54. Fidler, *Practice and Law of Banking*, 329.
55. Contract Act, 1872, section 130.
56. Fidler, *Practice and Law of Banking*, 330.
57. Contract Act, 1872, section 131.
58. Terry and Guigni, *Business, Society and the Law*, 945.
59. Fidler, *Practice and Law of Banking*, 303.
60. Ibid.
61. Ibid.
62. See the English translation of Shari'ah Standard No. 5 issued by the AAOIFI, on page,53.
63. Hans Wehr, *A Dictionary of Modern Written Arabic*, s.v. "*ðamàn*".
64. See Abū Bakr al-Kāsānī, *Badā'i' al-Ṣanā'i'*, vol. 4, 600 (see also the Urdu translation of this book). Wahbah al-Zuhaylī attributes the use of this term to al-Māwardī in a classification given by him. See Wahbah al-Zuhaylī, *al-Fiqh al-Islāmī wa Adillatuhu*, vol. 6, 4141.
65. See AAOIFI, *Shari'ah Standards: 1423 H–2002*, 57–67.
66. See *Sharī'ah Standard No. 5*, 74; Wahbah al-Zuhaylī, vol. 6, 4141; the verse is relied upon for *kafālah* in most books of *fiqh*, as already stated.
67. The tradition is recorded by al-Nasā'ī, Ibn Màjah and al-Bayhaqī in their *Sunan*.
68. See *Sharī'ah Standard No. 5*, 74.
69. Ibid.
70. The tradition is recorded by Aḥmad ibn Ḥanbal, Abū Dāwūd, al-Tirmidhī and others.
71. Abū Bakr al-Kàsànī, *Badā'i' al-Ṣanā'i'*, vol. 4, 600.
72. For the details of the two types of *kafālah*, see Abū Bakr al-Kāsānī, *Badā'i' al-Ṣanā'i'*, vol. 4, 600 onwards and Wahbah al-Zuhaylī, *al-Fiqh al-Islāmī*, vol. 6, 4141 onwards.
73. As stated above.
74. Abū Bakr al-Kàsànī, *Badā'i' al-Ṣanā'i'*, vol. 4, 611; Wahbah al-Zuhaylī, *al-Islāmī*, vol. 6, 4144.
75. Abū Bakr al-Kàsànī, *Badā'i' al-Ṣanā'i'*, vol. 4, 611; Wahbah al-Zuhaylī, *al-Islāmī*, vol. 6, 4144.
76. Abū Bakr al-Kàsànī, *Badā'i' al-Ṣanā'i'*, vol. 4, 611; Wahbah al-Zuhaylī, *al-Islāmī*, vol. 6, 4165.
77. Abū Bakr al-Kàsànī, *Badā'i' al-Ṣanā'i'*, vol. 4, 612; Wahbah al-Zuhaylī, *al-Islāmī*, vol. 6, 4166.
78. Abū Bakr al-Kàsànī, *Badā'i' al-Ṣanā'i'*, vol. 4, 612; Wahbah al-Zuhaylī, *al-Islāmī*, vol. 6, 4166.
79. Abū Bakr al-Kàsànī, *Badā'i' al-Ṣanā'i'*, vol. 4, 612; Wahbah al-Zuhaylī, *al-Islāmī*, vol. 6, 4167.
80. See Wahbah al-Zuhaylī, *al-Fiqh al-Islāmī*, vol. 6, 4167.
81. *Shari'ah Standard No. 5*, item 3/1/2.
82. Ibid., item 3/1/4.
83. Ibid.
84. Ibid., item 3/1/5.
85. Ibid., item 3/2.
86. Ibid., item 3/3/1.
87. Ibid.
88. Ibid., item 3/3/2.
89. Ibid., item 3/3/3.
90. Ibid., item 3/1/1.
91. Ibid., item 3/1/4.
92. For example, Abū Bakr al-Kāsānī discuss it in *Badā'i' al-Ṣanā'i'*, vol. 4, on page 613.
93. See ibid., 606. The Author stipulates that the debt should be known.

