

**Shari'ah Standard No. (39)**

**Mortgage and Its  
Contemporary Applications**



# Contents

<b>Subject</b>	<b>Page</b>
<b>Preface .....</b>	<b>967</b>
<b>Statement of the Standard.....</b>	<b>968</b>
1. Scope of the Standard .....	968
2. Definition of Mortgage .....	968
3. Shari'ah Rulings on Mortgage .....	968
4. Mortgage of Financial Papers and Sukuk.....	973
5. Mortgage of Current Accounts and Cash Securities.....	974
6. Mortgage of Investment Units and Investment Accounts.....	974
7. Mortgage of What Will Be Owned.....	975
8. Insurance of the Mortgaged Asset.....	975
9. Zakah on the Mortgaged Asset.....	975
10. Date of Issuance of the Standard.....	975
<b>Adoption of the Standard.....</b>	<b>976</b>
<b>Appendices</b>	
<b>Appendix (a): Brief History of the Preparation of the Standard.....</b>	<b>977</b>
<b>Appendix (b): The Shari'ah Basis for the Standard.....</b>	<b>979</b>



***IN THE NAME OF ALLAH, THE ALL-MERCIFUL, THE MOST MERCIFUL***

All praise be to Allah, the Lord of all the worlds, and blessings and peace be upon our master, Muhammad, and his household and all his companions

## **Preface**

This standard aims to indicate Shari'ah rulings on mortgage and its contemporary applications in Islamic financial institutions (Institution/Institutions).<sup>(1)</sup>

---

(1) The word (Institution/Institutions) is used here to refer, in short, to Islamic financial institutions including Islamic Banks.

## Statement of the Standard

### 1. Scope of the Standard

This standard covers mortgages requested by the Institution with the aim of documenting the debts and commitments owed to it by other individuals and Institutions. It also covers the mortgages presented by the Institution to other parties in order to document the debts and commitments it owes to them. Furthermore, the standard covers the mortgages which the Institution, in its capacity as a notary or agent, keeps for the benefit of other parties.

### 2. Definition of Mortgage

To mortgage means to make a financial asset or so tied to a debt so that the asset or its value is used for repayment of the debt in case of default.

### 3. Shari'ah Rulings on Mortgage

3/1 Mortgage is permissible in Qur'an, Sunnah (Prophetic tradition) and Ijma' (consensus of Fuqaha).

3/1/1 The mortgage contract is binding for the mortgagor once it is concluded, and the mortgagor does not have the right to revoke it from his own side, whereas the mortgagee has the right to do so.

3/1/2 Possession of the mortgaged asset takes place on the basis of the same requirements for possession of a sold property. It could be actual possession by putting a hand on the property, which is known as seizure mortgage; or possession could be legal through registration and documentation, which is known as security or formal mortgage. Both types of mortgages are subject to the same rulings.

3/1/3 The mortgagee has the right to appoint an agent to possess the mortgage on his behalf. The agent, thus appointed, should have

the same rights of disposition which the principal has. The mortgage can also be put in the hands of the mortgagee or in the hands of a third party known as the notary, to be agreed upon between the two parties. When the mortgage is kept by a notary neither of the two parties has the right to transfer it to any other location.

- 3/1/4 The mortgagee has the right to stipulate a condition that the mortgagor should appoint him or his representative as an agent who can sell the mortgaged asset and repay the debt out of its value in case of default, without resorting to judiciary. The mortgagor does not have the right to retreat from such agency once agreed upon.
- 3/1/5 The death of the mortgagor or the mortgagee has no effect on the validity of the mortgage contract. The respective inheritors shall substitute the dead party.
- 3/1/6 The mortgage contract is no longer valid when the mortgaged asset perishes unless a compensation for it is obtained (through solidarity insurance, for instance). The mortgage contract can also cease to be valid for other reasons such as termination of the contract by the mortgagee, settlement of or relief from the debt, or relinquishment of the mortgage right. Furthermore, the validity of the mortgage contract can also expire as a result of transfer of the ownership of the mortgaged asset (through sale, gift or will) on permission of the mortgagee; unless the new owner accepts to keep the mortgage contract. [see item 3/2/6]
- 3/1/7 The mortgagee has the right to keep the whole mortgaged asset for any part of the debt, unless he accepts partial releasing of the mortgage. On repayment of the debt the mortgagee has no right to keep the mortgaged asset as a collateral for a new debt for which the asset is not mortgaged, except when the two parties agree to keep the mortgaged asset as a collateral for any debt between them within a specific period.

