

JURNAL CITA HUKUM

Indonesian Law Journal



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Welcoming contributions from scientists, scholars, professionals, and researchers in the legal disciplines to be published and disseminated after going through script selection mechanisms, reviewing sustainable partners, and rigorous editing processes.

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Comparative Study of Conditions for the Purpose of Guarantee in Mudarabah Contracts Perspective of Islamic Jurisprudence and Iran's Civil Law*

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Abstract

Contracts for practical investment are made in two forms, direct and indirect. Regarding the differences between the two investment methods, the guaranteed interest conditions for them will also be different. In the first method, which is the interest of direct investment, the owner of the capital is an investment agent too, and only interested investors are determined in terms and conditions. In this case from investment, interest is guaranteed by the fact that the investment recipient is committed to buying products produced at prices that guarantee logical interest for investors. The accuracy of this guarantee condition is ensured in terms of Islamic law and jurisprudence because a commitment to purchase is a necessary condition. But in the second form, unlike the first, investor interest is indirectly decided and guaranteed and conditions are increasingly attractive by carrying out industrial and manufacturing activities. This form of interest is also considered legal and valid both in Islamic law and Iran's Civil Law and practically based on the principles of conditions and article 234 of Iran's civil law. So, the main question of this research is how valid are the guaranteed interest conditions in Iranian jurisprudence and law?

Keywords: Guaranteed Profit Conditions, Jurisprudence, Iranian Law, Mudarabah

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Studi Komparatif Kondisi untuk Tujuan Jaminan dalam Kontrak Mudarabah Perspektif Yurisprudensi Islam dan Hukum Perdata Iran

Abstrak

Kontrak untuk investasi praktis dibuat dalam dua bentuk langsung dan tidak langsung. Mengenai perbedaan antara kedua metode investasi ini, kondisi bunga yang dijamin untuk mereka juga akan berbeda. Pada metode pertama, yang merupakan bunga investasi langsung, pemilik modal adalah agen investasi juga, dan hanya investor yang tertarik ditentukan dalam syarat dan ketentuan. Dalam hal ini dari investasi, bunga dijamin oleh fakta bahwa penerima investasi berkomitmen untuk membeli produk yang diproduksi dengan harga yang menjamin minat logis bagi investor. Ketepatan kondisi jaminan ini dipastikan dari segi hukum dan yurisprudensi Islam karena komitmen untuk membeli adalah syarat yang diperlukan. Namun dalam bentuk kedua, tidak seperti yang pertama, minat investor secara tidak langsung diputuskan dan dijamin dan kondisinya semakin menarik dengan melakukan kegiatan industri dan manufaktur. Bentuk minat ini juga dianggap sah dan baik dalam hukum Islam dan Hukum Perdata Iran dan praktis berdasarkan pada prinsip-prinsip kondisi dan pasal 234 hukum sipil Iran. Jadi, pertanyaan utama dari penelitian ini adalah seberapa validkah kondisi bunga yang dijamin dalam yurisprudensi dan hukum Iran?

Kata kunci: Kondisi Keuntungan Terjamin, Yurisprudensi, Hukum Iran, Mudarabah

Сравнительное изучение условий для целей гарантии в контракте Мудхароба с точки зрения исламского права и гражданского права Ирана

Аннотация

Контракты на практические инвестиции заключаются в двух формах - прямых и посредственных. У этих двух инвестиционных методов есть различия, и условия гарантированного процента для них также отличаются. В первом методе, который представляет интерес прямых инвестиций, владелец капитала также является инвестиционным агентом, и только заинтересованные инвесторы определяются по положениям и условиям. В случае инвестиций, интерес гарантируется тем фактом, что получатель инвестиций стремится покупать продукты, произведенные по гарантированным ценам. Условия данной гарантии обеспечиваются с точки зрения исламского права и исламской юриспруденции, поскольку обязательство по покупке является необходимым условием. Но во второй форме, в отличие от первой, заинтересованность инвестора определяется и гарантируется посредственным образом, а условия становятся все более привлекательными при осуществлении промышленной и производственной деятельности. Эта форма также считается законной и действительной как в исламском праве, так и в гражданском праве Ирана и практически основана на принципах обладания правом и статье 234 гражданского права Ирана. Итак, главный вопрос этого исследования состоит в том, насколько верны условия гарантированного интереса в иранской юриспруденции и Иранском праве.

