AAOIFI Certified Shari’ah Advisor and Auditor

CSAA study text

Edition 2024

Introduction

Certified Shari'ah Advisor and Auditor (CSAA) program is based on the AAOIFI Shari'ah Standards, AAOIFI Governance Standards and AAOIFI Auditing Standards, respectively.

This advanced-level fellowship program is designed for Islamic finance professionals seeking to develop correct understanding, interpretation and implementation skills in the requirements of Shari'ah, governance and auditing standards.

The emphasis of the program lies in building robust technical and practical knowledge, focusing on real-world applications of the standards within Islamic financial institutions (IFIs) and for transactions in the realm of Islamic finance.

Curriculum and examinable content

The curriculum of the CSAA program comprises of select Shari'ah, governance and auditing standards issued by AAOIFI, which are currently effective or will be effective within eight months of the given exam window.

As of 2024, the examinable content of the fellowship program includes standards with assigned weightage as follows:

- Part A: AAOIFI Shari'ah Standards – 60% weightage
- Part B: AAOIFI Governance Standards – 20% weightage
- Part C: AAOIFI Auditing Standards – 20% weightage

Candidates will be tested of their conceptual and practical understanding of the rationale, the requirements and the basis of conclusion of the respective standards.

Part A: AAOIFI Shari'ah Standards

No.	SS No.	Title
1	SS 31	Controls on Gharar in Financial Transactions
2	SS 25	Combination of Contracts

Islamic finance contracts and related topics

No.	SS No.	Title
Trade		
3	SS 1	Trading in Currencies
4	SS 8	Murabahah
5	SS 30	Monetization (Tawarruq)
6	SS 20	Sale of Commodities in Organised Markets
7	SS 10	Salam and Parallel Salam
8	SS 11	Istisna'a and Parallel Istisna'a
9	SS 57	Gold and its Trading Parameters in Shari'ah
10	SS 18	Possession (Qabd)
11	SS 38	Online Financial Dealings
12	SS 42	Financial Rights and How They Are Exercised and Transferred
Lease		
13	SS 9	Ijarah and Ijarah Muntahia Bittamleek
Services		
14	SS 23	Agency and the Act of an Uncommissioned Agent (Fodooli)
15	SS 46	Al-Wakalah Bi Al-Istithmar (Investment Agency)
16	SS 15	Jua'lah
17	SS 34	Hiring of Persons
Partnership		
18	SS 12	Sharikah (Musharakah) and Modern Corporations
19	SS 13	Mudarabah
20	SS 45	Protection of Capital and Investments

21	SS 40	Distribution of Profit in Mudarabah-based Investments Accounts
22	SS 50	Irrigation Partnership (Musaqat)
Options and promises		
23	SS 53	Arboun (Earnest Money)
24	SS 48	Options to Terminate Due to Breach of Trust (Trust-Based Options)
25	SS 51	Options to Revoke Contracts Due to Incomplete Performance
26	SS 52	Options to Reconsider (Cooling-Off Options, Either-Or Options, and Options to Revoke Due to Non-Payment)
27	SS 54	Revocation of Contracts by Exercise of a Cooling-Off Option
28	SS 49	Unilateral and Bilateral Promise
29	SS 58	Repurchase Agreement / Buyback
30	SS 36	Impact of Contingent Incidents on Commitments
Guarantees, documentary credit and Rahn		
31	SS 5	Guarantees
32	SS 39	Mortgage and its Contemporary Applications
33	SS 56	Liability of Investment Manager
34	SS 14	Documentary Credit
Dealing with debts		
35	SS 59	Sale of Debt
36	SS 4	Settlement of Debts by Set-Off
37	SS 7	Hawalah
38	SS 3	Procrastinating Debtor
39	SS 43	Insolvency
40	SS 19	Loan (Qard)
Islamic social finance		
41	SS 35	Zakah
42	SS 60	Waqf

Miscellaneous		
43	SS 22	Concession Contracts
44	SS 32	Arbitration
45	SS 29	Stipulations and Ethics of Fatwa in the Institutional Framework
46	SS 47	Rules for Calculating Profit in Financial Transactions

Islamic banking

No.	SS No.	Title
47	SS 28	Banking Services
48	SS 61	Payment Cards
49	SS 24	Syndicated Financing
50	SS 37	Credit Agreement
51	SS 44	Obtaining and Deploying Liquidity
52	SS 55	Competitions and Prizes
53	SS 6	Conversion of a Conventional Bank to an Islamic Bank

Islamic financial markets

No.	SS No.	Title
54	SS 17 / 62	Investment Sukuk / Sukuk[1]
55	SS 21	Financial Papers (Shares and Bonds)
56	SS 27	Indices
57	SS 16	Commercial Papers

[1] Shari'ah Standard No. 62 "Sukuk" is currently in exposure draft stage and will replace Shari'ah Standard No. 17 shortly. Whereas SS 62 will not be tested in 2024, candidates are nevertheless highly recommended to study the standard for deeper and clearer understanding of the topic

Islamic insurance (Takaful)

No.	SS No.	Title
58	SS 26	Islamic Insurance
59	SS 41	Islamic Reinsurance

Part B: AAOIFI Governance Standards

No.	SS No.	Title
1	GS 1	Shari'ah Supervisory Board- Appointment, Composition and Report
2	GS 2	Shari'ah Review
3	GS 3	Internal Shari'ah Review
4	GS 4	Audit and Governance Committee for Islamic Financial Institutions
5	GS 5	Independence of Shari'ah Supervisory Board
6	GS 6	Statement on Governance Principles for Islamic Financial Institutions
7	GS 7	Corporate Social Responsibility, Conduct and Disclosure for Islamic Financial Institutions
8	GS 8	Central Shari'ah Board
9	GS 9	Shari'ah Compliance Function

Part C: AAOIFI Auditing Standards

No.	SS No.	Title
1	ASIFI 1	Objective and Principles of Auditing
2	ASIFI 2	Auditor's Report
3	ASIFI 3	Terms of Audit Engagement
4	ASIFI 4	Testing for Compliance with Shari'ah Rules and Principles by an External Auditor
5	ASIFI 5	Auditor's Responsibility to Consider Fraud and Error in an Audit of Financial Statements

Contact

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Shari'ah Standard No. (31)

Controls on Gharar in Financial Transactions

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

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

Preface

This standard aims at defining Gharar (uncertainty), indicating its types and impacts and emphasizing controls that need to be applied when Gharar is to the extent which nullifies transactions.

Statement of the Standard

1. Scope of the Standard

This standard covers the impact of excessive, medium and minor Gharar on transactions performed by Islamic financial institutions (Institution/Institutions).[1] In this respect the standard will set out the Shari'ah rulings pertaining to the case when Gharar is involved in exchange-based contracts/commutative contracts (*'Uqud al-Mu'awadat*) including partnerships, and the case when Gharar is involved in donation contracts/non-commutative contracts (*'Uqud al-Tabarru'at*). The standard will also make special reference to the case when Gharar is involved in a contract's condition.

2. Definition and Types of Gharar

2/1 Gharar is a state of uncertainty that exists when the process of concluding a transaction involves an unknown aspect. In other words, Gharar refers to the status of results that may or may not materialize.

2/2 Degree-wise, Gharar can be excessive, medium or minor. As regards its effect on the transaction, Gharar can be to the extent which nullifies the contract or it may not be so.

3. Shari'ah Status of Gharar

It is impermissible in Shari'ah to conclude a contract or stipulate a condition that involves a degree of Gharar which could jeopardize the fulfillment of the contracts stipulations. The degree of Gharar for this purpose is judged as per item (4) below.

4. Controls on Gharar Which Violates Transactions

Gharar violates the transaction when it satisfies the following four conditions:

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

a) If it is involved in an exchange-based contract or any contract of that nature.

b) If it is excessive in degree.

c) If it relates to the primary subject matter of the contract.

d) If it is not justified by a Shari'ah-recognizable necessity.

4/1 First Condition: When Gharar is in an exchange-based contract or a similar contract:

This includes, for instance, sale, lease and partnership contracts, whereas Gharar does not affect donation contracts such as gift and will contracts.

In an exchange-based contract Gharar can be either in the form or subject matter of the contract.

4/2 Second Condition: When Gharar is excessive

4/2/1 Gharar is excessive when it becomes a dominating and distinctive aspect of the contract, and is capable of leading to dispute. However, assessment of Gharar for such purpose could differ according to place and time, and has to be determined in the light of normal practice ('Urf). Examples of excessive Gharar include selling of fruits before production, signing a lease contract for an unspecified period, and sale of a Salam commodity that is not usually available on date of delivery. Gharar in any of these forms sets the contract null and void.

4/2/2 Minor Gharar is the degree of Gharar that a contract could hardly avoid, and is not sufficient to generate dispute. This includes transactions like sale of a house to a buyer who has not seen its foundation, or leasing the house for one month while months differ in length. Such type of Gharar does not affect the contract.

4/2/3 Medium Gharar falls between excessive and minor and its examples are: sale of underground commodities or commodities that cannot be known unless broken, or leasing of fruit trees.

Medium Gharar can also exist in contracts like Ju'alah (payment of a specific reward for a task if accomplished), guardianship, companies and fixed-term Mudarabah. Medium Gharar does not affect the contract.

4/3 Third Condition: When Gharar relates to the primary object of the contract

If Gharar relates to the primary subject matter of the transaction, it sets the contract null and void, as when unripe fruits are sold (apart from the trees and without a stipulation for awaiting harvesting). If, instead, Gharar is in a corollary (*Tabi'*) of the primary subject matter, it has no effect on the contract. The example here is selling the unripe fruits along with the trees, or selling the nonexistent part of the plants along with the part that already exists. A further example of Gharar in a corollary is a fetus sold along with the pregnant sheep, or milk in the udder of a sold sheep.

4/4 Fourth Condition: When no Shari'ah-recognizable need has necessitated Gharar in the contract

Need in this context (which could be public or private) refers to the situation when refraining from commitment of impermissible Gharar leads to severe hardship, though may not amount to mortality. Need should also be inevitable; i e, there should be no permissible way of accomplishing the task, except through the contract that involves excessive Gharar. Commercial insurance, in the absence of Takaful (solidarity insurance) can be cited here as a fitting example.

5. Scope of Gharar in Exchange-Based Contracts *('Uqud al-Mu'awadat)*

Gharar in this type of contracts could be in the form, object or terms of the contract.

5/1 Excessive Gharar in the form of the contract

Gharar is said to be in the form of the contract when it relates to offer and acceptance rather than to the object of the contract. Practical types of such Gharar comprise the following:

5/1/1 Combining two sales in one sale (*Bay'atayn Fi Bay'ah*)

Combining two sales in one sale nullifies the contract, and the examples of that is selling a good for one thousand pounds in cash or two thousands on deferred payment, without concluding any of the two deals.

5/1/2 Sales in which the deal is finalized subject to random selection of the sold object

Sales become void when the sold item is randomly selected. One example of such type of sale is *Bay' al-Hasah* (sale by stone throwing), in which the seller throws a stone and the buyer has to accept the item on which the stone falls. Another example is *Bay' al-Munabadhah* (throwing of the sold commodity), where the seller throws to the buyer one of the commodities he wants to sell. Such sale could also be conducted by using a programmed machine to determine the sold good irrespective of the choices of the seller and the buyer.

5/2 Gharar in the object of the contract

5/2/1 Gharar in sold or leased objects and the like

5/2/1/1 Gharar which results from ignorance of the essence of the sold commodity nullifies the contract. This type of Gharar takes place when, for instance, a sale contract is concluded without indicating what the sold commodity is. Ignorance of the essence of the sold commodity would consequently result in ignorance of the type and characteristics of that commodity.

5/2/1/2 Gharar which stems from ignorance of the type of the sold commodity nullifies the contract, as when a car is sold without specifying its type, or when an amount of currency is sold (through a currency exchange contract) without indicating the type of that currency or having a generally accepted tradition for its determination.

5/2/1/3 Gharar which results from lack of knowledge of the sold commodity in particular (non-specification of the commodity) nullifies the contract. The example of this is sale of a non-specified car from a number of cars in a car showroom, or sale of a piece of land in a residential area without the option of specification.

5/2/1/4 Gharar due to ignorance of the specific characteristics of the sold commodity (for commodities that usually differ in nature) nullifies the contract. This happens when a nonexistent commodity is sold without describing it.

5/2/1/5 Gharar due to ignorance of the amount of the sold commodity, such as *Bay' al-Juzaf* (sale of an unknown quantity), nullifies the contract, except when there exist the conditions that make Gharar forgivable. Such conditions include: viewing the sold commodity at the time of sale, or when estimation is possible in the case of the commodity in question, or if what really matters for that specific commodity is the quantity as a whole rather than the individual components. In such cases, Gharar does not nullify the contract.

5/2/2 Gharar in the price or rent of the contract's object

Gharar could arise when, for instance, a commodity is sold without mentioning the price, or when the price is left to be determined by one of the two parties of the contract, or by a third party. Another example here is the case of somebody purchasing a commodity for an amount of money in a bundle or in his pocket. A third example is purchasing the commodity by using a currency which the buyer ignores its issuer and has no indication that could help him to know it. In all these cases, Gharar nullifies the sale contract.

However, there are some cases where Gharar in the price is permitted, as - for instance - when the sale contract is concluded

at the market price on the day of purchase, or at the price to be set by the market on the day of purchase, or at the price people usually sell at.

Sale with forgivable Gharar in price could also include purchasing commodities through *Bay' al- Istjrar*, in which the buyer obtains the goods regularly from the seller for a price to be determined subject to the price that people normally sell at, or subject to an index, and even after consumption of the goods in question.

A similar sale contract is that which comprises selling, at unit price, of a quantity of the commodity which the buyer can see, yet does not know its exact amount or total value. That is to say, one could sell a quantity of grains at the price per kilogram, or he could rent a car at a rent per mile, so that the payable amount of rent is determined after reaching the target destination.

Furthermore, such sales may include concluding a lease contract at the rent normally paid for similar property, or for a variable rent to be indicated by a specialized index.

In all these preceding cases, the contract does not become null and void.

5/3 Gharar relating to ignorance of the contract's period

5/3/1 The contract becomes null and void when its duration is not stipulated. If, however, Gharar is removed by knowledge of the contract's duration, or abandonment of the duration, at the time of contracting, the contract becomes valid.

5/3/2 Gharar can be forgiven in postponement of the price until known seasons such as season of harvesting. In this case, the two parties should observe the normal date of the season rather than the event of harvesting.

5/4 Gharar pertaining to failure in delivery

Gharar which relates to failure in delivery nullifies the contract. Examples of such Gharar include selling of fish in the water, unless it is

found in a confined place and does not require fishing. Such type of Gharar can also be seen in the sale (without option) of a commodity to be imported from abroad, and one is not sure whether a license for its importation would be obtained or not.

5/5 Gharar relating to sale of non-owned commodities

Gharar relating to sale of a non-owned commodity nullifies the sale contract. It refers to the case when the seller does not (personally) have the commodity at the time of signing the contract, and has to purchase it from the market. Salam and Istisna'a are exceptional cases here (subject to their respective conditions).

5/6 Gharar that results from sale of non-held commodities

A person shall not sell a commodity (whether it is a real estate or movable property) that he does not guarantee through actual or constructive holding. In the absence of actual or constructive holding, it will not be possible to determine the party that possesses (and hence guarantee) the sold object. Therefore, selling a commodity that one does not own nullifies the sale contract.

Actual holding in this context refers to receiving the good in hand, or receipt of the exact quantity in case of commodities measured in terms of volume or so. If the deal in question pertains to a Juzaf commodity (a commodity of an unknown quantity) holding would require shifting the commodity to another location. Holding in all cases, other than the preceding ones, shall be judged as per normal practice.

As regards constructive holding, it indicates the act of releasing the commodity and facilitating the process of its holding.

5/7 Gharar resulting from sale of nonexistent commodities

It is impermissible to sell a commodity that neither existents at present, nor does its existence in the future is ensured. Mu'awamah sale (sale of fruits to be delivered over several years) is a good example of such transactions.

5/8 Gharar which results from lack of viewing the sold commodity (*Bay' al-Ayn al-Gha`ibah*)

5/8/1 It is impermissible to sell a commodity without enabling the buyer to view it or obtain its full description. Nevertheless, a commodity can be sold on the basis of mere description, whether description is to be made by the seller or someone else. Description should include all those characteristics which could affect the price. The buyer should then conclude the deal if the commodity is exactly as described, otherwise he is free to conclude the deal or not.

5/8/2 It is permissible to sell an asset that the buyer has seen sometime before the time of signing the contract, provided that the asset has undergone no change since that time.

5/8/3 A sale can be concluded on the basis of a model that indicates the characteristics of the sold commodity.

6. Impact of Gharar on Documentation Contracts

6/1 Impact of Gharar on Rahn (Mortgage) contracts

Rahn (Mortgage) can permissibly involve a degree of Gharar that is not allowed in sale. For instance, a lost car or a farm that has not yet reached the stage of giving yield can be the object of a mortgage contract. Nonetheless, such property cannot be sold for settlement of the debt, unless the lost car is found or the farm has reached the stage of giving yield. [see Shari'ah Standard No. (5) on Guarantees]

6/2 Impact of Gharar on suretyship (Kafalah) contracts

Suretyship (Kafalah) can also involve a degree of Gharar that is not permitted in sale. Suretyship can be conditional (provided that the condition does not contradict with the stipulations of the contract); or it can be for an unknown period; or it may relate to a future obligation. [see Shari'ah Standard No. (5) on Guarantees]

6/3 Impact of Gharar on agency (Wakalah) contracts

Agency (Wakalah) is permissible with Gharar, if there are indications or traditions that can be used for specifying its subject matter. For

instance, agency can be conditional, or its subject matter can be identified through some of its forms. This shall, however, hold true when agency is free of charge, otherwise it shall be treated like Ijarah (hiring) and, thus, affected by Gharar. It is also permissible to make general agency contracts. [see Shari'ah Standard No. (23) on Agency and the Act of an Uncommissioned Agent (Fodooli)]

7. Impact of Gharar Which Stems from the Conditions of the Contract

The condition which results in Gharar in the form or subject matter of the contract:

A contract becomes null and void if it contains a condition that causes Gharar in its form, as when it contains an option without time limit. A contract can also become null and void for involving Gharar in its subject matter, as in the case of "*Bay' al-Thunya*" which refers to partial sale of a property, while retaining the remaining part as an exception (e.g., selling a multistory building with the exception of one floor without specifying it). Such sale is permissible only if the retained part of the property is specified.

8. Date of Issuance of the Standard

This Standard was issued on 26 Sha'ban 1428 A.H., corresponding to 9 September 2007 A.D.

Adoption of the Standard

The Shari'ah Board adopted the Standard on Controls on Gharar in Financial Transactions in its meeting No. (19) held on 26-30 Sha'ban 1428 A.H., corresponding to 8-12 September 2007 A.D., in Makkah Al-Mukarramah, Kingdom of Saudi Arabia.

Appendix (A)
Brief History of the Preparation of the Standard

In its meeting No. (14) held on 21-23 Rabi' I, 1426 A.H., corresponding to 30 April – 2 May 2005 A.D., in Dubai (U.A.E.), the Shari'ah Board decided to issue a Shari'ah Standard on Controls on Gharar in Financial Transactions.

On 20 Jumada II, 1426 A.H., corresponding to 26 July 2005 A.D., the Shari'ah Standards Committee decided to commission a consultant to prepare a study on Controls on Gharar in Financial Transactions.

The study was discussed in a joint meeting of the Shari'ah Standards Committees (1) and (2), held in Makkah Al-Mukarramah on 8-9 Rabi' I, 1427 A.H., corresponding to 6-7 April 2006 A.D. The joint committee then advised the consultant to introduce the necessary changes in the Standard, in the light of the discussions and observations of the meeting.

The revised draft of the Standard was discussed in another joint meeting of the Shari'ah Standards Committees (1) and (2), held in Al-Madinah Al-Munawarah, on 7-12 Jumadah I, 1427 A.H., corresponding to 3-8 June 2006 A.D. The consultant was again advised to introduce changes in the Standard as per the discussions and observations of the meeting.

In its meeting No. (17) held in Makkah Al-Mukarramah, on 27 Shawwal – 1 Dhul-Qa'dah 1427 A.H., corresponding to 18-23 November 2006 A.D., the Shari'ah Board discussed the changes in the Standard which had been made by the joint meeting of Shari'ah Standards Committees (1) and (2), and introduced changes that it deemed necessary.

The Secretarial General of AAOIFI held a public hearing in the Kingdom of Bahrain on 18 Safar 1428 A.H., corresponding to 8 March 2007 A.D.

More than 30 participants attended the session as representatives of central banks, institutions, and accounting firms. The session was also attended by Shari'ah scholars, university teachers and other interested parties. Several observations were made in the session, and duly responded to by the members of the Shari'ah Standards Committees (1) and (2).

In its meeting No. (19) held in Makkah Al-Mukarramah during 26 Sha'ban – 1 Ramadan 1428 A.H., corresponding to 8-12 September 2007 A.D., the Shari'ah Board discussed the amendments that had been suggested in the public hearing, introduced changes that it deemed necessary and adopted the Standard.

Appendix (B)
The Shari'ah Basis for the Standard

- Gharar is divided into excessive, medium and minor, because there is a degree of Gharar which contracts could hardly avoid, whereas there is an excessive degree of Gharar that could become a distinguishing aspect of the contract, such as *Bay' al-Gharar* (aleatory sale). In order to specify the two extreme limits of Gharar (excessive and minor) there should be a midpoint of Gharar (medium Gharar). Regarding controls on excessive Gharar, Abu Al-Walid Al-Baji said: "It is the degree of Gharar which becomes so dominant in the contract, that the contract is described in terms of it."(2)
- Prohibition of concluding a contract or making a condition that involves Gharar is based on the Hadith (Prophetic tradition) which states: *"The Prophet (peace be upon him) has forbidden aleatory sale"*.(3) Al-Nawawi said: "This Hadith is a great origin of Shari'ah injunctions on sales and covers an unlimited number of issues."(4)
- Assessing excessive Gharar in terms of the four conditions mentioned in this Standard is justified as follows:
  1. If Gharar is in an exchange-based contract: Involvement of Gharar in exchange-based contracts would lead to unlawful acquisition of the wealth of other people, whereas it is not so in donation contracts. No dispute would arise in the case of donation contracts, since the recipient of the donation would incur no loss.
  2. If Gharar is excessive: This is due to the consensus of the Shari'ah scholars on the impact of excessive Gharar on contracts. They have derived this conclusion from cases in which, due to involvement of excessive Gharar, contracts have been nullified by Hadiths (Prophetic traditions).

(2) *"Al-Muntaqa"* by Al-Baji [1: 41].
(3) Related by Muslim in his *"Sahih"* [3: 156] with comments by Al-Nawawi et al; and used by Al-Bukhari as a heading of a chapter in his *"Sahih"*: *"'Umdat Al-Qari"* [11: 264].
(4) Al-Nawawi comments, in *"Muslim"* [10: 156].

3) If Gharar is in the primary subject matter of the contract rather than in a corollary: This is based on the *Qa'idah* (Fiqh Principle): "What can be forgiven in corollaries is not so elsewhere". [item (45) of *Qwa'id Al-Majallah*]

4) If it is not justified by a Shari'ah-recognizable need: This is because Shari'ah has come for the sake of relieving people from hardship, as Allah, the Almighty, states: ***{"..and has not laid upon you in religion any hardship"}***.[5] This holds true whether the need is public or private, as per the Fiqh Principle which states: "Need, whether public or private, enjoys the same status of necessity". [*Qwa'id Al-Majallah*, item (33)]

- A contract which contains Gharar in its form is null and void because it will remain unconcluded. Gharar in this case tends to make finalization of the contract probable rather than definite. This has been derived from a number of similar cases on which strict prohibiting texts are available, such as the types of sales referred to in the Standard as well as other cases indicated in Fiqh sources.[6]
- The contract is null and void when its subject matter involves Gharar in its kind, nature, type or characteristics, because Gharar in these aspects is excessive and there are Shari'ah texts which prohibit similar sales. Moreover, such cases involve a great deal of Jahalah (ignorance) and, thus, may lead to dispute. Jahalah here cannot be resolved by offering the buyer the option of viewing for instance.
- The basis for nullity of a contract that involves Gharar in the amount of its subject matter is the consensus of the Shari'ah scholars on denial of ignorance of the amount, whether of the commodity sold or the price. It is also because ignorance of the amount leads to dispute that hinders delivery and receipt.[7] Permissibility of the cases which satisfy the conditions mentioned in this Standard (5/2/1/5 and 5/2), is due to the fact that such conditions make Gharar forgivable.

(5) [Al-Hajj (The Pilgrimage): 78].

(6) *"Bidayat Al-Majtahid"* [2: 153]; *"Fath Al-Qadir"* [5: 196]; *"Al-Mjmu'"* [9: 340]; *"Al-Sharh Al-Kabir"* by Al-Dardir [3: 2]; *"Al-Muqaddimat"* by Ibn Rushd (The Grand Father) [2: 221]; *"Al-Mughni"* [4: 207]; and *"Al-Bahr Al-Zakhkhar"* [2: 293].

(7) *"Hashiyat Ibn Abidin"* [4: 28]; and *"Al-Bada`i'"* [5: 158].

- Invalidity of the contract when its duration is unknown rests on the fact that it could generate dispute. Prohibition has been reported about a sale contract known as "*Bay' Habal al-Habalah*", which denotes a type of sale in which the price is postponed until the fetus of the camel is born and has given birth to another camel. The Qur`an has also indicated that indebtedness should have a specific duration: ***{"O you who believe! when you contract a debt for a fixed period, write it down"}.***[8]
- The nullity of the contract due to Gharar that relates to failure in delivery can be justified in terms of the excessive degree of Gharar it involves. A sale contract is meant to safeguard the rights of both parties (the seller and the buyer). If, instead, the seller is to get the price, while the buyer is unable to get the sold object, this will violate the very objective of the contract.
- impermissibility of the act of someone selling what he does not own stems from the Hadith which states: *"The Prophet, peace and blessings be upon him, has forbidden people from selling things that they do not own"*.[9] Prohibition of selling non-possessed property is also due to the excessive Gharar that failure in delivery could comprise. Gharar relating to failure in delivery is, in fact, the reason behind prohibition of selling a property which the seller does not hold, even legally. This has been derived from a Hadith[10] in this connection. Moreover banning sale of non-possessed property comes under the Fiqh Principle which states: "Any property that neither existent at present nor does its existence in the future is ensured should not be sold". In this regard also, many scholars have explicitly mentioned that sale of nonexistent property falls under Bay' al-Gharar (aleatory sale).[11]
- The Shari'ah basis of the details mentioned in this standard about sale of a nonexistent asset is the degree of Gharar involved therein. Gharar in this type of sale can be avoided only if the asset in question is well des-

(8) [Al-Baqarah (The Cow): 282].

(9) Related by Al-Tirmidhi in *"Al-Sunan"* [1: 159].

(10) Related by Muslim in his *"Sahih"* (1529) in the following words *"If you purchase food, do not sell it until you hold it"*.

(11) *"Nayl Al-Awtar"* [5: 244]; *"Al-Bahr Al-Zakhkhar"* [3: 381]; *"Al-Majmu' Sharh Al-Muhadhdhab"* [9: 258]; and *"Al-Muhadhdhab"* by Al-Shirazi.

cribed; otherwise absence of viewing may hinder the conclusion of the contract. The Hanafi scholars argue that the buyer should have the option of viewing so that the risk of Gharar can be avoided.

- The ruling that Gharar does not affect Rahn contracts is based on the fact that the Rahn (Mortgage) contract is not meant in itself, since it is a corollary contract signed for documentation.
- Similarly, the ruling that Gharar does not affect agency in the strict Shari'ah sense is based on the same reasons mentioned in the case of mortgage, besides the fact that agency is primarily based on donation.
- Suretyship is permissible with Gharar because suretyship is a corollary contract based on delegation of the right of disposal. However, if suretyship is paid for, it becomes an exchange-based contract and, thus, affected by Gharar.
- Nullity of a contract which involves Gharar in any of its conditions originates from what has been discussed above about aleatory contracts.

Appendix (C)
Definitions

Ghurur and Taghrir (Deception)

The difference between Gharar, and (Ghurur or Taghrir) is that the latter results from a statement, or an act, or a position which a person resort to for the sake of deceiving others, whereas Gharar does not involve any deception.

Jahalah (Ignorance)

The difference between Gharar and Jahalah is that Jahalah refers to lack of knowledge about the details of something, in spite of knowledge about its occurrence. In this sense, Gharar is more comprehensive than Jahalah. Therefore, all things that are unknown involve Gharar, whereas not all things that involve Gharar are unknown.

Qimar (Gambling), Murahanah (Betting) and Gharar

Gharar is similar to Qimar and Murahanah in that it entails a result which could be accomplished or not. However, Gharar does not resemble Qimar and Murahanah in constituting a means that each party uses for acquiring money from the other party. Therefore, Qimar is more specific than Gharar, because not all Gharar is Qimar.

Definition of the Mudaf (Postponed)

Idafah (postponement), refers to delay of the contract's effectiveness to a specific time in the future, and hence Idafah does not involve uncertainty like Gharar.

Shari'ah Standard No. (25)

Combination of Contracts

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

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

Preface

The purpose of this standard is to explain the process of combining more than one contract in one set. The Standard also aims to elucidate the characteristics, Shari'ah status and Shari'ah controls relating to the process of Contracts' Combining. Furthermore, the Standard indicates the Shari'ah rulings on Muwata`ah (prior agreement) and provides guidance on the main applications of combined contracts in Islamic financial Institutions (Institution/Institutions).[1]

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

Statement of the Standard

1. Scope of the Standard

This standard covers transactions that comprise more than one contract combined together in one set. The scope of the discussion in this respect covers the definition, forms, controls, characteristics, and concessions relating to the process of Combination of Contracts and explores the characteristics of Muwata`ah and the Shari'ah rulings pertaining thereto. The discussion also embarks on contemporary applications of combined contracts.

2. Concept of Combination of Contracts

2/1 Combination of contracts is a process that takes place between two parties or more, and entails the simultaneous conclusion of more than one contract. Hence, combination of contracts may take any of the following forms:

2/1/1 Combining more than one contract without imposing any of them as a condition in the other, and without prior agreement (Muwata`ah) to do so.

2/1/2 Combining more than one contract while imposing some of them as conditions in the others, without prior agreement to do so.

2/1/3 Combining more than one contract subject to prior agreement (Muwata`ah), but without imposing any of them as a condition in the others.

2/1/4 Agreement to conclude the deal through any of different contractual forms as will be finally decided in the future.

2/2 Forms of combined contracts

2/2/1 Combined contracts may have a single lump sum counter value. For instance, a party may sell his piece of land to the other and

simultaneously rents his car to the same party for one month, both against one thousand dinars.

2/2/2 Combined contracts may be concluded for separate values. For instance, one party may sell his house to the other for one thousand dinars, and rent his car to the same party for one hundred dinars per month.

2/2/3 Some of the combined contracts may be stipulated as conditions in the other contracts. One party, for instance, may say to the other party that I will sell you my house for ten thousand dinars, on condition that you undertake to rent the house to me for two years for one thousand dinars per year. The sale of the house in this manner could also be concluded on condition that the buyer of the house undertakes in return to sell his car to the seller for two thousand dinars.

2/2/4 Combined contracts may take the form of an exhaustive contractual statement comprising a number of successive parts and stages, which finally lead to realization of the desire of the two parties to conclude the deal in question. A good example in this regard may be seen in a number of present day financial transactions like Ijarah Muntahia Bittamleek, Murabahah, and Diminishing Musharakah.

3. Shari'ah Status of Combination of Contracts

It is permissible in Shari'ah to combine more than one contract in one set, without imposing one contract as a condition in the other, and provided that each contract is permissible on its own. Combining contracts in this manner is acceptable unless it encounters a Shari'ah restriction that entails its prohibition on exceptional basis.

4. Shari'ah Controls on Combination of Contracts

4/1 Contracts' combining should not include the cases that are explicitly banned by Shari'ah like combing sale and lending in one contract.

4/2 It should not be used as a trick for committing Riba such as agreement between two parties to practice *Bay' al-'Inah* or *Riba al-Fadl*.

4/3 It should not be used as an excuse for practicing Riba. The two parties could misuse, for instance, Contracts' Combining when they conclude a lending contract that, at the same time, facilitates some other compensatory gains to them. For example, they could stipulate in the contract that the borrower should offer accommodation in his house to the lender, or should grant him a present. Contracts' Combining could also be misused by imposing excess repayment in terms of quantity or quality on the borrower. [see Shari'ah Standard No. (14) on Loan (Qard) – item 1/4]

4/4 Combined contracts should not reveal disparity or contradiction with regard to their underlying rulings and ultimate goals. Examples of contradictory contracts include granting an asset to somebody as a gift and selling/leasing it to him simultaneously, or combining Mudarabah with lending the Mudarabah capital to the Mudarib, or currency exchange with Ju'alah, or Salam with Ju'alah for the same contract value, or leasing with selling (i.e. hire-purchase in its traditional form).

5. Shari'ah Concessions for Combination of Contracts

5/1 In principle, the Shari'ah concessions that can be granted to implicit and subsidiary contracts at the time of combining contracts cannot be granted to the same contracts when concluded independently. Here, implicit and subsidiary contracts refer to contractual commitments that are not explicitly embodied in the deal agreement or those which succeed the original commitments of the transaction. The concessions to be granted in this case should be judged in the light of traditions, practice and professional experience, and subjected to clearance by the Shari'ah Supervisory Board of the Institution.

5/2 Concessions granted to implicit and subsidiary contracts comprise relief from the following impermissible acts:

5/2/1 Gharar, which affects financial contracts, may be overlooked in implicit and subsidiary contracts.

5/2/2 Jahalah, which also affects financial contracts, may be ignored with regard to the object of a subsidiary contract.

5/2/3 Sale-based Riba and violation of currency exchange rules (as when spot delivery is ignored in a contract that combines currency exchange with money transfer) are also forgivable in subsidiary and implicit contracts.

5/2/4 Selling of a debt for another debt may be ignored when it comes in the context of a subsidiary contract. A fitting example here is purchasing (on debt) the shares of an indebted company.

5/2/5 Subsidiary and implicit contracts may also relieved from some prerequisites that underline the validity of contracts (such as offer and acceptance) when such relief is dictated by need or desire to achieve a permissible interest.

6. Prior Agreement (Muwata`ah) for Combination of Contracts

6/1 Muwata`ah or Tawatu' in Fiqh terminology has several meanings; most important among which are stated below:

6/1/1 Explicit or implicit intention of the parties to the contract to use a certain trick for practicing Riba through a Shari'ah accepted contractual form.

6/1/2 An unrevealed prior agreement between the two parties to perform a Shari'ah-permissible act or deal for the sake of finding a Shari'ah-accepted exit (acceptable trick).

6/1/3 Coincidence of the intentions of parties to the contract at the stage of preparatory negotiations that precede the signing of the contract as indicated in item (2/2/4) above.

6/2 In Fiqh perception, Muwata`ah for combining contracts has three distinct characteristics:

6/2/1 It is an agreement between two parties to conclude contracts and fulfill pledges in the future.

6/2/2 When Muwata`ah is stipulated as part of the contract it becomes a condition precedent to the conclusion of the contract, and the contract becomes subject to the relevant Shari'ah rulings with regard to permissibility, enforceability, and validity.

6/2/3 Enforceability of Muwata`ah in Shari'ah is similar to enforceability of conditions precedent to the signing of contracts. A condition that precedes the signing of the contract has the same validity and binding nature of the normal conditions of the contract, since the former constitutes the bases of the contract that have been mutually agreed upon between the two parties.

6/3 Muwata`ah to combine contracts takes several forms, which may be grouped into the following four types:

6/3/1 Muwata`ah to form up Riba tricks, in which the two parties agree to practice, for instance, *Bay' al-'Inah* or its reverse, or *Bay' al-Wafa`* (*Bay' al-Raja`*), or *Riba al-Fadl*. In this case, Shari'ah prohibits Muwata`ah and the contract so designed is invalid.

6/3/2 Muwata`ah for Riba excuses is prohibited by Shari'ah whereby the two parties agree to combine a loan with another transaction, or stipulate that the borrower has to present a gift to the lender, or make excess repayment in terms of quantity or quality.

6/3/2/1 Prohibition of Muwata`ah to use such tricks, which are permissible in principle, should be judged in the light of two conditions:

First, the intention to use the permissible act as a means of concluding a prohibited deal should be obvious and beyond all doubts.

Second, there should be no obvious need or lawful interest that justifies resorting to such a trick.

6/3/3 Muwata`ah for obtaining Shari'ah Exits, which refers to tricks that do not violate Shari'ah rules, or contradict with Shari'ah objectives, or result in any harm to others, is permissible.

6/3/4 Muwata`ah for combining contracts that contradict to or oppose each other is prohibited because it leads to performing of an act that has been strictly banned by Shari'ah. [see item 4/4]

7. Contemporary Applications and General Rules for Combination of Contracts

7/1 One of the most distinguishable forms of contemporary financial transactions is the contractual arrangements which comprise a number of contracts and pledges that the parties agree beforehand to execute in a specific manner and according to agreed number of successive stages. Such arrangements aim to achieve a given purpose or interest of the parties to the contract such as performing Murabahah on Order of Purchase, Ijarah Muntahia Bittamleek, or Diminishing Musharakah.

7/2 Muwata`ah, when provided for in the contract and used for combination of contracts, should be observed by, and remain binding to the parties to the contract, subject to permissible commercial and banking conventions. [see item 6/2/2]

7/3 The pledges contained in such combined contract sets are binding to their respective parties.

7/4 These newly devised sets of combined contracts should observe the general rules of Shari'ah with regard to structure, rulings, requirements and conditions in order to be Shari'ah compliant. [see item 5/2]

7/5 These contract sets should also observe the Shari'ah rulings pertaining to combination of contracts, and may make use of the Shari'ah concessions in this respect.

7/6 Failure of any of the parties to combined contracts to honor its contractual commitments gives the other party right of claiming indemnity for the actual injury encountered.

8. Date of Issuance of the Standard

This Standard was issued on 23 Rabi' I, 1426 A.H., corresponding to 2 May 2005 A.D.

Adoption of the Standard

The Shari'ah standard on Combination of Contracts was adopted by the Shari'ah Board in its meeting No. (15) held in Makkah Al-Mukarramah on 22–26 Sha'ban 1427 A.H., corresponding to 26 September – 2 October 2005 A.D.

Appendix (A)
Brief History of the Preparation of the Standard

The Shari'ah Board decided in its meeting No. (10) held on 2–7 Rabi' I, 1424 A.H., corresponding to 3–8 May 2003 A.D., in Al-Madinah Al-Munawwarah to issue a Shari'ah Standard on Combination of Contracts.

On 17 Sha'ban 1423 A.H., corresponding to 13 October 2003 A.D., the Shari'ah Standards Committee decided to commission a Shari'ah consultant to prepare a draft standard on combination of contracts.

In meeting No. (10) of the Shari'ah Standards Committee (2) held on Friday and Saturday 27-28 Safar 1425 A.H., corresponding 16-17 April 2004 A.D., in the Kingdom of Bahrain, the committee discussed the Shari'ah study and advised the consultant to incorporate the necessary changes, in the light of the discussions and observations of the meeting.

In meeting No. (11) of the Shari'ah Standard Committee (2) held on Wednesday 28 Rabi' II, 1425 A.H., 16 June 2004 A.D., held in Dubai (U.A.E) the Committee discussed the draft standard on combination of contracts and introduced necessary changes in it in the light of discussions and comments of the meeting.

The revised version of the Standard was submitted to the Shari'ah Board in its meeting No. (13) held in Makkah Al-Mukarramah on 30 Sha'ban 1426 A.H., 14 October 2004 A.D., and further changes were incorporated in the document. The Board then decided to send the document to concerned experts for review and comments before discussing it in a public hearing.

AAOIFI held public hearing in the Kingdom of Bahrain on 15 Safar 1426 A.H., corresponding to 25 March 2005 A.D. More than 35 participants representing central banks, institutions, accounting firms, Shari'ah scholars,

university teachers and other interested parties attended the public hearing. Several observations were made in the public hearing to which members of the Shari'ah Standards Committees (1) and (2) duly responded.

In a meeting held in the Kingdom of Bahrain on 15-16 Safar 1426 A.H., corresponding to 25-26 March 2005 A.D., the Shari'ah Standards Committees (1) and (2) discussed the comments and observations made during the public hearing, and incorporated necessary changes in the document.

The Shari'ah Board discussed the draft standard in its meeting No. (14) held in Dubai (U.A.E) on 21-23 Rabi' I, 1426 A.H., corresponding to 30 April – 2 May 2005 A.D. and decided, in the light of the comments and observations of the meeting, to send the draft standard to the Shari'ah Standards Committee (2) for study.

In its meeting No. (15) held on 22–25 Sha'ban 1426 A.H., corresponding to 26-29 September 2005 A.D., in Makkah Al-Mukarramah, the Shari'ah Board discussed the amendments proposed by the Shari'ah Standards Committee and the Drafting Committee and made the changes in the draft Standard, where it deemed necessary. Consequently, the Shari'ah Board approved the Standard (unanimously for some clauses and with the majority for others), as indicated in the minutes of the Board's meetings.

Appendix (B)
The Shari'ah Basis for the Standard

- It is permissible to combine more than one contract in a single transaction as long as each of these contracts is permissible on its own. This is so because freedom of contracting and honoring commitments is acknowledged in principle by the general teachings and directives of Shari'ah, unless such contracts and commitments lead to violation of Shari'ah rulings.[2] Ibn Al-Qayyim said, "It is permissible in principle to form up contracts and conditions, except for what has been prohibited by Shari'ah."[3]
- According to the majority of the Hanafi, Shafi'i and Hanbali Fuqaha, the set of combined contracts can always be judged in the light of its individual components. Therefore, if the transaction comprises a number of contracts that each of them individually satisfies permissibility requirements, the combined set of such contracts is also permissible. [4]
- Based on the above fact the Hanbali and Shafi'i Fuqaha, as widely reported, indicate permissibility of combing two contracts, for the same contract value, even if the two contracts differ with regard to Shari'ah status and rulings.[5] Ibn Taymiyyah indicated permissibility of combining two contracts having two separate values.[6]
- Prohibition of combining contracts in specific cases on exceptional basis, as indicated by Al-Shatibi, stems from the fact that the act of combining

(2) *"Majmu' Fatawa Ibn Taymiyyah"* [29: 132]; and *"Al-Qawa'id Al-Nuraniyyah Al-Fiqhiyyah"*, (P. 188).

(3) *"I'lam Al-Muwaqi'in"* [1: 344]; and *"Jami' Al-Rasa`il"* by Ibn Taymiyyah [2: 317].

(4) *"Kashshaf Al-Qina'"* [3: 478]; *"Al-Bayan"* by Al-Umrani [5: 148]; *"Al-Majmu' Sharh Al- Muhadhdhab"* [9: 388]; *"Tabyin Al-Haqa`iq"* [4: 174], *"Al-Bada`i'"* [6: 58]; and *"I'lam Al- Muwaqi'in"* [3: 354]; *"Al-Mubdi'"* [5: 43].

(5) *"Al-Mughni"* [6: 39 and 355]; *"Al Majmu'"* [9: 388]; *"Sharh Al-Sunnah"* by Al-Baghawi [8: 67].

(6) *"Nazariyyat Al-'Aqd"* by Ibn Taymiyyah (P. 191); and *"Al-Ikhtiyarat Al-Fiqhiyyah Min Fatawa Ibn Taymiyyah"* (P. 122).

could sometimes generate Shari'ah restrictions that do not hold true when the combined acts are taken up individually. Examples of acts that become prohibited when combined, though they are individually permissible, include combining sale and lending, marrying two sisters, or marrying a woman and her aunt.(7)

- The absence of any exceptional Shari'ah restriction in the particular case of combining constitutes the first control on contracts' combining due to the directives of the Prophet (Peace be upon Him) who has been quoted to have prohibited combining sale with lending,(8) or combining two sales in one deal,(9) or two transaction in one transaction.(10)
- The second control, which prohibits using Contracts' Combining as a trick for practicing Riba is based on the directives of the prophet (peace be upon him) which indicate prohibition of *Bay' al-'Inah*(11) and *Riba al-Fadl*. As regards *Riba al-Fadl*, it has been reported that the Prophet (Peace be upon Him) instructed one of his employees to sell his low-quality dates first and then buy the high-quality dates he wanted, instead of resorting to exchange of more quantity of low-quality dates for less quantity of high-quality dates.(12) Ibn Al-Qayyim said, "This indicates that the employee was directed to commence the process of purchasing the high-quality dates after the complete finalization of the former transaction; i.e., selling his low-quality dates. If, instead, he agreed beforehand with another party

(7) *"Al- Muwafaqat"* [3: 192].

(8) Al-Tirmidhi said: "This is a good authentic Hadith": *"Al-Muwatta'* "[2: 657]; *"Mukhtasar Sunan Abu Dawud"* by Al-Munziri [5: 144]; *"Musnad Al-Imam Ahmad"* [2: 178]; *"'Aridat Al-Ahwazi"* [5: 249]; *"Sunan Al-Nasa`i"* [7: 295]; and *"Nayl Al-Awtar"* [5: 152].

(9) Ibn Al-Arabi confirmed that these has been the directives of the Prophet (peace be upon Him): *"Al-Qabas"* [2: 842]; *"Mukhtasar Sunan Abu Dawud"* by Al-Munziri [5: 98]; *"Al-Muwatta`"* [2: 663]; *"'Aridat Al-Ahwazi"* [5: 239]; *"Sunan Al-Nasa`i"* [7: 295]; and *"Nayl Al-Awtar"* [5: 152].

(10) *"Musnad Al-Imam Ahmad"* [1: 198]; *"Nayl Al-Awtar"* [5: 152]; *"Fath Al-Qadir"* [6: 81]. Al-Haythami said: "Ahmad always reports from reliable sources": *"Majma' Al-Zawa`id"* [4: 84].

(11) *"Musnad Al-Imam Ahmad"* [2: 42, 48]; *"Al-Sunan Al-Kubra"* by Al-Bayhaqi [5: 316]; *"Subul Al-Salam"* [3: 14]; *"Mukhtasar Sunan Abu Dawud"* by Al-Munziri; and *"Tahdhib Al-Sunan"* by Ibn Al-Qayyim [5: 99, 104].

(12) Related by Al-Bukhari, Muslim, Al-Tirmidhi, Al-Nasa`i and Malik: *"Sahih Al-Bukhari"* [3: 97]; *"Sahih Muslim"* [3: 1208]; *"'Aridat Al-Ahwadhi"* [5: 249]; *"Al Muwatta`"* [2: 632]; and *"Sunan Al-Nasa`i"* [7: 244].

to conduct the two deals successively, the second contract will not become an independent contract, because it is a mere completion of the first one. The directives of the Prophet (Peace be upon Him), apparently necessitate two separate contracts that neither of them is related to or based on the other".[13]

- The third control, that prohibits using combined contracts as an excuse for dealing in Riba, is based on the directives of the Prophet (Peace be upon Him) which forbid combining lending with selling.[14] In this regard, the Fuqaha unanimously agree that when the two parties stipulate in the loan contract that the borrower should reward the lender by offering him free accommodation, or grant him a present, or the borrower should make excessive repayment in terms of quantity or quality, the contract becomes null and void. In other words, any loan arrangement that comprises a prior condition on a benefit to be rendered to the lender by the borrower is considered Riba.[15]
- The fourth control, which indicates that the contracts to be combined should not be contradicting with each other in terms of purpose or Shari'ah rulings, stems from the fact that contracts, as indicted by Al-Qarafi, are devices for using appropriate means to achieve specific objectives. Obviously, the same contracting requirement cannot always fit at the same time two contradicting positions[16]. Therefore, contracts that contradict each other in their rulings and effects cannot be combined together in the same transaction.
- The Shari'ah concessions sanctioned to subsidiary and implicit contracts are based on several statements in *"Al-Qawa'id Al-Fiqhiyyah"*, including the following:
  - What can be forgiven in a subsidiary contract cannot be forgiven in other contracts.[17]

(13) *"I'lam Al-Muwaqi'in"* [3: 238]; and *"Ighathat Al-Lahfan"* [2: 103].

(14) Related by Abu Dawud, Al-Tirmidhi, Al-Nasa`i, Ibn Majah, Ahmad, Al-Shafi'i and Malik. [See footnote No. (3) in Shari'ah Standard No. (19): Loan (Qard)].

(15) *"Al-Mughni"* [6: 436]; *"Al-Sharh Al-Kabir 'Ala Al-Muqni'"* [12: 432]; *"Al-Zakhirah"* [5: 289]; *"Al-kafi"* by Ibn Qudamah [2: 93]; *"Al-Mubdi'"* [4: 209]; and *"Majmu' Al-Fatawa"* by Ibn Taymiyyah [29: 334].

(16) *"Al-Furuq"* [3: 142].

(17) Article (54) of *"Majallat Al-Ahkam Al-Fiqhiyyah"*; and *"Al-Ashbah Wa Al-Naza`ir"*, (P. 120).

- What can be forgiven in implicit contracts cannot be forgiven in independent contracts.[18]
- Concessions that can be sanctioned to implicit provisions cannot be sanctioned to ordinary provisions.[19]
- Provisions in ordinary contracts entail more validity requirements than provisions in implicit and subsidiary contract.[20]
- Implicit contracts are relieved of what independent contracts cannot be relieved of.[21]
- Provisions that hold true in implicit contracts may not hold true in ordinary contracts.[22]

- Shortcomings like Gharar, which affect financial transactions such as sale contracts and the like, may be forgiven when the contract subject matter or the contract itself is subsidiary. The Prophet (peace be upon him) said: *"When somebody purchases a palm tree, that has not yet been pollinated, the fruits of the tree should belong to the seller unless the buyer stipulates in the contract that he should be entitled to the fruits"*.[23] This Hadith indicates that the reason for ignoring the gharar involved in the act of the buyer who stipulates in the contract that the anticipated fruits of the palm tree should belong to him, is the fact that getting the fruits is an implicit aspect of the contract. As is the case with gharar, excessive Jahalah is also forgivable in subsidiary and implicit contracts.
- Ignoring sale-based Riba and non-fulfillment of the Shari'ah requirements of currency exchange in subsidiary contracts is based on the Hadith of the Prophet (peace be upon Him) which states: *"When somebody buys a slave who has money, the slave's money should go to the seller, unless the buyer*

(18) *"Fatawa Al-Ramli"* [2: 115].
(19) *"Bada`i' Al-Fawa'id"* by Ibn Al-Qayyim [4: 27].
(20) *"Bada`i' Al-Sana`i'"* [5: 58].
(21) *"Al-Manthur Fi Al-Qawa'id"* by Al-Zarkashi [3: 378].
(22) *"Radd Al-Muhtar"* [4: 170].
(23) *"Sahih Al-Bukhari"* with *"Fath Al-Bari"* [5: 49]; *"Sahih Muslim"* with Al-Nawawi elaborations [10: 191]; *"Sunan Abu Dawud"* [2: 240]; *"Sunan Al-Nasa`i"* [2: 260]; *"Sunan Ibn Majah"* [2: 745]; *"Muwatta` Al-Imam Malik"* [2: 617]; *"Musnad Al-Imam Ahmad"* [2: 6, 9, 54, 63, 78, 102 and 150]; and *"'Aridat Al-Ahwazi"* [5: 253].

stipulates in the contract that he should get the money.[24] The justification for this is that the buyer may have taken into consideration (at the time of making his offer) the amount of money the slave could have, be it big or small, and explicitly determined a portion of the price for it, though he did not declare such portion independently. Hence, it becomes clear from this Hadith that it is permissible to buy a slave along with his money without observing the Shari'ah requirements of currency exchange, and regardless of whether the amount of money that the slave has is big or small, known or unknown.[25]

- Permissibility of *Bay' al-Kali` Bil-Kali`* (selling a debt for another debt) in subsidiary and implicit contracts although it is prohibited in original and independent contracts, is based on the previous Hadith about purchasing a slave along with the money he has. In this respect, Imam Malik indicated in "*Al-Muwatta`*" the permissibility of selling a slave and providing in the contract for the status of the money he owns, even if that money is a debt owed to the slave by a third party and the slave is himself sold on deferred payment. That is to say, Malik seems to have based his opinion on the apparent and general meaning of the Hadith and the ruling practice in Al-Madinah.[26]
- Permissibility of relieving, upon need or probable interest, subsidiary and implicit contracts from some of the bases and conditions of contracts' validity, can be derived from a statement by Al-Sayuti in *"Al-Ashbah Wa Al-Naza`ir"*. In that statement, Al-Sayuti indicates permissibility of abandoning offer and acceptance (the form) in case of implicit sale, or accepting deferred, instead of spot, delivery/payment in such sales. Such rulings in fact come as further ramifications of the Fiqh principle that "Subsidiary contracts can be relieved from what other contracts cannot be relieved from"[27]

(24) *"Sahih Al-Bukhari"* with *"Fath Al-Bari"* [5: 49], *"Sahih Muslim"* [3: 1173]; *"Sunan Abu Dawud"* [2: 240]; *"Sunan Al-Nasa`i"* [7: 261]; *"Sunan Ibn Majah"* [2: 746]; *"Muwatta` Al-Imam Malik"* [2: 611]; *"Musnad Al-Imam Ahmad"* [2: 9 and 78]; and *"'Aridat Al-Ahwazi"* [5: 252].

(25) *"Al-Qabas"* by Ibn Al-'Arabi [2: 805]; *"Al-Mughni"* by Ibn Qudamah [6: 96]; and "*Al-Zurqani 'Ala Al-Muwtta`*" [3: 253].

(26) *"Al-Zurqani 'Ala Al-Muwtta`"* [3: 253].

(27) *"Al-Ashbah Wa Al-Naza`ir"* by Al-Sayuti (pp. 120 and 377).

- Muwata`ah for combining contracts is considered as an enforceable condition that precedes the signing of the contract, because Muwata`ah, traditionally as well as in fiqh terminology, is an agreement between the two parties to sign contracts and honor pledges in the future. Therefore Ibn Taymiyyah said, "When the two parties agree beforehand to do specific things, and then sign a general contract, the contract should honor that prior agreement".[28]
- A condition that precedes the contract should be regarded as binding and enforceable as a one that comes in the text of the contract, because traditionally there is no difference between the conditions stated in the contract and those agreed upon beforehand, even if such prior conditions are not mentioned at the time of signing the contract. This is only natural since these conditions form the bases of the contract, which the two parties have agreed to observe. This viewpoint is supported by a number of traditionally accepted norms such as:
  - A condition, which the two parties agree to observe, resembles a one explicitly mentioned in the contract.
  - Traditionally acceptable conditions resemble explicitly stated conditions.
  - Intentions in contracts deserve observation.

  Moreover, enforceability of prior conditions was the ruling practice in Al-Madinah and the predominant opinion in Al-Imam Ahmad's School.[29]
- Prohibition of Muwata`ah for devising Riba tricks is because Muwata`ah in this case is a means used for practicing Riba. Consequently, since the end objective (which is Riba) is prohibited, the means used for achieving it must also be prohibited. As indicated in *"Al-Qawa'id Al-Fiqhiyyah"*, "means are discarded on discarding of objectives"[30]

(28) *"Nazariyyat Al-'Aqd"* by Ibn Taymiyyah (p. 204).

(29) *"I'lam Al-Muwaqqi'in"* [3: 105, 145, 212 and 241]; *"Kashshaf Al-Qina'"* [5: 98]; *"Bayan Al-Dalil 'Ala Butlan Al-Tahlil"* (P. 533); *"Majmu' Al-Fatawa"* by Ibn Taymiyyah [29: 336]; *"Al-Fatawa Al-Kubra"* by Ibn Taymiyyah [4: 108]; *"Al-Madkhal Al-Fiqhi Al-'Aam"* by Al-Zarqa [1: 487]; and *"Al-'Uqud Wa Al-Shurut Wa Al-Khiyarat"* by Ahmad Ibrahim (P. 711).

(30) *"Al-Furuq"* by Al Qarafi [2: 33]; and *"Al-Qawa'id Al-Kubra"* by Al-'Izz Ibn Abdul-Salam [1: 161 and 168].

- Prohibition of Muwata`ah as an excuse for Riba, originates from the application of the principle of *Sadd al-Zara`i'*. This principle aims to prohibit permissible practices that could be used as a means for accomplishing Shari'ah-banned objectives.(31)
- However, application of the principle of *Sadd al-Zara`i'* should be based on two requirements as indicated by the Maliki Fuqaha. The first requirement is that resort to the *Zari'ah* (excuse) should be very frequent and excessive in view of normal practice, and the second requirement is the presence of a strong accusation that rules out the possibility of any good intention behind using the excuse(32). Application of the principle of *Sadd al-Zara`i'* should also observe the non-existence of any need or lawful interest for using the *Zari'ah*, as has been emphasized by several fiqh principles such as:
  - Prohibition for the sake of blocking the way to excuses is less forceful than prohibition per se".(33)
  - Practices that originate from the need for devising acceptable Shari'ah exits deserve more Shari'ah concessions than other practices.(34)
  - Acts that are prohibited for the sake of blocking the way to excuses become permissible in case of need or desire to achieve a lawful interest.(35)
- Permissibility of Muwata`ah for devising acceptable Shari'ah exits can be derived from the statements of several Fuqaha who indicate that using Shari'ah accepted means to achieve permissible objectives is permissible. According to those Fuqaha practicing acceptable Shari'ah exits and helping others to devise them is a permissible and reward-worthy practice as long as it abides by the directives of Allah, Exalted be He, leads to avoidance of sins, and facilitates achievement of lawful interests.(36)

(31) *"Sharh Tanqih Al-Fusul"* (P. 449); *"Al-Furuq"* by Al-Qarafi [2: 32]; and *"Al-Qabas"* [2: 876].
(32) *"Al-Muwafaqat"* [4: 198]; *"Al-Ma'unah"* by Al-Qadi Abdul-Wahhab [2: 996]; and *"'Iqd Al-Jawahir Al-Thaminah"* [2: 441].
(33) *"I'lam Al-Muwaqqi'in"* [2: 140].
(34) *"Al-Ashbah Wa Al-Naza`ir"* by Al-Sayuti (P. 158).
(35) *"Zad Al-Ma'ad"* [4: 78]; *"Tafsir Ayat Ashkalat"* by Ibn Taymiyyah [2: 682]; *"Majmu' Al-Fatawa"* by Ibn Taimaih [23: 214-215], [32: 228-229]; and *"I'lam Al-Muwaqqi'in"* [2: 142].
(36) *"Ighathat Al-Lahfan"* [1: 339, 383 and 385] and [2: 86].

- Prohibition of Muwata`ah for combining contracts that contradict each other in rulings and objectives is because Muwata`ah in this case is used as a means of doing an unacceptable act. According to Shari'ah, means always follow ends with regard to permissibility and prohibition[37]. It has been indicated in "*Al-Qawa'id Al-Fiqhiyyah*" that: "Disregarding the ends leads to disregard of the means".[38]
- Recognition of Muwata`ah when it precedes contemporary transactions, that comprise a set of successive and inseparable contracts forming up a single transaction, is the present day commercial and banking tradition that considers Muwata`ah in this case as binding to the two parties. In fact, Muwata`ah in this sense is part of a whole system that tends to completely collapse when any of its individual components looses balance. Violating Muwata`ah in this case will jeopardize the fulfillment of the objectives of the contracting parties, and may cause them serious injuries.
- The pledges that relate to an agreement are binding to the two parties since, according to its nature and Fiqh status, and as perceived by most of the Fuqaha, such pledges are similar to the conditions stipulated in the agreement. Enforceability of such pledges also stems from the fact that they constitute the basis for the transaction. It is well known that Shari'ah-accepted conditions stipulated in a contract are binding from both the fiqhi as well as the legal viewpoints. Moreover, in present day commercial and banking traditions, such pledges are also considered as binding. Otherwise, it will not be possible for the two parties to form up a definite perception about the purpose and objectives of the contract, and hence they will not be able to sign it.

(37) *"Al-Muafaqat"* [2: 212].
(38) *"Al-Qawa'id"* by Al-Muqri [1: 329].

Appendix (C)
Definitions

Zara`i'

Zara`i' are the apparently permissible practices used as a means of doing a prohibited act. Therefore, *Sadd al-Zara`i'* means prohibition of permissible practices that can be used for committing Shari'ah-restricted acts. However, prohibition in this sense is subject to two restrictions. The first is the existence of a clear intention of the person in question to use the permissible practice for the sake of accomplishing Shari'ah-banned objectives, and the second is that resorting to prohibition should be only after wide spread of such misconduct in the society.

Subsidiaries

Subsidiary contracts or objectives in financial transactions refer to the consequent contracts or objectives that follow the original ones. The subsidiary status of these contracts or objectives is usually determined according to tradition, practice and the experience of those who are in the field.

Transaction

It is a binding contractual relationship that carries no optional choices.

'Inah

It is a sale whereby one party, for instance, sells the commodity to the other for one hundred dollars, on deferred payment basis, and repurchases it from the other for eighty dollars payable on spot. In fact, the sale transaction here is nothing but a mere trick for practicing usurious lending, and the commodity is used for no purpose other than facilitating the usurious transaction. The deal in this case has nothing to do with the purposes and objectives of sale, nor does it contain any element of them. In other words 'Inah takes place when one party buys a commodity from the other

on deferred payment basis and before making payment sells back the same commodity to the other for a less amount of money payable on spot.

Reverse 'Inah

It takes place when one party sells the commodity to the other party for a spot price, and the seller repurchases the same commodity from the buyer or from his agent for a higher deferred price.

***Bay' al-Raja`* (*Bay' al-Wafa`*)**

It is a sale whereby the seller keeps the intention to buy back his sold commodity. One of the most popular forms of this type of sale is when one party, who wants to obtain an interest-bearing loan, agrees to sell an income-earning asset to the lender. The lender will thus become entitled to the income of the asset as long as it remains in his ownership. The buyer then undertakes to return the sold asset to the seller whenever the seller pays back the same price to him. In this manner, the borrower (artificial buyer) succeeds to get the loan amount against payment of the agreed upon interest.

Shari'ah-Banned Tricks

It refers to those permissible contractual arrangements and other practices, which may be used to achieve prohibited goals like permitting what Shari'ah has prohibited, like escaping duties, deceiving people and performing other Shari'ah-banned practices.

Shari'ah Exit (Shari'ah-Acceptable Trick)

A Shari'ah exit is an act that is performed for the sake of avoiding commitment of sins, or achieving a permissible objective, or refraining from prohibited acts, or realizing a Shari'ah-acceptable interest.

Separation of the Transaction

Separation of a transaction means dividing the object of the same contract, into portions. To Fuqaha, it means a situation in which the provisions of the contract do not cover all the components of its object, or they may cover all of them first, and then shrink down to cover only some of them later on. Thus, either the single transaction is broken down into a number of portions, or only

some parts of it are separated in this manner. When separation takes place in this manner in a single transaction between a single buyer and a single seller and for a single price, the buyer should have the option to conclude the deal or not.

Shari'ah Standard No. (1)

Trading in Currencies

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

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

Preface

The purpose of this standard is to explain the Shari'ah rulings relating to trading in currencies, as well as the conditions and precepts laid down by the Shari'ah as to what is permissible in currency trading and what is not. The standard also explains some of the practices being applied by Islamic financial Institutions.[1]

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

Statement of the Standard

1. Scope of the Standard

This standard covers issues of both actual and constructive possession of currencies, the use of modern means of communication in currency trading, exchange of currencies in the context of the bilateral settlement of debts owed by the parties to the exchange, dealing in currencies in money markets, bilateral promises to buy and sell currencies, deferment of the delivery of one of two countervalues in currency trading, and some cases practised by the Institutions.

The standard does not cover the following cases: those where there are no trading in currencies; the effect of goldsmithery in selling gold and silver; transfers of debts that do not involve exchanges of currency; and the discounting of bills of exchange.

2. Shari'ah Ruling on Trading in Currencies

2/1 It is permissible to trade in currencies, provided that it is done in compliance with the following Shari'ah rules and precepts:

2/1/1 Both parties must take possession of the countervalues before dispersing, such possession being either actual or constructive.

2/1/2 The countervalues of the same currency must be of equal amount, even if one of them is in paper money and the other is in coin of the same country, like a note of one pound for a coin of one pound.

2/1/3 The contract shall not contain any conditional option or deferment clause regarding the delivery of one or both countervalues.

2/1/4 The dealing in currencies shall not aim at establishing a monopoly position, nor should it entail any evil consequences to the interest of individuals or societies.

2/1/5 Currency transactions shall not be carried out on the forward or futures market.

2/2 It is prohibited to enter into forward currency contracts. This rule applies whether such contracts are effected through the exchange of deferred transfers of debt or through the execution of a deferred contract in which the concurrent possession of both of the countervalues by both parties does not take place.

2/3 It is also prohibited to deal in the forward currency market even if the purpose is hedging to avoid a loss of profit on a particular transaction effected in a currency whose value is expected to decline.

2/4 It is permissible for the Institution to hedge against the future devaluation of the currency by recourse to the following:

2/4/1 To execute back to back interest free loans using different currencies without receiving or giving any extra benefit, provided these two loans are not contractually connected to each other.

2/4/2 Where the exposure is in respect of an account payable, to sell goods on credit or by Murabahah in the currency of the exposure.

2/5 It is permissible for the Institution and the customer to agree, at the time of settlement of the instalments of a credit transaction (such as a Murabahah), that the payment shall be made in another currency applying the spot exchange rate on the day of payment.

2/6 Possession in sales of currencies

2/6/1 When a contract is concluded for the sale of an amount of currency, possession must be taken for the whole amount that is the subject matter of the contract at the closing of the transaction.

2/6/2 Taking possession of one of the countervalues by one party without taking possession of the other is not enough to make a currency dealing transaction permissible. Likewise, taking partial possession is not sufficient. Taking possession of part

of a countervalue is valid only in respect of the part, possession of which is complete, whereas the remaining part of the transaction remains invalid.

2/6/3 Possession may take place either physically or constructively. The form of taking possession of assets differs according to their nature and customary business practices.

2/6/4 Physical possession takes place by means of simultaneous delivery by hand.

2/6/5 Constructive possession of an asset is deemed to have taken place by the seller enabling the other party to take its delivery and dispose of it, even if there is no physical taking of possession. Among other forms of constructive possession that are approved by both Shari'ah and business customary practices are the following:

a) To credit a sum of money to the account of the customer in the following situations:

1. When the Institution deposits to the credit of a customer's account a sum of money directly or through a bank transfer.
2. When the customer enters into a spot contract of currency exchange between himself and the Institution, in the case of the purchase of a currency against another currency already deposited in the account of the customer.
3. When the Institution debits – by the order of the customer – a sum of money to the latter's account and credits it to another account in a different currency, either in the same Institution or another Institution, for the benefit of the customer or any other payee. In following such a procedure, the Institution shall adhere to the principles of Islamic law regarding currency exchange.

A delay in making the transfer is allowed to the Institution, consistent with the practice whereby a payee may obtain actual receipt according to prevailing business practices in currency

markets. However, the payee is not entitled to dispose of the currency during the transfer period, unless and until the effect of the bank transfer has taken effect so that the payee is able to make an actual delivery of the currency to a third party.

b) Receipt of a cheque constitutes constructive possession, provided the balance payable is available in the account of the issuer in the currency of the cheque and the Institution has blocked such a balance for payment.

c) The receipt of a voucher by a merchant, signed by the credit card holder (buyer), is constructive possession of the amount of currency entered as payable on the coupon provided that the card issuing Institution pays the amount without deferment to the merchant accepting the card.

2/7 Agency in trading in currencies

2/7/1 It is permissible to appoint an agent to execute a contract of sale of a currency with authorisation to take possession of and deliver the countervalue.

2/7/2 It is permissible to appoint an agent to sell currencies without authorizing him to take possession of the amount sold, provided the principal or another agent takes possession at the closing of the transaction, before the principal parties are dispersed.

