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The Rulings on Capital Return Guarantees in *Muḍārabah* (Profit Sharing) Contracts: A Comparative Study between The AAOIFI Sharia Standards and the DSN-MUI Fatwas

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Abstract. *This study aims to identify and analyze the legal constructions of capital guarantees in the AAOIFI Sharia Standards and the DSN-MUI Fatwas. This is normative legal research with a specific comparative approach. This research shows that the rulings of the AAOIFI Sharia Standards are more reassuring and prioritize the principle of iḥtiyāth (precaution). Meanwhile, the legal provision of the DSN-MUI fatwas, allowing the capital manager to guarantee a return on business capital, is a commitment in the form of tabarru from the fund manager. The commitment should be fulfilled since it is a wa'ad mulzim (binding promise). This legal provision of the DSN-MUI Fatwas is a form of innovative ijtihad that seems different from the opinions of most scholars used as the legal basis of the AAOIFI. However, the DSN-MUI's fatwa is supported by various arguments and is more applicative.*

Keywords: *capital guarantees, muḍārabah contracts, DSN-MUI Fatwas, AAOIFI sharia standards*

Abstrak. *Penelitian ini bertujuan untuk mengetahui dan menganalisis konstruksi hukum jaminan modal dalam Standar Syariah AAOIFI dan Fatwa DSN-MUI. Penelitian ini merupakan penelitian hukum normatif dengan pendekatan komparatif. Penelitian ini menunjukkan bahwa ketentuan Standar Syariah AAOIFI lebih tepat dan mengedepankan prinsip iḥtiyāth (kehati-hatian). Sedangkan ketentuan hukum fatwa DSN-MUI yang memperbolehkan pengelola modal dengan jaminan pengembalian modal adalah komitmen dalam bentuk tabarru dalam pengelolaan dana. Komitmen tersebut harus dipenuhi karena merupakan wa'ad mulzim (janji mengikat). Ketentuan hukum Fatwa DSN-MUI ini merupakan bentuk ijtihad inovatif yang nampaknya berbeda dengan pendapat kebanyakan ulama yang dijadikan landasan hukum AAOIFI. Namun, fatwa DSN-MUI didukung oleh berbagai argumentasi dan lebih aplikatif.*

Kata kunci: *penjaminan modal, akad muḍārabah, Fatwa DSN-MUI, standar syariah AAOIFI*

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Introduction

In the Islamic legal system, a fatwa is a formal opinion or interpretation given by a legal scholar to respond to a question by a particular person or institution. In the early development of Islamic law, fatwas were given by someone who was an expert in Islamic law (ulama). However, in the present era, fatwas are given collectively through institutions consisting of experts competent in Islamic law (Afif Noor, 2021). Fatwas have a very important position in Islamic law as a tool to dynamize and adjust the law with the developments. An example is the emergence of Islamic economic activities, including Sharia banking, based on Islamic law principles (Lahsasna, 2018).

In Indonesia, Dewan Syariah Nasional Majelis Ulama Indonesia (DSN-MUI) or the National Sharia Board of Indonesian Ulama Council (Santi Lamusu, 2021) (Kasdi, 2018) has the authority to issue Sharia finance fatwas (al-Hakim, 2019). Fatwas are guidelines for implementing Sharia values in economic transaction activities (Putra, 2020). With the implementation of the Islamic economy, Sharia Financial Institutions have to be equipped with *fiqh mu'āmalah* (rulings on Islamic transactions) set by the DSN-MUI in *kāffah* (thoroughly) and *falāḥ* (to achieve glory) transactions for the public benefit and to avoid prohibited transactions (Santi Lamusu, 2021).

One interesting DSN-MUI fatwas to be analyzed is the DSN-MUI fatwa No. 105/DSN-MUI/X/2016 on Capital Return Guarantees on Mudharabah Financing. In general, the legal provisions in the fatwa are different from the legal provisions according to international fatwa authorities, such as the AAOIFI (The Accounting and Auditing Organization for Islamic Financial Institutions) Sharia Standards regarding the prohibitions of guaranteeing business capital return in *muḍārabah* (profit sharing) contracts.

Fiqh experts agree that the requirement to guarantee capital return for the capital manager in the event of profit loss is prohibited in *muḍārabah* contracts (al-Mishri, 2023). This is because a *muḍārabah* contract is based on trust (*amānah*) between the parties. Therefore, if there are conditions to guarantee a capital return, the contract, which was originally an *amānah* contract, changes to *ḍamānah,* which surely has legal implications (Ahmad, 2003).

However, the two points seem controversial and violate the opinion of the majority of *fiqh* scholars and the AAOIFI Sharia Standards. First, the manager is allowed to guarantee a return on capital of his own will without a request from the capital owner. Second, the capital owner may ask a third party to guarantee

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a return on capital. Therefore, an analytical study must be carried out, departing from comparing the legal provisions of the AAOIFI Sharia Standards and the DSN-MUI Fatwas regarding the rulings on guaranteeing capital return in *muḍārabah* contracts. This research aims to analyze the legal constructions of capital return guarantees and compare the legal provisions in the AAOIFI Sharia Standards and the DSN-MUI Fatwas.