29. The Contract Act provides the details of such liability and requires the co-sureties to contribute equally. Contract Act, section 146 and other sections following.
30. Is entitled to.
31. This right is affirmed by the Contract Act. It says that on payment or performance, the surety "is invested with all the rights which the creditor had against the principal debtor." Contract Act, 1872, section 140.
32. Terry and Guigni, *Business, Society and the Law*, 948.
33. Ibid. The Contract Act says that the surety is discharged if any variation is made in the principal contract without the surety's consent. Contract Act, 1872, section 133.
34. Terry and Guigni, *Business, Society and the Law*, 948.
35. The Contract Act grants the surety the right to benefit of the securities that the creditor holds against the principal debtor. If the creditor loses or parts with such securities, the surety is discharged, even if he is not aware of such securities. Contract Act, 1872, section 141.
36. Terry and Guigni, *Business, Society and the Law*, 949, citing the decision by Lord Eldon in Aldrich v Cooper (1803), 32 ER 402 at 405 and Dixon J. in Williams v Frayne (1937), 58 CLR at 738.
37. If one of the co-sureties is released by the creditor, the other sureties are not discharged, and the released surety remains liable to the other sureties.
38. Terry and Guigni, *Business, Society and the Law*, 949, citing A.E.Goodwin Ltd. v A.G.Healing Ltd. (1979), 7 ACLR 481 at 490.
39. Barron, *Fundamentals of Business Law*, 341; Terry and Guigni, *Business, Society and the Law*, 945. The Contract Act defines the contract of indemnity and says that loss may be caused by the indemnifier himself or the conduct of another person.
40. Terry and Guigni, *Business, Society and the Law*, 945. Such loss includes any damages paid by the promisee or costs incurred in a related suit. Contract Act, 1872, section 125.
41. Barron, *Fundamentals of Business Law*, 341.
42. Ibid.; Terry and Guigni, *Business, Society and the Law*, 945.
43. For example, an indemnity in favour of employees in respect of liabilities incurred by them in the course of employment. Terry and Guigni, *Business, Society and the Law*, 946.
44. Terry and Guigni, *Business, Society and the Law*, 946. An examination of the form of guarantee required by Pakistani banks may reveal that the document has both guarantee and indemnity mixed up in the same document that goes by the name of guarantee.
45. Ibid.
46. Fidler, *Practice and Law of Banking*, 305.
47. Ibid., 321.
48. Contract Act, 1872, section 134. This section mentions a contract between the creditor and the principal debtor.
49. Contract Act, 1872, section 135.
50. Contract Act, 1872, section 136.
51. Contract Act, 1872, section 137.
52. Contract Act, 1872, section 133.
53. Contract Act, 1872, section 139. The section should also cover unlawful disposal of the securities held against the principal debtor, as stated above, but the Act has mentioned it expressly.