2/7/3 It is permissible to authorise taking possession of the countervalues after the execution of a contract of currency exchange, provided such possession is completed by the authorised agents at the closing of the transaction, before the principal parties are dispersed.

2/8 Use of modern means of communication for currency trading

2/8/1 Bilateral contracting between two parties at different remote places using modern communication means has the same juristic consequences as execution of the contract in one and ame place.

2/8/2 An offer made for a stated period, which is transmitted by one of the prescribed means of communication, remains binding on the offeror during that period. The contract is not completed until acceptance by the offeree, and taking possession of the countervalues (either actual or constructive) by both parties, has taken place.

2/9 Bilateral promise to purchase and sell currencies

2/9/1 A bilateral promise to purchase and sell currencies is forbidden if the promise is binding, even for the purpose of hedging against currency devaluation risk. However, a promise from one party is permissible even if the promise is binding.

2/9/2 Parallel purchase and sale of currencies is not permissible, as it incorporates one of the following invalidating factors:

a) There is no delivery and receipt of the two currencies bought and sold, and thus the contract amounts to a deferred sale of currency.

b) Making a contract of currency exchange conditional on another contract of currency exchange.

c) A bilateral promise that is binding on both parties to the contract of currency exchange, and this is not permissible.

2/9/3 It is not permissible for one of the partners in Musharakah or Mudarabah to be a guarantor for the other partner, to protect the latter from the risks of dealing in currencies. However, it is permissible for a third party to volunteer being a guarantor for that purpose, provided this guarantee is not stated in the contract.

2/10 Exchange of currencies that are debts owed by the parties

An exchange of amounts denominated in currencies that are debts established as an obligation on the debtor is permissible, if this results in the settlement of the two debts in place of a bilateral exchange of currencies, and in the fulfilment of the obligations in respect of these debts. This covers the following cases:

2/10/1 Discharge of two debts when one party owes an amount from another party denominated in (say) dinar and the other party owes an amount from the first party denominated in (say) dirham. In this context, both may agree on the rate of exchange between the dinar and the dirham in order to extinguish the debts, wholly or partially. This type of transaction is known as *al-Muqassah* (set-off).

2/10/2 The creditor's making payment of a debt due to him in a currency different from that in which the debt was incurred, provided the settlement is effected as a spot transaction at the spot exchange rate on the day of settlement.

2/11 Combination of currency exchange and transfer of money

It is permissible to execute a financial transfer of money (remittances) in a currency different from that presented by the applicant for the transfer. This transaction consists of a currency exchange effected through actual or constructive possession by delivering an amount of currency that is evidenced by a bank draft, followed by the transfer of the amount using currency that is bought by the applicant for the transfer of money. It is permissible for the Institution to charge a fee for the transfer.

2/12 Forms of dealing in currencies via Institutions

2/12/1 Among the forms that are not permitted is the customer of an Institution entering into currency trading for an amount of money exceeding the amount of money he owns, using credit facilities granted by the Institution which handles the currency trading, thus enabling the customer to enter into a transaction for an amount in excess of what he would otherwise be able to pay for.

2/12/2 It is not permitted for the Institution to lend the customer a sum of money on the condition that currency dealing must be effected with that Institution and not with any other. If there is no such condition, then there is no Shari'ah prohibition.

3. Date of Issuance of the Standard

This Standard was issued on 27 Safar 1421 A.H., corresponding to 31 May 2000 A.D.

Adoption of the Standard

The Shari'ah Standard on Trading in Currencies was adopted by the Shari'ah Board in its meeting No. (4) held on 25-27 Safar 1420 A.H., corresponding to 29-31 May 2000 A.D.

Appendix (A)
Brief History of the Preparation of the Standard

In its meeting No. (1) held in Bahrain on Saturday 11 Dhul-Qa'dah 1419 A.H., corresponding to 27 February 1998 A.D., the Shari'ah Board decided to give priority to the preparation of a Shari'ah standard on Trading in Currencies.

On Saturday 11 Dhul-Qa'dah 1419 A.H., corresponding to 27 February 1999 A.D., a Shari'ah consultant was commissioned to prepare a juristic study and an exposure draft.

In its meeting held in Bahrain on 13-16 Rabi' I, 1420 A.H., corresponding to 27-30 June 1999 A.D., the Shari'ah Committee discussed the juristic study and made certain amendments to it. The committee also discussed the exposure draft of the standard in its meeting No. (3) held in Bahrain on 9-11 Rajab 1420 A.H., corresponding to 18-20 October 1999 A.D., and asked the consultant to make some amendments in light of the comments made by the members.

The revised exposure draft of the standard was presented to the Shari'ah Board in its meeting No. (2) held in Mecca on 10-15 Ramadan 1420 A.H., corresponding to 18-22 December 1999 A.D. The Shari'ah Board made further amendments to the exposure draft of the standard and decided that it should be distributed to specialists and interested parties in order to obtain their comments in order to discuss them in a public hearing.

A public hearing was held in Bahrain on 29–30 Dhul-Hajjah 1421 A.H., corresponding to 4-5 April 2000 A.D. The Public hearing was attended by more than 30 participants representing central banks, Institutions, accounting firms, Shari'ah scholars, academics and others who are interested in this field. Members of the Shari'ah Studies Committee responded in the

public hearing to the written comments as well as to the oral comments that were expressed in the public hearing.

The Shari'ah Studies Committee held its meeting No. (5) on 22-24 Muharram 1421 A.H., corresponding to 26-28 April 2000 A.D, to discuss the comments made about the exposure draft. The Committee made the necessary amendments, which it deemed necessary in light of both the discussions that took place in the public hearing and the written comments that were received.

The Shari'ah Board in its meeting No. (4) on 25–27 Safar 1421 A.H., corresponding to 29–31 May 2000 A.D., in Al-Madinah Al-Munawwarah discussed the amendments made by the Shari'ah Studies Committee, and made the necessary amendments, which it deemed necessary. The standard was adopted by the majority vote of the members of the Shari'ah Board, as recorded in the minutes of the Shari'ah Board.

Appendix (B)
The Shari'ah Basis for the Standard

Available Evidence Pertaining to the Exchange of Currencies

In the Hadiths of the Prophet, there are many Hadiths which govern the rules regarding the exchange of currencies. The best known Hadith is the one reported on the authority of Ubadah Ibn Al-Samit (may Allah be pleased with him) that the Prophet (peace be upon him) said: *"Gold for gold, silver for silver – until he said - equal for equal, like for like, hand to hand, if the kinds of assets differ, you may sell them as you wish provided it is hand to hand."*(2) The other Hadith, reported on the authority of Abu Sa'id Al-Khudri, is that the Prophet (peace be upon him) said: *"Do not sell gold for gold except equal for equal and do not sell what is deferred for a spot exchange."*(3) These two Hadiths show clearly enough that gold is of one kind and the silver is of another. A few decisions have been issued by Islamic Fiqh organizations(4) in accordance with the Shari'ah ruling that has been already accepted amongst the jurists, namely that dinars are of a different kind from dirhams. Contemporary Islamic Fiqh scholars have made an analogy between paper and coin money and gold and silver money referred to in the prophetic Hadith. The currency of each

(2) Related by Muslim in his *"Sahih Muslim"*.

(3) Related by Al-Bukhari in his *"Sahih Al-Bukhari"*.

(4) Among other examples is the one issued by the General council of Fatwa in Kuwait as follows: It is permissible to sell currencies that are different from each other because every currency is considered as a kind of money on its own, like that of gold and silver, and therefore it is permissible to sell a particular currency such as dollar, for another currency such as Indian Rupee even for inequality as it is permissible to sell gold for silver for a different weight, provided the bilateral taking possession of the two counter values (two currencies) must take place in the session of the contract. However, if a certain amount of a particular currency is sold for the same currency such as Indian rupee for Indian rupee, then the inequality is impermissible (*"Majmu'at Al-Fatawa Al-Shar'iyyah"*, Adminsitration of Fatwa of Kuwait 3/160 no. 788).

country is considered as being of a kind that is different from that of other countries as they are 'constructive money' according to the decision of the International Islamic Fiqh Academy.[5] Therefore, these currencies differ in kind according to the authority that considers them as money.

On this basis, it has been a condition, in the exchange of currencies that are of the same kind, that equality in amount as well as taking possession of the two countervalues before the two contracting parties depart the place of the closing of the contract. However, if the kind of the currencies to be exchanged is different, then it is permissible for the amounts to be different, but the condition of taking possession of the countervalues before the two contracting parties leave the place of signature of the contract shall prevail.

Shari'ah Ruling on Trading in Currencies

The original ruling on trading in currencies is that it is permissible, as it falls under the general Islamic provisions regarding the permissibility of selling gold, silver and money because this is one means of earning a profit. This ruling is applicable as long as there is no reason for considering the dealing as prohibited or objectionable. The basis of this ruling is the Hadith that are available with regard to exchange of currencies and the general ruling that is derived from these Hadith as decided by the jurists in the chapter on currency exchange. Whenever one of the Shari'ah precepts is not met, then the dealing is not permissible.

Stipulation of Equality and Taking Possession

While equality of the countervalues and concurrent taking of possession are required in the exchange of two similar kinds of currencies, only bilateral taking of possession is required in the exchange of two dissimilar kinds, based on the basis stated in (1) above.

Constructive Possession

Constructive possession –as in the forms mentioned in the standard– is on an equal footing with actual possession, because the Shari'ah never prescribed a particular method for taking possession. Therefore, reference must be made to the prevailing custom in the business community which

(5) The International Islamic Fiqh Academy Resolution No. 21 (9/3).

results in the ability to dispose of the currency for the intended purpose and transfer of the risk of the currency to the transferee, as in the forms mentioned in the standard.

As for the various forms of constructive possession, there is a decision issued by the International Islamic Fiqh Academy,[6] and the various Fatwa Committees have added to these forms some others, such as the credit card settlement coupon.[7]

The Ninth Seminar of Al Baraka[8] has confirmed the prohibition of giving a guarantee by one of the parties in Mudarabah or Musharakah transactions to the other party, to indemnify him against currency risks.

Agency in Exchange of Currencies and Issue of Taking Possession

Agency in exchange of currencies is permissible because agency is permissible with regard to an activity that the principal could undertake personally. As one could undertake the exchange himself, then it is also permissible for him to authorise its undertaking by others on his behalf. However, since taking possession of the countervalues immediately after concluding the contract has been a juristic condition, the juristic requirement in the case of agency would be the taking possession by the parties to the contract of exchange, whether through principal or agent. When the agency is for the purpose of taking possession only, the juristic rule relates to the leaving of the place of execution of the contract by both principals before possession is taken, and not to the agent's doing so.

Use of Modern Means of Communication for Trading in Currencies

The International Islamic Fiqh Academy[9] issued a decision on the subject of those means of communication. This is a reinforcement of what has already been approved by the jurists on the permissibility of concluding

(6) International Islamic Fiqh Academy Resolution No. 53 (3/6); *"Majallat Al-Majma'"*, vol. 6 [2: 785].

(7) Fatwa No. (12/6) of Al Baraka Seminar No. (12), stating: A payment slip signed by the cardholder is tantamount to receipt, by means of a cheque. In this respect it is stronger than a cheque, as stated by experts, because it is binding on the trader and it discharges the cardholder of the debt immediately, and he may not protest the collection of the amount thereof.

(8) Al Baraka Seminar No. 9 (9/5).

(9) The International Islamic Fiqh Academy Resolution No. 52 (3/6).

a contract via writing and communications that can be understood. This would cover all contemporary means such as telex, fax, internet, etc.

Bilateral Promise in Exchange of Currencies

The prohibition of a binding bilateral promise in an exchange of currencies is supported by the majority of Shari'ah jurists, because binding bilateral promises from two parties are equivalent to a contract, and also for the reason that the bilateral promise is not immediately followed by taking possession of the countervalues, since it is not the wish of the parties to take possession at that time.

Financial Institutions have a customary practice of treating promises as binding, even when formally they are not. A promise from one party only (as opposed to a bilateral promise) is permissible in currency exchange, even if it is binding.

Exchange of Currencies that Are Owed by the Parties

The basis of the permissibility of an exchange of amounts denominated in currencies that are debts established as an obligation of the debtor, on the condition that the two obligations are thereby settled, is that this would entail the settlement of the debt by discharging it. This does not involve any prohibited transaction pertaining to debts either with regard to sale or purchase.

As for some of the forms mentioned in the standard, there are texts to support them, inter alia, the Hadith reported on the authority of Ibn Umar (may Allah be pleased with him) who said: "I have met the Prophet (peace be upon him) at the house of Hafsah (may Allah be pleased with her). And I said to him: 'O Prophet of Allah, I would like to ask you; 'I sell a camel in Al-Baqi' for a price quoted in dinar but I take dirham, and I sell for a price quoted in dirham but I take dinars, I take this from this and I give this from this'. The Prophet (peace be upon him) replied: *'There is no objection to your taking the other currency based on the price of the day, provided you do not leave each other with something remaining owed as a debt between you'*."[10] Some of the forms in the standard are a kind of set-off and this is permissible.

(10) Related by Abu Dawud, Al-Tirmidhi, Al-Nassa`i, Ibn Majah and Al-Hakim, who deemed it a sound Hadith, as confirmed by Al-Dhahabi. It was also narrated without a chain of narrators, quoting only Ibn Umar (*"Al-Talkhis Al Habir"* [3: 26]).

Combination of Currency Exchange and Transfer of Money

The basis of the permissibility of the combination of currency exchange and transfer of money is the achievement of constructive possession by virtue of a bank draft for the amount that is given in one currency in return for an amount paid in another currency for the purpose of its transfer. In this regard, there is a decision by the International Islamic Academy of Fiqh that reads: "If a transfer of money is to be made in a currency different from the currency of the amount paid by the applicant, then the transaction is based on currency exchange and transfer of money. The currency exchange takes place before the transfer, that is, the customer pays the amount of money to the bank and the bank, after agreeing on the currency exchange rate that is printed on the receipt delivered to the customer, issues a bank draft on the basis of transfer of debt in the sense that has been mentioned."(11)

Forms of Trading in Currencies

The following form is not permissible: providing a type of financial facility to a customer who wishes to engage in currency trading which enables him to deal in amounts that he does not own and to sell amounts that he does not own. An alternative and permissible form is that the Institution lends the money to the customer so that the latter would then deal in amounts that he owns. However, this would not be permissible if the Institution made it a condition of the loan that the customer must carry out the currency trading with the Institution, as this would involve a combination of both loan and contract of exchange. This is not permissible because it results in a benefit to the lender. Where no such condition is imposed, there is no prohibition.

(11) International Islamic Fiqh Academy Resolution No. 48 (1/9)

Shari'ah Standard No. (8)

Murabahah*

(Revised Standard)

* This standard was previously issued by the title "Shari'ah Rules for Investment and Financing Instruments No. (1) Murabahah to the Purchase Orderer. It is reissued as a Shari'ah standard based on the resolution of the Shari'ah Board to reformat all Shari'ah Rules in the form of Shari'ah Standards.

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

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

Preface

The purpose of this standard is to explain the Shari'ah basis and rules for a Murabahah transaction, the stages of this transaction beginning from the promise to transferring ownership of the goods to the customer, and the Shari'ah requirements that need to be observed by Islamic financial Institutions.[2]

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

Statement of the Standard

1. Scope of the Standard

This standard covers the Murabahah transaction and its various stages, the issues relating to guarantees before concluding a Murabahah deal such as promise, *Hamish Jiddiyyah* (security deposit) and issues relating to guarantees for recovery of the debt created by the Murabahah transaction.

This standard does not cover deferred payment sales that take place on a basis other than that of Murabahah. It also does not cover other trust and bargaining sales.

2. Procedures Prior to the Contract of Murabahah

2/1 The customer's expression of his wish to acquire an item through the Institution

2/1/1 The Institution may purchase the item only in response to its customer's wish and application, as long as this practice is compatible with the Shari'ah precepts for the contract of sale.

2/1/2 With due consideration to item 2/2/3, it is permissible for the customer to request the Institution to purchase the item from a particular source of supply. However, the Institution is entitled to decline to carry out the transaction if the customer refuses offers from other sources of supply that are more suitable for the Institution.

2/1/3 The customer's wish to acquire the item does not constitute a promise or commitment except when it has been expressed in due form. It is permissible to prepare a single set of documentation to be signed by the customer and to include both the customer's stated wish that the Institution should buy the item from the supplier and a promise to buy the item from the Institution. It is permissible for the customer to prepare such

a document, or it may be a standard application form prepared by the Institution to be signed by the customer.

2/1/4 The customer may obtain statement of prices from the supplier whether they are addressed to the customer by name [specific offer], or with no reference to any named customer [general offer]. In the latter case, the statement is considered as an invitation to negotiate, and not as an offer of sale. It is preferable that the invoice should be addressed to the Institution so as to include an offer of sale from the supplier effective up to the end of a specified period. The contract of sale is deemed concluded once acceptance comes from the Institution.

2/2 The position of the Institution in respect to the application of the customer for Murabahah

2/2/1 When there is acceptance by the customer of an offer from the supplier that is either addressed to him personally, or that has no addressee, then the sale is concluded with the customer and so it is not permissible for the Institution to carry out Murabahah on the same item.

2/2/2 It is essential to exclude any prior contractual relationship between the customer who is the purchase orderer and the original supplier of the item ordered, if any, regarding the supply of the item. It is a requirement of Murabahah that the transaction between the two parties must genuinely, not fictitiously, exclude any prior contractual relationship.

It is not permissible to assign a contract that has been executed between the customer and the supplier of the ordered item to the Institution.

2/2/3 The Institution must ensure that the party from whom the item is bought is a third party other than customer or his agent. For example, it is not permitted for a customer to sell an ordered item to the Institution and then repurchase it through a Murabahah transaction. Nor may the party that is supplying the item be wholly, or by way of majority [more than 50%],

owned by the customer. If a sale transaction takes place and later on it is discovered that it was carried out through such practices, this would render the transaction void as it is tantamount to 'Inah.

2/2/4 If the supplier (owner) of the item has a blood relationship or marital relationship with the customer, then the Institution shall verify, before entering into Murabahah, that the sale is not fictitious and not a stratagem for the sale of 'Inah.

2/2/5 It is not permissible for the Institution and the customer to agree to form a Musharakah in a project or a specified deal together with a promise from one of them to buy the other's share in Musharakah by means of Murabahah on either spot or deferred payment terms. However, it is permissible for one partner to promise to purchase the other's share in Musharakah at market price or at a price to be agreed upon at the time of sale provided a new contract is drawn up. This sale may be on spot or on deferred payment terms.

2/2/6 It is not permitted to carry out a Murabahah on deferred payment terms where the asset involved is gold, silver or currencies.

2/2/7 It is also impermissible to issue negotiable Sukuk where the underlying asset consists of Murabahah receivables or other receivables only.

2/2/8 Likewise, it is not permitted to renew a Murabahah contract on the same commodity that was the subject matter of a previous Murabahah contract with the same customer, i.e. to refinance the transaction.

2/3 The promise from the customer

2/3/1 It is not permissible that the document of promise to purchase (signed by the customer) should include a bilateral promise which is binding on both parties (the Institution and the customer).

2/3/2 The customer's promise to purchase, and the related contractual framework, are not integral to a Murabahah transaction, but are intended to provide assurance that the customer will complete the transaction after the item has been acquired by the Institution. If the Institution has other opportunities to sell the item, then it may not need such a promise or contractual framework.

2/3/3 A bilateral promise between the customer and the Institution is permissible only if there is an option to cancel the promise which may be exercised either by both promisors or by either one of them.

2/3/4 It is permissible for the Institution and the customer, after the latter has given a promise but before the execution of the Murabahah, to agree to revise the terms of the promise whether with respect to the deferment of payment, the mark-up or other terms. The terms of the promise cannot be revised except by mutual consent by both parties.

2/3/5 It is permissible for the Institution to purchase the item from a supplier on a "sale or return" basis, i.e., with the option to return it within a specified period. If the customer then does not purchase the item, the Institution is able to return it to the supplier within the specified period on the basis of the conditional option that is established in Shari'ah. The option between the Institution and the supplier does not expire by the mere presentation of the item to the customer, but it expires by virtue of the actual sale to the customer. It is advisable to stipulate in a stipulated option to revoke (*khiyar al-Shart*) that the mere offer by the purchaser for the sale of the item to a third party does not invalidate the option.

2/4 Commissions and expenses

2/4/1 It is not permissible for the Institution to receive a commitment fee from the customer.

2/4/2 It is not permissible for the Institution to receive a fee for providing a credit facility.

2/4/3 The expenses of preparing the documents of the contract between the Institutions and the customer are to be borne evenly by the two parties (the Institution and the customer), provided they do not agree that the expenses are to be borne wholly by one party, and provided those expenses are proportional to the actual amount of work involved, so that they do not implicitly include a commitment fee or a facility fee.

2/4/4 If the Murabahah is carried out by means of syndicated financing, the Institution which acts as the arranger of the syndicate is entitled to an arrangement fee to be paid by the participants in the syndicate.

2/4/5 It is permissible for the Institution to receive a fee for a feasibility study that it undertakes in case such study is requested by the customer and for the benefit thereof and the customer agrees to pay the fee thereof. The customer is entitled to a copy of the study if he so requires.

2/5 Guarantees related to the commencement of the transaction

2/5/1 It is permissible for the Institution to obtain from the customer (the purchase orderer) a guarantee (performance deed) regarding the good performance by the supplier of his contractual obligations towards the Institution in his personal capacity and not in his capacity as purchase orderer or in his capacity as an agent of the Institution. Hence, if the Murabahah contract is not executed, his guarantee would still be valid. This guarantee is required only in cases where the customer has suggested a particular source of supply for the item that is the subject matter of the Murabahah contract.

As a consequence of this guarantee, the customer shall make good any damage suffered by the Institution due to failure of the supplier to provide good performance of his contractual obligations. These obligations concern meeting the specification

of the item to be supplied and the exercise of diligence in executing the contract, non-observance of which may result in the loss of the Institution's time and efforts or property, or in a legal dispute and damage claims.

2/5/2 It is not permitted to impose on a customer who is the purchase orderer a guarantee regarding hazards that may affect the item such as damage and destruction during a period of shipment or storage.

2/5/3 It is permissible for the Institution, in the case of a binding promise by the customer, to take a sum of money as *Hamish Jiddiyyah* (security deposit). This is to be paid by the customer at the request of the Institution, both as an indication of the financial capacity of the customer and to ensure the compensation of any damage to the Institution arising from a breach by the customer of his binding promise. Having taken this *Hamish Jiddiyyah*, the Institution need not to demand compensation for damage as this may be charged against the *Hamish Jiddiyyah*. The *Hamish Jiddiyyah* is not considered as 'Arboun (Earnest Money). The amount of money deposited by the customer as security for his commitment can be either held, if the customer permits the Institution to invest it, as an investment trust on the basis of Mudarabah between the customer and the Institution, or held in a current account at the discretion of the customer.

2/5/4 In the case of the customer's breach of his binding promise, the Institution is not permitted to retain *Hamish Jiddiyyah* as such. Instead, the Institution's rights are limited to deducting the amount of the actual damage incurred as a result of the breach, namely the difference between the cost of the item borne the Institution and the price at which the item is sold to a third party. The actual damage to the Institution may not include the loss of its mark-up in the Murabahah transaction, that is, its opportunity loss.

2/5/5 When the customer has fulfilled his promise and executed the contract of Murabahah, the Institution must refund *Hamish Jiddiyyah* to the customer. The Institution is not entitled to receive any amount out of *Hamish Jiddiyyah* except in the case of breach of promise as laid down in item 2/5/3. It is permissible for the Institution to agree with the customer that the amount of *Hamish Jiddiyyah* will be deducted from the price payable by the customer pursuant to the contract of Murabahah.

2/5/6 It is permissible for the Institution to take 'Arboun (Earnest Money) upon conclusion of the Murabahah sale with the customer. This may not be done during the contractual stage at which the customer has given his promise to purchase. In the event that the customer revokes the contract in an 'Arboun-based transaction, it is preferable that the Institution, after deducting the actual damage it incurs, refunds the remaining amount of 'Arboun to the customer. The damage in this context means the difference between the cost of the item borne the Institution and the price at which the item is sold to a third party.

3. Acquisition of Title to, and Possession of, the Asset by the Institution or Its Agent

3/1 The acquisition of the asset or good by the Institution prior to its sale by means of Murabahah

3/1/1 The Institution shall not sell any item in a Murabahah transaction before it acquires such item. Hence, it is not valid for the Institution to conclude a Murabahah sale with the customer before the Institution concludes a urchase contract with the supplier of the item the subject matter of the Murabahah and before it acquires actual or constructive possession of such items, which can be achieved when the supplier gives the Institution control over the item or the documents that represent possession thereof [see items 3/2/1-3/2/4]. Likewise, the Murabahah is considered void in case the contract with the supplier is void, because

in this case the Institution would fail to acquire complete title to the item.

3/1/2 It is permitted that the contract between the Institution and the supplier be completed by means of a meeting of the two parties to discuss the details, at which point the contract may be executed. Likewise, it is permitted that the contract be completed through exchanging of the notices of offer and acceptance, either in writing or by any form of modern communication customarily practiced according to known principles.

3/1/3 The original principle is that the Institution itself purchases the item directly from the supplier. However, it is permissible for the Institution to carry out the purchase by authorizing an agent, other than the purchase orderer, to execute the purchase; and the customer (the purchase orderer) should not be appointed to act as an agent except in case of a dire need. Furthermore, the agent must not sell the item to himself. Rather, the Institution must first acquire title of the item and then sell it to the agent. In such a case, the provisions of item 3/1/5 should be observed.

3/1/4 In cases when the customer is authorized to purchase the item as the Institution's agent, it is obligatory to adopt procedures which would ensure that certain conditions are observed. These conditions include:

a) the Institution itself must pay the supplier, and not pay the price of the item into the account of the customer as agent, whenever possible.

b) the Institution should obtain from the supplier the documents that confirm that a sale has taken place.

3/1/5 It is obligatory to separate the two liabilities of risk attaching to the purchased item, namely the liability of the Institution and the liability of the customer as agent of the Institution. This is achieved by having an interval in time between the

performance of the agency contract and the execution of the contract of Murabahah, as indicated in the customer's notice of performance of the agency contract to acquire the item and offer to purchase the item by means of Murabahah [see Appendix (a)], followed by the institution's notice of its acceptance of the customer's offer to purchase and the execution of the Murabahah sale contract [see Appendix (b)].

3/1/6 The original principle is that all documents and contracts concerned with the execution of the sale of the item must be in the name of the Institution and not in that of the customer, unless the latter acts as the Institution's agent in acquiring the item.

3/1/7 It is permissible, at the time when the Institution appoints someone as its agent for the acquisition of the item, that the two parties agree to authorize the agent to carry out the acquisition of the item as agent, without disclosing the existence of the agency agreement. In this case, the agent will act as principal in dealing with other parties, and will undertake the purchase directly in his name but on behalf of the Institution as principal. However, it is preferable that the agent's role be disclosed.

3/2 The Institution's taking possession of the asset or good, prior to its sale by Murabahah

3/2/1 It is obligatory that the Institution's actual or constructive possession of the item be ascertained before its sale to the customer on the basis of Murabahah.

3/2/2 The condition that possession of the item must be taken by the Institution (before its onward sale to the customer) has a specific purpose: that the Institution must assume the risk of the item it intends to sell. This means that the item must move from the responsibility of the supplier to the responsibility of the Institution. Similarly, it is obligatory that the point when the risk of the item is passed on by the Institution to the customer

be clearly identified, with reference to the stages in which the item is transferred from one party to another.

3/2/3 The forms of taking delivery or possession of items differ according to their nature and different trade customs. Taking possession may be actual in the case of the physical delivery or transportation to the acquirer or its agent, but may also take place constructively by placing of the item at the acquirer's disposal so as to enable him to deal with it at his will, even though no physical delivery has taken place. Taking possession of an item of real property may also take place by means of the property being vacated and its being placed at the acquirer's disposal; if the latter is not able to have disposal of the purchased item, then the vacation of the property is not considered as conveying possession. In the case of moveable assets, possession will take place in accordance with the nature of the asset.

3/2/4 The receipt of a bill of lading by the Institution or its agent, when purchasing goods on the international market, is considered as constructive possession. The same would apply to the Institution's receipt of certificates of storage issued by warehouses following appropriate and reliable formalities.

3/2/5 The original principle is that the Institution itself must receive the item from the premises of the supplier or from a location that is specified in the delivery conditions. The responsibility for the risk attached to the item is transferred to the Institution upon its taking possession of the item. However, it is permissible for the Institution to authorize another party to take delivery of the item on its behalf.

3/2/6 As the Institution is the owner of the subject matter of Murabahah its insurance lies with the Institution before selling it to the customer. Any amount recovered from insurance at this stage will belong to the Institution exclusively and the customer has no claim to it even if the recovered amount exceeds the purchase price. The Institution is entitled to include

the expenses of insurance in the Murabahah cost price to be subsequently added to the price of Murabahah. Insurance must be on the basis of Takaful whenever possible.

3/2/7 Agency in carrying out the procedures of obtaining insurance cover for the item at the stage of the Institution's acquisition of ownership of the asset is permitted. However, it is obligatory that the Institution should bear the cost of insurance.

4. Conclusion of a Murabahah Contract

4/1 It is not permitted for the Institution to consider that the contract of Murabahah is automatically concluded by its mere taking possession of the asset. Likewise, the Institution may not force a customer who is the purchase orderer to take delivery of the asset and pay the Murabahah selling price, if the customer refuses to conclude the Murabahah transaction.

4/2 The Institution is entitled to receive compensation for any actual damage it has incurred as a result of the customer's breach of a binding promise. The compensation consists of the customer reimbursing the Institution for any loss due to a difference between the price received by the Institution in selling the asset to a third party and the original cost price paid by the Institution to the supplier.

4/3 When the Institution has purchased an asset for a deferred price, with the intention that it will be sold on a Murabahah basis, then the Institution is obliged to disclose to the customer that the asset is purchased by the Institution on deferred payment basis. The Institution has the obligation to disclose to the customer, when concluding the contract of sale, the details of any expenses that it would include in determining the cost. The Institution is also entitled to include any expenses relating to the item if this is acceptable to the customer. However, if the Institution failed to disclose any expenses, it is not entitled to include them unless they are customarily considered as normal expenses, such as transportation expenses, storage expenses, fees for letters of credit and insurance premiums.

4/4 The Institution is not entitled to include in the base cost of the item, for the purpose of calculating the Murabahah price, any amounts other than the direct expenses that are paid to a third party. It is not permissible, for example, for the Institution to add to the cost of the item payments made to its own staff for their work, and the like.

4/5 If the Institution has, even after the drawing up of the Murabahah contract, received a discount for the same item that was sold on Murabahah basis from the supplier of the item, then the customer should benefit from that discount by a reduction of the total Murabahah selling price in proportion to the discount.

4/6 It is an obligation that both the price of the item and the Institution's profit on the Murabahah transaction be fixed and known to both parties on the signature of the contract of sale. It is not permitted under any circumstances to subject the determination of the price or the profit to unknown variations or variations that are determinable in the future, such as by concluding the sale and making the profit dependent on the rate of LIBOR that will prevail in the future. There is no objection to referring to any other known indicators during the promise stage as a comfort indicator to determine the rate of profit, provided that the determination of the Institution's profit at the time of concluding the Murabahah is based on a certain percentage of the cost and is not tied up with LIBOR or a time factor.

4/7 The Institution's profit mark-up in Murabahah must be known, and the mere mention of the total selling price is not sufficient. It is permissible that the profit be determined based on a lump sum amount or a certain percentage of the cost price only or of the cost price plus the expenses. This determination is completed by the agreement and mutual consent of the two parties.

4/8 It is permissible to agree on the payment of the price of the item under Murabahah either by short or long term instalments, and the selling price of the asset becomes a debt that the customer is obligated to pay at the time agreed upon. It is not permitted subsequently to demand any extra payment either in consideration of extra time

given for payment or for delay in payment that may be for a reason or no reason.

4/9 It is permissible for the Institution to stipulate in the contract of Murabahah a condition that the Institution is free from responsibility for all or some of the defects of the asset, but not from destruction caused before the possession of the customer or diminution of quantity sold; this is known as *Bay' al-Bara`ah* (sale on 'as is' basis). In the case of stipulating such a condition, it is preferable that the Institution should assign to the customer the right of recourse to the supplier to obtain compensation for any defects that are established, which would otherwise be recoverable by the Institution from the supplier.

4/10 The Institution shall be responsible for pre-existing hidden defects which appear after the conclusion of the contract, unless it stipulates otherwise according to item 10/4. However, it shall not be responsible for any new defects (recent defects) that arise after the conclusion of the contract and taking delivery by the customer.

4/11 The Institution is entitled to include, as a condition of the contract, that in case of the customer's refusal, after the execution of the Murabahah contract, to take delivery of the asset at the prescribed time, the Institution could revoke the contract or sell the asset to a third party on behalf of the customer and for his account. The Institution could then recover from the selling price the amount due to it from the customer under the contract, and would have recourse to the customer for the balance if that price were not sufficient to cover the amount due to the customer.

5. Guarantees and Treatment of Murabahah Receivables

5/1 It is permissible for the Institution to stipulate to the customer that instalments may become due before their originally agreed due dates in case of the customer's refusal or delay in paying any instalment without any valid reason after the lapse of the time specified in the notice to be sent by the Institution to the customer within a reasonable period of time following the due date.

5/2 The Institution should ask the customer to provide permissible security in the contract of Murabahah. Among other things, the Institution may receive a third party guarantee or the mortgagee of the investment account of the customer or the mortgagee of any item of real or moveable property, or the mortgagee of the subject matter of the Murabahah contract as a fiduciary mortgagee (or a registered charge), either without taking possession of the mortgageed asset, or by taking possession of the mortgageed asset and then releasing the mortgagee progressively according to the percentage of the total payment received.

5/3 It is permissible for the Institution to require the customer to provide cheques or promissory notes before the execution of the contract of Murabahah, as a guarantee of the indebtedness that will be created after the execution of the contract. This is possible on the written condition that the Institution is not entitled to use these cheques or documents except on their due dates. The requirement to provide cheques as security is not permissible in countries where they could be presented for payment before their due date.

5/4 It is not permissible to stipulate that the ownership of the item will not be transferred to the customer until the full payment of the selling price. However, it is permissible to postpone the registration of the asset in the customer's name as a guarantee of the full payment of the selling price. The Institution may receive authority from the customer to sell the asset in case the customer delays payment of the selling price, in which case the Institution should issue a counter-deed to the customer to establish the latter's right to ownership. If the Institution sells the asset as a result of the customer's failure to make a payment of the selling price on its due date, it must confine itself to recovering the amount due to it and must return the balance to the customer.

5/5 In the case of the Institution receiving a mortgagee from the customer, the Institution is entitled to stipulate that the customer should make an assignment to the Institution to enable it to sell the mortgageed

asset for the purpose of recovering the amount due from the customer without recourse to the judiciary.

5/6 It is permissible that the contract of Murabahah consists of an undertaking from the customer to pay an amount of money or a percentage of the debt, on the basis of undertaking to donate it in the event of a delay on his part in paying instalments on their due date. The Shari'ah Supervisory Board of the Institution must have full knowledge that any such amount is indeed spent on charitable causes, and not for the benefit of the Institution itself.

5/7 It is not permissible to extend the date of payment of the debt in exchange for an additional payment in case of rescheduling, irrespectively of whether the debtor is solvent or insolvent.

5/8 When there is default in payment by the customer with regard to instalments of the selling price that are due, the amount due is just the amount of the unpaid selling price. It is not permissible for the Institution to impose any additional payment on the customer for the Institution's benefit. This provision is, however, subject to item 5/6 .

5/9 It is permissible for the Institution to give up part of the selling price if the customer pays early, provided this was not part of the contractual agreement.

5/10 If the customer wishes to pay in a currency different from Murabahah currency, it is permissible, with the agreement of the Institution at the time of payment on condition that the payable debt is paid in full or the amount agreed to be paid in different currency is paid in full and no part of the currency exchange amount remains due. This currency exchange may not be stipulated in the contract of Murabahah.

6. Date of Issuance of the Standard

This Standard was issued on 4 Rabi' I, 1423 A.H., corresponding to 16 May 2002 A.D.

Adoption of the Standard

The Shari'ah standard for Murabahah was adopted by the Shari'ah Board in its meeting No. (4) held on 25-27 Safar 1421 A.H., corresponding to 29-31 May 2000 A.D.

In its meeting No. (8) held in Mecca on 28 Safar - 4 Rabi' I, 1423 A.H., corresponding to 11-16 May 2002 A.D., the Shari'ah Board readopted a resolution to reformat the Shari'ah rules for Murabahah in the form of a Shari'ah standard.

Appendix (A)
Notice from Institution's Customer of Its Performance of Purchasing Asset or Good As Agent for Institution, and of Its Offer to Purchase Item from Institution According to Contract of Murabahah

Notice from the institution's customer of its performance of the purchase of the asset or good as agent for the institution:

From: (The Institution's customer as agent) .....

To: (The Institution).....

In the performance of my contract of agency with you, I hereby inform you that I have purchased the item described below on your behalf and for your benefit. This item is in my possession on your behalf.

In accordance with my promise to you, I hereby agree to purchase this item from you for a total price of ……., namely the cost price of …... plus the mark-up of ….....

The payment of this price will be in accordance with the following schedule of instalments:

- ……..

- …….

- ……..

Please send the acceptance in accordance with this offer.

Appendix (B)
Notice of Acceptance by Institution of Customer's Offer to Purchase Asset or Good to Be Acquired, and of selling item by Institution to Customer

Notice of the acceptance by the Institution of the customer's offer to purchase the asset or good to be acquired:

From: (The Institution).....

To: (The customer as the Institution's agent).....

In response to your notice dated ….., containing your offer to purchase the item described below which is owned by us, we hereby confirm to you our sale of the item to you at a total price of ….. comprising the cost price of ….. plus the mark-up of ….., in accordance with the conditions explained in the general agreement to a contract of Murabahah.

Please send the acceptance in accordance with this offer.

Appendix (C)
Brief History of the Preparation of the Standard

In its meeting No. (1) held on 11 Dhul-Hajjah 1419 A.H., corresponding to 27 February 1999 A.D., the Shari'ah Board decided to give priority to the preparation of a Standard setting out the Shari'ah rules for Murabahah.

On Tuesday 13 Dhul-Hajjah 1419 A.H., corresponding to 30 March 1999 A.D., the Fatwa and Arbitration Committee recommended to the Shari'ah Board the commissioning of a Shari'ah consultant to prepare a juristic study and an exposure draft of the Shari'ah Rules for Murabahah.

In its meeting held on 13-14 Rajab 1420 A.H., corresponding to 22-23 October 1999 A.D., the Fatwa and Arbitration Committee discussed the exposure draft of the Shari'ah Rules for Murabahah, and asked the consultant to make the amendments in light of the comments made by the members.

The revised exposure draft of the Shari'ah Rules was presented to the Shari'ah Board in its meeting No. (2) held in Mecca on 10-15 Ramadan 1420 A.H., corresponding to 18-22 December 1999 A.D. The Shari'ah Board made further amendments to the exposure draft of the Shari'ah Rules and decided that it should be distributed to specialists and interested parties in order to obtain their comments in order to discuss them in a public hearing.

A public hearing was held in Bahrain on 29–30 Dhul-Hajjah 1421 A.H., corresponding to 4-5 April 2000 A.D. The public hearing was attended by more than 30 participants representing central banks, institutions, accounting firms, Shari'ah scholars, academics and others who are interested in this field. The members responded to the written comments that were

sent prior to the public hearing as well as to the oral comments that were expressed in the public hearing.

The Shari'ah Studies Committee and the Fatwa and Arbitration Committee held a joint meeting on 21-23 Muharram 1421 A.H., corresponding to 26-28 April 2000 A.D., to discuss the comments made about the exposure draft of the Shari'ah Rules. The joint meeting made the necessary amendments, which it deemed necessary in light of the discussions that took place in the public hearing.

The Shari'ah Board in its meeting No. (4) held on 25–27 Safar 1421 A.H., corresponding to 29–31 May 2000 A.D., in Al-Madinah Al-Munawwarah discussed the amendments made by the Shari'ah Studies Committee and the Fatwa and Arbitration Committee, and made the necessary amendments, which it deemed necessary. The standard was adopted with the name of "Shari'ah Rules for the Murabahah". Some paragraphs were adopted by the unanimous vote of the members of the Shari'ah Board, while the other paragraphs were adopted by the majority vote of the members, as recorded in the minutes of the Shari'ah Board.

The Shari'ah Board decided in its meeting No. (7) held in Makkah Al-Mukarramah on 9-13 Ramadan 1422 A.H., corresponding 24-28 November 2001 A.D., to pass a resolution to reformat all Shari'ah rules in a form of standards and a committee was formed for this purpose.

In its meeting No. (8) held in Al-Madinah Al-Munawwarah on 28 Safar - 4 Rabi' I, 1423 A.H., corresponding to 11-16 May 2002 A.D., the Shari'ah Board adopted the reformatting of the Shari'ah Rules for Investment and Financing No. (1) on Murabahah with the name of Shari'ah Standard No. (8) on Murabahah.

The Shari'ah Standards Review Committee reviewed the standard in its meeting held in Rabi' II, 1433 A.H., corresponding to March 2012 A.D., in the State of Qatar, and proposed after deliberation a set of amendments (additions, deletions, and rephrasing) as deemed necessary, and then submitted the proposed amendments to the Shari'ah Board for approval as it deemed necessary.

In its meeting No. (39) held in the Kingdom of Bahrain on 13-15 Muharram 1435 A.H., corresponding to 6-8 November 2014 A.D., the Shari'ah Board discussed the proposed amendments submitted by the Shari'ah Standards Review Committee. After deliberation, the Shari'ah Board approved the necessary amendments, and the standard was adopted in its current amended version.

Appendix (D)
The Shari'ah Basis for the Standard

Preface on the Permissibility of Murabahah

Definition of Murabahah

Murabahah is selling a commodity as per the purchasing price with a defined and agreed profit mark-up. This mark-up may be a percentage of the selling price or a lump sum. This transaction may be concluded either without a prior promise to buy, in which case it is called an ordinary Murabahah, or with a prior promise to buy submitted by a person interested in acquiring goods through the Institution, in which case it is called a "banking Murabahah" i.e. Murabahah to the purchase orderer. This transaction is one of the trust-based contracts that depends on transparency as to the actual purchasing price or cost price in addition to common expenses.

Permissibility of Murabahah

The authorities for the permissibility of Murabahah are authorities on the permissibility of sale. Among them is the saying of Allah, the exalted: ***{"...Allah has permitted trade..."}***.[3] Some scholars has also cited to support the permissibility of Murabahah the saying of Allah, the Exalted: ***{"It is no crime for you to seek the bounty of your Lord,"}***[4] arguing that the bounty mentioned here means profit. The Murabahah is also analogous to a form of sale called *Tawliyyah* (which means to sell as per the purchasing price without making profit). This is because the Prophet (peace be upon him) purchased a she-camel from Abu Bakr to use it as a transportation to immigrate to Medina. Abu Bakr wanted to give it to the Prophet (peace be upon him) free of charge, but the Prophet refused

(3) [Al-Baqarah (The Cow): 275].
(4) [Al-Baqarah (The Cow): 198].

saying: *"I will preferably take it at the acquisition price"*. The majority of scholars agreed, in principle, on the permissibility of Murabahah.

Promise from the Purchase Orderer

- The basis for the permissibility of responding to the application of the customer that the Institution buys the commodity from a particular supplier is because such a demand will not affect the acquisition of the commodity by the Institution, especially in view of the fact that this demand is not binding. The Institution is entitled to acquire the commodity from another supplier provided the commodity complies with the desired specification. The customer may be forced to fulfil his obligation on the basis of general sources of the Qur`an and Sunnah that require fulfilment of obligation and undertaking. The International Fiqh Academy has issued a resolution endorsing a unilateral binding promise.(5) The same was adopted in a fatwa for Kuwait Finance House,(6) Qatar Islamic Bank,(7) and others.
- The basis for allowing price quotations be submitted in the name of customer is because such an act has no contractual effect if there is no acceptance by the customer. The basis why it is preferred that the quotation be submitted in the name of the Institution, is to avoid confusion and this is what was endorsed by the Fatwas of Qatar Islamic Bank,(8) and Kuwait Finance House.(9)
- The basis for not allowing a Murabahah deal when the customer accepts the deal directly from the supplier is because, by this, a sale contract has taken place between the customer and the supplier in which case the commodity enters into ownership of the customer. This ruling will not be affected whether or not the customer has paid the price. This is because payment is not a condition for the permissibility and conclusion of a contract as payment of the price is but a consequence of a contract and is not principal requirement or a condition for regarding a contract valid.

(5) International Fiqh Academy Resolution No. 40-41 (2/5 and 3/5).
(6) Fatwa No. (49).
(7) Fatwa No. (8).
(8) Fatwa No. (35).
(9) Fatwa No. (87).

- The basis for the requirement that there must not be any contractual commitment between the customer and the supplier is to safeguard against the contract being a mere interest-based financing. Therefore, the lack of any commitment between the customer and the supplier is a basic condition for the permissibility of executing a Murabahah by the Institution.
- The basis for the requirement that the customer must not have any (business) connection with the supplier is to avoid involving in a 'Inah (sell and buy back) transaction that is prohibited by Shari'ah.
- The basis for the permissibility that the supplier may be a relative of the customer or a husband or wife to the customer is because both parties have independent legal liability unless it has come to be that they are involved in a 'Inah transaction, in which case the transaction is prohibited. This is to defeat a potential intentional arrangement to evade formalities of the transaction. The Fatwa of Kuwait Finance House supports this.[10]
- The basis for not allowing a partner to promise to buy the shares of another partner on a Murabahah basis is because this will lead to the buyer guaranteeing the share of other partner, which is Riba.
- The basis for not allowing dealings in gold, silver and currencies on deferred Murabahah basis is the saying of the Prophet, peace be upon him, in respect to exchange of gold with silver that such exchange take place *"hand to hand"*;[11] i.e., without delay in delivery, and the rules of currencies are subsumed under the ruling for gold and silver. This ruling is endorsed by the resolution of the International Fiqh Academy.[12]
- The basis for the prohibition of Murabahah tradable securities or refinancing of a Murabahah transaction is because these fall under the heading of sale of debt that is prohibited by Shari'ah.
- The basis for not allowing a bilateral binding promise is because it amounts to a contract prior to acquisition of the item to be sold. The International Fiqh Academy has issued a resolution in this respect.[13]
- The basis for the permissibility of the agreement to amend the terms of the promise is because a promise is not a contract and as such the amendment

(10) Fatwa No. (55).
(11) The Hadith has been related by Muslim in his *"Sahih"*.
(12) International Fiqh Academy Resolution No. 63 (1/7).
(13) International Fiqh Academy Resolution No. 41(3/5).

of the profit margin and the duration will not amount to rescheduling of debt which is prohibited by Shari'ah.

- The basis for using options when buying on Murabahah is the case of Hibban Ibn Munqidh when the Prophet (peace be upon him), said to him: *"If you buy, a condition that there is no cheating and that you have a three day period for any of the goods bought. If you are satisfied, then keep it and if you are not satisfied, return it to the buyer."*(14) The ruling on the application of option in Murabahah is endorsed by a resolution issued during the second Fiqh Forum organised by Kuwait Finance House.
- The basis for the impermissibility of a commitment fee is because such a fee is in exchange for the right to contract, which is a mere intention and wish that is not a subject of exchange.
- The basis for the impermissibility of a facility commission is because it is not allowed to receive commission in the event of giving out a loan facility itself. It is therefore a logical conclusion to disallow commission for a mere readiness to finance the customer on a deferred payment basis.
- The basis for allowing that the expenses of preparing the document of contracts between the Institution and the customer be borne by the two parties is because both parties will equally benefit from this, and moreover there is no any impermissible act involved. The basis for the permissibility that these expenses may be borne by one of the parties is because this is a form of condition that is permissible.
- The basis for the permissibility of the customer guaranteeing the good performance of the supplier is because this guarantee secures rights and does not adversely affect any rules of the Murabahah transaction.
- The basis for not allowing that the customer guarantee the risk of transportation of the goods is because the safety of the goods is the responsibility of the owner and the customer is not the owner. Hence, the owner must bear the risk since the right to profit is associated with bearing risk.
- The basis for the permissibility of *Hamish Jiddiyyah* (security deposit) is because it is a form of guarantee for any financial damage that may occur.
- The basis for the permissibility of obtaining the earnest money to secure performance is the practice of Umar Ibn Al-Khattab (may Allah be pleased

(14) The Hadith has been related by Ibn Majah, *"Sunan Ibn Majah"* [2: 789].

with him) in the presence of some companions of the Prophet, peace be upon him,[15] which has been permitted by Imam Ahmad. A resolution has been issued in connection with the permissibility of 'Arboun (Earnest Money) by the International Islamic Fiqh Academy.[16]

Acquisition of Title to, and Possession of, the Asset by the Institution or its Agent

- The basis for the prohibition of selling a commodity before taking possession is the saying of the Prophet (peace be upon him): *"Do not sell what you own not"*[17] and the Hadith in which the Prophet (peace be upon him) prohibits a person from selling what he does not own.[18] The basis for preferring that the Institution appoint an agent other than the purchase orderer in case of the need to do so is to avoid a fictitious transaction that shows on paper that the acquisition is made on behalf of the Institution. This is necessary in order that the Institution appear as the real purchaser and in order to demarcate the liabilities of the parties, the liability of the Institution and the liability of the purchase orderer after the sale contract.
- The basis for the requirement that the Institution must pay the supplier directly is to avoid the risk of the contract degenerating into mere interest-based financing.
- The basis for the requirement that the liabilities of the parties -in case the Institution acquires the goods through agency- is to demarcate the two liabilities.
- The basis for the requirement that documents must be directed to the Institution is because the purchase is taking place on behalf of the institution.
- The basis for the requirement that the agent must explain to the supplier his agency status is to control the transaction and to determine the party to be referred to for the execution of the contract.

(15) The source of the Hadith has been stated earlier.
(16) Resolution No. 72 (3/8) in respect of 'Arboun (Earnest Money).
(17) The Hadith has been related by Al-Tirmidhi *"Sunan al-Tirmidhi"* [3: 534].
(18) The Hadith has been related by Al-Tabrani in *"Al-Mu'jam Al-Awsat"* [5: 66], Dar Al-Haramayn, Cairo, 1415 A.H.

- The basis for the requirement of possession before a sale contract is to ensure that the Institution becomes liable for the risk of destruction of the commodity before it is entitled to sell it.
- The basis for separating an agency contract from a Murabahah transaction is to be sure that there is no any intentional arrangement to connect the two contracts.
- The basis for the rule that constructive possession is sufficient to meet the requirement of possession and that possession is according to the nature of the items is because the Shari'ah did not state a particular form for possession. Rather this is left to the customary practices. Again, the purpose of possession is to enable one to have control over something. Therefore, any procedure that serves this objective would be regarded as possession.
- The basis for the requirement that the contract of agency be separate from the contract of sale on a Murabahah basis is because of the risk that the contracts may be connected to each other.
- The basis for the rule that the Institution bear the expenses of insurance is because these expenses follow ownership of the goods.

Conclusion of a Murabahah Contract

- The basis for the rule that the Institution is entitled to compensation in case of breach of a binding promise by the customer to buy the goods is because of the damage that may be inflicted on the Institution due to the act of the customer. This is because the customer has caused the Institution to enter into a deal that it would not have concluded in the absence of the promise. The International Islamic Fiqh Academy has issued a resolution in this respect.[19]
- The basis for the rule that the Institution's rights are limited, in case of breach of promise, to the difference between the cost of the item to the Institution and its selling price to a third party is because the lawful right in a guarantee is limited to the amount that compensates for the damage suffered and because the Institution's right to recover loss of its mark-up is irrational since there is no mark-up unless there is actually a Murabahah transaction and in this case there is no such transaction.

(19) International Islamic Fiqh Academy's resolution No. 40-41 (2/5 and 3/5).

- The basis for the requirement of transparency as to the cost price is because Murabahah is a trust related contract that requires disclosure of the amount and the currency of the cost price because a price in a deferred payment sale is higher.
- The basis for allowing normal expenses to be included in computing the selling price of the commodity is because these expenses are paid to a third party.
- The basis for entitlement of the buyer to benefit from the discount acquired by the Institution is because Murabahah is a mark-up sale. Therefore, if the previous purchasing price decreases then the cost price is the amount that remains after the discount and this price is the cost price for the purpose of the Murabahah.
- The basis for the requirement that the price and the profit in Murabahah must be determined is to avoid uncertainty and lack of knowledge.
- The basis for the requirement that the profit must be separately disclosed from the cost price and that it is not allowed to be calculated as a single amount for the customer is because Murabahah is a sale with a profit margin. Therefore, it is necessary this profit be disclosed separately to ensure that the customer will agree to it.
- The basis for the permissibility of instalment payment is because Murabahah is one of the sale contracts that are subject to spot payment, deferred payment or instalment payment. The basis for the impermissibility of requesting an additional sum of money for delay in payment is because this is the prohibited Riba.
- The basis for the permissibility of stipulating a defect exclusion item is because a buyer is entitled to require guaranteeing hidden defects which are related to the sold commodity by the seller. However, the buyer may relinquish this right by agreeing to a defect exclusion item, as stated by a number of scholars.[20]
- The basis for the permissibility of stipulating that the contract would be terminated for default in payment is because the original princi-

(20) See Al-Kasani, *"Bada`i' Al-Sana`i'"* [5: 276]; Al-Mawwaq, *"Al-Taj Wa Al-Iklil"* [4: 439]; Al-Shirazi, *"Al-Muhadhdhab"* [1: 284]; Ibn Qudamah, *"Al-Mughni"* [4: 129]; and Al-Buhuti, *"Kashshaf Al-Qina'"* [3: 228].

ple in respect to stipulations is validity and permissibility. In addition, this item does not render permissible an impermissible act or prohibit a permissible act. Hence, this item falls under the Hadith that says: *"Muslims are bound by the conditions they made, except a condition that renders permissible an impermissible act or prohibits a permissible act.*[21]

Guarantees in Murabahah and Treatment of Murabahah Receivables

- The basis for the condition that all instalments will become due if there is delay in payment is the Hadith of the Prophet, peace be upon him: Muslims are bound by the conditions they made, and because payment on a deferred basis is the right of the buyer, and the buyer may choose to pay before time and relinquish the deferral of the date of payment entirely or make payment of all instalments contingent on default on payment of one instalment.
- The basis for demanding collateral to secure payment is because such a requirement does not affect the contract; rather, it consolidates performance and such guarantees are relevant to contracts involving credit.
- The basis for not allowing a stipulation that delays transfer of ownership is because such a stipulation is against the effect of a sale contract, which is immediate transfer of ownership. The basis for allowing the Institution to hold up registering the commodity in the name of the customer until payment is realised is that such an action does not affect the transfer of ownership to the buyer.
- The basis for the permissibility of stipulating a condition, whereby the debtor in case of default is obliged to donate a sum of money in addition to the amount of the debt to be spent by the Institution on charitable causes, is because this has been considered as an instance of the commitment to make a donation, which is well established in the Maliki school of law. This

(21) This Hadith has been reported by number of the companions. It has been related by Ahmad in his *"Musnad"* [1: 312]. Ibn Majah through a good chain of transmission in his *"Sunan"* [2: 783], Mustafa Al-Babi Al-Halabi edition, Cairo, 1372 A.H./1952 A.D.; Al-Hakim in his *"Mustadrak"*, Hyderabad edition, India, 1355 A.H.; Al-Bayhaqi in his *"Sunan"* [6: 70 and 156] and [1: 133], Hyderabad edition, India, 1355 A.H.; and Al-Daraqutni in his *"Sunan"* [4: 228] and [3: 77], Dar Al-Mahasin Lil-Tiba'ah edition, Cairo, 1372 A.H./1952 A.D.

is the opinion of Abu Abdullah Ibn Nafi' and Muhammad Ibn Ibrahim Ibn Dinar, among the Maliki jurists.[22]

- The basis for the prohibition of additional payment over the principal debt in consideration for extension of time is because such action is a pre-Islamic form of Riba.
- The basis for the permissibility of discount or rebate for earlier payment is because discount for early payment is a form of settlement between the creditor and the debtor to pay less than the amount of the debt. This is among the settlement that are endorsed by Shari'ah as stated in the case of Ubay Ibn Ka'b (may Allah be pleased with him) and his debtor where the Prophet (peace be upon him) suggested to him in words: *"write off a portion of your debt."*[23] The International Islamic Fiqh Academy has issued a resolution in support of this rule.[24]
- The basis of the permissibility of payment of debt in another currency is that this would entail the settlement of the debt by discharging it. This does not involve any prohibited transaction pertaining to debts either with regard to sale or purchase.

As for some of the forms mentioned in the standard, there are texts to support them, inter alia, the Hadith reported on the authority of Ibn Umar (may Allah be pleased with him) who said: "I have met the Prophet (peace be upon him) at the house of Hafsah (may Allah be pleased with her), and I said to him: 'O Prophet of Allah, I would like to ask you: 'I sell a camel in Al-Baqi' for a price quoted in dinar but I take dirham, and I sell for a price quoted in dirham but I take dinars, I take this from this and I give this from this.' The Prophet (peace be upon him) replied: *'There is no objection to your taking the other currency based on the price of the day, provided you do not leave each other with something remaining owed as a debt between you'.*"[25] Some of the forms in the standard are a kind of set-off and this is permissible.

(22) See the book entitled: *"Tahrir Al-Kalam Fi Masa`il Al-Iltizam"* by Al-Hattab. This rule has been endorsed by the resolutions and recommendations of the Fourth Fiqh Forum organized by the Kuwait Finance House.

(23) The Hadith has been related by Al-Bukhari: *"Sahih Al-Bukhari"* [1: 179] and [2: 965].

(24) The International Islamic Fiqh Academy Resolution No. 64 (7/2).

(25) Related by Abu Dawud, Al-Tirmidhi, Al-Nassa`i, Ibn Majah and Al-Hakim, who deemed it a sound Hadith. Al-Dhahabi agreed with Al-Hakim. It was also narrated without a chain of narrators, quoting only Ibn Umar: *"Al-Talkhis Al-Habir"* [3: 26].

Appendix (E)
Definitions

Murabahah

It is the sale of a commodity by an institution to its customer (the purchase orderer) as per the purchasing price/cost with a defined and agreed profit mark-up (as set out in the promise/*Wa'd*), in which case it is called a banking Murabahah. The banking Murabahah involves deferred payment terms, but such deferred payment is not one of the essential conditions of such transaction, as there is also a Murabahah arranged with no deferral of payment. In this case, the seller only receives a mark-up that only includes the profit for a spot sale and not the extra charge it would, otherwise, receive for deferral of payment.

Commitment Fee

A commitment fee is the percentage or amount which the Institution takes from the customer to start processing the transaction even though a sale contract may not be concluded).

'Arboun

The term 'Arboun means an amount of money that the customer as purchase orderer pays to the Institution after concluding the Murabahah sale, with the provision that if the sale is completed during a prescribed period, the amount will be counted as part of the price. If the customer fails to execute the Murabahah sale, then the Institution may retain the whole amount.

Syndicated Financing

A syndicated financing is a partnership relationship for financing a particular project which two or more parties has interest to finance. They will distribute the profit or revenue as per agreement. In other words, syndicated financing is the acceptance of a number of companies (financial Institutions) to enter into a joint investment transaction through one of the permissible investment instruments with an understanding that one of the

parties assumes leadership of the deal. During the period of the transaction, the transaction would enjoy an independent liability separated from their companies.

Credit Facility

A credit facility is an upper limit for a customer's Murabahah transactions. This credit facility may be restricted to a specified type of item, or to a specified period of time.

Shari'ah Standard No. (30)

Monetization (Tawarruq)

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

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

Preface

The purpose of this standard is to indicate the essence of Monetization and explain the Shari'ah conditions for its validity, as well as the controls pertaining to its application in Islamic financial Institutions (Institution/ Institutions).[1]

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

Statement of the Standard

1. Scope of the Standard

This Standard covers the different applications of monetization, whether the beneficiary is the customer or the institution.

2. Definition of Monetization and Its Distinction from *Bay' Al-'Inah*

Monetization refers to the process of purchasing a commodity for a deferred price determined through Musawamah (Bargaining) or Murabahah (Mark-up Sale), and selling it to a third party for a spot price so as to obtain cash.

Whereas 'Inah refers to the process of purchasing the commodity for a deferred price, and selling it for a lower spot price to the same party from whom the commodity was purchased.

3. Mutawarriq (Monetization Beneficiary)

3/1 The Monetization beneficiary may be a customer who purchases the commodity from the Institution and sells it to a third party to obtain liquidity. It may also be the Institution itself when it purchases the commodity from the customer or another Institution and sells it to a third party to obtain liquidity. The controls for both cases are shown in items (4) and (5) below.

3/2 The institution should not perform Monetization for the benefit of conventional banks when it discovers that such banks are going to use the liquidity for interest-based lending instead of Shari'ah-compliant operations.

4. Controls on Monetization Transactions

4/1 The requirements of the contract for purchasing the commodity on deferred payment bases should be fulfilled, for both Musawamah and Murabahah transactions, with due consideration to Shari'ah Standard

No. (8) on Murabahah. There shall also be a real commodity that the seller owns before selling it. If the process is to involve a binding promise, it shall be from only one party. As regards the commodity sold, it shall not be gold or silver or any type of currency.

4/2 The commodity sold shall be well identified so as to become distinct from the other assets of the seller. This may be done by separating the commodity from the other assets of the seller, or recording the numbers of its identifying documents such as storing certificates. [see Shari'ah Standard No. (20) on Sale of Commodities in Organized Markets, item 4/2/2]

4/3 If the commodity is not made available at the time of signing the contract, the client shall be given a full description or a sample that indicates the quantity of the commodity and the place of its storage, so that his act of purchasing the commodity becomes real rather than fictitious. In this sense, using local commodities for Monetization is more preferable.

4/4 The commodity shall be actually or constructively received by the buyer, and there remains no further condition or procedure for receiving it.

4/5 The commodity (object of Monetization) must be sold to a party other than the one from whom it was purchased on deferred payment basis (third party), so as to avoid 'Inah which is strictly prohibited. Moreover, the commodity shall not return back to the seller by virtue of prior agreement or collusion between the two parties, or according to tradition.

4/6 The contract for purchasing the commodity on deferred payment basis, and the contract for selling it for a spot price shall not be linked together in such a way that the client looses his right to receive the commodity. Such linking of the two contracts is prohibited whether it is made through stipulation in the documents, acceptance as a normal tradition, or incorporation in the procedures.

4/7 The client shall not delegate the Institution or its agent to sell, on his behalf, a commodity that he purchased from the same Institution and, similarly, the Institution shall not accept such delegation. If, however, the regulations do not permit the client to sell the commodity except through the same Institution, he may delegate the Institution to do so after he, actually or constructively, receives the commodity.

4/8 The Institution should not arrange proxy of a third party to sell, on behalf of the client, the commodity that the client purchased from the Institution.

4/9 The client shall not sell the commodity except by himself or through an agent other than the Institution, and shall duly observe the other stipulations.

4/10 The Institution shall provide the client with the information that he or his appointed agent may need for selling the commodity.

5. Controls on Monetization When the Institution Is the Beneficiary

5/1 Monetization is not a mode of investment or financing. It has been permitted when there is a need for it, subject to specific terms and conditions. Therefore, the Institutions shall not use Monetization as a means of mobilizing liquidity for their operations, and exert no effort for fund mobilization through other modes such as Mudarabah, investment agency, Sukuk, investments funds, and the like. The Institution shall resort to monetization only when it faces the danger of a liquidity shortage that could interrupt the flow of its operations and cause losses for its clients.

5/2 The institutions shall avoid proxy in selling the Monetization commodity, even if proxy is to be arranged with a third party. In other words, Institutions shall use their own bodies for selling the monetization commodity, though using brokers for this purpose is permissible.

6. Date of Issuance of the Standard

This Standard was issued 1 Dhul-Qa'dah 1427 A.H., corresponding to 13 November 2006 A.D.

Adoption of the Standard

The Shari'ah standard on Monetization was adopted by the Shari'ah Board in its meeting No. (17) held in Makkah Al Mukarramah on 26 Shawwal – 1 Dhal-Qa'dah 1427 A.H., corresponding to 18-23 November 2006 A.D.

Appendix (A)
Brief History of the Preparation of the Standard

The Shari'ah Board decided in its meeting No. (7) held on 9-13 Ramadan 1422 A.H., corresponding to 24-28 November 2001 A.D., in Makkah Al Mukarramah, to issue a Shari'ah Standard on Monetization, as practiced by banks.

On 17 Sha'ban 1423 A.H., corresponding to 3 October 2005 A.D., the Shari'ah Standards Committee (2) decided to commission a Shari'ah consultant to prepare an exposure draft on Monetization.

On 6 Rabi' I, 1426 A.H., corresponding to 15 April 2005 A.D., the Shari'ah Standards Committee (2) decided to commission another Shari'ah consultant to redraft the Monetization Standard in the typical format of the other Shari'ah Standards.

The Committee (2) discussed the exposure draft in its meeting No. (15) held in Manama, Kingdom of Bahrain on 8 Jumada I, 1426 A.H., corresponding to 15 June 2005 A.D., and introduced necessary changes in the light of the comments and observations of the members.

A joint committee comprising members from Shari'ah Standards Committees (1) and (2) discussed the exposure draft in a meeting held in the Kingdom of Bahrain on 1 Safar 1427 A.H., corresponding to 1 March 2006 A.D., and introduced further changes in the light of the comments and observations of its members.

In its meeting No. (16) held in Al-Madinah Al-Munawwarah on 7-12 Jumada I, 1427 A.H., corresponding to 3-8 June 2006 A.D., the Shari'ah Board discussed the amendments suggested by the joint meeting of the two Shari'ah Committees and accepted what it deemed appropriate.

AAOIFI then held a public hearing in the Kingdom of Bahrain on 6 Rajab 1427 A.H., corresponding to 31 July 2006 A.D. The public hearing was attended by more than 30 participants representing central banks, Institutions, accounting firms, Shari'ah scholars, university teachers and other interested parties. Several observations were made in the public hearing to which the members of the Shari'ah Standards Committees (1) and (2) duly responded.

In its meeting No. (17) held in Makkah Al-Mukarramah on 26 Shawwal – 1 Dhul-Qa'dah 1427 A.H., corresponding to 18-23 November 2006 A.D., the Shari'ah Board discussed the changes proposed by the participants in the public hearing, accepted some of them, and adopted the Standard (unanimously for some clauses and with the majority for others), as indicated in the minutes of the Board's meetings.

Appendix (B)
The Shari'ah Basis for the Standard

- Differentiation between Monetization and 'Inah with regard to permissibility and prohibition stems from the fact that, contrary to the former, the latter is a trick for practicing Riba (usury). 'Inah takes place between two parties who are in fact a borrower and a lender. The lender sells the commodity to the borrower for a deferred price and buys it back from him for a less price payable on spot. The majority of the Fuqaha subscribe to prohibition of 'Inah and permissibility of monetization, except Ibn Taymiyyah and Ibn Al-Qayyim who consider monetization as prohibited or worthy of aversion.
- Permissibility of constructive receipt of the commodity has already been catered for in the Shari'ah Standard No. (18) on Possession (Qabd) and the Shari'ah Standard No. (1) on Trading in Currencies.
- Permissibility of monetization transactions that observe the Shari'ah controls indicated in this Standard can be traced in the texts of the Qur`an and the Sunnah that permit sale transactions. It has also been confirmed by two resolutions issued by the Islamic Fiqh Academy of the Muslim World League,[(2)] and the Standing Committee of the Supreme Board of Shari'ah Scholars of the Kingdom of Saudi Arabia (Fatwa No. 19297), as well as the Fatwas of several Shari'ah Supervisory Boards. Therefore, monetization is an exit for avoiding Riba rather than a trick for performing it, as it is usual-

(2) Resolution of the 15th Session which imposes no condition other than that Monetization should not be performed like 'Inah. Also, the Resolution of the 17th Session which comprises other conditions (well-observed in this standard) most important of which is non-commitment of the bank to become the agent of the client in selling the commodity which "makes Monetization similar to 'Inah" – using the same words of the Resolution - and non-violation of the condition relating to receipt of the commodity: (the Resolution here did not impose actual receipt only, similar to what it did in its 11th Session where it considered legal receipt to be sufficient in currency exchange, which requires more controls than sale transactions).

ly practiced by those who do not want to be involved in interest-based borrowing. It has been reported by Abdullah Ibn Al-Mubarak[3] that 'A`ishah (may Allah be pleased with her) practiced it.