### **3/2 Rulings relating to the mortgaged asset**

- 3/2/1 The mortgaged asset should be a Shari'ah-permissible property. It should also be well specified (through pointing, naming or description) and can possibly be delivered.
- 3/2/2 In principle, the mortgaged object should be a tangible asset, yet it can be a debt, a cash amount, a fungible asset or a consumable commodity. Perishable objects can also be mortgaged as they can be sold and replaced by their value. Moreover, a mortgaged object can be a share of common property which can be identified and sold separately.
- 3/2/3 The same asset can be mortgaged to more than one mortgagee. If all mortgages are of the same rank the consent of all the parties has to be sought, and the mortgage right in the asset is to be shared among them in proportion to their respective debts. If the mortgages are ranked in such a way that a succeeding mortgagee should get his debt repaid only when his precedent mortgagee does, the consent of the succeeding mortgagee alone has to be sought.
- 3/2/4 The mortgaged asset is a trust in the hands of the mortgagee, the notary or the agent and is still owned by the mortgagor as long as it is mortgaged. Therefore when the mortgaged asset perishes in the hands of the mortgagee, the notary or the agent, for a reason other than transgression or negligence, no responsibility shall rest with him, and the debt shall still remain valid. If the perish of the mortgaged asset is due to transgression or negligence of the mortgagee, the agent or the notary he shall be held responsible for compensation at the value of the asset on the date of its perish, whereas the debt shall remain valid. In this case the two parties have the right to perform clearance arrangements between the debt amount and the value of the perished mortgage asset.
- 3/2/5 The mortgagor can mortgage an asset that is owed to him by the mortgagee, whether the asset is kept by the mortgagee



as a trust (such as deposited or lent assets and investment accounts); or as a guaranteed asset (such as current accounts and assets retained after nullification of contracts). In the latter case the status of the mortgagee will consequently change from keeping the asset on guarantee basis to keeping it on the basis of trust.

- 3/2/6 The mortgagor can mortgage a borrowed asset (borrowed mortgage), or a rented asset (rented mortgage), on permission of the owner in both cases. If a borrowed or rented mortgage is used for repayment of the defaulted debt, the owner of the asset should have the right of recourse on the mortgagor for compensation; in kind if the mortgaged asset is a fungible asset, or in value if otherwise. When a borrowed or rented mortgage asset perishes in the hands of the mortgagor, the mortgagor has to compensate the owner of the borrowed asset, whereas for the rented asset compensation is deserved only if the perish of the mortgaged asset is due to transgression or negligence of the mortgagor.
- 3/2/7 In a sale contract the seller has the right to stipulate a condition that the buyer, after actual or constructive possession of the good, should mortgage it to him against the deferred price.
- 3/2/8 Appreciation in the value of the mortgaged asset as well as its income is considered to be mortgaged along with the principal, unless the two parties agree otherwise.
- 3/2/9 The mortgagor can benefit from the mortgaged asset on permission of the mortgagee, whereas the mortgagee has no right at all to enjoy free of charge benefit from the mortgaged asset with or without the permission of the mortgagor. However, on permission of the mortgagor the mortgagee can utilize the mortgaged asset against the normal pay for similar assets. [see items 3/3/ and 4/3]
- 3/2/10 The mortgagor should bear all actual expenses relating to reparation of the mortgaged asset and its preservation against

decay. When the mortgagee pays such expenses with or without the permission of the mortgagor he has the right of recourse on the mortgagor for compensation or he may obtain compensation in terms of an equivalent period of benefiting from the mortgaged assets. The mortgagee should bear all the expenses relating to safekeeping, documentation and selling of the mortgaged asset, except when the two parties agree that the mortgagor should bear such expenses.

3/2/11 With due consideration to item (5), it is permissible to mortgage debt, whether such debt is owed by the mortgagee or anyone else.

3/2/12 Possession of a mortgaged debt takes place by possession of the debt's document or by attestation of the debt at the time of its mortgaging. When a debt is mortgaged, the mortgagee becomes more entitled to it than anyone else.

### **3/3 Rulings relating to the debt for which the mortgage is signed**

3/3/1 The debt for which the mortgage is signed should be a permissible debt such as sale income, guarantee against damage, Salam commodity, Istisna'a commodity or an owed usufruct. Concluding a valid mortgage contract need not necessarily be preceded by establishing the debt. The mortgage contract can be signed before or at the same time of signing the debt contract. The debt for which the mortgage is signed should not be a impermissible debt (such as a usurious loan); or a non-debt deal (such as a specific price, the usufruct of a specific asset, and a spot sale commodity that is still in the hands of the seller).

3/3/2 It is impermissible to stipulate mortgage as a condition in trust-based contracts such as agency, deposit, Musharakah, Mudarabah and leasing contracts. If mortgage in such contracts is to be confined to indemnity in case of transgression, negligence or breach of the contract, then it is permissible. [see Shari'ah Standard No. (5) on Guarantees, item 2/2/1]

### **3/4 Execution of the mortgage**

- 3/4/1 With due consideration to item 3/1/4, the mortgagee has the right to claim the sale of the mortgaged asset in case of default. After repayment of the mortgagee's debt the remaining value of the mortgaged asset should be given to the mortgagor by virtue of the mortgage contract. If the sale value of the mortgaged asset happened to be less than the due debt, the difference shall be subject to Shari'ah rulings on normal debt, and the mortgagee should have the right of recourse on the mortgagor for settlement of such difference.
- 3/4/2 The mortgagee does not have the right to stipulate a condition that he should own the asset in case of default. Nevertheless, there is no prohibition for the mortgagee to purchase the mortgaged asset from the mortgagor at market value, and take the portion of the value to which he is entitled.
- 3/5/3 When the mortgagor is bankrupt, the mortgagee should have the priority over other debtors, for getting his debt repaid from the sale value of the mortgaged asset. If the sale value of the mortgaged asset is less than the mortgagee's debt, he becomes in the same standing with other debtors with regard to the excess indebtedness.