Ключевые слова: условия гарантированной прибыли, юриспруденция, иранское право, *мудароба*

Introduction

Condition for guaranteeing profit is actually logical only when the amount of the guaranteed interest is determined. Therefore, the guaranteed profit condition is not comparable with the contract for assuring liability and argue that as for assuring liability contract and condition ones needs not to know the party to whom the debt is due, for guaranteeing the interest, it is not necessary to determine the amount of it, either. This is so because in assuring the liability, it is determined prior to the assurance and as its amount can be decided on by contract or the factor causing it, it is termed that a brief knowledge of the debt is sufficient and it does not need detailed facts (Najafi, 2004; Katozian, 1995).

In articles 694 and 695 of the civil law of Iran the same argument is followed, and it is definitely stated that about the interest gained out of investment, not guarantee is applicable before the amount of the interest is designated because the conditions and contract for guaranteeing the interest are independent while in assuring the liability and debt, the contract is dependent. The point to consider is, regarding the importance of *riba* (usury) in Islamic teachings, it should be decided whether determining the amount and rate of interest by the investor in advance is a valid and legitimate practice or not. According to the views of the Islamic jurists about *mudarabah* which is a sort of modern investment and on *participation* which is a direct investment, the condition of predetermining the interest of the investment is prohibited (Helli, 1987).

Difference between profit and interest

Lexically, the word interest means something gained out of an activity. As both profit and interest belong to the owner of the capital and are paid to them because of their investment, they are the amount of money or other things one may gain in addition to the capital. Because of their affinity and similarity, they are often interchangeable. Yet, in Islamic laws, interest is legitimately approved of, but profit is not and they are different in terms of the case and subject under consideration (Shamsabadi, 2012). Here, profit is the amount of property that the owner of an asset gains regardless of using the asset in economic and trade activities or, if used in such cases, regardless of the profitability of the case (Sadr, 1992: 14). Interest, however, is a property that one gains over their original capital because of their economic activities and through the circulation of the capital of the investor and after excluding the original capital and other costs. Because of this technical difference, profit is often considered as a sort of usury in legal usage

(Jafari, 2002). Therefore, although both imply an amount of gain in addition to the original asset, interest is a gained out of economic and commercial activities only, while profit is gained only upon presenting a capital.

Validity and legitimacy of the condition for guaranteeing interest

In the common practice of the marketplace, not only the interest of the investor is determined, the receiver of the investment also tends to guarantee the determined interest by imposing certain conditions. The validity of such terms and conditions are subject to certain considerations: first, the subject of the guarantee and the property to be guaranteed are not yet gained, so how can a property which is not yet realized be guaranteed? It is so, while the article 691 of the civil code of Iran states that for the guarantee to be valid, at least the cause of it shall be clearly set. What can we decide from this case is that the condition of guarantee for interest is not a contract guarantee in which the guaranteed property or gain be transferred from the ownership of one person to that of the guarantor because no interest is yet realized to be covered by the contract, while for the validity of the guarantee, the thing under it or its cause shall be determined (Khoie, 1996). Second, the relation between the investor and the investee is not that of debtor and the indebted, and the condition for guarantee is not a contract guarantee. Also, by the condition for ensuring the interest, we do not mean the guarantee dependent on the property in hand because, first, there is not yet any interest gained to come into the hand of the investor and be ensured, second, the relation between the investor and the investee is not that of the owner and lodger in which a property is transferred from one hand to another. Thus, the condition for guaranteeing is not a contract or coercive condition; rather it is the commitment of the guarantor for providing the decided interest.

a. from the stance of jurisprudence

There are many different views among the Islamic jurists about agreement of the parties involved for designating and sharing interest. Most of them prohibit the payment of a certain amount of interest, while a minority of the jurists approve of it.

