary Shariah scholars<sup>163</sup> and Shariah Councils<sup>164</sup> has resolved that the imposition of *ujrah* on *kafalah* is permissible. A few contemporary scholars further opined that *ujrah* charged on *kafalah* shall be permitted on the basis of *maslahah* and public needs because in the current context, it is difficult and impractical to obtain free-of-charge guarantee.<sup>165</sup> Moreover, one of the contemporary scholars, in his presentation to the OIC Fiqh Academy, had expressed his view that *ujrah* charged on *dhaman* (guarantee) is permissible. He is of the view that although originally *dhaman* is a type of *tabarru`*, the condition to charge *ujrah* on the *dhaman* is considered valid. He further reiterated that *dhaman* contract is not considered as *qard* as it falls under *istithaq* contract. Thus, receiving *ujrah* for the guarantee service is not prohibited as *dhaman* contract is different from *qard* contract<sup>166</sup>; and
- ii. *Qiyas* on *akhz al-ajr `ala al-jah* (to charge fee for someone's reputation) and *akhz al-ju`l `ala ruqyah min al-Quran* (to charge fee on the treatment/medication using Quranic verses). Some classical scholars permitted imposition of fee in both situations and this permissibility could be extended to the imposition of *ujrah* on guarantee as both have similarities in terms of the services provided.<sup>167</sup>

<sup>163</sup> OIC Fiqh Academy, *Majallah Majma` al-Fiqh al-Islami*, 1986, no. 2, v. 2, p. 1146 – 1147; Nazih Kamal Hammad, *Mada Jawaz Akhzu al-Ajr `ala al-Kafalah fi al-Fiqh al-Islami*, Journal of King Abdul Aziz University (Islamic Economics), 1997, v. 9, p. 95 -121.

<sup>164</sup> Shariah Advisory Council of Securities Commission Malaysia, Resolutions of the Securities Commission Shariah Advisory Council (Second Edition), Securities Commission Malaysia, 2006, p. 44 – 45.

<sup>165</sup> Al-Zuhaili, *Al-Fiqh al-Islami wa Adillatuh*, Dar al-Fikr, 2002, v. 6, p. 4178.

<sup>166</sup> OIC Fiqh Academy, *Majallah Majma` al-Fiqh al-Islami*, 1986, no. 2, v. 2, p. 1146 – 1147.

<sup>167</sup> OIC Fiqh Academy, *Majallah Majma` al-Fiqh al-Islami*, 1986, no. 2, v. 2, p. 1134 – 1135.

## 102. Guarantee on the Sale Price

The SAC was referred to on the issue as to whether CGC may guarantee the sale price including the profit margin of an Islamic financing.

### Resolution

The SAC, in its 55<sup>th</sup> meeting dated 29 December 2005, has resolved that it is permissible for CGC to guarantee the sale price including the profit margin of an Islamic financing that is based on sale and purchase contract.

### Basis of the Ruling

As the credit guarantee offered by CGC is on debt or financial obligation of an Islamic financing customer, a guarantee mechanism based on the outstanding selling price is reasonable since it is recognised by the current banking practice whereby the outstanding debt is equal to the remaining debt or the selling price after deducting the rebate value (*ibra'*) due to the customer at a certain point of time.

Danajamin Nasional Berhad (Danajamin) was established in 2009 as a national financial guarantee institution to maintain market confidence in bond markets (including *sukuk*) and to ensure that viable companies have access to financing via bond markets. Apart from providing credit enhancements to corporations with viable businesses, Danajamin also establishes investment grade ratings to facilitate the corporations in obtaining funds from bond markets at a reasonable cost.

### **103. Shariah Concept for the Operation of Guarantee Facility by Danajamin Nasional Berhad**

Under the guarantee facility mechanism by Danajamin, Danajamin undertakes to pay the investors in the event the *sukuk* issuer fails to make good such payment. Subsequently, Danajamin will claim the amount paid to the investors from the *sukuk* issuer.

In this regard, the SAC was referred to ascertain the appropriate Shariah concept for the operation of guarantee facility by Danajamin.