### **4. Mortgage of Financial Papers and Sukuk**

- 4/1 It is permissible to mortgage the financial papers and Sukuk which can be issued and transacted according to Shari'ah, such as Islamic Sukuk and shares of Islamic financial Institutions. The shares of the companies whose original activities are permissible can also be added to this category. [see Shari'ah Standard No. (21) on Financial Paper: Shares and Bonds, item 3/4]
- 4/2 It is permissible to mortgage usufruct-based Sukuk which represent common shares in the usufructs of specific assets, or assets in the form of a specific indebtedness. This should be taken with due consideration to Shari'ah Standard No. (17) on Investment Sukuk, item 5/1/5/2.

4/3 It is impermissible to mortgage the financial papers and Sukuk that should not be issued or transacted according to Shari'ah, such as interest-based bonds, preference shares and enjoyment shares [see Shari'ah Standard No. (21) on Financial Paper: Shares and Bonds, items 2/6 and 2/7]. Such financial papers include also traditional investment certificates, certificates of traditional investment deposits and shares of the companies that pursue impermissible activities like manufacturing of alcohols, swine trade and dealing in Riba [see Shari'ah Standard No. (21) on Financial Paper: Shares and Bonds, item 2/1 and Shari'ah Standard No. (14) on Documentary Credit, items 3/4/1 and 3/4/2]. Among these financial papers also are shares of traditional financial Institutions, shares of traditional financial companies, shares of traditional insurance companies and shares of companies which originally pursue permissible activities, yet Riba-based and other prohibited dealings constitute a predominant part of their activities.

#### **5. Mortgage of Current Accounts and Cash Securities**

When a current account is mortgaged for the benefit of the same institution with which it is opened, the institution should not use the account unless an agreement is reached between the two parties to transfer the account to an investment account, and thus, make it subject to the rulings on Mudarabah instead of the rulings on loan. This is so because the institution, as a mortgagee, has to avoid making free of charge benefit from the mortgaged account. On transference of the account to an investment account, the account holder becomes entitled to his profit share as the owner of the capital (Rab al-Mal), while the institution becomes entitled to its profit share as the worker (Mudarib).

#### **6. Mortgage of Investment Units and Investment Accounts**

6/1 The Institution can accept mortgage in the form of investment units in Islamic investment funds. In this case the Institution as a mortgagee can suspend the right of the client to get back or draw from the account, absolutely or in proportion to the amount of the debt, whichever is more suitable.

- 6/2 The income and growth earned by the units or the account are considered to be mortgaged along with the principal. This should hold true whether the contractual relationship between the client and the Institution or the fund is Mudarabah or investment agency, unless the two parties agree on other arrangement.

#### **7. Mortgage of What Will Be Owned**

It is permissible to mortgage an income which is still to be owned if the principal (income earning asset) is specified. The contract in this case is valid whether such income is to be mortgaged along with the principal or independently.

#### **8. Insurance of the Mortgaged Asset**

The mortgagee has the right at the time of signing the contract to request from the mortgagor to arrange Islamic insurance for the mortgaged asset whenever it is possible. When the mortgagor accepts to do so the compensation to be received on the damage of the mortgaged asset shall replace it. If the compensation is received in the form of a cash amount such amount shall be mortgaged along with its returns by depositing it in a frozen investment account owned by the mortgagor. [see Shari'ah Standard No. (5) on Guarantees, item 4/8]

#### **9. Zakah on the Mortgaged Asset**

- 9/1 The owner of the mortgaged asset should pay Zakah if it is payable on the asset and its income or on its income only. The fact that the owner cannot dispose of the mortgaged asset does not relieve him from payment of Zakah.
- 9/2 Zakah is payable on all cash mortgages such as current accounts, cash securities, units of investment funds, frozen investment accounts, Sukuk, Salam debts, and Istisna'a debts, subject to stipulations of Shari'ah Standard No. (35) on Zakah, items 5/1, 5/2 and 5/3.

#### **10. Date of Issuance of the Standard**

This Standard was issued on 17 Rabi' I, 1430 A.H., corresponding to 15 March 2009 A.D.

## **Adoption of the Standard**

The Shari'ah Board adopted the standard on Mortgage and its Contemporary Applications in its meeting No. (23) held in the Kingdom of Bahrain, on Thursday – Saturday 15–17 Rabi' I, 1430 A.H., corresponding to 12-15 March 2009 A.D.



## **Appendix (A)**

### **Brief History of the Preparation of the Standard**

In its meeting No. (16) held in Al-Madinah Al-Munawwarah on 7-12 Jumada I, 1427 A.H., corresponding to 3-8 June 2006 A.D., the Shari'ah Board decided to issue a Shari'ah standard on Mortgage and Its Contemporary Applications.

On 12 Rajab 1427 A.H., corresponding to 6 August 2005 A.D., the Secretariat General decided to commission a Shari'ah consultant to prepare a study on Mortgage and Its Contemporary Applications.

A joint committee composed from Shari'ah Standards Committees (1) and (2) held a meeting in the Kingdom of Bahrain, on 24 Rabi' II, 1428 A.H., corresponding to 11 May 2007 A.D., the joint committee discussed the study, and asked the consultant to introduce necessary changes in the light of the discussions and observations of the meeting.