a.1. The dominant stance of the jurists

Most of the jurists state that *mudarabah* is a contract in which a person gives a piece of property or capital to another one to trade and work with and share the gained interest (Abo Jafar, p.297). Therefore, if the whole interest goes to the

owner of the capital, the legal act is something other than mudarabah for which the basic condition is the sharing of the gained interest between the parties involved. This is the definition that other jurists have also referred to. Sheikh Sadogh, for instance, says: "Mudarabah occurs when one gives a capital to another one who does economic trade with it and has a certain amount of the interest gained as half, a third or quarter of it and the losses are for the investor" (Ghomi, 1988, Vahid Khurasani, 2007).

This conception of mudarabah shows that the shared decision about the interest is a natural condition for it to take place. Also, Allameh Helli assigns for conditions for interest in mudarabah contract one of which is that the interest be decided about partly and through joint agreement. For instance, the parties agree that half or one third of the gained interest be devoted to one of them. But if one of them asserts that he gains, say, a hundred beside the shared interest, mudarabah will be canceled because, this way, they have definitely decided about the interest in advance. Mohaghegh Korkei also has the same idea and believes that mudarabah is a contract in which the shares of the actor and the owner are jointly decided about (Korkei, 1993).

Some other jurists believe that the rightful condition for mudarabah contract is to decide about the interest rate as shared fractions such as half, one third or quarter. The parties, cannot, however, agree about paying a certain amount each month because it intrudes with the validity of the contract. They, of course, also assure that the receiver of the interest can pay back a portion of it to the investee at the end of each decided period or month (Saffi, 1996). Thus, according to this percept paying a portion of the interest is only possible after it is realized. And this implies that in itself, the mudarabah contract cannot guarantee a certain amount of interest for the investor. Other jurists have refuted the validity of a mudarabah contract for which the interest is definitely set by consulting the hadiths and narratives from religious leaders. For them the true sort of mudarabah is the one in which the interest is decided about by the two parties jointly.

For deciding about the amount of interest in a definite way, some jurists prescribe the reward instead of mudarabah. They argue if the owner offers something as interest to the actor, it is also as if they want to give them a reward, like when the owner says that "I will give this amount of money to whoever finds and brings back my missing property." This way, there is no mudarabah (Mirza Qomi, 1994). Also, it is said that if the contractors decide that the owner gives a property to the other party to do trade with and has all the gained interest, the legal act is a deal (Kolini, 2008). In this sense, if the owner gives his property to

another person to work with it is as if he has also bestowed the ownership of it to that person and the commitment is to give back the original asset to the real owner. This way, the whole amount of the interest is produced in the property owned by the secondary owner and belongs to him or her. Also, if the parties agree that the actor does trade with the property of the owner and give all the interest to the owner, the legal act is termed reward in which the basic condition is that the doer of the economic act with the property shall pay all the gained interest to the owner and is him/herself receive something as wage or reward in return for what they have done. Thus, every legal act in which interest is involved depends on the agreement of the parties, and its validity is not dependent on pronouncing certain terms or words and any means which clarifies their true intention suffices. Therefore, other forms of contracts such as reward or deal may also be announced and set through the use of *mudarabah* terms in which the condition is that bot or all the parties shall take part in determining the interest rate.

a.2. Less prevalent stances

Some Islamic jurists have approved of a *mudarabah* contract in which the parties decide about a certain rate of interest. They rely a hadith from Imam Moses Kazem based on which, they argue, there is no reason to say that this hadith refers to the necessity of sharing the gained interest as a joint portion. They state that the point clarified by this hadith is that both conditions are correct in one of which the interest is decided about as joint portion and in the other one, is definitely decided. They finally conclude that the gained interest is shared merely based on the agreement of the parties upon getting which the contract is sound (Tabatabai, 2002: 20). Some others still propose that the determined amount of interest by the parties is only legitimate when they are certain that the final interest will be greater than the determined amount (Movahedi, 2004). In the teachings of contemporary jurists also it is obvious that some have asserted that the rate of interest in *mudarabah* contract is set in two ways in which the interactors agree that a certain amount of the interest by paid to the actor (investee) and the rest go to the owner, or vice versa. In another form also, the parties decide that a certain portion, such as half, a third or quarter, of the interest be given to the actor (Khomeini, 2003).