The origin of the word *muḍārabah* is *ḍaraba* which has various meanings because it depends on the word iuran. Some of its literal meanings are going in search of sustenance (*ḍaraba al-tair*); mix (*ḍaraba al-shai bi al-shai*); trade or do business (*d ḍaraba fi al-māl bi al-māl*). Wahbah al-Zuhaili explains that one of the literal meanings of *muḍārabah* is to travel on earth (*al-sīr fial-arḍ);* some of the derivations of the word *al-sīr* are *istār* or *istiyār* which means shopping for necessities on his journey (al-Zuhaili, 2012).

In *mu'āmalah* fiqh literature, there are two terms used to denote business for *hasul* whose capital is fully provided by one of the partners (*sharīk* [*ṣāhib al-māl*]), namely *muḍārabah* and *qirāḍ* or *muqāraḍah*. The two terms have the same meaning; it's just used by different scholars. During the tabi'in era, there were two centers for the development of jurisprudence, namely Hijaz (Medina) and Iraq, also known as Baghdad. For Iraqi clerics, cooperation between investors and business actors is called *muḍārabah*, while for Hijaz clerics it is called *qirāḍ* or *muqāraḍah* which literally means *al-qat'* (disconnected). The right of the owner of capital to do business with that capital has been abolished because it has been handed over to the *muḍārib*.

Legal provisions regarding *muḍārabah* contracts in the legal context in Indonesia are specifically regulated in the DSN-MUI fatwas Number 115 of 2017 concerning *Muḍārabah* contracts. In this fatwa it is stated that *muḍārabah* is a joint venture agreement between the capital owner who provides all the capital and the manager (*'amil/muḍārib*) and the business profits are shared between them according to the ratio agreed in the contract.

The *muḍārabah* contract is part of the *amānah* contract, namely the contract made between *ṣāhib al-māl* and *muḍārib* because the *ṣāhib al-māl* believes in *muḍārib*, both in terms of honesty and business prowess. Therefore, the existence of business guarantees in the form of capital guarantees in this trust agreement requires discussion because the *muḍārabah* provisions in *fiqh* books must be harmonized with statutory regulations and regulations that are rigid in Indonesia, including in the context of mandatory sharia banking (based on positive law). to mitigate the risk of the financing it does. One way is by having legal provisions

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regarding capital guarantees in trust contracts such as *muḍārabah*. This provision is based on the DSN-MUI fatwas Number 105 of 2016.

In addition to the DSN-MUI fatwas, provisions regarding capital guarantees are also regulated in the AAOIFI (The Accounting and Auditing Organization for Islamic Financial Institutions) Sharia Standards regarding the prohibitions of guaranteeing business capital return in *muḍārabah* (profit sharing) contracts. Related to this discussion has actually been a debate among both classical and contemporary *fiqh* scholars, this is as informed by Nazih Hammad in several of his works including *Madā Ṣiḥah Tamḍīn Yad al-Amānah bi al-Sharṭ fī al-Fiqh al-Islām and fī Fiqh al-Mu'āmalāt al-Māliyyah al-Maṣrafiyyah al-Mu'āṣirah: Qirā'ah Jadīdah* (Hammad, 2007).

Methods

This paper is based on a normative legal study, employing a comparative legal approach. The study relies on the analysis of fatwas and legal provisions issued by the AAOIFI Sharia Standards and DSN-MUI on capital return guarantees in *muḍārabah* contracts.

Results and Discussion

The Legal Constructions of Capital Return Guarantees in the AAOIFI Sharia Standards

Muḍārabah contract is a part of the partnership contract (*shirkah*) (al-Zuhaili, 2012). Scholars classify this *muḍārabah* contract as a cooperation contract based on trust between the partners. Since the *muḍārabah* contract is trust-based (*yad al-amanah*), it is prohibited to require a guarantee of a return on capital (read: *ra's al-māl*), especially for the *muḍārib* (capital manager).

Provisions regarding the prohibition of capital return guarantees in trust/ *muḍārabah* contracts in the AAOIFI Sharia Standards are as follows:

> "Partners in a cooperation contract based on the principles of trust, there should be no guarantee (of capital return) to the other partner (*muḍārib*), unless the *muḍārib* commits an act of *ta'adi* (doing something that should not be done) or *taqṣīr* (not doing something that should be done). Moreover, it is not allowed to require a guarantee for partners to be responsible for the shirkah capital because the shirkah contract is based on the principles of trust." (AAOIFI, 2017)

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The legal provision in the AAOIFI Sharia Standards above is in accordance with the Decree of the Organisation of Islamic Cooperation Number 30 4/5 as follows:

> "It is not allowed to require the capital manager (*muḍārib*) to guarantee business capital. If this happens (requirement of capital return), either explicitly or implicitly, then the requirement is void, and the capital manager is entitled to similar benefits (*ribḥ al-mithl*)".