In a further meeting of the joint committee, held in the State of Kuwait on 21 Jumada I, 1428 A.H., corresponding to 7 June 2007 A.D., the draft of the standard was discussed and necessary amendments were introduced in the light of the discussions and observations of the meeting.

In its meeting No. (22) held in the Kingdom of Bahrain, on 28-30 Dhul-Qa'dah 1430 A.H., corresponding to 26-28 November 2008 A.D., the Shari'ah Board discussed the amendments made by the joint meetings of the Shari'ah Standards Committees (1) and (2) and introduced the changes which it deemed necessary.

The Secretariat General of AAOIFI held a public hearing in the Kingdom of Bahrain on 24 Safar 1430 A.H., corresponding to 19 February 2009 A.D. More than 30 participants attended the session as representatives of central

banks, institutions, and accounting firms. The session was also attended by Shari'ah scholars, university teachers and other interested parties. Several observations were made in the session, and duly responded to by the members of the Shari'ah Standards Committees (1) and (2).

In its meeting No. (23) held in the Kingdom of Bahrain, on Thursday – Saturday 15–17 Rabi' I, 1430 A.H., corresponding to 12-15 March 2009 A.D., the Shari'ah Board discussed the amendments introduced by the public hearing, introduced the changes that it deemed necessary and adopted the standard.



## Appendix (B)

### The Shari'ah Basis for the Standard

#### Shari'ah Rulings on Mortgage (item 3)

- Mortgage is permissible when the debt transaction takes place while the two parties are on travel because Allah, the Almighty, says: ***{“I And if you are on a journey and cannot find a scribe, then let there be a pledge taken (mortgaging)...”}***.<sup>(2)</sup> Mortgage is also permissible when the contracting parties are not on travel, because Anas is reported to have said: *“The Prophet (peace be upon Him) mortgaged his armor plate to a Jew in Al-Madinah and took some barley from him to his family”*. In this regard Ibn Al-Mundhir said: “I do not know anyone, except Mujahid, who held a different interpretation for the Verse: ***{“...if you are on a journey ...etc”}***. Traveling (adds Ibn Al-Mundhir) is referred to in the Verse as the predominant case where mortgage is needed, since traveling parties would most probably be in lack of a scribe. Hence the verse, although it mentions traveling, it does not stipulate it as a condition for concluding mortgage contracts. Mortgage is also not obligatory, a fact which - to my knowledge - has encountered no dispute. The emphasis on mortgage in the Verse indicates guidance rather than obligation, because Allah, the Almighty, says: ***{“and if one of you deposits a thing on trust with another”}***.<sup>(3)</sup>
- According to the Hanbali,<sup>(4)</sup> Hanafi<sup>(5)</sup> and Shafi'i scholars mortgage is valid and binding when it is stipulated as a condition in a sale contract. The Hanbali<sup>(6)</sup> scholars believe that it is one of the conditions that serve

---

(2) [Al-Baqarah (The Cow): 283].

(3) Muhammad Ibn Abdul-Wahhab, *“Mukhtasar Al-Insaf Wa Al-Sharh Al-Kabir”* [1: 506], Matabi' Al-Riyadh, Riyadh, First Edition, Abdul-Aziz Ibn Zayd Al-Rumi et al (eds.). Electronic Copy, Al-Jami' Al-Kabir Program.

(4) Ala' Al-Din (Al-Mardawi), *“Al-Insaf”*, op. cit, [11: 206–207].

(5) Ala' Al-Din Al-Samarqandi, *“Tuhfat Al-Fuqaha”*, op. cit, [2: 70].

(6) Ministry of Awqaf – Kuwait, *“Al-Mawsu'ah Al-Fiqhiyyah”*, the letter Ba, Bay' Wa Shurut, item 28.

the interest of the contract, whereas the Hanafi scholars consider it as one of the conditions that suit and conform to the contract, since it entails contract documentation.<sup>(7)</sup> In elaborating their standpoint the Hanafi scholars indicate: "In Shari'ah, mortgage as well as price suretyship serve the purpose of debt documentation. Stipulating mortgage as a condition in the contract is just like stipulating a condition that relates to quality of the price, hence it is an explicit condition for what the contract implicitly aims at".<sup>(8)</sup> Mortgage is one of the conditions needed when the deal is to be concluded with someone who insists on them. If a condition of this type is not fulfilled the concerned party will have the right of option. One of the cases that justify having the right of option, according to the Hanafi scholars, is "Refraining from honoring a valid condition like the mortgage condition or suretyship for an outstanding debt".<sup>(9)</sup>

- Keeping the mortgaged asset in the hands of a notary is permissible. According to the Shafi'i scholars it is permissible "because the right belongs to the two parties, so they can agree on that".<sup>(10)</sup>
- According to the Hanbali School when the seller stipulates a condition that he shall keep the sold object until he receives the price, his condition is considered to be valid and observable. To the Hanbali scholars, such type of condition is neither part of the contract's necessities nor does it serve the contract's interest, yet it does not run counter to the contract's objectives. Nonetheless, such condition (as perceived by the Hanbali scholars) entails some benefit for the seller or the buyer.<sup>(11)</sup>
- The seller does not have the right to stipulate a condition that he shall retain the ownership of the sold commodity until he receives the price which is deferred for a certain period.<sup>(12)</sup> The seller does not have such right be-

(7) Mustafa Ahmad Al-Zarqa, *"Al-Madkhal Al-Fiqhi Al-'Am"*, published 1968, [1: 477-478].