Some jurists also propose that determining the amount of the interest in advance is allowed only when the owner delegates the actor from the beginning so that when paying the determined interest to the owner, the actor shall also give him an extra amount so that his intended amount of interest is actually realized. In fact, the owner gives delegation to the actor to do commerce in his

place. Of course, the parties may also agree about the payment of that amount of interest at some later time (Behjat, 2007). Here also, although determining the rate of the interest is not allowed from the beginning, it is possible, under certain conditions, to legitimize this contract by relying on delegation and agreement.

Still for other jurists, although determining the interest in advance is sound only when the parties know that the final gain is greater than the amount agreed on, it is suggested that after deciding about amount of interest, the owner can make a condition according to which the contractor should lend a certain amount of money to the owner each month, and then assign the contractor as his delegate to exchange the share of the owner with the interest that is made out of the capital. If no interest is made, the contractor has to take back the money he has lent the owner (Tabrizi, 1994). Based on some of these arguments, some of the contemporary jurists have approved of the mudarabah contracts that banks now offer. This way, the bank can make the condition based on which if the interest does not reach the determined rate, the contractor (bank) is obliged to pay the deficit to the owner of its own asset. Also, the owner can agree with the proviso that if the mudarabah has no interest, he is allowed to make up for the deficit out of the properties of the bank (Sistani, 1889).

b. From a legal stance

Some legislatives believe that any mudarabah contract in which the condition for setting the interest is definitely mentioned can be considered a rightful legal act. Yet, there are those who, resorting to somewhat the same arguments resented above and following the jurists, consider these contracts as invalid and illegitimate.

b.1. Those who believe in its validity as a legal act

According to article 546 of the Civil Code, "Mudarabah is a contract based on which one of the parties offers an asset with the proviso that the other party does trade with and both share the interest. The investor is called the owner and the actor is contractor." Also, based on article 548 of the same code, "the share of each of the owner or contractor in the gains of the act shall be a part of the whole such as half, a third, quarter, etc." From what we can infer from the ideas of both jurists and legislatives, it can be concluded that one of the branches of mudarabah contract is the joint interest in which each party's share is decided jointly. It is also true that sometimes the owner and contractor agree to a certain amount of interest in which case some legislatives believe that, regardless of the title of the act, it is a sound legal contract.

Therefore, if each of the parties set a different amount of interest, the made contract is not *mudarabah*; rather, a contract is made which is valid by itself and can have legal validity based on article 10 of the Civil Code and the principle of free will. The provisions under such contract are also valid based on the principles of dominance, conditions and being logical (Barikloo, 2008). The basis for this justification is that the conditions pertaining to the nature of a contract abolishes it only when it becomes known that none of the parties have intended any known legal contract, or what they have done is against the law or social order. This also is possible that the conditions opposed to the nature of the contract change it into another sort of valid contract. Thus, the point is not whether the interest being shared is a condition for *mudarabah* or not; rather, the question is whether a contract in which the share of the contractor is definitely set is against law or social order, or such contract is valid based on the article 10 of the Civil Code. The same point is also true about the sort of action that the contractor undertakes; that is, a contract in which the act is other than trade and commerce also is rightful based on article 10 of the Civil Code (Davarzani, 2014). Thus, as most of the contracts are valid through the agreement and signature of the parties involved and the principle of parties' will, such contracts are valid as long as they are not contrary to any laws or regulations. And if the contractors give a certain amount of interest to one party and the rest be shared between them, the contract is not *mudarabah*, because the nature of *mudarabah*, as defined in article 546 of civil law, demands that interest be the joint division of it and determining the exact amount of it by one party is against the nature of such contract. Such contradiction is true only when the parties want to make merely *mudarabah* and no other contract.