#### **Resolution**

The SAC, in its 10<sup>th</sup> special meeting dated 9 April 2009 and 95<sup>th</sup> meeting dated 28 January 2010, has resolved that:

- i. The application of *kafalah bi al-ujr* (guarantee with fee) as the appropriate Shariah concept for the guarantee facility on the *sukuk* issuance by Danajamin is permissible. Under this concept, Danajamin shall act as the guarantor (*kafil*), the *sukuk* issuer as the guaranteed party (*makful `anhu*) and the investors as the beneficiary (*makful lahu*); and
- ii. Danajamin is allowed to claim back the amount that has been paid to the investors from the *sukuk* issuer through this guarantee facility. The repayment period for the amount claimed by Danajamin from the *sukuk* issuer shall be based on the current market practice subject to obtaining the consent of contracting parties namely Danajamin and the *sukuk* issuer, and it shall take into consideration the size of the *sukuk*.

## Basis of the Ruling

The aforesaid SAC's resolution is based on the permissibility of guarantee facility with fee (*kafalah bi al-ujr*) as stated under item 101.<sup>168</sup>

## 104. Capital Segregation in the Operation of Danajamin

As Danajamin provides guarantee facility for both *sukuk* and conventional bond, the SAC was referred to on the issue as to whether Danajamin's capital for guarantee facility services on the *sukuk* and conventional bond should be segregated. This was due to the concern that the capital segregation might limit Danajamin's capacity to efficiently and effectively provide guarantee facility for both *sukuk* and conventional bond.

### Resolution

The SAC, in its 10<sup>th</sup> special meeting dated 9 April 2009, has resolved that Danajamin's capital for guarantee facility services for *sukuk* and conventional bond need not be segregated. However, the fund obtained from the services of guarantee facility for *sukuk* and conventional bond (with fee) shall be separated.

## Basis of the Ruling

Danajamin's capital management for guarantee facility services for *sukuk* and conventional bond need not be segregated on the basis of *maslahah*, so as to ensure Danajamin is able to carry its function as a guarantor in effectively stimulating growth and stability of the capital market, including the Islamic capital market. In addition, capital segregation will only limit the capacity of this guarantee institution to effectively and efficiently provide guarantee facility on *sukuk* and conventional bond.

<sup>168</sup> Shariah Concept for the Operation of Islamic Guarantee Facility by Credit Guarantee Corporation.

## 105. Scope of Danajamin's Guarantee on *Sukuk*

The SAC was referred to ascertain the scope of guarantee by Danajamin on the *sukuk* issuer, specifically on the issue as to whether Danajamin may guarantee capital and profit value.

### Resolution

The SAC, in its 10<sup>th</sup> special meeting dated 9 April 2009, has resolved that:

- i. For sale-based *sukuk* like *murabahah*, Danajamin shall guarantee both capital and profit value; and
- ii. For *sukuk* issued based on *isytirak* contract (partnership) like *musyarakah*, *mudarabah* and *wakalah bi al-istithmar*, Danajamin shall guarantee the capital value only.

### Basis of the Ruling

For *sukuk* issued based on *isytirak* contract like *musyarakah*, *mudarabah* and *wakalah bi al-istithmar*, Danajamin as a third party may only guarantee the amount of capital. This is in line with the jurists' view that third party guarantee is permissible for *musyarakah*, *mudarabah* and *wakalah bi al-istithmar* contracts but the guarantee is restricted only to the capital value.

## 106. Guarantee on the Obligation Arising from Purchase Undertaking

The SAC was referred to on the issue as to whether Danajamin may guarantee *sukuk* obligation arising from a purchase undertaking in *sukuk* as agreed between the *sukuk* issuer and the investors.

### Resolution

The SAC, in its 94<sup>th</sup> meeting dated 23 December 2009, has resolved that Danajamin may guarantee the obligation of *sukuk* issuer arising from the purchase undertaking in *sukuk* as agreed between the *sukuk* issuer and the investors. However, the formula to determine the amount of purchase undertaking shall exclude the unearned profit.