- Prohibition of joining together the contract for purchasing the commodity and the contract for selling it is justified by the fact that joining them together would impose a commitment on the client to sell the commodity right away. Hence, such immediate transfer of the ownership of the commodity may not enable the client to receive it. This is again the same reason for prohibition of agency-related commitments.
- Permissibly of resorting to agency of the Institution when the client, by virtue of law, cannot sell the commodity directly, is meant to safeguard the deal from being nullified by the law.
- The ruling that the Institution shall provide detailed information about the commodity to the client aims at preventing fictitious transactions and helping the client to obtain liquidity. Such requirement holds true whether the commodity in question is a commodity, a car, shares of a company, international goods, or local goods. The latter are more suitable for monetization due to the easiness of ensuring their existence, and the chance available to the client to actually hold them if he so desires.
- The ruling that the Institution shall provide the client with a full description or a sample of the commodity is to ensure that the latter's act of purchasing the commodity is actual rather than fictitious.
- Monetization (where the client or the Institution is beneficiary) shall be subjected to strict controls and restrictions so that institutions fulfill the main objectives underlying their presence and the interest of customers to make dealings with them.
- Principally, institutions have to show strict commitment towards using modes of investment and financing such as the various forms of Musharakah (Partnership) and exchange of goods, usufructs and services that conform to the very nature and basic activities of Islamic banking. Hence, imposition

(3) Al-Azhari Al-Shafi'i, *"Al-Zahir"* (P. 216); and *"Al-Fa`iq Fi Ghrib Al-Hadith"* [2: 108]. For permissibility of Monetization see also Al-Mardawi, *"Al-Insaf"* [4: 250]; *"Kashshaf Al-Qina'"* [2: 447] and [3: 185]; *"Al-Mughni"* [4: 127]; Al-Sarakhsi, *"Al-Mabsut"*, [11: 211]; and Al-Nawawi, *"Al-Rawdah"* [3: 416].

of controls and restrictions on monetization would curb any tendency for expanding monetization to the extent that jeopardizes the extensive use of the original modes of investment and financing. Therefore, Institutions shall not use monetization except in the limited scope defined in this Standard. They shall also restrict the use of monetization to the cases of clients whose transactions cannot be disposed of through other modes of financing and investment such as Musharakah, Mudarabah, Ijarah, Istisna'a and the like. Monetization may also be used as a means for helping the clients to dispose of their previous interest-based debts, after ensuring that they have developed genuine intention not to deal in usurious transactions any more.

Shari'ah Standard No. (20)

Sale of Commodities in Organized Markets

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

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

Preface

This Standard aims to elaborate the foundations on which international commodity sales, between parties from different countries, are based whether the contracts have been concluded for spot or deferred commodities or through derivatives (futures, options, indexes and swaps). The Standard also explains what is permissible out of these according to the Shari'ah and what is not, along with an explanation of the Shari'ah substitutes for them within the Islamic financial institutions (Institution/Institutions).[1]

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

Statement of the Standard

1. Scope of the Standard

This Standard covers international sales contracts whose subject-matter are commodities and to derivatives of various kinds: Swaps, Indexes, Futures and Options.

The Standard does not cover financial and commercial paper or currencies, because these have their own specific standards, just as it does not cover sales that are concluded outside the organized markets.

2. Definition of International Sales and Their Kinds

2/1 Definition of international commodity sales

2/1/1 International commodity sales are contracts that are concluded in organized commodity markets under the supervision of specialised Organizations and through intermediaries who coordinate the demand for sales and the demand for purchases by employing standard contracts that contain various conditions and specifications along with a statement of the period and place of delivery. The contract may also stipulate the deposit of a portion of the price as a security for the execution of the contract and opening of an account with the intermediary.

2/2 Types of international commodity sales

International commodity sales are divided into three types:

2/2/1 Spot contracts

These are contracts that require immediate delivery and acceptance of delivery, however, delivery and possession may take place within the limit of a day or two days in accordance with the regulations of the market.

2/2/2 Forward contracts

These are contracts in which both counter-values are deferred with the legal effects of the contracts taking place at a determined future date, and delivery and possession take place at that time.

2/2/3 Futures commodity contracts

These are contracts whose legal effects take place at a determined future date either through liquidation between the parties, or cash settlement or through counter-contracts, but they rarely end in actual delivery and possession.

2/3 Termination of international commodity sales

International commodity sales end in one of the following ways:

2/3/1 Contracts in which actual delivery takes place for both counter-values or in one of them;

2/3/2 Contracts that end through the operation of liquidation between the two parties;

2/3/3 Contracts that end in cash settlement by agreement; and

2/3/4 Contracts that end in counter-contracts.

3. Shari'ah Basis for International Commodity Sales

3/1 Spot contracts

Conclusion of spot contracts in the commodity markets is permitted with the following conditions:

3/1/1 That the commodity sold must be in existence and owned by the seller;

3/1/2 That the commodity sold must be ascertained in a manner that distinguishes it from others;

The documents that establish the existence of the commodity, its ownership and distinguish it from others are sufficient proof of the realisation of the two previous conditions.

3/1/3 That the contract should not include a condition that prevents the buyer from taking delivery of the commodity sold and obliges him to accept a set-off for value;

3/1/4 That the price be paid on a spot basis. Delay, without the stipulation of delay, in the delivery of an existing and ascertained commodity, or delay in the acceptance of spot price, does not affect the validity of the contract.

3/2 Forward contracts (both counter-values delayed)

3/2/1 These are the selling and buying of commodities with the stipulation of delivery in the near future. They differ from futures transactions insofar as they are not organized in an exchange and they are instruments of hedging that do not submit to financial supervision.

3/2/2 There are two forms for contracts with both counter-values delayed:

3/2/2/1 That the commodity is a liability through description, while the price is deferred, irrespective of the contract being concluded with the word sale or with the word Salam. These contracts are not permitted, because they amount to a Salam contract in which the capital of Salam (Ras al-Mal) is not paid promptly. [see Shari'ah Standard No. (10) on Salam and Parallel Salam]

3/2/2/2 That the commodity is ascertained, but a delay in its delivery is stipulated along with a delay in the price. Such contracts are not permitted.

3/2/3 When the contract is that of Istisna'a, such a contract is valid even when the price is delayed. [see Shari'ah Standard No. (11) on Istisna'a and Parallel Istisna'a, item 3/1/5]

3/2/4 There is no restriction in delaying one of the counter-values: the price, while observing Accounting Standard No. (20) on Deferred Sale; and the commodity sold, while observing Shari'ah Standard No. (10) on Salam and Parallel Salam.

3/3 Futures transactions in commodities

It is not permitted to undertake futures transactions according to the Shari'ah, either through their formation or by trading in them. [see items 2/2/3, 5/1]

4. Key Applications of International Commodity Sales

4/1 Permissible applications of international commodity sales:

4/1/1 Appointing another person as an agent for the purchase of a commodity at a spot price, and the sale of the commodity by the agent to a third person for a deferred price on behalf of the principal along with the determination of compensation for the agent as part amount or percentage of the purchase price of the commodity. These are the operations of the "Investment Agency."

4/1/2 Appointing another person for the management of purchase operations with a spot price and sale on a deferred basis with the manager being entitled to a known undivided share in the profit. These are "Mudarabah" operations. [see Shari'ah Standard No. (13) on Mudarabah]

4/1/3 The agent undertaking -after the purchase of the commodity on account of the principal- to buy it for himself from the principal with the stipulation of distinguishing between the liability of the agent and the liability of the principal for the commodity and this by ensuring two independent offers and acceptances between the principal and the agent. It is possible that this be accomplished through the exchange of two advices, one for notifying ownership by means of agency and the proposal of purchase (offer), and the other for agreement to sell (acceptance). [see Shari'ah Standard No. (8) on Murabahah (appendices A and B)]

4/1/4 Purchase by the institution of a commodity on a spot basis and the subsequent sale of this commodity by the institution to another on a deferred payment basis. In this application the avoidance of

buy-back is stipulated, like the buyer selling what he purchased with a deferred price to one from whom it was initially bought on a spot basis at a price lesser than this (deferred price).

4/2 International commodity sales prohibited by the Shari'ah

4/2/1 Transactions in commodities that are not permissible.

4/2/2 Sale of the purchased commodity prior to its ascertainment in a manner that distinguishes the commodity sold from other commodities leading to the overlapping of the liability of the buyer and the liability of the seller due to the mixing up of what is owned by the buyer with what remains with the seller.

4/2/3 Purchase by the agent of a commodity for the institution's account and its sale thereafter to himself without the exchange of two advices of offer and acceptance between the agent-buyer and the institution that owns the commodity so that the liability of the principal (seller) and the liability of the agent selling the commodity to himself come to overlap.

4/2/4 Sale by the agent of the purchased commodity before actually or legally taking delivery. Legal delivery includes the transfer of liability to the buyer (agent) by ascertaining the commodity in a manner that distinguishes it from things other than the commodity sold.

4/2/5 Commodity purchase operations of the institution through agency and purchase thereafter by the agent for his own account on a deferred basis by confining the transaction to an offer by the agent to the institution to enter into the transaction and acceptance by the institution thereof prior to taking possession of the commodity by the institution or without the exchange of the two advices of offer and acceptance.

4/2/6 Purchase of a commodity by an institution on the basis of a spot price and thereafter its sale to the (same) institution itself on a deferred basis, or its sale to a holding institution of the seller institution with complete or majority ownership, or

with effective control, amounts to a buy-back ('Inah) sale. [see Shari'ah Standard No. (8) on Murabahah and item 2/2/4 of Shari'ah Standard No. (11) on Istisna'a and Parallel Istisna'a]

4/2/7 Sale by an agent of a commodity for his client, prior to the transfer of ownership to him through purchase, to an institution that is his principal.

4/2/8 Sale of ascertained specified commodity, without its passing into the ownership of the seller, through fictitious documents or the sale of the same commodity at the same time to more than one institution dealing with the commodity. It is necessary to be precise about the numbers of the title documents of the commodity along with the fixing of liability for the person causing a discrepancy.

4/2/9 The lack of detail about compensation for agency (brokerage) and merging it with the determined purchase price, which is stated as an amount that includes it. The substitute for this is the mentioning of the compensation and then deducting it from the inclusive price, or the addition of the compensation to the purchase price or the determination of the sale price with the specification that what is in excess is the compensation of the agent.

4/2/10 A statement within the general memorandum of agency for purchase and sale of commodities that denies the right of the buyer (principal) to take delivery of the commodity.

4/2/11 The institution making the payment of the purchase price of the commodity contingent upon the agent providing a guarantee for the payment of the sale price by the agent himself or by another person.

4/2/12 Stipulation of a guarantee by the seller for the sale price under all circumstances. He is obliged to provide a guarantee in case of tort, negligence or breach of the provisions of agency like the stipulation that he obtain sureties from the buyers of the

commodities with respect to the deferred period. [see Shari'ah Standard No. (5) on Guarantees]

5. Derivatives

Derivatives have a large number of kinds, the most important of which are: Futures, Options, Indexes and Swaps. The Shari'ah rule for derivatives is based on the rule for the contracts employed within their framework, as stated in paragraphs that follow:

5/1 Futures

5/1/1 A contract that is binding under law. It is concluded on the trading floor of the exchange for the sale and purchase of commodities or financial instruments for a period linked to the near future. The transaction is arranged with the mentioning of the quantity, type and category along with the statement of the date and place of delivery. As for the price, it is the sale element that varies, and it is ascertained in the trading hall.

5/1/2 The Shari'ah rule for futures contracts

It is not permitted according to the Shari'ah to undertake futures contracts either through their formation or trading. [see para. 4]

5/2 Options

5/2/1 A contract by means of which a right is bestowed -but not an obligation- for the purchase or sale of an identified item (like shares, commodities, currencies, indexes or debts) at a etermined price and for a determined period. There is no obligation in this contract except on the person selling this right.

5/2/2 The Shari'ah rule for options

Options indicated above are not permitted neither with respect to their formation nor trading.

5/2/3 Shari'ah substitutes for options

5/2/3/1 The conclusion of a contract pertaining to ascertained assets is permitted according to the Shari'ah, along with the payment of part of the price as 'Arboun (Earnest Money) with the stipulation that the buyer has the right to revoke the contract within a specified period in lieu of the entitlement of the seller to the amount of earnest money in case the buyer exercises his right of revocation. It is not permitted to trade the right established with respect to the earnest money.

5/2/3/2 The conclusion of a contract for commodities in themselves along with the stipulation of an option for establishing the right of revocation for one of the parties, or for both, during a known period. This option is not eligible for trading.

5/2/3/3 The issuance of a binding promise by the owner of assets to sell them, or a binding promise by one desiring to buy them, without specifying a counter-value for the promise. This promise is not eligible for trading.

5/3 Swaps

5/3/1 Swaps are agreements between two parties for the temporary exchange of determined financial assets, material assets or interest rates. In some cases the sale of a commodity or deferred currency takes place without the transaction resulting in any exchange of the commodity, while in other cases there may be an option, in return for a counter-value, that gives the owner the right to execute or not to execute the contract.

5/3/2 The Shari'ah rule for swaps

Swaps are not permitted in the forms in which they are practised in commodity exchanges.

6. Date of Issuance of the Standard

This Standard was issued on 30 Rabi' I, 1425 A.H., corresponding to 20 May 2004 A.D.

Adoption of the Standard

The Shari'ah Standard on International Commodity Sales in Organized Markets was adopted by the Shari'ah Board in its meeting No. (12) held in Al-Madinah Al-Munawwarah during the period of 26-30 Rabi' I, 1425 A.H., corresponding to 15-20 May 2004 A.D.

Appendix (A)
Brief History of the Preparation of the Standard

In its meeting No. (8) held in Al-Madinah Al-Munawwarah during the period of 28 Safar to 3 Rabi' I, 1423 A.H., corresponding to 11-16 May 2002 A.D., the Shari'ah Board decided to issue the Standard on International Commodity Sales in Organized Markets.

On 25 Rajab 1423 A.H., corresponding to 2 October 2002 A.D., the Shari'ah Standards Committee decided to commission a Shari'ah consultant to prepare an exposure draft on international commodity sales in organized markets.

The Shari'ah Standards Committee (2) in its meeting held in the Kingdom of Bahrain on 13 Safar 1424 A.H., corresponding to 15 April 2003 A.D., discussed the juristic study and required the consultant to incorporate necessary amendments in the light of the discussion and the observations of the members. The Committee also discussed the exposure draft in its meeting held on Monday 23 Rabi' II, 1424 A.H., corresponding to 23 June 2003 A.D., and made necessary amendments in the light of the discussion and the observations of the members.

The revised exposure draft of the standard was presented to the Shari'ah Board in its 11th meeting held in Makkah Al-Mukarramah during the period of 2-8 Ramadan 1424 A.H., corresponding to 27 October - 2 November 2003 A.D. The Shari'ah Board made amendments to the exposure draft of the standard and decided that it be sent to specialists and interested parties in order to obtain their comments in preparation for its discussion in a public hearing.

A public hearing was held in the Kingdom of Bahrain on 29 Dhul-Qa'dah 1424 A.H., corresponding to 21 January 2004 A.D. The public hearing was

attended by more than fifteen participants representing central banks, institutions, accounting firms, Shari'ah scholars, academics and others interested in the field. The members of the Shari'ah Standards Committees (1) and (2), responded to the written comments that were sent prior to the public hearing as well as to the oral comments that were expressed in the public hearing.

The Shari'ah Standards Committees (1) and (2) in a joint meeting in the Kingdom of Bahrain on 30 Dhul-Qa'dah 1424 A.H., corresponding to 22 January 2004 A.D., discussed the comments that were made during the public hearing as well as the observations received in writing. The Committees made amendments that were deemed suitable.

The amended exposure draft was presented to the Drafting Committee in its meeting held in the Kingdom of Bahrain on 25 Safar 1425 A.H., corresponding to 15 April 2004 A.D.

The Shari'ah Board in its meeting No. (12) held in Al-Madinah Al-Munawwarah during the period of 26-30 Rabi' I, 1425 A.H., corresponding to 15-20 May 2004 A.D., discussed the amendments suggested by the Shari'ah Standards Committee and the Drafting Committee, and incorporated the amendments deemed suitable. The Shari'ah Board unanimously adopted some of the items of the standard and some items were adopted by the majority vote of the members of the Shari'ah Board, as recorded in the minutes of the meetings of the Shari'ah Board.

Appendix (B)
The Shari'ah Basis for the Standard

- The basis for the permissibility of international sales transactions that fulfil the required Shari'ah elements and conditions of the validity of sales is their inclusion within the fold of the sale with respect to which the Words of Allah, the Exalted, were laid down: ***{"...Where Allah has permitted trading..."}***,[2] as well as His Words: ***{"...Eat not up your property among yourselves unjustly except it be a trade amongst you, by mutual consent..."}***.[3] The implementation of the international conventions on sales or the implementation of the laws of some countries does not require prohibition of these sales if they do not contain what conflicts with the rules and principles of the Shari'ah, and this is due to the Words of Allah the Exalted: ***{"O you who believe! fulfil (your) obligations..."}***,[4] with the proviso *"except what legalizes the prohibited and prohibits what is legal"*, due to the words of the Prophet (peace be upon him): *"Muslims shall abide by their conditions, except for a condition that legalises the prohibited or prohibits the lawful"*.[5]
- The basis for the prohibition of delaying of both counter-values is that in this there is the creation of two liabilities, along with what the jurists have mentioned with respect to the impermissibility of delaying the capital of Salam. Further, there is opposition to the conditions required by the contract. The basis for the conditions of spot contracts in the commodity

(2) [Al-Bqarah (The Cow): 275].
(3) [Al-Nisa` (Women): 29].
(4) [Al-Ma`idah (The Table): 1].
(5) This Hadith has been narrated by a number of Companions. It has been related by Ahmad [1: 312]; Ibn Majah with a hasan chain of transmission [2: 784], Mustafa Al-Babi Al-Halabi edition, Cairo (1372 A.H./1952A.D.); Al-Hakim (Hyderabad, India edition, 1355 A.H.); Al-Bayhaqi [6: 70, 156], [10: 133], Hyderabad, India edition, 1355 A.H.); Al-Daraqutni [4: 228], [3: 77], Dar Al-Mahasin Lil-Tiba'ah, Cairo (1372 A.H./1952 A.D.).

markets is that these are general conditions of sale and are permitted according to the Shari'ah.

- The basis for the permissibility of contracts in which one of the counter-values is deferred is the validity of *Bay' Mu'ajjal* and Salam.
- The basis for the permissibility of forms of transactions mentioned in the Standard related to international commodity sales is that they are concluded in accordance with the principles of Wakalah (agency), sale with a deferred period, Murabahah sale, and all these are valid contracts.
- The basis for the obligation of issuing an offer by the agent for seeking a sale on his own account and its acceptance by the principal as a seller is the distinction between the liability of the seller (the principal) and the liability of the buyer (the agent).
- The basis for the obligation of specifying the wages of the agent, and not merging it with the price is the Hadith: *"He who hires a hired worker must make known to him his wages"*.(6) This rule of the contract of Ijarah is applicable to agency for wages.
- The basis for the prohibition of stipulating the lack of delivery in commodity sales is that this negates the requirements of sale, which are the transfer of ownership to the buyer and his right to undertake transactions in the sold commodity.
- The basis for prohibiting the stipulation of a guarantee by the agent is that the agent is a trustee and does not provide a guarantee except for cases of transgression, negligence or going against the constraints of agency.
- The bases for the prohibition of deferred transactions in currencies are the Hadiths prescribing the obligation of possession in their sale. This has received support from a resolution of the International Islamic Fiqh Academy emphasising this.(7)
- The basis for the prohibition of derivatives is that these are binding promises that are converted to sale contracts pertaining to the future without an offer and acceptance. The Shari'ah substitutes mentioned in the Standard for derivatives are stated in a resolution of the International Islamic Fiqh Academy.(8)

(6) Related by Ibn Majah in his *"Sunan"* [2: 817]; See also *"Majma' Al-Zawa`id"* by Al-Haythami [4: 98], Dar Al-Rayyan Lil-Turath and Dar Al-Kitab Al-'Arabi.

(7) The International Islamic Fiqh Academy Resolution No. (63) 1/7.

(8) The International Islamic Fiqh Academy Resolution No. (63) 1/7.

- The basis for the impermissibility of options is that the subject-matter of the contract in them is not wealth that can be deemed compensation according to the Shari'ah.[9]
- The basis for the impermissibility of swaps is that no actual exchange of counter-values takes place thereby. Such swaps, as well, usually constitutes interest payment, 'Inah, and deferment of one of the counter-values.

(9) The International Islamic Fiqh Academy Resolution No. (63) 1/7.

Shari'ah Standard No. (10)

Salam and Parallel Salam

(Revised Standard)

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

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

Preface

The aim of the standard is to explain the rules for and limitations of Salam and Parallel Salam in respect to concluding a Salam contract, the subject matter of Salam and changes to the contract, whether in the event of ability to deliver or otherwise. The standard also explains rulings in respect to issuing Salam Sukuk.

Statement of the Standard

1. Scope of the Standard

This standard covers Salam and Parallel Salam transactions, whether the Institution is the buyer or the seller, and issuing Salam Sukuk. This standard does not cover Istisna'a (manufacturing or supplier contract) because the latter is covered by a separate standard.

2. Contract of Salam

2/1 General framework for Salam contracts

2/1/1 It is permissible to initiate through negotiations several Salam contracts (with different parties). Each operation will end at its due date. It is also permissible to draw up a general framework or a master agreement that consists of an understanding to conclude successive Salam contracts, each of which will take place at an appropriate time. In this latter case, the transaction involved shall be concluded on the basis of a memorandum of understanding in which the contracting parties determine the framework of the contract and the intention of the parties to buy and sell. The parties shall also determine the quantity and specifications of the goods, the manner of their delivery, the basis for determining the price, and the manner of payment. The types of guarantees and other prospective arrangements shall also be specified in the memorandum. The execution of each Salam contract may then take place separately at the appropriate date.

2/1/2 If the Salam contract is concluded on the basis of what was initially agreed in the memorandum of understanding, the contents of the memorandum become part and parcel of the contract. This will hold true unless the parties agreed when the

contract was concluded to exempt themselves from some of the obligations referred to in the memorandum of understanding.

2/2 Form of a Salam contract

A contract of Salam may be concluded using the word Salam, or Salaf, or sale, or any term that indicates sale of a prescribed commodity for deferred delivery in exchange for immediate payment of the price.

3. Subject Matter of Salam

3/1 Capital of Salam contract and its conditions

3/1/1 It is permissible for the capital of Salam to be in the form of fungible goods (such as wheat and other cereals) in which case the parties must make sure that they do not fall into Riba. The capital may also be items of material value (such as livestock). It is also permissible for it to be in the form of the general usufruct of a particular asset, such as living in a house or having the use of an aircraft or a ship for a certain period. In such a case, when a party is granted access to the usufruct through delivery of the asset, this is regarded as immediate receipt (possession) of the Salam capital.

3/1/2 The capital of Salam should be made known to the two parties in a manner that removes all uncertainty and eliminates the possibility of dispute. In principle, the capital of Salam should be in the form of cash. In this case, the currency of payment, the amount and the manner of payment shall be clearly defined. If the capital of Salam is in the form of fungibles,[1] then the kind, type, specifications and quantity of these shall be clearly defined.

3/1/3 The capital in a Salam contract must be paid immediately at the place where the contract is concluded. However, as an exception to this ruling, payment may be delayed for two or three days at

(1) Fungibles are goods that share common features such that they do not differ significantly. Any fungibles can be replaced by any other in the event of destruction, without need to assess the value of the item destroyed or the one replacing it.

most. Even if such a short delay has been stipulated earlier, this will not affect the Salam contract provided that the period of delay is not equal to or greater than the delivery period for al-Muslam Fihi.

3/1/4 It is not permitted that a debt be recognised as the capital of Salam, such as using as the capital of Salam loans or debts owed by the seller to the Institution as a result of previous transactions.

3/2 Al-Muslam Fihi and its conditions

3/2/1 Salam contracts are permitted for fungible goods, like those that may be weighed, measured or counted, the articles of which do not differ in any significant manner, provided that no Riba ensues.

3/2/2 Among the items for which variations in numbers make no difference are the products of companies that manufacture goods in approximate units that are identified by trademarks, standardised specifications and are regularly and commonly available at any time. However, this rule must be read together with item 3/2/8.

3/2/3 Salam is not permitted for anything specific like "this car". Nor is it permitted for anything for which the seller may not be held responsible, like land, buildings or trees; or for articles whose values change according to subjective assessment, like jewellery and antiques. Also, it is not permissible to stipulate that al-Muslam Fihi must be from a specific piece of land. However, on the delivery date the seller may present the buyer with whatever items are available (and meet the contract specifications), irrespective of whether such items are from his own fields or factories or elsewhere.

3/2/4 It is not permissible for al-Muslam Fihi to be an amount of currency, gold or silver, if the capital of the Salam contract was paid in the form of currency, gold or silver.

3/2/5 Al-Muslam Fihi must be the kind of article for which a specification may be drawn up so that the seller may be held responsible for its conformity to the specification. It will be sufficient if the specification is explained in a manner that removes uncertainty, except for minor discrepancies that are customarily ignored, considered acceptable, and not usually regarded as grounds for dispute.

3/2/6 It is a requirement that al-Muslam Fihi be clearly known to the contracting parties in a manner that eliminates any possibility of uncertainty or ambiguity. The reference for determining descriptions that are used to specify and identify al-Muslam Fihi is customary practice and the experience of experts.

3/2/7 It is a requirement that the parties know the quantity of al-Muslam Fihi. The quantity of each item is determined according to its condition and nature with regard to weight, measurement, volume and number.

3/2/8 It is a requirement that al-Muslam Fihi be commonly available under normal circumstances at the place where it should be on the delivery date, so that the commodity will be accessible to the seller in order to discharge his obligation by delivering it to the buyer.

3/2/9 It is a requirement that the date of delivery for al-Muslam Fihi be known in a manner that eliminates any uncertainty or ambiguity which may lead to a dispute. There is no Shari'ah objection to the contracting parties setting various dates on which the delivery of al-Muslam Fihi may take place, in instalments, provided the capital of Salam was paid at the time the contract was originally concluded.

3/2/10 In principle, the parties may designate the place at which al-Muslam Fihi is to be delivered. If the parties to the contract do not determine the place of delivery, then the place at which the contract was concluded will be regarded as the place of delivery unless it turns out to be impossible to make delivery

to such a place. In that case, the place of delivery should be determined according to customary practice.

3/3 Security for al-Muslam Fihi

Al-Muslam Fihi may be secured by a mortgagee or a guarantee or any other permissible means of securing payment.

4. Changes to al-Muslam Fihi

4/1 Selling al-Muslam Fihi before taking possession

It is not permitted for the buyer to sell al-Muslam Fihi before taking possession of it.

4/2 Replacement of al-Muslam Fihi

It is permissible for the buyer to exchange al-Muslam Fihi for other goods, except currency, after the delivery date falls due, as long as such a substitution was not stipulated in the contract. This rule applies whether or not the substitute is similar in kind to al-Muslam Fihi. This is provided that the substitute is suitable for being exchanged as al-Muslam Fihi for the capital of the Salam contract, and that the market value of the substitute should not be greater than the market value of al-Muslam Fihi at the time of delivery.

4/3 Cancellation (Iqalah) of a Salam contract

It is permissible, when both parties agree, to cancel the entire Salam contract in return for repayment in full of the amount of the capital of Salam. Partial cancellation, that is, cancellation of the delivery of part of al-Muslam Fihi, in return for repayment of a corresponding part of the capital of Salam, is also permissible.

5. Delivery of al-Muslam Fihi

5/1 The seller is under an obligation to deliver al-Muslam Fihi to the buyer on the due date in accordance with the terms of the contract, such as agreed specifications and quantity. The buyer, on the other hand, must accept the goods if they meet the specifications explained in the contract. If the buyer refuses to accept al-Muslam Fihi, he shall be compelled to do so.

5/2 If the seller offers delivered goods of a quality that is superior to that required by the contractual specifications, the buyer must accept the goods, provided that the seller shall not seek a higher price for the better quality. This may be considered one of the ways in which a contract is ethically fulfilled. However, this will apply only if the (inferior) description specified in the contract is not itself deemed vital.

5/3 If the quality of the delivered goods is inferior to that required by the contractual specifications, the buyer is entitled either to reject or to accept the goods in that condition. If he accepts the goods, his action is considered as ethical acceptance. It is also permissible for the two parties to agree to a settlement on terms for acceptance of the goods even at a discounted price.

5/4 It is not permitted for a seller to deliver al-Muslam Fihi in the form of a commodity different from the one agreed upon if the commodity is considered to belong to the same genus as al-Muslam Fihi (e.g., al-Muslam Fihi is corn and the commodity that the seller wants to deliver is wheat). However, the delivery of al-Muslam Fihi in the form of a different type of commodity from that agreed upon may take place only on the basis of the conditions for the replacement of al-Muslam Fihi by other goods. [see item 4/2]

5/5 Delivery of al-Muslam Fihi may take place before the due date, on condition that the goods conform to the agreed specifications and quantities. If the buyer has a valid reason for rejecting the goods, then he will not be compelled to accept them. Otherwise, the buyer will be forced to accept the goods.

5/6 If the seller fails to perform his obligation, owing to insolvency, he should be granted an extension of time for delivery.

5/7 It is not permitted to stipulate a penalty clause in respect of delay in the delivery of al-Muslam Fihi.

5/8 In case all or part of al-Muslam Fihi is not available to the seller on the due date, the buyer shall have the following options:

5/8/1 To wait until al-Muslam Fihi is available.

5/8/2 To cancel the contract and recover the paid capital.

It is also permissible for the parties to agree to replacement of al-Muslam Fihi by other goods. [see item 4/2]

6. Parallel Salam

6/1 It is permissible for the seller to enter into a separate, independent Salam contract with a third party in order to acquire goods of a similar specification to those specified in the first Salam contract, so that the first Salam obligation will be discharged by delivering these goods. Hence, the seller in the first Salam contract becomes the buyer in the second Salam contract.

6/2 It is permissible for the buyer to conclude a separate parallel Salam with a third party for the purpose of selling, on the basis of Salam, a commodity whose description corresponds to the description of the commodity to be acquired through the first Salam contract. In this situation, the buyer in the first Salam contract becomes the seller in the second Salam contract.

6/3 In both the two situations mentioned in items 6/1 and 6/2, it is not permissible for the parties to link the obligations under the two Salam contracts together so that the execution of the obligations of one contract is contingent on the outcome of the other. Hence, it is necessary that both the obligations and the rights under the two contracts stand alone in all respects. Therefore, if one party breaches his obligation under the first Salam contract, the other party (the injured party) has no right to relate this damage or loss to the party with whom he concluded a Parallel Salam. Consequently, he has no right on the basis of his loss or damage under the first Salam contract to terminate the second Salam contract or to delay in performing it.

6/4 All the rules of Salam as explained in items 1-5 above are applicable to Parallel Salam as well.

7. Salam Sukuk Issues

It is not permitted to issue tradable Sukuk based on the debt from a Salam contract. [see item (4/1)]

8. Date of Issuance of the Standard

This Shari'ah Standard was issued on 29 Safar 1422 A.H., corresponding to 23 May 2001 A.D.

Adoption of the Standard

The Shari'ah Standard on Salam and Parallel Salam was adopted by the Shari'ah Board in its meeting No. (6) held on 25-29 Safar 1422 A.H., corresponding to 19-23 May 2001 A.D.

In its meeting No. (8) held in Mecca on 28 Safar - 4 Rabi' I 1423 A.H., corresponding to 11-16 May 2002 A.D., the Shari'ah Board readopted a resolution to reformat the Shari'ah Rules for Salam and Parallel Salam in the form of a Shari'ah Standard.

Appendix (A)
Brief History of the Preparation of the Standard

In its meeting No. (5) held in Makkah Al-Mukarramah on 8-12 Ramadan 1421 A.H., corresponding to 4-8 December 2001 A.D., the Shari'ah Board decided to give priority to the preparation of the a Shari'ah rules for Salam and Parallel Salam.

On Monday 11 Shawwal 1420 A.H., corresponding to 17 January 2000 A.D., the Fatwa and Arbitration Committee decided to commission a Shari'ah consultant to prepare a juristic study and an exposure draft on the Shari'ah Rules for Salam and Parallel Salam.

In its meeting held in Bahrain on 21-23 Muharram 1421 A.H., corresponding to 26-28 April 2000 A.D., the Fatwa and Arbitration Committee discussed the exposure draft of the Shari'ah rules for Salam and Parallel Salam and asked the consultant to make the amendments in light of the comments made by the members.

In its meeting No. (4) held in Abu Dhabi, United Arab Emirates, on 14 Sha'ban 1421 A.H., corresponding to 10 November 2000 A.D., the Fatwa and Arbitration Committee discussed the exposure draft and made some relevant amendments.

The revised exposure draft of the Shari'ah rules was presented to the Shari'ah Board in its meeting No. (5) held in Makkah Al-Mukarramah on 8-12 Ramadan 1421 A.H., corresponding to 4-8 December 2000 A.D. The Shari'ah Board made further amendments to the exposure draft of the standard and decided that it should be distributed to specialists and interested parties in order to obtain their comments to discuss them in a public hearing.

A public hearing was held in Bahrain on 4-5 Dhul-Hajjah 1421 A.H., corresponding to 27-28 February 2001 A.D. The public hearing was attended by more than 30 participants representing central banks, institutions, accounting firms, Shari'ah scholars, academics and others interested in this field. Members of the Shari'ah Studies Committee responded to the written comments that were sent prior to the public hearing as well as to the oral comments that were expressed in the public hearing.

The Fatwa and Arbitration Committee held its meeting No. (5) in Bahrain on 15 Dhul-Hajjah 1421 A.H., corresponding to 10 March 2001 A.D., to discuss the comments made about the exposure draft. The committee made the necessary amendments in light of both the written comments that were received and oral comments that took place in the public hearing.

The Shari'ah Board in its meeting No. (6) held in Al-Madinah Al-Munawwarah on 25-29 Safar 1422 A.H., corresponding to 19-23 May 2001 A.D., discussed the amendments made by the Fatwa and Arbitration Committee, and made the necessary amendments. The standard was adopted in the name of Shari'ah rules for Salam and Parallel Salam. Some paragraphs were adopted by the unanimous vote of the members of the Shari'ah Board while the other paragraphs were adopted by the majority vote of the members, as recorded in the minutes of the Shari'ah Board.

The Shari'ah Board decided in its meeting No. (7) held in Makkah Al-Mukarramah on 9-13 Ramadan 1422 A.H., corresponding 24-28 November 2001 A.D., to reformat all Shari'ah rules in a form of standards and a committee was formed for this purpose.

In its meeting No. (8) held in Al-Madinah Al-Munawwarah on 28 Safar - 4 Rabi' I, 1423 A.H., corresponding to 11-16 May 2002 A.D., the Shari'ah Board adopted the reformatted version of the Shari'ah rules for Investment and Financing No. (3) on Salam and Parallel Salam with the title of Shari'ah Standard No. (9) on Salam and Parallel Salam, without any substantial changes in the content.

The Shari'ah Standards Review Committee reviewed the standard in its meeting held in Rabi' II, 1433 A.H., corresponding to March 2012 A.D.,

in the State of Qatar, and proposed after deliberation a set of amendments (additions, deletions, and rephrasing) as deemed necessary, and then submitted the proposed amendments to the Shari'ah Board for approval as it deemed necessary.

In its meeting No. (39) held in the Kingdom of Bahrain on 13-15 Muharram 1435 A.H., corresponding to 6-8 November 2014 A.D., the Shari'ah Board discussed the proposed amendments submitted by the Shari'ah Standards Review Committee. After deliberation, the Shari'ah Board approved necessary amendments, and the standard was adopted in its current amended version.

Appendix (B)
The Shari'ah Basis for the Standard

Permissibility of Salam

A contract of Salam derives its permissibility from the Qur`an, the Sunnah and Ijma' (consensus of Fuqaha). On the level of the Qur`an, Allah, the Almighty, says: ***{"O ye who believe! When you deal with each other, in transactions involving future obligations in a fixed period time, reduce them to writing"}***.(2) Ibn Abbas said: "I declare that a Salaf (Salam) contract in which the commodity is guaranteed for future delivery has been permitted by Allah" and then he read: ***{"O ye who believe! When you deal with each other, in transactions involving future obligations in a fixed period time, reduce them to writing"}***. It is reported that Ibn Abbas said: "This verse is a revelation for the particular purpose of making Salam permissible."(3)

On the level of Sunnah, Ibn Abbas is reported to have said: *"The Prophet (peace be upon him) has came to Medina and found that people were selling dates for deferred delivery after a duration of one or two years on a Salam basis. The Prophet (peace be upon him) said: 'Whoever pays for dates on a deferred delivery basis (Salam) should do so on the basis of a specified scale and weight'"*. In another text of the Hadith the Prophet (peace be upon him) said: *"Whoever pays on a deferred delivery basis should do so on the basis of a specified scale, weight and date of delivery"*.(4)

The scholars are unanimous on the permissibility of a Salam contract. Ibn Mundhir said that the scholars agreed that a Salam contract -i.e, a contract

(2) [Al-Baqarah (The Cow): 282].

(3) See: Ibn Al-Jawzi, *"Zad Al-Masir Fi 'Ilm Al-Tafsir"* [1: 336]; and Ibn Kathir, *"Tafsir Al-Qur`an Al-'Azim"* [1: 496].

(4) The Hadith has been related by Al-Bukhari, Muslim and others. See: *"Sahih Al-Bukhari"* [2: 781], Damascus: Dar Al-Qalam edition; and *"Sahih Muslim"* [3: 1226], Beirut: Dar Al-Fikr edition.

in which a person sells to his fellow man a specific and determined thing by weight or measure for a future defined date of delivery—is permissible.[5]

Wisdom of Making Salam Permissible

The wisdom of making Salam permissible lies in the fact that Salam facilitates a type of financing for people in need of it. In particular, farmers, market gardeners and merchants, among others, need working capital for their businesses and for their living expenses in order to operate. Hence, Salam is made permissible so that these businesses may benefit from it. The buyer may benefit from its permissibility as well, by acquiring the commodity at a price below the market price.

Similarly, a contract of Salam responds to the needs of a large number of business enterprises at different levels, ranging from small and medium-sized enterprises to conglomerates that are involved in agricultural and industrial production or trade and the like. In order for these businesses to be productive, they need working capital in the form of either cash or assets. Hence, Salam has provided an investment opportunity in the form of financing of the working capital for trade. It also covers the demands of those in need of liquidity, as long as they are able to fulfill the orders they receive in return at the due date.

Although the contract of Salam is commonly used by agricultural businesses, its permissibility is not, however, confined to these fields. It can also be used in other investment opportunities, such as industry or trade.

The contract of Salam also meets immediate needs for liquidity. This is because it gives the seller flexibility in using the sale proceeds (before the commodity is delivered), and the opportunity to arrange for the counter-value (al-Muslam Fihi) and its delivery to the buyer at the date of delivery.

Subject Matter of a Salam Contract

- The basis for the permissibility of presenting usufruct as capital in a Salam contract is the view of the Maliki scholars. This is regarded as immediate receipt of the capital based on the Shari'ah maxim that says:

(5) Ibn Al-Mundhir, *"Al-Ijma'"* (P. 54); and Ibn Qudamah; *"Al-Mughni"* [6: 385], Cairo: Matba'at Hajar edition.

"Taking possession of part of a thing is like taking possession of the whole thing".[6] Hence, this is not a sale of debt (because the buyer has received control over the usufruct).[7]

- The basis for the requirement that the capital of Salam must be known to the two parties is that a Salam contract is one of the exchange contracts in which the consideration need to be known so as to remove any uncertainty.[8]
- The basis for the requirement that the capital must be paid at the conclusion of a Salam contract is the saying of the Prophet (peace be upon him): *"Whoever pays on a deferred delivery basis should do so on the basis of specifying the scale"*.[9] The *Taslif* or *Islaf* means payment in advance. Salam was so named because the capital must be paid in advance. If payment is delayed, the transaction is not called Salam.[10] Again, any delay in payment of the capital and dispersal of the parties renders the transaction a sale of debt for debt[11] which is prohibited, and the scholars agreed on its prohibition. Ibn Rushd said: "As for sale of debt for debt, Muslim scholars are unanimous regarding its prohibition".[12]
- The basis for it not being permitted that a debt be capital in Salam is because this would render the transaction a form of sale of debt and this is prohibited by the Shari'ah.
- The basis for the impermissibility of Salam where the subject matter is a specific and identified thing is the Hadith stating that *"A man came*

(6) Al-Dardir, *"Al-Sharh Al-Saghir"* [4: 347].

(7) Al-Buhuti, *"Sharh Muntaha Al-Iradat"* [2: 37].

(8) Al-Qadi Abdul-Wahhab, *"Al-Ma'unah"* [2: 987]; Ibn Juzay, *"Al-Qawanin Al-Fiqhiyyah"* (P. 202); Al-Kasani, *"Bada`i' Al-Sana`i'"* [5: 301]; Ibn Qudamah, *"Al-Mughni"* [6: 411]; and Al-Shirazi, *"Al-Muhadhdhab"* [1: 300].

(9) The Hadith has been related by Al-Bukhari, Muslim and others: *"Sahih Al-Bukhari"* [2: 781], Damascus: Dar Al-Qalam edition; and *"Sahih Muslim"* [3: 1226], Beirut: Dar Al-Fikr edition.

(10) Ibn Qudamah, *"Al-Mughni"*, [6: 408]

(11) See: Al-Kasani, *"Bada`i' Al-Sana`i'"* [5: 202]; Ibn Rushd (the grandson) *"Bidayat Al-Mujtahid Wa Nihayat Al-Muqtasid"* [2: 205], Beirut, Dar Al-Qalam edition; Al-Qadi Abdul-Wahhab, *"Al-Ma'unah"* [2: 988]; and Al-Zayla'i, *"Tabyin Al-Haqa'iq Sharh Kanz Al-Daqa'iq"* [4: 117].

(12) Ibn Rushd, *"Bidayat Al-Mujtahid"* [2: 150].

to the Prophet (peace be upon him) and said; 'The kin of so and so from the Jews had embraced Islam. However, they are hungry and I am afraid they may become apostates'. The Prophet (peace be upon him) asked the people around him; 'Who has something (money)?' One Jew said; 'I have so and so (he mentioned a sum of money), may be he said; 'I have three hundred dinars and I will pay such and such price for the products of the farm of the kin of so and so'. The Prophet (peace be upon him) said: '(buy) With such and such price to be delivered after such and such period, but not for the products of the kin of so and so'".[13] Again, if a Salam contract is concluded for providing products from a specific farm, there might not be products from this farm at the time of delivery, and this leads to Gharar (uncertainty).

- The basis for the requirement that the subject-matter of Salam be commonly available under normal circumstances where it is required is to remove uncertainty and to ensure that the seller will be able to deliver it at the date of delivery.

Changes to a Salam Contract

- The basis for the impermissibility of selling the subject-matter of Salam before taking possession of it is because such an action is a form of sale of debts which is not permissible.
- The basis for the impermissibility of substituting the subject-matter of Salam with a commodity, the price of which is higher than the prevalent market value of the subject-matter of Salam at the date of delivery is to deter the buyer from making a compound profit on one deal.
- The basis for the permissibility of the termination of a Salam by agreement (Iqalah) is because the Prophet (peace be upon him) has encouraged Iqalah in general and Salam is not an exception from this concession. Salam is also a form of sale and since sale contracts admit Iqalah, so too does a Salam contract. Again, Iqalah is actually

(13) The Hadith has been related by Ibn Majah and Abu Dawud. See: *"Sunan Ibn Majah"* [2: 765-766]; and *"Sunan Abu Dawud"* [3: 744]. Al-Shawkani said: "There is an unknown narrator in the chain of transmission of this Hadith. This is because Abu Dawud narrated it through Muhammad Ibn Kathir from Sufyan from Abu Ishaq from a Najrani man from Ibn Umar. Therefore, the Hadith is not of a strong authority. See: *"Nayl Al-Awtar"* [5: 345-346].

permitted for the sale of tangible goods in consideration of the need of contracting parties to be able to deal with regret and a desire to withdraw from the contract. In the case of Salam, the possibility that the parties may regret concluding the transactions is greater than in the sale of tangible goods because Salam is a low cost form of sale for which permissibility of Iqalah is easily applicable in Salam.[14]

Delivery of al-Muslam Fihi

The basis for not allowing penalty clauses in Salam is because al-Muslam Fihi is considered to be a debt; and it is not permitted to stipulate payment in excess of the principal amount of debts.

Parallel Salam

- The basis for the permissibility of Parallel Salam is that it represents two Salam deals that are separable from each other despite the fact that the descriptions of the subject-matter in the two contracts are similar. However, the contract does not lead to two sales in one, which is impermissible.
- The basis for the impermissibility of tradeable Salam Sukuk is because trading with such Sukuk is a form of sale of debt which is prohibited.

(14) See: Al-Kasani, *"Bada`i' Al-Sana`i'"* [5: 214].

Appendix (C)
Definitions

Salam

A Salam transaction is the purchase of a commodity for deferred delivery in exchange for immediate payment. It is a type of sale in which the price, known as the Salam capital, is paid at the time of contracting while the delivery of the item to be sold, known as al-Muslam Fihi (the subject-matter of a Salam contract), is deferred. The seller and the buyer are known as al-Muslam Ilaihi and al-Muslam or Rab al-Salam respectively. Salam is also known as Salaf (literally; borrowing).

Parallel Salam

If the seller enters into another separate Salam contract with a third party to acquire goods, the specification of which corresponds to that of the commodity specified in the first Salam contract, so that he (the seller) can fulfil his obligation under that contract, then this second contract is called, in contemporary custom, Parallel Salam or *Salam Muwazi*. The following is an example of such a contract. An Institution on one hand buys a specified quantity of cotton from farmers on a Salam basis and, in turn, the buyer in the first Salam contract enters into a new separate Salam contract with textile mills so as to provide them, by means of that new Salam contract, with cotton, the specifications of which are similar to the specifications of the cotton to be acquired under the first Salam contract, without making the execution of the second Salam contract contingent on the execution of the first Salam contract.

Iqalah

Iqalah or cancellation of a contract is a bilateral agreement of the contracting parties to abate and remove the legal effect of a contract.

Mithlis (Fungibles)

Items that are mutually interchangeable, i.e., items whose units are identical (in specifications), and if destructed, are guaranteed by other identical units without consideration to their value.

Shari'ah Standard No. (11)

Istisna'a and Parallel Istisna'a

(Revised Standard)

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

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

Preface

The objective of this standard is to explain the Shari'ah rulings and limitations applicable to Istisna'a and parallel Istisna'a transactions in respect to concluding an Istisna'a contract, the subject-matter of Istisna'a and changes to the contract. The standard also explains issues relating to the execution of the contract and the supervision of its execution.

Statement of the Standard

1. Scope of the Standard

The standard covers Istisna'a and parallel Istisna'a transactions whether the Institution is acting as an ultimate purchaser or is acting as a manufacturer or as a builder for construction.[1]

2. Istisna'a Contract

2/1 Conclusion of an Istisna'a contract at the time of contracting or after the bilateral promise

2/1/1 It is permissible that the Institution and a customer conclude an Istisna'a contract before the Institution assumes title to the subject-matter to be sold to the customer or to the materials from which the subject-matter will be produced (manufactured or constructed).

2/1/2 It is permissible for the Institution to benefit from any price offers or quotations that the customer has obtained from other dealers or suppliers to assist it in the evaluation of expenses and the computation of prospective profit.

2/1/3 It is not permissible that the Institution's role in the Istisna'a be that of a financial intermediary between a buyer and a third party, especially if the buyer has become unable to meet his obligations toward such a third party, and this prohibition applies whether such a role would take place before or after the commencement of the work. [see item 4/2/2]

(1) The Arabic term "Istisna'a" applies to both manufacturing and construction, and there is no convenient term in English that covers both manufacturers and builders. Therefore, the term "manufacturer" will be used in this standard to designate a party acting as manufacturer or contractor in an Istisna'a contract, and the term 'subject-matter' will be used to designate the goods or buildings that are the subject-matter of the contract.

2/2 Form and conditions of an Istisna'a contract

2/2/1 A contract of Istisna'a is binding on the contracting parties provided that certain conditions are fulfilled, which include specification of the type, kind, quality and quantity of the subject-matter to be produced. Moreover, the price of the subject-matter must be known and, if necessary, the delivery date must be determined. If the subject-matter does not conform to the specification agreed upon, the customer has the option to accept or to refuse the subject-matter.

2/2/2 Since a contract of Istisna'a is binding, the parties to the contract are inevitably bound by all obligations and consequences flowing from their agreement. In other words, the contracting parties need not to renew an exchange of offer and acceptance after the subject-matter is completed. This is different from the promise in a contract of Murabahah, which requires the signature of a sale contract through a new offer and acceptance by the parties when possession of the items to be sold is taken by the Institution.

2/2/3 It is not permitted for the manufacturer to stipulate in the contract of Istisna'a that he is not liable for defects.

2/2/4 It is not permissible to conclude Istisna'a contracts or processes of Istisna'a in a manner that makes it a legal device for a mere interest-based financing. Examples are a transaction in which the Institution buys items from the contractor on a cash payment basis and sells them back to the manufacturer on a deferred payment basis at a higher price; or where the party ordering the subject-matter to be produced is the manufacturer himself; or where one third or more of the facility in which the subject-matter will be produced belongs to the customer. All the circumstances mentioned above would make the deal an interest-based financing deal in which the subject-matter never genuinely changes hands, even if the deal is won through competitive bidding. This rule is intended to avoid sale and buy back transactions (*Bay' al-'Inah*).

3. Subject-Matter of, and Guarantees in, Istisna'a

3/1 The rulings concerning al-Masnoo'

3/1/1 An Istisna'a contract is permissible only for raw materials that can be transformed from their natural state by a manufacturing or construction process involving labour. Therefore, Istisna'a is valid only in so far as the supplier has agreed to provide a subject-matter that is manufactured or constructed.

3/1/2 It is permissible that a contract of Istisna'a be concluded for the production of a subject-matter having unique descriptions according to the requirement of the ultimate purchaser even if such a subject-matter has no substitutes in the market, provided the subject-matter is subject to specification. Similarly, it is permissible that the subject-matter of a contract of Istisna'a be items that have perfect substitutes in the market, and can be substituted for one another in fulfilling an obligation, because they share common characteristics by virtue of the process of manufacture or construction. This rule applies whether the items to be produced are intended for consumption or for use with their substance kept intact.

3/1/3 It is not permissible that the subject-matter of an Istisna'a contract be an existing and identified capital asset. For example, it is invalid for the Institution to conclude a contract to sell a particular designated car or factory on the basis of Istisna'a. This is because Istisna'a is a sale contract applicable to items that are identified by specification, not by designation. Unless the items are completely or partially delivered, the ultimate purchaser has no prior right (in the event that the supplier is declared bankrupt or insolvent) over a third party to the items that are the subject-matter of the contract while they are still in the process of being produced and have not yet been delivered to him. In addition, the ultimate purchaser cannot be regarded as the owner of the materials in the possession of the manufacturer for the purpose of producing the subject-

matter of the contract, unless the manufacturer has previously undertaken, as a guarantee for the completion of the work, that such materials will only be used for the order of the ultimate purchaser.

3/1/4 The contract of Istisna'a may be concluded with a condition that the production shall be carried out by the Institution using its own resources, in which case it has to abide by this condition and has no right to assign the process of production to another entity.

3/1/5 It is permissible for the manufacturer to fulfil his obligation in an Istisna'a contract by using items produced by his own resources or items produced by other parties that existed before the contract was concluded. The latter option is, however, only valid if the ultimate purchaser did not stipulate that the manufacturer should use his own resources. However, this rule should not be used as a device for deferment of consideration (the price and the commodity) of a sale of a subject-matter that is to be delivered in the future based on its specification as given by the seller, but which are not intended to be produced.

3/1/6 The manufacturer is under an obligation to produce the subject-matter according to specification and within the period agreed upon or within such reasonable time as the nature of the work may permit, in accordance with accepted practice that is recognised by experts.

3/1/7 The parties may agree on a period during which the manufacturer will be liable for any defects or the maintenance of the subject-matter. They may also leave the determination of liability relating to defects and maintenance to customary practice.

3/1/8 It is permissible to draw up an Istisna'a contract for real estate developments on designated land owned either by the ultimate purchaser or the contractor, or on land in which either of them

owns the usufruct. This is permissible because the contract involves the construction of specified buildings that will be built and sold according to specification and the contract of Istisna'a in this case does not concern a particular identified place (i.e. the land).

3/2 Price and guarantees of Istisna'a contract

3/2/1 It is a requirement that the price for an Istisna'a contract be known at the conclusion of the contract, in which case it can be in the form of cash or tangible goods or the usufruct of an asset for a particular duration, whether such usufruct is related to an asset other than the subject-matter or to the subject-matter itself. The use of usufruct of the subject-matter itself as consideration for an Istisna'a contract is relevant to situations when a government offers a preferential contract giving usufruct to the builder or manufacturer for a particular duration, commonly known as Build Operate Transfer (BOT).

3/2/2 The price of an Istisna'a contract may be deferred or paid in instalments within a certain period of time, or if delivery of the subject-matter is to be made in stages a portion of the price may be paid immediately while the balance is paid by instalments according to the stages of delivery. It is also permissible to connect payment with the stage of completion of the work, (such that a payment is made at the end of each stage), provided the stages of this type of work are by custom subject to specification and their identification will not lead to dispute.

3/2/3 If the process of manufacture or construction is divided into phases, or payment is designed according to the stage of completion of the work, then the manufacturer or contractor is entitled to request that the ultimate buyer make payment accordingly for each stage that has been carried out according to specification.

3/2/4 It is permissible that the price of Istisna'a transactions vary in accordance with variations in delivery date. There is also no objection to a number of offers being subject to negotiation, provided that eventually only one offer will be chosen for concluding the Istisna'a contract. This is to avoid uncertainty and lack of knowledge that may lead to dispute.

3/2/5 A contract of Istisna'a cannot be drawn up on the basis of a Murabahah sale, for example, by determining the price of Istisna'a on a cost- plus basis.

3/2/6 If the actual costs incurred by the Institution to bring the subject-matter to completion are substantially less than the estimated costs or the Institution secures a discount from the party with whom it contracted on a Parallel Istisna'a basis to acquire the subject-matter in order to fulfil its contractual obligation, the Institution is not obliged to give a discount to the ultimate purchaser and the latter is not entitled to the amount or part thereof the Institution has gained over the estimated costs. The same rule applies conversely when the actual costs of production are substantially greater than the estimated costs.

3/3 Guarantees

3/3/1 It is permissible for the Institution, acting either in the capacity of the manufacturer or of the ultimate purchaser, to give or demand accordingly 'Arboun as a guarantee, which will either be part of the price, if the contract is fulfilled, or forfeited, if the contract is rescinded. However, it is preferable that the amount forfeited be limited to an amount equivalent to the actual damage suffered.

3/3/2 In an Istisna'a contract, it is permissible for the Institution, whether acting in the capacity of manufacturer or in the capacity of the ultimate purchaser, to demand guarantees that it considers sufficient to secure fulfilment of its rights against

an ultimate purchaser or a manufacturer. It is also permissible for the institution, when acting in the capacity of an ultimate purchaser, to give guarantees requested by the manufacturer, which can be in a form of a mortgage, personal guarantee, assignment of rights, a current account, or an investment account or consent to blocking withdrawal from an account.

4. Changes to Istisna'a Contract

4/1 Amendments, changes and introduction of new conditions

4/1/1 It is permissible, after the conclusion of an Istisna'a contract, for the manufacturer and the ultimate purchaser to agree on amending the manufacturing or construction specifications previously agreed upon or introducing additional specification requirements on condition that the price is adjusted accordingly and a reasonable period for the execution of the new requirements is granted. It is also permissible to state in the contract that the consideration for amendments or introduction of additional requirements shall be determined and added to the original price as per the expert opinion, custom or an identified price index which preclude any uncertainty that may potentially lead to dispute.

4/1/2 The ultimate purchaser cannot oblige the manufacturer to introduce modifications and changes to the subject matter of an Istisna'a contract without the consent of the manufacturer.

4/1/3 It is not permissible for amendments and changes to the contract to be agreed on the basis that an additional sum will be paid in consideration for an extension of the period of payment. However, a rebate for pre-payment is permissible provided it is not stipulated at the conclusion of the contract.

4/2 Intervening contingencies (force majeure)

4/2/1 It is permissible, by way of agreement of the contracting parties or arbitration or judicial procedure, to amend the contract price

of an Istisna'a contract upwards or downwards, as a result of intervening contingencies (force majeure). This rule must be read together with item 4/1/3 above.

4/2/2 It is permissible for the Institution to replace a contractor and enter into an Istisna'a contract with a customer to complete a project which had been started by the previous contractor of such a customer. In this case, an assessment of the project should be undertaken on the basis of the existing status of the project. The cost of this assessment is chargeable to the account of the customer, in which case all outstanding debts, if any, that arise from the incomplete Istisna'a contract shall be the personal responsibility of the customer. The parties may after this conclude a new Istisna'a contract for the remaining work. The Institution is not bound to deal with the previous contractor. Rather, the Institution has the right to stipulate that the work needed to complete the project will be carried out by any means it deems fit.

4/2/3 In the case of constructing buildings or public utilities on land owned by the ultimate purchaser, it is permissible to stipulate that the ultimate purchaser has the right to perform the contract of Istisna'a at the expense of the manufacturer if the latter fails to perform the contract or to complete the work within a particular period of time, and that this performance will be effected from the date the manufacturer halted the work.

4/2/4 If the contractor is unable to continue to discharge his obligation, the ultimate purchaser (the owner of the land) is not entitled to acquire ownership of the incomplete building structures or utilities that are already in place without giving consideration to the contractor. However, this rule depends on the cause of the failure to continue the work. If the failure to perform is due to the misconduct of the contractor, the ultimate purchaser is liable only for the value of the building structure and the builder is liable to compensate the ultimate purchaser for any actual

damage or loss he suffered. If the failure to perform is due to the misconduct of the ultimate purchaser, the contractor is entitled to the value of the work he has completed and compensation for any damage or loss. However, if the failure to perform has not been caused by either of them, the ultimate purchaser is liable only for the value of the building structure that is already in place and neither of them has any responsibility to pay compensation for the loss or damage the other party had suffered. [see item 4/2/3]

4/2/5 It is permissible that a contract of Istisna'a includes a clause to the effect that if any additional conditions are inserted into the contract at a later date as a result of directives of the relevant authorities, and these additional conditions lead to extra expenses that cannot, by virtue of the terms of the contract, be borne by the manufacturer because they were not in the original contract as signed or there is no law making such payment compulsory, the extra expenses will be borne by the ultimate purchaser.

5. Supervision of the Execution of an Istisna'a Contract

5/1 It is permissible for the seller and purchaser to appoint technically experienced consulting firm to represent it in determining whether the subject-matter conforms to the contractual specification, and to advise the Institution as to whether payment for the subject-matter, or delivery or acceptance of it, under the terms of the contract, should take place, and they should adhere to its resolutions

5/2 It is permissible for the Institution, when acting as the manufacturer, to draw-up an independent and separate contract of agency appointing the ultimate purchaser as an agent of the Institution to supervise the manufacturing or construction process so as to ensure that the items produced conform to contractual specification.

5/3 It is permissible for the manufacturer and the ultimate purchaser to agree on the party who will bear the additional costs of supervision of an Istisna'a contract.

6. Delivery and Disposal of the Subject-Matter

6/1 The manufacturer is discharged from liability if the subject-matter is delivered to either the ultimate purchaser or to a person appointed by him or if the ultimate purchaser is enabled to exercise full control over the subject-matter.

6/1/1 If the condition of the subject-matter does not conform to the contractual specifications at the date of delivery, the ultimate purchaser has the right to reject the subject-matter or to accept it in its present condition, in which case the acceptance constitutes satisfactory performance of the contract. It is also permissible for the contracting parties to agree on acceptance of a subject-matter that fails to conform to the specification even if such an arrangement involves a price discount.

6/1/2 If the seller offers to deliver a better quality, then the purchaser shall accept his conditions, provided that the seller shall not charge any additional amounts for the better quality, which may be considered one of the ways in which a contract is ethically fulfilled, unless the quality specified in the contract is particularly pursued by the purchaser.

6/2 It is permissible that delivery of the subject-matter takes place before the due date, on condition that the subject-matter meets the specifications agreed upon, in which case the ultimate purchaser is obliged to accept the subject-matter. If the ultimate purchaser is unwilling to take delivery of the subject-matter, the rule on this point depends on whether or not there is justification for this refusal. If there is a good reason for the rejection of the subject-matter, the ultimate purchaser shall not be obliged to accept it. If there is not a good reason for rejecting it, then the ultimate purchaser will be obliged to accept the subject-matter.

6/3 The delivery of the subject-matter may take place through constructive possession, by enabling the ultimate purchaser to take control over the subject-matter after the production process is completed. At this

point, the liability of the manufacturer in respect of the subject-matter comes to an end and the liability of the ultimate purchaser begins. If after enabling the ultimate purchaser to take control over the subject-matter any loss or damage subsequently occurs to the subject-matter without any proof of negligence or misconduct on the part of the manufacturer, then the ultimate purchaser is liable. This is therefore the demarcation line between the liabilities of the two parties: the liability of the manufacturer and the liability of the ultimate purchaser.

6/4 If the ultimate purchaser refuses to accept the subject-matter without a good reason after he is enabled to take possession, the subject-matter will remain in the possession of the manufacturer on a trust basis, in which case the manufacturer will not be liable for loss or damage that occurs to it, unless such loss or damage is a result of negligence or misconduct on the part of the manufacturer. The ultimate purchaser bears the expenses for the safe keeping of the subject-matter.

6/5 It is permissible to state in a contract of Istisna'a that the manufacturer will act as the agent of the ultimate purchaser to sell the subject-matter if there is a delay on the part of the purchaser in taking delivery of the subject-matter within a particular period of time. In this case, the manufacturer will sell the subject-matter on behalf of the ultimate purchaser and, after deducting the agreed contract price, the balance, if any, will be returned to the purchaser. If the price obtained is less than the contract price, the manufacturer shall have a right of recourse to the ultimate purchaser for the recovery of the remaining balance. In addition, the ultimate purchaser will bear the expenses incurred in selling the subject-matter.

6/6 It is permissible for the contract of Istisna'a to include a fair penalty clause stipulating an agreed amount of money for compensating the ultimate purchaser adequately if the manufacturer is late in delivering the subject-matter. Such compensation is permissible only if the delay is not caused by intervening contingencies (force majeure). However, it is not permitted to stipulate a penalty clause against the ultimate purchaser for default on payment. [see item 2/1/2 of the Shari'ah Standard No. (3) on Procrastinating Debtor]

6/7 It is not permissible to sell the subject-matter prior to taking either actual or constructive possession of it [see item 6/4]. However, it is permissible to conclude an Istisna'a contract to sell an item on the basis of description or specification that is similar to an item to be acquired from a manufacturer, and this is called *Istisna'a Muwazi*: Parallel Istisna'a [see item 7].

6/8 It is permissible for the Institution acting in the capacity of ultimate purchaser to appoint, after taking possession of the subject-matter, the manufacturer as an agent to sell the subject-matter to latter's customers on behalf of the Institution. This agency is permissible whether it is carried out free of charge, or for consideration either in the form of a fixed fee or a particular percentage of the sale price, on condition that the contract of agency and the contract of Istisna'a were not entered into in connection with each other.

7. Parallel Istisna'a

7/1 It is permissible for the Institution to buy items on the basis of a clear and unambiguous specification and to pay, with the aim of providing liquidity to the manufacturer, the price in cash when the contract is concluded. Subsequently, the Institution may enter into a contract with another party in order to sell, in the capacity of manufacturer or supplier, items whose specification conforms to the wishes of that other party, on the basis of parallel Istisna'a, and fulfil its contractual obligation accordingly. This is permissible on condition that the delivery date stipulated in the parallel (sale) contract must not precede that stipulated in the original purchase contract, and, moreover, the two contracts should remain separate from each other. [see item 3/1/4]

7/2 It is permissible for the Institution, acting in the capacity of the producer or supplier, to conclude an Istisna'a contract with the aim of selling such items to the customer on a deferred payment basis, and to enter into a Parallel Istisna'a contract on an immediate payment basis with a manufacturer or builder to acquire such items as per the specifications in the first contract and sell them to the customer. This

is permissible on condition that the two contracts should remain separate and, moreover, be subject to the matters set out in item 3/1/4.

7/3 As a result of concluding an Istisna'a contract in the capacity of a producer or supplier, the Institution must assume liability for ownership risk and maintenance and insurance expenses prior to delivering the subject-matter to the ultimate purchaser (the customer). Moreover, the Institution is not permitted, in the Parallel Istisna'a contract concluded with the manufacturer, to transfer to the latter the risk arising from its obligations towards the customer.

7/4 It is not permissible to make any contractual link between the obligations under two contracts (the contract of Istisna'a and the contract of Parallel Istisna'a) when they are concluded. Therefore, it is also not permissible for a party to an ordinary Istisna'a contract (I) to withdraw his contractual obligations or delay delivering the subject-matter of the contract because the obligation under Parallel Istisna'a did not take place or (II) to increase the price of the goods to be delivered because of an increase in the cost of goods in the Parallel Istisna'a. However, there is no restriction on the right of the Institution to stipulate conditions and requirements when concluding a Parallel Istisna'a contract as a purchaser, including a penalty clause similar to, or different from, that which the customer has stipulated in the first Istisna'a contract in which the Institution is the supplier.

8. Date of Issuance of the Standard

This Standard was issued on 29 Safar 1422 A.H., corresponding to 23 May 2001 A.D.

Adoption of the Standard

The Shari'ah Standard on Istisna'a and Parallel Istisna'a was adopted by the Shari'ah Board in its meeting No. (6) held on 25-29 Safar 1422 A.H., corresponding to 19-23 May 2001 A.D.

In its meeting No. (8) held in Makkah Al-Mukarramah on 28 Safar - 4 Rabi' I, 1423 A.H., corresponding to 11-16 May 2002 A.D., the Shari'ah Board readopted a resolution to reformat the Shari'ah rules for Istisna'a and Parallel Istisna'a in the form of a Shari'ah standard.

Appendix (A)
Brief History of the Preparation of the Standard

In its meeting No. (5) held in Makkah Al-Mukarramah on 8-12 Ramadan 1421 A.H. corresponding to 4-8 December, 2000 A.D., the Shari'ah Board decided to give priority to the preparation of the a Shari'ah rules for Istisna'a and Parallel Istisna'a.

On Monday 11 Shawwal 1420 A.H. corresponding to 17 January 2000 A.D., the Fatwa and Arbitration Committee recommended to the Shari'ah Board the commissioning of a Shari'ah consultant to prepare a juristic study and an exposure draft on the Shari'ah Rules for Istisna'a and Parallel Istisna'a.

In its meeting held in Bahrain on 21-23 Muharram 1421 A.H., corresponding to 26-28 April 2000 A.D., the Fatwa and Arbitration Committee discussed the exposure draft of the Shari'ah Rules for Istisna'a and Parallel Istisna'a and asked the consultant to make amendments in light of the comments made by the members.

In its meeting No. (4) held in Abu Dhabi, United Arab Emirates on 14 Sha'ban 1421 A.H. corresponding to 10 November 2000 A.D., the Fatwa and Arbitration Committee discussed the exposure draft and made some relevant amendments.