Reference

1. Clive Boxer, *Professional Liability Today* (1988).
2. *Black's Law Dictionary*, s.v. "Guarantee" and "Guaranty".
3. Leaving the rest of the world confused.
4. P.J.M. Fidler, *Sheldon and Fidler's Practice and Law of Banking*, 11th ed. (London: Pitman, 1985), 303.
5. Andrew Terry and Des Guigni, *Business, Society and the Law*, 2nd ed. (Australia: Harcourt Brace, 1997), 945.
6. *Black's Law Dictionary*, s.v. "Guaranty".
7. Ibid.
8. Contract Act, 1872, section 126.
9. Contract Act, 1872, section 128.
10. Terry and Guigni, *Business, Society and the Law*, 945. The Contract Act defines it as follows: "A contract of guarantee is a contract to perform the promise, or discharge the liability, of a third person in case of his default." Contract Act, 1872, section 126. The words "in case of his default" distinguish it from the contract of indemnity.
11. Terry and Guigni, *Business, Society and the Law*, 945.
12. Ibid.
13. M.L.Barron, *Fundamentals of Business Law*, 3rd ed. (Australia: McGraw Hill, 2000), 340.
14. Consideration in a guarantee is defined as: "Anything done, or any promise made, for the benefit of the principal debtor." Contract Act, 1872, section 127.
15. The creditor's forbearance to sue does not discharge surety. Contract Act, 1872, section 137.
16. Fidler, *Practice and Law of Banking*, 305.
17. Barron, *Fundamentals of Business Law*, 340; Terry and Guigni, *Business, Society and the Law*, 945.
18. As stated in Contract Act, 1872, section 126.
19. Barron, *Fundamentals of Business Law*, 342; Terry and Guigni, *Business, Society and the Law*, 945. The special rules for guarantee in the Contract Act, 1872 are contained in sections 127 to 147.
20. Barron, *Fundamentals of Business Law*, 342.
21. Contract Act, 1872, section 126. This is strange as the rule in England, much before the Contract Act was drafted, was that guarantees be written.
22. Contract Act, 1872, sections 142 and 143.
23. Barron, *Fundamentals of Business Law*, 342; Terry and Guigni, *Business, Society and the Law*, 948.
24. Barron, *Fundamentals of Business Law*, 342.
25. In Pakistani law, the liability of the guarantor is co-extensive with the debtor, that is, if interest is owed on an amount due, the surety is liable for that too. Contract Act, 1872, section 128.
26. A guarantee that extends to a series of transactions is called a continuing guarantee. Contract Act, 1872, section 129.
27. Terry and Guigni, *Business, Society and the Law*, 948, citing *A Pocketful of Change* (Martin Report).
28. Ibid.

7. It is permitted to the guarantor to set an order in which the demand is made, that is, the creditor demanding the debt from the principal debtor, and upon default, demanding it from the guarantor[87]. This means that secondary liability for the guarantor can be created, but is not essential and he may consent to have primary liability.
8. If the creditor absolves the principal debtor of the debt liability, the guarantor's liability is terminated. If the creditor absolves the guarantor of liability, the liability of the principal debtor still stands[88].
9. The contract of *kafālah* may be part of a loan agreement or be independent of it[89].
10. It is permitted to have more than one guarantor[90].
11. In the case of future obligations, the guarantor may determine the guarantee by notice served upon the creditor, but this is done before the debt liability has arisen[91].

The Standard does not discuss ways in which the contract of guarantee is determined. A perusal of the books of *fiqh* shows that this is almost the same or the same rules can be easily derived[92]. We are not dealing with this issue here.

Conclusion

A comparison of the contract in both legal systems shows that the contract is almost exactly the same. This does not mean that there are no problems when the contract is compared with *fiqh* literature. For instance, the jurists may not allow a guarantee for an unknown debt or for a debt that has not come into existence as yet[93].

different legal effects. Likewise, the contract of *salam* has been given a specific name for legal effects that are implied by the term used for the contract. The legal effect is the immediate payment of the price and its possession within the session of the contract. It also implies the delay of the goods bought. The meaning of *ṣarf* is the payment of each counter-value within the session. In the same way the contract of *kafālah* conveys the meaning of merger of liabilities. The implication is that one *dhimmah* be merged with another. This is not possible if the principal debtor is absolved of liability. As distinguished from this *ḥawālah* means transfer, and this meaning is realised when the liability is transferred from the *dhimmah* of the principal debtor[79].

The above analysis leads the jurists to conclude that the creditor has the choice to claim the debt from any of the two debtors, the principal debtor or the surety, and to make a demand upon any of them. It may be added here that under certain circumstances the principal debtor can be absolved of liability in a contract of *kafālah* through stipulation. From this we may conclude that primary and secondary liability can also be varied[80].