### Basis of the Ruling

Fundamentally, the obligation of purchase undertaking in *sukuk* is valid and acknowledged by Shariah. This is because such obligation is derived from a binding promise (*wa`d mulzim*) by the *sukuk* issuer to purchase an underlying asset of the *sukuk* based on agreed terms and conditions. In this regard, the guarantee on such obligation and responsibility may be executed either with or without fee.

## 107. Late Payment and Additional Recourse Charge

Normally, after Danajamin makes payment to the investors in the event of default by the *sukuk* issuer, Danajamin will claim the amount paid from the *sukuk* issuer. In order to avoid delay of the repayment by the *sukuk* issuer, the imposition of late payment charge on the *sukuk* issuer who delays the repayment was proposed.

In this regard, the SAC was referred to on the following matters:

- i. Whether late payment charge may be imposed on the *sukuk* issuer who delays in repayment; and
- ii. Whether Danajamin may impose additional charges on the *sukuk* issuer upon making the repayment to Danajamin.

### Resolution

The SAC, in its 10<sup>th</sup> special meeting dated 9 April 2009 and 95<sup>th</sup> meeting on 28 January 2010, has resolved that:

- i. It is permissible to impose late payment charge on the *sukuk* issuer who fails to make repayment within the stipulated period. However, the late payment charge shall be non-compounding;
- ii. A certain amount of the late payment charge may be recognised as income by Danajamin on the basis of *ta`widh*. However, the determination of *ta`widh* rate shall be made by a third party namely Bank Negara Malaysia; and
- iii. The imposition of any other additional charges by Danajamin on the *sukuk* issuer upon claiming the guaranteed amount paid to the investors is not allowed.

## Basis of the Ruling

The aforesaid SAC's resolution on late payment charge is based on the permissibility of *ta'widh* and *gharamah* as stated under item 81.<sup>169</sup> In addition, the prohibition to impose additional recourse charge is based on the view that the payment of guarantee (*kafalah*) by Danajamin to the investors and the right to claim such payment from the *sukuk* issuer would result in the guarantee to appear as a debt (*qard*) that is granted by Danajamin to the *sukuk* issuer. The Shariah stipulates that any additional charge on debt repayment is *riba* unless such additional charge is imposed only to recover the actual cost incurred.<sup>170</sup>

## 108. Ownership of Underlying Asset in *Sukuk* Based on *Ijarah* Contract

In *ijarah*-based *sukuk*, the ownership of the underlying asset is held by the investors, while the *sukuk* issuer as the asset-lessee has the obligation to pay the coupon which refers to periodic rental amount. The SAC was referred to on the issue as to whether the ownership of the underlying asset in *sukuk ijarah* will be transferred to the *sukuk* issuer or Danajamin in the event Danajamin exercises the guarantee by paying the rent and principal amount to the investors.

### Resolution

The SAC, in its 10<sup>th</sup> special meeting dated 9 April 2009, has resolved that:

- i. The ownership status of the underlying asset in *sukuk ijarah* is subject to the terms and conditions of the contract. If Danajamin only pays the periodic rental amount or coupon within the *sukuk* tenure, the underlying asset remains under the investors' ownership. However, if Danajamin pays the purchase undertaking price, the ownership of the underlying asset will be transferred to the *sukuk* issuer. Notwithstanding that, the asset will be regarded as a security or a collateral for the debt which has been paid by Danajamin to the investors, until the *sukuk* issuer repays the amount paid; and

<sup>169</sup> Imposition of *Ta'widh* and *Gharamah* in Islamic Financing Facilities.

<sup>170</sup> AAOIFI, *Al-Ma'ayir al-Syar'iyyah*, Standard no. 19 (*Al-Qard*), paragraphs 4 and 5.

- ii. The guarantee on *sukuk* issued based on *ijarah* contract may cover guarantee on the rent as well as *wa`d* to purchase the asset.