The revised exposure draft of the Shari'ah Rules was presented to the Shari'ah Board in its meeting No. (5) held in Makkah Al-Mukarramah on 8-12 Ramadan 1421 A.H. corresponding to 4-8 December 2000 A.D. The Shari'ah Board made further amendments to the exposure draft of the standard and decided that it should be distributed to specialists and interested parties to obtain their comments in order to discuss them in a public hearing.

A public hearing was held in Bahrain on 4-5 Dhul-Hajjah 1421 A.H., corresponding to 27-28 February 2001 A.D. The public hearing was attended by more than thirty participants representing central banks, Institutions, accounting firms, Shari'ah scholars, academics and others who are interested in this field. Members of the Shari'ah Studies Committee responded to the written comments that were sent prior to the public hearing as well as to the oral comments that were expressed in the public hearing.

The Fatwa and Arbitration Committee held its meeting No. (5) in Bahrain on 15 Dhul-Hajjah 1421 A.H., corresponding to 10 March 2001 A.D., to discuss the comments made about the exposure draft. The committee made the necessary amendments in light of both the written comments that were received and oral comments that took place in the public hearing.

The Shari'ah Board in its meeting No. (6) held in Al-Madinah Al-Munawwarah on 25-29 Safar 1422 A.H., corresponding to 19-23 May 2001 A.D., discussed the amendments made by the Fatwa and Arbitration Committee, and made necessary amendments. The standard was adopted in the name of Shari'ah Rules for Istisna'a and Parallel Istisna'a. Some paragraphs were adopted by the unanimous vote of the members of the Shari'ah Board while the other paragraphs were adopted by the majority vote of the members, as recorded in the minutes of the Shari'ah Board.

The Shari'ah Board decided in its meeting No. (7) held in Makkah Al-Mukarramah on 9-13 Ramadan 1422 A.H. corresponding 24-28 November 2001 A.D. to reformat all Shari'ah rules in the form of standards and a committee was formed for this purpose.

In its meeting No. (8) held in Al-Madinah Al-Munawwarah on 28 Safar - 4 Rabi' I 1423 A.H. corresponding to 11-16 May 2002 A.D., the Shari'ah Board adopted the reformatting of the Shari'ah Rules for investment and Financing No. (4) on Istisna'a and Parallel Istisna'a in the name of Shari'ah Standard No. (11) on Istisna'a and Parallel Istisna'a without any substantial changes in the content.

The Shari'ah Standards Review Committee reviewed the standard in its meeting held in Rabi' II 1433 A.H. corresponding to March 2012 A.D.

in the State of Qatar, and proposed after deliberation a set of amendments (additions, deletions, and rephrasing) as deemed necessary, and then submitted the proposed amendments to the Shari'ah Board for approval as it deemed necessary.

In its meeting No. (4) held in Al-Madinah Al-Munawwarah, Kingdom of Saudi Arabia on 27-29 Sha'ban 1436 A.H. corresponding to 14-16 June 2015 A.D., the Shari'ah Board discussed the proposed amendments submitted by the Shari'ah Standards Review Committee. After deliberation, the Shari'ah Board approved necessary amendments, and the standard was adopted in its current amended version.

Appendix (B)
The Shari'ah Basis for the Standard

Legitimacy of Istisna'a Contract

The legitimacy of Istisna'a is based on the request of the Prophet (peace be upon him) that a pulpit (a platform) for preaching and a finger ring be manufactured for him.[2] An Istisna'a contract is also permissible on the basis of the principle of Istihsan (Shari'ah approbation), the general principles of contracts and transactions and the objectives of Shari'ah. The Istisna'a is a binding contract and not a mere promise. The International Islamic Fiqh Academy has issued a resolution in support of the legitimacy of Istisna'a.[3]

Istisna'a Contract

- The basis for it not being permissible that the role of the Institution remain as a mere financier for a deal concluded between the supplier and the ultimate purchaser is that this would lead to involvement in a Riba transaction which makes the Istisna'a contract a mere cover-up and not a real Istisna'a.
- The basis for stating that an Istisna'a contract is binding is the view of Imam Abu Yusuf, as stated in the *"Majjalat Al-Ahkam Al-'Adliyyah"*, (known in English by the name the Mejelle), that the manufacturer has spent money in order to manufacture and to deliver according to specification. If the ultimate purchaser has a right to refuse the manufactured goods, then the manufacturer will incur losses.

(2) The Hadith in which the Prophet (peace be upon him) requested the manufacture of finger ring has been related by Al-Bukahri and Muslim: *"Sahih Al-Bukhari"* [5: 220]; and *"Sahih Muslim"* [3: 1655]). The Hadith in which the Prophet (peace be upon him) requested the manufacture of a pulpit for preaching has been related by Al-Bukhari in his *"Sahih"* [2: 908].

(3) International Islamic Fiqh Academy Resolution No. 65 (3/7).

- The basis for the impermissibility of the manufacturer including a defect exclusion clause in an Istisna'a contract is that a valid Istisna'a is a sale of specified goods to be delivered in the future and exclusion of liability as to defects is valid only in the sale of particular identified goods. This prohibition of excluding liability as to defects in Istisna'a is one feature that makes it different from an ordinary sale.
- The basis for the impermissibility of drawing up Istisna'a contracts or procedures in a way that appears to be a mere interest-based financing is the need to avoid involvement in a Riba transaction, a potential Riba or 'Inah sales.

Subject Matter of, and Guarantees in, an Istisna'a Contract

- The basis for the impermissibility of concluding an Istisna'a contract for items that are not manufactured or constructed is that items that are not the subject of transformation by manufacture or construction by man, that is natural things such as animals, fruits and vegetables, are not by definition covered by the term Istisna'a which means a sale of materials on condition that they be subjected to transformation by a manufacturing or construction process.
- The basis for the permissibility of concluding an Istisna'a for manufactured items that either have or do not have equivalents in the market is because it is normal for people to deal in these kinds of item. As a principle, rules that are based on customary practice will change whenever such customary practice is changed. Therefore, any customary transaction that is subject to specifications may be a subject-matter of Istisna'a, regardless of whether it is for use or consumption.
- The basis for not allowing the subject-matter of Istisna'a to be a specific identified item is that an Istisna'a contract involves a sale for future delivery based on a specification. Therefore, if the items to be sold are specific identified items, the transaction involves selling identified items that the seller does not own, which is prohibited by the saying of the Prophet (peace be upon him): *"Do not sell what you own not"*.[4]

(4) The Hadith has been related by Al-Tirmidhi in his *"Sunan "* [3: 534], edited by Ahmad Shakir; and Al-Albani, *"Irwa' Al-Ghalil"* [5: 132].

Again, items to be manufactured or constructed do not yet exist and thus cannot be specific and identified. The non-existent item is to be produced and delivered later and this constitutes a non-monetary obligation of the supplier.[5]

- The basis for the permissibility of a stipulation by the ultimate purchaser that the manufacture be carried out by the Institution itself is because this stipulation does affect the purpose of the contract. Rather, this condition is relevant in this contract because the ultimate purchaser may be interested in the items that are produced by a particular supplier due to this supplier's distinguished competence in manufacturing or construction and the quality of the items manufactured or constructed by this supplier.
- The basis for the permissibility of the manufacturer presenting to the ultimate purchaser either what he has produced or what other parties have produced, if the ultimate purchaser did not stipulate to the contrary, is because this satisfies the purpose of the contract. This is the case because the items are being delivered according to the specifications that are laid down in the contract.
- The basis for the permissibility of stipulating a time-period during which manufacturer remains liable for any manufacturing or construction defects is that such a stipulation serves the purpose of the contract. This is because the ultimate purchaser wants to use the subject-matter and this is not possible unless the subject-matter is free from defects.
- The basis for the requirement that the price be known is to remove any lack of knowledge and uncertainty that may lead to dispute.
- The basis for the permissibility in Istisna'a of payment on deferred terms or on an instalment basis is that labour (i.e. transformation and added value) is an important part of the items to be sold and this makes the transaction similar to a leasing contract in which it is permissible for the rentals to be paid on a deferred or instalment basis without this being considered as a sale of debt for debt which is prohibited. The same ruling applies to Istisna'a.

(5) See: *"Majallat Al-Ahkam Al-'Adliyyah"*, article (158).

- The basis for the permissibility of offering a difference in the price for an Istisna'a contract relating to a difference in the date of delivery is that Istisna'a is analogous to an Ijarah contract. The fuqaha have stated that it is permissible to give a labourer in Ijarah an option regarding wages depending on whether the worker finishes the work in one day or in two days. The hirer may say two dinars if the worker finishes in one day or one dinar if he finishes in two days. Istisna'a is similar to this. There is a resolution issued during the Al Baraka Annual Forum supporting this ruling.[6]
- The basis for not allowing a contract of Istisna'a to be drawn up on the basis of a Murabahah sale, for example, by determining the price of Istisna'a on a cost- plus basis, is because the subject-matter of Murabahah should be something already in existence, the cost of which is known and which is owned prior to the conclusion of a Murabahah sale. An Istisna'a contract, on the other hand, is concluded prior to ownership of the subject-matter, because (I) it is a sale based on a specification giving rise to a future obligation, and (II) the actual cost will be known only after the completion of the work, and, (III) the price in a contract of Istisna'a should be known when the contract is concluded.
- The basis for deciding that the Institution is not obliged to give a discount when the actual costs of the manufacture are substantially greater than the estimated costs or when it secures a discount from the manufacturer is because the Istisna'a contract and Parallel Istisna'a contract are independent in terms of obligation and effects. The Shari'ah Supervisory Board of the Kuwait Finance House has issued a Fatwa in this respect.[7]
- The basis for the permissibility of the Institution acquiring all necessary guarantees is that these guarantees secure its rights and this request does affect the purpose of a contract.

Changes to an Istisna'a Contract

- The basis for the impermissibility of extending the date of payment in return for consideration is because that is Riba.

(6) See: Resolution No. (13/7).
(7) *"Al-Fatawa Al-Shar'iyyah Fi Al-Masa'il Al-Iqtisadiyyah"*, Fatwa No. (447).

- The basis for the permissibility of discounting for unconditional earlier payment is the saying of the Prophet (peace be upon him) in the case of Ubay Ibn Ka'b (may Allah be pleased with him) and his debtor: *"Write off a portion of your debt"*.[8] The International Islamic Fiqh Academy has issued a resolution in support of this rule.[9]
- The ultimate purchaser (the owner of the land) is not entitled to acquire ownership of incomplete building structures or utilities that are already in place without giving consideration to the builder if the builder is unable to continue to discharge his obligation. The basis for this is that the construction was initiated by the builder at the request of the ultimate purchaser and such a request is stronger than a mere permission to build on the latter's land.
- The basis for the permissibility of a contract of Istisna'a including a clause that the manufacturer is not liable for extra expenses that result from additional conditions inserted into the contract at a later date as a result of directives of the relevant authorities, is because this condition is agreed upon by the parties and does not affect the purpose of Istisna'a contract. The Shari'ah Supervisory Board of Kuwait Finance House has issued a Fatwa in respect to this ruling.[10]
- The basis for the permissibility of a penalty clause in an Istisna'a contract is that such a clause is in the interest of the contract and because it is laid down in respect to an obligation regarding items that must be produced and delivered in the future and not in respect to monetary debt.

Supervision of the Execution of an Istisna'a Contract

The basis for the permissibility for the Institution, when acting as the ultimate purchaser, to appoint a technically experienced consulting firm and the permissibility for the Institution, when acting as the manufacturer, to appoint the ultimate purchaser as an agent is because agency is permissible and there is nothing against it in an Istisna'a contract provided it is done with the agreement of the parties.

(8) The Hadith has been related by Al-Bukhari in his *"Sahih"* [1: 179] and [2: 965].
(9) International Islamic Fiqh Academy Resolution No. 64 (7/2).
(10) See: Fatwa No. (251).

Delivery and Disposal of the Subject-Matter

The basis for the impermissibility of selling the items to be produced prior to taking either actual or constructive possession of them is that such an action is considered as selling a non-existent item. It is also considered as selling what one does not own because it is not available for the seller at the time of conclusion of the contract.

Parallel Istisna'a

The basis for the permissibility of the Institution entering into a contract with another party in order to sell, in the capacity of manufacturer, builder or supplier, items whose specification conforms to the wishes of that other party, on the basis of Parallel Istisna'a, is that in such a case there are two separate deals of Istisna'a. There is no link between the two contracts; hence, this is not an instance of two sales in one deal, which is impermissible. The separation of the two contracts also has the effect of making the transaction a type of non-Riba-based financing.

Appendix (C)
Definitions

Istisna'a Contract

Istisna'a is a contract of sale of specified items to be manufactured or constructed, with an obligation on the part of the manufacturer or builder (contractor) to deliver them to the customer upon completion.

Parallel Istaisna'a

Another form of Istisna'a, known in modern custom as Parallel Istisna'a *"al-Istisna'a al-Muwazi"*, takes effect through two separate contracts. In the first contract, the Islamic Financial Institution acts in the capacity of a manufacturer, builder or supplier and concludes a contract with the customer. In the second contract, the Institution acts in the capacity of a purchaser and concludes another contract with a manufacturer, builder or supplier in order to fulfil its contractual obligations towards the customer in the first contract. By this process, a profit is realised through the difference in price between the two contracts and, in most cases, one of the two contracts is concluded immediately, (i.e. the Istisna'a contract entered into with the manufacturer, builder or supplier), while the second contract (i.e. the contract entered into with the customer) is concluded later.

Difference Between Istisna'a and Ijarah

The contract of Istisna'a differs from the contract of Ijarah in the sense that the latter is a contract of services without any commitment to supply materials whereas the former requires that the manufacturer or builder provide both services for the transformation or construction process and ultimately to supply the materials in the form of the finished items.

Difference Between Istisna'a and a Standard Construction Contract

The contract of Istisna'a also differs from a standard construction contract in that the latter is regarded as an Ijarah contract if it is confined to providing

services only, with the materials to be provided by the customer (the person who engaged the Institution to carry out the construction work). But if a construction contract requires the builder to provide both the services and the materials needed to fulfil the contract, then it is an Istisna'a contract.

Difference Between Istisna'a and Salam

The Istisna'a contract also differs from a Salam contract in the sense that the former is a contract that involves a sale of specified items that have by nature to be manufactured or constructed. In other words, an Istisna'a contract is applicable to materials that require transformation by a manufacturing or construction process. The Salam, on the other hand, is a contract of sale of specified goods, the permissibility of which is not attached to a condition that the goods must be manufactured or constructed.

WORLD GOLD COUNCIL
مجلس الذهب العالمي

AAOIFI
ACCOUNTING AND AUDITING ORGANIZATION FOR ISLAMIC FINANCIAL INSTITUTIONS

The AAOIFI Shari'ah Standard No. 57 on Gold and its Trading Controls

Developed in collaboration with the World Gold Council

Shari'ah Standard No. (57)

Gold and Its Trading Parameters in Shari'ah

This Standard has been prepared with the support and cooperation of the World Gold Council.

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

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

Preface

This Shari'ah standard aims to explain the types and forms of gold, the Shari'ah parameters for trading in gold, and the Shari'ah rulings for gold-based financial products in the institutions.[1]

(1) The term "Institution(s)" has been used as a short form for Islamic Financial Institutions, which include Islamic banks.

The Text of the Standard

1. Scope of the Standard

This standard covers the Shari'ah rulings for gold in its various types and forms, the Shari'ah parameters for trading in gold, and the Shari'ah rulings for gold-based financial products in the institutions.

This standard does not cover the Shari'ah rulings related to precious metals other than gold and silver, nor does it cover the Shari'ah rulings for currencies, as they are covered in a separate standard.

2. Gold and Its Shari'ah Characterization

Gold is the well-known natural element and precious metal. It is, in principle, a fungible item (measured by weight) and a Ribawi commodity, and is subject to the Shari'ah rulings for currency exchange (*al-Sarf*).

3. Shari'ah Rulings for Trading in Gold

Shari'ah rulings for trading in gold vary according to the following considerations:

3/1 On the Basis of Equality or Disparity in Weight

3/1/1 The sale of gold for gold is permissible provided the counter-values are equal in weight regardless of being new or old (used or unused) and provided both the counter-values are exchanged as required by Shari'ah. See item (2/6) of Shari'ah Standard No. (1), on "Trading in Currencies".

3/1/2 If gold is not the primary asset of a commercial entity whose activities do not involve trading in gold, silver and currencies, and the entity or a part thereof is sold, along with that gold, the permissibility of the sale is not subject to the Shari'ah rulings for currency exchange (*al-Sarf*). However, it is not permissible

to [deliberately] establish a portfolio for the specific purpose of trading in gold, unless it complies with the Shari'ah rulings for currency exchange (*al-Sarf*).

3/1/3 Sale of gold for silver is permissible regardless of disparity in the weight of the counter-values; and sale of gold for currencies is permissible at any mutually agreed price. In both cases [gold for silver and gold for currencies] the counter- values must be exchanged as required by Shari'ah. See item 3.1.1 above.

3/1/4 Sale of gold for anything other than gold, silver or currencies- as in the case of selling gold for commodities (other than gold, silver, or currencies) or usufruct or service- is permissible at any price without the requirement of immediate exchange of the counter-values.

3/2 On the Basis of Immediate or Deferred Exchange of the Counter-values

3/2/1 In case of sale of gold for gold, or silver or currencies, the two counter-values must be delivered during the contracting session, physically or constructively. If gold is sold for anything other than the above, deferment of one of the counter-values is then permissible. This Shari'ah ruling invariably applies to gold in all states of purity, used or unused.

3/2/2 It is not permissible that the sale contract be contingent on an event or occurrence, nor is it permissible to be a forward contract (deferred to the future). Similarly, stipulation of *Khiyar al-Shart* (cooling-off option)[2] in the sale of gold is impermissible.

3/2/3 It is not permissible to stipulate deferment of both the counter-values when selling gold, as in the case of forward or futures contracts. This is because in these cases, the Shari'ah requirement of exchange of the counter-values is not met.

(2) See Shari'ah Standard No. (54) on Revocation of Contracts by Exercise of a Cooling-off Option.

3/3 On the Basis of Gold Purity

3/3/1 Gold alloys:

Gold mixed with other elements/substances may be categorized into three types:

3/3/1/1 **The first type:** gold mixed with another metal, wherein each metal in the alloy/mixture is intended per se. This comes in several forms including the following:

The first form: Gold mixed with silver. It is permissible to sell it for pure gold or pure silver, provided that the exchange of the counter-values is spot, and that the weight of the pure counter-value is more than that of the counter-value in the alloy/ mixture. If the pure counter-value is equal in weight or lighter than its kind in the alloy/ mixture, the sale is not permissible. If the alloy/ mixture is sold for another alloy/ mixture of gold and silver, or for currencies, only the spot exchange of the counter-values is required.

The second form: gold is mixed with elements/ substances other than silver. This has two types:

The first type: the percentage of pure gold exceeds 50%, in which case sale of the alloy is permissible in exchange for:

a) pure gold, provided that the exchange is spot and the pure counter-value weighs more than its kind in the alloy/mixture, so that the excess in the pure gold is the counter-value to the non-gold substance in the alloy/ mixture.

b) pure silver or gold mixed with any substances other than silver, or for currencies, provided that the counter-values are exchanged on spot.

c) elements/ substances other than silver or currencies, in which case the spot exchange of counter-values is not required.

The second type: where the percentage of pure gold is 50% or less, in which case it is not deemed a sale of gold, unless it is sold for gold, silver or currencies, in which case spot exchange of counter-values is required.

3/3/1/2 The second type: where gold is mixed with a substance not intended per se; rather the substance is intended for the purposes of standardizing or coloring gold, etc. For example, when a substance is added to gold in specific proportions to render it of a certain standard (karatage), such as 21K or 18K. In this case, the substances added to the gold are not intended per se. Therefore, the exchange of one counter-value for the other must be spot and the weight of pure gold in each of the two counter-values must be equal.

3/3/1/3 **The third type:** where a proportionately insignificant amount of gold, not intended per se, is mixed with a large quantity of non-gold element/ substance that is intended per se. Examples include gilding gold and decoration of non-gold articles. The sale of such items/ articles is not subject to the Shari'ah rulings for sale of gold.

3/4 Sale of Gold Ingots for Currencies

When gold ingots are sold for currencies, the counter-values must be exchanged during the contracting session. Possession of the ingot by the buyer, or his agent, is realized either physically or constructively. Constructive possession is realized by allocation of the ingot and by enabling the buyer to dispose of it, or by holding a certificate that represents ownership of a specified ingot that is distinguishable (an allocated ingot) from others, by serial numbers or other distinct marks from other ingots, provided the certificate is issued the day the contract is concluded [Trade Date "T+0"], by officially or customarily recognized agencies, enabling the buyer to take physical possession of the purchased ingot at his request. Hence, it is not permissible to sell

an unspecified ingot (technically known in the market as unallocated ingot) without physical possession.

3/5 Shari'ah Rulings for Joint Ownership of Gold

3/5/1 It is permissible to jointly own gold where each partner owns an undivided share of a specified percentage in the pool of gold. Such ownership is subject to the rulings set out in item 3/4 above.

3/5/2 The owner of the undivided share may request the segregation of his share, if possible, without prejudice to the other partners. He may sell his undivided share without segregation.

3/5/3 In case of loss or damage, each co-owner shall bear the losses/damages pro rata.

3/5/4 Ingots stored in a warehouse and not distinguishable by serial numbers are considered unallocated and are thus subject to the Shari'ah rulings for joint ownership. However, if the ingots have distinguishing serial numbers, each owner shall own his allocated ingots and be liable for their loss, unless they all agree that the ownership of the stored ingots shall be joint and undivided, in which case the rulings of joint ownership shall apply. In the event of loss or damage of the jointly owned ingots, each owner shall bear the loss pro rata, provided that the overall amount in storage is specified at all times.

4. Gold in Contracts of *Musharakah* and Modern Corporations and Companies

4/1 The use of gold as capital in *Musharakah*, *Mudharabah* and Investment *Wakalah* is permissible provided that gold is valuated and its monetary value in the currency of capital is determined at the contract date by mutual agreement of the contracting parties. This valuation is carried out for the purpose of determining the shares of the partners in *Musharakah* or the capital of *Mudharabah* and Investment *Wakalah*. If valuation of the gold is not possible, the use of gold as capital is not permissible.

4/2 It is permissible for the parties to distribute the profit in gold provided it is at the market value of gold at the time of profit distribution.

4/3 It is permissible for the parties to redeem their capital in gold, upon liquidation, provided it is at the market value of gold at the time of redemption.

4/4 It is permissible to buy the shares of a company that operates in extraction of gold provided that the relevant Shari'ah parameters are complied with. See Shari'ah Standard No. (21) on Financial Papers.

5. Gold in Commutative Contracts (*Mu'awadhat*)

5/1 Gold in Sale Contract

5/1/1 It is permissible for an institution to purchase gold from a supplier at spot, and sell it at spot by way of *Murabahah* or *Musawamah*, provided the Shari'ah requirements set out in items (3) and (2/2/6) in Shari'ah Standard No. (8) on *al-Murabahah* are complied with.

5/1/2 It is not permissible to purchase gold by way of documentary credit unless Shari'ah requirements set out in item (3) are complied with, including payment of the price of the documentary credit without deferment. See item (3/1/3) of Shari'ah Standard No. (14) on Documentary Credit.

5/1/3 It is permissible to appoint an agent to purchase and take possession of gold (*Wakalah*). After purchase and taking possession, it is permissible for the agent to purchase from the principal the gold purchased by way of *Wakalah* through an exchange of Offer (*Ijab*) and Acceptance (*Qabul*). In that case, liability for the purchased gold is transferred to the agent as purchaser in the latter contract. See item (6.1.4) of Shari'ah Standard No. (23), on "Agency and the Act of an Uncommissioned Agent (*Fodooli*)"; and also item (3/1) of Shari'ah Standard No. (8) on *Murabahah*.

5/2 Gold in the Contracts of *Salam and Istisna'a*

5/2/1 It is permissible to use gold as capital of Salam, provided that the subject matter of Salam sale (*al-Muslam Fehi*) is not gold, silver or currencies.

5/2/2 It is permissible to purchase gold through a *Salam* contract, provided the capital of *Salam* is not gold, silver or currencies.

5/2/3 It is permissible to execute an *Istisna'a* contract in gold, provided the price of *Istisna'a* is not gold, silver or currencies.

5/3 Gold in *Ijarah* (Lease and Services) Contract

5/3/1 It is permissible to lease gold whether in the form of jewelry or ingots provided the corpus of the leased asset is not consumed during the lease. The rent may be payable in advance or in arrears, and whether the lease contract is for an identified asset or it is *Ijarah Mawsufah Fi Zhimmah*.

5/3/2 It is permissible for the lessee to purchase the [leased] gold from the lessor at a spot price agreed upon at the time of purchase.

5/3/3 It is permissible to pay the rent amount (*Ujrah*) in gold, even if the leased asset is gold. See 5.3.1 above.

5/3/4 *Ijarah* is permissible in gold smithery, where gold is provided by the hirer [service recipient] and work is provided by the goldsmith [service provider]; the remuneration (*Ujrah*) may be in advance or in arrears. The laborer's remuneration (Ajr) can be paid out in gold.

5/4 Gold in Deposit Contract (*Wadi'ah*)

5/4/1 Deposits of gold shall be held in trust with the depository. It is not permissible for the depository to use or dispose of deposits of gold (gold deposited with it), or commingle them with its gold or any other gold held in its safekeeping without allocation. In case the depositor permits that his gold deposits are commingled with gold held in his depository's safekeeping, item (3.5) shall apply.

5/4/2 It is permissible for the depository to charge fees for safekeeping the gold. The fees may be charged as a lump sum amount or as a percentage of the value of the deposited gold. If the gold is deposited as collateral against a loan borrowed by the depositor,

the fees shall not exceed the actual cost incurred in safekeeping the deposited gold.

5/4/3 If the deposited gold is damaged or defected due to misconduct, negligence, or violation of the contractual terms and conditions by the depository, the depository shall be liable to indemnify the depositor with equivalent gold amount of the same kind, if possible. Otherwise, indemnification shall be of the value of the damaged or defected gold at the time of occurrence of the damage or defect.

6. Gold in Noncommutative contracts (*Uqud al-Tabarru'at*)

6/1 It is permissible to lend [*I'arah*] non-fungible gold, and fungible gold [if identifiable].

6/2 It is permissible to lend [Qard] gold if it is fungible.

6/3 It is permissible to endow gold as *Waqf*, such as endowment for lease whereas the rent amount constitutes the yield (*Ray'*), or to endow it for lending [*I'arah*] or to extend it as a loan [*Qard*].

7. Gold in Security Contracts (*Uqud al-Tawtheeqat*)

7/1 Use of Gold as a Pledge/ Collateral (*Rahn*)

7/1/1 It is permissible to use gold as a pledge/ collateral [for loans/ debts], whether it is in the form of jewelry or any other form, and whether the collateral is the gold itself or the certificate of its ownership.

7/1/2 The gold shall be held by the pledgee in a fiduciary capacity; hence not being liable except in cases of misconduct, negligence, and violation of contractual terms and conditions. If the pledged gold is lost, stolen or damaged due to the pledgee's misconduct, negligence, and violation of contractual terms and conditions, the pledgee shall be liable to indemnify the pledgor in equivalent gold amount of the same kind, if possible. Otherwise, indemnification shall be of the value of the damaged gold at the time of occurrence of the damage.

7/1/3 If the debtor defaults in settling his debt at maturity, the creditor may demand sale of the pledged gold in order to recover his dues from the sale proceeds, and return the remaining amount to the debtor. The gold shall be sold at market value prevailing at the time the debt is recovered from the sale proceeds.

7/1/4 It is not permissible for the pledgee to stipulate any entitlement to dispose of the pledged gold by way of sale or by using it as pledge in another transaction or by leasing it etc., even if the pledgee undertook to return it to the pledgor.

7/1/5 The pledgee's possession of ownership certificates of the gold stored in a warehouse is a constructive possession of the pledged gold as long as the pledgor/owner cannot dispose of the gold without presenting these certificates of ownership.

7/1/6 The pledgor shall bear all actual expenses incurred in maintaining and safekeeping the pledged gold. If the pledgee pays the expenses -with or without the pledgor's permission- the pledgee has recourse to the pledgor with respect to the amount paid, or may benefit from the pledged gold to the extent of the amount of expenses [without consuming its corpus]. The pledgee may bear these expenses if stipulated in the contract.

7/2 Use of Gold as *Hamish Jiddiyyah*

7/2/1 It is permissible to take from the customer, who is a purchase orderer [in *Murabahah*], an amount as *Hamish Jiddiyyah* (security deposit) in the form of gold to secure a binding promise (*Wa'd Mulzim*). This amount shall be held as a trust and shall not be considered *'Arboun* (down payment) for lack of any contract at that time. In case of default, only the amount of actual loss - i.e., the difference between the cost and the selling price to a third party- shall be deducted. In this case, the gold shall be evaluated at the prevailing market price of gold at the time of deduction [from *Hamish Jiddiyyah*]. See item (2/5/3) of Shari'ah Standard No. (8) on *Murabahah*.

7/2/2 It is permissible to agree in a commutative contract (*'Aqd al-Mu'awadhah*) that the gold given as *Hamish Jiddiyyah* is made part of the price or rent (*Ujrah*). In this case, the gold shall be evaluated at the prevailing market price of gold at the time of payment.

7/2/3 *Hamish Jiddiyyah* shall be subject to the rulings pertaining to expenses associated with pledged items (*Marhoon*). See item (7/1/6).

7/3 Use of Gold as *'Arboun* (Earnest Money)

In a commutative contract where *'Arboun* is permissible, gold may be used as *'Arboun* provided that the subject matter is not gold, silver or currencies. The seller owns the '*Arboun* whether the sale is completed or terminated. See Shari'ah Standard No. (53) on '*Arboun*.

7/4 Gold in Debt Assignment (*Hawalat al-Dayn*)

7/4/1 It is permissible to use gold as subject matter of a debt assignment subject to Shari'ah requirements. See Shari'ah Standard No. (7) on "*Hawalah*".

7/4/2 If the subject matter of *Salam* (*Muslam Fehi*) is gold (see item 5.2.2), the seller (*Muslam Elaihi*) may assign the buyer to the assignee (the seller's debtor) provided the debt or the assigned portion of the debt are equal. See item (6/6) of Shari'ah Standard No.(7) on *Hawalah*.

7/4/3 If the assignee (the seller's debtor) chooses to prepay the *Salam*'s gold to the principal creditor (*Muhaal* i.e., *Muslim*), the latter may relinquish part of the *Salam*'s gold (subject matter of *Salam*), and the assignee may prepay the remainder.

7/4/4 It is permissible that the creditor (*Muhaal*) foregoes part of the amount of gold (subject matter of *Salam*) provided the assignee prepays the remaining amount.

7/5 Set-off (*Muqassah*) in Gold

7/5/1 Set-off is permissible between two back-to-back debts denominated in gold. If the amounts of the two debts are different,

set-off takes place on the lesser amount. See Shari'ah Standard No. (4) on "Settlement of Debt by Set-Off".

7/5/2 It is permissible to conduct set-off between two back-to-back debts where one of the debts is gold and the other is silver or denominated in a currency, provided the rulings for currency exchange (*al-Sarf*) are complied with. See Shari'ah Standard No. (1) on "Trading in Currencies".

8. Unilateral and Bilateral Promises (*Wa'd and Muwa'adah*) in Gold

8/1 It is permissible to issue a unilaterally binding promise to sell gold; however, bilaterally binding promises for sale of gold are impermissible. See item (2/9/1) of Shari'ah Standard No. (1) "Trading in Currencies".

8/2 It is permissible to make the execution of a unilateral promise to purchase gold contingent upon the performance of a specific index.

8/3 It is permissible to pay *Hamish Jiddiyyah* when promising to purchase gold. If the promissor fails to fulfill the binding promise, the promissee may request him to pay for the actual damage resulting from this failure to fulfill. See item (3/4) of Shari'ah Standard No. (49) regarding Unilateral Promise (*Wa'd*) and Bilateral Promise (*Muwa'adah*); and item (2/5/3) of Shari'ah Standard No. (8) on *Murabahah*.

8/4 Trading in promises in any form is not permissible.

9. *Zakat* of Gold

Zakat of gold is obligatory when the relevant Shari'ah rules are met. See Shari'ah Standard No. (35) on "*Zakat*".

10. General Shari'ah Rulings and Applications

10/1 All Shari'ah rulings relating to gold, set out in this standard, also apply to silver.

10/2 Unless the seller expressly absolves himself of any latent defects in the sold gold, the buyer has the right to exercise the Option to Revoke Due to Defect, if and when defects appear. In this case, the buyer may conclude or terminate the contract and return the gold [back to the seller].

10/3 Investment *Sukuk*, units of investment funds, and units of exchange-traded funds (ETFs) whose entire assets are gold, shall be also subject to the rulings for gold.

10/4 It is permissible to purchase gold using debit card, credit card or charge card or any Shari'ah-compliant alternatives to credit cards, even if the seller of gold is the bank (institution) issuing these cards. See Shari'ah Standard No. (2) on Debit Card, Charge Card and Credit Card.

10/5 It is permissible for the importer of gold to deposit a certain amount of money with the exporter (supplier) on the condition that once the exporter has a specific shipment of gold ready for delivery, a contract for sale of the same shall be concluded at a price mutually agreed on at the date of the contract. In this case, the sold gold shall be delivered and the price shall be deducted from the deposited amount on the date of the contract. However, if the exporter utilized the amount of the deposit, the gold must be sold at the market price prevailing on the date of the contract.

10/6 All Shari'ah rulings for gold also apply to white gold.[3] However, these rulings do not apply to metals such as platinum, palladium and nickel, which are called white gold in some countries.

10/7 It is permissible to charge a fee for safekeeping, allocating, minting, and physical delivery of gold, among other services. If these services involve exchange of gold for gold the fee shall be based on the actual expenses.

10/8 It is permissible to open a current account in which gold with specific weight and karatage is deposited. This account (gold denominated account) shall be subject to the rulings for current accounts. See item (10/1) of Shari'ah Standard No. (19) on *Qard*.

11. Date of Issuance of the Standard

This Standard was issued on 19 Safar 1438H corresponding to 19 November 2016.

(3) See the technical definition from the World Gold Council regarding white gold, which appears in Appendix C of this Standard.

Adoption of the Standard

The Shari'ah Standard on Gold was adopted by the Shari'ah Board in its meeting No. 46 held in the Kingdom of Bahrain from 17-19 Safar 1438H, corresponding to 17-19 November 2016.

Appendix (A)
Brief History of Preparation of the Standard

On the proposal of the World Gold Council and Amanie Advisors, LLC, that Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) prepares a comprehensive Shari'ah standard on gold, AAOIFI's Shari'ah Board decided, in its meeting No. 42 held in the Kingdom of Bahrain on 22-23 Safar 1437 A.H., corresponding to 4-5 December 2015 A.D., to approve and initiate the project. The board formed a subcommittee to discuss the detailed study prepared on the topic, and to vet the draft standard.

In this respect, the subcommittee held five extended meetings in Dubai, UAE, during which it discussed the study and the draft standard, and incorporated the amendments it deemed appropriate, then forwarded the draft standard to the Shari'ah Board.

The Shari'ah Board thoroughly reviewed the draft standard and discussed relevant Shari'ah rulings in its meeting No. 44, which was held in al-Madinah al-Munawwarah from 24 – 26 Rajab 1437 A.H. corresponding to 1 – 3 May 2016 A.D. The board recommended that the subcommittee held another meeting to rearrange the items and paragraphs of the draft standard, and to review and amend the Shari'ah rulings on certain issues, where the draft standard could be submitted to the Board in its meeting No. 45 to finalize discussion of the remaining items and paragraphs of the draft standard.

The subcommittee held two extended meetings, one in Dubai on 16 July 2016, and the other in the Kingdom of Bahrain on 8 September 2016, where it discussed draft standard again, especially in relation to the issues the Shari'ah Board requested to be reviewed. The subcommittee incorporated the amendments it deemed necessary, and then forwarded the draft standard again to the Shari'ah Board.

In its meeting No. 45, held from 28 Dhul Hijjah 1437 A.H., corresponding to 29 September 2016 A.D. to 1 Muharram 1438 A.H., corresponding to 2 October 2016 A.D., the Shari'ah Board discussed the draft standard, incorporated the amendments it deemed necessary, and decided to present the draft standard to public hearings.

As instructed by the Shari'ah Board, the General Secretariat of AAOIFI held three public hearings in the Kingdom of Oman, on 23 Muharram 1438 A.H., corresponding to 24 October 2016 A.D.; in Sudan, on 24 Muharram 1438 A.H., corresponding to 24 October 2016 A.D., and in Malaysia, on 4 Safar 1438 A.H., corresponding to 4 October 2016 A.D. The public hearings were attended by a number of scholars, jurists and experts, including representatives of central banks, Islamic financial institutions, accounting and auditing firms, and law firms , academics, and other interested parties. The draft standard was discussed in detail, and comments and suggestions of scholars and experts were collected.

The Shari'ah Standards Committee (Dubai) held a meeting in Dubai, United Arab Emirates, on 12 Safar 1438 A.H, corresponding to 12 November 2016 A.D, in which it discussed in detail and sorted out the comments and suggestions collected at the three public hearings, in addition to the remarks submitted by scholars and experts from the broader Islamic finance industry. The committee approved a number of worthwhile remarks and forwarded them to the Shari'ah Board for final decision.

In its meeting No. 46, held from 17 - 19 Safar 1438 A.H., corresponding to 17 – 19 November 2016 A.D., the Shari'ah Board discussed the comments and suggestions raised in the three hearing sessions, as well as the comments and proposals received from a number of experts, and incorporated the amendments it deemed appropriate, and adopted the standard.

In its meeting held in the Kingdom of Bahrain on 19 Safar 1438 A.H., corresponding to 19 November 2016 A.D., the Shari'ah Standards Drafting Committee reviewed the standard, and made a few amendments relating to formulation, and officially adopted and issued the standard.

Appendix (B)
The Shari'ah Basis for the Standard

- The basis for fungibility of gold is its conformity with the definition of fungibles (fungible items), which are measured in terms of weight or counting. The value of gold is determined and measured by weight. In case gold is in the form of coins, i.e., minted currencies, individual units are identical in weight, a feature common in fungibles.
- The basis for classification of gold as a Ribawi item is the several Prophetic traditions (Hadiths) reported on sales, such as the following narration by "Ubaidah bin al-Samit (may Allah be pleased with him) that the Prophet (peace be upon him) said: Gold for gold … like for like, ... and if these kinds differ, then sell as you wish so long as they are [exchanged] hand in hand."(4)
- Jurists are unanimous on the Shari'ah requirements for spot exchange of countervalues in gold trading, in conformity with the aforementioned Hadith. In this regard, the International Islamic Fiqh Academy issued resolution No. 84 to that effect.
- The basis for the permissibility of selling gold for a non-gold item, silver and currencies without the requirement for spot exchange of countervalues is the consensus of jurists (*Ijma' al-Fuqaha*) on the permissibility of *Salam* when gold is one of the countervalues.
- The basis that the rulings for currency trading (*al-Sarf*) do not apply in cases where gold is not the primary asset of a commercial entity whose activities do not involve trading in gold, silver, and currencies, and where the entity or its shares is/are sold, along with that gold, is the Shari'ah maxim "A thing which is not permissible in itself, may be permissible as an accessory"(5) and "a thing may be permissible implicitly if it is made

(4) Reported by al-Imam Muslim in his Sahih, 3/1211.
(5) Article (54) from the Majelle, al-Suyuti's al-Ashbahwa al-Nadhair, p.120.

impermissible intentionally"[6]. See the "the Shari'ah Basis for the Standard" in Shari'ah Standard No. (21) on Financial Papers [Shares and Bonds], and the "the Shari'ah Basis for the Standard" in Shari'ah Standard No. (25) on Combination of Contracts.

- The basis for impermissibility of a conditional sale and Khiyar al-Shart (Cooling-off Option) in gold trading is that it contravenes the Shari'ah requirements for spot exchange of countervalues.
- The basis for the sale of gold-silver alloys for pure gold or pure silver, with the condition of spot exchange of the countervalues, and the requirement that the pure counter-value exceeds in weight its kind in the alloy is that the pure counter-value is equal in weight to its kind in the alloy, and that the excess in the pure gold shall be considered in lieu of the silver substance in the alloy. This is the view of the Hanafi School.
- The basis for not deeming assets whose gold content is less than 49% as gold is to adhere to the principle of majority based on the maxim that in terms of ruling (*Hukm*), majority is tantamount to the whole.
- The basis for considering constructive possession in the sale of gold ingots in exchange for currencies, is that the possession of a gold certificate, in line with this standard, is deemed as good as taking physical possession of the gold in terms of legal effect, transfer of risk and benefits, including growth potential, and ability to dispose of, especially that gold ingots nowadays are stored in dedicated, licensed safes, which are maintained according to specific conventions and controls by service providers which act as agents on behalf of the certificate holders in relation to storage, safekeeping and insurance of gold, and so on.
- The basis for permissibility of joint ownership of gold is that it fulfills the Shari'ah requirements of gold ownership and does not contravene the rulings for currency trading (*al-Sarf*).
- The basis for permissibility of using gold as capital in Musharakah, Mudharabah and Investment Wakalah after determining its value in the currency of the capital at the time of entering into the contract by mutual agreement of the contracting parties, is that it fulfills the requirement of

(6) Radd al-Mukhtar, (4/170).

express determination of the capital amount in these contracts; and the evaluation of the gold determines the respective shares.

- The basis for permissibility that the contracting parties agree to distribute profits in gold at market price at the time of distribution and also the basis for the permissibility that capital be recovered in gold, after liquidation, at market price at the time of the recovery is that such practices serve valid purposes and needs of the two contracting parties, and do not contravene Shari'ah rulings as happens when capital is guaranteed or profit sharing is denied [to a specific party].
- The basis for of the requirement that the sale of gold is effected at spot price if sold by way of *Murabahah* or *Musawamah* is that it fulfills the requirement of spot exchange of the counter-values.
- The basis for of impermissibility of purchasing gold using documentary credit is that it contravenes Shari'ah rulings set out in item (3), in which case taking possession of the purchase price of the gold does not take place in the same contracting session as required by Shari'ah.
- The basis for permissibility of using gold as capital of *Salam* or the subject matter of *Istisna'a* (*al-Mustasna'a*) provided that the subject matter of *Salam* sale or the price in *Istisna'a* is not gold, silver or currency, and the permissibility of using gold as the subject matter of *Salam* provided that the capital of *Salam* is not in the form of gold, silver or currency, is that there is no *Riba* involved for the reason of a different *Illah* (ratio legis) in each of the counter-values.
- The basis for permissibility of leasing gold is that the lessee can utilize its usufruct while its corpus remains intact, and the subject matter of the lease is the usufruct rather than the corpus of gold.
- The basis for permissibility of paying rent (Ujrah) in gold, even if the leased item is also gold, is that the gold paid as rent is in lieu for the usufruct rather than the corpus.
- The basis for the requirement that the rent shall not exceed actual expenses of safekeeping the gold pledged against a loan is to avoid charging Riba in a loan contract.
- The basis for permissibility for endowing gold by way of Waqf is the precedent of early jurists who considered endowment of money and movable assets permissible.

- The basis for permissibility of using gold as a pledge (*Rahn*) is that gold constitutes a valuable item of wealth (*Mal Mutaqawwim*) whose sale is permissible. Every item of wealth that is salable may also be used as a pledge (*Rahn*), particularly that gold can be allocated and assigned specific symbols and serial numbers. The remaining rulings on pledging gold are identical to the rulings and Shari'ah basis for Shari'ah Standard on *Rahn* with respect to the physical asset used as a pledge (*Rahn*), and the sale of that asset.
- The basis for impermissibility for the pledgee to stipulate the right to utilize the gold used as a pledge (*Rahn*)- for its own benefit- is to prevent the combination of loan contract and sale contract in a single arrangement, as this stipulation renders the pledged asset (*Marhoon*) a loan that the pledgee shall be liable for.
- The basis for responsibility of the pledgor [or a customer who has deposited a *Hamish Jiddiyyah*] to pay the expenses of safekeeping the pledge [or *Hamish Jiddiyyah*] is that it serves his own interest. As for expenses of 'Arboun, it shall be borne by the seller as it is for his own benefit.
- The basis for the requirement that the evaluation of gold should be based on the prevailing market price at the time *Hamish Jiddiyyah*'s gold is liquidated or converted to be used as part of the price of the purchased asset in case of no default, is to ensure fairness in practice since the liquidation or conversion takes place in the absence of the depositor of gold [as *Hamish Jiddiyyah*].
- The basis for impermissibility of trading a promise (*Wa'd*) through sale or purchase in any form is that promise cannot be used as subject matter of a commutative contract.
- The basis for the right of the buyer to have the option to revoke due to defect (*Khiyar al-Ayb*) in case any latent defect appears in the purchased gold, which the seller did not absolve himself from its responsibility, is that the Shari'ah requirements of safeguarding the rights of the contracting parties and preventing harm. This will not contravene the rulings for currency trading (*al-Sarf*).
- The basis for permissibility of the case set out in item (10/5) is fulfilling the requirement of taking possession at the inception of the contract, as the exporter fulfills the requirement by debiting the selling price from

the deposit. The requirement of selling gold at market price in case the exporter utilizes and derives benefits from the deposited amount: this aims to prevent rendering the deposit into a loan that is associated with benefits.

Appendix (C)
Definitions

Allocated gold/unallocated gold

- **An allocated account is an account** with a bullion dealer, which may also be a bank, to which individually identified gold bars owned by the account holder are credited. The gold bars in an allocated gold account are specific to that account and are identified by a list which shows, for each gold bar, the refiner, fineness, serial number and weight.
- **In an unallocated gold account,** a customer does not own specific bars but has a general entitlement to a set amount of gold.
- **Fine gold:** The actual quantity of gold in the ingot. This is measured in fine troy ounces. 1 fine troy ounce equals 31.1034768 grams.
- **Gold nuggets (Tibr):** A piece of gold in its natural form. There is no standard technical definition for a gold nugget. Its price/value is determined by the quantity of gold in the metal ore.
- **Gold coins:** Also known as bullion coins. They are issued by governments or government agencies. They have both a face and the market value. They take various forms and have different levels of purity. The market value depends on its gold content.
- **Karat:** Is a measure of purity of gold. It represents the proportion of fine gold in an alloy based on 24 parts. Thus 24-karat gold is pure gold, but it is usually mixed with metals like copper or silver to make jewelry. 21-karat gold contains 87.5% of gold and 12.5% of other metals. Meanwhile 18-karat gold consists of 75% gold and 25% of other metals, mostly copper and silver. The 10-karat gold is the legal minimum accepted standard of gold in the U.S and the 14-karat gold is the most popular and widely circulated. In France, the UK, Australia, Portugal and Ireland, 9-karat gold is the legal minimum accepted standard of gold. This legal standard drops to 8-karat gold in Denmark and Greece.

- **Investment gold ingots:** Investment gold bars: come in a range of sizes from 1g (a gold wafer) to 1 kg to "Good Delivery" bars weighing approximately 12.5 kilograms or 400oz, which form the basis of the global wholesale gold market. Good Delivery bars must meet stringent standards set by the London Bullion Market Association (LBMA), including a minimum fineness of 995 parts per thousand fine gold and weigh between 350 and 430 fine troy ounces.
- **White gold:** It is a mixture of gold with other white metals, like nickel, palladium and platinum. Gold may be mixed with usually small quantities of other metals in the manufacturing of gold jewelry to harden the alloy or to alter its color. Silver and Zinc may also be found in white gold alloys not specified and is not owned by specific individuals.

Shari'ah Standard No. (18)

Possession (Qabd)

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

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

Preface

The purpose of this standard is to elaborate actual possession in contracts along with its related Shari'ah rules as well as the significant applications undertaken by Islamic financial Institutions (Institution/Institutions).[1]

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

Statement of the Standard

1. Scope of the Standard

This standard covers possession in contracts and what acts as a constructive substitute for it (constructive possession). It elaborates the mode of its realisation in immovable and movable property as well as in things that are ascertained and those established as a liability by description. The standard also identifies the person responsible for its costs (maintenance and expenses) in various types of contracts along with their modern applications.

The standard does not cover acts other than contracts, like possession in usurpation (*Ghasb*) and the like. Further, it does not cover the nature of possession with respect to liability for compensation or otherwise, nor to possession in set-offs, as these have their specific standards.

2. Definition of Possession

Possession is the gathering of a thing or what takes its rule, according to the requirements of customary practice.

3. Mode of Taking Possession

3/1 The basis for determining the mode of possession in things is custom ('Urf). It is for this reason that possession of things has differed in accordance with the nature of things and differences among people with respect to things.

3/2 Actual possession is realised in immovable property through relinquishment and enabling transactions in it.

3/3 Actual possession takes place in movables through physical corporeal delivery. Constructive possession, in ascertained movables as well as in those established as a liability by description, takes place -after their ascertainment by means of one of the methods known for their

ascertainment- by relinquishing (releasing) the thing for the person entitled to it enabling him to deliver it without any obstacle even when no transportation or transmission has taken place. This takes place irrespective of the thing being one that is acquired by hand in practice or is one in which delivery (transmission) is stipulated through one of the customary units of measure -cubic measure, weight or linear measure- or it is a commodity to which these measures do not apply due to their inapplicability or with the possibility of their applicability, but the measures are not applied, as in the case of sale by estimate.

3/4 Constructive possession includes the registration of a mortgage of immovables and (hypothecation) of mobile movables like cars, trains, steamers and airplanes through registration that is valid under the law. Registration stands in place of actual possession with respect to its rules and legal effects.

3/5 The possession of documents, like bills of lading and warehouse receipts, issued in the name of the possessor or acknowledging his interest therein is deemed constructive possession of what the documents represent if the ascertainment of commodities, goods and appliances is attained through them along with the ability of the possessor to undertake transactions in them.

3/6 Prior possession of a tangible thing stands in place of subsequent lawful possession due to a cause acknowledged by the Shari'ah irrespective of the possession of the prior possessor being on the basis of the liability to bear loss (Daman) or one of trust (Amanah) and irrespective of the subsequent constructive possession entailing liability for loss or a burden of trust (Amanah).

3/7 Reciprocal possession stipulated in the contract of *Sarf* (transaction in gold, silver and currencies) is delivery and acceptance of delivery within the session of the contract on a spot basis (*Yadan Bi Yadin*). [see item 2/6 of Shari'ah Standard No. (1) on Trading in Currencies]

4. Expenses of Possession

4/1 Expenses of possession in financial commutative contracts

4/1/1 The expenses of delivering the sold commodity -for presenting it if it is absent, for ascertaining it through one of the customary units where that entails a claim for ascertainment like wages of employing a cubic measure, weight, linear measure and counting- is the responsibility of the seller. As for the expenses of delivering the price, if any, it is the responsibility of the buyer, unless there is a stipulation or customary practice to the contrary, in which case it is binding to follow such stipulation or practice.

4/1/2 The expenses of conveyancing, witnessing, preparation of instruments that record a sale and the formalities of registration are borne as stipulated by the parties to the contract. If there is no such stipulation on their part, customary practice is relied upon.

4/1/3 Where it is stipulated by the buyer for the seller that the sold commodity be delivered at a particular place, other than the one where it is present at the time of the contract, and that it be delivered at the expense of the seller, the seller is bound to deliver it at the specified place and the expenses of transporting it to such place will be borne by the seller.

4/1/4 The rules for the expenses of possession explained in items 4/1/1, 4/1/2 and 4/1/3 apply to all financial commutative contracts, like Salam, Istisna'a and others. Accordingly, the expenses of delivering the Salam commodity will be borne by the seller, the expenses of delivering the capital (Ras al-Mal) will be borne by the Rab al-Salam (the buyer); the expenses of taking possession of the leased property will be borne by the lessor, the expenses for the delivery of possession of the lease value (wages) shall be borne by the lessee; and the expenses for delivering the subject matter of Istisna'a will be borne by the manufacturer, while the expenses for the delivery of the price shall be borne by the orderer. In all these cases, if there is a customary practice or stipulation to the contrary, then, such practice or stipulation shall be observed.

4/2 Expenses for delivery of possession in a loan (Qard)

4/2/1 The expenses for delivery and recovery in a contract for loan, expenses that pertain to its ascertainment through one of the customary units of measure and the like, shall be borne by the borrower.

4/2/2 The expenses for the drawing up of documents, promissory notes, title deeds and the like that are required for transacting a loan contract; its implementation or documentation shall be borne by the borrower. [see Shari'ah Standard No. (19) on Loan (Qard), item 8]

4/3 Expenses for delivery of possession in a deposit (Wadi'ah)

The expenses of deposit and withdrawal in a contract of deposit shall be borne by the depositor (the owner of the deposit).

5. Key Modern Applications of Possession

5/1 Possession by the beneficiary of a bank draft or personal cheque is deemed constructive possession of the amount payable by the drawee bank. This is deemed possession of the payable amount even though there is delay in the payment of the actual amount, keeping in view what is laid down in Shari'ah Standard No. (1) on Trading in Currencies (item 2/6/5) as well as what is laid down in the Shari'ah Standard No. (12) on Commercial Papers (items 6/1 and 6/2).

5/2 Payments for a credit card are deemed constructive possession of such payments. [see Shari'ah Standard No. (2) on Debit Cards and Credit Cards (item 4/4)]

5/3 A deposit by a person of an amount in a bank account maintained for a debtor, upon his demand or with his consent, is deemed constructive possession irrespective of the deposit being by way of cash, by endorsement or by cheque drawn upon a bank with which an account is maintained, and the depositor is absolved of liability when he is indebted to the extent of such amount.

6. Date of Issuance of the Standard

This Standard was issued on 30 Rabi' I, 1425 A.H., corresponding to 19 May 2004 A.D.

Adoption of the Standard

The Shari'ah Standard on Possession was adopted by the Shari'ah Board in its 12th meeting held in Al-Madinah Al-Munawwarah during the period of 26-30 Rabi' I, 1424 A.H., corresponding to 15-19 May 2004 A.D.

Appendix (A)
Brief History of the Preparation of the Standard

In its meeting No. (8) held during the period of 28 Safar to 4 Rabi' I, 1423 A.H., corresponding to 11-16 May 2002 A.D., in Al-Madinah Al-Munawwarah, the Shari'ah Board decided to issue the Exposure Draft of Shari'ah Standard on Possession (Qabd).

On 24 Rajab 1423 A.H., corresponding to 1 October 2002 A.D., the Shari'ah Standards Committee decided to assign to a Shari'ah consultant the responsibility of preparing the Exposure Draft of the Shari'ah Standard on Possession (Qabd).

The Shari'ah Standards Committee (1), in its meeting No. (7), which was held in the Kingdom of Bahrain on 16 Muharram 1424 A.H., corresponding to 19 March 2003 A.D., discussed the Shari'ah study and required the consultant to incorporate certain necessary amendments in the light of the discussion and the comments made by the members.

In its meeting No. (8) held on 16-17 April 2003 A.D., in the Kingdom of Bahrain, the Shari'ah Standards Committee (1) discussed the exposure draft of the Standard on Possession in the light of the discussions and the observations of the members, just as the Committee discussed the exposure draft in its meeting held during the period of 25–26 Rabi' II, 1424 A.H., corresponding to 25-26 June 2003 A.D., and made necessary amendments to the draft in the light of the discussion and observations of the members.

In its meeting No. (9) held in Amman, the Hashimite Kingdom of Jordan, during the period of 23-24 Jumada I, 1424 A.H., corresponding to 23-24 July 2003 A.D., the Committee discussed the exposure draft and made necessary amendments in the light of the discussions and the observations of the members.

The revised exposure draft of the Standard was presented to the Shari'ah Board in its meeting No. (11) held in Makkah Al-Mukarramah during the period of 2-8 Ramadan 1424 A.H., corresponding to 27 October - 2 November 2003 A.D. The Shari'ah Board incorporated amendments to the exposure draft of the Standard and decided that it be distributed among specialists and interested parties in order to obtain their comments as a preliminary to the discussion in a public hearing.

A public hearing was held in the Kingdom of Bahrain on 29 Dhul-Qa'dah 1424 A.H., corresponding to 21 January 2004 A.D. The public hearing was attended by more than fifteen participants representing central banks, institutions, accounting firms, Shari'ah scholars, academics and others interested in the field. The members of the Shari'ah Standards Committees (1) and (2) responded to the written comments that were sent prior to the public hearing as well as to the oral comments that were expressed in the public hearing.

The Shari'ah Standards Committees (1) and (2) in a joint meeting in the Kingdom of Bahrain on 30 Dhul-Qa'dah 1424 A.H., corresponding to 22 January 2004 A.D., discussed the comments that were made during the public hearing as well as the observations received in writing. The Committees made amendments that were deemed suitable.

The amended exposure draft was presented to the Drafting Committee in its meeting held in the Kingdom of Bahrain on 25 Safar 1425 A.D., corresponding to 15 April 2004 A.D.

The Shari'ah Board in its meeting No. (12) held in Al-Madinah Al-Munawwarah during the period of 26-30 Rabi' I, 1425 A.H., corresponding to 15-20 May 2004 A.D., discussed the amendments suggested by the Shari'ah Standards Committee and the Drafting Committee, and incorporated the amendments deemed suitable. The Shari'ah Board unanimously adopted some of the items of the Standard and some items were adopted by the majority vote of the members of the Shari'ah Board, as recorded in the minutes of the meetings of the Shari'ah Board.

Appendix (B)
The Shari'ah Basis for the Standard

Realisation of Possession in the Shari'ah

- The basis for the realisation of actual possession with respect to gold, silver and currencies through actual physical possession is the sound tradition reported from Ubadah Ibn Al-Samit (may Allah be pleased with him), that the Messenger of Allah (peace be upon him), said, *"Gold for gold, silver for silver. . . ,"* till he said, *"like for like, equal for equal, from hand to hand. If these species differ, then sell as you like as long as it is from hand to hand"*.(2)
- The basis for acknowledging custom ('Urf) as the basis for the realisation of possession is the consensus (Ijma') of the Jurists (Fuqaha).It is in this regard that Al-Khatib Al-Shirbini says: "The reason is that the Law-giver has used the term possession in an unqualified sense and has deemed it the basis of rules. He did not elaborate it, and there is no definition for it in the language. It is for this reason that recourse is to be had to custom ('Urf)".(3) Ibn Taymiyyah said, "As long as there is no definition for it in the language or in the Shari'ah, recourse must be had to the custom of the people, like possession mentioned in the words of the Prophet (peace be upon him): '*He who buys food is not to sell it until he takes possession of it*'."(4) Al-Khattabi says: "Forms of possession differ for things in accordance with a difference in their own forms and in accordance with the varying practices of the people with respect to them."(5)
- The basis for the realisation of possession in immoveable property through relinquishment is customary practice. The opinion of the

(2) Related by Muslim in his *"Sahih"*.
(3) *"Mughni Al-Muhtaj"* [2: 72].
(4) *"Majmu' Al-Fatawa"* by Ibn Taymiyyah [3: 272].
(5) *"Ma'alim Al-Sunan Li Al-Khattabi"*, [3: 136].

majority of the jurists among the Hanafis, Malikis, Shafi'is, Hanbalis and Zahiris, as well as others besides them, is that possession in immoveable property is delivered through relinquishment and the facilitating of transactions in it.[6] Hanafi jurists have stipulated that if a lock is placed on the immoveable property, then, it is sufficient for the delivery of possession to deliver the key along with relinquishment so as to provide the facility to the possessor to open it without difficulty.[7]

- The basis for considering registration of immoveable property as constructive possession in the case of mortgage (Rahn) is custom and its practice (in countries that have adopted the system of registration of property) whereby registration of mortgage of immovable property by entry in a page of the register of mortgages is deemed delivery of possession under the law (constructive possession) and it acts as a substitute for actual delivery of possession with respect to its legal effects and results. This applies even if the property has in it the household assets of the tenant or is attached to the rights of the lessor over this property, because in such a case too they are considered possession constructively and in fact.[8]
- Add to this the fact that official mortgage grants to the creditor (mortgagee) a personal right over the mortgaged property, which gives him, as a result of the death of the owner or his insolvency, a right prior to all the creditors for the satisfaction of his claim from this property.[9]

Possession of Ascertained Moveable Property

- The basis for the realisation of possession in ascertained moveable property, as well as liabilities by description, through relinquishment in favour of one entitled to it and in a manner that enables him to deliver it without any

(6) *"Al-Fatawa Al-Hindiyyah"* [3: 16]; *"Radd Al-Muhtar"* [4: 561], passim; *"Rawdat Al-Talibin"* [3: 515]; *"Al-Majmu' Sharh Al-Muhadhdhab"* [9: 276]; *"Mawahib Al-Jalil"* [4: 477]; *"Kashshaf Al-Qina'"* [3: 202]; *"Al-Mughni"* [4: 333]; *"Al-Muhalla"* [8: 89]; see article (263) in *"Majallat Al-Ahkam Al-'Adliyyah"*; article (435) in *"Murshid Al-Hayran"*; and article (335) in *"Majallat Al-Ahkam Al-Shar'iyyah 'Ala Madhhab Al-Imam Ahmad"*.

(7) *"Radd Al-Muhtar"* [4: 561]; *"Al-Fatawa Al-Hindiyyah"* [3: 16]; see articles (270) and (271) in *"Majallat Al-Ahkam Al-'Adliyya"*; and articles (435) and (436) in *"Murshid Al-Hayran"*.

(8) *"Al-Madkhal Al-Fiqhi Al-'Amm Lil-Zarqa"* [1: 278] and [2: 648] marginal note.

(9) *"Al-Mudhakkirah Al-Idahiyyah Li Al-Qanun Al-Madani Al-Kuwayti"*, (P. 339) as quoted by Muhammad Wahid Al-Din Suwar in his book on Islamic Fiqh, (P. 94).

restriction, whether or not the moveable property needs to be delivered through one of the customary units of measure, is that delivery of a thing literally means delivering it completely without any impediments, so that no one shares it with the possessor, and this is possible by relinquishment. Further, the person who is under an obligation to deliver must have a way through which he can be discharged of his obligation, and what is in his ability is to relinquish it and remove all obstacles. As for actual physical possession (by hand), it is not within his ability to provide that for it is a voluntary act of taking possession. If the obligation to make such a delivery is imposed on him, it would become difficult for him to meet such an obligation.[10]This rule, as well as its basis, has been supported by a resolution of the Islamic Fiqh Academy (OIC).[11]

- The basis for considering the registration of pledges (hypothecation) of mobile moveable property like cars, steamers, airplanes and trains in the official register for the beneficiary (in countries where a system of registration has been adopted for such moveable property) is deemed constructive possession for what it represents. It is the governing custom that considers official registration as the delivery of constructive possession to the beneficiary and acts as a substitute for actual possession with respect to its legal effects and consequences.
- The basis for stipulating the ascertainment (setting aside) of moveable property through customary units of measure for the realisation of possession are the words of the Prophet (peace be upon him): *"He who buys food (wheat) is not to sell it until he has measured it."*[12] insofar as they indicate that possession in this case is not attained except by the use of the cubic measure. Thus, ascertainment in what is estimated by cubic measure is through cubic measure and the remaining types are assigned

(10) *"Bada`i' Al-Sana`i'"* [5: 244]; *"Al-Fatawa Al-Hindiyyah"* [3: 16]; *"Radd Al-Muhtar"* [4: 561]; *"Sharh Al-Majallah Li Al-Atasi"* [2: 200 and after]; *"Al-Mughni"* [4: 111]; *"Al-Ifsah Li-Ibn Hubayrah"* (P. 224); articles (272) to (275) of *"Majallat Al-Ahkam Al-'Adliyyah"*; and articles (437) and (438) in *"Murshid Al-Hayran"*.

(11) Resolution No. 53 (4/6) in its 6th Session (Sha'ban 1410 A.H./March 1990 A.D.).

(12) Related by Muslim in his *"Sahih"*, [10: 169]; Abu Dawud in his *"Sunan"* [2: 252]; and Al-Nasa`i in his *"Sunan"* [7: 285].

a similar rule on the basis of analogy.[13] This is the view of the majority of the Jurists from among the Malikis, Shafi`is and Hanbalis upholding that possession in things that are estimated by cubic measure, weight, linear measure and counting is attained by taking delivery through these measures accompanied by relinquishment.

- The basis for considering the delivery of documents pertaining to commodities, appliances and goods (like bills of lading and warehouse receipts) as constituting constructive possession of what they represent is the customary practice in this respect seeking support from the view of the Malikis that the mode of possession in moveable property that is not subjected to estimation is recourse to custom ('Urf).[14] Further, the basis for stipulating cubic measure for the soundness of possession in food that is estimated by cubic measure in the tradition from the Prophet (peace be upon him) is the custom that was prevalent during the period of the Prophet (peace be upon him) to the effect that possession in things subjected to cubic measure is through cubic measure and for the rest analogy is to be employed. As the determination of the issue of possession in contracts is based on custom, therefore, everything that is taken by custom to be possession in a certain period is to be deemed as possession from the perspective of the Shari'ah. If the custom of the people changes in this respect, the consideration of that mode as possession ceases. The reason is that where the constructive basis of rules is custom, the rules will alter with a change in custom,[15] except for those things that have been specified by the Shari'ah. As far as the custom prevalent in our times is based upon the consideration of the delivery of documents for moveable commodities and goods -even where these are subjected to estimation- as amounting to possession of these commodities and goods, it will be deemed valid from the perspective of the Shari'ah. The basic principle here is what is stated by Al-Wansharisi, "A thing that is acted upon by the people and is preferred by their custom and practice must

(13) *"Mughni Al-Muhtaj"* [2: 173]; *"Kashshaf Al-Qina'"* [3: 201]; and Ibn Qudamah, *"Al-Mughni"* [4: 111].

(14) *"Sharh Al-Khirashi"* [5: 158]; Al-Dardir, *"Al-Sharh Al-Kabir"* [3: 145]; and Al-Baji, *"Al-Muntaqa"* [6: 97].

(15) *"Al-Mughni"* [6: 188]; *"Al-Furuq"* [1: 176]; and Al-Qarafi, *"Al-Ihkam Fi Tamyiz Al-Fatawa 'An Al-Ahkam"*, (P. 231).

be accommodated through the Shari'ah even against disagreement and opposition, as far as possible".[16]

- The basis for considering prior possession of a certain thing as a substitute for subsequent possession on grounds that are acknowledged by the Shari'ah, when it represents it, is that the purpose behind the realisation of possession is to establish control over, and the ability to undertake transactions in, the thing possessed. If this state is found possession is found too. This is based on what is upheld by the Malikis and Hanbalis to the effect that if a person sells a thing, or gives it away as gift or pledges it, while the thing is in the possession of a usurper, borrower, bailee, hirer, agent or another, then prior possession represents absolutely subsequent entitled possession through the contract, irrespective of the nature of possession exercised by the possessor being that of liability or trust and irrespective of the entitled possession being in the nature of trust or liability. As for what arises from this with respect to the possessor being liable for the thing possessed or holding it as a trustee, it has no connection with or effect upon the reality of possession.[17]

Expenses of Possession

- The basis for the view that the expenses of possession of the sold commodity are borne by the seller is that the delivery of the sold commodity is obligatory on the seller by virtue of the contract, and the contract is not completed without it; and a thing without which an obligation cannot be fulfilled is also obligatory. Accordingly, this is what was upheld by the majority of the Jurists to the effect that meeting the expenses of the delivery of the sold commodity -by presenting it if it is absent and by ascertaining it if it needs to be ascertained by a customary unit of measure- is the responsibility of the seller. The basis for the view that expenses, if any, of taking delivery of the price are the responsibility of the buyer, is that payment of the price to the seller is obligatory upon the buyer, thus, it is binding on him to bear the burden of all that is required by such delivery. The basis for qualifying this rule to impose the expenses on both parties insofar as there

(16) Al-Wansharisi, *"Al-Mi'yar"* [6: 471].