The Rules of the Contract of Guarantee (*Ḍamān*) in Islamic Law

The rules for *kafālah* will now be stated very briefly with the purpose of comparison with the contract of guarantee in Western law. For this purpose we have relied upon the *Sharī'ah Standard* alone, although most of the rules can be derived from the books of *fiqh*, both earlier and modern.

1. *Kafālah* is of two types: *Kafālah* that is with the consent of the principal debtor and *kafālah* that is without the consent of the principal debtor. The banks only accept the form in which the principal debtor has given his consent[81].
2. It is permitted to fix a period of the guarantee and to determine and amount to be paid[82].
3. It is also permitted to make the contract conditional and to associate it with a future obligation[83].
4. It is not permitted to charge an amount for providing a guarantee, but the guarantor is entitled to the costs incurred[84].
5. It is permitted to guarantee a debt that is not determined as yet or one that has not become due as yet[85].
6. It is permitted for the creditor to demand the debt, at his choice, from the principal debtor or from the guarantor[86].

meeting this demand depends upon the original debt. In this situation, even though the debt is due from them both, the demand can be directed to either one of them, just like the case of the usurper who has usurped from the first usurper (*ghāṣib*). Each one of them is liable for the value of the property, but the property itself is due only from one of them[75].

Liability in *Kafàlah* Compared to Liability in *Ḥawālah*

To better understand the meaning of *kafālah*, it needs to be compared to *ḥawālah* (transfer of debt). *Ḥawàlah* and its derivative meanings convey the idea of transfer from one location to another. The legal meaning is the transfer of the debt from the liability (*dhimmah*) of the principal debtor to that of another person within a relationship of trust and creditworthiness. The jurists disagree about the legal implications of the two contracts.

1. **The Ḥanafī view**. According to the H;anafī jurists, the difference between *kafālah* and *ḥawālah* is that in *kafālah* the principal debtor is not absolved of liability (he remains liable for the debt), while in *åawàlah* the principal debtor is no longer liable for the debt after the contract of *ḥawālah* is concluded[76].
2. **Ibn Abī Laylā's view**. In Ibn Abī Laylà's view, the contract of *kafālah* absolves the principal debtor of liability as in the case of *ḥawālah*. The basis is that the debt is established against the liability (*dhimmah*) of the surety and this necessarily absolves the principal debtor of liability. The reason is that as long as one *dhimmah* holds the debt completely, all other *dhimmas* have to be free of it. If it moves from this to another *dhimmah*, the first one becomes free. As the debt is established against the *dhimmah* of the surety, the *dhimmah* of the principal debtor becomes free. Thus, in his view, in both *ḥawālah* and *kafālah*, the principal debtor is absolved of liability[77].
3. **Imām Zufar's view**. As distinguished from this view, Imàm Zufar maintained that in the contract of *ḥawālah* the principal debtor is not absolved of liability. Thus, in both *ḥawālah* and *kafālah*, the principal debtor remains liable. In his view, the only thing that is added through the contracts is that the demand for the debt has been strengthened or doubled, not that it has been removed altogether from one of the parties[78].
4. **The Response of the Ḥanafī jurists**. To counter these arguments, the Ḥanafī jurists maintain that each contract, that is, *ḥawālah* and *kafālah*, has been assigned a different name and this indicates

guarantee, because guarantee is a kind of a loan to the principal debtor and charging for it will convert it into a contract of *ribā*[69].

The evidence for guaranteeing an unknown amount or a future obligation is the tradition *al-za`īm ghārim*. It may be translated as: the gurantor is liable (for the debt)[70]. The Åanafī jurists rely on this tradition for the legality of *kafālah*[71]. As the tradition conveys an unqualified meaning, it is considered to cover all eventualities.