This is also in accordance with the fatwa decision of *Lajnah Taḥrir al-Fatawa* Egypt as follows:

> "In *muḍārabah* mushtarakah (contracts), (it is permissible that) capital is guaranteed by the manager for the owner. Meanwhile, capital guarantees in *muḍārib* fardiyah (regular *muḍārabah*) make the *muḍārib* contract damaged (*fasad*)" (Ali Jum'ah Muhammad, 2009).

The legal construction on the prohibition of capital return guarantees in the AAOIFI Sharia Standards is based on the opinions of the majority of *fiqh* scholars regarding the prohibition of capital return guarantees in *amānah* contracts, such as *muḍārabah* contracts. *Fiqh* scholars agree that a condition to guarantee capital (return) in trust-based contracts such as *muḍārabah* contracts is void. This aligns with the following principle:

> "The existence of a condition to guarantee (capital return) on the party given the trust (*muḍārib*) is a void condition" (al-Dubyan, 1432).

In addition to the principle above, the *fiqh* of the *Ḥanbali madhhab* maintains the following relevant principle:

> "Any contract that is an amanah contract and does not become ḍamānah with conditions" (al-Din, 1997).

In line with the *Ḥanbali madhhab* above, in the *Shafi'i madhhab*, there is also a similar principle as stated by Al-Khatabi as follows:

> "If the original ruling is an *amānah* (contract), then it cannot be changed from the original ruling by conditions" (al-Khatab, 1932).

The issue of guarantees or guarantee conditions on business capital return is a classic issue discussed in *fiqh* literature. The opinion of the majority of scholars regarding this matter is that they prohibit guarantees on capital return (if the business manager suffers a loss). This is the opinion of the Ḥanafiyah, Malikiyyah,

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and Ḥanabilah scholars. This opinion by the majority of fiqh scholars is also in accordance with the views of al-Tsauri, al-Auza'i, Ishaq, al-Nakha'i, and Ibn Mundzir.

Fiqh literature from each mazhab prohibits the guarantees from returning business capital if the business manager (*muḍārib*) suffers a loss. Even in the Hanafi madhab literature, such matter can be classified as a form of *ḥīlah* (usury). This matter is explained by the Hanafiyah scholars such as al-Sarkhasi in the book of *al-Mabsūṭ* as follows:

> "If a person (capital owner) wants to hand over business capital using *muḍārabah* contract to another party and the capital owner wants the capital manager (*muḍārib*) to guarantee it, then such matter changes the *ḥīlah* (to usury) because the substance of the contract is qarḍ contract, in which the capital owner lends his assets/money to the other party...". (al-Sarkhasi, 1993)

This is also explained by al-Kasani in the book *Badā'i al-Shanā'i* as follows:

> "If the capital owner wants to make his capital guaranteed by the capital manager, then that is a *ḥīlah* (legal trick), which substantially is that he lends his assets to the capital manager..." (al-Kasani, 1986).

In line with al-Sarkhasi above, al-Zaila'i, who is also a scholar from the Ḥanafiyah, argues that:

> "If a capital owner wants his capital guaranteed by the capital manager (the substance is *qarḍ* contract), the capital owner lends all of their money to the other party..." (al-Zaila'i, 1313).

Ibn al-Barr from the Malikiyah scholars argues that:

> "There is no difference of opinion among the scholars that the capital manager served as (the beneficiary of) amanah. No *ḍamah* (liability/guarantee) for capital damages if it is not due to his negligence or damages that he has done, and also not based on wasting it since the contract (*muḍārabah*) is basically a trust-based contract." (al-Qurthubi, 2000)

Similarly, in the Shafi'i madhab it can be found a statement from al-'Imrani as follows:

> "*'Amil* (capital manager) is a trusted person to manage business capital in a *qirāh*/*muḍārib* contract, no liability/guarantee unless the person commits

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ta'adi (doing something he is not allowed to do), because the capital owner entrusts/gives him an amanah, as in a *wadī'ah* (deposit) contract.

Ibn Qudamah, a scholar from among the Hanabilah, explains that:

"A *fasid* (damaged) condition is to require things that are not classified as the benefits of the contract and the purpose of the contract, such as giving a condition to the capital manager to guarantee the capital and a share of profit expectations. There is no difference of opinion between the scholars regarding the damage of the conditions" (al-Maqdisi, 1968).

Furthermore, in the *sharaḥ* (explanation) of the book, Syams al-Din emphasizes that:

"Thus, that a condition of guarantee for which the reasons of the guarantee are not found, then such condition is not binding, Just as it is required to have a guarantee for a damage that lies in the hands of the owner (of the capital)" (al-Din, 1986).