(17) *"Mayyarah 'Ala Al-Tuhfah"* [1: 111]; *"Bidayat Al-Mujtahid"* [2: 229]; Majd Ibn Taymiyyah, *"Al-Muharrar"*, [1: 374]; Ibn Taymiyyah, *"Nazariyyat Al-'Aqd"*, (P. 236); *"Kashshaf Al-Qina'"* [3: 249 and 373], [4: 253]; and Al-Qarafi, *"Sharh Tanqih Al-Fusul"* (P. 456).

is no condition to the contrary, is extended from the ruling of the majority of the Jurists of upholding conditions. As for the qualification that "there is no custom to the contrary," it is based on the view of the Jurists, insofar as it is stated in their texts that if there is a stipulation or custom to the contrary, then, it is binding to follow such stipulation or custom.[18]

- The basis for the buyer bearing the expenses of constructive possession of what he has purchased, as represented by official registration and attestation for the sale of immoveable property or its mortgage in countries that have adopted a system of registration of transfer of immoveable property, as well as the sale of some mobile moveable property like cars, vehicles, steamers and airplanes or their pledging (hypothecation) in countries that have adopted a system of officially registering such things, and as well as the purchase of shares of corporations -whose trading is permissible according to the Shari'ah in markets for financial paper- is the customary practice in all these things. Further, such a practice secures the interest of the buyer and is supported by the rule that gain is linked to the bearing of expenses. It is also supported by derivation of the rule from what has been stated by the Hanafi Jurists to the effect that the expenses of the drafting of documents, promissory notes and of witnessing, which confirm the transaction of sale, are to be borne by the buyer as long as there is no custom or stipulation to the contrary.
- The basis for the seller bearing the expenses for the delivery of the sold commodity to the buyer with the stipulation of a known place (other than the place of contract where it is present) is what has been stated by the Hanafis and the Hanabalis affirming that such expenses are borne by the seller in case of a stipulation to this effect.[19]

(18) *"Al-Zurqani 'Ala Khalil"* [5: 158}; *"Hashiyat Al-Dusuqi"* [3: 144]; *"Al-Bahjah 'Ala Al-Tuhfah"* [2: 144]; Al-Dardir, *"Al-Sharh Al-Saghir"* [3: 197]; *"Al-Mughni"* [6: 188]; *"Sharh Muntaha Al-Iradat"* [2: 192]; *"Mughni Al-Muhtaj"* [2: 73]; *"Bada`i' Al-Sana`i'"* [5: 243]; Al-Atasi, *"Sharh Al-Majallah"* [2: 221]; articles (45-242) in *"Majallat Al-Ahkam 'Ala Madhhab Al-Imam Ahmad"*; articles (288-91) in *"Majallat Al-Ahkam Al-'Adliyyah"*; and articles (67-466) in *"Murshid Al-Hayran"*.

(19) *"Durar Al-Hukkam"* [3: 230]; *"Kashshaf Al-Qina'"* [3: 180]; *"Sharh Muntaha Al-Iradat"* [2: 161]; articles (353), (446) in *"Murshid Al-Hayran"*; article (287) in *"Majallat Al-Ahkam Aal-'Adliyyah"*; and article (342) in *"Majallat Al-Ahkam Al-Shar'iyyah 'Ala Madhhab Al-Imam Ahmad"*.

Expenses of Possession in Qard (Loan)

- The basis for the borrower bearing the expenses of delivery and acquisition, which refer to taking of delivery through customary units of measure in a contract of Qard, is that the lender has undertaken a good act, and costs are not to be imposed on one who does a good act.[20] Linked to these with respect to the rule are the expenses of the drawing up of documents, promissory notes and so on, which are matters that are needed for the implementation, execution or verification of the contract of Qard (loan), it is the borrower who bears these costs insofar as these are the requirements or appendages of raising a loan, which is for his interest. The lender is undertaking an act of donation of the benefits of his wealth and the person doing good is not to be made to bear costs over and above his granting of a thing, because "No ground (of complaint) can there be against those who do good."[21] If it is made binding on him to bear the costs of lending and recovery as well as attestation, it would run counter to his good act, and it would lead to the preventing to those who own wealth from lending it.

Expenses of Possession in Deposit (Bailment)

- The basis for the depositor bearing the costs of deposit and recovery in a contract of *Ida'* (deposit) is that "The burden of possession on each thing is binding upon the one who benefits from its possession, due to the principle: Gains are based on the bearing of costs."[22]22 It is known that the benefit in deposit and its return belong to the depositor alone, thus, the expenses that are incurred on its deposit and recovery are binding upon him.[23]

Key Modern Applications of Possession

- The basis for considering the possession of a bank draft or a personal cheque, accepted for payment by the drawee, as constructive possession of

(20) *"Al-Zarqani 'Ala Khalil"* [5: 158]; Al-Dardir, *"Al-Sharh Al-Saghir"* [3: 197]; and *"Hashiyat Al-Dusuqi"* [3: 144].

(21) [Al-Tawbah (Repentance): 91].

(22) *"Durar Al-Hukam"* [2: 333].

(23) *"Al-Bahr Al-Ra`iq"* [7: 276]; *"Durar Al-Hukkam"* [2: 272]; *"Al-Mughni"* [9: 269]; *"Kashshaf Al-Qina'"* [4: 203]; *"Asna Al-Matalib"* [3: 84]; *"Tuhfat Al-Muhtaj"* [7: 124]; *"Al-Muhalla"* [8: 278]; articles (793) in *"Majallat Al-Ahkam Al-'Adliyyah"*; and articles (1340) in *"Majallat Al-Ahkam Al-Shar'iyyah 'Ala Madhhab Al-Imam Ahmad"*.

the amount accepted is customary banking practice and trading transactions in this respect. The confirmation of this is laid down in a resolution of the International Islamic Fiqh Academy.[24]

- The basis for considering a payment on a credit card as constructive possession of the amount of repayment is banking practice in this respect. Likewise, in the consideration of a deposit by a person of an amount in a bank account of the client, irrespective of this being cash, a bank endorsement, or a cheque accepted for payment by the drawee bank, as constructive possession by the beneficiary. This has been confirmed by a resolution of the International Islamic Fiqh Academy.[25]

(24) Resolution No. (53) 4/6 in its 6th Session (Sha'ban 1410 A.H./March 1990 A.D.).
(25) 25 Resolution No. (53) 4/6) in its 6th Session.

Appendix (C)
Definitions

Al-'Aqar (Immoveable Property)

It is something that has a permanently affixed foundation and it is not possible to transfer it or move it, along with the subsistence of its shape and form, like land and houses.

Al-Manqul (Moveable Property)

It is something that can be transferred and moved. Thus, it includes cash, loans, animals, cars, ships, airplanes, trains, things subjected to cubic measure or weight.

Bay' Al-Juzaf (Sale by Random Estimate)

It is the sale of something whose precise quantity is not known, and its quantity is known through estimation without employing a cubic measure, weight, linear measure, count.

Al-Qabd Bi-Sifat Al-Daman (Possession Creating a Liability for Return)

It is the acquisition of a thing that leads to the liability for the return of the thing, if it is a fungible commodity, that is, its return to its owner as long as the thing exists, and its value, if it is non-fungible, on its loss or conversion, whatever the cause of this, and this when it occurs without the permission of the owner (as a wrongful act, delict, tort), like the possession by a thief or usurper, or with the permission of the owner, but with the intention of owning it, like the possession of one bargaining for it or one who has expressed the intention to own it. Some Jurists have deemed the possession by the borrower, the mortgagee (pledge), lessor and the independent contractor to be of this nature.

Al-Qabd Bi-Sifat Al-Amanah (Possession Creating a Trust)

It is the acquisition of a thing that leads to its treatment as a trust in the possession of the possessor insofar as he does not bear the liability of its

loss, and as long as he has not committed a tort or negligence in its safe-keeping. This occurs with the permission of the owner when there is no intention to own it rather it is for the interest of the owner, like the bailee, agent, dedicated servant, Wali and Wasi, or it is for the interest of the person acquiring it, like the tenant, borrower, and mortgagee, or for their common interest, like the Mudarib, partner, tenant and irrigator.

'Urf (Custom)

It is what is practised by the people and what they have come to follow in terms of words, acts or relinquishment. The 'Urf that is acknowledged by the Shari'ah is the one that meets the following conditions:

1. That it should not contradict the Shari'ah. If the 'Urf goes against a Shar'iah Text or one of the principles of the Shari'ah, it is a custom that is void.
2. That the 'Urf should be continuous or predominantly so.
3. That the 'Urf be prevalent at the time of the undertaking of the transaction.
4. That the two parties to the contract should not have expressly stipulated against it. If they express such a stipulation the 'Urf is not admissible.

Shari'ah Standard No. (38)

Online Financial Dealings

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

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

Preface

This Standard aims to indicate the Shari'ah rulings relating to conclusion of contracts and financial dealings online, and illustrate what the Institution/ Institutions[1] should observe in this respect.

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

Statement of the Standard

1. Scope of the Standard

This standard covers the Shari'ah rulings relating to conclusion of financial contracts online, either by launching commercial websites, or by provision of online access services. The standard aims to indicate the various aspects pertaining to this subject such as the Shari'ah status of the contracts concluded in this manner, determination of the time of contract inception, permissible procedures of possession after signing the contract, and Shari'ah rulings relating to protection of online financial dealings.

2. Launching Commercial Websites for Contractual Dealings

2/1 It is permissible in Shari'ah to launch commercial websites, provided that such sites do not involve any impermissible act, such as promotion of impermissible goods and services, or using impermissible means to promote pemissible goods and services.

2/2 It is permissible in Shari'ah to conclude online contracts, provided that the contracts thus concluded between the institution and its clients observe the general rules of financial transactions as prescribed by the Shari'ah, regarding for instance, opening of the accounts, performing remittances and signing commercial contracts.

3. Provision of Online Access Services

3/1 Shari'ah permits institutions to provide online access services to users on the basis of subscription contracts or any other similar arrangement, and against a specific fee.

3/2 The contract for provision of online access service by the institution is a shared-hiring contract "*Ijarah Mushtarakah*" signed between the institution and the beneficiary. Therefore, it should become subject to the conditions and rulings of the contract for hiring of persons in general, and those of the contract for hiring of a shared employee in

particular. [see Shari'ah Standard No. (34) on Hiring of Persons and Shari'ah Standard No. (9) on Ijarah and Ijarah Muntahia Bittamleek]

3/3 The institution which provides such service should take all necessary precautions and measures to prevent impermissible use of the internet by the beneficiaries to whom the Institution provides the access service.

4. Contract Signing Session (*Majlis al-'Aqd*) for Concluding Online Financial Contracts

4/1 When the contract is concluded through audio or audiovisual communication between the two parties, it should become subject to the same Shari'ah rulings on contracts signed in the presence of the two parties. Consequently it should satisfy the rulings relating to this type of contracts which include, for instance: simultaneous presence of the two parties (*Itihad al-Majlis*), non-existence of any indication of disinterest from any of the two parties, succession of offer and acceptance (as per normal practice), and all the other rulings.

4/1/1 The contract signing session in this case is the time of communication between the two parties if the conversation relates to the contract. If the conversation is over or disconnected, or the two parties shifted to another subject, the contract signing session is considered to have stopped (unless disconnection of the conversation is for a reasonably short while).

4/2 When the contract is concluded through written communication, by e-mail, or through access to site, it shall become subject to the rulings applicable to contracts signed in the absence of the two parties, because such deal is similar to message contracting.

4/2/1 The contract signing session in the case indicated in item 4/2 above starts from the moment of communicating the offer to the concerned party up to issuance of acceptance. The contract signing session may also be discontinued when the offering party retreats from his offer before an acceptance decision is made by the other party.

4/2/2 When the offering party specifies a certain period for validity of his offer, the time allowed for acceptance should cover the whole period. The offering party has no right to withdraw from his offer during that period.

4/3 When the contract is concluded through online bidding the highest bidder should not retreat from his bid until the bidding process is over. The highest bidder should also not retreat from his offer after finalization of the bidding process if the seller had made a condition that the offer should remain binding for a certain period, or if the normal practice necessitates validity of the offer for such period.

5. Expressing Offer and Acceptance in Online Financial Contracts

5/1 Expression of offer and acceptance in online contracts can be in any form that indicates the consent of the two parties to conclude the contract.

5/2 When the offering party sends through website or e-mail a message containing all the rights and commitments pertaining to the contract in question without retaining the right of withdrawal if the message is accepted, that message is considered as an offer.

5/3 When the offering party sends the electronic message through website or e-mail without indicating all the rights and commitments relating to the contract in question, or when he stipulates a condition that he should have the right of withdrawal even if the message is accepted, the message is considered to be an announcement or an invitation for contracting rather than an offer. In this case a process of offer and acceptance has to be done.

5/4 When the contract is concluded through website, clicking on the acceptance icon is considered as acceptance in the strict Shari'ah sense if the system in the website does not require confirmation of acceptance. If the system in the website requires confirmation of acceptance in any way, acceptance does not take place without making such confirmation.

5/4/1 The Institution which provides its services on website should include in the system a step for acceptance confirmation as a precautionary measure against dealers' mistakes.

6. Time of Commencement of an Online Contract

Irrespective of the method of contracting, an online contract is considered to be valid since the time when the other party accepts the offer and whether the offering party has come to know that or not.

7. Possession (Qabd) in Online Financial Contracts

7/1 Regarding online contracts, possession in the strict Shari'ah sense takes place through all accepted methods of actual and constructive possession. [see Shari'ah Standard No. (18) on Possession (Qabd), items 3 and 5]

7/2 If the sold commodity is computer software or the like, possession in the strict Shari'ah sense takes place when the purchaser, after signing the contract, downloads the software or the data or any good of this type from the website to his personal computer.

7/3 When the sold commodity is a currency, gold, silver or any other commodity in which instant exchange (Taqabud) is required, instant exchange of the two objects of the contract should be ascertained during the contract's signing session.

8. Protection of Online Financial Dealings

8/1 Protection of commercial sites and dealers data against being trespassed

8/1/1 Commercial websites are considered as private properties of their owners, and therefore their trespassing could necessitate compensation.

8/1/2 The institution should use all possible measures of website protection, so as to safeguard its own rights as well as the rights of its clients.

8/1/3 Trespassing of dealers' online data is impermissible. It is strictly prohibited to sell such data or transmit it to others without the permission of its owners.

8/1/4 Verification of trespassing of commercial sites and data stealing should be done by referring to the prevailing traditions and regulating rules which do not encounter the rules and principles of Shari'ah.

8/1/5 The compensation due in case of trespassing should comprise direct financial loss as well as actual loss of earnings. Expert advice for assessment of compensation can also be sought when need arises.

8/1/6 Compensation shall become due only when it is claimed, whereas claiming compensation does not have a specific time limit after the incident of trespassing is known. In this regard relevant rules and regulations should be observed provided that they do not contradict with the rules and principles of Shari'ah.

8/1/7 In case of stealing money or confidential data from a protected website the responsibility should rest with the person who committed the theft directly. If it is not possible, for a permissible reason, to charge the person who committed the act of theft directly, the responsibility should rest with the one who facilitated the act. The owner of the site is by no means chargeable for such act, if he has taken all possible measures to protect his site, and unless he has pledged to shoulder such responsibility under all circumstances.

8/2 Verification of dealers' identities

8/2/1 In order to safeguard its own interests, the Institution should take all possible precautions and measures to verify the identities of its website dealers, and make sure that they are legally competent for concluding valid contracts.

8/2/2 It is acceptable in Shari'ah to adopt the electronic signature as a means of verifying the identities of dealers, provided that such means is adoptable by virtue of the prevailing rules and regulations.

8/2/3 When forgery or an error is committed with regard to the personality or characteristics of one of the two parties, the other party has the right to terminate the contract.

8/2/4 For verification of forgery or error recourse should be to the general rules of evidence.

8/3 Protection of dealers from adhesion contracts (*'Uqud al-Iz'an*)

8/3/1 It can be noticed that in a big part of the online contracts the offer is addressed to the public in general and the contract has uniform details. In such contracts also the offering party alone has the right of stipulating the terms and conditions of the contract, while the other party does not have the right to change such terms and conditions. A contract of this type is considered as an "adhesion contract" when it relates to a commodity or usufruct that nobody can do without, and the offering party assumes actual and legal monopoly or face only meager degree of competition in its supplying.

8/3/2 According to Shari'ah, online adhesion contracts should be subject to state control so as to protect dealers by endorsement of what is equitable and elimination of what is inequitable in these contracts, before launching them to dealers.

8/3/3 If the price in the online adhesion contract is fair, and the terms and conditions of the contract do not entail any injustice for the adhering party, the contract is considered to be permissible and binding to its two parties.

8/3/4 If the price in the online adhesion contract is unfair (comprises excessive injustice), or the contract includes an unjust condition for the adhering party, the latter has the right to resort to law for nullification of the contract or amending its conditions for the sake of relieving him from the consequent injustice.

8/4 If the online contract is concluded on the basis of describing the sold object, or depending on the fact that the buyer has previously seen the object, or on presentation of a model resembling the object,

whereas at the time of delivery the sold object is found to be different, the buyer should have the choice between concluding the contract, terminating it, or negotiating with the seller appropriate means of settlement.

9. Date of Issuance of the Standard

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

Adoption of the Standard

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

Appendix (A)
Brief History of the Preparation of the Standard

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

On 12 Rajab 1427 A.H., corresponding to 6 August 2005 A.D., the Secretariat General decided to commission a Shari'ah consultant to prepare a study on Online Financial Dealings.

A joint committee composed from Shari'ah Committees (1) and (2) held a meeting in the Kingdom of Bahrain, on 18 Safar 1428 A.H., coresponding to 8 March 2006 A.D. The joint committee discussed the study, and asked the consultant to introduce necessary changes in the light of the discussions and observations of the meeting.

In a further meeting of the joint committee, held in the Kingdom of Bahrain on 24 Rabi' II, 1428 A.H., coresponding to 11 May 2007 A.D., the draft of the standard was discussed and the consulted was requested to introduce necessary amendments in the light of the discussions and observations of the meeting.

In its meeting No. (19) held in Makkah Al-Mukarramah, on 26–30 Sha'ban 1428 A.H., corresponding to 8-12 September 2007 A.D., the Shari'ah Board discussed the amendments made by the joint committee meeting and introduced the changes which it deemed necessary.

In its meeting No. (20) held in the Kingdom of Bahrain, on 4–8 Safar 1429 A.H., corresponding to 11–15 February 2008 A.D., the Shari'ah Board discussed once again the draft standard and introduced further changes.

The Secretarial General of AAOIFI held a public hearing in the Kingdom of Bahrain on 24 Safar 1430 A.H., coresponding to 19 February 2009 A.D. More than 30 participants attended the session as representatives of central banks, institutions, and accounting firms. The session was also attended by Shari'ah scholars, university teachers and other interested parties. Several observations were made in the session, and duly responded to by the members of the Shari'ah Standards Committees (1) and (2).

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

Appendix (B)
The Shari'ah Basis for the Standard

- The basis for permissibility of launching commercial websites if such sites are free from impermissible practices is the fact that in principle, transactions in any form are allowed, unless they lead to commitment of an impermissible act. Moreover, launching of such sites serves the interests of a large number of people in this era, and thus, conforms to the underlying mission of Shari'ah.
- Permissibility of concluding online financial contracts is due to the fact that such contracts do not involve any impermissible aspect. They carry no difference from traditional contracts except in that the means used for their conclusion is different. If, in principle, contracts as such are allowed as long as they observe the rules of transactions in Shari'ah, it is only natural that the means whereby these contracts are concluded become allowed as long as they conform to permissible rules of contracting.
- Concluding online contracts through audio or audiovisual communication between the two parties is classified under the category of contracts concluded in the presence of the two parties, because in such online contracts both parties are in fact present at the same time, although not in the same place. Therefore, simultaneous presence of the two parties in terms of time, which constitutes the prerequisite meant by coincidence of presence,[(2)] is fulfilled at the time of exchanging offer and acceptance. In this connection the International Islamic Fiqh Academy issued a resolution about the Shari'ah ruling on concluding contracts through the modern means of communication. The text of the resolution is as follows: "If any two parties enter into a contract at the same time while they are in different places – this includes contracting through

(2) See: *"Fath Al-Qadir"* [3: 190–192]; *"Hashiyat Al-Dusuqi 'Ala Al-Sharh Al-Kabir"* [3: 5]; *"Mughni Al-Muhtaj"* [2: 5]; *"Al-Mughni"* [3: 481]; and see *"Al-Madkhal Al-Fiqhi Al-'Am"* [1: 348].

telephone and wireless devices – contracting between these two parties is considered as contracting between two present parties".[3] Needless to say, there is no difference between contracting through a telephone call, and contracting through online voice communication.

- When the contract is concluded through written communication, by e-mail, or through access to site, it shall be classified as a contract signed in the absence of the two parties. This ruling is based on the fact that exchange of offer and acceptance in this case takes place without simultaneous presence of the two parties. In this regard the Al Baraka Seminar on Islamic Economics issued a resolution stating that "According to Shari'ah, when an online contract is signed between two parties who are not in the same place, it is considered as a contract between two absent parties if neither of the two parties can hear the voice of the other. Consequently such contract should become subject to the Shari'ah rulings on message contracting".[4]
- The ruling that the offering party does not have the right to retreat from his offer within the period specified by the seller for validity of the offer is based on the viewpoint of some Maliki scholars who believe that if an offer is announced to be valid for a specific period it should remain valid throughout that period. This viewpoint has been emphasized by Al-Hattab quoting Abu Bakar Al-Arabi.[5] In this regard also The International Islamic Fiqh Academy issued a resolution emphasizing the following: "When the offering party issues a term-offer through these devices, he is committed to keep his offer during the specified period. He does not have the right to retreat from it."[6]
- When the offering party sends the electronic message through website or e-mail without indicating all the rights and commitments relating to the contract in question, or when he stipulates a condition that he should have the right of withdrawal even if the message is accepted, the

(3) Resolution No. 52 (3/6).

(4) The 19th Al Baraka Seminar on Islamic Economics, held in Makkah Al-Mukarramah, on 6–7 Ramadan 1420 A.H., corresponding to 2-3 December 2000 A.D.

(5) See: *"Mawahib Al-Jalil"* by Al-Hattab [4: 241]. This viewpoint has been adopted by a number of civil laws, and is known as "Term Offer". See article (98) of the Jordanian Civil Law and article (93) of the Syrian Civil Law.

(6) Resolution No. 52 (3/6).

message is not considered as an offer, because from a Shari'ah point of view an offer should be categorically obvious and cannot bear any other meaning.[7]

- The ruling that irrespective of the method of contracting an online contract is considered to be valid since the time when the other party accepts the offer and whether the offering party has come to know that or not, is based on the fact that Shari'ah scholars define contract as "the concordance of two wills". Therefore as soon as the accepting party declares his consent concordance between the two wills takes place and the contract becomes valid.[8] A resolution issued in this regard by the International Islamic Fiqh Academy states: "When a contract is to be signed, through a written message or a messenger, between two absent parties who are not in the same place and neither of them can see or hear the other - a case which includes contracting through telex, fax and PC screens - the validity of such contract starts as soon as the concerned party receives and accepts the offer".[9]
- The ruling that possession in the strict Shari'ah sense takes place when the purchaser, after signing the contract, downloads the computer software or the data or any other good of this type from the website to his pc, is based on the fact that possession takes place actually and constructively when the sold object is released and disposition is facilitated for the buyer. Possession of objects differs according to the type of the object in question and how its possession is normally perceived. In this respect a resolution has been issued by the International Islamic Fiqh Academy regarding possession and its forms, especially the recent ones.[10]
- Prohibition of trespassing commercial websites and data theft is derived from prohibition of all forms of encroaching upon rights of others because Allah, the Almighty, says: ***{"...but transgress not the limits. Truly, Allah likes not the transgressors."}***.[11] Moreover, websites have financial worth, and are considered as private rights of their owners. Trespassing of such

(7) See: *"Fath Al-Qadir"* [3: 190-92]; *"Hashiyat Al-Dusuqi 'Ala Al-Sharh Al-Kabir"* [3: 5]; *"Mughni Al-Muhtaj"* [2: 5]; and *"Al-Mughni"* [3: 481].

(8) See: *"Bada`i' Al-Sana`i'"* [6: 2994] and *"Hashiyat Ibn 'Abidin"* [7: 26].

(9) Resolution No. 52 (3/6).

(10) Resolution No. 53 (4/6).

(11) [Al-Baqarah (The Cow):190].

sites may result in financial harm for their owners. In this regard the International Islamic Fiqh Academy issued a resolution emphasizing prohibition of transgression against trade name, trade address, trademark and all other similar rights.[12]

- Acceptability of adopting the electronic signature as a means of verifying the identities of dealers if such means is recognizable by the prevailing rules and regulations is based on the need to avoid the harm that could arise from online forgery in the dealers' identities. In addition to that, adopting electronic signature does not constitute an impermissible practice. In fact Shari'ah encourages the use of technological means to preserve peoples' wealth, because preservation of wealth constitutes one of the main five aims (*Maqasid*) of Shari'ah.
- The ruling that when forgery or an error is committed with regard to the personality or characteristics of one of the two parties, the other party has the right to terminate the contract is based on the fact that such an incident can influence the consent of the deceived party. According to Shari'ah the consent of the two parties is the fundamental prerequisite of contracting. This fact has been emphasized by the majority of Shari'ah scholars.[13]
- The ruling that the state has to assume control upon online adhesion contracts - which are characterized with launching of public offers, uniform details, imposed terms and conditions, provision of indispensible commodities or usufructs and monopoly of supply - is based on the general texts of Shari'ah which instruct people to avoid harm and achieve justice.
- If a contract is concluded on the basis of describing the object sold, or depending on the fact that the buyer has previously seen the object, or on presentation of a model resembling the object; whereas at the time of delivery the sold object is found to be different, the buyer should have the option of terminating the contract for false description. This ruling is based on the need for preservation of the rights of the two parties of the contract, as has been emphasized by the majority of Fiqh scholars.

(12) Resolution No. (5), 5th Session 1408 A.H. – 1988 A.D.
(13) See: *"Al-Mawsu'ah Al-Fiqhiyyah"*, the term *Rida*, Vol. (22).

Appendix (C)
Definitions

Internet

A cross-border devise of communication between computer networks.

Website

Information stored in the form of pages, while each page contains a set of certain type of information formed up by a page designer by using special symbols. For browsing of the pages, software of internet browser is requested, so as to resolve the symbols and issue orders for page display.

Internet Service Provider

The service provider is the party (institution) which provides lines of internet access to beneficiaries on the basis of subscription contracts or any other arrangement, against a specific fee.

Electronic Signature

The electronic signature is data in the form of letters, figures, symbols, signs or any other form, embodied in or attached to or liked with an information message through electronic, digital, phonic or any other format. The electronic signature has a style which allows specification of the distinct identity of the signatory, so that the signature can be verified and the content of the message is approved.

Electronic Message

The data and information published or exchanged through electronic devices such as internet, telex, fax and other similar means.

Shari'ah Standard No. (42)

Financial Rights and How They Are Exercised and Transferred

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

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

Preface

This Standard aims to describe the rules relating to financial rights, how they are exercised and transferred and the mechanisms used to protect them as well as to highlight certain rights exercised in the transactions of Islamic financial institutions.[1]

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

Statement of the Standard

1. Scope of the Standard

This Standard provides a description of financial rights, their types, rules, conditions, parameters, the way they are exercised and transferred and the mechanisms used to protect them. It also addresses the most important rights exercised in the transactions of financial institutions.

This Standard does not cover non-financial rights; *Khiyarat* (options to terminate a contract); e.g., *Khiyar al-Shart* (an option stipulated by the parties giving one or both of them the right to revoke the contract within a specified period of time) and *Khiyar al-Naqd* (an option giving the seller the right to revoke the contract for non-payment within a specified time etc.); or rights relating to Waqf (endowments), as they have already been covered in separate standards.

2. Definition of Financial Rights

A financial right is the prerogative of a (natural or artificial) person recognized by the Shari'ah to have rights and responsibilities and the legal capacity to enter into transactions.

3. Types of Financial Rights

Financial rights are of three types:

3/1 Personal rights (rights in personam): These are rights arising from the liability of another person, such as debts payable by a debtor.

3/2 Proprietary rights (rights in rem): These are rights attached to specific property conferring to the owner direct authority over it without interference from another person, whether such rights are primary or secondary.

3/2/1 Primary proprietary rights, such as rights arising from full and complete ownership, are independent rights that do not rely on the existence of any other right.

3/2/2 Secondary proprietary rights; these are proprietary rights that have no purpose of their own except to protect the fulfillment of personal rights, such as the rights of a creditor in security provided by an obligor.

3/2/3 The distinction between proprietary and personal rights: The owner of a proprietary right is able to directly enforce his right to specific property using permissible means. The owner of a personal right, on the other hand, cannot enforce his right by claiming any specific property.

3/3 Rights to intangible assets:

3/3/1 These are financial rights to intangible assets, whereby the owner is exclusively entitled to their output.

3/3/2 Types of rights to intangible assets: Rights to intangible assets are of many kinds, including rights to trade name, trading addresses, trademarks, commercial licenses; intellectual property, technical and industrial know-how, patents and copyrights.

3/3/3 Rules governing rights to intangible assets:

3/3/3/1 Rights to trade names, trading addresses, trademarks, copyrights, inventions and patents are the rights of their respective owners. These possess recognised monetary value in contemporary business and commercial custom. Since these rights are recognised and protected by the Shari'ah , it is not permissible to violate them.

3/3/3/2 Since rights to intangible assets are recognised as financial rights, it is permissible to dispose of or transfer them for consideration provided that such transactions are free of Gharar (ambiguity), deception and fraud.

3/3/3/3 Commercial license: A commercial license is a right given by the relevant authority to certain businesses to engage in specified activities. It is permissible for the license holder to dispose of it for or without consideration unless specifically prohibited by law.

3/4 Financial rights can be acquired by contract, stipulated conditions, inheritance or court order. Financial rights may be established by long-standing continuous use without objection or first use subject to fulfillment of all the Shari'ah conditions required for the acquisition of such rights.

4. Rights Resulting from Ownership

4/1 Ownership of an asset or usufruct gives the owner the right of complete disposition, either by a complete transfer or the transfer of usufruct only, for or without consideration, except what is prohibited by the Shari'ah.

4/2 Ownership of usufruct entitles the owner to use it (whether directly or indirectly through another person) subject to compliance with the terms stipulated by the owner of the asset and bearing liability for the asset in case of misuse, negligence or breach of condition.

4/3 Ownership of a license to use gives the licensee the right to personal use only which cannot be transferred to a third party.

5. Easements

5/1 Private easements are established rights attached to one real estate property over another, such as irrigation rights, watercourse rights, drainage rights and rights of passage.

5/2 Public easements are the rights of the general public to benefit from public utilities provided by the state and similar entities.

5/2/1 The right of an individual to a public easement is restricted to personal use only.

6. Financial Rights Arising from Neighbourhood

6/1 The rights of neighbourhood based on the ownership of different floors of a building prohibit each owner to act in a manner that will definitely or most likely cause harm to others.

6/2 Since the owners of different floors of a building co-ownership in the underlying land, the following apply:

6/2/1 If a lower storey collapses due to any fault of its owner, he is liable to reconstruct it so that the owners of the upper-storeys are not harmed.

6/2/2 If the owner of the lower storey is not responsible for the collapse, the courts have decisive authority to settle the matter in the best interests of both parties and to avert harm from them.

6/2/3 The owners have the right to enjoy use of common facilities and services.

7. Right of Shuf'ah (Preemption)

7/1 Definition of Shuf'a (preemption): Shuf'a is the right given to a neighbour or co-owner of real estate property to acquire a sold property from its buyer with or without their consent for the price at which it was sold.

7/1/1 The right of Shuf'ah exists only in relation to immovable property or movable property attached to it.

7/1/2 The right of Shuf'ah enjoyed by a neighbour is applicable only when the two properties share common easement rights.

7/2 Rules of Shuf'ah

7/2/1 The Shafi' (preemptor) takes the place of the buyer and, subject to circumstances being equal, enjoys the right to purchase the property on the same terms as contracted with the buyer, such as deferred payment. The Shafi' (preemptor) assumes all also the liabilities of the buyer such as the usual conveyancing costs.

7/2/2 If in a jointly owned property, there are more than one Shufa'a`(preemptors), each has the right of Shuf'ah proportionate to his share in the property.

7/2/3 Rights of Shuf'a are not extinguished upon the death of the Shafi' (preemptor) but are inherited by his heirs.

7/2/4 Rights of Shuf'ah must be claimed immediately upon becoming aware of the sale in accordance with custom or law, failing which they lapse.

7/2/5 The Shafi' (preemptor) is entitled to invalidate all the dispositions of the preempted property that were made prior to the exercise of the right of Shuf'ah , even if it has changed hands.

7/2/6 There is no right of Shuf'ah where ownership is transferred without a sale or a transaction having the effect of a sale. Therefore, there is no right of Shuf'ah where transfer is effected by inheritance, bequest or gift without consideration.

8. Right of Occupancy

Occupancy is a right based on the right of the tenant to retain his tenancy in property or commercial unit.

Occupancy has a number of forms:

8/1 The Shari'ah does not prohibit the owner and the tenant agreeing that the tenant will pay a lump sum of money over and above the periodic rental amount, on condition that it is considered part of the agreed rent for the entire lease period. If the lease is terminated early, the rules applicable to rental payments apply to this amount.

8/2 It is permitted by the Shari'ah for the owner and the tenant to agree during the lease period that the owner will pay an amount to the tenant in exchange of the tenant waiving his contractual right to the ownership of the usufruct for the remaining period on the basis that such payment compensates the tenant for waiver of his right to the usufruct that he purchased from the owner. However, if the lease period expires and the contract is not renewed, either expressly or by operation of a provision for automatic renewal, then it is not permitted to take payment for vacating the premises, and the owner has the right to take back his property after expiry of the term.

8/3 The Shari'ah permits an agreement between the incumbent tenant and a new tenant during the lease period to assign the lease for an amount exceeding the regular rental amount for release of occupancy subject to the requirements of the terms and conditions of the original lease

contract and applicable laws that are compliant with the rules of the Shari'ah.

In long-term lease contracts, contrary to contractual terms that are based on what is permitted by the laws of some jurisdictions, the Shari'ah does not permit the tenant to sub-lease or assign the property to another tenant in return for payment except with the agreement of the owner.

If the incumbent tenant agrees to hand over occupancy to a new tenant after the end of the lease period, the Shari'ah does not permit him to take any payment because the right of the incumbent tenant in the usufruct has expired.

9. Right of Tahjir

9/1 Tahjir means taking possession of a piece of land and marking it with certain recognised markers with the permission of the government.

9/2 Tahjir results in exclusivity and priority over others, but it does not on its own confer ownership.

9/3 A person who has carried out Tahjir on a piece of land is permitted to waive his entitlement in favour of another person for consideration, but he is not allowed to sell the land as he does not yet own it.

9/4 The right of Tahjir expires if the land is not utilised for three years, or as provided by applicable regulations.

10. Transfer of Rights for Consideration

10/1 It is not permissible to take consideration for transfer of put or call option rights, whether by means of sale or otherwise.

10/2 It is not permissible to take consideration for transfer or waiver of rights granted only to prevent harm, such as the right of Shuf'ah (preemption).

10/3 It is permissible to take consideration for transfer or waiver of easement rights, by means of sale or otherwise.

10/4 It is permissible to sell rights to use and rights arising from first use.

11. How Rights Are Exercised and Transferred

11/1 All financial rights are in principle disposable, and the owner of a financial right has the absolute right to exercise and transfer his right in accordance with the rules and principles of the Shari'ah and in particular, the following:

11/1/1 Rights should not be exercised in a manner abuse to others.

11/1/2 The public interest is given priority when it conflicts with the exercise of a private property right.

11/2 Subject to the provisions of this Standard, the constructive methods of disposal of rights include all types of contracts of exchange, donations, waivers, partnerships, and assignments of rights. [see Standard No. (7) on Hawalah]

12. Protection of Rights

12/1 Rights are to be protected from any violation.

12/2 In addition to the provisions of Shari'ah Standard No. (5) on Guarantees, the methods of protecting financial rights include:

a) Rights do not extinguished by passage of time but there can be a limitation period after which a claim cannot be made in court.

b) Right of lien: A creditor has the right to retain the debtor's property already in his possession until he receives payment of the due debt from the debtor. This may take several forms:

I. The right of the seller to retain the sold item until he receives the due price.

II. The right of a manufacturer or worker to retain the product of their work until they receive the payment due.

III. The right of the lessor to retain the lessee's property inside the leased asset until he receives the rent due, because the lessor has possession of the leased asset which contains the lessee's property.

IV. The right of a courier to retain the dispatched property until he receives his fees.

V. The right of a bailee to retain the bailed property until he receives his fee.

VI. The right of an agent to retain the property of the principal until he receives his agency fee.

c) If the buyer of an item becomes insolvent and the seller finds that specific item in the insolvency assets, the seller has a priority proprietary right to it if the applicable regulations of a jurisdiction allow it. Refer to Shari'ah Standard No. (43) on Insolvency.

13. Some Rules Governing Contemporary Applications of the Transfer and Exercise of Financial Rights

13/1 It is permitted for corporate bylaws to give existing shareholders priority over third parties to subscribe for shares upon a decision to increase the company's share capital. Each shareholder is entitled to subscribe in proportion to his respective share prior to the share issuance.

13/2 It is permissible to assign a right of priority referred to in item 13/1 to a third party without consideration, subject to the provisions of the law and the rules of company supervisory bodies.

14. Date of Issuance of the Standard

This Standard was issued on 4 Dhul-Qa'dah 1430 A.H., corresponding to 23 October 2009 A.D.

Adoption of the Standard

The Shari'ah Board has adopted the Standard on Financial Rights and How they are Exercised and Transferred in its meeting No. (25) held during the period of 2-4 Dhul-Qa'dah 1430 A.H., corresponding to 21-23 October 2009 A.D.

Appendix (A)
Brief History of the Preparation of the Standard

On 13 Shawwal 1425 A.H., corresponding to 25 November 2004 A.D., the General Secretariat decided to commission a Shari'ah consultant to prepare a juristic study on Financial Rights and How They Are Exercised and Transferred.

In its meeting held on 4 Sha'ban 1426 A.H., corresponding to 8 September 2005 A.D., the Shari'ah Standards Committee discussed the draft of a Shari'ah Standard on on Financial Rights and How They Are Exercised and Transferred and made necessary amendments.

The revised draft of the Shari'ah Standard was presented to the Shari'ah Board in its meeting No. (16) held in Al-Madinah Al-Munawwarah, Kingdom of Saudi Arabia, during the period of 7-12 Jumada I, 1427 A.H., corresponding to 3-9 June 2006 A.D. It became clear that the issue needed further study to deal with some Shari'ah aspects.

The General Secretariat commissioned a Shari'ah consultant to prepare a juristic study on Financial Rights and Their Disposition (to be presented) on 14 Jumada II, 1430 A.H., corresponding to 7 June 2009 A.D.

The General Secretariat held a public hearing, and all the comments made in the public hearing were listened to, and the members of the Shari'ah Board answered these comments and made commentary on them.

In its meeting No. (25) held in Bahrain during the period of 2-4 Dhul-Qa'dah 1430 A.H., corresponding to 21-23 October 2009 A.D., the Shari'ah Board discussed the draft of the Standard, incorporated the necessary amendments that it deemed appropriate, and adopted the Standard.

Appendix (B)
The Shari'ah Basis for the Standard

- The basis for the recognition of financial rights is recognised jurisprudential evidences from the Qur`an, Sunnah, Ijma' and Qiyas that indicate the right of ownership.
- The basis for the rules governing rights to intangible assets is the Resolution of the International Islamic Fiqh Academy No. (43) 5/5 affirming, from established proofs, their existence and the rules governing them, which are the basis for the resolution.
- The basis for the distinction between proprietary rights and personal rights is the view of contemporary jurists that Islamic jurisprudence has recognised this distinction in all matters that require such distinction.(2)
- The basis for the recognition of rights, whether to tangible or intangible assets is the saying of the Prophet (peace be upon him): *"No harm and no reciprocal harm"*.(3)
- The basis for the right of Shuf'a enjoyed by a partner or a neighbour is the practice of the Prophet (peace be upon him). Jabir Ibn Abdullah (may Allah be pleased with him) narrated: *"Allah's Messenger (peace be upon him) ruled in favor of the right of Shuf'ah so long as the property is not divided"*.(4) Abu Salamah Ibn Abdul-Rahman narrated: *"The Prophet (peace be upon him) ruled in favor of the right of Shuf'ah in property that has not been divided among the partners. If boundaries have been assigned between them and the paths have been demarcated, then there is no right of Shuf'ah"*.(5) In the narration related by Muslim: *"The Prophet (peace be upon him) ruled in favor of the right of Shuf'ah in any undivided co-ownership, whether in a*

(2) See Mustafa Al-Zarqa: *"Al-Madkhal Ila Nazariyyat Al-Iltizam"*.
(3) The Hadith has been related by Malik in *"Al-Muwatta`"* (P. 464); *"Musnad Ahmad"* [1: 313], and *"Sunan Ibn Majah"* [2: 784].
(4) *"Sahih Al-Bukhari"*, (H: 2257).
(5) *"Al-Muwatta"*, (H: 1420).

piece of land or an orchard. A co-owner is not allowed to sell his share unless permitted by the other co-owners. If the co-owner wants, he can buy it. If he wants, he can leave it. But if one co-owner sells it without permission of the other co-owners, then they have a greater right to it".[6] Qatadah narrated that the Prophet (peace be upon him) said: *"The neighbour of the house has a greater right to the house".*[7] These two Hadiths are reconciled by ascribing the last Hadith to a neighbour who is also a co-owner or shares easement rights.

- The basis for the right to a share of water is Allah's Statement in the Qur`an: ***{"Here is a she-camel: It has a right to drink (water), and you have a right to drink (water), (each) on a day, known"}.***[8] There is also Allah's Statement in the Qur`an: "And inform them that the water is to be shared between them. Each one should drink in turn".[9] In Shari'ah, it means a turn to utilise water for land or trees or crops. Related Shari'ah terms are the right of Shirb, which is specifically for watering crops and trees; the right of Shafah, which is specifically the right of humans and animals to drink as well as using water for purposes like ablution, bathing, etc.[10] There is a special set of rules for water in the Shari'ah based upon the statement of the Prophet (peace be upon him): *"People share in three things: water, pasturage and fire".*[11]
- The basis for the right of Tahjir and the rights established by first use is the Sunnah. Ibn Qudamah states: "Anyone who carries out Tahjir of previously unappropriated land and begins to make it productive but did not complete it, he is more entitled to it than others, based upon the statement of the Prophet (peace be upon him): *"Anyone who first uses what no other Muslim has previously used is more entitled to it".* If he transfers it to someone else, then the second person is more entitled to it than others because the first owner of the right has granted it to him. If the owner of the right dies, it transfers to his heirs, based on the statement of the

(6) *"Sahih Muslim"* (H: 1608).
(7) *"Sahih al-Bukhari"* with *"Fath Al-Bari"* [12: 345].
(8) [Al-Shu'ara (The Poets): 155].
(9) [Al-Qamar (The Moon): 28].
(10) Al-Kasani, *"Bada`i' Al-Sana`i'"* [6: 188-192].
(11) *"Musnad Ahmad"* [5: 364].

Prophet (peace be upon him): *"The heirs of a deceased person inherit his estate"*. However, it is not permitted for the owner of a right of Tahjir to sell it because his entitlement is confined to his personal use like the right of Shuf'ah (preemption). [An alternative view is that] its sale could be considered valid because he is more entitled to it.(12) Al-Mardawi states: "Anyone carrying out Tahjir over previously unappropriated land will not own it…but he is more entitled to it than others, as well as his heirs after him and whomever he transfers it to, without any dispute. However, he cannot sell it, and this is the position of our School. It has also been said that he may sell it. Abu Khattab mentioned it as a possibility, and he referred to its permissibility as the correct position without any qualification in *"Al-Muharrar"*, *"Al-Ri'ayatayn"* and *"Al-Hawi Al-Saghir"*.(13)

- The basis for the prohibition of abusive exercise of rights is deduction from the Qur`an and Sunnah. There are many Verses in the Qur`an which indicate the obligation of justice, fairness and refraining from exercising one's rights in a way that harms others. Allah commands: ***{"Show forgiveness, enjoin what is good, and turn away from the foolish"}***.(14) As for the Sunnah, we find the following Hadith: *"May Allah bless the person who is lenient in selling and buying and when demanding his right"*.
- The basis for the invalidity of a condition stipulating that the seller retains ownership in a sale contract is that the transfer of ownership is a legal effect of the sale contract. Therefore, it is not permissible for a sale to take place without it. This has also been stressed in Resolution No. (51) 6/2 of the International Islamic Fiqh Academy held in Jeddah, which states: "The seller is not entitled to retain ownership of the sold item after the sale, but it is permissible for him to stipulate a condition on the buyer to retain possession of the item as security against deferred installments."
- The basis for the right of retention is the Qur`an and Sunnah. As for the Qur`an, it is stated by Allah: ***"And if you punish, then punish them with the like of that with which you were afflected. But if you endure patient-***

(12) Ibn Qudamah, *"Al-Kafi"* [2: 394].
(13) Al-Mardawi, *"Al-Insaf"* [6: 373 and 374].
(14) [Al-A'raf (The Heights):199].

ly, verily, it is better for those who are patient".[15] The Glorious Verse indicates the permissibility of reciprocal treatment. Based on this, it is permissible for a person to retain his property unless he receives his own rights from others. As for the Sunnah, it was narrated that the Prophet (peace be upon him) said: *"The best amongst you is the one who is best in settlement of his obligations"*.[16]

- The basis for the impermissibility of taking consideration for sale or transfer of put or call options is Resolution No. (63) 7/1 of the International Islamic Fiqh Academy, which is based on recognised evidences.
- The basis for the impermissibility of selling the abstract rights mentioned in item 10 is the lack of monetary value [according to Shari'ah] as well as the presence of Gharar (uncertainty)and Jahalah (ambiguity).

(15) [Al-Nahal (The Bees): 126].
(16) *"Sunan Al-Nasai"*, printed with Suyuti's Commentary, (P. 318).

Appendix (C)
Definitions

Right of Easement

It is the established right over one piece of real estate for the benefit of another piece of real estate.

Right of Irrigation (Shirb)

Shirb literally means a share in water. The Shari'ah definition is a turn to irrigate land or trees or crops.

Right of Watercourse (Majra)

It is the right of an owner of land distant from a watercourse to bring it via the property of his neighbour to his land to irrigate it.

Right of Drainage (Masil)

It is the right of a person to get rid of excess water in his property via the property of another person. Watercourse is different from drainage in that watercourse is in order to bring water whereas drainage is to get rid of water not needed for the land.

Right of Way Easement (Murur)

It is the right of the owner of an interior piece of land (land surrounded by other persons' lands) to access his land by means of a road/path. It makes no difference if the road/path is public, not owned by anyone, or is privately owned by someone.

Right of Ascendancy (Ta'alli)

The right of ascendancy means one person's right to have his structure be physically located above the structure of another person. This happens in multi- storey buildings in which one person owns a unit in a lower storey and another owns a unit in the storey above it.

Preemption

Preemption in the terminology of jurists means the entitlement of the partner to buy what his partner has sold for the price at which he sold it.

Intangible Rights

Intangible right is the authority of a person over something that is abstract, e.g., ideas and inventions. The International Islamic Fiqh Academy, headquartered in Jeddah, issued its Resolution No. (43) 5/5 on the subject of intangible rights, which include; Trade Name, Title, Trademark, Authorship, and Invention. The Academy considered these to be rights particular to their respective owners which have established financial value. Consequently, these rights are recognized by the Shari'ah and they should not be violated.

Right of Utilization (Intifa')

The right of utilization is a juridical concept that refers to a person's temporary right over the asset of another person, who authorizes him to use it, exploit it, and dispose of its usufruct, but not the asset itself, during the period of utilization. The majority of jurists, including the Shafi'is, Malikis and Hanbalis, distinguish between the ownership of usufruct (Manfa'ah) and ownership of utilization (Intifa'). Granting ownership of utilization (Intifa') only allows a person to directly utilise [the asset]. Granting ownership of usufruct (Manfa'ah) is more general and comprehensive; it allows its owner to use the asset himself or to enable others to use it, either for compensation, as in a lease, or without compensation, as in gratuitous lending of the asset.

Right of Exclusive Lease (Hikar)

Hikar is the right to lease the land of an endowment for a long period of time. The Mustahkir (exclusive lessee) makes an advance payment to the endowment which is nearly equal to the price of the land that is used to develop it or for the maintenance of its premises. Another, insignificant, amount is arranged to be paid annually to the endowment by the Mustahkir (exclusive lessee) or by whosoever this right has been transferred to.

Right of Priority in Subscribing to an Increase in a Company's Capital

It is the stipulation that the existing shareholders will have the right of priority in subscribing to an increase in the company's capital by purchasing shares at their nominal value

Vacating Houses or Shops

It refers to the right to stay in a house or shop.

Business License

It is a right granted by the authorities to some traders to deal in specific activities.

Right of Demarcation

It means taking possession of a piece of land and marking it with markers or a wall. Demarcation confers privilege and precedence over others. It means that whosoever demarks land is more entitled to develop it; however, it does not confer ownership.

Disposal

Disposal is the competence approved by the Shari'ah , or custom, or law that enables the owner of rights to dispose of them. This disposal can either be by transferring his right to others for recompense; e.g., sale or barter, or without recompense; e.g., gift, will, or by relinquishment.

Abusive Use of a Right

It the use of a right in such a way that it is likely to cause serious extraordinary harm to another.

Expiry

It is the lapse of a right due to the passage of time. However, in the Shari'h, rights do not lapse due to the mere passage of time.

Shari'ah Standard No. (9)

Ijarah and Ijarah Muntahia Bittamleek*

(Revised Standard)

* This standard was previously issued by the title "Shari'ah Rules for Investment and Financing Instruments No. (2) Ijarah and Ijarah Muntahia Bittamleek. It was reissued as a Shari'ah standard based on the resolution of the Shari'ah Board to reformat all Shari'ah Rules in the form of Shari'ah Standards.

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

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

Preface

This standard outlines the basis of the Shari'ah rulings on Ijarah and Ijarah Muntahia Bittamleek, beginning with the rules relating to the promise to lease, if any, and concluding with the rules of repossession of the leased property in an operating Ijarah by the lessor or transferring its ownership in case of Ijarah Muntahia Bittamleek, within or by the end of the lease term. The Standard also aims to outline the Shari'ah requirements that must be observed by Islamic financial Institutions (Institution/Institutions)[2] with respect to Ijarah transactions.

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

Statement of the Standard

1. Scope of the Standard

This standard covers operating leases of properties or Ijarah Muntahia Bittamleek, whether the Institution is the lessor or the lessee.

This standard does not cover *Sukuk al-Ijarah*, as they are covered by Shari'ah Standard on Investment Sukuk, nor the employment of persons (labour contract), as it is covered by a separate standard.

2. Promise to Lease (an Asset)

2/1 In principle, an Ijarah contract is executed for an asset owned by the lessor or an usufruct owned by the sub-lessor. However, it is for a customer to request an Institution to acquire the asset or to acquire the usufruct of an existing asset which the customer wishes to take on lease.

2/2 In principle, Ijarah may be effected directly on the asset without any requirement of a preceding master agreement. However, it is permissible to have a master agreement drawn up coveringa number of Ijarah transactions between the Institution and the customer, setting out the general terms and conditions of agreement between the two parties. In this case, there may either be a separate lease contract for each transaction, in a specific written document signed by the two parties, or alternatively the two parties may exchange notices of offer and acceptance by referring to the terms and conditions contained in the master agreement.

2/3 It is permissible for the Institution to require the customer who has promised to lease to pay a sum of money to the Institution to ensure the customer's seriousness in accepting a lease on the asset and the subsequent obligations, provided no amount is to be deducted from

this sum except in proportion to the actual damage suffered by the Institution in case the customer does not fulfil his promise. Thus, if the customer, in case of Ijarah associated with a promise to transfer ownership, breaches his promise, the promisor shall be charged either the difference between the cost of the asset intended to be leased and the total lease rentals for the asset which is leased on the basis of Ijarah Muntahia Bittamleek to a third party, or, in case of operating Ijarah, the promisor breaching his promise shall be charged the difference between the cost of acquisition and the total selling price if sold to a third party by the Institution (promisee). Otherwise; i.e., in case it is not sold, the promisee shall not be entitled to receive any compensation.

2/4 The amount of money deposited by the customer as security for his commitment can be either held on trust in the custody of the Institution in which case the latter cannot invest it, or it may be held on an investment trust basis in which case the customer permits the Institution to invest it on the basis of Mudarabah between the customer and the Institution. It is permissible to agree with the customer, upon the execution of the contract of lease, that this amount shall be treated as an advance payment of the instalments of the lease rental.

3. Acquisition of the Asset to Be Leased, or Its Usufruct, by the Institution

3/1 For the permissibility of an Ijarah contract concerning a specified asset, the lease contract should be preceded by acquisition of either the asset to be leased or the usufruct of that asset.

3/1/1 If the asset or the usufruct thereof is owned by the Institution, which should in principle be the case, an Ijarah contract may be executed as soon as agreement is reached by the two parties.

3/1/2 However, if the asset is to be acquired by the customer [see item 3/2 below], or by a third party, the Ijarah contract shall not be executed unless and until the Institution has acquired that asset.

Ownership is possible under a sale contract, even if the title is not registered in the purchaser's name (the Institution), and the purchaser has the right to obtain a counter-deed to establish the actual transfer of his ownership of the asset. [see item 3/5 below]

3/2 An asset may be acquired by a party and then leased to that party. In this case, the Ijarah transaction should not be stipulated as a condition of the purchase contract by which the Institution acquires the asset.

3/3 A lessee of an asset may enter into a sub-lease contract with a party other than the owner for a rental that is either the same, lower or higher, payable either currently or on a deferred basis, unless the owner stipulates that the lessee should not assign or sublet the property to third parties, or should not do so without his approval.

3/4 The lessee may lease the asset back to its owner in the first lease period for a rental that is lower, same or higher than what he is paying, if the two rentals are paid on a spot basis. However, this is not permissible if it should lead to contract of 'Inah, by varying the rent or the duration. For example, it is not permissible, if the first rental is one hundred dinars payable on a spot basis, for the lessee to sublet it to the lessor for one hundred and ten dinars payable on a deferred basis, or if the first rental is one hundred and ten dinars payable on a deferred basis, for the second to be for one hundred dinars payable instantly, or if the two rentals are of the same amount, but the payment of the first rental is deferred for one month and the second rental is deferred for two months.

3/5 An Ijarah contract may be executed for an asset undertaken by the lessor to be delivered to the lessee according to accurate specifications, even if the asset so described is not owned by the lessor. In this case, an agreement is reached to make the described asset available during the duration of the contract, giving the lessor the opportunity to acquire or to produce it. It is not a requirement of this lease that the rental should be paid in advance as long as the lease is not executed according to the contract of Salam (or Salaf). Should the lessee receive

an asset that does not conform to the description, then he is entitled to reject it and demand an asset that conforms to the description.

3/6 An Institution's customer may jointly acquire an asset that he wishes to lease with the Institution, and then lease the Institution's share of the asset from the Institution. In this case, the rental specified as receivable by the Institution should only be in proportion to its share in the ownership of the asset, since the lessee is a co-owner of the asset and therefore has to pay rent only on the share that he does not own.

3/7 An Institution may appoint one of its customers to act as its agent in acquiring on its behalf an asset that is desired by that customer such as equipment, machinery, etc., whose description and price are fixed with a view to the Institution's leasing such asset or assets to the customer after it has acquired their ownership through either actual or constructive possession. Although this type of agency (for the purchase of the assets) is permissible, it is always preferred that the agent is someone other than the customer (prospective lessee) as far as possible.

4. Concluding an Ijarah Contract and the Forms of Ijarah

4/1 Signature of the contract and the consequences thereof

4/1/1 The lease contract is a binding contract which neither party may terminate or alter without the other's consent [see items 5/2/2, 7/2/1, and 7/2/2]. However, an Ijarah contract may be terminated in accordance with item 7/2/1.

4/1/2 The duration of an Ijarah contract must be specified in the contract. The period of Ijarah should commence on the date of execution of the contract, unless the two parties agree on a specified future commencement date, resulting in a future Ijarah, that is, an Ijarah contract to be executed at a future date.

4/1/3 If the lessor fails to deliver the asset to the lessee on the date specified in the Ijarah contract, no rental is due for the period

between the date specified in the contract and the date of actual delivery, and the rental should be reduced accordingly, unless it is agreed that the lease be extended by an equivalent period after its original expiry date.

4/1/4 'Arboun (Earnest Money) may be taken in respect of lease at the execution of the contract of lease, with the lessee having the right to terminate the contract during a specified period of time, and 'Arboun is treated as an advance payment of the rental. If the Ijarah contract is not executed for a reason attributable to the lessee, the lessor may retain the 'Arboun. However, it is preferable for the Institution to forgo any amount in excess of the actual damage it has suffered. [see para. 3/2]

4/2 Forms of the Ijarah contract

4/2/1 Ijarah contracts may be executed in respect of the same asset for different periods for several lessees, provided that two contracts are not executed in respect of the same asset for the same period. Such an arrangement is called "successive leases", because each Ijarah is considered as being successive to the previous one and not concurrent with it on the basis of its being a future Ijarah. [see item 4/1/2 above]

4/2/2 If the lessor signs an Ijarah contract for a particular asset for a specified period of time, he cannot sign another Ijarah contract with another lessee for the duration of the existing Ijarah period or for any remaining period thereof. [see item 7/1/2 below]

4/2/3 An Ijarah contract may be signed with several lessees being entitled to the same specified usufruct of a particular asset and duration of rent, without specifying a particular period of time for a particular person. In this case, each lessee may benefit from the property during the time assigned to him in accordance with specified rules. This case is one form of Muhaya`ah (time-sharing) in benefiting from the usufruct.

4/2/4 A lessee may invite others to share with him in the usufruct he owns. In this case, they become co-owners in the usufruct of the leased property. This can only be done before entering into a sub-lease. If the property is sub-leased after the co-owners having owned the usufruct each co-owner is entitled to a share in the sub-lease rental pro rata to his share in the usufruct.

5. Subject Matter of Ijarah

5/1 Rules governing benefit and leased property

5/1/1 The leased asset must be capable of being used while preserving the asset, and the benefit from an Ijarah must be permissible by Shari'ah. For example, a house or a chattel may not be leased for the purpose of an impermissible act by the lessee, such as leasing premises to be used as headquarters by an Institution dealing in interest or to a shopkeeper for selling or storing prohibited goods, or leasing a vehicle to transport prohibited merchandise.

5/1/2 The subject matter of Ijarah may be a share in an undivided asset held in common with the lessee, whether the lessee is a partner with the lessor or not. In this case the lessee may benefit from the leased share in the same way in which the lessor used to benefit from it, i.e., by usufruct division based on Muhāya'ah i.e. by identifying a particular time (time-sharing) or a particular part of the property, used alternately by the co-owners, or any other means with consent of the other partner.

5/1/3 An Ijarah contract may be executed for a house or a chattel, even with a non-Muslim, if the use to be made of it is permissible, such as a house for residential purposes, a car for transport, or a computer to store data, unless the lessor knows in advance, or has reason to presume, that the use of the asset to be leased will be for an impermissible purpose.

5/1/4 The lessee must use the leased asset in a suitable manner or in conformity with common practice, and comply with conditions which are acceptable in Shari'ah. He must also avoid causing

damage to the leased asset by misuse through misconduct or negligence.

5/1/5 The lessor must accept responsibility for any defects of the leased asset which impair the intended use of the asset, and may not exclude his liability for any impairment that the leased asset may sustain, either by his own doing or as a result of events outside his control, which affect the benefits intended to be available under the Ijarah contract.

5/1/6 If the benefit from the leased asset is impaired wholly or partially as a result of the lessee's misconduct, while the property remains under lease, the lessee is obliged to restore or repair the usufruct, and rent for the time during which the benefit is lost is not to be waived.

5/1/7 The lessor may not stipulate that the lessee will undertake the major maintenance of the asset that is required to keep it in the condition necessary to provide the contractual benefits under the lease. The lessor may delegate to the lessee the task of carrying out such maintenance at the lessor's cost. The lessee should carry out operating or periodical (ordinary) maintenance.

5/1/8 The leased asset is the responsibility of the lessor throughout the duration of the Ijarah, unless the lessee commits misconduct or negligence. The lessor may take out permissible insurance on it whenever possible, and such insurance expenses must be borne by the lessor. The lessor may take this into account implicitly when the lease rental is to be fixed. However, he may not, after the contract is signed, charge the lessee any cost in excess of the cost anticipated at the time of fixing the rent. The lessor may also delegate to the lessee the task of taking out insurance at the lessor's expense.

5/2 Rules governing lease rentals

5/2/1 The lease rental may be in cash or in kind (goods) or benefit (service). The rental must be specified, either as a lump sum

covering the duration of the Ijarah contract, or by instalments for parts of the duration. It may also be for a fixed or variable amount, according to whatever designated method the two parties agree upon. [see item 5/2/3 below]

5/2/2 The rental is made obligatory by the contract and the lessor's entitlement to the rental runs from the time when the lessee starts to benefit from the asset or once the lessor makes the usufruct of the asset available to the lessee, and the entitlement to the rental does not necessarily commence on the date of signing the Ijarah contract. The rental may be paid entirely in advance or in instalments during a period equivalent, or more or less, to the duration of the Ijarah. However, if the asset is made available only after a period longer than what customary practices deem proper, then no payment shall be obligatory.

5/2/3 In case the rental is subject to changes (floating rental), it is necessary that the amount of the rental of the first period of the Ijarah contract be specified in lump sum. It is then permissible that the rentals for subsequent periods be determined according to a certain benchmark. Such benchmark must be based on a clear formula which is not subject to dispute, because it becomes the determining factor for the rentals of the remaining periods. This benchmark should be subject to a ceiling, on both maximum and minimum levels.

5/2/4 It may be agreed that the rental should consist of two specified parts: one to be paid or transferred to the lessor and the other to be held by the lessee to cover any expenses or costs approved by the lessor, such as the cost of major maintenance, insurance, etc. The excess of the second part of the rental shall be treated as an advance to the lessor on account, while the lessor shall bear any shortage.

5/2/5 The amendment of future rentals is permissible by the agreement of both parties, i.e. the periods for which the lessee has not yet received any benefit. The rentals of any previous periods which

have not yet been paid become a debt owed to the lessor by the lessee, and therefore cannot be increased.

6. Guarantees and Treatment of Ijarah Receivables

6/1 Permissible security, of all kinds, may be taken to secure the rental payments or as a security against misuse or negligence on the part of the lessee, such as a charge over assets, guarantees or an assignment of rights over assets of the lessee held by third parties, even if such rights are a permissible life or property insurance indemnity in favour of the lessee.

6/2 The two parties may agree that the rental be paid fully in advance. It is also permissible to make the rent payable in instalments, in which case the lessor may stipulate that the lessee should immediately pay the remaining instalments if he, after receiving a specified period of due notice, delays, without a valid reason, payment of one instalment or more, provided that the asset shall be made available for the lessee to use for the remaining period of time. Any stipulated upfront rental or accelerated -because of delay of payment- rental is subject to settlement at the end of the Ijarah period or, if the Ijarah contract is terminated earlier, at the time of such termination. Any extension of time by the lessor after the stipulated time for prompt payment is considered as a consent to deferral of payment throughout the extension period and not a right of the lessee, subject always to item 5/2/2 above.

6/3 No increase in the rental due may be stipulated by the lessor in case of delay in payment by the lessee.

6/4 It may be provided in the contract of Ijarah or Ijarah Muntahia Bittamleek that a lessee who delays payment for no good reason undertakes to donate a certain amount or percentage of the rental due in case of late payment. Such donation should be paid to charitable causes under the co-ordination of the Institution's Shari'ah Supervisory Board.

6/5 In case of foreclosure of the security provided by the lessee, the lessor may deduct from such amounts only what is due in respect

of rental for previous periods, and not all rental instalments, including instalments which have not yet fallen due and in respect of periods for which the lessee has not had the benefit of the leased asset. The lessor may also deduct from the security all legitimate compensations necessitated by the lessee's breach of contract.

7. Changes to the Ijarah Contract

7/1 Selling of or damage to the leased asset

7/1/1 If the lessor sells the leased asset to the lessee, the Ijarah contract is terminated due to the transfer of the ownership of the leased asset and ownership of usufruct to the lessee.

7/1/2 The lessor may sell the leased asset to a third party other than the lessee, and the title to the asset together with the rights and obligations of the lessor under the Ijarah contract is thereby transferred to the new owner, because the asset and the rights and obligations attached to it become the right of the third party. The lessee's consent is not necessary when the lessor decides to sell the asset to a third party. If the purchaser does not know about the Ijarah contract, he may terminate the sale contract, but if he knows about it and consents to it, he takes the place of the previous owner in his entitlement to the rental for the remaining period.

7/1/3 In case of total destruction of the leased asset, the Ijarah contract is terminated if it is concluded on an identified asset. In such a case, it may not be stipulated that the rest of the instalments should be paid.

7/1/4 The leased asset in the possession of the lessee is held by the lessee in a fiduciary capacity on behalf of the lessor. The lessee will not be held liable for any damage or destruction of the leased asset unless such damage or destruction is a result of misconduct or negligence on the part of the lessee. In this case, he is obliged to replace the asset if it is replaceable; otherwise, he is liable for the amount of the damage to be determined by valuation.

7/1/5 In case of the partial destruction of the leased asset in a manner that impairs the benefits expected from the leased asset, the lessee may terminate the Ijarah contract. Both he and the lessor may also agree to amend the rental in case of partial destruction of the leased property, if the lessee waives his right to termination. The lessor in this case is not entitled to rent for the period during which the lessee was not able to benefit from the asset unless the lessor makes it up (by agreement with the lessee) with a like benefit after the expiry of the period specified in the contract. [see para. 5/1/6]

7/1/6 In an *Ijarah Mawsufah fi al-Dhimmah* (contract for an unidentified asset undertaken by the lessor to be delivered according to the agreed specifications), the owner in cases of total and partial destruction must offer an alternative asset having a specification similar to that of the destroyed asset, unless otherwise agreed at the time. The Ijarah shall continue for the remaining time of the contract. If it is not possible to provide a substitute asset, the contract will be terminated. [see item 3/5]

7/1/7 If the lessee stops using the leased asset or returns it to the owner without the owner's consent, the rental will continue to be due in respect of the remaining period of the Ijarah, and the lessor may not lease the property to another lessee for this period, but must keep it at the disposal of the current lessee unless the lessee relinquishes to the lessor the remaining period of time, in which case the lease expires. [see item 7/2/1 below]

7/2 Termination, expiry and renewal of the Ijarah contract

7/2/1 It is permissible to terminate the lease contract by mutual consent but it is not permissible for one party to terminate it except in case of force majeure or there is a defect in the leased asset that materially impairs its use. Termination is also possible when one party secures an option to terminate the contract in which case the party who holds the option may exercise it during the specified period.

7/2/2 The lessor may stipulate that the Ijarah contract be terminated if the lessee does not pay the rent or fails to pay it on time.

7/2/3 An Ijarah contract does not terminate with the death of either party thereto. However, the heirs of the lessee may terminate the Ijarah contract if they can prove that the contract has become, as a result of the death of their legator, too onerous for their resources and in excess of their needs.

7/2/4 An Ijarah contract expires with the total destruction of the leased asset in the case of leasing a specific asset or with the inability to enjoy the usufruct owing to the loss of the benefit that the asset was intended to provide.

7/2/5 The two parties may terminate the Ijarah contract before it begins to run.

7/2/6 The lease expires upon the expiry of its term, but it may remain operative for a good cause, such as the late arrival to the place intended in the lease of transportation vehicles, and in the case of a late harvesting period for land leased for crop cultivation. The lease then continues with the rental based on the prevailing market value. An Ijarah may be renewed for another term, and such renewal may be made before the expiry of the original term or automatically by adding a provision in the new contract for such renewal when the new term starts, unless either party serves a notice on the other of its desire not to renew the contract.