(8) Ala' Al-Din Al-Samarqandi, *"Tuhfat Al-Fuqaha"*, op. cit, [2: 70].

(9) Muhammad Al-Hajjar, *"Fath Al-'Allam Bi-Sharh Murshid Al-Anam Fi Al-Fiqh 'Ala Madhab Al-Sadah Al-Shafi'yyah"* [5: 19], Dar Ibn Hazm, Beirut, First Edition, 1418 A.H.

(10) Ibrahim Ibn Ali Ibn Yusuf Al-Shirazi Abu Ishaq, *"Al-Muhadhdhab Fi Fiqh Al-Imam Al-Shafi'i"* [1: 310], Dar Al-Fikr, Beirut. Electronic copy: Al-Jami' Al-Kabir Program.

(11) Ministry of Awqaf – Kuwait, *"Al-Mawsu'ah Al-Fiqhiyyah"*, the letter Ba, Bay' Wa Shurut, item 28.

(12) Ministry of Awqaf – Kuwait, *"Al-Mawsu'ah Al-Fiqhiyyah"*, the letter Ba, Bay', *"Ahkam Mushtarakah Bayn Al-Mabi' Wa Al-Thaman"*, item 60/D.

cause he has willingly relinquished his right in spot payment of the price; therefore, he has no right to cancel the right of the other party (to get the sold commodity).<sup>(13)</sup> This viewpoint is adopted by the Hanbali School.<sup>(14)</sup>

### **Rulings Relating to the Mortgaged Asset (item 3/2)**

- The mortgaged asset should be a Shari'ah-permissible property because the underlying objective is to sell this asset for settlement of the debt in case of default. Therefore if the mortgaged asset is an impermissible property of the mortgagor, it cannot be sold. In this regard the Hanafi scholars indicate that "Mortgage is for settlement of debt, and a Muslim cannot repay debts or get debts repaid to him in terms of Shari'ah-banned objects such as alcohol and swine".<sup>(15)</sup> In "*Al-Insaf*" the Hanbali viewpoint is indicated as follows: "It is permissible to mortgage any asset that can be sold".<sup>(16)</sup>
- The mortgaged asset can be a debt,<sup>(17)</sup> a cash amount,<sup>(18)</sup> a common pro-

(13) Ala' Al-Din Al-Samarqandi, "*Tuhfat Al-Fuqaha*", op. cit, [2: 56].

(14) Ala' Al-Din (Al-Mardawi), "*Al-Insaf*", op. cit, [11: 491]

(15) Ala' Al-Din Al-Samarqandi, "*Tuhfat Al-Fuqaha*", op. cit, [3: 53-54]

(16) Muhammad Ibn Abdul-Wahhab, "*Mukhtasar Al-Insaf Wa Al-Sharh Al-Kabir*" [1: 511], Al-Riyadh Press, Riyadh, First Edition, Abdul-Aziz Ibn Zayd Al-Rumi et al (eds.).

(17) In "*Al-Insaf*" Mortgage is defined as "documentation of a debt by an asset so that the debt can be repaid from the sale value of the asset when repayment from other sources is not possible". Al-Zarkashi said: "Mortgage is documentation of a debt by an asset or a debt". This viewpoint of Al-Zarkashi is reported by Ala' Al-Din (Al-Mardawi) in "*Al-Insaf*" printed with "*Al-Muqni*"; "*Al-Sharh Al-Kabir*" and "*Al-Insaf*" [12: 359], Hujar Press, First Edition, 1995.

(18) According to the Shafi'i scholars "It is permissible to lend cash so as to be mortgaged. When the debt is due, if the debtor made repayment the case is obvious, otherwise the cash can be used for purchasing the asset required for settlement, or the same cash amount can be paid for settlement of the debt if it is a cash debt", Muhammad Al-Hajjar, "*Fath Al-'Allam*", op. cit, [5: 27]. Permissibility of selling the mortgaged asset and mortgaging its value instead of it has also been indicated by the Hanbali scholars in several cases as when they state that "It is permissible to mortgage perishable objects for an outstanding debt, so that the sale income of such objects can be mortgaged", Shamsul-Din (Ibn Qudamah), "*Al-Sharh Al-Kabir*", op. cit, [12: 368]. The Maliki scholars state that "It is impermissible to mortgage dinars, or dirhams or filses, or food stuffs in the form of mixed ingredients or what is measured in terms of volume and weight, without imprinting a mark on it so that the mortgagee would not be able to use the mortgaged object and return back a similar one", Abu Abdullah Muhammad Ibn Muhammad (Al-Maghribi), "*Mawahib Al-Jalil Li-Sharh Mukhtasar Khalil*", Dar Al-Fikr, Second Edition, 1978, [5: 5].

perty,<sup>(19)</sup> a borrowed asset or a rented<sup>(20)</sup> asset.