Types of *Kafâlah*

Kafālah in *fiqh* is primarily of two types[72]. The first is *kafālah bi'nafs* or surety for the person. This is the old contract of suretyship for producing the person, and in which the guarantor sometimes became a hostage[73]. It can be compared to the provision of bail in criminal cases today. The other type is *kafālah bi'l-māl* or standing surety for debts. This second type is the subject matter of this paper and we shall focus on this type.

The Liability of the Surety and the Principal Debtor in Islamic Law

The Nature of *Kafālah* and Liability

In order to understand the liability of the principal debtor and the surety in Islamic law, it is essential to see how the nature of the contract of *kafālah* is understood and how its meaning is traced in *fiqh*. The meaning of *kafālah* is understood in two ways:

1. **Merger of Liabilities With Respect to the Demand**: The first way of considering the nature of *kafālah* is to treat it as the merger of liabilities for purposes of demand of the debt for the parties, but not with respect to the debt itself. The debt remains the liability of the principal debtor as it was originally. The surety, however, becomes subject to demand from the creditor just like the principal debtor. This case is similar to the separation of demand for the debt in the case of the agent and the principal in the case of a *bay'* (sale). The *ḥuqūq* and the *ḥukm* are separated. Likewise, in this case the demand is directed towards the surety when the debt remains attached to the *dhimmah* (liability) of the *aṣīl* (principal debtor). It may also be compared to *rahn* (pledge) where the right of disposal is separated from the ownership of property. Likewise, in this case[74].
2. **Merger of Liabilities With Respect to the Debt**. The second way is to merge the liability (*dhimmah*) of the surety with the liability of the principal debtor for the debt itself. The basis here is that *kafālah* here is a credit given to the principal debtor attached to his *dhimmah* and the obligation for meeting the demand of the debt. The obligation for

Islamic law and we feel that there is a need to be more precise. The following contracts and transactions are included in this standard under the heading of guarantees[65].

1. Guarantees in contracts of trust (*amānah*).
2. Guarantees for existing leased properties.
3. Personal guarantees (*kafālah*).
4. Pledges (*rahn*).
5. Letters of guarantee.
6. Documentary credits.

Types of *Kafālah*: Surety and *Ḍamān*

Examining the Evidence (*Dalīl*) for *Kafālah*

In almost every book on *fiqh*, whether classical or modern[66], the following verse of the Qur'ān [Qur'ān 12:72] is quoted as evidence for the legal validity of the contract of guarantee or *kafālah*:

They said: "We miss the great beaker of the king; for him who produces it, is (the reward of) a camel load; I will be bound by it."

The argument advanced is that as the word *za'īm* means *kafīl* (surety), therefore, the contract of *kafālah* is legally valid. We find it difficult to agree with this reasoning. An examination of the transaction that is the subject-matter of the verse reveals that this is not the contract of *kafālah*, but what is called a "general offer," a unilateral contract that becomes binding on both parties once the promisee completes the act required. In Islamic law it goes by the name of *ju'ālah*, also *ji'ālah*. In this case, the promisor is merely saying to the promisee that if he can bring the king's beaker he will have a camel load. The contract would have been valid even without the words "I will be bound by it." In our view, this evidence does not justify the contract of *kafālah*.

Thereafter, a tradition is quoted to support the contract. This is the tradition of Salmah ibn Akwa' in which the Prophet (pbuh) refused to offer funeral prayers over the indebted deceased till one person offered a guarantee for its repayment[67]. This tradition has another problem even though the contract of guarantee is clearly mentioned. It implies that the consent of the principal debtor is not required (dead in this case). If consent is not required, it is difficult to see how the guarantor will recover the debt from the principal debtor.

Consensus of the jurists (*ijmā'*) is also claimed for the contract[68]. The consensus also upholds the illegality of charging for the provision of

Applications of Guarantees

Lenders require that the repayment of loans be guaranteed, especially where otherwise unsecured[58]. Wherever an amount has to be repaid, guarantees are obtained. As a guarantee is the simplest form of security it is for that reason the commonest[59]. A guarantee, however, is not a particularly safe form of security[60]. Unless a charge is taken over some form of property, a loan secured by a guarantee is regarded by bankers as an unsecured loan[61].