### Basis of the Ruling

The aforesaid SAC's resolution is based on the consideration that the effect of a contract is subject to the terms and conditions agreed in the contract as long as they do not contravene any general principles of Shariah. This is in line with the following *fiqh* maxim:

الأصل رضى المتعاقدين ونتيجته هي ما التزمه بالتعاقد

*"The original rule of a contract is the mutual consent or agreement by both contracting parties and the consequence of the contract is based on (rights and responsibilities) agreed in the contract."*<sup>171</sup>

<sup>171</sup> Ahmad al-Zarqa', *Syarh al-Qawa'id al-Fiqhiyyah*, Dar al-Qalam, 1989, p. 482.

The Malaysia Deposit Insurance Corporation (PIDM) was established in 2005 to provide Islamic and conventional deposit insurance. The initiative to establish deposit insurance system aims at strengthening the consumer protection infrastructure as one of the main agendas in the ongoing development of the Malaysian financial system. The deposit insurance system will strengthen incentives for financial institutions to adopt sound financial and business practices and enhance public confidence in the financial system by providing explicit protection of deposits.

## 109. Shariah Concept for the Operation of Islamic Deposit Insurance

Deposit insurance is a mechanism that enables PIDM to protect depositors against loss of their deposits placed with banking institutions in the unlikely event of a bank failure. So as to enable the depositors of Islamic banking institutions to enjoy the same protection, the SAC was referred to ascertain the appropriate underlying Shariah concept for the operation of Islamic deposit insurance.

### Resolution

The SAC, in its 80 meeting dated 7 January 2009, has resolved that the application of *kafalah bi al-ujr* (guarantee with fee) as the underlying Shariah concept for the operation of PIDM in managing Islamic deposit insurance fund is permissible.<sup>172</sup> Based on the concept of *kafalah bi al-ujr*, the premium paid by the member institutions of PIDM offering Islamic banking services is considered as an *ujrah* or fee for PIDM and thus, belongs to PIDM. As premium is considered as fee, PIDM may structure it in the form of absolute or proportionate value.

### Basis of the Ruling

The aforesaid resolution by the SAC has considered the permissibility of *kafalah bi al-ujr* as stated in item 101.<sup>173</sup>

<sup>172</sup> This resolution supersedes the previous resolution made by the SAC in the 26<sup>th</sup> meeting dated 26 June 2002 which held that the suitable Shariah concept for the operations of Islamic deposit insurance is *tabarru'*.

<sup>173</sup> Shariah Concept for the Operation of Islamic Guarantee Facility by Credit Guarantee Corporation.

## 110. Commingling of Funds Contributed by Islamic and Conventional Banking Institutions in Deposit Insurance

Under the deposit insurance arrangement, Islamic and conventional banking institutions are required to be members of PIDM and pay the annual premium that serves as a source of fund for the deposit insurance scheme. Apart from being utilised to make payment to the insured depositors in the event of winding-up of any banking institution, the fund is also used for investment in Shariah compliant instruments as well as to defray the expenses of PIDM.

In this regard, the SAC was referred to on the issue as to whether the accumulation of premium contributed by Islamic and conventional banking institutions into one single fund is allowed by the Shariah.

In addition, the SAC was also referred to on the issue as to whether the Government may make it mandatory for all Islamic banking institutions to be members of PIDM.

### Resolution

The SAC, in its 26<sup>th</sup> meeting dated 26 June 2002, has resolved that the premium or fee contributed by Islamic and conventional banking institutions shall be segregated and shall not be accumulated into one single fund. In the event of dissolution of PIDM, the SAC, in its 29<sup>th</sup> meeting dated 25 September 2002, has resolved that two separate liquidation processes for both funds shall be executed.

In addition, the SAC, in its 80<sup>th</sup> meeting dated 7 January 2009, has also resolved that the Government may make it mandatory for all Islamic banking institutions to be members of PIDM as there is no Shariah impediment for the imposition of such requirement.

## Basis of the Ruling

The premium or fee contributed by Islamic and conventional banking institutions shall be segregated to avoid commingling of funds between Islamic and conventional deposit insurance schemes. This is also to ensure that the Islamic deposit insurance fund is invested in Shariah compliant instruments. The commingling of premium funds of Islamic and conventional banking may raise uncertainties on the Shariah compliance status of the Islamic banking premium fund. Separate liquidation processes shall also be executed in order to ensure that the rights and priority in the payment of the protection are accorded to the rightful parties.