- The mortgage is a trust in the hands of the mortgagee and is owned by the mortgagor. The mortgagor should bear all the expenses relating to maintenance of the proper state of the mortgage object including all necessary outlays such as feeding, clothing, safekeeping, veterinary services and the likes. In this regard, the Prophet (peace be upon him) is

---

(19) The Shafiee scholars emphasized permissibility of mortgaging the asset that can permissibly be sold (even if common property, that can be sold), Muhammad Al-Hajjar, *"Fath Al-'Allam"*, op. cit, [5: 25]. The Hanafi scholars emphasize prohibition of mortgaging "common property....., because delivery cannot take place", Ala' Al-Din Al-Samarqandi, *"Tuhfat Al-Fuqaha"*, op. cit, [3: 54]. It has been stated in *"Al-Sharh Al-Kabir"*: "Mortgage of common property is permissible as emphasized by Ibn Abu Layla, Al-Nakh'i, Malik, Al-Awza'i, Al-Aniri, Al-Shfiee and Abu Thur. According to Ashab Al-Ra'y, it is impermissible except when a partner mortgage his share to his counter partner, or the two partners together mortgage their common property to one person, or one person mortgages his asset to two person so that they can possess it together", Shamsul-Deen (Ibn Qudamah), *"Al-Sharh Al-Kabir"*, op. cit, [12: 369–370].

(20) Ibn Al-Mundhir said: All our precedent scholars from whom we learnt unanimously agreed that when someone borrows an object from someone else so as to mortgage it for obtaining a specific amount of money from a specific person for a specific period, his act is permissible. Ibn Al-Mundhir has also reported a unanimous agreement among Fiqh scholars that if the person (in the preceding example) borrowed the object according to the above stated conditions, but he mortgaged something else, his act is impermissible. If such person mortgaged the borrowed object for a debt amount that exceeds what he had stated when borrowing the object, the mortgage becomes null and void either for the whole amount of the debt as emphasized by Al-Shafiee, or for the excess part only, on the basis of deal fragmentation. According to Al-Qadhi when the object to be mortgaged is borrowed without restrictions, the process of borrowing is permissible and the borrower can mortgage the borrowed object for any amount. This viewpoint is one of two viewpoints supported by Al-Shafi'i. The other viewpoint emphasized by Al-Shafiee is that mortgage of a borrowed asset is impermissible without knowledge of the amount, nature and maturity of the debt to be mortgaged for. When the borrowed mortgage asset perishes the guarantee resets with the mortgagor, since a borrowed property has to be guaranteed by the borrower. There is also the case when the person from whom the mortgaged asset is borrowed releases the mortgaged asset without resorting to the mortgagor, and whether he should resort to the mortgagor in this case or not. Fiqh scholars are divided between two standpoints concerning this issue, as they do with regard to the case of someone who repays the debt of someone else without his permission, Shamsul-Deen (Ibn Qudamah), *"Al-Sharh Al-Kabir"*, [5: 148]. Electronic copy: Al-Jammi' Al-Kabir Program. As indicated in *"Al-Insaf"*, It is permissible to borrow or rent something so as to mortgage it, on permission of the owner in both cases", Ala' Al-Din (Al-Mardawi), *"Al-Insaf"*, op. cit, [5: 148-149]. Electronic copy: Al-Jami' Al-Kabir Program.



reported to have said: *"The one who mortgages the asset should get its benefits and bear its expenses."* Since the mortgaged asset belongs to the mortgagor he should, therefore, bear its expenses as if it is still in his hands.<sup>(21)</sup> According to the Hanafi School "expenses of a mortgaged asset are of two types: the first type includes all the expenses which relate to maintenance of the proper state of the asset and its preservation against decay, and such expenses should be borne by the mortgagor. The second type comprises expenses such as those relating to safekeeping of the asset, or returning it back to mortgagor, or returning back part of it which has been damaged by an accident; and such expenses have to be borne by the mortgagee". Furthermore, the Hanafi scholars indicate: "When the mortgagee without the permission of the competent authority bears the expenses that should have been borne by the mortgagor, he is considered to have done so in donation, whereas when he does so on permission of the competent authority he has the right of recourse on the mortgagor for repayment. Similarly, the mortgagor is considered as a donor when he bears the expenses that should have been borne by the mortgagee without the permission of the concerned authority, and should have the right of recourse on the mortgagee when he does so, on permission of the competent authority".<sup>(22)</sup>

- The mortgagee does not have the right to make free of charge benefit from the mortgaged asset, because otherwise he will be committing Riba.

#### **Rulings Relating to the Debt for Which the Mortgage Is Signed (item 3/3)**

- The mortgage contract can be signed before, along with or after the debt contract. In this regard the Hanbali scholars indicate that "signing of the mortgage contract can be visualized in terms of three cases: it can take place after signing of the debt contract and in this case it is permissible as per the unanimous viewpoint of Fiqh scholars, because the debt is already

---

(21) Abdullah Ibn Qudamah Al-Maqdisi Abu Muhammad, *"Al-Kafi Fi Fiqh Al-Imam Al-Mubajjal Ahmad Ibn Hanbal"*, Al-Maktab Al-Islami – Beirut, [2: 146]. Electronic copy: Al-Jami' Al-Kabir Program.