The Contract of Guarantee in Islamic Law

The broad features of the contract of guarantee in law have now been identified. These features will enable us to compare this contract with its counterpart in Islamic law. For purposes of comparison we will rely mostly on Shari'ah Standard No. 5 issued by the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI). The title of the standard is *Ḍamānāt*. The word has been translated as "Guarantees"[62]. Where needed, we will also refer to the works of the earlier jurists and modern scholars.

The Meaning of the Word *Ḍamàn*

The word *ḍamān* in its literal modern sense means: to be or become responsible; be guarantee; give security or guarantee; ensure; safeguard; to insure; to be jointly liable; and to have joint responsibility[63]. When we examine the literature on *fiqh*, we find the term *ḍamān* being used in almost every area of the law. Thus, it is found in criminal law, in the sense of paying compensation for an injury caused. The meaning of compensation is found in other areas of the law as well. Another meaning is that of liability, which is also the modern meaning. Thus, we say "so and so will be held liable for this" or "will pay compensation for this." It is also used in the sense of the capacity or readiness " to bear loss" as in the *qā'idah*: "*al-kharāju bi'ḍ-ḍamān.*" Nevertheless, despite this variety in meanings, we do find the earlier Muslim jurists using the term *ḍamàn* for the contract of guarantee in Islamic law. This is the contract of *kafālah* where it applies to wealth and debts, that is, *kafālah bi'l-māl*[64].

Ḍamàn and *Shari'ah* Standards for Islamic Banks

Shari'ah Standard No. 5, referred to above, uses the term *ḍamānāt* (guarantees) in the modern sense and then includes a large number of contracts under it that are not guarantees, but independent contracts, even though their purpose is the provision of security or collateral. The use of the term *ḍamān* in this imprecise way brings vagueness into the study of

2. **Discharge by release of the principal debtor.** An express release of the principal debtor from all further liability will discharge the guarantor, because such release extinguishes the guaranteed debt[47]. This includes any act or omission of the creditor the legal consequence of which is the discharge of the principal debtor[48].
3. **Discharge by agreement to give time.** The Contract Act states that the surety is discharged when a contract between the creditor and the principal debtor leads to a composition, the granting of more time, or an agreement not to sue the principal debtor, unless the surety assents to such contract[49]. In contrast, when the creditor makes a contract with a third person to give more time to the principal debtor, the surety is not released[50]. Further, mere forbearance on the part of the creditor will not discharge the surety[51].
4. **Discharge by material variation of principal contract.** Any variance, without the surety's consent, in the terms of the principal contract discharges the surety *as to transactions subsequent to the variance*[52].
5. **Discharge by material variation of contract of guarantee and creditor's act or omission impairing surety's eventual remedy.** If the creditor departs from the terms of the guarantee, like not giving a period stipulated to the principal debtor, or does any act inconsistent with the rights of the surety, so that eventual remedy against the principal debtor is impaired, the surety is discharged[53].
6. **Discharge by change in legal position of the parties.** This is not mentioned by the Contract Act, 1872, however, it is settled law in England. It covers, for instance, cases of partnerships where the constitution of the partnership is subsequently changed or new partners are admitted[54].

Determination of Guarantees

1. **Determination by notice.** A continuing guarantee may be revoked any time as to future transactions, by notice to the creditor[55]. It is possible, however, to include a clause in other guarantees that they will be revoked by notice[56], but it is difficult to imagine a bank accepting such a condition.
2. **Determination by death.** In the absence of any contract to the contrary, the death of a surety operates as a revocation of a continuing guarantee with respect to future transactions[57].
3. **Determination by mental incapacity or bankruptcy.** This will apply to future and not to past transactions. Mental incapacity will be governed by sections 11 and 12 of the Contract Act, 1872.

the principal contract without the express or implied consent of the guarantor[33]. The guarantor also has the right to set-off any proper counter-claim against the creditor[34]. The subrogation also entitles the guarantor to benefit of any securities of the debtor held by the creditor[35]. The fact that such subrogation is not mentioned in the guarantee does not prevent the operation of such right[36].