## 111. Guarantee Limit for Islamic Banking Deposits by PIDM

In executing the guarantee on Islamic banking deposits, the SAC was referred to on the issue as to whether PIDM may guarantee the principal value as well as the profit realised but not yet distributed by the Islamic banks.

### Resolution

The SAC, in its 29<sup>th</sup> meeting dated 25 September 2002, has resolved that there is no restriction on the execution of guarantee on *wadi'ah* deposit. *Mudarabah* deposit, however shall only be guaranteed by a third party (in this situation, it may refer to PIDM). However, the insurance deposit shall not give priority to guarantee *mudarabah* profit that has not been declared.

## Basis of the Ruling

The aforesaid resolution of the SAC is based on the following considerations:

- i. PIDM may limit the guarantee coverage as it is in line with the principle of *kafalah* that allows the *kafil* to determine the guarantee limit;<sup>174</sup>

<sup>174</sup> Al-Zuhaili, *Al-Fiqh al-Islami wa Adillatuh*, Dar al-Fikr, 2002, v. 6, p. 32.

- ii. There is no Shariah impediment in executing guarantee on deposit based on *wadi'ah*; and
- iii. Deposit insurance should not give priority to guarantee *mudarabah* profit that has not been declared as it should be used to settle the claims and liabilities of higher priority.

## 112. Definition of Term “Deposit” in Islamic Deposit Insurance

As the date of winding up of an Islamic banking institution might take place even before the payment of monthly declared profit/*hibah*, the SAC was referred to ascertain the definition of deposit payable to the depositors in the event of winding up of an Islamic banking institution.

### Resolution

The SAC, in its 30<sup>th</sup> meeting dated 28 October 2002, has resolved that the definition of deposit that is payable in the event of winding up of an Islamic banking institution refers to the principal amount plus the profit/*hibah* which has been credited into the account, including declared profit/*hibah* but not yet credited until the date of winding up of the Islamic banking institution. Nevertheless, any additional value (whether termed as profit/*hibah*) for the period between the winding up date and the date of payment is subject to the discretion of PIDM.

In addition, the SAC has also resolved that the value guaranteed by PIDM shall be clearly stated in the *`aqad* or contract.

## Basis of the Ruling

The aforesaid SAC's resolution is based on the consideration that the criteria and definition of the term "deposit" may be determined based on the common practice of the financial industry. This is in line with the following *fiqh* maxims:

المعروف عرفا كالمشروط شرطا

"Something which has been identified as a custom is considered like a stipulated condition."<sup>175</sup>

المعروف بين التجار كالمشروط بينهم

"Something which has been acknowledged as common practice among the traders is considered as agreed condition among them."<sup>176</sup>

### 113. Status of PIDM's Claim Against Depositors' Claim in the Event of Winding up of an Islamic Banking Institution

Upon winding up of an Islamic banking institution and its inability to fulfill its obligation to return the deposit to the depositors, PIDM will pay the depositors either partial or the whole amount of the deposits from the Islamic deposit insurance fund. Subsequently, PIDM will claim the amount paid from the Islamic banking institution.

In this regard, the SAC was referred to ascertain the status of PIDM's claim against the depositors' claim in getting refund from the Islamic banking institution.

#### Resolution

The SAC, in its 26<sup>th</sup> meeting dated 26 June 2002, has resolved that the priority of PIDM's claim against the depositor's claim in getting refund in the event of winding up of an Islamic banking institution would depend on the type of deposit paid by PIDM. For example, if PIDM paid for guaranteed *wadi'ah* deposit, PIDM's claim is considered equal to *wadi'ah* depositors and so forth.

<sup>175</sup> Ahmad al-Zarqa', *Syarh al-Qawa'id al-Fiqhiyyah*, Dar al-Qalam, 1989, p. 237.

<sup>176</sup> Ahmad al-Zarqa', *Syarh al-Qawa'id al-Fiqhiyyah*, Dar al-Qalam, 1989, p. 239.