(22) Ala' Al-Din Al-Samarqandi, *"Tuhfat Al-Fuqaha'"*, Ihya' Al-Turath Al-Islami – Qatar, [3: 59-61].

there and it needs documentation. The second case is when the mortgaged contract is signed at the same time of signing the debt contract, as when – for instance – one party says to the other: I sell to you this garment of mine for ten dinars payable after a month provided that you mortgage to me your slave Saad, and the other party responds: I agree to that. The mortgage contract in this second case is also valid, according to Al-Shafi'i and Ashab Al-Ra'y, because it is needed. The third case is when the mortgage contract is signed before the debt contract, as when – for instance – one party says to the other: I mortgage this slave of mine to you against lending me ten dinars. In this third case the mortgage contract is invalid according to the prevailing view point of the Hanbali School, while Al-Shafi'i considers it to be valid. The proponents of the validity of the contract in this case include also Abu Al-Khattab, Malik and Abu Hanifah. It is argued that the mortgage contract in this case is a documentation of a valid right and therefore it can precede it, similar to the case of guarantee. A further justification given by Fiqh scholars in this connection is that the mortgage contract in this case is signed for something which will take place in the future, and therefore it is similar to a darak guarantee (guarantee against occurrence of third party claim on the asset)".<sup>(23)</sup>

#### **Execution of the Mortgage (item 3/4)**

- Foreclosure: According to Hadith: "*Mortgage should not be foreclosed from its owner who should get its benefit and bear its expenses*". The meaning of this Hadith is that the failure of the mortgagor to redeem his mortgaged asset does not make the mortgagee entitled to that asset. This was, in fact, the practice during the Pre-Islamic period (Jahiliyyah) when the mortgagee used to seize the mortgaged asset in case of default."<sup>(24)</sup>

#### **Contemporary Applications of Mortgage**

- Holding the documents which represent the ownership of the goods as a mortgage is permissible, because possession of the documents is

---

(23) Muwaffaq Al-Din (Ibn Qudamah), "*Al-Mughni*", op. cit, [6: 444–445]. Darak guarantee is a "Guarantee given to the purchaser against the case when the purchased asset turns out to be owned by a third party". See: Muhammad Al-Hajjar, "*Fath Al-'Allam*", op. cit, [5: 44].

(24) Mohammad Al-Hajjar, "*Fath Al-'Allam*", op. cit, [5: 25].

considered as possession of the goods themselves. The possessor of the documents will become authorized to dispose of the goods like an owner.

- It is permissible to mortgage shares because shares represent a common share of Shari'ah-permissible assets (cash, tangible assets, usufructs, rights and debts – item 3/1 of Shari'ah Standard on Financial Papers). As shown in item (7) above, some of the Fiqh scholars indicate that mortgaging of common property is permissible.
- It is permissible to mortgage Sukuk because, similar to shares, they represent common shares in Shari'ah-permissible assets (cash, debts, usufructs, tangible assets). The only difference between shares and Sukuk is that Sukuk can be a common share of only one type of these assets (cash, or debts or usufructs or tangible assets), [see Shari'ah Standard on Investment Sukuk]. As we have seen previously Fiqh scholars indicate that it is permissible to mortgage common property as well as cash, tangible assets and debts. Although there is no Shari'ah or Fiqh text that permits or prohibits mortgaging of usufructs, yet I can see no Shari'ah restriction against it, if such usufructs are Shari'ah-acceptable and their mortgaging could achieve the Shari'ah objective of "Preservation of rights and documentation of debts, through sale of the mortgaged asset and repayment of the debt in case of default". Achievement of such objective appears to be possible through mortgaging of the Sukuk issued against usufructs of assets (in hand and with debtors). [see Shari'ah Standard on Investment Sukuk, 5/1/5/2]
- Permissibility of freezing the balances of current accounts and the like as mortgages is based on the fact that this is similar to mortgaging of assets which are previously held under the guarantee of the mortgagee (assets in the hands of the mortgagee), which is permissible.<sup>(25)</sup>

---

(25) According to the majority of Fiqh scholars (except the Shafi'i School) the account in this case becomes kept by the institution on trust basis, rather than on guarantee basis. As can be understood from what has been stated by Imam Ahmad, the mortgage becomes binding once the contract is signed. The Hanbali scholars elaborate on this issue by stating: "When someone mortgages an asset which is already in the hands of the mortgagee, whether the mortgagee has obtained such asset through borrowing, on trust basis, or forcibly ...etc, the mortgage is valid, because the asset is owned by the mortgagor and can be possessed, hence, it can be mortgaged, as if it is in =

- It is permissible for the Institution to retain investment accounts and investment units as mortgage because this is considered as mortgaging of common property which is permissible as has been indicted earlier in this standard. Permissibility of such mortgages can also be based on the fact that an investment account or unit usually comprises cash, or assets, or debts, or most often a mixture of all that. As we have seen earlier mortgaging of any of these items is permissible. Furthermore, mortgaging of investment accounts and units can be seen as similar to mortgages that comprise a forgivable degree of gharar, due to the changing nature of real assets as a com-