The legal provisions in the AAOIFI Sharia Standards correspond with the view of the majority of scholars that the condition to guarantee capital return is a forbidden matter, even classified as a void condition. However, the legal provisions in the AAOIFI Sharia Standards do not explain whether such a condition has any implications for the validity of the *muḍārabah* contract. In the classical *fiqh* books, scholars have discussed that the condition to guarantee capital return is void. However, scholars have different opinions about the validity of the *muḍārabah* contract: is the contract valid, o*fāsid* or void?

Abu Umar Dubyan Ibn Muhammad al-Dubyan, in *al-Mu'āmalāt al-Māliyyah Ashālah wa Mu'āsirah,* elaborates on the scholars' opinion regarding this matter. It is stated that according to the Hanafi and Hanbali mazhab, the contract is still valid. This can be seen from Ibn Qudamah's statement as follows:

"If it is required to the capital manager a guarantee for a capital return or a portion of the loss, then the condition is void. We do not know any difference of the scholars' opinions in this matter, and the contract is still valid based on Imam Ahmad's history." (al-Maqdisi I. Q.-J.)

However, according to the opinions of scholars from among the Maliki and Shafi'i madhhabs, that contract is *fasad* (damaged), as stated in the book *al-Muntaqa al-Bajali* as follows (al-Dubyan, 1432):

"If there is a condition of guarantee (capital return) on the capital manager,

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> then the contract is damaged (*fasād*). (This is) in contrast to the view of Abu Hanifah, who argues that the contract is valid".

Several arguments support the void of the conditions of business capital guarantees in *muḍārabah* contracts. *First,* that condition is prohibited since it violates the substance and purpose of *muḍārabah* contracts. There is a history in which the Prophet (PBUH) prohibited practices involving void conditions, as in a hadith narrated by Imam al-Bukhari as follows:

> "....Why did people make requirements with conditions that do not exist in *Kitābullāh* (Book of Allah). Whoever makes conditions that do not exist in Kitabullah, the conditions will not be applicable. Even if he makes requirements one-hundred times...." (H.R Bukhari).

The *second* argument is that a *muḍārabah* contract, in principle, is a contract based on trust (*yad al-amānah*), not a contract based on a guarantee. Thus, the guarantee on business capital return is a void condition since it contradicts the substance of the *muḍārabah* contract. This is similar to a condition in a sale contract in which the buyer cannot use the goods they have bought or a condition in marriage in which the couple is prohibited from consummating their marriage. All of these conditions are invalid because they contradict the main purpose of the contract.

The *third* argument in which the scholars have come to an *ijmā'* (consensus) is that such a condition is a void one, as in the statements of Ibn Abd al-Bar and Ibn Qudamah above and also of Ibn Taimiyah as follows:

> "If the partners agree that one of them contributes to business management (*muḍārib*) and the other contributes to capital or business and the capital suffers a loss (whether all) or a part that is unintentional or caused by negligence by the business manager. Then, there is no liability/guarantee for the manager on that loss, either the muḍārabah contract is valid or damaged based on the scholars' consensus (*ijmā'*)."

According to Abdullah Ibn Muhammad al-'Ajlan, the consensus by the scholars above is based on four considerations: (1) *muḍārib* manages business funds based on permission from the capital owner. Thus, it is not permissible to have a guarantee (of capital return) just as in *wadī'ah*, *wakālah,* and other *amanah* contracts. (2) *Muḍārabah* contract is being analogically reasoned (*qiyās)* to *musāqah, muzāra'ah* contracts. If a plant or tree is damaged because of flood or other calamities, the amil (manager) is not responsible. (3) A condition to

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guarantee capital return contradicts the substance and the purpose of *muḍārabah* contracts based on the principle of trust. (4) This can lead to profits without risks, where the capital owners want to earn profits without risks. Therefore this kind of practice is prohibited by the Prophet (PBUH) (al-'Ajlan, 1430).

The fourth argument is the substance of the contract, used as a basis in a transaction, not the formal nomenclature. If the capital owner requires a guarantee on capital return, this contract is essentially a *qarḍ* (loan) contract, not classified as a *qirāḍ* contract. Because the fund owner requires a benefit in the *qarḍ* contract, it is feared that it might be classified as a usury transaction.

Thus, it can be concluded that the prohibition of capital guarantee conditions in the *muḍārabah* contract in the AAOIFI Sharia Standards/*ma'ayir shar'iyyah* No. 4/2/3 adopted the opinion of the majority of scholars. This opinion is agreed upon by most of the *fiqh* scholars. There are no details regarding legal exceptions in the AAOIFI Sharia Standards. The legal provision seems to take *ihtiyāṭ* (precautions) steps and stringent legal provisions.

The Legal Constructions of Capital Return Guarantees in the National Sharia Board of Indonesian Ulema Council (DSN-MUI) Fatwas

In general, there is no difference of opinion between *salaf* (previous generation) and *khalaf* (later generations) scholars and international fatwas authorities that an investment manager (*muḍārib*) is trusted and does not bear the risk of investment loss (because it is in the domain of *amanah* contracts) unless the capital manager commits an act of *ta'adī* (doing something beyond his authority), *taqṣīr* (negligent/ not doing his duty), and *mukhālafah al-shurūṭ* (violating agreements).