## Basis of the Ruling

Deposit products of Islamic banking institutions are structured based on different types of contracts, hence, leading to different legal consequences. The priority of repayment of the deposits, therefore, depends on the *`aqad* or contractual relationship concluded between the depositor and the Islamic banking institution.

Since *wadi`ah* as practised by the Islamic banking institutions has the same effect of *qard* from *fiqh* perspective, the Islamic banking institutions are obliged to guarantee and return the whole amount deposited into the *wadi`ah* account.<sup>177</sup>

For *mudarabah*-based deposit, the Islamic banking institutions are not obliged to guarantee or refund the whole amount of *mudarabah* capital or the profit<sup>178</sup>, unless the loss incurred is due to the negligence or mistake on the part of the financial institution as the *mudarib*.

Notwithstanding the above, based on the contract of *kafalah bi al-ujr* concluded by PIDM and the Islamic banking institutions, PIDM bears the responsibility to guarantee *mudarabah* loss on the basis of third party guarantee. In this regard, the Islamic banking institutions are obliged to give priority to satisfy the right of *wadi`ah* account depositors before the *mudarabah* account depositors. This is because the Islamic banking institutions owe direct responsibility towards the *wadi`ah* account depositors.

<sup>177</sup> OIC Fiqh Academy, *Majallah Majma` al-Fiqh al-Islami*, 1995, 9<sup>th</sup> Convention, resolution no. 86 (9/3).

<sup>178</sup> OIC Fiqh Academy, *Majallah Majma` al-Fiqh al-Islami*, 1995, 9<sup>th</sup> Convention, resolution no. 86 (9/3).

## 114. Application of *Muqasah* in Islamic Deposit Insurance

Usually, after an Islamic banking institution has been declared insolvent, an offset (*muqasah*) process will take place to determine the amount of deposit that should be paid by PIDM to the depositors. Under this process, the payable amount will be determined based on the difference between the deposit amount and the outstanding amount of financing or debt owed by the customer to the Islamic banking institution. For example, if a customer has a deposit of RM100,000 and at the same time, he has an outstanding financial or debt obligation of RM50,000, the customer is eligible to receive a payment of RM50,000 only.

In this regard, the SAC was referred to on the issue as to whether the offset process between the depositors and the Islamic banking institution as illustrated above is permissible in the process of deposit repayment by PIDM and the liquidator.

### Resolution

The SAC, in its 32<sup>nd</sup> meeting dated 27 February 2003, has resolved that the offset process between the depositors and the Islamic banking institution is permissible to be applied in the process of deposit repayment by PIDM and the liquidator.

### Basis of the Ruling

In principle, *muqasah* is permissible in Islamic transactions. *Muqasah* can be carried out in two manners, namely, *al-muqasah al-ittifaqiyyah* (mutually agreed by both parties) and *al-muqasah al-jabariyyah* (determined by the authority to ensure justice). Most of the Islamic financial institutions have included an offset clause in the Islamic financing agreements, and it is enforceable based on the consent of the customer who signs the agreement. This is in line with the following *fiqh* maxim:

الأصل رضى المتعاقدين ونتيجته هي ما التزمه بالتعاقد

*"The original rule of a contract is the mutual consent or agreement by both contracting parties and the consequence of the contract is based on (rights and responsibilities) agreed in the contract."*<sup>179</sup>

<sup>179</sup> Ahmad al-Zarqa', *Syarh al-Qawa'id al-Fiqhiyyah*, Dar al-Qalam, 1989, p. 482.

## 115. Mortgage Guarantee Facility

In order to enhance the securities market development, the National Mortgage Corporation or Cagamas has proposed to provide Islamic mortgage guarantee facility. The mortgage guarantee facility offers to the Islamic financial institutions, particularly the mortgage originators, a portfolio and risk management solution to manage the credit risk exposure of their mortgage portfolio. This will subsequently enhance the capacity of the Islamic financial institutions to provide affordable mortgage financing to homebuyers. The mortgage guarantee facility would be offered through the establishment of a joint venture company, acting as a Special Purpose Vehicle (SPV).