The guarantor who is obliged to pay is entitled to demand contribution from the co-guarantors[37]. This form of liability is not affected by multiple or separate documents of guarantee[38].

Guarantee Distinguished From Other Contracts

A contract of guarantee is different from indemnity in a number of respects. A contract of indemnity is where one party (the indemnifier) undertakes to become liable to another against any loss arising out of a transaction with a third party. *The liability arises irrespective of any default*[39]. Indemnity involves an undertaking to keep the party to whom it is given free from loss[40]. An indemnity contract involves two parties, while guarantee involves three[41]. Liability on an indemnity is *primary*, and is activated in the event of something happening. The guarantor, however, is liable only if the principal debtor defaults. The guarantor's liability is, therefore, secondary[42]. The liability on an indemnity may arise from the terms of the contract of indemnity or by legal implication[43]. This shows that an indemnity need not be written.

It is important to note that a distinction between a guarantee and indemnity is often blurred and to avoid problems lenders frequently require both undertakings in support of a loan[44].

A *letter of credit* issued by a bank on behalf of a client to a third party in reality constitutes a guarantee, but is not strictly regarded in law as a guarantee, and particular rules of law applicable to guarantees are not applied to letters of credit as regards interpretation and enforcement[45]. As compared to this, a *letter of comfort*, for example one issued by a holding company about the future financial stability of its subsidiary, is not considered a guarantee and the rules of guarantee do not apply to it.

Discharge of the Guarantor (Surety)

The ways in which the guarantor is discharged from liability are listed below with brief explanations.

1. **Discharge by payment.** A guarantor is discharged from his obligation under the guarantee if the principal debtor pays the principal debt. Such discharge is revocable as the payment may be fraudulent[46]

The obligation that is being guaranteed is most often the payment of money. It does not have to be, and may be the performance of a particular act[13]. The consideration moves from the creditor and is in reality his assurance to the guarantor[14], who has made the request, that he will forbear for some time, that is, he will give time to the principal debtor[15]. This is valid as consideration does not have to be passed on to the guarantor[16].

It is obvious from the above explanation that the guarantor has *secondary liability*[17], and the liability arises only on default by the debtor[18]. The contract of guarantee is a contract and not a mere unilateral promise. It is covered by the general principles of contract law as to its creation and interpretation. In addition, the special rules of guarantee law also apply to it[19]. Although liability of the guarantor is secondary, it is not necessary that the principal debtor be sued first. The creditor can bring action against the guarantor immediately a default has occurred[20]. The guarantor, however, is not liable, unless the debtor defaults. A contract of guarantee may be either oral or written[21], but oral guarantees are useless as far as banks are concerned. A guarantee obtained by misrepresentation or concealment is not valid[22].

Liability of the Guarantor

The liability of the guarantor commences upon default by the debtor[23]. In other words, as stated earlier, the liability is secondary. Thus, upon default by the debtor, the creditor need not sue the debtor; he can sue the guarantor directly[24].

The scope of the liability depends upon the terms of the guarantee. The guarantee may cover the entire debt or a particular amount[25]. Again, the guarantee may be specific, extending up to a specified time, or continuing[26]. There are guarantees that are called "all monies" guarantees. These create a very broad liability, but are discouraged by the law[27]. The courts in general interpret guarantees strictly, and in case the terms are vague, they tend to favour the guarantor[28]. Where there is more than one guarantor, they may be severally and jointly liable, and the creditor can have recourse to any one of them[29].