This opinion is also chosen by the National Sharia Board of Indonesian Ulama Council (DSN-MUI) in its fatwa No. 105/DSN-MUI/X/2016 about Capital Return Guarantees for *Muḍārabah, Musharakah* and *Wakalah bil Ististmar* financing. In substance, this fatwa consists of four legal provisions, namely:

First, the business manager (*sharīkh, muḍārib/'āmil/wakil*) is not required to return the business capital when there is a loss unless the manager commits *ta'adī, tafrīt* or *mukhālafah al-shurūṭ*. Likewise, the capital owner is not allowed to require the manager to guarantee a return on capital. This legal provision is based on the following legal basis:

A *hadith* of the Prophet (PBUH) narrated by Abu Dawud as follows:

> "The benefit is obtained by someone who guarantees the item." (H.R Abu Dawud) (al-Sijistani, nd)

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Also, a *fiqh* principle mentions:

"The risk of harm is proportional to the benefit." (al-Zuhaili M. M., 2006)

The DSN-MUI Fatwa No. 105 of 2016 considers the opinion of Ibn Qudamah al-Maqdisi, a scholar from among the Hanabilah, as explained above. Even in this fatwa, the DSN-MUI cites the opinion of international fatwa authorities such as the AAOIFI and the decree of OIC on the prohibition of capital guarantees as cited above.

Second, the capital manager is allowed to guarantee a return on capital of his own will without a request from the capital owner. This is an opinion from al-Dasuqi, stating:

> "Whoever commits to doing an act, then the commitment must be fulfilled" (al-Maliki, nd)

The above opinion by al-Dasuqi is in line with the opinion of Ibn 'Arabi:

> "Whoever commits to doing an act, then according to Sharia (Islamic law), he is obliged to fulfil it." (al-'Arabi, 2003)

The following principle supports the above opinion:

> "Whoever requires/imposes something on himself voluntarily without coercion, then it must be done" (Mulaqin, 2010).

Also, the opinion of al-Shaukani regarding the reasons for the permissibility to guarantee capital based on self-initiative is as follows:

> "Because they (business capital managers) have chosen an option for themselves (to bear the risk). And based on this willingness, it can be a cause to make a servant's assets lawful." (al-Syaukani, nd)

Third, the capital owner may ask a third party to guarantee a return on capital, and the guarantee fee cannot be charged directly or indirectly to the manager. This is in accordance with the opinion in the legal provisions of the AAOIFI Sharia Standards No. 39 as follows:

> "It is not permissible to require a collateral (*rahn*) on Amanah contracts such as *wakālah*, *wadī'ah*, *mushārakah*, *muḍārabah*, and leasing. Regarding the collateral being intended as a payment source (the right of the trust giver), if the trust holder does an act of *ta'adī*, *taqsīr*, or violates the conditions, then the collateral is permissible."

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Fourth, in the event that the business suffers a loss, the capital manager is required to prove that the loss suffered was not because of an act of *ta'adī, taqsīr,* or *mukhālafah al-shurūṭ.* If the capital owner accepts the proof, then the loss becomes the capital owner's responsibility. If the capital owner does not accept the proof, the dispute will be resolved through litigation or non-litigation. Before a binding verdict, the loss is the manager's responsibility.

Based on the provision of the fatwa above, in general, there are similarities between the fatwa of the National Sharia Board of Indonesian Ulama Council (DSN-MUI) and the AAOIFI Sharia Standards, particularly the first point of the DSN-MUI fatwa. It states that it is not permissible to have capital guarantee requirements in *amānah* contracts such as *muḍārabah*.

However, in contrast with the AAOIFI Sharia Standards, the DSN-MUI fatwas in its special provisions number (3) states, *"The manager is allowed to guarantee capital return at his own will without a request from the capital owner".* Meanwhile, the provision in number (4) mentions, *"The capital owner may ask a third party to guarantee a return on capital"*. These two legal provisions distinguish the DSN-MUI fatwas and the AAOIFI Sharia Standards, wherein the AAOIFI Sharia Standards do not open up any opportunities for capital guarantees, either at the manager's will, based on his initiative or a third party.

Comparative Analysis of the Rulings on Capital Guarantees in *Muḍārabah* Contracts in The AAOIFI Sharia Standards and The DSN-MUI Fatwas

The *legal* decisions in the AAOIFI Sharia Standards, as stated above, are a fairly stringent opinions, meaning there is no chance of capital return guarantees from the *'āmil* or a third party. The position of the capital manager in *muḍārabah* contracts is as a trustee that performs *tasarruf* on the capital, so a trustee cannot be required to guarantee a capital return (al-Mishri, al-Tamwīl al-Islāmī, 2012).