The mortgage guarantee facility shall be based on *wakalah* and *kafalah* contracts which are entered into independently. In the proposed structure of the mortgage guarantee facility, the SPV will carry the following two roles for the Islamic financial institutions:

- i. Based on *wakalah* contract, the SPV shall act as an agent for the Islamic financial institutions to carry out certain services, with an agreed *ujrah* or fee, such as analysing the risk of the mortgage financing portfolio; and
- ii. Based on *kafalah* contract, the SPV shall act as a guarantor to undertake the loss of the Islamic financial institution in the event of default in the payment of periodic instalment by homebuyers. *Kafalah* is given with a recourse element whereby the SPV shall claim the guaranteed amount paid to the Islamic financial institutions from the customer. Nonetheless, no fee will be charged for the guarantee facility offered by the SPV.

In this regard, the SAC was referred to on the issue as to whether the above proposed structure of the mortgage guarantee facility is allowed by the Shariah.

### Resolution

The SAC, in its 74<sup>th</sup> meeting dated 3 April 2008, has resolved that the proposed mortgage guarantee facility is permissible, provided that the facility is agreed by the customer of the Islamic financial institution.

## Basis of the Ruling

The permissibility of *wakalah* has been stated in the al-Quran as follows:

فَاتَّبِعُوا أَحَدَكُمْ بِوَرِقِكُمْ هَذِهِ إِلَى الْمَدِينَةِ فَلْيَنْظُرْ أَيُّهَا أَزْكَى طَعَامًا فَلْيَأْتِكُمْ بِرِزْقٍ مِنْهُ

"...let one of you go to the city with this silver coin and find food that is purest and lawful (that is sold there). Let him bring you provision from it..."<sup>180</sup>

The permissibility of *wakalah* has also been stated by Rasulullah SAW as narrated in the following *hadith*:

عن عقبه بن عامر رضي الله عنه أن رسول الله صلى الله عليه وسلم أعطاه غنما يقسمها على صحابته ضحايا فبقي عتود فذكره لرسول الله صلى الله عليه وسلم فقال ضح به أنت

*Narrated by 'Uqbah ibn 'Amir that Rasulullah SAW had given him several goats to be distributed among his companion until a goat was left after the distribution. When he informed Rasulullah SAW about it, Rasulullah SAW said: Sacrifice it on my behalf.*"<sup>181</sup>

The permissibility of *kafalah* contract has also been stated in the al-Quran as follows:

وَلِمَنْ جَاءَ بِهِ حِمْلُ بَعِيرٍ وَأَنَا بِهِ زَعِيمٌ

"...and he who restores it shall be awarded a camelload (of food supply), and I pledge my word for it."<sup>182</sup>

<sup>180</sup> Surah al-Kahfi, verse 19.

<sup>181</sup> Al-Bukhari, Sahih al-Bukhari, Al-Matba'ah al-Salafiyah, 1982, v. 2, p. 207, *hadith* no. 2500.

<sup>182</sup> Surah Yusuf, verse 72.

The permissibility of *kafalah* is also stated by Rasulullah SAW as narrated in the following *hadith*:

الزعيم غارم

*"A guarantor is the one who bears the liability."*<sup>183</sup>

The collective numbers of Shariah contracts in a product or service is permissible, in line with contemporary *fatwa* that allows the collective numbers of various Shariah contracts in a transaction as long as it is not in contradiction with the Shariah ruling. Moreover, such collective number of various Shariah contracts has long been practised.<sup>184</sup> What is important is that the contracts have to be implemented independently and do not fall among the contracts prohibited by Shariah.

In addition, the customer's consent for any mortgage guarantee with recourse element is required to ensure that the customer is aware about his responsibility to pay the guaranteed amount to the SPV upon the latter's claim.

<sup>183</sup> Al-Baihaqi, *Al-Sunan al-Kubra*, Dar al-Kutub al-'Ilmiyyah, 2003, v. 6, p. 119.

<sup>184</sup> Kuwait Finance House, *Al-Fatawa al-Syar'iyyah fi al-Masa'il al-Iqtisadiyyah* (latest edition), v. 2, p. 29 – 30, *fatwa* no. 384.