8. Transfer of the Ownership in the Leased Property in Ijarah Muntahia Bittamleek

8/1 In Ijarah Muntahia Bittamleek, the method of transferring the title in the leased asset to the lessee must be evidenced in a document separate from the Ijarah contract document, using one of the following methods:

a) By means of a promise to sell for a token or other consideration, or by accelerating the payment of the remaining amount of rental, or by paying the market value of the leased property.

b) A promise to give it as a gift (for no consideration).

c) A promise to give it as a gift, contingent upon the payment of the remaining instalments.

In all these cases, the separate document evidencing a promise of gift, promise of sale or a promise of gift contingent on a particular event, should be independent of the contract of Ijarah Muntahia Bittamleek and cannot be taken as an integral part of the contract of Ijarah.

8/2 A promise to transfer the ownership by way of one of the methods specified in item 8/1 above is a binding promise by the lessor. However, a binding promise is binding on one party only, while the other party must have the option not to proceed. This is to avoid a bilateral promise by the two parties which is Shari'ah impermissible because it resembles a concluded contract.

8/3 In all cases of transfer of ownership by way of gift or sale, it is necessary, when the promise is fulfilled, that a new contract be drawn up, since the ownership to the property is not automatically transferred by virtue of the original promise document that was drawn up earlier.

8/4 In case the Ijarah contract is combined, through a separate document, with a gift contingent upon the condition that the remaining rent instalments be paid, the ownership to the leased property is transferred to the lessee if the condition is fulfilled, without the need for any other procedure to be adopted or a document to be signed. However, if the lessee's payment is short of even one instalment, the ownership to the property is not transferred to him, since the condition has not been fulfilled.

8/5 If the leased asset was purchased from the lessee before it was leased back to the lessee on the basis of Ijarah Muntahia Bittamleek, a (reasonable) period of time, between the lease contract and the time of the sale of the asset to the lessee, must have expired, to avoid the contract of 'Inah. This period must be long enough so that the leased property or its value could have changed. This shall

also apply to the case of early ownership of the asset where a sale contract is concluded during the Ijarah. [see para. 7/1]

8/6 Subject to item 8/8 below, the rules governing Ijarah must apply to the Ijarah Muntahia Bittamleek, i.e. when a promise is made by the lessor to transfer the ownership in the leased asset to the lessee. None of these rules should be breached under the pretext that the leased asset was bought by the lessor on the basis of a promise by the lessee that he would acquire it or that ownership of it would devolve upon him, or that he would pay rentals in excess of those payable in respect of a similar property which are similar in amount to the instalments of an instalment sale, or that local laws and conventional banking practices consider such a transaction as an instalment sale with a deferred transfer of the ownership.

8/7 Transfer of the ownership in the leased property cannot be made by executing, along with the Ijarah, a sale contract that will become effective on a future date.

8/8 If the leased asset is destroyed or if the continuity of the lease contract becomes impossible up to the expiry period without the cause being attributable to the lessee in either case, then the rental is adjusted based on the prevailing market value. That is, the difference between the prevailing rate of rental and the rental specified in the contract must be refunded to the lessee if the latter rental is higher than the former. This is to avoid loss to the lessee, who agreed to a higher rental payment compared to the prevailing rate of rental in consideration of the lessor's promise to pass the title to him upon the expiry of the lease term.

9. Date of Issuance of the Standard

This Standard was issued on 4 Rabi' I, 1423 A.H., corresponding to 16 May 2002 A.D.

Adoption of the Standard

The Shari'ah standard for Ijarah and Ijarah Muntahia Bittamleek was adopted by the Shari'ah Board in its meeting No. (4) held on 25-27 Safar 1421 A.H., corresponding to 29-31 May 2000 A.D.

In its meeting No. (8) held in Mecca on 28 Safar - 4 Rabi' I, 1423 A.H. corresponding to 11-16 May 2002 A.D., the Shari'ah Board readopted a resolution to reformat the Shari'ah rules for Ijarah and Ijarah Muntahia Bittamleek in the form of a Shari'ah standard.

Appendix (A)
Brief History of the Preparation of the Standard

In its meeting No. (1) held on 11 Dhul-Hajjah 1419 A.H., corresponding to 27 February 1999 A.D., the Shari'ah Board decided to give priority to the preparation of the Shari'ah rules for Ijarah and Ijarah Muntahia Bittamleek.

On Tuesday 13 Dhul-Hajjah 1419 A.H., corresponding to 30 March 1999 A.D., the Fatwa and Arbitration Committee decided to commission a Shari'ah consultant to prepare a juristic study and an exposure draft on the Shari'ah Rules for Ijarah and Ijarah Muntahia Bittamleek.

In its meeting held on 13-14 Rajab 1420 A.H., corresponding to 22-23 October 1999 A.D., the Fatwa and Arbitration Committee discussed the exposure draft of the Shari'ah Rules for Ijarah and Ijarah Muntahia Bitamleek, and asked the consultant to make the amendments in light of the comments made by the members.

The revised exposure draft of the Shari'ah Rules was presented to the Shari'ah Board in its meeting No. (3) held in Mecca on 10-15 Ramadan 1420 A.H., corresponding to 18-22 December 1999 A.D. The Shari'ah Board made further amendments to the exposure draft of the Shari'ah Rules and decided that it should be distributed to specialists and interested parties in order to obtain their comments in order to discuss them in a public hearing.

A public hearing was held in Bahrain on 29–30 Dhul-Hajjah 1421 A.H., corresponding to 4-5 April 2000 A.D. The public hearing was attended by more than 30 participants representing central Institutions, accounting firms, Shari'ah scholars, academics and others who are interested in this field. The members responded to the written comments that were sent prior

to the public hearing as well as to the oral comments that were expressed in the public hearing.

The Shari'ah Standards Committee and the Fatwa and Arbitration Committee held a joint meeting on 21-23 Muharram 1421 A.H., corresponding to 26-28 April 2000 A.D., to discuss the comments made about the Shari'ah Rules. The committee made the amendments which it considered necessary in light of the discussions that took place in the public hearing.

The Shari'ah Board in its meeting No. (4) held on 25–27 Safar 1421 A.H. corresponding to 29–31 May 2000 A.D., in Al-Madinah Al-Munawwarah discussed the amendments made by the Shari'ah Studies Committee and the Fatwa and Arbitration Committee, and made the amendments which it considered necessary. Some paragraphs of the standard were adopted in the name of Shari'ah Rules for Ijarah and Ijarah Muntahia Bittamleek by the unanimous vote of the members of the Shari'ah Board, while the other paragraphs were adopted by the majority vote of the members, as recorded in the minutes of the Shari'ah Board.

In its meeting No. (7) held on 9-13 Ramadan 1422 A.H. corresponding to 24-28 November 2001 A.D., in Makkah Al-Mukarramah, the Shari'ah Board decided to convert all Shari'ah rules for Investments and Financing to Standards and a committee was formed for this purpose.

In its meeting No. (8) held in Al-Madinah Al-Munawwarah on 28 Safar - 4 Rabi' I, 1423 A.H. corresponding to 11-16 May 2002 A.D., the Shari'ah Board adopted the reformatting of Shari'ah Rules for Ijarah and Ijarah Muntahia Bittamleek in the name of Shari'ah Standard No. (9) on Ijarah and Ijarah Muntahia Bittamleek. The committee did not make any changes to the substance.

The Shari'ah Standards Review Committee reviewed the standard in its meeting held in Rabi' II, 1433 A.H. corresponding to March 2012 A.D., in the State of Qatar, and proposed after deliberation a set of amendments (additions, deletions, and rephrasing) as deemed necessary, and then submitted the proposed amendments to the Shari'ah Board for approval as it deemed necessary.

In its meeting No. (39) held in the Kingdom of Bahrain on 13-15 Muharram 1435 A.H., corresponding to 6-8 November 2014 A.D., the Shari'ah Board discussed the proposed amendments submitted by the Shari'ah Standards Review Committee. After deliberation, the Shari'ah Board approved necessary amendments, and the standard was adopted in its current amended version.

Appendix (B)
The Shari'ah Basis for the Standard

Permissibility of Ijarah and Ijarah Muntahia Bittamleek

- Ijarah derives permissibility from the Qur`an, the Sunnah, consensus of Fuqaha and Ijtihad (reasoning).
- On the level of the Qur`an, Allah, the Almighty, says: ***{"said one of them 'O my father engage him on wages"}***,[3] and ***{"if you had wished, surely you could have exacted some recompense for it"}***.[4]
- The authority for the permissibility of Ijarah in the Sunnah is the saying of the Prophet (peace be upon him): *"Whoever hired a worker must inform him of his wages"*,[5] and his saying: *"Give a worker his wages before his sweat (body odour) is dried"*.[6]
- The permissibility of Ijarah also generated consensus among the legal community. The Ijarah is also acceptable by reasoning because it is a convenient means for people to acquire right to use assets that they do not own since not all people may be able to own tangible assets.
- The Ijarah Muntahia Bittamleek, on the other hand, is not different in its rules from an ordinary Ijarah, except that it is associated with a promise by the lessor to transfer ownership at the end of the Ijarah term. The permissibility of this form of Ijarah is confirmed by the resolution of International Islamic Fiqh Academy which explained the impermissible and the permissible forms of Ijarah Muntahia Bittamleek.[7]
- It must be noted that the permissible Ijarah Muntahia Bittamleek is different from hire-purchase as commonly practised by the conventional

(3) [Al-Qasas (The Narrative): 26].
(4) [Al-Kahf (The Cave): 77].
(5) This Hadith has been related by Ibn Majah in his *"Sunan"* [2: 817]; and Al-Haythami in *"Majam' Al-Zawa'id"* [4: 98].
(6) This Hadith has been reported by Ibn Majah in his *"Sunan"* [2: 817]; and Al-Tabrani in *"Al-Mu'jam Al-awsat"*; and Al-Haithami in *"Majam' Al-Zawa'id"* [4: 98].
(7) Resolution of the International Islamic Fiqh Academy No. 110 (4/12).

banks in the following respects. In hire-purchase, the terms and provisions of sale and leasing are applied to the subject matter at the same time, and subsequently the ownership of the subject matter is transferred to the lessee (buyer), once he pays the last instalment without the need for a separate contract for the transfer of ownership. In the permissible Ijarah Muntahia Bittamleek, on the other hand, the provisions governing Ijarah are applied to the leased asset until the end of the Ijarah term, after which the lessee obtains ownership of the asset in the manner explained in this Standard.

- It must be noted also that the Ijarah contract intended in this Standard is the lease of tangible assets (chattels or property), which is a contract giving a legal title to legitimate and identified usufruct for a defined period of time in exchange for a legitimate and determined consideration.

Promise to Lease an Asset

The basis for allowing the Institution to demand payment of money by a party who has promised to take the property as lessee is the need to confirm the commitment of the promissor. This is because a binding promise has financial implications if the promissor retracts the promise. The request for payment of a commitment fee is to cater for financial damage that the Institution may have incurred as a result of the promissor taking back the promise or defaulting in payment. The unified Shari'ah Supervisory Board of Al Baraka issued a Fatwa in respect to *Hamish Jiddiyyah* (security deposit) in Murabahah.[8] This ruling is also applicable to Ijarah.

Acquisition of the Asset to be Leased, or Its Usufruct, by the Institution

- The basis for not allowing the leasing of an asset that is not owned by the lessor is the Hadith that prohibits one from selling what he does not own,[9] and Ijarah proper is a sale of usufruct. The basis for allowing the leasing back of an asset to the person from whom the asset was acquired is because such a transaction does not involve any 'Inah sale.
- The basis for not allowing a simultaneous combination of Ijarah and sale is because making purchase contracts contingent upon leasing contracts is impermissible by an explicit text in the view of a number

(8) International Islamic Fiqh Academy Resolution No. 110 (4/12).
(9) Fatwa of Unified Shari'ah Board of Al Baraka No. (9/10).

of jurists. This is prohibited by a well-known Hadith which prohibits two sales in one sale.[10]

- The basis for the permissibility of sub-leasing when the lessor has allowed it is because the lessee has ownership of the usufruct by virtue of the Ijarah contract, in which case he is entitled to transfer such usufruct for consideration as he deems fit. The basis for impermissibility of sub-leasing when the lessor has not allowed it is because the ownership of usufruct by the lessee is limited in which case the lessee is obliged to consider any limitations on this ownership.
- The basis for the permissibility of leasing a property on the basis of specifications even if the lessor does not own it is that this will not lead to dispute, in which case it is similar to a Salam contract. However, in this case the lessor should not request advance payment of the rentals according to one of the views of the Shafi'is and Hanbalis.
- The basis for preferring that the agent who purchases on behalf of the Institution be someone other than the customer (lessee) is to avoid fictitious transactions and to demonstrate the genuine role of the Institution in making the usufruct of the asset available to the lessee.

Contract of Ijarah

- The basis for the binding nature of an Ijarah contract is because Ijarah is one of the contracts for transferring ownership that depends on an exchange of counter-values. The Shari'ah principle is that these contracts are binding because of the Saying of Allah, the Almighty: ***{"... Fulfil (your) obligations..."}***.[11] The basis for allowing cancellation of an Ijarah contract due to contingencies is because without the right to cancel the Ijarah contract the lessee would waste money by paying rent for unneeded usufruct due to an event of which he did not contribute to the occurrence.
- The basis for requiring a designated term for the lease is because without such a designated term there would be an uncertainty that might lead to dispute. The basis for allowing an Ijarah contract take effect based on

(10) The Hadith has been related by Abu Dawud in his *"Sunan"* [3: 283].

(11) The Hadith has been related by Ahmad, Al-Nasa'i and Al-Tirmidhi. Al-Tirmidhi autheticated the Hadith: see, *"Nayl Al-Awtar"* [5: 248].

future events is because Ijarah is, unlike a sale contract, a contract that involves time and for this it is relevant that it be contingent on future events.

- The basis for the permissibility of obtaining 'Arboun (Earnest Money) to secure performance is the practice of Umar Ibn Al-Khattab (may Allah be pleased with him) in the presence of some companions of the Prophet (peace be upon him). This practice is also permitted by Imam Ahmad. A resolution has been issued in connection with the permissibility of 'Arboun (Earnest Money) by the International Islamic Fiqh Academy.(12)
- The basis for the impermissibility of re-leasing after the lease of the asset is that under the first contract, the usufruct of the asset no longer belongs to the owner, and a new contract may not be signed with another lessee before the contract with the first lessee is terminated. Hence, this form of Ijarah is not suitable as an investment instrument, because it constitutes an impermissible sale of the rent receivable pursuant to providing new lessees with an asset already leased out to the existing lessee. The form just described is different from the transfer, by the owner, of the ownership of the leased assets to an investor, so that the latter takes his place, wholly or partially, with regard to the ownership of all or some parts of the assets, as well as in the ownership of the usufruct of, and entitlement to his share of the rent from, those assets. Al Baraka Forum has issued a resolution disallowing multiple leases of the same asset after the first Ijarah contract.(13)
- The basis for allowing successive leases on the same specified usufruct of a particular asset without specifying a particular period for a particular person is because the usufruct -in line with the term assigned to each party- can accommodate the parties. The justification for not allowing a specific term for each person is that each party will know the term to which he is entitled in his turn and because their applications are considered in order. This rule was supported by a resolution of Al Baraka Forum.(14)

(12) [Al-Ma`idah (The Table): 1].
(13) Resolution No. 72 (3/8) in respect of 'Arboun (Earnest Money).
(14) Resolution No. (13/4).

- The basis for the requirement that incorporating co-lessees must take place before any sub-lease contract is signed is because sub-leasing the property means the sub-lessor no longer owns the usufruct, and thus he would be leasing out a benefit of the usufruct that he does not own, which is not permissible in Shari'ah as stated earlier. The jurists have considered a bankrupt lessor -a person who leases things he does not own- among those who must be restricted in using their property.

Subject Matter of Ijarah

- The basis for the requirement that the leased asset must be capable of being used while preserving the asset is that the subject of a lease is usufruct and not the asset, as leasing is not possible for things that perish by use. The basis for the requirement that benefit from Ijarah must be permissible is that leasing an asset that will be used in impermissible way makes the lessor an accomplice in doing evil and this is prohibited as per the saying of Allah, the Almighty: ***{"Help you one another in Al-Birr and At-Taqwa (virtue, righteousness and piety)"}***.[15]
- The basis for the impermissibility of stipulating a defect exclusion clause in respect to the leased asset is that such a condition defeats the purpose of the contract, which is exchange of usufruct for rentals. If the usufruct is partially or wholly impaired, the receipt of the rentals by the lessor becomes a form of unjust enrichment. The resolution of the International Islamic Fiqh Academy has declared that the lessor must accept responsibility for any destruction or impairment of the leased asset insofar as these events are not sustained as a result of misconduct or negligence on the part of the lessee.[16] The Fatwa of the unified Shari'ah Supervisory Board of Al Baraka states that the lessor is not entitled to exclude his liability in respect of defects in the leased asset.[17]
- The reason why the lessor may not stipulate that the lessee will undertake the major maintenance of the leased asset is that this condition defeats the purpose of an Ijarah contract. Again, it is the duty of the lessor to ensure that the usufruct is intact, and this is not possible unless the asset is maintained and kept safe so that the lessor may be entitled

(15) Resolution No. (10/1).
(16) [Al-Ma`idah (The Table): 2].
(17) International Islamic Fiqh Academy Resolution No. 13 (1/3).

to the rentals in consideration for the usufruct. The unified Shari'ah Supervisory Board of Al Baraka issued a fatwa supporting this.[18]

- The reason why insurance expenses must be borne by the lessor is that the owner of the asset is responsible for insuring it, and the lessor is the owner. This is supported by the resolution issued by the International Islamic Fiqh Academy.[19]
- The basis for the permissibility of using a certain benchmark or price index to determine rentals of subsequent periods after the expiration of the first period of an Ijarah contract is that the rentals will subsequently be known. This is similar to the principle of *Ujrat al-Mithl* (prevailing market rate of rental) and does not lead to dispute. Again, using a benchmark to determine the rentals is to the benefit of all parties since there is possibility of rental fluctuation that may be in favour of either the lessee or the lessor in view of the fact that the contract remains binding on both parties throughout its term. This rule is supported by a Fatwa issued during Al Baraka's 11th Forum.
- The basis for the permissibility of restructuring the rentals for the future periods is that such an act is deemed to create a new contract for a new term for which the rentals are not yet due. Hence, the rentals are not regarded as a debt, in which case the prohibition of rescheduling rentals in return for higher payment is not applicable to this. However, increasing previously agreed rentals in exchange for a deferred period of payment is a form of Riba.

Guarantees and Treatment of Ijarah Receivables

- The basis for the permissibility of obtaining guarantees for payment is that this is not contrary to the purpose of an Ijarah contract. Rather guarantees are relevant to credit transactions because they secure performance.
- The basis for the permissibility of a payment acceleration clause is the saying of the Prophet (peace be upon him): *"Muslims are bound by the conditions they made"*, and because payment on a deferred basis is the right of the lessee (the debtor as to rentals), and the lessee may, based

(18) Fatwa of the Unified Shari'ah Board of Al Baraka No. (1/97).
(19) Fatwa of the Unified Shari'ah Board of Al Baraka No (9/9).

on agreement, choose to pay before time and relinquish the deferral of the date of payment entirely. The lessee may also agree to a stipulation that bases acceleration of payment on the event of default in payment.

- The basis of the prohibition of increasing the amount of lease receivables in exchange for a deferral of payment is because this is a form of Riba.
- The basis for the permissibility of stipulating that a solvent debtor should undertake to make a payment to charity in case of default is that this is similar to an undertaking to make a donation that is approved by the Maliki scholars, notably Abdullah Ibn Nafi' and Muhammad Ibn Ibrahim Ibn Dinar.[20]

Changes to the Ijarah Contract

- The basis for allowing the lessor to sell the leased asset to a third party without the consent of the lessee is that the lessor owns the asset and is acting within the limits of his ownership without affecting the right of the lessee that is materialised in the usufruct. If the Ijarah expires, enabling the buyer to take possession of the asset is sufficient to discharge the seller from any responsibility as to delivery in which case the buyer will own the asset excluding the right of the lessee to the usufruct which is attached to the asset even if the ownership is transferred. The Shari'ah Supervisory Board of Al Rajhi Banking and Investment Corp.,[21] and the Shari'ah Supervisory Board of the Jordan Islamic Bank[22] have issued a resolution in support of this ruling.
- The basis for the termination of the lease contract due to a total destruction of the leased asset is that the rent is in consideration of the benefit of the leased asset and if the latter is destroyed, there is no justification for the payment of the rental.
- The basis for the entitlement of the lessor to the rentals even though the lessee returns the leased asset to the owner or stops using it is that Ijarah is a binding contract that cannot be terminated unilaterally by the lessee.

(20) International Islamic Fiqh Academy Resolution No. 13 (1/3).
(21) See: Al-Hattab, *"Tahrir Al-Kalam Fi Masa`il Al-Iltizam"* (pp. 170). This view appeared in the Fatwas of Kuwait Finance House.
(22) Resolution of the Shari'ah Board of Al Rajhi Banking and Investment Corp. No. (11).

- The basis for the permissibility of terminating the lease contract in case of intervening contingencies or force majeure is that there is a pressing need which calls for this. This is because if the contract were to be binding in spite of such contingencies, then a person with a valid excuse may incur loss that was not a result of a contract. The Shari'ah Supervisory Board of the Kuwait Finance House[23] and the unified Shari'ah Supervisory Board of Al Baraka[24] have issued a supporting Fatwa in this regard.
- The basis for the permissibility that the lessor may stipulate that an Ijarah contract be terminated due to non-payment of rental by the lessee is that contractual stipulations are primarily valid and enforceable. This stipulation does not legalise impermissible acts or invalidate permissible acts. Therefore, the permissibility of this stipulation comes under the prophetic Hadith stating: *"Muslims are bound by the conditions they made except a condition that legalises impermissible act or invalidates permissible act"*.[25]
- The basis of the rule that Ijarah does not terminate with the death of either party thereto is that the subject-matter of the contract is the asset and as long as the asset is available the Ijarah contract remains unaffected. The basis for the right of the lessee's heirs to terminate the Ijarah if they can prove that the contract has become too onerous for their resources is to avoid inflicting damage on the heirs. This exceptional ruling is taken from the Maliki School of law since it serves the interests of the lessee. The heirs of the lessor may not terminate the Ijarah in the event of the death of the lessor because there is no potential damage to them, as they will receive the rentals for the remainder of the term of the contract.

Transfer of the Ownership in the Leased Asset in Ijarah Muntahia Bittamleek

- The basis of the rule that the documents of the lessor's promise to sell and the methods of transfer of ownership be separated from the Ijarah contract is to ensure that the obligations and liabilities are not

(23) Fatwas of the Shari'ah Board of Jordan Islamic Bank No. (18).
(24) Fatwa No. (233) and (253).
(25) Fatwa No. (9/9) of the Unified Shari'ah Board.

linked to each other. The International Islamic Fiqh Academy has issued a resolution in this regard.[26]

- The basis for the rule that the promise of a client to take an asset acquired by the Institution on lease is binding is that the Institution has acquired the asset in order to lease it to the client due to the promise. Therefore, the rule that the promise to take the asset on lease is binding will protect the promisee.
- The basis for not allowing bilateral promises is that the resemblance of these promises to a contract, i.e. a contract is effected before taking ownership of the subject matter of the contract. The International Islamic Fiqh Academy has issued a resolution in this regard.[27]
- The basis for the permissibility of a gift contingent upon the expiry of the Ijarah term is that a conditional gift is valid. The Prophet (peace be upon him) sent a gift to Negus (the former emperor of Ethiopia) on condition that he was alive at the time of the arrival of the messenger.[28] The basis for the permissibility of leasing an asset to the person from whom it is purchased by way of Ijarah Muntahia Bittamleek on condition that the parties observe the lapse of a period of time is that this prevents the contract from becoming a 'Inah transaction. This is because the physical changes to the asset or changes in the value of the asset during this period give it the economic characteristics of a different asset.
- The basis for the requirement that all the rules prescribed for an ordinary lease are applicable to Ijarah Muntahia Bittamleek is that a mere promise to transfer ownership does exclude the contract from becoming an Ijarah contract or from the applicable rules. This requirement is necessary in order to prevent a linking of contracts (the sale contract and lease

(26) This Hadith has been related by a number of companions. It was also related by Ahmad in his *"Sunan"* [1: 312]; Ibn Majah in his *"Sunan"* through a good chain of transmission [2: 783], Mustafa Al-Babi Al-Halabi edition, Cairo, 1372 A.H./1952 A.D.; Al-Hakim in *"Mustarak"*, Edition of Hyderabad, India, 1355 A.H.; Al-Bayhaqi in his *"Sunan"* [6: 70 and 156] and [1: 133], Edition of Hyderabad, India, 1355H; and Al-Daraqutni in his *"Sunan"* [4: 228] and [3: 77], Dar Al-Mahasin Lil-Tiba'ah edition, Cairo, 1372 A.H./1952 A.D.

(27) Intenatioanl Islamic fiqh Academy Resolution No. 13 (1/3).

(28) The Hadith has been related by Ibn Hibban: *"Sahih Ibn Hibban"* [11: 516]; and Ahmad in his *"Musnad"* [6: 404].

contract). The International Islamic Fiqh Academy has issued a resolution in support of this ruling.[29]

- The basis for the rule that ownership cannot be made in contingent on a future date is that a sale contract cannot be dependent on a future date, as the term 'sale' means that its effect (transfer of ownership) immediately takes place.
- The basis for allowing recourse to the prevailing market rate of rental when the transfer of ownership becomes impossible without any cause attributable to the lessee is to protect the lessee against any loss as the lessee has paid more than the prevailing rate of rental in order to acquire title to the asset. If this acquisition of title becomes impossible, then the rental must be adjusted retrospectively to the prevailing market rate. This ruling is analogous to the principle that the price must be discounted when a sold crop has suffered damages due natural calamities.

(29) See Note (25).

Appendix (C)
Definitions

Ijarah

The term Ijarah as used in this standard means leasing of property pursuant to a contract under which a specified permissible benefit in the form of a usufruct is obtained for a specified period in return for a specified permissible consideration.

Ijarah Muntahia Bittamleek

One of the forms of Ijarah used by Islamic financial Institutions is Ijarah Muntahia Bittamleek. This is a form of leasing contract which includes a promise by the lessor to transfer the ownership in the leased property to the lessee, either at the end of the term of the Ijarah period or by stages during the term of the contract, such transfer of the ownership being executed through one of the means specified in the Standard.

Shari'ah Standard No. (23)

Agency and the Act of an Uncommissioned Agent (Fodooli)

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

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

Preface

The purpose of this Standard is to clarify the Shari'ah rulings that govern the activities of Islamic financial Institutions (Institution/Institutions)[1] in appointing agents or becoming agents of others, whether in arranging contracts and disposing of property, or undertaking procedural tasks, or managing/investing funds. The Standard also indicates the underlying conditions of Agency, elaborates on its various forms, spells out its repercussions, and outlines the responsibilities of both the Principal and the Agent. Moreover, the Standard aims to embark upon the Act of an Uncommissioned Agent "Fodooli" and the Shari'ah rulings thereon.

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

Statement of the Standard

1. Scope of the Standard

This Standard covers agency and the acts of an uncommissioned agent in concluding contracts on financial transactions (such as sale, Ijarah and compensatory reconciliation), disposing of assets, providing services and conducting practical acts such as receipt, payment and delivery. The Standard also covers areas such as fund management, real estate and investment agency. However, it does not cover agency and the act of an uncommissioned agent in several other affairs of life such as worshipping (like Zakah, for which there is a separate standard), personal affairs, penalty affairs, legal prosecution/advocacy, and documentary credits (which have also been dealt with in a separate standard).

2. Agency

2/1 Definition, permissibility and characteristics of agency

2/1/1 Agency is the act of one party delegating the other to act on its behalf in what can be a subject matter of delegation and it is, thus, permissible.

2/1/2 Agency is, basically, a non-binding contract for both the parties thereto. However, it may sometimes become a binding contract. [see 3/4 below]

2/2 Basic elements of agency

2/2/1 The basic elements of agency include the form, the subject matter of agency, and the two parties to the contract (the principal and the agent).

2/2/2 The form of agency comprises any act that customary practices traditionally consider a delegation of the right to acting by someone on behalf the other. Such delegation comprises of

offer and acceptance which has no standard form of wording and may be expressed through utterance of words, writing, messaging or gesture. In accepting non-paid agency, silence is also considered as sufficient acceptance, while a negative response is indicative of rejection of agency.

2/2/3 Agency may take place in any of the following forms:

2/2/3/1 Immediate Agency, as usually the case, where the contract becomes effective as soon as it is entered into.

2/2/3/2 Conditional Agency: where the validity of the contract is made subject to fulfillment of a certain condition, for instance when a debtor agrees to put his own assets under the management of his creditor in case of default.

2/2/3/3 Future Agency: where the contract becomes valid only at a specific date in the future.

2/2/3/4 Agency, whether free or limited, shall be subject to specific conditions. In case of free agency, consideration should be given to customary practices, interest and the state of the principal.

2/2/4 While conditionality and limitation may be resorted to in concluding agency contracts, they may also be confined to the disposal of the subject matter of agency. In this case, though the agency contract is immediately effective, disposal is made subject to the fulfillment of a specific condition, such as resorting back to the principal before disposal. The conditions set by the principal should be observed such as offering him a guarantee or lien.

2/2/5 The subject matter of agency is for what the contract is entered into. [see item 3/3]

2/2/6 The two parties to the contract are the principal and the agent. [see items 3/1 and 3/2]

3. Conditions on the Agency Parties

3/1 Conditions on the principal

3/1/1 The principal should possess legal capacity to enter into contract.

3/1/2 The principal should have the right to dispose of the asset in question. Agency, therefore, is not acceptable from a legally incapable person like a lunatic or an indiscriminating minor. A partially capable person, such as a discriminating minor, may appoint an agent for matters that result in absolute benefit to him, such as accepting donations from others, but he cannot appoint an gent in harmful matters like making donations. In acts that may be harmful or useful, such as buying and selling, a partially capable person may appoint an agent, but the acts of that agent remain pending the approval of the principal's guardian or whosoever enjoys the similar right on behalf of the principal.

3/2 Conditions on the agent

3/2/1 The agent should have full legal capacity, because a lunatic or an indiscriminating minor cannot become an agent. A discriminating minor may become an agent, provided that all the contractual commitments are the sole responsibility of principal.

3/2/2 The agent should be aware of his status as an agent. When somebody acted on behalf of another and later on, the former comes to know that he is an agent of the latter, the preceding act does not fall under the agency contract. If, however, he does so with the intention of performing the act regardless of agency, the case should be subjected to the rules governing the act of an uncommissioned agent (*Fodooli*). [see item 8]

3/3 Conditions on the subject matter of agency

3/3/1 The subject matter of agency should be known to the agent. However, minor *Jahalah* (unknowability) that does not lead to

dispute, or temporary uncertainty, may be dispensed with. It can also be overlooked when, in absolute agency, the principal authorizes the agent to channel the funds in any form of investment. Nevertheless, the agent should observe the interest of the principal, as well as the norms and customary practices if necessary.

3/3/2 It should be owned by the principal, or he has the right of deposing thereof.

3/3/3 It should be something that can be disposed of through agency. This includes all types of financial contracts and dealings that a person can perform personally. Any contract that a person is permitted by Shari'ah to be involved in personally can be performed through agency.

It should not involve a Shari'ah-banned practice, like trading in impermissible commodities or committing usurious lending.

4. Types of Agency

4/1 Agency may take the following forms:

4/1/1 Specific versus general agency. General agency includes all methods of disposing of assets provided that the interest of the principal and the customary practices are well observed. Disposal of assets here does not include making donations, unless the principal authorizes the agent to do so.

4/1/2 Limited versus absolute agency. Absolute agency is bound by customary practices and the interest of the principal. It is not permissible in absolute agency to sell at less or buy at more than the market price, nor is it permissible to perform barter and deferred payment sales, except with the prior consent of principal.

4/1/3 Paid versus non-paid agency. [see item 4/2]

4/1/4 Binding versus non-binding agency. [see item 4/3]

4/1/5 Temporary versus continuous agency. [see item 4/4]

4/2 Paid agency

4/2/1 Paid agency is permissible in Shari'ah, whether remuneration is explicitly stipulated in the contract or ascertained in accordance with the customary practices, as when the agent doses provide such service except for remuneration.

4/2/2 When agency is paid, it falls under the Shari'ah rulings on Ijarah. [see item 4/3]

4/2/3 The amount payable as remuneration for agency should be known, whether in lump sum or as a share of a specific amount of income. It may also be defined in terms of an amount of income to be known in the future, as when remuneration is linked to an indicator that may be quoted at the beginnings of different intervals of time. However, it is not permissible to leave remuneration for agency undetermined and allow the agent to take an unspecified share from the entitlements of the principal.

4/2/4 When remuneration for agency is not specified, it may be measured in terms of the prevailing market rate for similar effort.

4/2/5 Remuneration for agency may be any gain in excess of a specific amount of output of the operation, or a share of the output.

4/2/6 A certain share of the output may be added to the specific remuneration of the agent, as a motivation.

4/2/7 When the agent, for no reasonable excuse, refrains from carrying on agency that he has been paid for, and the work he has done was beneficial, he becomes entitled to the remuneration commensurate with the part of work done, and within the limits of the contract value for that part of work. The agent in this case is bound to indemnify the principal for any actual loss resulting from his refusal to continue the work.

When the principal, for no reasonable excuse, forces the agent to discontinue the work before the end of the agency period,

the agent becomes entitled to the full remuneration agreed upon.

When the principal, for a valid reason, forces the agent to discontinue the work before the end of the contract, the agent becomes entitled to remuneration for that part of work he has already performed.

4/2/8 Damage of the subject matter of agency does not relieve the principal from paying remuneration to the agent for the part of the work the latter has already performed. When the damage occurs because of misconduct or negligence of the agent, he is bound to indemnify the principal for it.

4/3 Binding agency

Agency is, basically, not binding, because each of the two parties has the right to revoke the contract without denying its effects that may continue after revocation. However, agency becomes binding in the following cases:

4/3/1 When it involves rights of others, as when the mortgagor appoints the mortgagee as an agent, or when the mortgagor is authorized to seize the mortgaged asset or sell it on maturity. Agency in the latter case is binding to the mortgagor (the debtor). A further example of binding agency is a case when the owner of an income-generating asset assigns the collection of his entitlements to an agent manager.

4/3/2 When agency is a paid agency. [see item 4/2]

4/3/3 When the agent commences tasks that cannot be discontinued or phased out without causing injury to him or to the principal. Agency in this case remains binding until it is possible to suspend the work, or phase it out without causing injury to any of the two parties.

4/3/4 When the principal or the agent undertakes not to revoke the contract within a certain period.

4/4 Temporary agency

4/4/1 Basically, agency has no time limit beyond which the contract becomes no longer valid, because the agent can be terminated at any time. The two parties, however, may agree on a certain period after which the agency becomes invalid without a request from any of them to revoke the contract.

4/4/2 The effect of specification of a time limit for agency is confined to restrain the agent from commencing new operations subsequently.

4/4/3 Unless the contract stipulates otherwise, the agent may commence new operations during the contract period even if the effects of such operations will succeed the period of the contract.

5. Commitments of the Principal and the Agent

5/1 Commitments of the principal

5/1/1 In contract of procurement agency, the price and other expenses should be borne by the principal. Besides the price of purchased commodity, the principal should reimburse the agent expenses such as those of transportation, storage, taxation, maintenance and insurance. In paid agency, such expenses should not be stated in the contract as payable by the agent now or in the future.

5/1/2 In paid agency, the principal should pay the agent the amount of remuneration agreed upon in the contract. [see item 4/2]

5/2 Commitments of the agent

The agent is considered as a trustee in holding the asset in question, and therefore, he is not bound to indemnify the principal for that asset in case of damage. He shall be held responsible for indemnity only when the damage results from his own misconduct, negligence or breach of terms or stipulations of the contract. Breach of contract for this purpose does not include acts that serve the interest of the

principal, like selling at a higher or buying at a lower price. In this regard, Shari'ah Standard No. (5) on Guarantees indicates under item 2/2/2 the following:

"It is not permissible to combine agency and personal guarantees in one contract at the same time (i.e. the same party acting in the capacity of an agent on one hand and acting as a guarantor on the other hand), because such a combination conflicts with the nature of these contracts. In addition, a guarantee given by a party acting as an agent in respect of an investment turns the transaction into an interest-based loan, since the capital of the investment is guaranteed in addition to the proceeds of the investment, (i.e. as though the investment agent had taken a loan and repaid it with an additional sum which is tantamount to Riba). But if a guarantee is not stipulated in the agency contract and the agent voluntarily provides a guarantee to his principals independently of the agency contract, the agent becomes a guarantor in a different capacity from that of agent. In this case, such an agent will remain liable as guarantor even if he is discharged from acting as agent".

6. Stipulations on the Agent

6/1 Performing deals with one's self and relatives

6/1/1 When an agent conducts deals with his ascendant or descendant relatives, who are neither under his guardianship, nor are the agent's spouse, the deal is permissible unless it encompasses injustice or favoritism. In case of deals that involve relatives who are under the guardianship of the agent, or deals that involve the agent's spouse, the agent should obtain the consent of the principal.

6/1/2 An agent should not conduct deals with his own self or with his son/daughter who is still under his guardianship, or with his partner (*Sharik*) in the same contract.

6/1/3 The agent should not act for both parties to the contract.

6/1/4 An agent may purchase what he has bought for the principal, by way of offer and acceptance. The deal should be concluded

in such a way that the guarantees stemming from the agency contract and the sale contract are kept separate. After the completion of the conclusion of the sale contract, the commodity becomes under the guarantee of the purchaser/agent. [see Shari'ah Standard No. (8) on Murabahah – item 3/1/5]

6/2 Monitoring of the provisions and rights of the contract

Monitoring the provisions of contract is the responsibility of principal, whereas monitoring the activities stipulated in the contract (except donations that should be assigned to the principal) is the responsibility of agent. Nevertheless, the principal, by virtue of ownership, may pursue the agent's activities.

6/3 Breach of contract stipulations

6/3/1 When the agent breaches the contract in a way that does not serve the interest of the principal, the latter is free to maintain the contract or declare it invalid. Breach of the contract on the part of the agent may relate to the subject matter of agency or part thereof, the price, on spot or deferred payment, possession (purchase), or transfer of ownership (sale). [see items (8) and 5/2]

6/3/2 When the agent breaches the contract by purchasing at a price that exceeds both the market price and the price set forth by the principal, he should compensate the principal for the difference between the purchase price and the market price. Similarly, if the breach is by selling at less than the price specified by the principal, compensation should be for the difference between the selling price and the market price. Hence, the case here is similar to what happens in Mudarabah or investment agency whereby selling is stipulated to take place for a profit not less than a specified proportion. And hence, the agent (or the Mudarib) doesn't guarantee that proportion, but his guarantee is limited to any amount less than the price of a similar fungible good.

6/4 Appointing a sub-agent

The agent has no right to appoint a sub-agent except with the permission of the principal. Once a sub-agent is appointed, his termination does not spontaneously follow the termination of the first agent, but the principal can terminate him.

6/5 Appointing more than one agent

When more than one agent are appointed in the same contract, none of them should become the sole decision-maker unless with the authorization of principal. If they have been appointed by separate contracts, each of them has the right to discharge their responsibilities independently, unless the principal requires joint action from them.

7. Expiry of Agency

7/1 The agency contract expires in the following cases:

7/1/1 The contract expires when the principal or the agent dies or loses legal capacity or when the Institution undergoes bankruptcy or liquidation.

7/1/2 When the principal terminates the agent or the latter resigns. In case of termination, the principal has to inform the agent [see item 4/2/7], for compensation of loss resulting from refusal by the agent to continue the work, or forced discontinuation of work imposed by the principal before the expiration of contract or agency term, in regard to the consequent remuneration or damage compensation.

7/1/3 When the agent completes the work assigned to him in fixed-task agency or the principal performs the task in question.

7/1/4 When the principal no longer owns the asset in question or the principal has lost the right of disposing thereof. Agency also expires if the principal has performed the work, or the subject matter of agency no longer exists.

7/1/5 At the occurrence of the incidence that has been stipulated for ipso facto expiry of the agency.

7/1/6 At the expiry of the contract term in temporary agency. In this case, the contract may be extended to the required term when necessary. [see item 4/3]

7/2 Interminable agency remains effective even after the death of the principal or liquidation of the Institution. It continues up to the end of the subject matter of agency.

8. Act of an Uncommissioned Agent (Fodooli)

8/1 An uncommissioned agent (Fodooli) is a person who discharges (in the absence of any need or urgency) the affairs of others without being an agent or having a right to do so by virtue of Shari'ah. The deal becomes subject to the rulings on the Fodooli, even when the acts of a real owner makes him appear an agent.

8/2 The approval or denial of a contract concluded by an uncommissioned agent is subject to the discretion of the owner. Approval of such contract by the owner should also precede revocation of the contract by either of the two parties; otherwise, a new contract has to be initiated. If the owner of the property does not approve the act of the uncommissioned agent, the act becomes binding to the latter, if he did not declare at the time of signing the contract that he had no authority.

8/3 The rulings on the uncommissioned agent are applicable to all financial contracts, including compensatory contracts like sale, purchase, rent and hiring contracts, donations by way of gift, and investment agency contracts.

8/4 When the owner of the asset approves the act of the uncommissioned agent, the contract becomes effective, and subject to all rulings on agency. The approval shall be retroactively effective, based on the date of such an act.

9. Date of Issuance of the Standard

This Standard was issued on 23 Rabi' I, 1426 A.H., corresponding to 30 April 2005 A.D.

Adoption of the Standard

The Shari'ah Board adopted the Shari'ah Standard on Agency and the Act of An Uncommissioned Agent in its meeting No. (14) held in Dubai on 21 – 22 Rabi' I, 1426 A.H., corresponding to 30 April – 2 May 2005 A.D.

Appendix (A)
Brief History of the Preparation of the Standard

The Shari'ah Board decided in its meeting No. (10), held on 2–7 Rabi' I, 1424 A.H., corresponding to 3–8 May 2001 A.D., in Al-Madinah Al-Munawwarah to issue a Shari'ah Standard on Agency and the Act of Uncommissioned Agent.

On 17 Sha'ban 1423 A.H., corresponding to 13 October 2002 A.D., the Shari'ah Standards Committee decided to commission a Shari'ah consultant to prepare a draft standard on Agency and the Act of Uncommissioned Agent.

In its meeting No. (10) held on Friday and Saturday 26-27 Safar 1425 A.H., corrsponding to 16-17 April 2004A.D., in the Kingdom Of Bahrain, the Shari'ah Standards Committee (2) discussed the Shari'ah study and advised the consultant to make necessary changes in light of the discussions and observations of its members.

In its meeting No. (11) held on Wednesday 28 Rabi' II, 1425 A.H., corrsponding to 16 June 2004 A.D., in Dubai (U.A.E), the Shari'ah Standards Committee (2) discussed the draft Standard on Agency and the Act of Uncommissioned Agent (Fodooli) and introduced some changes thereto in light of the discussions and observations of the members.

Once again, the committee discussed the draft standard in its meeting held on 24–25 Rajab 1425 A.H., corresponding to 9-10 September 2004 A.D., and made further changes in light of the discussions and observations of its members.

The revised draft of the standard was then submitted to the Shari'ah Board in its meeting No. (13) held in Makkah Al-Mukarramah on 26-30

Sha'ban 1425 A.H., corresponding to 10–14 October 2004 A.D. The Board made some changes in the document and decided to send the amended document to a number of experts for their comments before discussing it in a public hearing.

A public hearing was held in the Kingdom of Bahrain on 15 Safar 1426 A.H., cooresponding to 25 March 2005 A.D., and attended by more than 35 participants representing central banks, financial Institutions, accounting firms, Shari'ah scholars, academics and other concerned parties. Several comments were made before and after the public hearing. Some members of the Shari'ah Standards Committees (1) and (2) responded to the quires made during the session.

In the meeting of the Shari'ah Standards Committees (1) and (2), held in the Kingdom of Bahrain on 15-16 Safar 1426 A.H., corresponding to 25-26 March 2005 A.D., the comments made during the public hearing were discussed and some changes were made to the document.

The Shari'ah Board convened its meeting No. (14) on 21–23 Rabi' I, 1426 A.H., corresponding to 30 April - 2 May 2005 A.D., held in Dubai (U.A.E) and adopted the Standard.

Appendix (B)
The Shari'ah Basis for the Standard

- Permissibility of agency by Shari'ah is demonstrated in the noble Qur`an, where Allah, Exalted be He, says: ***{"...So send one of you with this silver coin of yours to the town, and let him find out which is the good lawful food..."}.***[2] Similitude of this incidence to agency is that the one who was sent to the town to buy the food was the agent of the others.[3] In Sunnah, a Hadith was narrated by Urwah Al-Bariqi (may Allah be pleased with him) who said that the Prophet (peace be upon him) had given him one dinar to purchase a sacrificial sheep for the Prophet,[4] an incidence that involves agency. As regards to Ijma' (consensus of Fuqaha), the author of the *"Al-Bahr Al-Zakhkhar"* and others have demonstrated permissibility of agency. Also, in common sense agency is well demonstrated in terms of the help of others that one may sometimes need, especially for things that he cannot do himself.[5]
- Permissibility of initiating agency in any wording which indicates initiation thereof is based on the fiqh principle that "What matters in contracts are intentions and meanings rather than wording and constructions". Therefore, whatever indicates delegation, which is the essence of agency, is acceptable for initiating the contract. The underlying reason for consideration of silence as acceptance in case of non-paid agency is that acceptance in this case is considered to have been given implicitly[6]. Effectiveness of the agency contract can be linked to fulfillment of a certain condition or to a future date because agency is delegation of power rather than an act of ownership

(2) [Al-Kahf (The Cave): 19].
(3) Related by Al-Bukhari, Abu Dawud and Al-Tirmidhi: *"Al-Talkhis Al-Habir"* [3: 304].
(4) *"Nayl Al-Awtar"* [5: 352]; *"Fath Al-Qadir"* by Ibn Al-Humam [6: 554]; *"Al-Mughni"* by Ibn Qudamah [5: 203]; and *"Al-Bahr Al-Zakhkhar"*.
(5) *"Al-Bahr Al-Ra`iq"* by Ibn Nujaym [7: 153].
(6) *"Al-Minhaj"* by Al-Nawawi [2: 164]; and *"Fath Al-Qadir"* [6: 553].

transfer that could be required immediately. On the contrary, a person may need to tie delegation to the occurrence of a certain incidence, or to a specific date in the future.

- The principal shall possess the right of disposing of the asset in question because the agent is going to derive such right from him; hence the former cannot delegate a right that he does not own[7].
- As for the detailed rulings pertaining to partial legal capacity of the agent, these rulings hold true for all dealings including agency.
- The ruling that agency should be known to the agent is manifested in the fact that knowledge in this case is a necessity for completion of the process of offer and acceptance, and hence distinction between a real agent and an uncommissioned agent.
- Imposition of four conditions on the subject matter of agency is necessary to facilitate conclusion and validity of the contract that cannot be attained without these four conditions namely: existence of the asset, asset ownership by the principal, possibility of disposing of the asset through agency and the absence of any Shari'ah restriction that prevents the deal.
- Permissibility of paid agency stems from the fact that agency is a useful work for which the agent has the right to ask remuneration. An agent who is known to be providing agency services only against payment is entitled to remuneration even when remuneration is not explicitly mentioned in the contract, because a customary practice is acceptable as long as it does not encounter a Shari'ah restriction. Non-paid agency is also permissible because it is considered, in this case, as a form of donation.
- The justification for the clauses relating to remuneration of the agent is that such clauses are essential to make remuneration well known at either the time of the contract conclusion or in the future. Temporary uncertainty about the exact amount of the remuneration is overlooked because knowledge of the amount in the future will leave no room for dispute.[8] Permissibility of adding a certain share of the profit to the principal remuneration rests on the fact that such addition does not distort knowledge of the principal

(7) *"Al-Lubab"* by Al-Maydani [2: 139].

(8) *"Al-Insaf"* [5: 403]; *"Al-Rawdah"* by Al-Nawawi [4: 301]; *"Al-Khurashi"* [7: 5]; *"Al-Fatawa Al-Hamidiyyah"* [1: 324]; and *"Tadhkirat Al-Fuqaha`"* by Al-Hilli [2: 114].

amount. In this case, the commitment to offer the agent a certain share of the profit is in the sense of a pledge to offer donation. Thus, the offered share of the profit can be considered as a conditional gift, or as Ju'alah. There is another viewpoint that considers the pledged share of the profit as a subsidiary addition to the principal remuneration, and concludes that in a subsidiary we can overlook what we cannot overlook in the principal.

- Agency is, originally, non-binding because it is an act of delegation that neither the principal nor the agent should be forced to continue. The exceptional cases of binding agency have been dealt with to preserve whatever rights of others involved therein. Moreover, an exceptional treatment is also needed for paid agency that should be subjected to the rulings on Ijarah, as well as the case when there is a pledge not to revoke the contract within a specific period because breaching such commitment may cause injury to others.
- It is permissible to specify a time limit for agency, because agency is nothing but a contract that could have a specific duration, like Ijarah for instance.
- The justification for defining the commitments of the principal and the agent is – as set out in the Standard- the need to honor contractual obligations of agency and pursue the acts and liabilities that emerge from it.
- The agent is considered as a trustee in holding the asset because he works for the interest of others (the principal) and trusteeship is the normal status in similar engagements. Moreover, the principal's act of choosing the agent for the purpose in question is an indication of his good faith on him, and therefore the principal should not reverse that good faith, except for misconduct, negligence or breach of the contract's limitations.
- Impermissibility of combining agency and guarantee in the same contract, is based on their opposing implications, in addition to the fact that guarantee by the agent entails a suspicion of Riba (usury). Therefore, the status of the agent as a trustee contradicts with provision of guarantee.
- Impermissibility for the agent to represent both parties to the contract – as per the Hanafi School and the predominant view in the Shafi'i School – is to avoid assigning both offer and acceptance to the same party, and hence prevent any probable self bias. Adopting the viewpoint of these two Schools is, therefore, most suitable for Institutions to avoid malpractices and

misleading formalism in making transactions and prevent overlapping of guarantees.

- Monitoring of the contract's provisions is assigned to the principal because he is the principal party of the contract, whereas the agent, who is just a contractor, has to monitor the activities of the contract.
- Suspension of an agent act that breach the contract without adding to the benefit of the principal, until obtaining the principal's approval conforms to the normal Shari'ah practice of exerting the best possible effort to rectify an act of a Muslim.(9) The act here remains pending approval of the principal to safeguard him against injury.
- An agent who breaches the contract by selling or buying at a price other than the price agreed upon has to indemnify the principal for the difference between the price he accepted/offered, and the market price. The justification for this ruling is the need to establish justice and compensate the principal for loss, without committing the Shari'ah-banned practice of accepting capital on pre-fixed return, which entails a suspicion of Riba. This case has been discussed in *"Al-Mughni"* by Ibn Qudamah, who referred also to another viewpoint that suggests revocation of the deal.(10)
- Agency in selling a mortgaged asset is treated as an exceptional case where the contract does not expire on the death of the agent (agency to be pursued by inheritors), in order to preserve the rights of the mortgagee. Moreover, such agency is originally irrevocable before fulfillment of its purpose, for thereto is attached others' rights.
- The justification for adopting the fiqh viewpoint that advocates suspending the act of the uncommissioned agent rather than revoking the deal (for uncertainty about its confirmation by the principal), is the fact that an act of a Muslim should, as far as possible, be preserved from cancellation.(11) Preservation of the act against cancellation is possible here through suspension, in addition to the fact that the act may prove to be useful to the

(9) *"Al-Mughni"* by Ibn Qudamah [5: 135-136].

(10) Ibid.

(11) In *"Al-Bada'i'"* [5: 177], it is stated: "The act of the Muslim should, as far as possible, be perceived as correct"; and in *"Fath Al-Qadir"* [2: 445], it is stated: "Making the best possible effort to rectify the act of the Muslim".

owner of the property in question. In this connection, Ibn Al-Humam said: "When the case is viewed from the standpoint of Gharar (uncertainty), the contract appears to be invalid, whereas if it is viewed from the standpoint of benefit and absence of harm the contract appears to be permissible. Therefore, Ibnul Humam supports reconciliation of the two standpoints by suggesting permissibility with suspension."(12) It has also been narrated that the Prophet (peace be upon him) said: *"Whoever can offer a benefit to his Muslim brother, should do so"*. If, however, the act turned to be harmful to the principal, he can revoke it by virtue of the right he has.

Moreover, permissibility of suspending the act of the uncommissioned agent until approval of the principal can also be derived from the Hadith narrated by Hakim Ibn Hizam (May Allah be pleased with him) stating that the Prophet (peace be upon him) gave him one dinar so as to buy a sheep that the Prophet (peace be upon him) wanted to sacrifice. Hakim purchased the sheep for one dinar and sold it for two. Then he purchased another sheep for the Prophet (peace be upon him) for one dinar and handed over the remaining dinar to him. The Prophet (peace be upon him) took the remaining dinar and spent it on charity and then prayed to Allah to bless Hakim's trading business.(13)

(12) *"Fath Al-Qadir"* [5: 317].

(13) Related by Abu Dawud and Al-Tirmidhi.

Shari'ah Standard No. (46)

Al-Wakalah Bi Al-Istithmar (Investment Agency)

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

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

Preface

This Standard aims to explain the rules of Investment Agency applicable to Islamic financial institutions,[1] the conditions for its validity, its types, its implications and its contemporary applications.

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

Statement of the Standard

1. Scope of the Standard

This Standard covers Investment Agency in various fields, or parts thereof, and the powers and responsibilities of the principal and the investment agent. It does not cover Agency in general or the acts of Uncommissioned Agent (Fodooli) as they are covered by Shari'ah Standard No. (23) on Agency and the Acts of an Uncommissioned Agent (Fodooli).

2. Definition of Investment Agency and Its Permissibility

2/1 Investment Agency means appointing another person to invest and grow one's wealth, with or without a fee.

2/2 Investment Agency is permissible subject to the relevant Shari'ah rules.

3. Investment Agency: Integral Parts (Arkan) and Its Key Types

3/1 The integral parts (Arkan) of a valid investment agency are offer and acceptance, the subject matter of the contract, and the two contracting parties (the principal and the agent). [see Shari'ah Standard No. (23) for the conditions that are required for a valid agency and the rules relating to the acts of the uncommissioned agent (Fodooli)]

3/2 It is permissible to make the appointment of an agent contingent agency upon the fulfillment of certain conditions or to cause to take effect on a specified future date. It is also permissible to stipulate conditions/restrictions that are compliant with Shari'ah. For further details, see Shari'ah Standard No. (23).

3/3 It is permissible for the investment agency to be restricted to a particular kind of investment, or a specific place or be subject to other restrictions. It is also permissible that it be unrestricted, in which case it would still be restricted by customary practice and that the agent acts in the principal's best interests.

3/4 It is not permissible for any one of the parties to unilaterally amend the restrictions in the agency contract. [see Shari'ah Standard No. (23) for the types of agency]

4. Characteristics of Investment Agency

4/1 Investment agency contracts, whether remunerated or unremunerated, are binding on institutions because they are invariably fixed term contracts in which both parties agree not to terminate within a specified period.

4/2 Where the parties agreed to terminate for a specified period, it is permissible for the contract to stipulate the right of one of the parties to terminate the contract unilaterally in specific circumstances.

4/3 When the term of an agency expires, the agent is required not to enter into new investment activities, but may not liquidate ongoing existing investments.

5. Agency Fee

5/1 If the agency is remunerated, the agent's fee should either be a fixed amount or a percentage of the amount invested. It is also permissible to link the fee to an established index/benchmark that is known to both parties and is referred to before every investment period after the fee of the first period has been determined. It should, however, be capped and floored (by assigning it maximum and minimum limits).

5/2 If the fee was not specified in the contract and the agent customarily charges a fee as is normal practice in institutions then the agent will be entitled to a fee which is prevalent in the relevant markets. This also applies when the agent does not complete the task required after starting and realizing returns that are beneficial to the principal.

5/3 The principal is required to pay the investment agent's fees in accordance with stipulated time and manner.

5/4 It is permissible to stipulate that the agent, in addition to his fee, is entitled to all or part of any amount over and above the expected profit as a performance incentive.

6. Amount, Term and Profit of the Investment

6/1 The amount and term of the investment should be determined, irrespective of whether the amount is paid as a lump sum or in installments.

6/2 The principal is responsible for any expenses related to the investment such as transportation, storage, taxes, maintenance and insurance. It is not permissible to require the agent to pay them from the agent's own funds, or to defer any reimbursement due to the agent where he has paid them on behalf of the principal or to make such reimbursement subject to the yield of the investment. And the investment agent is liable, as a legal entity, for any expenses related to its employees or equipment.

6/3 The agent may start investment activity before receiving the funds (from the principal), and with the principal's permission, by:

6/3/1 Incurring a debt on behalf of the principal by purchasing on credit;

6/3/2 Advancing a loan to the principal by purchasing something on his behalf.

6/4 Any loan advanced by the agent is construed as an interest free loan which may not bring any benefit to the agent as creditor. The agent is entitled to its fee and performance incentive, without consideration to the loan advanced.

6/5 The profit in its entirety is the right of the principal unless it is stipulated that the agent shall be entitled to all or part of any excess above the expected profit as a performance incentive in addition to its fixed fee.

6/6 It is permissible for the agent, with the principal's consent, to set aside a portion of the profit to create a profit equalisation reserve for the benefit of the principal.

6/7 Upon liquidation, the balance of the profit equalisation reserve is returned to the principal without affecting the agent's entitlement to the fixed fee or performance incentive for the period in which the reserve was set aside.

7. Liability of an Investment Agent

7/1 The agent acts in a fiduciary capacity in relation to the investment and therefore is not liable for any loss in cases other than willful misconduct, negligence, or breach of contract unless the breach happens to be advantageous to the principal such as selling an asset for a price higher than the price required by the principal. In situations where the agent is held liable for loss of capital, such liability is limited to the capital amount and the agent is not liable for loss of expected profit whether the capital was invested immediately or delayed or not invested at all.

7/2 If the investment results in profit or capital gain in case of a breach that is advantageous to the principal, then such profit or capital increase belongs to the principal without affecting the agent's right to its performance incentive.

8. Rights and Obligations of the Contracts Executed by the Agent

The results of the contract (like transfer of ownership and entitlement to the fee) belong to the principal. However, the rights and obligations (like pursuit of payment or delivery including litigation) belong to the agent.

9. Appointment of a Sub-Agent

9/1 The investment agent is not permitted to appoint a sub-agent for the prescribed investment activities except for activities outside its area of expertise, or what is normally outside the capacity of the agent or its employees or where the principal grants the agent permission to subcontract.

9/2 The sub-agent appointed by the agent with the consent of the principal cannot be dismissed by the agent but can only be dismissed by the principal. However, if the principal authorizes the agent to appoint any sub-agent at his will, the agent is entitled to dismiss the sub-agent.

10. Restrictions Stipulated in Investment Agency

10/1 The investment agent must adhere to a restriction requiring it to consult the principal before any investment and if any breach by the agent results in loss, the agent shall bear it.

10/2 If the Investment Agency is restricted to activities that yield a minimum specified profit margin and the agent does not find such an investment, then it should seek the principal's consent before investment. If it invests in lower-yielding transactions, it is liable to compensate the principal for the difference between the profit earned and the average profit prevalent in the market (if it is less than the stipulated amount/percentage). It is not liable for the minimum profit margin specified for the investment by the principal. [see Shari'ah Standard No. (23) on Agency and the Acts of an Uncommissioned Agent (Fodooli), item 6/3/2]

11. Rules of Investment Agency

If the agent co-mingles his own funds with the principal's funds or with the funds that he manages, he may not then purchase, for his own account any assets from the assets owned by the co-mingled funds without giving notice on each occasion. This is to establish the transfer of ownership and liability for the asset from the co-mingled funds to the agent's account. This requirement is impracticable in relation to investment accounts (and therefore this requirement may be waived). [see items 7/1/2 and 7/1/3]

See also Shari'ah Standard No. (23) on Agency and the Acts of an Uncommissioned Agent (Fodooli).

12. Contemporary Applications of Investment Agency

12/1 Co-mingling the funds of an unrestricted agency with Mudarabah funds or with the agent's funds.

12/1/1 It is permissible to co-mingle funds on the basis of Investment Agency with funds from Mudarabah investment accounts. Such funds are treated as if they were extra funds provided by a capital provider in a Mudarabah investment or shareholder funds when they are co-mingled with funds in Mudarabah investment accounts. Allocation of profits is calculated by the standard prorated method (usually daily weighted

average method) for funds invested in Mudarabah which takes into account each investor's amount and the tenor of the investment. All the profits of the invested funds in Murabahah belong to the principals and the agent is entitled to his fee and any performance incentive stipulated. The agent is not entitled to any profits generated from the Mudarabah accounts he invested.

12/2 Investment agency for the financing of working capital[2]

Investment agency can be used as a substitute for an overdraft. The amount provided to the client is regarded as the institution's undivided share in the working capital of the client. It is permissible for the client to use the withdrawn amount to settle the client's liabilities relating to his activities or his employees' salaries. The client is entitled to a fee for his service and profit from his portion of the working capital and losses occurring after the agency, if any, are borne by both parties on a pro-rata basis. If the client has any interest-bearing deposits or loans, the institution should stipulate that the client is solely responsible for them.

When the client does not require financing anymore, then the relationship may be terminated on the basis of Takharuj which means that either the joint account is distributed between them pro-rata or one party will purchase the share of the other at a price agreed upon at that time.

12/3 Appointing conventional banks by the institutions as their investment agents and vice versa

12/3/1 It is permissible for institutions to appoint a conventional bank as an investment agent, provided that the relevant contracts are compliant with Shari'ah approved by the institution's Shari'ah Supervisory Board, and that the conventional banks have among their activities Shari'ah-compliant modes of financing and investment with proper Shari'ah supervision

(2) As an alternative to an overdraft, its application requires precise accounting treatment.

and Shari'ah audit without violating the requirements of the regulatory authorities.

12/3/2 It is permissible for the institution to accept funds based on Wakalah from conventional banks and invest them in its activities which have been approved by its Shari'ah Supervisory Board, provided that the contract is free from conditions and restrictions that are prohibited by the Shari'ah.

12/4 Expiry of the investment agency term before collecting amounts receivable

If the agency expires and the receivables are yet to be collected, and the agency is not mutually renewed, the investment agent is required to collect the receivables and take necessary actions against the debtors or other counter-parties delaying their payments.

The agent is not entitled to any fee for such collection unless agreed otherwise. It is not permissible for the agent to use such funds received for his personal use or to re-invest them. The agent is not required to pay to the principal such receivables from his own personal funds, or to seek financing like Tawarruq for this purpose.

12/5 In the event of early termination of the agency either by mutual agreement, or by one party unilaterally exercising its right to terminate or by early settlement of the amounts due (from the obligors), it is permissible (if mutually agreed upon) to reduce the performance incentive stipulated for the agent, if any, in proportion to the tenor of the investment.

13. Date of Issuance of the Standard

This Standard was issued on 26 Jumada II, 1432 A.H., corresponding to 29 May 2011 A.D.

Adoption of the Standard

The Shari'ah Board adopted this Standard in its 30th meeting held in the Kingdom of Bahrain during the period of 24-26 Jumada II, 1432 A.H., corresponding to 27-29 May 2011 A.D.

Appendix (A)
Brief History of the Preparation of the Standard

On 23 Muharram 1430 A.H., corresponding to 20 January 2009 A.D., the General Secretariat decided to commission a Shari'ah consultant to prepare a juristic study on Investment Agency.

In its meeting held in Kuwait, on 6 Rabi' I, 1431 A.H., corresponding to 20 February 2010 A.D., the Shari'ah Standards Committee discussed the draft of a Shari'ah Standard on Investment Agency and made necessary amendments.

The revised draft of the Shari'ah Standard was presented to the Shari'ah Board in its 28th meeting held in the Kingdom of Bahrain, during the period of 12-14 Dhul-Qa'dah 1431 A.H., corresponding to 20-22 October 2010 A.D. The amendments that were deemed appropriate were included.

The revised draft of the Shari'ah Standard was presented to the Shari'ah Board in its 29th meeting held in Makkah Al-Mukarramah, during the period of 28-30 Rabi' I, 1432 A.H., corresponding to 3-5 March 2010 A.D. The amendments that were deemed appropriate were included.

The General Secretariat held a public hearing in the Kingdom of Bahrain, on 25 Jumada II, 1432 A.H., corresponding to 28 May 2011 A.D. All the comments made in the public hearing were listened to, and a representative of the Shari'ah Board answered these comments and made commentary on them.

In its meeting No. (30) held in the Kingdom of Bahrain, during the period of 24-26 Jumada II, 1432 A.H., corresponding to 27-29 May 2011 A.D., the Shari'ah Board discussed the amendments proposed by the participants in the public hearing and incorporated the amendments that it deemed appropriate, and adopted the Standard.

In its meeting held in Al-Madinah Al-Munawwarah, on 30 Sha'ban 1436 A.H., corresponding to 17 June 2015 A.D., the Shari'ah Standards Review Committee reviewed this Standard. After deliberation, the committee approved necessary amendments, and the Standard was adopted in its current amended version.

Appendix (B)
The Shari'ah Basis for the Standard

- The basis for the differentiating between investment agency and agency in general is that the former is in order to increase wealth, and it is similar to Mudarabah and Musharakah in this respect. However, the difference between investment agency and Mudarabah and Musharakah is that Investment Agency is a form of Ijarah (hiring), while Mudarabah and Musharakah are forms of partnership. As for the general agency, it is an authorization to perform specific tasks such as payment etc. Even if the authorization is to engage in a sale/purchase, such as the authorization of the client in a Murabahah contract, its main purpose is to acquire ownership for the institution rather than investment on its behalf.
- The basis for the permissibility of investment agency is the Hadith stating: *"Engage in trade with the wealth of orphans so that it will not be consumed by Zakah"*(3) as well as numerous Verses of the Qur`an on seeking sustenance, striving and earning.
- The basis for the binding nature of the investment agency is that it is entered into for a specific period; i.e., there is an agreement between the counterparties that neither of them can unilaterally dissolve the contract except in certain circumstances specified in the contract.
- The basis for allocating for the investment agent any profit amount in excess of the expected profit is that it is a type of conditional gift and is an incentive.
- If the agency contract stipulates a certain percentage of profit and the agent invests in lower-yielding transactions, the agent is liable to compensate the principal for the difference between the profit earned and the average

(3) Related by Al-Tabrani in *"Al-Awsat"* and graded authentic (*sahih*) by Al-'Iraqi. Ibn Hajar graded it as good (*hasan*). *"Fayd Al-Qadir"* [1: 108]. It is found in *"Al-Muwatta`"* as a statement of Umar (may Allah be pleased with him).

profit prevalent in the market (if it is less than the stipulated amount/ percentage), because he is in breach of the conditions of the Agency. However, the agent is not liable for the specified percentage stipulated in the contract if it is higher than the prevalent market rate, because it will be tantamount to acquiring another's wealth by illegitimate means.[4]

- The basis for the permissibility of employing the agency's funds in the Mudarabah portfolio is that the authorization granted by the investment agency includes such employment when the agency is unrestricted.
- The basis for the principle that the agent, in a situation where the agency's funds are employed in a Mudarabah portfolio, is entitled to the agency commission and not to Mudarabah profit is that his contract with the institution is that of agency and not of Mudarabah. Even if the agent has employed the funds in a Mudarabah portfolio, the profit entitled to the institution is generated from the Mudarabah portfolio and not on the basis of agency.

(4) See *"Al-Mughni"*, vol. 5, (P. 135).