b. 2. Those who deny the validity of *mudarabah* as a legal act

As we said above, some jurists and legislatives state that any *mudarabah* contract in which all the interest is either decided by one party, the owner for instance, or determined definitely for one party and the rest is given to the other one is not valid (Tafreshi and Ghanavati, 1998; Taheri, 1997; Ezadifar, 2000; Emami, 2002; Katoozian, 2009). The main reasons they present for this stance of theirs are:

- a. **Lack of reason on the correctness of the contract:** the arguments and fatwas on the validity of the *mudarabah* contract are limited to the cases where the sharing of the interest is jointly decided or based certain known principles and laws. Thus, if the contract is not contained within the provisions for the validity of contracts, it will be subject to doubts which can be a source of abolition for it (Tafreshi, 1998: 131). It might be said that

the principle of validity of contracts relates to the validity of the government holding that law and, therefore, if there is any doubt about the validity of a deal, one shall consider that principle for making sure. Against this denial, one can argue that the principle of validity is a case principle, while in the present discussion, the difference is in the terms and conditions of the act. And the effect of the sharing of interest as a certain amount is on the validity and correctness of the contract.

- b. **Contradiction of conditions of the contract with its nature's demands:** in cases where even a least amount of interest is definitely assigned to the owner of the capital, the contract is abolished because such condition is against the nature of mudarabah (Taheri, 1997). The nature of this contract demands that the contractor does trade activities with the money of the owner and they share the gained interest. Any condition contrary to this calls off the deal as clarified in sentence 1 of article 233 of the Civil Code.
- c. **Realization of usury in the contract:** in case the parties involved in mudarabah discuss and decided about a certain amount of money as interest, it will be cancelled as usury (Ezadifard, 2000). If the parties agree that interest shall be a certain amount, it would be as if the owner gave a piece of property or an amount of money to the contractor to trade with but receives it back with an extra amount. This is considered usury and illegitimate. Here we can add that if the content of the condition clarifies that interest be determined definitely and given wholly to the owner, the contract is a kind of service lease based on which the contractor is to receive an amount as wage for their activity. But if it is presented as proviso that a certain amount of the interest be given to the owner, the legal act is considered as a sort of usury which is not only itself invalid, but it cannot be the source for the realization of any other legal act. In such conditions, as the legal act is illegitimate, the original asset would be returned to the owner and the contractor deserves his own wage and is not related to the nature of the contract. Also, it shall be noted that based on article 558 of Civil Code does not clarify the guaranteeing of a certain amount of interest because the condition for guaranteeing an absolute amount is against the nature of mudarabah contract (Masudi, 2008). This condition is an example of unfair condition which the legislative do not approve of its use in civil companies, too (Kashani, 2009).

Comparative Study

The condition of guaranteeing the interest in both Islamic teachings and the laws of Iran is to be considered as both the interest of investment and as assurance for the acts of the contractor. In article 11 of the laws and regulations for attracting foreign investments passed in July 2002, there references to the interest of direct investment: "About those investment plans in which a governmental agency is the sole buyer of products and services, and in cases where the goods and services are presented with trade subsidies, the governmental agencies can guarantee the purchase of them based on the prices designated in the contract and based on the legal terms and conditions of the case." Therefore, the condition of guaranteeing interest as commitment for buying the products and services is not legally banned. Beside the general terms of the validity of conditions and contracts, one can rely on other things as owner's agreement for bestowing the ownership of the property in return for the guaranteed payment of its price (Hosseini, 1997). About the cases where interest of the investor is indirectly determined and guaranteed, such as the sale of bonds, there are no legal terms prohibiting the setting of prior condition for the interest, and most of the restricting terms are about the cases where no interest is gained. Today, however, as estimating the interest for most of economic activities is often possible, this problem has been overcome. Also, guarantee means the commitment of the parties for striving toward realizing an interest that has been decided about by the parties. This kind of guarantee which is conditioned by the gaining of interest through doing economic activities is quite legitimate and adheres to the laws and regulation. It is also valid based on article 234 of the Civil Code.