The legal basis in the AAOIFI Sharia Standards number (45) regarding the impermissibility to guarantee a return on capital by the investment fund manager is an agreement by *fiqh* scholars. Some declared it as a consensus that the capital manager is not responsible for capital return unless the manager commits an act beyond his authority or is negligent. Subsequently, such conditions remove the substance of the *amānah* contract and change it into a loan *(qarḍ)* contract, which becomes the manager's responsibility (to return the capital).

Based on the theory of *taḥawwul al-'aqd,* which is *"a change from a certain contract into another considering whether the terms and/or conditions are fulfilled or*

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not" (al-Rasyid, 2001), a *muḍārib* contract with a condition of a capital return guarantee is *out* of the contract substance. Thus, the component of the *muḍārib* contract is not fulfilled. However, a component in another contract is fulfilled, namely the *qarḍ* contract. This is based on the following *fiqh* principle:

> "What is used as a standard in a contract is the purpose and the substance, not the editorial or the naming nomenclature." (al-Qaradhawi, 2010)

Based on the *fiqh* principle above, it can be concluded that even though the contract's nomenclature is a *muḍārabah* contract, it is not. It is a *qarḍ* contract. This is because a full return of capital and the absence of risk are substances of a *qarḍ* contract. The difference between the AAOIFI Sharia Standards and the DSN-MUI fatwas regarding this matter is the two legal provisions in the DSN-MUI fatwas. It states, *"the manager is allowed to guarantee a return on capital at his own will without a request from the capital owner"* and *"the capital owner may ask a third party to guarantee capital return".*

In *fiqh* literature, a fairly "bold" opinion from Nazih Hammad can be found, stating that the ruling on capital return is absolutely permissible. In contrast to the majority of the scholars and the AAOIFI Sharia Standards, Nazih Hammad analyzes that the impermissibility of a capital owner to require a guarantee to the manager is based on the *sadd al-dharī'ah* (precaution/prevention) considerations. Furthermore, Nazih Hammad explains this matter at length as follows:

> "(The prohibition of) Capital owners (Islamic banks) to require the managers (customers-*muḍārib)* to guarantee the business capital of the banks is a preventive measure (*sadd al-dharī'ah*). Thus, the banks are prevented from *qardh* contracts by adding interest to the customers. Terminologically, sadd *al-dharī'ah* is permissible (to do), but it is only a medium to achieve the prohibited things. As explained by al-Shathibi (the prohibition of these actions), the essence of such an action is because of its role in turning something that has benefit into damage. Ibn Taimiyyah said that in the view of fiqh scholars, *sadd al-dharī'ah* is prohibited due to its role as a medium for unlawful acts. The damage will never exist if the role does not exist" (Hammad, 2007).

In addition, to refute the opinion of scholars who prohibit capital owners from asking the capital manager for a guarantee of capital return if the business suffers a loss for any reason, Nazih Hammad expressed his opinions as follows:

> ".... In fact, something that is prohibited because of *sadd al-dharī'ah* is lighter

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> (in prohibition level) than something that is unlawful because of *maqāshid* (purpose); and in fact, what is used for being a medium (*wasīlah*) is something that is not used for being a maqāshid; and what is prohibited because of *sadd al-dharī'ah*, in fact, it is permitted if there is a necessity (*al-ḥājah*) and a clear benefit." (Hammad, 2007)

After explaining and clarifying the opinions of the scholars and analyzing the arguments, Nazih Hammad expressed his quite controversial opinion, stating that it is permissible for the capital owners to require a guarantee from the capital manager in the event that the *muḍārabah* business suffers a loss. Nazih also admitted that his opinion violates the sharia provisions or standards, strictly prohibiting guarantees in *muḍārib* contracts. Then, Nazih Hammad expresses his opinion as follows:

> "It seems clear to me after paying attention to the differences among the scholars along with the arguments used about the requirement for the capital manager to guarantee a return on capital under various conditions, whether because of damage, reduction, loss, or other reasons, and then examining it objectively based on scientific consideration, away from the fanatic attitude toward mazhab or following lust. The strong opinion is the opinion that states a guarantee of capital return by the capital manager is valid, with the condition that it is to make the manager guarantee capital. Paying attention to many objections against the opinions of the scholars who prohibit it, the stronger one is those allowing it.
>
> And the arguments of the majority of scholars that are refuted (answered), we determined that no sharia argument prohibits the permissibility. The opinion of the scholars that permit it does not violate the agreed (*muḍārabah* contracts) provisions, nor is it a forbidden act, because it is classified as usury, gambling, or *gharar* trading. It does not contain real difficulties (*mafsadah*). There is no doubt that (an opinion that permits) as well as the better and the more important opinions than the stringent one (*tasyaddud*) that prohibits it, then looks for loopholes to (allow) capital managers to guarantee capital using various ways of *ḥīlah*... Allah Knows Best." (Hammad, 2007)

Nazih Hammad's opinion above, as informed by Abu Umar Dubyan Ibn Muhammad al-Dubyan, *al-Mu'āmalāt al-Māliyyah Asālah wa Mu'āsirah* is also an opinion from classical scholars such as Ibn Basyir and his disciple Ibn 'Utab, al-Syaukani and a contemporary scholar Sami Hamoud (al-Dubyan, 1432).