Shari'ah Standard No. (15)

Ju'alah

(Revised Standard)

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

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

Preface

The purpose of this standard is to elaborate the definition of Ju'alah, to distinguish it from Ijarah, to describe its elements, conditions, legal status in the Shari'ah, fundamental rules, and applications in the transactions of Islamic financial Institutions (Institution/Institutions),[1] irrespective of the institution acting as the general offeror (demanding performance) or as the worker (under an obligation to perform), even when this is through another, parallel Ju'alah.

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

Statement of the Standard

1. Scope of the Standard

This standard sets out fundamental rules of the Shari'ah on Ju'alah and its application in activities for which the extent of the work required cannot be precisely determined for it continues throughout the determined period. It is for this reason that it does not cover the contract of Ijarah for employment/service or leasing, just as it does not cover maintenance contracts or stipulations of maintenance in relation to other contracts, such as the requirement of maintenance in a sale contract or an Istisna'a contract (construction contract).

2. Definition of Ju'alah

Ju'alah is a contract in which one of the parties (the Ja'il) offers specified compensation (the Ju'l) to anyone (the 'Amil) who will achieve a determined result in a known or unknown period.

3. Permissibility of Ju'alah

Ju'alah is permissible deeming the determination of the end result to be realised through it as sufficient, and it is not affected by the uncertainty that prevails with respect to the subject-matter of the contract, that is, the work to be done. It is for this reason that Ju'alah is suitable for activities for which Ijarah, which requires that the desired work be clearly specified, is not.

4. Shari'ah Status of Ju'alah

4/1 With due consideration to item (6) below in respect to the revocation of Ju'alah, Ju'alah, in principle, is not a binding contract. The general offeror (Ja'il) or the worker ('Amil) are entitled to revoke it unilaterally, however, it becomes binding for the Ja'il when the worker commences work. If the worker undertakes not to revoke the contract during a specified period, it is binding on him to abide by the undertaking.

4/2 The possession of the worker exercised over the property of the offeror is that of a trustee. He is, therefore, not liable except in the case of negligence, misconduct or violation of the conditions stipulated by the offeror.

5. Elements of Ju'alah and Its Conditions

The elements of Ju'alah are: The two parties (the offeror and the worker), the form of the contract and the subject-matter of the contract (the compensation and the work).

5/1 The two parties to the contract (the offeror and the worker)

The existence of legal capacity is a condition for both parties to the contract. It is not a condition that the worker be specified, therefore, Ju'alah is concluded by the issuance of an offer directed at the general public. Any person whom the offer reaches may undertake the work himself or with the help of another. If, however, the worker is specified, it is obligatory for him to undertake the work himself or with the express consent of the offeror through someone under his supervision and control.

5/2 Form of the contract

The Ju'alah contract is concluded by an offer directed towards a specified worker or towards the general public, irrespective of such an offer being made verbally, in writing or through any other means that indicate an invitation to work and an obligation to pay the compensation. Acceptance of the offer is not stipulated as a condition.

5/3 The subject matter of the contract (compensation and work)

The subject matter of the contract is the work that is agreed upon through Ju'alah as well as the compensation for the work.

5/3/1 Work that produces the desired result

5/3/1/1 Among the forms of activity that may be agreed upon on the basis of the Ju'alah contract are the following:

a) An activity that is intended, through the agreement, to produce a result such as the extraction of minerals.

b) Any information in which the offeror has an interest such as presenting a report or study or the completion of scientific works that realise a result, but in which the extent of the work cannot be determined.

c) An activity that is intended, through the agreement, to return lost property to its seeker.

5/3/1/2 It is permissible to stipulate that the job is done within a specified period so that the worker will not be entitled to compensation after this period, except when the period is over and the result is close to realisation, in which case the period will be automatically extended.

5/3/1/3 When the period is over and the worker has done (part of) the work that will benefit the offeror, the worker is entitled to reasonable wages (*Ujrat al-Mithl*).

5/3/1/4 The Ju'alah contract is valid despite uncertainty as to the nature of the work, provided that the required result realised by the work is determined.

5/3/1/5 It is a condition that the work involves some type of effort.

5/3/1/6 It is a condition that the work not be obligatory for the worker.

5/3/2 The compensation

5/3/2/1 The compensation should be known, valuable in the eyes of the Shari'ah, and deliverable. If the compensation is unknown, unlawful or not deliverable, payment of reasonable compensation becomes binding.

5/3/2/2 The compensation may be a portion of the object of work in Ju'alah, for instance, a percentage of a debt agreed upon for collection or the right to utilise, for a determined period, a project whose implementation is agreed upon.

5/3/2/3 As a rule, entitlement to compensation is not established until the work is completed and delivered to the offeror. The following are the exceptions to the rule:

a) Where it is evident that the work undertaken by the worker belongs to someone other than the offeror and has been decreed as such, the worker is entitled to the compensation.

b) Where an accident occurs during work undertaken by the worker causing loss that was not due to the tort or negligence of the worker, the worker is entitled to full compensation.

5/3/2/4 It is permissible to stipulate that all or part of the compensation be paid in advance at the conclusion of the contract or thereafter, even though this is before the completion of the entire work, however, it is considered "subject to accounts" and the worker is not entitled to it without the realisation of the result, the offeror having the right to reclaim it if the work is not realised.

6. Revocation of Ju'alah

6/1 If the offeror, or the worker, revokes the contract prior to the commencement of work, the worker is not entitled to compensation.

6/2 If the offeror prevents the worker from working after commencement of the work, the offeror is bound to pay reasonable wages.

6/3 If Ju'alah contract is terminated by the worker after the work is commenced; the worker is not entitled to a reward, except when the parties agree to otherwise.

6/4 If the worker revokes the contract after commencing the work, he has no claim against the offeror, unless they had agreed to the contrary.

7. Distinction between Ju'alah and Ijarah

Ju'alah is distinguished from Ijarah on the following grounds:

7/1 Ju'alah is valid despite uncertainty of work deeming the determination of the required result by the offeror as sufficient.

7/2 Ju'alah does not require acceptance.

7/3 Entitlement to compensation depends on completion of work and delivery of result.

7/4 Ju'alah is valid even if the other party is not known.

7/5 As a rule, Ju'alah is terminable, while Ijarah is binding.

8. Applications of Ju'alah

Among the applications of Ju'alah in activities where the extent of work is undetermined and in which uncertainty is overlooked are:

8/1 Exploration for minerals and extraction of water

Ju'alah contract may be used for the exploration for minerals and the extraction of water in situations where entitlement to wages is contingent upon the finding of minerals or water without reference to the amount of time or the extent of the period.

8/2 Collection of debts

Ju'alah is used for collecting debts in cases where the entitlement to compensation is contingent upon the collection of all of the debt, in which case entitlement to the entire compensation is established, or part of the debt so that compensation proportionate to the amount of debt collected is due.

8/3 Securing permissible financing facilities

8/3/1 Securing permissible financing facilities means that the worker undertakes some work that leads the institution to agree to the granting of financing facilities to the offeror or to arrange syndicated financing.

8/3/2 Ju'alah contract may be used for securing facilities provided that the condition of the permissibility of Ju'alah is met, that is,

the subject-matter of Ju'alah must be valid such as the creation of debt through Murabahah on deferred payment, Ijarah with deferred rental, raising of loans without interest, issuance of letters of guarantee or the opening of documentary credit with the condition that the transactions are not employed for raising interest bearing loans through stipulations, customary practice or dealings among institutions.

8/4 Brokerage

Ju'alah is used in brokerage activities in cases where the entitlement to compensation is contingent upon the conclusion of the contract for which intermediation is undertaken.

8/5 Discoveries, inventions and designs

Ju'alah is used for the realisation of scientific discoveries, innovative inventions and designs, such as symbols and trade marks, where entitlement to compensation is contingent upon the realisation of the discoveries, the registration of patents or the creation of designs conforming to the conditions elaborated by the offeror.

9. Role of Institutions in Ju'alah

9/1 It is permissible for an institution to have the status of a worker in Ju'alah by contract, for work benefiting others irrespective of the institution undertaking the work itself or by contracting out the work through another Ju'alah that is in the nature of a parallel, unless it is stipulated that the institution will carry out the work itself. It is obligatory that the two Ju'alahs are not linked.

9/2 It is permissible for an institution to have the status of the offeror whether the work benefits the institution or is for the fulfilment of its obligation in a Ju'alah for the benefit of another (parallel Ju'alah) ensuring that the two Ju'alahs are not linked.

10. Date of Issuance of the Standard

This Shari'ah Standard was issued on 7 Rabi' I, 1424 A.H., corresponding to 8 May 2004 A.D.

Adoption of the Standard

The Shari'ah Standard on Ju'alah was adopted by the Shari'ah Board in its meeting No. (9) held during the period of 11-16 Ramadan 1423 A.H., corresponding to 16-21 November 2002 A.D.

Appendix (A)
Brief History of the Preparation of the Standard

In its meeting No. (7) held in Makkah Al-Mukarramah during the period of 9-13 Ramadan 1422 A.H., corresponding to 24-28 November 2002 A.D., the Shari'ah Board resolved to give priority to the preparation of the Shari'ah Standard for Ju'alah.

On Saturday 14 Shawwal 1422 A.H., corresponding to 29 December 2001 A.D., a Shari'ah consultant was commissioned to prepare a juristic study and an exposure draft on the Shari'ah Standards for Ju'alah.

In its meeting No. (1) held on 9 Safar 1423 A.H., corresponding to 20 April 2002 A.D., in the Kingdom of Bahrain, the Shari'ah Standards Committee discussed the exposure draft of the standard and made some amendments.

In its meeting No. (2) held on 20 and 21 Rabi' I, 1423 A.H., corresponding to 1 and 2 June 2002 A.D., in the Kingdom of Bahrain, the Committee also discussed the exposure draft of the standard and asked the consultant to make the necessary amendments in light of comments and discussions of the members.

In its meeting No. (3) held on 20 Rabi' II, 1423 A.H., corresponding to 1 July 2002 A.D., in the Kingdom of Bahrain, the Committee further discussed the exposure draft and made amendments that it deemed suitable in preparation of the submission of the exposure draft to the Shari'ah Board.

The revised exposure draft of the Shari'ah standard was presented to the Shari'ah Board in its 9th meeting held in Makkah Al-Mukarramah during the period of 11-16 Ramadan 1423 A.H., corresponding to 16-21 November 2002 A.D. The Shari'ah Board made further amendments to the exposure draft of the standard and resolved that it be distributed to specialists and interested

parties for soliciting their comments in preparation of their discussion in a public hearing.

A public hearing was held in Bahrain on 18 Dhul-Hajjah 1423 A.H., corresponding to 19 February 2003 A.D. The public hearing was attended by more than thirty participants representing central banks, institutions, accounting firms, Shari'ah scholars, academics and others having interested in this field. The public hearing was based on the observations made whether these transmitted prior to the public hearing or were raised during the public hearing. The members of the Shari'ah Standards Committees (1) and (2) responded to the observations and comments.

The Shari'ah Standards Committees (1) and (2) held a joint meeting on 2 Muharram 1424 A.H., corresponding to 5 March 2003 A.D., in the Kingdom of Bahrain to discuss the comments made during the public hearing as well as those sent received in writing, inserting amendments deemed suitable.

The Shari'ah Board in its 10th meeting held in Al-Madinah Al-Munawwarah during the period of 2-7 Rabi' I, 1424 A.H., corresponding to 3-8 May 2003 A.D., discussed the amendments suggested by the Shari'ah Standards Committee, and incorporated the amendments that it found suitable. The Shari'ah Board unanimously adopted some of the items of the standard and some items were adopted by the majority vote of the members of the Shari'ah Board, as recorded in the minutes of the meetings of the Shari'ah Board.

The Shari'ah Standards Review Committee reviewed the standard in its meeting held on Rabi' II, 1433 A.H., corresponding to March 2012 A.D., in the State of Qatar, and proposed after deliberation a set of amendments (additions, deletions, and rephrasing) as deemed necessary, and then submitted the proposed amendments to the Shari'ah Board for approval as it deemed necessary.

In its meeting No. (41) held in Al-Madinah Al Munawwarah, Kingdom of Saudi Arabia during the period of 27-29 Sha'ban 1436 A.H., corresponding to 14-16 June 2015 A.D., the Shari'ah Board discussed the proposed amendments submitted by the Shari'ah Standards Review Committee. After deliberation, the Shari'ah Board approved necessary amendments, and the standard was adopted in its current amended version.

Appendix (B)
The Shari'ah Basis for the Standard

Permissibility of Ju'alah

Ju'alah contract is permissible according to the majority of the Fuqaha on the basis of the Qur`an, the Sunnah, Ijma' (consensus of Fuqaha) and Ijtihad (reasoning).

- As for the Qur`an, the evidence is in the story of Yusuf (Joseph) and his brother after the announcement of the loss of the King's great beaker, ***{"For him who brings it is the (reward of) a camel load; I will stand surety for it"}.***[(2)]
- As for the Sunnah, the evidence is in the report from Abu Sa'id Al-Khudri[(3)] about the stipulation of Ju'l (compensation) if the chief of the tribe was cured through him and the tacit approval of the Prophet (peace be upon him) of this.
- There is Ijma' (consensus of Fuqaha) about the contract of Ju'alah in essence with some disagreement about its scope insofar as some Fuqaha restricted it to reward for the return of a runaway slave, as is recorded in the Sunnah.
- As for Ijtihad (reasoning), there is a general need for Ju'alah in the case of acts that cannot be performed by a person himself nor can he find someone who will volunteer for him. Further, it is suitable for cases for which the contract of Ijarah is not suitable, like the return of lost property from an unknown location.

Shari'ah Status of Ju'alah

- The basis for the principle that Ju'alah is not binding for the offeror is that accrual of the compensation is contingent upon a condition, thus,

(2) [Yusuf (The Prophet Joseph): 72].
(3) *"Sahih Al-Bukhari"* [5: 2166].

it resembles bequest, which is not binding. The basis for Ju'alah being non-binding for the worker is that the work to be done is uncertain, thus, it resembles Mudarabah, which is not binding.

- The basis for regarding Ju'alah as binding when the worker has commenced work is that at this stage Ju'alah is similar to Mudarabah in which the Mudarib has commenced work. Like Mudarabah, Ju'alah is considered binding by the Maliki scholars in such a case. The basis for considering it binding when the two parties undertake not to terminate the contract during the period of the contract is that unilateral revocation leads to the loss of the effort put in by the worker or the likelihood of injury for the offeror.
- The basis for the entitlement of the worker to receive reasonable wages, when the contract is revoked after commencement of work, is that the work done by the worker is legally valid and loss is not to be caused to him. He, therefore, has recourse to reasonable compensation as is the case in Ijarah when it is revoked due to a defect.

Elements of Ju'alah and Its Conditions

- The basis for the rule that it is obligatory in Ju'alah that all its elements (two parties, form, work and compensation) be found is that it is a contract and must have these elements. Further, Ju'alah is a commutative contract that must have a form to indicate the task required as well as the amount of compensation.
- The basis for permitting the worker to seek assistance from others, when there is no stipulation for his personal services, is that Ju'alah is similar to agency in which seeking help from others is valid.
- The basis for not stipulating the identification of the worker and directing the offer towards the general public is that the offeror does not know of a person who is able to achieve what is required.
- The basis for not stipulating acceptance on the part of the worker, when he is unknown, is that it is not possible to obtain his acceptance.
- The basis for allowing the work to be uncertain is the general need along with the impossibility of determining the extent of work.
- The basis for stipulating that compensation be known is that compensation is like wages and that there is no need to validate Ju'alah when

the compensation is unknown as against the uncertainty about the work and the worker.

- The basis for recourse to reasonable compensation upon the vitiation of the named compensation is analogy constructed upon Ijarah with recourse to reasonable wages upon the vitiation of the named wages.
- The basis for the permissibility of compensation being a portion of the subject-matter of Ju'alah, even though it is uncertain and does not exist, is that it is a type of uncertainty that does not prevent delivery and involves no Gharar (uncertainty) since entitlement to compensation is not established until the task is accomplished.
- The basis for the rule that entitlement to compensation is not established until the work is completed and delivered, is that work in Ju'alah is not determined or certain, therefore, stipulating payment as compensation would amount to compensating something that has not compensation because the work has not been completed.

Applications of Ju'alah

- The basis for permitting an institution to undertake Ju'alah, as a worker or as an offeror, is the permissibility of Ju'alah for which natural persons and juristic persons have the same legal capacity.
- The basis for the permissibility of Ju'alah for debt collection, and other similar acts stated in the standard, is that these are acts whose precise determination is difficult and Ijarah is not suitable for them, while Ju'alah is legally valid despite the uncertainty with respect to work.

Shari'ah Standard No. (34)

Hiring of Persons

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

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

Preface

This Standard aims to indicate the Shari'ah rulings on hiring of persons in its two distinct forms which include: hiring in the sense of obtaining the services of a private employee (*Ajir Khas*), as well as hiring in the sense of obtaining the services of a shared employee (*Ajir Mushtarak*). The service could also be either a defined task, or a future service which needs to be specified through detailed terms of reference. The standard also covers the relevant controls that Islamic financial institutions (Institution/Institutions)[1] should observe when the institution is the employee and when it is the employer.

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

Statement of the Standard

1. Scope of the Standard

This standard covers hiring of the service/work of persons between the institution and other institutions or individuals. The standard covers the cases when the institution is the employee and when it is the employer. However, the standard does not cover other contracts such as Mudarabah, investment agency, Musaqat, Muzara'ah, Mugharasah, and Istisna'a.

2. Definition of the Term "Hiring of Persons"

It refers to the contract through which a service/work of a natural or a legal person is obtained against a specific amount of pay. The service thus obtained could be specific or a future one that needs to be specified through detailed terms of reference, such as educational, health and consultancy services.

3. Pledge to Hire a Service

3/1 There is no Shari'ah prohibition against having a framework agreement to regulate the process of hiring between the institution and the client. Such agreement may comprise the general conditions which govern the relationship between the two parties, whereas there should be a separate hiring contract for each operation, signed by both parties. Under such framework agreement the two parties may also perform operations through exchange offer and acceptance with due reference to the general conditions stipulated in the agreement.

3/2 The institution has the right to ask the client who pledges to hire its services to pay a specific amount to be retained by the institution as a guarantee for the seriousness of the client in executing his pledge and honoring any commitments that may result from it. In case of withdrawal from the part of the client the deduction from this guarantee amount should not exceed the actual harm caused to the

institution. The guarantee amount can either be kept as a deposit with the institution without being disposed of, or invested on behalf of the client through Islamic Mudarabah or investment agency, or frozen in a current account owned by the client and guaranteed by the institution. The institution and the client may also agree at the time of signing the contract to consider the guarantee amount as a prepaid installment of the cost payable by the client. [see Shari'ah Standard No. (9) on Ijarah and Ijarah Muntahia Bittamleek, item 2/3]

4. Concluding a Contract for Hiring of Persons

4/1 A contract for hiring of persons can take place in any form that normally indicates it. It can be concluded verbally, in writing or through modern means of communication.

4/2 The two parties of the contract (the employer and the employee) should be legally competent (capable of awarding and accepting agency), otherwise the contract cannot be concluded.

4/3 A private employee, who works for and under the supervision of a single employer, has no right to work, at the same time, for anyone else, except on permission of his former employer. Unlike a private employee a shared employee who works for more than one person and who is not supposed to work for a specific person at a specific time, is not subject to such restriction.

4/4 The private employee should be informed about the hiring period and the type of work he is supposed to do in general, while the shared employee should be informed about the work, its type, and specifications. The specific period within which the work has to be done could also be added, and in that case the employee has to do the work within that specific period. When no specific period for doing the work is referred to in the contract, resort should be to normal practice.

4/5 A private employee is not responsible for damage, unless it is due to his own transgression, negligence, or breach of a stipulated condition.

4/6 A shared employee is absolutely responsible for damage, unless it is caused by an evitable factor. This, however, does not hold true in the case of an investment agent who is permitted to utilize the money. Unlike the shared employee who has to guarantee what he is paid to work on, the investment agent does not guarantee, except in case of transgression or negligence.

4/7 The contract for hiring of persons is a binding contract, which none of the two parties can terminate or amend without the consent of the other, except in case of contract breaching, or due to an emergent excuse, or because of inevitable circumstances.

4/8 For a private employee, the beginning of the hiring period should be specified. The hiring period should start at the time of signing the contract, except when the two parties agree on a specific date for its beginning. Hiring in the latter case is known as (deferred hiring), or hiring that has to be executed in the future.

4/9 When a private employee fails to report to work on the date specified in the hiring contract he shall be entitled to no pay for the period between the specified and actual dates of work commencement (the pay for the absence period should be deducted from his total pay). The employer in this case shall have the right to terminate the contract, unless the two parties agree on a compensatory period at the end of the contract period.

4/10 For a shared employee, a certain period for performing the work may be specified. When the shared employee fails to do the work during that period, the employer has the right to terminate the contract or a new period can be agreed upon.

4/11 There is no Shari'ah prohibition for any of the two types of employees (private and shared) to receive 'Arboun (Earnest Money) at the time of signing the contract. If the hiring contract is implemented, the amount of earnest money should become a prepaid part of the employee's pay, otherwise the earnest money should go to the employee. However, when the contract is not executed the employee

is preferably supposed to take from such earnest money only the portion which compensates the actual harm caused to him.

5. Subject Matter of Hiring Contract

The subject matter of the hiring contract is the service/work and the pay.

5/1 Rulings pertaining to the service/work

5/1/1 The service/work of the employee which constitutes a subject matter of the contract should be well known, accomplishable and permissible in Shari'ah.

5/1/2 It is permissible to determine service in terms of a specific work to be done or a specific period of service, or in terms of both. If the employee is able to do all the work within the specified period, he becomes entitled to the whole pay. If he is able to do only part of it during the period, his entitlement to the pay will depend on two probable outcomes. If the part of the work he has done during the period is in fact useless and cannot be benefited from the employee shall become entitled to no pay. If the accomplished part of the work is useful and can be benefited from, and the employer is unwilling to extend the period, the employee shall become entitled to the amount normally paid for similar work (*Ajr al-Mithl*).

5/1/3 When a person is hired for doing a specific service/work, the employer has no right to hire out the service/work of such person to a sub-employer, unless the contract permits sub-hiring, or this has been agreed upon by the two parties. If the hired service/work is specifically defined and has to be delivered in the future, the employer in this case has the right to hire out to someone else an identical service/work (Parallel hiring). [see Shari'ah Standard No. (17) on Investment Sukuk, item 5/2/10]

5/1/4 The employer should stick to utilizing the work/service of the hired person as per the permissible conditions that have been agreed upon.

5/1/5 When the hiring contract relates to a specific service, the employee (the institution) should own the service and have the ability to deliver it. Hence, it is impermissible for the institution to sign a contract with the client before it possesses the service and becomes in a position to perform actual or constructive delivery.

5/1/6 Hiring can be for performing a future service that is well described and specified to the extent which leaves no room for ambiguity and dispute. In that case the employer does not have to own the required service before signing the contract. Consequently, an agreement may be reached for performing the service at a specific time in the future, with due consideration to the ability of the employee to own the service and become able to deliver it on time, by himself or through someone else. The pay for the service here should not necessarily be made in advance, unless the contract is a Salam or Salaf contract. If the employee happens to deliver a service that does not conform to what has been agreed upon, the employer has the right to reject it and insist on having a service that conforms to specifications.

5/2 Rulings pertaining to the pay

5/2/1 The pay, whether in cash, or in-kind or in the form of a service, should be well known to the extent that leaves no room for dispute. It can be either fixed or variable according to a method which is well known to the two parties.

5/2/2 The pay can be determined for the work as a whole so that the employee becomes entitled to it after doing all the work, or it can be determined in installments and the employee becomes entitled to each installment at the relevant stage of the work done. The pay can also be determined on the basis of a specific period, after which the employee becomes entitled to it, or such period can be divided into sub-periods and the pay determined accordingly. Furthermore, the pay can be determined on the basis of both the work and the period,

and the employee becomes entitled to it when he performs the work within the specified period. [see item 5/2/9]

5/2/3 The pay becomes obligatory when the two parties sign the contract, and payable on delivery of the service/work or making it available (when the employee puts himself at the disposal of the employer even if the employer has not yet assigned a task to him). After signing the contract, there is no Shari'ah prohibition against forwarding the pay as a lump sum amount, or in installments.

5/2/4 The pay can be variable, yet the amount of pay for the first period should be known. Following the first period, it is permissible to use an accurate indicator for predetermination of the pay for the successive periods. However, such indicator should be known to both parties and mutually agreed upon, for avoidance of dispute. This indicator which replaces the specifically determined pay for the period should have an upper and a lower limit.

5/2/5 It is permissible, on the consent of the two parties, to amend the pay of future periods (the periods in which benefiting from the service has not yet taken place), whereas the unpaid amounts of pay that relate to past periods become a debt obligation owed by the employer, and hence it is impermissible to stipulate a condition for increasing such amounts (rescheduling).

5/2/6 The pay can be determined as a percentage of the output (e.g., 10%) or a part of the thing to be made.

5/2/7 It is permissible to stipulate in the contract that in case of default by the employer in the settlement of any installment, or when he refrains from doing so without a reasonable excuse and after a sufficient period of notification; all other installments shall become due and eligible for premature settlement. However, the employee in this case does not own the prepaid installments finally until he completes the work of the whole hiring period. [see Shari'ah Standard No. (8) on Murabahah, item 5/1]

5/2/8 It is impermissible to make a condition which leads to any increment in the pay agreed upon, in case of default by the employer. Nevertheless, the contract may include a pledge by the employer to donate, in case of default, a percentage of the pay for charitable purposes. Such donation should entirely go to charitable purposes, under the supervision of the Shari'ah Board of the institution.

5/2/9 It is permissible to agree upon more than one rate of pay, as when the two parties agree that if the work is done within a certain period the pay will be this much, and if it is done in another (shorter) period the pay will increase to that much. Similarly, two different rates of pay can also be linked to two different places, types, or specializations, of the work to be done.

6. Guarantees for Provision of the Pay and the Service

6/1 The employee has the right to obtain the permissible guarantees in their different forms so as to document his eligibility for receiving the pay. Likewise, the employer has also the right to obtain such guarantees for receiving indemnity in case of any transgression or negligence or breach of the contract from the part of the employee. The ruling here is, in fact, similar to that on documentation and collateralization (Rahn), suretyship (Kafalah) transfer of right (*Hawalat al-Haqq*) and set-off (Maqassah). [see Shari'ah Standard No. (5) on Guarantees, item 2/3]

6/2 It is permissible to state in the contract that the pay has to be made in advance, deferred, or in installments. In case of premature termination of a contract in which the pay has already been made in advance, the two parties should resort to settlement. When the employee accepts any period of delay for a pay that has to be settled in advance, such acceptance should be considered as a respite which the employee has willingly granted to the employer, and hence it can by no means be considered as a right of the latter. Due attention shall be given here to item 5/2/2.

7. Commitments of the Employee and the Employer

7/1 Commitments of the employee

7/1/1 The private employee has to render his service to the employer and observe the period of hiring during which he should not be absent, except on permission of the employer, or to perform a recognizable duty. Similarly, the shared employee has to perform the work as agreed upon, and within the stipulated period, if any.

7/1/2 In principle, the employee is supposed to do the work by himself since he has been hired to perform a specific work required from him, unless the contract stipulates otherwise. This, however, does not hold true in case of hiring someone to do a future service/ work that has been specifically defined. In this latter case, what needs to be catered for is observation of all the specifications mentioned in the contract.

7/1/3 In hiring of persons, it is permissible to stipulate a penalty code indicating a specific amount which the employee should pay to the employer in case of delay in performing the work/service within the specified period. The amount to be thus paid has to be determined with due consideration to normal practice as well as justice.

7/2 Commitments of the employer

7/2/1 The employer shall observe the following:

a) Payment of the pay in advance, on deferred payment basis, or in installments as agreed upon. In the absence of agreement on a specific form of payment, the due pay should be paid after rendering the complete service to the employer, or on expiry of the hiring period in case of private employment. When a due pay is delayed by the employer in spite of notification the employee has the right to stop work or prevent the employer from utilizing the service that has already been done.

b) Provision of facilities/requirements to the employee, if the work to be done so requires, or when provision of such facilities and requirements is stipulated in the contract.

8. Emergencies, Termination, Expiry and Renewal of Hiring Contracts

8/1 Emergencies of hiring

8/1/1 A private or shared hiring contract which relates to the employee in person as per normal practice, shall be terminated on the death of the employee, or when the employee loses his entire legal competence, or when - due to injury or sickness - he becomes unable to work anymore or for a period which is normally considered to be too long for the employer to tolerate. Such contract shall also be terminated when the employee-institution encounters liquidation, bankruptcy, or freezing of activities.

8/1/2 When the employee refrains from delivery of the service as required, and fails to present the suitable alternative as agreed upon, the employer has the right to terminate the contract and demand indemnification for the actual harm caused to him by the act of the employee.

8/2 Termination, expiry and renewal of hiring contracts

8/2/1 In specific hiring, when the service/work becomes completely useless the contract becomes null and void; whereas when it is partially useless the employer has the right to terminate the contract. If, instead, the service/work that has become useless pertains to hiring on the basis of future delivery of a well defined service, the contract shall remain valid, and the employee, in this case, has to deliver a similar service.

8/2/2 The hiring contract can be terminated on the consent of its two parties, yet none of them has the independent right of its termination, except for a contingent excuse or *force majeure* situation. The employer has the right to terminate the contract on the existence of a defect that makes the service useless. The

contract can also be terminated on the basis of a conditional option (*Khiyar al-Shart*), by the party who has stipulated such option, and within its specified period.

8/2/3 The employee has the right to stipulate termination of the contract when the employer fails to make or delay payment of the pay agreed upon, or when the employer does not pay one installment or more of such pay (*Khiyar al-Naqd*).

8/2/3 On the consent of the two parties, the hiring contract can be terminated before its effectiveness.

8/2/3 Hiring comes to an end at the end of the contract period, yet it remains when it is needed for a reasonable excuse or for avoidance of harm. In case of continuation, hiring shall be for a pay to be agreed upon between the two parties, otherwise the normal pay for similar services should be applied.

8/2/6 The hiring contract can be renewed for another period, whether renewal is to be declared before expiry of the original contract, or to take place spontaneously. For spontaneous renewal, a condition is to be stated in the contract indicating that the contract shall spontaneously become renewed on the commencement of a new period, if none of the two parties notifies the other about his disinterest in renewal.

9. Date of Issuance of the Standard

This Standard was issued on 28 Jumada II, 1429 A.H., corresponding to 2 July 2008 A.D.

Adoption of the Standard

The Shari'ah Board adopted the Standard on Hiring of Persons in its meeting No. (21) held on 24–28 Jumada II, 1429 A.H., corresponding to 28 June – 2 July 2008 A.D., in Dar Al-Taqwa Hotel, in Al-Madinah Al-Munawwarah, Kingdom of Saudi Arabia.

Appendix (A)
Brief History of the Preparation of the Standard

In its meeting No. (14) held on 21-23 Rabi' I, 1426 A.H., corresponding to 30 April – 2 May 2005 A.D., the Shari'ah Board decided to issue a Shari'ah standard on Hiring of Persons (usufructs of services).

On 29 Jumada I, 1426 A.H., corresponding to 6 July 2005 A.D., the Secretariat General decided to commission a Shari'ah consultant to prepare a study on Hiring of Persons (usufructs of services).

A joint committee composed from Shari'ah Committees (1) and (2) held a meeting in the Kingdom of Saudi Arabia, on 7 Jumada I, 1427 A.H. corresponding to 3 June 2006 A.D. The joint committee discussed and cleared the study, and asked the consultant to prepare the draft of the standard.

In a further meeting of the joint committee, held on Thursday 21 Sha'ban 1427 A.H., corresponding to 14 September 2006 A.D., in the Kingdom of Bahrain, the draft of the standard was discussed and the consultant was requested to introduce necessary amendments in the light of the discussions and observations of the meeting.

In its meeting No. (19) held in Makkah Al-Mukarramah on 26–30 Sha'ban 1428 A.H., corresponding to 8-12 September 2007 A.D., the Shari'ah Board discussed the draft of the standard and introduced the changes that it deemed necessary.

In its meeting No. (20) held in the Kingdom of Bahrain, on 4-8 Safar 1429 A.H., corresponding to 11-15 February 2008 A.D., the Shari'ah Board discussed once again the draft standard and introduced further changes.

The Secretarial General of AAOIFI held a public hearing in the Kingdom of Bahrain on 8 Jumada II, 1429 A.H., corresponding to 12 June 2008 A.D. More than 30 participants attended the session as representatives of central banks, institutions, and accounting firms. The session was also attended by Shari'ah scholars, university teachers and other interested parties. Several observations were made in the session, and duly responded to by the members of the Shari'ah Standards Committees (1) and (2).

In its meeting No. (21) held in Al-Madinah Al-Munawwarah, on 24–28 Jumada II, 1429 A.H., corresponding to 28 June – 2 July 2008 A.D., the Shari'ah Board discussed the draft standard, introduced the changes that it deemed necessary and adopted the Standard.

Appendix (B)
The Shari'ah Basis for the Standard

- Hiring of persons is permissible according to Qur`an, Sunnah (Prophetic Traditions) and Ijma' (consensus of Fuqaha). In Qur`an this is emphasized in the Verse stating: ***{"Then if they give suck to the children for you, give them their due payment"}***.[2]

  As far as Sunnah is concerned, permissibility of hiring of persons can be derived, for instance, from the Hadith of the Prophet (peace be upon him) in which he said: *"The most eligible of whatsoever you have got a pay for, is the Book of Allah"*.[3] This in addition to many other Hadiths. In this regard, Al-Bukhari presented a whole chapter on Ijarah (hiring) which comprises 22 sections, and so did Abu Dawud, as well as other Sunnah scholars who referred to several Hadiths on the subject within other chapters.

  Similarly, Ijma' (consensus of Fuqaha) on permissibility of hiring of persons is said to have been reached since the time of the Sahabah (companions of the Prophet, peace be upon him), as well as the time of their successors and the founding leaders of the schools of Fiqh. In this respect Al-Kasani said: "As regards Ijma' of the Ummah (Muslim Nation) it had been reached before the existence of the deaf……."[4]

- Permissibility of a pledge which is binding to only one party is supported by a number of Shari'ah proofs which support honoring of contracts, pledges and promises, in addition to what has been emphasized by some Shari'ah scholars. On this regard, the International Islamic Fiqh Academy issued its

(2) [Al-Talaq (Divorce): 6]; and see: *"Jami' Al-Bayan"*, by Al-Tabari, verified by Mahmoud Shakir, Dar Ibn Hazm, [28: 181].
(3) *"Sahih Al-Bukhari"* with *"Fath Al-Bari"* [4: 452–453].
(4) *"Bada`i' Al-Sana`i'"*, Muassasat Al-Tarikh Al-Arabi, Beirut, 1421 A.H. [4: 16].

resolution No. 40-41 (2/5 & 3/5) on Enforceability of Pledge in Murabahah.[5] The rulings stated in that resolution also hold true in the case of pledge in hiring and other similar dispositions.

- Permissibility for the institution to receive an amount from the party who pledges to hire its services (seriousness margin), is based on need and interest. A similar Fatwa (Shari'ah opinion) has been issued in this regard by the Unified Shari'ah Supervisory Board of Al Baraka Group.[6] That Fatwa is relevant to the case of hiring.
- Enforceability of the hiring contract is derived from the verses and Hadiths which instruct people to honor contracts, as when Allah, the Almighty, says: ***{"O you who believe! Fulfill (your) obligations..."}***.[7] besides the general consensus among fiqh scholars on enforceability of hiring,[8] since it is a contract which facilitates ownership through exchange of two objects.
- The ruling that the period of hiring should be specified stems from the fact that non-specification could result in prohibited Gharar (uncertainty) and Jahalah (ignorance) which lead to dispute. Prohibition of sales which involve Gharar (uncertainty) has been emphasized by well verified Hadiths.[9] Therefore hiring of persons shall not involve Gharar, because, in essence, it is a sale of service/work.
- Permissibility of hiring of persons for doing deferred services is based on the practice of the Prophet (peace be upon him) when he and Abu Bakr hired a man from Bani Al-Dail to serve them as a guide, after three days.[10] Moreover, hiring is a time-based contract and therefore its object can be delivered in the future.
- Permissibility of taking 'Arboun (Earnest Money) is derived from what Omar did in the presence of Sahabah (companions of the Prophet, peace

(5) The Journal of the Academy, Issue No. (5), Vol. (2), (pp. 754 and 965).
(6) Fatwa No. (9/10) of the Unified Shari'ah Board of Al Baraka.
(7) [Al-Ma'idah (The Table): 1].
(8) *"Al-Fatawa Al-Hindiyyah"* [4: 410]; *"Al-Sharh Al-Kabir"* [2: 4]; *"Al-Rawdah"* [5: 173]; and *"Al-Mughni"* with *"Al-Sharh Al-Kabir"* [6: 20].
(9) *"Sahih Muslim"* [5: 3]; and *"Sunan Abu Dawud"* (H: 3376).
(10) *"Sahih Al-Bukhari"* with *"Al-Fath"* [4: 443], Al-Matba'ah Al-Salafiyyah.

be upon him), and adopted by Ahmad. On this regard, The Islamic Fiqh Academy of Makkah Al-Mukarramah has also issued its resolution No. 72 (3/8).

- Sub-hiring is permissible because when the employer owns the service/ work he becomes able to transfer it to someone else.
- The ruling that a hiring contract can be conditional is based on the Hadith of the Prophet (peace be upon him) which indicates: *"Muslims are at their conditions, except a condition that permits what has been prohibited or prohibit what has been permitted."*[11]
- The ruling that hiring for a specific service is impermissible before owning and possessing the service, is reached by analogy to prohibition of selling things that one does not own, and the Hadith which has been narrated by Hakim Ibn Hizam stating: *"Don't sell what you do not have"*.[12]
- Permissibility of signing a hiring contract for a service to be delivered in the future, is judged by analogy to Salam, and because that does not lead to dispute. According to the Shafi'i and Hanbali scholars the pay should not necessarily be made in advance.
- A private employee should not guarantee what he works on, except in case of transgression, negligence, or breach of a condition. This is actually the general principle in trust-based contracts; in addition to that, the contract comprises an interest for the employee since he will receive the pay. In case of transgression, negligence, or breach of condition the act results in harm, and hence the employee has to indemnify the employer, as per the directives of the Prophet (peace be upon him) who said: *"No harm, and no reciprocal harm"*.[13]
- The ruling that a shared employee has to guarantee what he works on, is based on what has been reported about some of the Sahabah (companions of the Prophet – peace be upon him) who emphasized that this has to be so,

(11) Related by Al-Bukhari: *"Fath Al-Bari"*, *"Kitab Al-Ijarah"* [4: 451]; and *"Abu Dawud"* with *"'Awn Al-Ma'bud"* [9: 516].

(12) Related by Abu Dawud in his *"Sunan"* (H: 3530); Al-Nasa`i in his *"Sunan"* [2: 225]; Ibn Majah in his *"Sunan"* (H: 2187), and Ahmad in his *"Musnad"* [3: 42].

(13) Related by Malik in *"Al-Muwatta'"*, *"Kitab Al-Aqdiyah"* [1: 464]; Ahmad in his *"Musnad"* [1: 313] and [5: 327]; and Ibn Majah in his *"Sunan"* [2: 784].

because the shared employee will be doing what he has been paid to do in the absence of the owner, besides the fact that the employee in this case is working for many employers rather than for a particular employer.(14)

- The hired service shall be permissible because what is prohibited by Shari'ah cannot be an object of a Shari'ah-recognizable contract. Moreover, impermissible hiring entails provision of support to wrongdoing and misbehavior; whereas Allah, the Most High, says: ***{"Help you one another in Al-Birr and Al-Taqwa (virtue, righteousness and piety, but do not help one another in sin and transgression"}***.(15)
- The pay for future hiring periods can be adjusted on mutual consent of the two parties, because such adjustment constitutes contract renewal for a coming period. No pay has yet become payable to the employee for that future period so that it can become a debt owed the employer, and consequently lead to prohibited rescheduling of debt. When, instead, such adjustment is done for an unsettled amount of pay which belongs to past periods, so as to extend the repayment period against an increase in the amount to be paid, adjustment in this case will lead to Riba (usury). The 11th Seminar of Al Baraka has already issued a Fatwa in this connection.(16)
- The ruling that the pay can be composed of two parts is based on Tradi (mutual consent), in addition to the fact that such arrangement neither violates the contract rulings nor does it encounter a Shari'ah prohibition.
- The pay can be in the form of a common share, because the pay in this form can be known, and will not lead to dispute or Gharar (uncertainty).
- Permissibility of stipulating in the contract that all outstanding installments of the pay shall become due in case of default by the employer in the settlement of any installment is based on Tradi (mutual consent), besides the fact that such a condition neither violates the contract nor does it encounter Shari'ah prohibition. The Prophet (peace be upon him) said: *"Muslims are*

(14) *"Bada`i' Al-Sana`i'"* [4: 210]; *"Hashiyat Al-Dusuqi"* [4: 23]; *"Mughni Al-Muhtaj"* [2: 351]; and *"Al-Mughni"* with "*Al-Sharh Al-Kabir"* [6: 115].

(15) [Al-Ma'dah (The Table): 2].

(16) The Book on Resolutions and Recommendations of Al Baraka Seminar (11/2).

bound by the conditions the make".[17] In this regard the International Islamic Fiqh Academy has also issued its resolution No. 64 (2/7).[18]

- Impermissibility of stipulating a condition for increasing pay overdues is based on the fact that any increment in such amounts (against extension of settlement period) is Riba (usury). In this connection, The International Islamic Fiqh Academy issued its resolution No. 133 (7/14).[19]
- Permissibility of applying two rates of pay (so that the employer would become entitled to the higher rate when he performs the work in the shorter period and vice versa) stems from the fact that such arrangement does not lead to Gharar (uncertainty) or Jahalah (ignorance). In addition to that, such arrangement had been Traditionally resorted to, and approved by a number of Fiqh scholars.[20]
- Permissibility of seeking payment guarantees, is similar to permissibility of Kafalah (suretyship) and *Tawthiqat* (documentations) in Islamic jurisprudence, besides the fact that request for guarantees here does not violate the rulings of the contract but rather confirms them, since guarantees are suitable for debt contracts.
- The contract becomes null and void when the service is completely or partially useless, because the outcome of the contract has not been accomplished, and the contract has not achieved its objectives. In addition to all that, the pay is supposed to be made against the benefit. In this respect, the International Islamic Fiqh Academy issued its Resolution No. 13 (1/3).[21] If, instead, the contract relates to a specifically defined service which has to be delivered in the future, the contract does not become null and void because the service in question will still remain as a debt, and the employee should be asked to provide a service that has the same specifications.
- The ruling that hiring will come to an end on expiry of the contract period or on the consent of the two parties, is based on the fact that a hiring contract

(17) Reference has been referred to earlier.
(18) The Journal of the Academy, No. (6), (P. 193) and No. (7), Vol. (2), (P. 9).
(19) The Journal of the Academy, No. (14), Vol.(4), (P. 687).
(20) See: *"Al-Fatawa Al-Hindiyyah"* [4: 445] and *"Al-Mughni"* by Ibn Qudamah [5: 442].
(21) See: the Journal of the Academy, No. (2), Vol. (2), (P. 527) and No. (3), Vol. (1), (P. 77).

is a time-based contract and therefore, it expires at the end of the period. Similarly, a hiring contract is a consensual contract which starts and ends on the consent of the two parties.

- Permissibility of spontaneous renewal of the contract when it is stipulated as a condition or when agreed upon between the two parties, stems from the fact that such condition does not violate the rulings of the contract. The Prophet (peace be upon him) said: *"Muslims are bound by the conditions the make"*.[22]
- The basis for the commitments of the employee and the employer is that such commitments constitute essential requisites of the contract for hiring of persons. Moreover, such commitments are based on the agreement of the two parties. Both of these two justifications are unanimously accepted by Shari'ah scholars.[23]
- The ruling that a hiring contract which relates to the employee in person becomes null and void on the death, loss of legal competency or persistent sickness of the employee, is based on the fact that the object of contracting will, thus, become no longer existent. Consequently, there will also be no pay since the pay is to be made in exchange of the benefit. In addition to all that, this ruling conforms to normal practice.
- The ruling that a contract which relates to a future service does not become null and void on the death of the employee, is based on the fact that in this case the service, as a debt, is considered as existent.
- The pay shall become due even if the employer could not benefit from the employee who had put himself at his disposal. This ruling is based on the fact that the employee is entitled to the pay since he has been able to fulfill the condition of putting himself at the disposal of the employer, while the employer has no excuse for not benefiting from the services.
- Permissibility of terminating the hiring contract in case of contingencies is based on observation of need and necessity of avoiding hardship, in addi-

(22) Reference has been referred to earlier.

(23) See: *"Bada`i' Al-Sana`i'"* [4 :210]; *"Tabyin Al-Haqa`iq"* [5: 124]; Al-Dusuqi in *"Al-Sharh Al-Kabir"* [4: 23]; *"Mughni Al-Muhtaj"* [2: 351; and *"Al-Mughni"* with *"Al-Sharh Al-Kabir"* [6:115].

tion to normal practice. A Fatwa in this regard has been issued by the Board of Fatwa and Shari'ah Supervision of the Kuwait Finance House.[24]

- Permissibility for the employee to state a condition for termination of the contract when the pay is delayed is based on the fact that such condition is fair, and does not violate the rulings of the contract. The Prophet (peace be upon him) said: *"Muslims are at their conditions"*.[25]

(24) Fatwa No. (232) and No. (252).
(25) Reference has been referred to earlier.

Shari'ah Standard No. (12)

Sharikah (Musharakah) and Modern Corporations

(Revised Standard)

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

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

Preface

The objective of this standard is to explain the basis and general rulings for Sharikat al-'Aqd, (contractual partnership) which is known today as Musharakah, including the rulings for joint partnership, reputation (creditworthiness) partnership, vocation partnership, diminishing partnership and modern corporations. The explanation of these partnerships includes definitions, rulings applicable to each partnership and the Shari'ah limitations that must be taken into account by Islamic financial Institutions (Institution/Institutions).[1]

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

Statement of the Standard

1. Scope of the Standard

This standard covers all forms of traditional Fiqh-nominate partnerships that operate on the basis of Sharikat al-'Aqd (contractual partnership), except the partnerships that are explicitly excluded by this standard as indicated below. The standard also applies to all modern forms of partnerships including diminishing Musharakah. The standard does not cover ownership partnership where the parties jointly own an asset. It does not include rules for Sharikat al-Mufawadah because the practical application of this form of partnership is rare and, if need be, reference should be made to Fiqh books. The standard does not cover Mudarabah, because this form of partnership has a separate standard. In the same vein, it does not cover sharecropping partnerships, such as irrigation and agricultural partnerships. The standard also does not cover, as far as modern partnerships are concerned, regulatory policies and procedures necessary for operations in the market.

2. Definition, Classifications and Types of Sharikat al-'Aqd

2/1 Definition of Sharikat al-'Aqd

Sharikat al-'Aqd (contractual partnership) means an agreement between two or more parties to combine their assets, labour or liabilities for the purpose of making profits.

2/2 Classifications of Sharikat al-'Aqd

Sharikat al-'Aqd is classified into two main categories:

First Category: Traditional Fiqh-Nominate Partnerships.

Second Category: Modern Corporations.

2/2/1 The traditional Fiqh-nominate partnerships are as follows:

a) Sharikat al-'Inan (contractual partnership)

b) Sharikat al-Wujuh or Al-Dhimam, i.e. partnership of credit-worthiness or reputation (liability partnership)

c) Sharikat al-A'mal (vocational partnerships and partnerships for undertaking difficult work or accepting jobs)

2/2/2 Modern corporations and their well-known forms are as follows:

a) Stock company

b) Joint-liability company

c) Partnership in commendum

d) Company limited by shares

e) Allotment (Muhassah) partnership

f) Diminishing partnership (this partnership has originated from Sharikat al-'Inan)

3. First Category: Traditional Fiqh-Nominate Partnerships

3/1 General rulings for Sharikah, especially Sharikat al-'Inan

Sharikat al-'Inan is a partnership between two or more parties whereby each partner contributes a specific amount of money in a manner that gives each one a right to deal in the assets of the partnership, on condition that the profit is distributed according to the partnership agreement and that the losses are borne in accordance with the contribution of each partner to the capital.

3/1/1 Conclusion of a Sharikah contract

3/1/1/1 A Sharikah contract can be concluded by agreement between the parties concerned on the basis of offer and acceptance. The contract of partnership should, if necessary, be documented and registered officially. The objectives of the partnership must be clearly spelt out in the document of partnership or in the articles of association of the company.

3/1/1/2 It is permissible for the Institution to enter into a partnership contract with non-Muslims or conventional banks to carry out operations acceptable by Shari'ah

unless it has become evident that the funds or items presented by these entities for the purpose of the partnership are from non-permissible sources. In operating a partnership with non-Muslims or conventional banks, arrangements must be made to obtain all necessary assurances and guarantees that rules and principles of the Shari'ah are observed during operations of the partnership. Among such guarantees is one to the effect that the operations of the company be either managed or supervised by an entity that observes the Shari'ah rules.

3/1/1/3 It is permissible for the Institutions to include conventional banks as partners in a syndicated financing which operates on the basis of Shari'ah, provided that the Institution secures the right to manage the partnership's operations and that such operations are subject to the Shari'ah supervision. [see Shari'ah Standard No. (24) on Syndicated Financing]

3/1/1/4 It is permissible for the partners to amend at any point of time the terms of a partnership contract. They may make changes to the ratio of profit-sharing, taking into account that any losses are shared according to the share of each partner in the partnership capital.

3/1/2 The capital of Sharikah

3/1/2/1 In principle, the capital of Sharikah should be contributed in the form of monetary assets on which one can rely in order to determine the amount of the capital and to recognise profit or loss. Nevertheless, it is permissible, with the agreement of all partners, to provide tangible assets (commodities) as the capital of Sharikah after the monetary values of these assets are determined and expressed in currency in order to know the share contributed by each partner.

3/1/2/2 If partners have contributed their partnership capital in different currencies, these currencies must be translated into the currency of the Sharikah at current exchange rates so as to determine the shares and liabilities of each partner.

3/1/2/3 The share of each partner in the capital should be determined, whether it is contributed in the form of one lump sum or by more than one payment over time; i.e., when there is a need for additional funds to increase the capital.

3/1/2/4 It is not permitted that debts (receivables) alone be used as a contribution to the Sharikah capital. However, debts may form part of the contribution to the capital where they become inseparable from other assets that can be presented as a contribution to the capital in Sharikah, such as when a manufacturing firm use its net assets as a contribution to the capital. [see Shari'ah Standard No. (21) on Financial Paper]

3/1/2/5 The funds of current accounts, although they are juristically classified as loans to the Institutions, can be presented as a contribution to the capital in a Sharikah either with the Institution itself or with a third party.

3/1/3 Managing a Sharikah venture

3/1/3/1 In principle, each partner is entitled to act in the interest of the partnership in the following transactions: spot or deferred sales; taking possession or custody of the partnership receivables; making payments or deposits and providing or receiving a mortgage on behalf of the partnership; asking for payment of debts, admission of liabilities, taking up legal actions, cancellation of contracts, rejecting defective goods, renting the assets of the partnership, processing transfers of rights and

debts; requesting credit facilities in the interest of partnership; and doing what is customary in the interest of trading. A partner is not entitled to act against the interest of the partnership or to perform actions that will damage the partnership, such as giving out grants or loans, unless all the partners have consented to such an action. However, the partner may give out short-term minor loans that will not, according to customary practice, affect the operation of partnership.

3/1/3/2 It is permissible for the partners to agree that the management of the partnership will be restricted to certain partners or to a single partner. In this case, the other partners are bound to abide by their consent not to act on behalf of the partnership.

3/1/3/3 It is permissible for the partners to appoint a manager other than one of the partners and pay him a fixed remuneration that will be included in the expenses of the Sharikah. It is also permissible that the partners set aside a portion of the investment profit plus a fixed remuneration as a form of incentive for the manager. However, if the management is carried out from the outset for a percentage share in the profit earned, this action classifies the manager as a Mudarib and he is only entitled to a share in the profit, if any, and deserves no further remuneration for management services.

3/1/3/4 It is not permitted, in a Sharikah contract, to specify a fixed remuneration for a partner who contributes in managing the Sharikah funds or provides some form of other services, such as accounting. However, it is permissible to give him a greater share of profit than he would receive solely on the basis of his share in the partnership capital.

3/1/3/5 It is permissible that one of the partners be appointed to provide services that are mentioned in item 3/1/3/4 provided that the appointment is based on an independent contract from the Sharikah contract so that he may be dismissed as a manager at any point of time without the need to amend or to terminate the Sharikah contract. In this case, the appointed partner may earn a specific remuneration.

3/1/4 Guarantees in a Sharikah contract

3/1/4/1 All partners in a Sharikah contract maintain the assets of the Sharikah on a trust basis. Therefore, no one is liable except in cases of misconduct, negligence or breach of contract. It is not permitted to stipulate that a partner in a Sharikah contract guarantees the capital of another partner.

3/1/4/2 It is permissible for a partner in a Sharikah contract to stipulate that another partner provides a personal guarantee or a mortgage to cover cases of misconduct, negligence or breach of contract.

3/1/4/3 A third party may provide a guarantee to make up a loss of capital of some or all partners. This guarantee is circumscribed with the conditions that (I) the legal capacity and financial liability of such a third party as a guarantor are independent from the Sharikah contract, (II) the guarantee should neither be provided for consideration nor linked in any manner to the Sharikah contract; (III) the third party guarantor should not own more than a half of the capital in the entity to be guaranteed, and (IV) the guaranteed entity should not own more than a half of the capital in the entity that undertakes to provide a guarantee. In case of a third party's undertaking to guarantee, the partner benefiting from such

an undertaking is not, however, entitled either to claim that the Sharikah contract becomes null and void or to refuse to meet his obligations under the contract if the guarantor fails to meet his voluntary promise to cover the loss of his capital, on the grounds that he (the beneficiary) entered into the Sharikah contract taking into account the state of such a third party's undertaking to guarantee the loss of his capital.

3/1/5 The outcome of Sharikah investments (profit and loss)

3/1/5/1 The Sharikah contract should incorporate a provision specifying the manner of sharing profits between the parties. The allocation of profits must be made in a manner that gives each partner an undivided percentage of profit, not a sum of money or a percentage of the capital. [see item 3/1/5/9]

3/1/5/2 It is not permitted to defer the determination of the profit percentages due to each partner until the realisation of profit. The profit percentage for each partner must be determined at the conclusion of Sharikah contract. The parties may bilaterally agree to amend the percentages of profit-sharing on the date of distribution. Also, a partner may relinquish, on the date of distribution, a part of the profit that is due to him in favour of another party.

3/1/5/3 In principle, the shares of profit may be in proportion to the percentage of each partner's contribution to the Sharikah capital. Nevertheless, the partners may agree to make profit-sharing not proportionate to their contributions to capital, provided the additional percentage of profit over the percentage of contribution to the capital is not in favour of a sleeping partner. If a partner did not stipulate a condition that he be

a sleeping partner, then he is entitled to stipulate an additional profit share over his percentage of contribution to the capital even if he did not work.

3/1/5/4 It is a requirement that the proportions of losses borne by partners be commensurate with the proportions of their contributions to the Sharikah capital. It is not permitted, therefore, to agree on holding one partner or a group of partners liable for the entire loss or liable for a percentage of loss that does not match their share of ownership in the partnership. It is, however, valid that one partner takes, without any prior condition, the responsibility of bearing the loss at the time of the loss.

3/1/5/5 It is permissible for the partners to agree on the adoption of any method of allocation of profit, either permanent or variable, for example, by agreeing that the percentages of profit shares in the first period are one set of percentages and in the second period are another set of percentages, depending on the disparity of the two periods or the magnitude of the realised profit. This is allowed provided that using such a method does not lead to the likelihood of a partner being precluded from participation in profit.

3/1/5/6 It is not permitted to start the allocation of profit between the partners unless the operating costs, expenses and taxes are deducted in calculating the profit and the capital of the Sharikah is maintained intact.

3/1/5/7 It is not permitted that the conditions or modes of profit allocation in a Sharikah contract include any clause or condition that may result in the probable violation of the principle of sharing profit. For example, if a predetermined amount of profit or a specific percentage of capital is assigned to one of the partners, this assignment will be rendered void. If the assignment

is amended before profit comes forth, profit shall be divided in accordance with what partners agreed on as to amendment. Otherwise, profit shall be divided based on each partner's respective share in capital.

3/1/5/8 Taking into account the provisions of item 3/1/5/3, it is permissible to agree that if the profit realised is above a certain ceiling, the profit in excess of such a ceiling belongs to a particular partner. The parties may also agree that if the profit is not over the ceiling or is below the ceiling, the distribution will be in accordance with their agreement.

3/1/5/9 The profit may be finally distributed on the basis of the proceeds of selling all the existing assets, known as actual valuation, or on the basis of constructive valuation of assets which means valuation of the assets of the Sharikah at fair value. The receivables must be valued at the cash value that is expected to be realised, i.e. after deduction of an allowance for doubtful debts. In valuing receivables, it is not permitted to take account of the time value of money (interest) or the notion of discount on the basis of current value, i.e. a discount of the amount of the debt as consideration for earlier payment, and cash amounts shall be recognized as is.

3/1/5/10 It is not permitted that the final allocation of profit take place based on expected profit, i.e. it is necessary that the allocation of profit take place on the basis of actual profit earned through actual or constructive valuation of the sold assets.

3/1/5/11 It is permissible to allocate some funds to any of the partners on account, i.e. before actual or constructive valuation, on condition that the final actual settlement will take place at a later stage. In this case, the parties

should undertake to reimburse to the Sharikah any amount that they have received in excess of their share of profit after actual or constructive valuation.

3/1/5/12 If the subject matter of Sharikah is assets acquired for leasing that bring in income or the subject matter is services that bring in revenue, then the amount distributed to the partners annually is on account, and it is subject to settlement and reimbursement at the end of the Sharikah.

3/1/5/13 It is permissible, based on the articles of association or a decision of the partners, not to distribute the profits of the company. It is also permissible to set aside periodically a certain ratio of profit as a solvency reserve or as a reserve for meeting losses of capital (investment risk reserve) or as a profit equalisation reserve.

3/1/5/14 It is permissible to agree on setting aside a proportion of profit for non-partners as a charitable donation.

3/1/6 Maturity of Sharikah

3/1/6/1 Each partner is entitled to terminate the Sharikah (i.e. to withdraw from the partnership) after giving his partner/s due notice to this effect, in which case he shall be entitled to his share in the partnership, and this withdrawal would not necessitate the termination of the partnership of the remaining partners. It is permissible for the partners to enter into a binding promise for the continuity of the partnership for a period of time. In this case, it is permissible for the parties to agree to terminate the partnership before such a fixed period. In all these cases, the obligations and actions that took place before termination will remain unaffected and they will continue to exist.

3/1/6/2 It is permissible for a partner to issue a binding promise to buy, either within the period of operation or at the time of liquidation, all the assets of the Sharikah as per their market value or as per agreement at the date of buying. It is not permissible, however, to promise to buy the assets of the Sharikah on the basis of face value.

3/1/6/3 A Sharikah venture comes to an end at the expiry date or before the expiry date if the partners agree to terminate it prematurely, or, in the case of partnership in a particular business, by actual liquidation of the assets that constitute the subject matter of the partnership. The termination of a Sharikah can take place on the basis of constructive liquidation. In this case, the Sharikah will be regarded as if it has been ended and the parties have commenced a new partnership whereby the assets that were not sold through actual liquidation, but have been valued on the basis of constructive liquidation, will be considered as the capital of the new partnership. If the liquidation is based on the expiry date, then all the existing assets shall be sold according to current market values and the proceeds will be used as follows:

a) Payment of liquidation expenses.

b) Payment of financial liabilities from the net assets of the partnership.

c) Distribution of the remaining assets among the partners in accordance with their percentage of contribution to the capital. If the assets fall short and the partners do not recover all of their contributed capital, the distribution shall take place on a pro rata basis to the shares of capital.

3/2 Partnership in creditworthiness or reputation (liability partnership)

3/2/1 A partnership in creditworthiness (partnership of liability) is a bilateral agreement between two or more parties to conclude a partnership to buy assets on credit on the basis of their reputation for the purpose of making profit, whereby they undertake to fulfil their obligations according to the percentages determined by the parties. In addition, the parties should determine for each partner the percentage of profit sharing and of liability sharing, which latter may, by agreement, differ, downwards or upwards, from the percentage of profit sharing.

3/2/2 The partnership in creditworthiness has no monetary capital. This is because the subject matter of the partnership is an obligation or a liability that is contingent on creditworthiness (outstanding reputation). This is the obligation of the partners to pay the amount of debts created through purchases on credit, which form the liability of the partners. Therefore, the parties should agree on the ratio of liability for which each partner is responsible when paying such debts.

3/2/3 The profit shall be distributed according to the agreement. However, the loss will be borne by each partner according to the ratio that each partner had undertaken to bear in proportion to overall assets that are purchased on credit. It is not permitted that the contract of partnership incorporates a provision that specifies a lump sum from the profit for a particular partner.

3/3 Service partnerships (professional or vocational partnerships and partnerships in skilled trades)

3/3/1 A service partnership is an agreement between two or more parties to provide services pertaining to a profession, vocation or skilled trade or to render some services or professional advice or to manufacture goods, and to share profit according to an agreed upon ratio.

3/3/2 The service partnership has no monetary capital. This is because the subject matter of the partnership is rendering services. There is no Shari'ah implication regarding any disproportion in the services the partners or their representatives may have rendered. The partners may also distribute different types of services among themselves and may assign some or all partners a set of services or a particular service in a way that will achieve the integration and purpose of the overall service to be rendered.

3/3/3 The profit shall be distributed among the partners according to the agreed ratio, but the contract should not specify that a lump sum be paid from the profit to a particular partner.

3/3/4 If the service partnership requires capital goods (e.g., equipment or tools), then it is permissible for each party to provide the necessary goods that his services require, in which case each partner owns the goods he has provided. The partners may contribute funds to acquire the goods on the basis of a partnership in ownership. It is also permissible for a party to a Sharikah contract to provide the capital goods required by the partnership in consideration for fees that will be charged against the Sharikah operation as expenses.

4. Second Category: Modern Corporations

4/1 Stock company

4/1/1 Definition of a stock company

4/1/1/1 A stock company is a company of which the capital is partitioned into equal units of tradable shares and each shareholder's (co-owner's) liability is limited to his share in the capital. It is a form of financing partnership. The rules of Sharikat al-'Inan apply to this company except on the issue of the limited liability of the shareholders and the fact that this type of company cannot be unilaterally terminated by one party or a minority of its shareholders. [see items 4/1/2/1 and 4/1/2/9]

4/1/1/2 The stock company has a juristic personality through its incorporation by law in such a way that it cannot avoid its obligations to people dealing with it. This separates the liability of the company from the liability of its shareholders (the co-owners) and also establishes for it a separate legal capacity as required for necessary legal arrangements, irrespective of the legal capacity of the shareholders. By definition, a stock company is entitled to initiate legal claims through its representative. It is subject to the jurisdiction of the place of its incorporation.

4/1/2 Shari'ah Rulings relating to a stock company

4/1/2/1 The contract forming a stock company is binding during the duration designated by the articles of association for the continuity of the company on the basis of the undertaking of the parties not to dissolve the company unless the majority of the partners have consented to do so. Therefore, no one is entitled to dissolve (to terminate) the company in respect to his shares. However, a shareholder is entitled to sell his shares or to relinquish title to them in favour of another person.

4/1/2/2 It is permissible for the issuer of shares to add a certain percentage to the actual value of the shares on the subscription date in order to recover issuing expenses, provided that such percentage is appropriately estimated to reflect the actual expenses incurred.

4/1/2/3 It is permissible to issue new shares in order to increase the capital provided the new shares are issued at the fair value of the old shares. This should be done in accordance with the opinion of experts in valuation of the company's assets. In other words, the new issues can be issued at a premium or at a discount to their nominal value, or issued at a market value.

4/1/2/4 It is permissible that a shareholder underwrite an issue of shares without any consideration. In such a case, there is an agreement between a person and the company on the date of incorporation of the company, or of a share issue, to the effect that such a person is undertaking to buy all or part of the shares issued. In other words, it means an undertaking to subscribe all the remaining shares that are not subscribed at its nominal value. However, it is permissible for a shareholder to ask for consideration for services provided other than the underwriting, such as conducting feasibility studies or marketing the shares.

4/1/2/5 It is permissible that a part of payment for subscription of shares be made in an instalment and that the other instalments be deferred. In this case, the paid instalment is a contribution to the Sharikah capital, and the deferral of some instalments constitutes an undertaking to increase his share of capital in the company subsequently. This is permissible provided the instalments cover all the shares and that the company's liability is confined to the value of the subscribed shares.

4/1/2/6 It is not permitted to purchase shares using interest-based loans, provided by either a broker or any other person, in consideration for mortgaging the shares as a security for payment.

4/1/2/7 It is not permitted for someone to sell shares that he does not own and the promise of a broker to lend the shares to him at the date of delivery does not constitute ownership or possession of the shares. This is not allowed especially if the broker stipulates that the seller must pay the price of the shares so that he can deposit it and earn interest in return for such a loan.

4/1/2/8 In the legitimate public interest, it is permissible for the relevant authorities to organise trading in shares in such a way that trading will not take place except through specific licensed stockbrokers.

4/1/2/9 It is permissible to restrict the liability of a company to its paid up capital if this is made public, in order to make the customers of the company aware of the financial position of the company without any uncertainty or lack of transparency.

4/1/2/10 It is permissible to sell shares in the company subject to rules and regulations of the company that do not conflict with Shari'ah, such as pre-emptive rights of the existing shareholders to purchase the shares.

4/1/2/11 It is permissible to mortgage the company's shares. However, this is subject to the rules and regulations of the company vis-à-vis the right of the shareholders to mortgage their ownership rights to undivided shares in the company.

4/1/2/12 It is permissible to issue shares "to the order of" (nominative shares).

4/1/2/13 It is permissible to issue "bearer shares". This is executed by handing over to the investor a certificate that represents a right to shares in the company and receiving their value in cash or acquiring a counter deed recognising a debt against the shareholder. In this case, the common ownership of shares represented by the certificate is vested in the holder of the certificate of shares at any time.

4/1/2/14 It is not permitted to issue preference shares, i.e. shares that have special financial characteristics that give them a priority at the date of liquidation of the company or at the date of distribution of profit. However, it is

permissible to grant certain shares, in addition to being entitled to rights attached to common shares, certain procedural and administrative privileges, such as a right of vote.

4/1/2/15 It is not permitted to issue *Tamattu'* (enjoyment) shares: shares that entitles the holder a participation in the net profit, but not to vote and which are gradually redeemed before the termination of the company through distribution of profits.

4/2 Joint-liability company

4/2/1 Definition of Joint-liability Company

4/2/1/1 A joint-liability company is a form of personal partnership. It is a necessary requirement that this partnership is publicly declared as a registered company assigned a unique title (trademark).

4/2/1/2 A joint-liability company has a juristic personality and independent financial liability unrelated to the liability of the partners. Nevertheless, all the partners are personally responsible for the obligations and liabilities of the company if the existing assets cannot meet the liabilities of the company.

4/2/1/3 In addition to maintaining documents of the joint-liability company, the partners are also obliged to maintain commercial documents relating to external trade activities.

4/2/2 Shari'ah Rulings relating to Joint-liability Companies

4/2/2/1 A creditor of a joint-liability company is entitled to demand fulfilment of all or part of his rights from any of the partners in any way the creditor deems fit. Therefore, the creditor is not obliged to claim such fulfilment from the company first.

4/2/2/2 The contract of a joint-liability partnership is not binding; hence, a partner is entitled to withdraw from the partnership on the following conditions:

a) If the partners did not set a duration for the company. If they agreed on a duration, then such duration must be observed.

b) The partner should notify the other partners of the intention to withdraw.

c) If the unilateral withdrawal from the partnership would not cause damage to other partners.