Another restricting element on the condition for guaranteeing the interest is the time of its realization because by determining the amount of interest and guaranteeing it, the owner will not possess it. Because the means for owning the interest by the parties is the principle based on which the interest must conform to the asset which is done after doing economic activity of the investee. That is to say, the ownership of the owner over the interest is through the activity of the asset and that of the contractor is through the activity of the investment (Najafi, 2004). Thus, as long as the interest is not realized, there is no ownership for it and contracts will not bring ownership of it. Today, it is usual in the marketplace to pay interest to the investor from the beginning either daily or monthly, while for gaining a valid interest, there should be a time period. But in the usual practice of investment, the investor gets the expectation for receiving interest from the beginning. As this condition is implicitly certain in the investment market which can be considered a condition for the contract based on the article 255 of the Civil Code. So, as the interest is only valid after realization but it is fashionable to

receive interest from the beginning of investment, how are we to resolve this contradiction? Some jurists have suggested the delay for calculating the interest and have stated that at least two months after investment; the investor can expect to receive any interest (Saddr, 1994). This solution cannot resolve the problem properly because the interest may not be realized even after two months and this can lead the people toward other forms of illegitimate investment such as usury.

Another solution is that the parties can agree to exchange the predictable interest as cash (Saddr, 1994). Based on this solution, the investor agrees to receive the predictable amount of interest. The contract thus formed the interest after being gained by the investee is then transferred to the investor as instalments. The validity and terms of this sort of contract can be based on article 768 of the Civil Code in which it is clarified that the investor can own a predictable amount of interest from the other party. In this case, the future interest which is valid and legitimate is exchanged with cash. Therefore, the condition thus pronounced will not violate any halal or gain any haram which the terms of valid contracts might prohibit. About the guarantee for preventing the committed party from not doing its duties, Sheik Ansari states: "in direct investment, as the guarantor is committed to buy the products of the investor, he will be forced to do so, if he refuses from buying them. Thus under any conditions and provisions agreed upon also, the person affected by the condition is obliged to do it" (Ansari, 2006). Therefore, as it is impossible to violate the conditions, the committed party has to buy the products with the agreed price or that set by the market. But about the interest gained out of indirect investment, if the final gained interest is more than the money exchanged for it, the investor has the right to terminate the contract because he is to suffer loss of asset. In fact, the transactions in which there is the possibility of loss, the condition for cancellation is optional (Tabatabai, 1998). If the final gained interest is little or nothing at all, the exchange contract will be called off and the investor shall pay the received cash to the contractor because in exchange transactions, the realization of the amount agreed upon is the condition for the validity of the transaction (Shahidi, 1998; Naini, 2000; Katozian, 1995).

All such arguments are dependable only when the committed one and the guarantor have not been involved in the failure of interest's realization. So, if this failure is because of the parties' fault, can we find ways for supporting the investor? About the farming contracts, for instance, the article 536 of the civil Code has that if the failure of crops is because of the contractor's lack of care and taking proper measures, he is obliged to pay the agreed amount to the owner. Thus, if it is proved that if the investee's fault is the reason for interest's lack of realization, he is liable to pay the share of interest agreed on for the investor,

because not gaining interest is also a kind of loss for making up which there are enough legal terms and provisions. Therefore, the condition for guaranteeing the realization of interest in direct investment contracts is the obligation of the committed party to do the commitment. In the indirect investment, however, the guarantee for condition of interest, if the guarantor is rightful and has no fault, is that one can cancel the contract if they see the possibility of loss or because of not realization of the conditions agreed upon.

Conclusion

The state of the condition for guaranteeing the interest depends on the state of pre-decided conditions for the interest because nothing can be guaranteed before it is clear enough to be understood, and the commitment for guaranteeing the interest is for the amount of interest intended not its nature. And for the validity of the interest, it should be set beforehand. About the condition for pre-deciding about the interest, most of the jurists and legislatives do not approve of it. Some of them rely on the conditions of the participation's nature; others say that the decided interest is not certain to be realized; still others resort to the lack evidence for the validity of it. Yet many others see it as legally valid which seems to be logical as now the calculation or estimation of the interest for economic or commercial activities is possible, thus the condition for guaranteeing is valid and there are no other reasons for refuting it.

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