In contrast to Nazih Hammad's opinion, in the fatwa of the National Sharia Board of Indonesian Ulama Council (DSN-MUI) No. 105/DSN-MUI/X/2016

regarding Capital Return Guarantees on *Muḍārib, Mushārakah* and *Wakālah bil Isthitmar* Financing, point number (3) states that *"the manager is allowed to guarantee capital return at his own will without a request from the capital owner."*

Even though that provision is different from the provisions in the AAOIFI Sharia Standards, according to the authors' analysis, point number (3) in the DSN-MUI fatwa has an adequate legal basis in the form of *nas shara'* (Islamic legal texts), *fiqh* principles, and the opinions of the scholars. The argument used as a basis is a hadith, stating: "*Muslims are bound by the conditions they make*" and several *fiqh* principles on the obligation to fulfill a commitment. Even if it is returned to the basic principles in *mu'āmalāh māliyyah,* it is permissible until an argument that prohibits it comes. Another opinion by scholars is as follows:

> "The absence of arguments from the Quran or hadith about the impermissibility of requiring guarantees in *amānah* contracts makes the commitment to fulfill that condition not become unlawful" (al-Dubyan, 1432).

The next argument is an analogy (*qiyas*), which analogizes the capital manager with *ajīr mushtarak*/general worker (a worker whose benefits are shown to many *mu'jīr* and others). According to the Maliki scholars, *ajīr mushtarak* acts as a trustee. However, due to his concern about a potential moral hazard and treacherous acts and possible public benefits, asking for a guarantee is allowed based on *istiḥsān*. Even Ibn Rusyd argues that having a guarantee on *ajīr mushtarak* is an effort to bring benefits, coupled with an emergency consideration. However, if the element of emergency is missing, it returns to the initial rulings, in which the *ajīr mushtarak* is the trustee (al-Qurthubi A. a.-W., 1988).

Considering the legal provision point number (3) in the DSN-MUI fatwa that: *"the manager is allowed to guarantee a return on capital at his own will without a request from the capital owner"* (Hammad, 1320)*, tabarru' (*charity*)* carried out by the fund manager on his own initiative without any coercion. Scholars from among the Malikiyah argue that it is permissible in *amānah* contracts if the trustee does tabarru' or charity (one of which is a commitment to guarantee capital return) after the contract is executed. This means that the contract, which originally has the nature of *amānah,* becomes *ḍamānah* due to the presence of the commitment (*illāzm*). In the view of Malikiyah, this is a form of *tabarru'* in goodness, so the capital manager must fulfill the commitment (Hammad, Madā Shihah Tamḍīn Yad al-Amānah bi al-Syarth Fī al-Fiqh al-Islām, 1320).

According to Nazih Hammad, the Malikiyah scholars, based on a popular opinion, stated *taṭawwu/tabarru'* committed by capital managers to guarantee

capital return is carried out after the contract takes place, and that commitment is binding (Putra, 2018; Hammad, 1320). Therefore, the commitment is a *wa'ad mulzim (*binding promise). In the context of the DSN-MUI fatwas, the promise/ *wa'ad* in business and financial transaction activities are *mulzim* (legally binding). This aligns with the DSN-MUI Fatwa No. 85/DSN-MUI/XII/2012 about Promises (W*a'ad)* in Sharia Financial and Business Transactions (Panji Adam Agus Putra, 2022). The provision of the legally binding promise (*wa'ad mulzim*) is an opinion by some Shafi'iyah scholars and Ibn Shubramah based on the considerations of benefit values (Putra, Konsep Wa'ad dan Implementasinya dalam Fatwa Dewan Syariah Nasional-Majelis Ulama Indonesia, 2018).

Based on the above explanations, it is permissible for the fund manager to commit to guaranteeing fund return if it is done after the contract occurs, not before. However, in the DSN-MUI Fatwas, it is not explained in detail when the commitment is done, whether it is after or before. If this guarantee is made before the contract occurs, the concern is with the possible *tuhmah* (negative accusation) that the *muḍārabah* contract is just jargon. Meanwhile, what happens is a *qard* (loan) contract. Thus, an explanation is needed in the fatwa of DSN-MUI 105 of 2016 regarding when the *āmil is* permitted to guarantee the capital return.

This paper argues that provision number (3) of the DSN-MUI fatwas is an application of *muqtaranah bi al-sharth (*conditions accompanying a contract) contract. According to Muhammad Uthman Shubair, a condition that accompanies a contract is an obligation/commitment (*iltizām*) determined at the time the contract was made and is an addition to the principle and legal consequences of the contract (*muqtaḍa al-'aqd*). These become an integral part of the contract's elements which becomes the basis of willingness (of the parties)" (Syubair, 2009).