---

= the hands of the owner. Therefore what can be understood from this statement by Imam Ahmad is that the mortgage here becomes binding by virtue of the same contract with no need for any further act (i.e., what changes is the ruling only). According to Al-Qadi and his companions as well as Al-Shafi'i the mortgage does not become valid without the elapse of sufficient time for possession", Shamsul-Din (Ibn Qudamah), *"Al-Sharh Al-Kabir"*, op. cit, [12: 406]. The author of *"Al-Insaf"* has also discussed this issue and added mortgaging of an asset held by the mortgagee on the basis of a nullified contract (Ala' Al-Din Al-Mardawi, Electronic copy: Al-Jami' Al-Kabir Program). An important point to be noted here is what has been quoted in *"Mukhtasar Al-Insaf"* and *"Al-Sharh Al-Kabir"* on the discussion about the status of the mortgagee who is already holding the asset on guarantee basis. The quoted statement comprises the following: "When someone mortgages an asset which is already seized or borrowed by the mortgagee, the mortgage is valid and the guarantee of the mortgagee is cancelled according to Malik and Abu Hanifah. Al-Shafiee said that the guarantee should not be cancelled and the mortgage is valid because there is no contradiction between the two. According to Al-Shafiee even in the mortgage arrangement the mortgagee is committed to guarantee in case of transgression. To me, the mortgagee has the right to hold the asset as a mortgage and he is no longer to be seen as a transgressor, yet the assertion that there is no contradiction between holding the asset as a mortgage on the one hand, and holding it through borrowing or seizure on the other, is objectionable, because a borrower or someone who takes the asset by force has to guarantee the asset whereas a mortgagee is supposed to keep the asset on trust basis rather than under guarantee. Moreover, on mortgaging the asset there will remain no reason which justifies continuation of the guarantee. If the mortgagee is to be held responsible later on for transgression against the mortgaged asset, that will be for his transgression rather than for his status as a borrower or someone who has taken the asset by force", Muhammad Ibn Abdul-Wahhab, *"Mukhtasar Al-Insaf Wa Al-Sharh Al-Kabir"*, [1: 508] – Electronic copy: Al-Jami' Al-Kabir Program. The Shafiee scholars [Muhammad Al-Hajjar, *"Fath Al-'Allam"*, op. cit, [5: 29] indicate: "The mortgaged asset is a trust in the hand of the mortgagee except in eight cases: (I) An extorted asset changed to a mortgage in the hands of the extorter, =



ponent of such accounts and units. As we have seen before, such mortgages are permissible according to the Maliki scholars who argue that “since the mortgagee has the right to lend his money without documentation, it is only logical that he can accept documentation with some Gharar. In the final analysis something is better than nothing”.<sup>(26)</sup> Moreover, it can be argued that the unknown aspects of the transaction are later on going to be known.

### Contemporary Applications of Debt Mortgaging

- It is permissible to issue documentary credit for a client on guarantee of a debt owed to this client by a third party, and documented by a letter of credit, a guarantee, a receipt, a commercial paper, a bond, or Islamic Sukuk, because it is permissible to mortgage debt as we have seen earlier.
- It is permissible to issue documentary credit to a client against another documentary credit (Back-to-back credit and transferable credit), be-

---

= (II) A mortgaged asset changed to an extorted asset, (III) A borrowed asset changed to a mortgage, (IV) An asset offered for sale changed to a mortgage, (V) An asset sold through a false contract changed to a mortgage, (VI) A sold asset changed to a mortgage after termination of the contract by the buyer, and (VII) An amount payable by the husband on divorce changed to a mortgage before being received by the wife. The justification for guarantee in these cases is the presence of the reason which necessitates it. That is to say relaxation of guarantee because of mortgage is overruled by a Shari'ah requisite for guarantee because of borrowing or seizure; contrary to the case of on-trust deposit (Wadi'ah) where there is a Shari'ah prohibition against guarantee. Regarding the same issue of mortgaging an asset that is already in the hands of the mortgagee, the following has also been stated by Fiqh scholars “when the mortgaged asset is already in the hands of the mortgagee such as a borrowed or an extorted asset, the mortgage is valid and the guarantee is cancelled according to Malik and Abu Hanifah. Al-Shafiee argues that the guarantee should not be cancelled and the mortgage is valid because there is no contradiction between the two. According to Al-Shafi'i even in the mortgage arrangement the mortgagee is committed to guarantee in case of transgression, and therefore the mortgage is valid along with the guarantee.”; Shamsul-Din (Ibn Qudamah), *“Al-Sharh Al-Kabir”*, op. Cit, [12: 407]. Ibn Qudamah then discussed the proposition advocated by Al-Shafi'i that there is no contradiction between holding the asset as a mortgage on the one hand, or holding it through borrowing or seizure on the other. Ibn Qudamah emphasized that a borrower or someone who takes the asset by force has to guarantee the asset whereas a mortgagee is supposed to keep the asset on trust basis rather than under guarantee. See: *“Al-Mawsu'ah Al-Fiqhiyyah Al-Kuwaytiyyah”*, the term Al-Rahn, item (9).

(26) See: *“Al-Mawsu'ah Al-Fiqhiyyah Al-Kuwaytiyyah”*, the term Al-Rahn, item (9).

cause a documentary credit results in a debt owed by the bank to the client, and such debt can be mortgaged for obtaining a new debt.

**Insurance of the Mortgaged Asset**

- Insurance of the mortgaged asset is permissible because if such asset is damaged the compensation received can be used for replacing the mortgage; and thus continuation of the vital role of mortgage in preservation of rights, documentation of debts and facilitation of debt repayment and collection is ensured.