Rights of the Guarantor After he has Discharged the Liability

When the guarantor is required to pay, he is "subrogated"[30] to the creditor's rights, that is, he stands in the shoes of the creditor[31]. He can now sue the principal debtor for indemnity[32]. This is why guarantee is a contract and not merely a unilateral declaration. To protect this right of recourse of the guarantor, the creditor is placed under a duty not to modify

and suretyship are sometimes used interchangeably. According to some,suretyship is the old term for the contract of guarantee[4]. There is a historical distinction between "guarantor" and "surety" in that a surety was once a hostage, but there is no contemporary legal distinction and the use of both words together is redundant[5]. Yet, *Black's Law Dictionary* says that although the terms are used interchangeably, the two terms should not be confounded[6]. The contract of suretyship provides, it says, a joint undertaking with the principal debtor, while guarantee is an independent separate undertaking[7]. The Pakistan Contract Act uses the term "surety" in place of "guarantor"[8]. The Act also states that the liability of the surety is "co-extensive with the principal debtor"[9], but that is not joint liability. To avoid confusion, in this paper we will use the term guarantee and not suretyship. The word "surety" will be used in the meaning assigned to it by the Contract Act, 1872.

It may be stated at the outset that a comprehensive treatment of the topic of guarantee is beyond the scope of this paper. Accordingly, we will not discuss issues like the taking of a guarantee, that is, clauses usually incorporated in the forms of banks, variations in the position of the guarantor; variation in the terms of the original contract; and special types of guarantors. In other words, the focus of this paper will be on the nature of the contract of guarantee itself, so that it can be easily be compared with its counterpart in Islamic law. The description of guarantees in law will, therefore, attempt to highlight those points that are needed for comparison.

The Contract of Guarantee in Western and Pakistani Law

Parties to the Contract and Their Rights and Liabilities

The Contract

A contract of guarantee is one in which the guarantor agrees to perform the obligation, or to discharge the liability, of a third party if the latter fails to do so[10]. There are three parties to the contract[11]:

1. **The principal debtor:** He is the person primarily liable for the obligation or liability whether existing or contemplated.
2. **The creditor:** He is the person entitled to the benefit of the obligation or liability.
3. **The guarantor:** He promises the creditor to discharge the liability of the principal debtor if the debtor should fail to do so[12]. The guarantor is called surety in the Contract Act, 1872, as already stated.

THE CONTRACT OF GUARANTEE AND ISLAMIC BANKING

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Abstract

It may be stated at the outset that a comprehensive treatment of the topic of guarantee is beyond the scope of this paper. Accordingly, we will not discuss issues like the taking of a guarantee, that is, clauses usually incorporated in the forms of banks, variations in the position of the guarantor; variation in the terms of the original contract; and special types of guarantors. In other words, the focus of this paper will be on the nature of the contract of guarantee itself, so that it can easily be compared with its counterpart in Islamic law. The description of guarantees in law will, therefore, attempt to highlight those points that are needed for comparison

Key Words: Guarantee, Dama'n, Surety, Liability, Islamic Banking.

Introduction

Charles Dickens said that "Credit is a system whereby a person *who can't pay* gets another person *who can't pay* to guarantee that *he can pay*." In contrast to this, it is said that a guarantor is "a fool with a fountain pen"[1]. The purpose of this paper is to identify with precision the contract of guarantee in law, distinguishing it from closely resembling contracts and relationships, and then to elaborate the Islamic version of this contract with equal precision along with its applications in Islamic banking as it is prevalent today.

The words "guarantee" and "guaranty" are both used as nouns as well as verbs. The noun in both cases denotes the contract of guarantee or guaranty, while the verb denotes the act of providing a guarantee or guaranty[2]. It appears that there is no major distinction between the two words, and "guarantee" is preferred in England as well as in the United States, while "guaranty" is mostly used as a noun[3]. The terms guarantee

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