Discussions related to the *muqtaranah bi al-sharṭ* contract have created pros and cons among *fiqh* scholars. However, the eminent opinion is that it is permissible to have a contract accompanied by a condition (*muqtaranah bi al-sharṭ*) if it does not contradict *nash syara*' (Islamic legal text) (al-Syadzali, 2009). Thus, the commitment to guaranteeing capital in the DSN-MUI fatwas is supported by the permissibility of the *muqtaranah bi al-sharṭ* contract.

The following legal provision in the DSN-MUI Fatwa No. 105 of 2016 is the ruling on a guarantee by a third party contained in the legal provision No. 4, stating: *"The capital owner may ask a third party to guarantee a return on capital".*

The legal discussion of whether or not a capital owner may require a third party to guarantee capital return has led to disputes among *fiqh* scholars, resulting

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in two different opinions (Tayah, 2016). The first opinion prohibits the guarantee as it can lead to *ribā.* Also, it is out of the substance of the *muḍārabah* contract. This is an opinion of contemporary *fiqh* scholars such as Taqi al-Din Uthman, Sadiq Darir, and Yusuf al-Shabili.

The second opinion allows a third party to add a guarantee in *muḍārabah* contracts. This opinion is by Majma' Fiqh Islami, Sami Hamoud, and Mundzir Qahf. This opinion is based on the Hadith of the Prophet (PBUH) and the *fiqh* principles, one of which is a hadith narrated by Abu Dawud as follows:

> "Rasulullah *shallallahu' alaihi wasallam* once borrowed some armour during the Hunain war, then he said, "Is this a usurpation, O Muhammad!". The Prophet (PBUH) replied: "No, it is a loan that will be guaranteed" (H.R Abu Dawud) (al-Sijistani, nd).

The argumentation of this hadith is basically *'āriyah* or a trust-based contract. However, when the Prophet Muhammad (PBUH) committed to including a guarantee, this commitment was binding. This is analogized to business capital that was once *amānah* and changed to *ḍamānah* because of conditions (commitment to guarantee). In this case, a third party can be a guarantor, whether the third party is an individual or an institution. If the third party commits an act of *tabarru'*, that he is not involved in the contract, then the guarantee inclusion is permissible. If *ḍamān* is allowed by the borrower in the *'āriyah* contract, then it is also permissible for a third party to be a guarantor in *muḍārabah* contracts. Likewise, if the capital manager is allowed to commit to guaranteeing a return on capital, then a third party's permissibility is preferable.

The *fiqh* principle used as an argument is a principle regarding the permissibility of *mu'āmalah* transactions as long as no argument prohibits them. The principle is as follows:

> "Basically, in matters of contract, it is valid and permissible as long as no argument prohibits it" (Abshish, 2016).

Mutabarru' is (a person who does a charity) (al-Syamri, 1433). The *tabarru'* in assets is permissible, while the *tabarru'* in terms of *damān* (guarantee) is preferable (al-Syamri, 1433). The guarantee made by a third party is a form of *wa'ad mulzim* (binding promise) and is not included in the contract. So the position of the promise is binding both morally and legally (al-Syamri, 1433).

Based on the description above, the authors argue that the more predominant (*rājiḥ*) opinion regarding guarantees committed by a third party is the one that

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permits it. This is based on the following considerations: (1) strong arguments of the opinions that allow it; (2) there is a need and a benefit to mitigate business risk; and (3) as a form of capital protection from the risk of loss or unwanted situations.

Therefore, it can be concluded that the legal provisions of the DSN-MUI Fatwa No. 105 of 2016 Provision number (4), that a capital owner may ask a third party to guarantee a return on capital, does not contradict Islamic texts (*nas shara* and is even supported by various arguments such as hadith, *fiqh* principles, Islamic legal scholars' opinions, and other legal considerations.

Conclusions

In principle, the requirements of capital guarantee in trust-based contracts are prohibited. This is a legal decision from the AAOIFI Sharia Standards, which is the opinion of most Islamic legal scholars, and the National Sharia Board of Indonesian Ulema Council (DSN-MUI) Fatwas. The legal provision in the AAOIFI Sharia Standards is a more reassuring opinion and prioritizes the principle of *iḥtiyāṭ* (precaution). As for the legal provision in the DSN-MUI fatwas, the permissibility for the capital manager to guarantee a return on capital is a form of commitment in the form of *tabarru'* from the fund manager. This must be fulfilled because the commitment is a *wa'ad mulzim* (binding promise).

The DSN-MUI fatwas regarding the permissibility of the capital owner to ask the third party to become is not conflicted with *nash shara*'. Various Islamic legal bases, such as hadith, *fiqh* principles, opinions of Islamic legal scholars, and other legal considerations, even support this argument. This legal provision in the DSN-MUI fatwas is a form of innovative *ijtihād* that seems different from the opinion of the majority of scholars. However, the fatwa is more applicable in the Indonesian context, especially when used as a product in Islamic financial institutions in Islamic and non-Islamic banks.

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