4/2/2/3 It is not permissible for the partner to bring in a substitute for himself without the agreement of the other partners.

4/3 Partnership in commendum

4/3/1 Definition of partnership in commendum

4/3/1/1 Partnership in commendum is a form of financing partnership. This is because the personality of the operating partner is important for the sleeping partner and because there is a difference in terms of determination of the ownership of the partners, whereby the ownership is calculated based on disproportionate lots and not on the basis of proportionate shares that are equal in number.

4/3/1/2 This form of company consists of managing partners and sleeping partners. The managing partners in this partnership are jointly liable for the obligations of the company from their personal wealth on the basis of joint-liability. The liability of each sleeping partner is limited to the number of lots he owns and his liability does not extend to his personal assets. It is permissible to limit the liability of some investors

without any consideration for limiting their liability, in which case the company consists of joint-liability partners and partners with limited liability. [see item 4/1/2/9]

4/3/1/3 It is not permissible for the sleeping partners to interfere in the operations of the company. The law does not even allow that their names be mentioned on the date of the registration of the company. Only the funds collected from the sleeping partners are mentioned.

4/3/1/4 The management of the company may be delegated either to one of the joint liability partners or to a third party. The sleeping partners are not entitled to manage the company.

4/3/2 Shari'ah Rulings relating to the partnership in commendum

4/3/2/1 Profit must be distributed according to the ratio of lots or agreement. Losses are borne by managing and sleeping shareholders partners, according to the ratio of their shares in the capital.

4/3/2/2 It is not permissible to stipulate that a sleeping partner has a right to an amount of profit according to a particular percentage of the capital or a lump sum. [see item 3/1/5/8]

4/4 Company limited by shares

4/4/1 Definition of a company limited by shares

The company limited by shares is a form of personal partnership. The subscription in this company is in accordance with equal numbers of shares and it comprises of managing partners and sleeping partners.

4/4/2 Shari'ah Rulings relating to the company limited by shares

4/4/2/1 The managing partners in this company are liable for the obligations of the company from their personal

assets on the basis of joint liability. They are in the position of a person who works as a Mudarib and simultaneously participates in a partnership. The sleeping partners' liability is limited to the number of the shares each partner owns and does not extend to his own assets. In this case, the liability of sleeping partners is equivalent to that of the capital providers in a Mudarabah contract. It is permissible to limit the liability of some investors without any consideration for limiting their liability, in which case the company consists of joint liability partners and partners with limited liability. [see item 4/1/2/9]

4/4/2/2 It is not permissible for the sleeping partners to interfere in the operations of the company. The law does not even allow that their names are mentioned on the date of the registration of the company. Only the funds collected from the sleeping partners are mentioned.

4/4/2/3 The management of the company may be delegated either to one of the managing partners or to a third party. The sleeping partners are not entitled to manage the company.

4/4/2/4 Profit must be distributed according to the ratio of participation or agreement. Losses are borne by the managing shareholding partners and sleeping shareholding partners according to their shares in the capital. And any excess losses shall be borne by managing partners.

4/4/2/5 It is not permissible to stipulate that a sleeping partner has a right to an amount of profit according to a particular percentage of the capital or a lump sum.

4/5 Allotment/particular (Muhassah) partnership

4/5/1 Definition of allotment partnership

4/5/1/1 The definition of Sharikat al-'Inan is applicable to an allotment partnership [see item 3/1]. This type of partner-

ship belongs to the personal (private) form of company. The reason for this is that the partners take into account before concluding a partnership each ones financial strength and ability to meet financial obligations from his personal assets.

4/5/1/2 Sharikat al-Muhassah has no juristic personality because people other than the partners do not know about it. This partnership does not have any separate financial liability as an entity.

4/5/2 Shari'ah rulings relating to Muhassah Company

4/5/2/1 The rulings for and basis of a Muhassah company do not differ from those for an 'Inan partnership. [see item 3/1]

4/5/2/2 The liability of partners is personal and, as such, they are liable for the liabilities of the company from their personal assets. The rules for and classification of an allotment partnership do not differ from 'Inan partnership.

4/5/2/3 The contract of a Muhassah partnership is not binding. However, if the parties agree to make it binding for a particular period of time, then they shall be bound by such an agreement. [see 4/3/2/2]

4/5/2/4 A partner in Sharikat al-Muhassah is entitled to terminate his partnership on condition that (I) he notifies other partners of his intention to withdraw and (II) the unilateral withdrawal from partnership would not cause damage to other partners or clients of the company. The partnership can be liquidated by way of actual or constructive liquidation of the company's assets.

5. Diminishing Musharakah

5/1 Diminishing Musharakah is a form of partnership in which one of the partners promises to buy the equity share of the other partner

gradually until the title to the equity is completely transferred to him. It is necessary that this buying and selling should not be stipulated in the partnership contract. In other words, the buying partner is allowed to give only a promise to buy. This promise should be independent of the partnership contract. In addition, the buying and selling agreement must be independent of the partnership contract. It is not permitted that one contract be entered into as a condition for concluding the other.

5/2 The general rules for partnerships must be applied to a diminishing partnership, especially the rules for Sharikat al-'Inan. Therefore, it is not permitted that the contract of diminishing partnership include any clause that gives any of the parties a right to withdraw his share in the capital.

5/3 It is not permitted to stipulate that one partner should bear all the cost of insurance or maintenance on the ground that he will eventually own the subject matter of the partnership.

5/4 Each partner should contribute part of the capital. The contribution may be in the form of cash or tangible assets that can be translated into a monetary value, for example, a land for building or equipment required for the operation of partnership. The loss, if any, shall be borne periodically by the parties in accordance with the participation ratio of each partner as the equity stake of one partner decreases and the stake of the other partner increases.

5/5 The ratio of profit or income of the partnership that each partner (the Institution and customer) is entitled to should be clearly determined. However, it is permissible for the partners to agree on a ratio of profit sharing that is disproportionate to the ratio of equity ownership. It is also permissible for the partners either to maintain the ratio of profit already determined even if the ratio of equity shares has changed, or to agree on amending the ratio of profit sharing due to the change in the ratio of equity shares. In doing so, they must ensure that the principle of allocation of losses in accordance with the ratio of equity share of ownership is maintained.

5/6 It is not permitted to stipulate that one partner has a right to receive a lump sum out of the profits. [see item 3/1/5/8]

5/7 It is permissible for one of the partners to give a binding promise that entitles the other partner to acquire, on the basis of a sale contract, his equity share gradually, according to the market value or a price agreed at the time of acquisition. However, it is not permitted to stipulate that the equity share be acquired at their original or face value, as this would constitute a guarantee of the value of the equity shares of one partner (the Institution) by the other partner, which is prohibited by Shari'ah.

5/8 The partners may arrange for the acquisition of the equity share of the Institution in a manner that serves the interests of both parties. This includes, for example, a promise by the Institution's client to set aside a portion of the profit or the return he may earn from the partnership for the acquisition of a percentage of the equity of the Institution. The subject matter of the partnership may be divided into shares, in which case the Institution's partner can purchase a particular number of these shares at certain intervals until the partner becomes the owner of the entire shares and consequently becomes the sole owner of the subject matter of the partnership.

5/9 It is permissible for either of the partners to rent or to lease the share of the other partner for a specified amount and for whatever duration, in which case each partner will remain responsible for the periodical maintenance of his share on a timely basis.

6. Date of Issuance of the Standard

This Standard was issued on 4 Rabi' I, 1423 A.H., corresponding to 16 May 2002 A.D.

Adoption of the Standard

The Shari'ah Standard on Sharikah (Musharakah) and Modern Corporations was adopted by the Shari'ah Board in its meeting No. (8) held in Al-Madinah Al-Munawwarah on 28 Safar - 4 Rabi' I, 1423 A.H., corresponding to 11-16 May 2002 A.D.

Appendix (A)
Brief History of the Preparation of the Standard

In its meeting No. (5) held in Makkah Al-Mukarramah on 8-12 Ramadan 1421 A.H., Corresponding to 4-8 December 2000 A.D., the Shari'ah Board decided to give priority to the preparation of a Shari'ah Standard on Sharikah (Musharakah) and Modern Corporations.

On Saturday 15 Dhul-Hajjah 1421 A.H., corresponding to 10 March 2001 A.D., the Fatwa and Arbitration Committee recommended to the Shari'ah Board the commissioning of a Shari'ah consultant to prepare a juristic study and an exposure draft on the Shari'ah Rules for Sharikah (Musharakah) and Modern Corporations.

In its meeting held on 18 Muharram 1422 A.H., corresponding to 12 April 2001 A.D., the Fatwa and Arbitration Committee discussed the exposure draft of the Shari'ah Rules for Sharikah (Musharakah) and Modern Corporations and asked the consultant to make amendments in light of the comments made by the members. The Committee also held a meeting on 20 Jumada II 1422 A.H., corresponding to 8 September 2001 A.D. and made some amendments in light of the comments made by the members.

The revised exposure draft of the Standard was presented to the Shari'ah Board in its meeting No. (7) held in Makkah Al-Mukarramah on 9-13 Ramadan 1422 A.H., corresponding to 24-28 November 2001 A.D. The Shari'ah Board made further amendments to the exposure draft of the standard and decided that it should be distributed to specialists and interested parties in order to obtain their comments and discuss them in a public hearing.

A public hearing was held in Bahrain on 29–20 Dhul-Hajjah 1422 A.H., corresponding to 2-3 February 2002 A.D. The public hearing was attended by more than thirty participants representing central banks, institutions,

accounting firms, Shari'ah scholars, academics and others who are interested in this field. Some of the members of the Shari'ah Board responded to the written comments that were sent prior to the public hearing as well as to the oral comments that were expressed in the public hearing.

The Shari'ah Standards Committee in its meeting held on 21-22 Dhul-Hajjah 1422 A.H., corresponding to 6-7 March 2002 A.D., in the Kingdom of Bahrain discuss the comments made about the exposure draft. The Committee made the necessary amendments, which it deemed necessary in light of both the discussions that took place in the public hearing, and the written comments that were received.

The Shari'ah Board in its meeting No. (8) held on 28 Safar – 4 Rabi' I, 1423 A.H., corresponding to 11-16 May 2002 A.D., in Al-Madinah Al Munawwarah discussed the amendments made by the Shari'ah Standards Committee, and made the necessary amendments, which it deemed necessary. Some paragraphs of the standard were adopted by the unanimous vote of the members of the Shari'ah Board, while the other paragraphs were adopted by the majority vote of the members, as recorded in the minutes of the Shari'ah Board.

The Shari'ah Standards Review Committee reviewed the standard in its meeting held in Rabi' II 1433 A.H., corresponding to March 2012 A.D. in the State of Qatar, and proposed after deliberation a set of amendments (additions, deletions, and rephrasing) as deemed necessary, and then submitted the proposed amendments to the Shari'ah Board for approval as it deemed necessary.

In its meeting No. (41) held in Al-Madinah Al Munawwarah, Kingdom of Saudi Arabia on 27-29 Sha'ban 1436 A.H., corresponding to 14-16 June 2015 A.D., the Shari'ah Board discussed the proposed amendments submitted by the Shari'ah Standards Review Committee. After deliberation, the Shari'ah Board approved necessary amendments, and the standard was adopted in its current amended version.

Appendix (B)
The Shari'ah Basis for the Standard

Permissibility of Partnership

The Fuqaha have classified partnerships into four categories, namely Sharikat al-'Inan (contractual partnership), Sharikat al-Abdan (skilled trade partnership), Sharikat al-Mufawadah (agency-like partnership) and Sharikat al-Wujuh (creditworthiness or reputation partnership). The most important of all is Sharikat al- 'Inan (contractual partnership). The permissibility of this form of partnership is established by the Qur`an, the Sunnah and practical consensus of the Fuqaha.

The permissibility of Sharikah is supported by the Saying of Allah, the Almighty: ***{"...And, verily, many partners oppress one another, except those who believe and do righteous good deeds, and they are few..."}***.(2)

Among the Sunnah provisions that support the permissibility of partnership is the case of Al-Sa`ib Ibn Abu Al-Sa`ib Al-Makhzumi who was a partner of the Prophet (peace be upon him) in business at the beginning of Islam. On the day when the Prophet (peace be upon him) conquered Mecca, he met Al-Sa`ib, then he (peace be upon him) said: *"Welcome my brother and my partner. He jokes not (i.e. he is serious in business) and do not argue (unnecessarily)."*(3)

Moreover, partnership is one of the main transactions in all societies since the advent of Islam. This constitutes, therefore, a practical consensus for the permissibility and validity of partnerships.

The partnerships for which the jurists have clarified their rules are the origins of the modern corporations, such as joint-stock companies whose

(2) [Sad: 24]

(3) The Hadith had been related by Al-Hakim who deemed it authentic [2: 61]. Al-Dhahabi agreed with Al-Hakim.

financial standing and obligations are related to the volume of the shares of the company and on its juristic personality, not on the personality of the shareholders. Therefore, the general rules for various partnerships in Shari'ah will govern modern forms of corporations. However, the procedural systems relating to representation of partnership companies and bureaucratic, administrative and accounting procedures are required by Maslahah (consideration of the public good or common need), which is an acceptable source for validating human actions provided it is employed in line with the principles of Shari'ah.

The general basis of Sharikah is agency (Wakalah) because each partner is acting as a principal partner, on one hand, and acting in the interest of the partnership, on the other hand, as an agent for the remaining partners. Unlike other partnerships, *Sharikat al-Mufawadah* combines rules of agency and guarantee simultaneously.

Conclusion of Sharikah Contract

- It is permitted to conclude a partnership contract with non-Muslims or conventional banks for carrying out permissible operations in association with necessary guarantees that they will observe Shari'ah precepts and principles. The Shari'ah basis for this is the Hadith stating: *"The Messenger of Allah has prohibited concluding partnership with Jews and Christians unless the selling and buying is in the hands of the Muslim"*.[4] The cause of the prohibition is the fear of being involved in interest-based transactions or in concluding impermissible contracts and this fear is absent when there are guarantees to observe and apply Shari'ah rulings.[5] Al Baraka Forum has issued a resolution in support of partnership between Islamic banks and conventional banks.[6]
- The basis for the permissibility of an agreement on amending the terms of partnership and the profit sharing ratio is that this action does not lead to a possibility of precluding a partner from getting a share of profit.[7]

(4) *"Musannaf Ibn Abu Shaybah"* [6: 9].
(5) See: Ibn Qudamah, *"Al-Mughni"* [7: 110-111].
(6) See: Resolution No. (9/1): *"Fatawa Nadwat Al Baraka"* No. 9, (P. 151).
(7) See: Resolution No. (11/8): *"Fatawa Nadwat Al Baraka"* No. 11, (P. 194).

Capital of Sharikah

- The basis for the permissibility that Sharikah capital may be contributed in the form of tangible assets other than cash, after valuation, is that the purpose of Sharikah is to give partners a right to use the contributed money freely and to share the profit. This objective is realisable even if the capital is contributed in the form of tangible assets just as it is in the case of a contribution in cash. Therefore, it is just as valid to present tangible assets for Sharikah investment as to present cash. At the liquidation, each one of the partners will be entitled to the equivalent value of the assets presented at the conclusion of the Sharikah.[8] This is the view of the Maliki and the Hanbali scholars.[9]
- The basis for the requirement that a payment of contribution to Sharikah capital in a currency different from the designated currency of partnership must be valued according to the current exchange rate at the time of payment is that this action is a currency exchange between two currencies which is permitted provided it is carried out at the current exchange rate. This is evidenced by the Hadith in which Ibn Umar asked the Prophet (peace be upon him) concerning selling camels at (a place in Medina called Al-Baqi') in a currency and collecting payment in a different currency. The Prophet (peace be upon him) endorsed the transaction provided it had taken place according to the current exchange rate.[10]
- The basis for the requirement that the investments of parties in the capital should be properly determined is that failure to do so will lead to ambiguity in respect to the capital. It is not permissible that the capital of Sharikah be ambiguous since certainty as to the amount of the capital is a benchmark for sharing profit. The equitable distribution of profit is not possible if the amount of capital contributed by each party is ambiguous.[11]
- The basis for rejecting payment of partnership capital in receivables alone is that debts owed to a partner by another partner cannot actually be used in partnership operations, as they are not assets in possession.

(8) *"Al-Mughni"* [7: 124]
(9) *"Hashiyat Al-Dusuqi"* [2: 517]; and *"Al-Mughni"* [5: 17].
(10) The source of the Hadith has been stated earlier.
(11) *"Al-Mughni"* [7: 125].

Again, this may potentially lead to Riba when the partner is the one in debt.[12] However, if the receivables are combined with other assets and the ratio of debt to the total assets is negligible, then debt and the other assets can be presented as a contribution to partnership capital. The basis for this is the principle of *Taba'iyyah* (things dependent on another thing) as per the legal maxim: "A thing which in fact follows from another thing follows it also in law and judgment cannot be given separately for a thing that follows from another" and the legal maxim: "The law is flexible in things that follow from another".

- The basis for allowing current accounts as capital in partnership is that, in spite of their being considered as loan, they are presumed to be possessed by the accountholders because the funds are available on demand. This is because the Institutions are obliged by their regulations and directives of the supervisory bodies to pay the owner on demand or accept cheques against these accounts irrespective of the financial situation of the Institution.

Managing a Partnership

- The basis for the right of each partner to participate in the management of the partnership is that partnership is based on elements of agency and trust. The element of agency requires that each party be entitled to be involved in the operations in a manner that is in the interest of the partnership. The element of trust requires that each party act for the benefit of the partnership.[13]
- The basis for not allowing a fixed remuneration for a partner who assists in the management is that this may lead to guaranteeing the capital of this partner, or to his not being exposed to risk of loss, if any, in proportion to his contribution in the capital.
- The basis for the permissibility of appointing, by a separate independent contract, one partner to manage the partnership and the permissibility of paying him wages is that the partner becomes an employee of the company and he is not acting in the capacity of a partner.

(12) *"Hashiyat Al-Dusuqi"* [3: 517]; and *"Al-Mughni"* [5: 17].
(13) See: *"Al-Mughni"* [7: 128].

Guarantees in Partnership

- The basis of the requirement that a partner is not liable except in cases of misconduct or negligence, and of the impermissibility of a stipulation to the effect that a partner guarantees the capital of another partner, is that partnership operates on the basis of trust, and to hold a trustee liable for losses (except in the case of misconduct or negligence) is impermissible.[14]
- The basis for allowing a party to a partnership to require a guarantee or a mortgage from another party as security against cases of misconduct and the like is that this requirement does not conflict with the rules for partnership. Again, the general principle of contracts and partnerships is that parties are required to observe stipulated terms as far as possible.[15]
- The basis for the permissibility of a "promise to guarantee" by a third party whose financial liability is independent from the parties to a partnership is that this action is a mere charitable act and an undertaking that is independent of the partnership contract. In other words, a fulfilment of a promise by a third party is not a condition for the permissibility of the contract. In addition, the third party's guarantee does not adversely affect the established Shari'ah principle against guaranteeing capital or profit. A resolution was issued by International Fiqh Academy in support of the permissibility of a third party's promise to guarantee.[16]
- The basis for the requirement that the guaranteeing Institution should not be the owner of the guaranteed Institution or vice versa is that by ownership the transaction becomes in substance a guarantee by a partner of the capital of another partner.

Outcome of Partnership Investment (Profit and Loss)

- The basis for the impermissibility of an agreement to determine the profit share on the basis of a lump sum or a percentage of the capital is because this is inconsistent with the sharing of profit and because profit is not realised unless the capital is maintained intact.

(14) See: Ibn Qudamah, *"Al-Kafi"* [2: 230]; and *"Al-Mubdi"* [4: 256].
(15) See: Fatwa (1/5) of Al Baraka First Forum, 1403 A.H.: *"Qararat Wa Fatawa Nadwat Al Baraka"* (P. 18).
(16) International Fiqh Academy resolution No. 30 (5/4).

- The basis for the impermissibility of deferring the statement of the profit ratio of each party until profit is realised is because such a procedure involves uncertainty which may potentially lead to dispute. However, the parties are entitled to amend the profit ratio or to relinquish a right to profit on the date of distribution. This is because the profit belongs to them; hence, it is permissible for them to make amendments or relinquishments.
- The basis for the requirement that the profit share may be either proportionate or disproportionate to the contribution of each party in the capital is that an individual deserves a share in profit on the basis of the funds contributed, the work done or the risk borne. If an individual is involved in any of these three, then it is allowed for the parties to agree on a profit ratio accordingly. This is the opinion of the Hanafi and Hanbali schools.(17)
- The basis for the impermissibility of one party bearing losses or that each party bear a portion of losses that may not be proportionate to the share of each party in the capital is the saying of Ali Ibn Abu Talib (may Allah be pleased with him): "Profit distribution is according to agreement of the partners and loss must be borne in proportion to the contribution in the capital."(18) Therefore, it is a void condition that one party should bear the loss of other parties and such a condition facilitates misappropriation of the property of others.
- The basis for the permissibility of the partners agreeing on any method for allocation of profit, whether fixed or variable during a particular period, is that this agreement is circumscribed with a condition that the method adopted should not contravene any Shari'ah principle, which means the method should not preclude a party from sharing in profit.
- The basis for not allowing final distribution of profit before deduction of expenses and expenditure is that there is no profit unless the capital is maintained intact.

(17) See: Al-Mirghinani, *"Al-Hidayah Sharh Al-Bidayah"* [3: 7-8], Al-Maktabah Al-Islamiyyah edition; Al-Kasani, *"Bada`i' Al-Sana`i'"* [6: 62-63]; and Ibn Muflih, *"Al-Mubdi"* [5: 4], Al-Maktab Al-Islami edition

(18) This Athar has been reported by Ibn Abu Shaybah in his *"Musannaf"* [4: 268], Riyadh: Maktabat Al-Rushd.

- The basis for the impermissibility of specifying a lump sum profit amount for one partner is that this action is inconsistent with sharing in profit.
- The basis for not allowing a partner to earn a share of profit and a fee simultaneously is that this fee is a lump sum that may preclude sharing in profit due to the possibility that the partnership business may not realise enough profit to cover it. The basis for allowing a partner to receive, based on a separate contract, a fee is that the contract that entitles a partner to a fee is not part of the partnership contract and because this fee is not inconsistent with sharing in profit, as the partner in this case is considered to be a third party.
- The basis for the permissibility of an agreement that if the profit realised is above a certain ceiling, the profit over such ceiling belongs to a particular partner, is because this constitutes a valid condition that is not inconsistent with profit sharing.[19] Moreover, the capital provider is the one who will bear losses, if any.
- The basis for the permissibility of distributing profit based on constructive valuation is that the use of this method is permitted by Shari'ah[20] and was used in a number of cases, such as Zakah and theft. The basis for the permissibility of constructive valuation is also the saying of the Prophet (peace be upon him): *"If a co-owner of a slave frees his part, the slave will be set free against his property if he has property; otherwise, it will be valued by fair value and freed."*[21]
- The basis for the permissibility of distributing funds to partners on account, i.e. subject to settlement and refund of any additional profit acquired over the contribution to the capital on the date of actual liquidation, is because this action causes no damage to any of the partners since the distributed funds on account are subject to settlement at a later stage.

(19) *"Al-Bahr Al-Zakhkhar"* [5: 83], Dar Al-Kitab Al-Islami edition.

(20) See: Resolution No. (4) of the Islamic Fiqh Academy under the auspices of Muslim World League that was issued in the 16th session held in Mecca on 21-26/10/1422 A.H.; the International Islamic Fiqh Academy resolution No. 30 (5/4) and Fatwa No. (8/2) issued during the Al Baraka's 8th Forum on Islamic Economics in *"Fatawa Al Baraka"* (P. 134).

(21) This Hadith has been related by Muslim, See: *"Sahih Muslim"* [2: 1140].

- The basis for allowing distribution of partnership revenues, including the capital assets, prior to liquidation of the partnership is that the partners suffer no damage from this and also the distribution is subject to review and reimbursement when liquidation is actually effected.[22]

Termination of Partnership

- The basis for the rule that termination of partnership will not affect obligations and actions that took place before it is protection of the remaining partners against any potential damage.
- The basis for the impermissibility of a promise by one of the partners to buy assets of the partnership at face value is that this constitutes a guarantee of the capital which is prohibited by Shari'ah. The basis for the permissibility of a promise to buy the assets of partnership at the market value is that this does not constitute a guarantee of capital.

Modern Corporations

- The permissibility of modern corporations is dependent on the principle of Shari'ah that human transactions are, in principle, permissible (*Mubah*) as long as there is no clear injunction against them, especially in view of the fact that the categorisation of any one or more of these corporations had parallels in Shari'ah-nominate contracts, such as 'Inan partnership, Mudarabah and the like.[23]

Stock Companies

- The basis for the permissibility of underwriting issues of shares without taking consideration is that this is an undertaking that does not involve an impermissible act, such as taking a commission for a guarantee. The International Islamic Fiqh Academy has issued a resolution in this respect.[24]
- The basis for the impermissibility of buying shares using an interest-based loan provided by a stockbroker or other party against a mortgage of the shares is that this is an interest-based transaction secured by

(22) See: International Islamic Fiqh Academy Resolution No. 30 (5/4), and resolution of Islamic Fiqh Academy under the auspices of Muslim World League during its 16th session.

(23) See: Abdul-Aziz Al-Khayyat, *"Al-Sharikat"* [2: 158-159].

(24) See: The International Islamic Fiqh Academy Resolution No. 63 (1/7).

shares.[25] In this case, both transactions are prohibited by an explicit source that indicates that Allah, the Almighty, has cursed a person who lives on interest-based transactions, a person who pays such interest, and a person who notarises or acts as a witness for such transactions.

- The basis for the impermissibility of selling shares that the seller does not own is that this constitutes selling of an item that one does not own or an involvement in a transaction without bearing a risk which is prohibited by Shari'ah.
- The basis for allowing a mortgage of shares is that mortgaging is permissible. Moreover, anything that can be sold may be presented as a mortgage as in the case of shares unless the bylaws of the company state otherwise in which case the conditions stated must be observed.
- The basis for the permissibility of "shares to the order of" (nominative shares) is that this is a form of transferring ownership of shares to another investor. The acceptance by the remaining shareholders of the bylaws of the company that give a right to transfer is an implied consent to the transfer of ownership.[26] The basis for the permissibility of "bearer shares" is that it is a sale of shares by a shareholder to another investor. The acceptance by the remaining shareholders of the bylaws of the company that give a right to sell is an implied consent to the sale. The fact that the identification and personality of the new shareholder (the purchaser) is not known to other shareholders will not affect the sale as they may be provided with this information if need be.[27]
- The basis for the impermissibility of issuing preference (preferred) shares is that preference shares are inconsistent with profit sharing and involve depriving other partners of their fair share of profit.[28]
- The basis for the impermissibility of issuing shares that entitle the holder a participation in the net profit and entitles the company to gradually redeem the participation through the distribution of profits before the termination of the company, is because the funds the certificate holders receive constitute profit in respect of their shares. The claim that the

(25) See: International Islamic Fiqh Academy Resolution No. 63 (1/7).
(26) See: International Islamic Fiqh Academy Resolution No. 63 (1/7).
(27) See: International Islamic Fiqh Academy Resolution No. 63 (1/7).
(28) See: International Islamic Fiqh Academy Resolution No. 63 (1/7).

participations are redeemed in consideration for the distributed profit is invalid. Therefore, the certificate holders remain owners of the shares and are entitled to proceeds when the company is liquidated.[29]

Joint Liability Company

- The basis for the permissibility of the undertaking of partners in a joint liability company to be jointly responsible is that the joint liability in this way is subject to the rules for guarantees. The permission granted by each of them to the others to act on behalf of the company is subject to the rules of agency as in the case of Mufawadah partnership which combines elements of guarantee and agency. The partners have consented to be liable jointly because there is no gain at the expense of any of the partners and no one is to be cheated.[30]
- The basis for the impermissibility of bringing in a substitute partner in a joint liability company when the other partners did consent to it is that the personality of the partner is significant for the partners because the liability of the company includes his personal assets and the substitute may not be in the same financial position as the partner.

Partnership in Commendum

- The basis for the impermissibility of sleeping partners of partnership in commendum or company limited by shares being entitled to interfere in the management of the company is that they have agreed not to do so and this agreement does not affect the rules of partnership.
- The reason why the financial liability of the sleeping partners in partnership in commendum is limited to their shares is that they are in the position of capital providers in a Mudarabah contract.

Allotment (Particular) Partnership

The basis for the permissibility of unilateral termination of participation in this kind of partnership by any of the partners is that, in principle, unilateral termination of participation is allowed provided such action inflicts no damage to any of the partners as per the saying of the Prophet (peace be upon him): *"No harm to be inflicted and no reciprocal harm."*[31]

(29) See: International Islamic Fiqh Academy Resolution No. 63 (1/7).
(30) See: Abdul-Aziz Al-Khayyat, *"Al-Sharikat"* [2: 235].
(31) The Hadith has been related by Ibn Majah in his *"Sunan"* [2: 784].

Diminishing Partnership

- The basis for saying that all the general rules for partnerships, especially the rules for 'Inan partnership, are applicable to diminishing partnerships is to safeguard this new form of partnership from becoming a mere interest-based financing transaction in which a client undertakes to pay another party for his finance in addition to a share in the partnership income.
- The basis for the impermissibility of one partner being responsible for the expenses of insurance or maintenance is that this condition is in conflict with the nature of the partnership contract.[32]

(32) See: Fatwa No. (219) of the Fatwas of Kuwait Finance House.

Appendix (C)
Definitions

Contract Partnership (Sharikat al-'Aqd)

Contract partnership is an agreement between two or more parties to combine their assets or to merge their services or obligations and liabilities with the aim of making profit.

Partnership of Ownership (Sharikat al-Milk)

Partnership of ownership (Sharikat al-Milk) is the combination of the assets of two or more persons in a manner that creates a state of sharing the realised profit or income or benefiting from an increase in the value of the partnership assets. This combination of assets for making profit necessitates bearing losses, if any. The ownership partnership is created by events beyond the partners' control such as the inheritance rights of heirs in the legacy of a deceased person. This partnership is also created by the wish of the partners such as when two or more parties acquire common shares in a particular asset.

Mufawadah Partnership

Mufawadah partnership is any partnership in which the parties are equal in all respects, such as funds contributed by them, their right to act and their liability, from the commencement of the partnership to the date of its termination.

Sharecropping Partnership (Muzara'ah)

Sharecropping is partnership in crops in which one party presents land to another for cultivation and maintenance in consideration for a common defined share in the crop.

Irrigating Partnership (Musaqat)

Irrigating partnership is a partnership that depends on one party presenting designated plants/trees that produce edible fruits to another in order to work on their irrigation in consideration for a common defined share in the fruits.

Agricultural Partnership (Mugharasah)

Agricultural partnership is a partnership in which one party presents a treeless piece of land to another to plant trees on it on the condition that they share the trees and fruits in accordance with a defined percentage.

Distribution of Proceeds and Profits

Distribution of proceeds and profits is a process of termination an undivided ownership in the company by the final distribution of the assets whereby rights of each partner are defined and common shares are partitioned into identified sets for each partner. This is why distribution is defined as identification of undefined shares or proceeds of a particular person.

Shari'ah Standard No. (13)

Mudarabah

(Revised Standard)

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

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

Preface

The aim of this standard is to explain the Shari'ah rulings for restricted and unrestricted Mudarabah, whether the Islamic financial Institution (Institution/Institutions)[1] is acting in the capacity of a Mudarib (entrepreneur) or in the capacity of an investor.

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

Statement of the Standard

1. Scope of the Standard

This standard covers Mudarabah contracts between the Institution and the other entities or individuals. It also covers joint investment accounts and special purpose investment accounts if these accounts are administered on the basis of Mudarabah.

The standard does not cover Sukuk of Mudarabah (Mudarabah Certificates) or other types of partnership contracts, as these are covered by separate standards.

2. Definition of Mudarabah

Mudarabah is a partnership in profit whereby one party provides capital (Rab al-Mal) and the other party provides labour (Mudarib).

3. Agreement of Mudarabah Financing

3/1 It is permissible, on the basis of a general framework or a memorandum of understanding, to conclude Mudarabah financing contracts for a particular sum of money and within a particular defined duration provided that the memorandum of understanding will be later implemented in line with specific or successive Mudarabah transactions.

3/2 The memorandum of understanding should define the general contractual framework, indicating the intention of the parties to use either unrestricted or restricted Mudarabah financing instrument, either through revolving transactions or separate transactions. Also, the memorandum of understanding should indicate the profit ratio, and type of guarantees that shall be presented by the Mudarib to cover situations of negligence, misconduct or breach of contract and other relevant issues in this regard.

3/3 If the Mudarabah contract is actually concluded on the basis of the memorandum of understanding, the contents of the memorandum become an integral part of any future contract, unless the parties had originally agreed to exempt themselves from some of the obligations mentioned therein.

4. Mudarabah Contract

4/1 The Mudarabah contract may be concluded using terms such as Mudarabah, Qirad or Mu'amalah.

4/2 Both parties should possess the legal capacity to appoint agents and accept agency. Therefore, a Mudarabah contract may not be concluded in the absence of two contracting parties with absolute legal capacity or of their agents who enjoy legal capacity similar to that of the contracting parties.

4/3 The general principle is that a Mudarabah contract is not binding, i.e. each of the contracting parties may terminate it unilaterally except in two cases:

4/3/1 When the Mudarib has already commenced the business, in which case the Mudarabah contract becomes binding up to the date of actual or constructive liquidation.

4/3/2 When the contracting parties agree to determine a duration for which the contract will remain in operation. In this case, the contract cannot be terminated prior to the end of the designated duration, except by mutual agreement of the contracting parties.

4/4 A Mudarabah contract is one of the trust-based contracts. Therefore, the Mudarib is investing Mudarabah capital on a trust basis in which case the Mudarib is not liable for losses except in case of breach of the requirements of trust, such as misconduct in respect to the Mudarabah fund, negligence and breach of the terms of Mudarabah contract. In committing any of these, the Mudarib becomes liable for the amount of the Mudarabah capital.

5. Types of Mudarabah

Mudarabah contracts are divided into unrestricted and restricted Mudarabah.

5/1 An unrestricted Mudarabah contract is a contract in which the capital provider permits the Mudarib to administer a Mudarabah fund without any restrictions. In this case, the Mudarib has a wide range of trade or business freedom on the basis of trust and the business expertise he has acquired. An example of unrestricted Mudarabah is when the capital provider says, "Do business according to your expertise". However, such unrestricted business freedom in an unrestricted Mudarabah must be exercised only in accordance with the interests of the parties and the objectives of the Mudarabah contract, which is making profit. Therefore, the actions of the Mudarib must be in accordance with the business customs relating to the Mudarabah operations: the subject matter of the contract.

5/2 A restricted Mudarabah contract is a contract in which the capital provider restricts the actions of the Mudarib to a particular location or to a particular type of investment as the capital provider considers appropriate, but not in a manner that would unduly constrain the Mudarib in his operations.

6. Guarantees in a Mudarabah Contract

The capital provider is permitted to obtain guarantees from the Mudarib that are adequate and enforceable. This is circumscribed by a condition that the capital provider will not enforce these guarantees except in cases of misconduct, negligence or breach of contract on the part of Mudarib.

7. Requirements Relating to the Capital

7/1 In principle, the capital of Mudarabah must be provided in the form of cash. However, it may be presented in the form of tangible assets, in which case the value of the assets is the contribution to the Mudarabah capital. The valuation of the assets may be conducted by experts or as agreed upon by the contracting parties.

7/2 The capital of Mudarabah should be clearly known to the contracting parties and defined in terms of quality and quantity in a manner that eliminates any possibility of uncertainty or ambiguity.

7/3 It is not permissible to use a debt owed by the Mudarib or another party to the capital provider as capital in a Mudarabah contract.

7/4 For a Mudarabah contract to be valid and for the Mudarib to be considered as having control over the capital, the capital must be, wholly or partially, put at the disposal of the Mudarib, or the Mudarib must have free access to the capital.

8. Rulings And Requirements Relating to Profit

8/1 It is a requirement that the mechanism for distributing profit must be clearly known in a manner that eliminates uncertainty and any possibility of dispute. The distribution of profit must be on the basis of an agreed percentage of the profit and not on the basis of a lump sum or a percentage of the capital.

8/2 In principle, it is not permissible to earn a share of profit in addition to a fee in a Mudarabah contract. However, it is permissible for the two parties to construct a separate agreement independent of the Mudarabah contract assigning one party to perform, for a fee, a business activity that is not by custom part of Mudarabah operations. The independence of this separate agreement means that if the contract of providing this activity is terminated, this will not affect the contract of Mudarabah.

8/3 The parties shall agree on the ratio of profit distribution when the contract is concluded. It is also permissible for the parties to change the ratio of distribution of profit at any time and to define the duration for which the agreement will remain valid.

8/4 If the parties did not stipulate the ratio of profit distribution, then they shall refer to customary practice, if any, to determine the shares of profit. If the customary practice is that the profit is distributed equally, then this will be applied as such. If there is no customary practice in this regard, the Mudarabah contract is regarded void

ab initio, and the party who acts as the Mudarib should receive a common market price for the kind and amount of services that he provided as Mudarib.

8/5 If one of the parties stipulates that he should receive a lump sum of money, the Mudarabah contract shall be void. This rule does not apply to a situation where the parties agree that if the profit is over a particular ceiling then one of the parties will take the additional profit and if the profit is below or equal to the amount of the ceiling the distribution of profit will be in accordance with their agreement.

8/6 It is not permissible for the capital provider to give the Mudarib two amounts of capitals on condition that the profit earned on one of the two amounts would be taken by the Mudarib while the capital provider would take the profit earned on the other amount. It is not also permissible for the capital provider to state that the profit of one financial period would be taken by the Mudarib and the capital provider would take the profit of the following financial period. Similarly, it is not permissible to assign the profit from a particular transaction to the Mudarib and the profit from another transaction to the capital provider.

8/7 No profit can be recognised or claimed unless the capital of the Mudarabah is maintained intact. Whenever a Mudarabah operation incurs losses, such losses stand to be compensated by the profits of future operations of the Mudarabah. The losses brought forward should be set against the future profits. All in all, the distribution of profit depends on the final result of the operations at the time of liquidation of the Mudarabah contract. If losses are greater than profits at the time of liquidation, the balance (net loss) must be deducted from the capital. In this case, as he is a trustee the Mudarib is not liable for the amount of this loss, unless there is negligence or misconduct on his part. If the total Mudarabah expenses are equal to the total Mudarabah revenues, the capital provider will receive his capital back without either profit or loss, and there will be no profit in which the Mudarib is entitled to a share. If profit is realised, it must be distributed between the parties as per the agreement.

8/8 The Mudarib is entitled to a share of profit as soon as it is clear that the operations of the Mudarabah have led to the realisation of a profit. However, this entitlement is not absolute, as it is subject to the retention of interim profits for the protection of the capital. It will be an absolute right only after distribution, i.e. when actual or constructive valuations take place. It is permissible to distribute the realised profit among the parties on account, in which case the distribution will be revised when actual or constructive valuation takes place. The final distribution of profit should be made based on the selling price of the Mudarabah assets, which is known as actual valuation. It is also permissible that the profit be distributed on the basis of constructive valuation, which is valuation of the assets on the basis of fair value. Receivables shall be measured at the cash equivalent, or net realisable value, i.e. after the deduction of a provision for doubtful debts. In measuring receivables, neither time value (interest rate) nor discount on current value for extension of period of payment shall be taken into consideration.

8/9 If the Mudarib has commingled his own funds with the Mudarabah funds, the Mudarib becomes a partner in respect of his funds and a Mudarib in respect of the funds of the capital provider. The profit earned on the two commingled funds will be divided proportionately to the amounts of the two funds, in which case the Mudarib takes the profit attributable to his own funds, while the remaining profit is to be distributed between the Mudarib and the capital provider according to the provisions of the Mudarabah contract.

9. Duties and Powers of the Mudarib

The Mudarib should employ his best efforts to accomplish the objectives of the Mudarabah contract. The Mudarib should assure the capital provider that his money is in good hands that will act to find the best ways of investing it in a permissible manner.

9/1 If a Mudarabah contract is concluded on an unrestricted basis, the Mudarib is permitted, in general, to do what entrepreneurs do in his field of activity, including the following:

9/1/1 Attending to all permissible investment or trading fields that are feasible, given the amount of the capital at his disposal, and in which he believes that his expertise, and technical and professional qualifications are likely to give him the ability to compete effectively.

9/1/2 Carrying out the work himself or appointing another person to carry out some work if necessary, such as buying a commodity or marketing it for him.

9/1/3 Choosing as far as possible appropriate places and markets that are seemingly free of risks.

9/1/4 Safeguarding the Mudarabah funds or depositing them in the custody of a trustworthy person whenever appropriate.

9/1/5 Selling and buying on a deferred payment basis.

9/1/6 The Mudarib may do, either by permission or appointment of the capital provider, the following:

a) The Mudarib may, at any time, combine a Mudarabah contract and a partnership (Sharikah) contract, irrespective of whether this takes place at the outset of the contract or after the commencement of Mudarabah operations, and of whether the partnership contribution is from the Mudarib himself or from a third party. The mixture of unrestricted investment deposits with the Institutions' funds is an example of this kind of combination.

b) The Mudarib may accept funds from a third party on a Mudarabah basis if this new contract will not affect his investment and management responsibility in respect of the first Mudarabah contract.

9/2 It is permissible for the capital provider, on the basis of his interests, to place restrictions on the actions of the Mudarib. Thus, Mudarabah operations may be restricted to a specified time and place, so that the Mudarib may only invest the Mudarabah funds during a particular time period or in a specified country or in a market of a particular

country. In addition, the Mudarabah operations may be restricted to investment in certain sectors such as services or trade sectors or a single commodity or a group of commodities. However, restricting the Mudarabah operations to certain commodities is circumscribed with a condition that such commodities must be commonly available so that, other things being equal, the restriction will not prevent the objectives of the Mudarabah contract from being achieved. For example, the commodities to which the Mudarabah is restricted must not be scarce, seasonal (and out of season) or in very limited supply with the consequence that the objectives of the Mudarabah contract cannot be achieved.

9/3 The capital provider is not permitted to stipulate that he has a right to work with the entrepreneur (Mudarib) and to be involved in selling and buying activities, or supplying and ordering. However, the Mudarib should refer to him in performing any action and should not act without consulting him. Also, the capital provider is not entitled to lay down conditions that will restrict movements or actions of the Mudarib, such as a stipulation that the Mudarib must enter into a partnership with others or a stipulation that the Mudarib must mix his personal funds with the Mudarabah funds.

9/4 The Mudarib must carry out all the work that any similar asset or fund manager would be liable, by custom, to do. In this case, the Mudarib is not entitled to a fee for this work as this is part of his responsibilities. If the Mudarib appoints another party on an Ijarah (hiring contract) basis to carry out such work, the wages for the worker must be paid from the personal funds of the Mudarib and not from the Mudarabah funds. The Mudarib may hire against the account of Mudarabah funds another party, at the prevailing rate, to execute work that is not by custom the responsibility of the Mudarib.

9/5 The Mudarib is not entitled to sell items for the Mudarabah operation at less than the common or market price, or to buy items for the Mudarabah operation at a price higher than common prices, unless if such action in either case is intended to achieve an objective that is obviously in the interest of the Mudarabah.

9/6 It is not permissible for the Mudarib to make a loan or a gift or a charitable donation out of the Mudarabah funds. Likewise, the Mudarib is not entitled to waive a right associated with the Mudarabah operation unless the capital provider has consented to his doing so.

9/7 If the Mudarib has a right to receive living expenses from the Mudarabah funds that has been approved by the capital provider, then he is entitled to the amount so approved for him. If there is no agreement on this, then the Mudarib should take living expenses in accordance with custom and reason. The Mudarib is also entitled to travelling expenses in accordance with custom and reason.

10. Liquidation of a Mudarabah Contract

10/1 A Mudarabah contract can be liquidated in the following manner:

10/1/1 Being a non-binding contract, it can be liquidated by unilateral termination of the contract by one of the parties. [see item 4/3]

10/1/2 With the agreement of both parties.

10/1/3 On the date of maturity if the two parties had earlier agreed to set a time limit for it. [see item 3/4]

10/1/4 When the funds of Mudarabah contract have been exhausted or have suffered losses.

10/1/5 The death of the Mudarib or the liquidation of the institution that acts as Mudarib.

10/2 On the maturity of a Mudarabah operation, the assets should be liquidated in the manner explained in item 8/8.

11. Date of Issuance of the Standard

This Standard was issued on 4 Rabi' I, 1424 A.H., corresponding to 16 May 2002 A.D.

Adoption of the Standard

The Shari'ah Standard on Mudarabah was adopted by the Shari'ah Board in its meeting No. (8) held in Al-Madinah Al-Munawwarah during the period of 28 Safar to 4 Rabi' I, 1423 A.H., corresponding to 11-16 May 2002 A.D.

Appendix (A)
Brief History of the Preparation of the Standard

In its meeting No. (5) held in Makkah Al-Mukarramah during the period of 8-12 Ramadan 1421 A.H., corresponding to 4-8 December 2001 A.D., the Shari'ah Board decided to give priority to the preparation of a Shari'ah Standard on Mudarabah.

On Saturday 15 Dhul-Hajjah 1421 A.H., corresponding to 10 March 2001 A.D., the Fatwa and Arbitration Committee recommended to the Shari'ah Board the commissioning of a Shari'ah consultant to prepare a juristic study and an exposure draft on the Shari'ah Standard for Mudarabah.

In its meeting held on 18 Muharram 1422 A.H., corresponding to 12 April 2001 A.D., the Fatwa and Arbitration Committee discussed the exposure draft of the Shari'ah Rules for Mudarabah and asked the consultant to make amendments in light of the comments made by the members. The Committee also held a meeting on 20 Jumada II, 1422 A.H., corresponding to 8 December 2001 A.D., and made some amendments in light of the comments made by the members.

The revised exposure draft of the Standard was presented to the Shari'ah Board in its 7th meeting held in Makkah Al-Mukarramah during the period of 9-13 Ramadan 1422 A.H., corresponding to 24-28 November 2001 A.D. The Shari'ah Board made further amendments to the exposure draft of the Standard and decided that it should be distributed to specialists and interested parties in order to obtain their comments with the objective of discussing them in a public hearing.

A public hearing was held in Bahrain during the period of 29-20 Dhul-Hajjah 1422 A.H., corresponding to 2-3 February 2002 A.D. The public

hearing was attended by more than thirty participants representing central Institutions, Institutions, accounting firms, Shari'ah scholars, academics and others who are interested in this field. Some of the members of the Shari'ah Board responded to the written comments that were sent prior to the public hearing as well as to the oral comments that were expressed in the public hearing.

The Shari'ah Standards Committee in its meeting held during the period of 21-22 Dhul-Hajjah 1422 A.H., corresponding to 6-7 March 2002 A.D., in the Kingdom of Bahrain discussed the comments made on the exposure draft. The Committee made the amendments which it considered necessary in light of both the discussions that had taken place in the public hearing and the written comments that had been received.

The Shari'ah Board in its 8th meeting held on 28 Safar - 4 Rabi' I, 1423 A.H., corresponding to 11-16 May 2002 A.D., in Al-Madinah Al-Munawwarah discussed the amendments made by the Shari'ah Standards Committee, and made the necessary amendments, which it deemed necessary. Some paragraphs of the standard were adopted by the unanimous vote of the members of the Shari'ah Board, while the other paragraphs were adopted by the majority vote of the members, as recorded in the minutes of the Shari'ah Board.

The Shari'ah Standards Review Committee reviewed the Standard in its meeting held on Rabi' II, 1433 A.H., corresponding to March 2012 A.D., in the State of Qatar, and proposed after deliberation a set of amendments (additions, deletions, and rephrasing) as deemed necessary, and then submitted the proposed amendments to the Shari'ah Board for approval as it deemed necessary.

In its 41st meeting held in Al-Madinah Al-Munawwarah, Kingdom of Saudi Arabia during the period of 27-29 Sha'ban 1436 A.H., corresponding to 14-16 June 2015 A.D., the Shari'ah Board discussed the proposed amendments submitted by the Shari'ah Standards Review Committee. After deliberation, the Shari'ah Board approved necessary amendments, and the Standard was adopted in its current amended version.

Appendix (B)
The Shari'ah Basis for the Standard

Permissibility of Mudarabah and Its Rationale

- Mudarabah, known also as Qirad, is a contract that arranges cooperation in business investment between capital on one hand and entrepreneurship on the other, whereby the contracting parties jointly and commonly own the realised profit as per the agreement. The party providing the capital is known Rab al-Mal and the investor is known as Mudarib or 'Amil (literally. worker) or Muqarid.(2)

Mudarabah contract derives its permissibility from the following:(3)

a) From the Qur`an is the Saying of Allah, the Almighty: ***{"Others travelling through the land, seeking of Allah's bounty"}***.(4) This verse is interpreted to mean those who travel for the purpose of trading and seeking permissible income in order to provide for themselves and their family.

b) From the Sunnah is the Hadith that says, "Al-'Abbas Ibn Abdul-Muttalib used to pay money for Mudarabah and to stipulate to the Mudarib that he should not travel by sea, pass by valleys or trade in livestock, and that the Mudarib would be liable for any losses if he did so. These conditions were brought before the Prophet (peace be upon him) and he approved them".(5) Among the Hadiths regarding the permissibility of Mudarabah is the case that states that "Umar Ibn

(2) Al-Marghinani, *"Al-Hidayah Sharh Bidayat Al-Mubtadi"* [3: 202]; Al-Kasani, *"Bada`i' Al-Sana`i'"* [6: 56 and 57]; Ibn Rushd, *"Bidayat Al-Mujtahid"* [2: 236]; and Ibn Qudamah, *"Al-Mughni"* [3: 26].

(3) *"Takmilat Al-Majmu'"* [14: 357-360]; *"Subul Al-Salam"* [3: 76]; *"Bidayat Al-Mujtahid"* [2: 236]; *"Al-Hidayah"* [2: 202]; *"Al-Mughni"* [5: 26]; and *"Al-Muhadhdhab"* Printed with *"Al-Majmu'"* [14: 357].

(4) [Al-Muzzammil (The One Wrapped in Garments): 20].

(5) The Hadith has been related by Al-Bayhaqi [6: 111].

Al-Khattab gave one man the funds belonging to an orphan for the purpose of Mudarabah and the man was trading with these funds in Iraq".[6]

c) Ibn Al-Mundhir mentioned that there is generally consensus among the scholars in respect to the permissibility of a Mudarabah contract.[7]

- The rationale for making this contract permissible includes the following:

a) Money cannot increase unless it is associated with work. It is also not permissible to provide money in return for a periodic pre-agreed payment (rent) to a person who is willing to invest it as this will constitute a debt with Riba.

b) The Mudarabah contract is made permissible to facilitate investment cooperation between capital providers who are not prepared to invest and manage their money themselves, and competent business or investment experts who lack adequate capital. In other words, there are some individuals who are rich but lack business or investment know-how and others who have business or investment expertise but lack money. This situation thus calls for the permissibility of the Mudarabah contract so as to combine the interests of the two parties.[8]

Moreover, a Mudarabah contract is an instrument that was commonly used in trade and which usage expanded in modern times to include business, services, and agricultural or horticultural and industrial activities.

a) The business philosophy of conventional banks depends on the concept of renting out money and making profit in doing so, while Shari'ah prohibits this philosophy because of its being Riba. The Mudarabah financing instrument has been an essential instrument to develop Islamic financial Institutions (Institution/Institutions). This instrument is used by these institutions to attract unrestricted or restricted investment accounts and to reinvest these funds in various activities.

(6) The Hadith has been related by Al-Bayhaqi in *"Al-Ma'rifah"* (see: Al-Zayla'i, *"Nasb Al-Rayah"*).
(7) *"Al-Mughni"* [7: 133-134].
(8) *"Takmilat Al-Majmu'"* [14: 371].

Contract of Mudarabah

- The basis for the rule that both parties to a Mudarabah contract must be legally capable to appoint, or act as, an agent is because each party acts as an agent of the other party and appoints the other party to act on his behalf. The entitlement to appoint or act as an agent entitles one to conclude a Mudarabah contract.
- The basis for regarding a Mudarabah contract initially as a non-binding contract is that the Mudarib is using the capital provider's funds with his consent in a contractual relationship in which the Mudarib is just an agent, and an agency contract is not binding.
- The basis for making a Mudarabah contract binding once the work has commenced is that a unilateral termination of the contract at this stage might frustrate the objective of the parties to make profit and might cause damage to the Mudarib since he might not receive any compensation for his work.
- The basis for allowing a time limit for the operation of a Mudarabah contract is that a Mudarabah contract is, in essence, an agency contract, which is subject to a designated duration.(9) The International Fiqh Academy has issued a resolution in this respect.(10)
- The basis for considering the Mudarib as a trustee with respect to the Mudarabah funds is that the Mudarib is using another person's money with his consent, and the Mudarib and the owner of the funds share the benefits from the use of the funds. In principle, a trustee should not be held liable for losses sustained by the funds. Rather, the risks of such losses must be borne by the Mudarabah funds.

Guarantees in a Mudarabah Contract

- The basis for allowing guarantees in a Mudarabah that would be used in case of misconduct and negligence of the Mudarib is that in such a case the Mudarib then becomes liable for losses and must bear the consequences of these actions.(11)

(9) *"Al-Mughni"* [7: 133-134].
(10) Resolution No. 122 [5: 13].
(11) This is the opinion of the Shari'ah Board of Al Rajhi Company, see *"Al-Mudhakkirah Al-Tafsiriyyah"*. It is also endorsed in the First Al Baraka Forum.

Requirements Relating to the Capital

- The basis for it being permissible that the capital of Mudarabah may be constituted by the value of tangible assets contributed is that the objective of Mudarabah is to make profit. This objective can be realised whether the capital is contributed in the form of tangible assets or cash. This rule is based on the view of the Maliki and the Hanbali jurists.[12]
- The basis for the requirement that the capital of Mudarabah should be clearly known and should be defined in terms of quality and quantity in a manner that eliminates any possibility of uncertainty or ambiguity is because recognition of profit is dependent on the recovery of the capital on the date of liquidation. However, recovery of the capital cannot be ascertained if its amount was not known earlier, and this lack of knowledge may potentially lead to a dispute.
- The basis for not allowing a debt owed by the Mudarib to the capital provider be contributed as capital in a Mudarabah contract is because, as a principle, Mudarabah capital must be (at the conclusion of a Mudarabah contract) an asset that is available and cannot be used on the spot for the Mudarabah operations. A debt fails to meet this requirement, as it is a receivable that is not available for use when the contract is concluded. Moreover, considering a debt as capital of Mudarabah involves potential Riba. This is because the creditor may be suspected of having extended the debt tenure in order to get additional consideration (for the extension) from the debtor under the name of Mudarabah.
- The basis for the requirement that the Mudarabah operation is valid only if the capital is presented to the Mudarib is because the Mudarib is the manager of the Mudarabah operation, and the trustworthy trustee for the Mudarabah capital and income. Therefore, it is necessary that the capital be fully released to the Mudarib so that he will be able to protect and invest the capital and achieve the objective of the Mudarabah contract.[13]

(12) *"Hashiyat Al-Dusuqi"* [3: 517]; and *"Al-Mughni"* [5: 17].
(13) *"Al-Hidayah"* [3: 203]; and *"Hashiyat Al-Dusuqi"* [3: 517].

Rules and Requirements Relating to Profit

- The basis for the requirement that the profit ratio is known is because profit is the subject matter of a Mudarabah contract and a lack of knowledge as to the subject matter renders a contract void.
- The basis for the requirement that the profit share of each party be a percentage of the profit and not a lump sum is because a Mudarabah contract is a form of partnership for sharing profit. Any condition that allocates a lump sum to one party would not be consistent with the sharing of profit. This is because the Mudarabah operation may not realise a profit other than the lump sum which goes to one party, thus excluding the other party from partnership in profit.
- The basis for the impermissibility of simultaneously receiving a share of profit and a fee for managing a Mudarabah is likewise that the fee is provided in the form of a lump sum and the Mudarabah operation may not realise a profit other than the lump sum, thus precluding the sharing of profit.
- The basis for the permissibility of an agreement to change the ratio of profit distribution at any time is that the profit is a right belonging to the parties and an agreement in the manner described does not lead to a prohibited act, such as preclusion of sharing in profit. Rather, the agreement makes the parties partners in profit.[14]
- The basis for nullifying a Mudarabah contract when the contract is silent on the ratio of profit distribution and there is no customary practice according to which the profit is to be distributed to each party is that the subject matter of a Mudarabah contract is profit. The lack of knowledge as to the subject matter nullifies contracts.
- The basis for nullifying a Mudarabah contract when one party stipulates entitlement to a lump sum is because a Mudarabah is about sharing profit and this form of condition precludes sharing of profit and may potentially lead to one party being wrongfully deprived of his rights.

(14) See: Al Baraka's 11th Forum, Fatwa No. (8); Al Baraka's 4th Forum, Fatwa No. (5). This is also seconded by the Fatwa of the Shari'ah Board of Faisal Islamic Bank, Sudan (P. 107), which was published in *"Dalil Al-Fatawa Al-Shar'iyyah Fi Al-A'mal Al-Masrafiyyah"*, Islamic Economic Centre, International Islamic Bank, (P. 53).

- The basis for not allowing an agreement that the Mudarib be entitled to the profit earned on one of two capital funds, while the profit earned on the other capital fund belongs to the capital provider, is that such an agreement may preclude the sharing of profit and may potentially lead to one party being wrongfully deprived of his rights.
- The basis for stating that profit is not realised unless the capital is recovered or maintained intact is the Hadith in which the Prophet (peace be upon him) said: *"The instance of a Musali (a person who performs prayer) is that of a businessperson who will not secure profit unless the capital is secured. Likewise, a supererogatory prayer is not acceptable unless the obligatory prayer is performed"*.(15) This Hadith shows that distribution of profit prior to recovery of the capital, or unless the capital is maintained intact, is invalid. Moreover, profit is an addition to the capital and such an addition cannot be recognised or realised unless the capital that is the source of the profit is maintained.
- The basis for the requirement that the Mudarib is preliminarily entitled to a profit when realised, i.e. prior to distribution (an encumbrance right), and that the net profit earned will be known absolutely only after allocation through actual or constructive valuation, is analogous to the contract of sharecropping. The Mecca based Islamic Fiqh Academy has issued a resolution in support of constructive valuation.(16)

Duties and Powers of the Mudarib

- The basis for allowing the Mudarib freedom of action in an unrestricted Mudarabah is that the Mudarib has the aim of achieving the objective of the capital provider, which is making profit, and this is not possible unless the capital is vigorously put into operation.
- The basis for not allowing the capital provider to stipulate a right to work with the entrepreneur (Mudarib) or to be involved in acts relating to Mudarabah operations is because such a stipulation would curtail

(15) The Hadith has been related by Al-Bayhaqi in his *"Sunan"*, and was narrated by Ali Ibn Abu Talib. Al-Bayhaqi stated that there is a weak narrator in the chain of transmission of this Hadith, *"Al-Mawsu'ah Al-Fiqhiyyah"* [38: 74].

(16) Resolution No. (4) of the Islamic Fiqh Academy under the auspices of Muslim World League issued in the sixth session that was held in Mecca. This is also the view that was endorsed by Al Baraka's 8th Forum, Fatwa No. (2).

the freedom of the Mudarib, limit the investment scope and hinder the Mudarib in achieving the objective of the Mudarabah contract, i.e. making profit.

- The basis for not allowing the Mudarib to make a loan, gift or charitable donation from the Mudarabah fund is because these actions do not benefit the Mudarabah operation, rather, they involve potential loss to the capital provider.
- The basis for allowing the Mudarib, when acting in the interest of the Mudarabah and in the event that the parties did not specify an amount of money for expenses, to obtain personal expenses from the Mudarabah funds as per customary practice is because what is known by custom is deemed to apply as a condition even if the parties did not clearly stipulate it. Again, the permission for the Mudarib to obtain common personal expenses in these cases is granted by custom.

Liquidation of Mudarabah Contract

- The basis for allowing liquidation of a Mudarabah contract unilaterally or by agreement of the parties or at the maturity date is because a Mudarabah contract is non-binding if the parties did not stipulate a term for its maturity.
- The basis for allowing constructive valuation is because Shari'ah has endorsed the concept of valuation. In addition, this is allowed because it is a valid tool that passes rights to owners appropriately. The actual valuation of assets for distribution is based on a common sense because this is the principle.
- The basis for allowing a Mudarabah contract be terminated on the grounds of loss of capital is that when the capital has been lost, the Mudarib is not able to put it to work in a business, and that the fund that was assigned for the Mudarabah is no longer in existence, thus entailing the termination of the Mudarabah contract.
- The basis for allowing termination of a Mudarabah contract due to the death of the Mudarib is that a Mudarabah contract is similar to contract of agency or, at least, it includes agency and an agency contract is terminable by the death of the agent.

Appendix (C)
Definitions

Sharikah

Sharikah is an agreement between two or more parties to merge their assets or to combine their services, obligations and liabilities with the aim of making profit.

A Mudarabah contract is distinguished from a Sharikah (Musharakah) contract in the following respects:

a) The basis for earning a share of profit in Sharikah is the required capital contribution of all parties, whether in the form of cash, commodities, services or liability in the case of reputation partnership and that the subject of the contract is based on a single element, i.e. capital. The basis for earning a profit in a Mudarabah, on the other hand, comes from two elements: the first element is the existence of capital that is subject to, and similar to, the conditions of Sharikah capital; the second element is the work done by the Mudarib that is different from the capital of the venture.

b) In Sharikah, the work, as a general rule, is to be done jointly by the parties, whereas in Mudarabah it is the Mudarib who works.

Shari'ah Standard No. (45)

Protection of Capital and Investments

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

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

Preface

This Standard aims at explaining the most important ways of protecting capital and investments in Islamic financial Institutions.[1] It also aims to explain what is permissible according to the Shari'ah and what is not permissible as well as the Shari'ah basis for it.

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

Statement of the Standard

1. Scope of the Standard

This Standard covers the instruments and methods used to protect capital and investments from loss, decrease and destruction.

2. Definition of Capital and Investment Protection and the Difference Between Protection and Guarantee

Protection of capital and investments means using available methods to prevent loss, decrease or destruction. It is wider than a guarantee of invested capital, as a guarantee is an undertaking by a particular party to bear any loss, decrease or destruction of the capital. On the other hand, protection refers to the safeguarding of capital.

3. Shari'ah Ruling

3/1 Protecting capital by permissible means is desirable in Shari'ah as it serves the objectives of Shari'ah with regard to wealth.

3/2 It is compulsory for an investment manager, whether he is a Mudarib, an investment agent or a managing partner, in his fiduciary capacity, to exercise due diligence to protect the funds from loss, decrease or destruction. If he fails to do so using usual means of protection, he is liable (for loss), taking into consideration items 4/1 and 7/1.

3/3 It is permissible to use Shari'ah-compliant instruments and processes to protect investment from risks that it may be exposed to whether they are risks relating to a loss of capital, depreciation in value, inflation, or the fluctuation of exchange rates, etc.

3/4 The investment manager acts in a fiduciary capacity with regard to the funds. He is not liable for loss of capital except in case of his wilful misconduct, negligence or breach of contractual terms and conditions.

3/5 The efforts exerted by the investment manager to grow the capital must be suitable for the nature of the relevant investment. It is also incumbent on him to take professional measures that normally provide suitable protection for the funds. Otherwise, he will be deemed negligent.

3/6 It is not permissible to stipulate in an investment agreement that the investment manager is unconditionally liable for any loss of capital in cases other than willful misconduct, negligence and breach of contractual terms and conditions.

3/7 If a loss occurs caused by the Mudarib's wilful misconduct, negligence or breach of contract, the capital provider may hold the Mudarib liable for the loss of capital but not the loss of profit. However, if it is determined through actual or constructive liquidation that the investment accrued profit which was added to the capital and then suffered a loss due to the Mudarib's wilful misconduct, negligence or breach of contract, the Mudarib is liable to idemnify for loss of that profit as it has become a part of the capital. If destruction of the whole or a part of the capital is caused by the Mudarib's wilfil misconduct, negligence or breach of contract, the Mudarib is liable for the value of the capital.

4. Shari'ah Compliant Means for Protecting Capital

4/1 Instruments and processes used to protect capital and investments must fulfill the following conditions:

4/1/1 The investment partners should bear the risks and losses according to their respective shares in the capital.

4/1/2 The objective should not be to hold the investment manager liable in cases other than willful misconduct, negligence or breach of contract.

4/1/3 The means adopted for capital protection must not be a non-Shari'ah compliant contract and should not be a pretext to achieve an objective violating Shari'ah.

4/2 Some permissible methods of protecting capital include:

4/2/1 Takaful (Islamic insurance) for the investment to protect the capital or cover the risks of willful misconduct, negligence, breach of contract, procrastination, death or bankruptcy. Takaful coverage may be obtained either by the investors themselves or through the investment manager on their behalf.

4/2/2 Obtaining Takaful cover for the leased assets underlying the Sukuk or other instruments against the risk of destruction and for major maintenance.

4/2/3 An undertaking provided by Takaful institutions to guarantee exports and investments.

4/2/4 A voluntary undertaking by a third party acting in the public interest, such as the state, or relevant public interest authorities, such as a guardian, executor or father, to indemnify against a loss of capital without any right of recourse to the investment manager, such as a government pledge in respect of an investment project. In order for this undertaking to be valid, the third party should be administratively independent of the investment manager and there should be no direct or indirect ownership relationship of more than a half between the investment manager and the third party.

4/2/5 An undertaking by a third party to indemnify against a loss of capital resulting from the investment manager's wilful misconduct or negligence without receiving consideration for providing such a guarantee. However, the guarantor has the right of recourse to the investment manager.

4/2/6 Creating reserves to protect the capital through deductions from the investors' share of profits but not from the investment manager's share of profits due to him in his capacity as the Mudarib.

4/2/7 Diversifying the investment assets to achieve an appropriate return and minimize risks. This may include:

a) Combining real assets, such as real estate and commodities with financial assets (such as stocks and *Sukuk)* or combining assets denominated in two different currencies.

b) Dividing the capital into two parts by deploying the capital in Murabahah and Musharakah contracts, respectively.

   The first part is used in Murabahah contracts with parties that have strong credit ratings in a way that the combination of the principal amount and the profit of Murabahah protect the initial capital and the second part is invested in Musharakah contracts.

c) Dividing the capital into two parts by deploying the capital in Ijarah and Musharakah contracts respectively.

   The first part is used in Ijarah contracts with parties that have strong credit ratings in a way that the combination of the principal amount and the rental amount protect the initial capital and the second part is invested in Musharakah contracts.

d) Dividing the capital into two parts and deploying them in Murabahah and 'Arboun contracts respectively.

   The first part is used in Murabahah contracts with parties that have strong credit ratings in a way that the combination of the principal amount and the profit of Murabahah protect the initial capital. The second part is used in 'Arboun contracts to purchase assets. If the value of the assets rises, the purchase contracts are completed and the assets are sold for a profit. If the value of the assets declines, the purchase contracts are not completed and the loss is limited to the amount of the 'Arboun, while the capital is protected by the Murabahah contracts. It is compulsory in this method to observe the Shari'ah rules relating to 'Arboun. This includes the requirement to reserve the assets sold under the 'Arboun contract from the time of contract conclusion until the settlement date and the impermissibility of trading in 'Arboun contracts. [see Shari'ah Standard No. (53) on 'Arboun]

4/2/8 Taking security and guarantees in Murabahah, Salam or Istisna'a contracts to ensure that debts are paid.

4/2/9 A sale with an option to terminate due to non-payment (*Khiyar al-Naqd*).

4/2/10 It is permissible to use other permissible instruments and processes with the consent of the investor to protect the capital from risks, whether those risks are related to the destruction of the original investment capital, depreciation in value, inflation or the fluctuation of exchange rates, etc.

4/2/11 If the investor has required the investment manager to adopt certain Shari'ah-compliant ways to protect the capital, the manager is obligated to do so. If he does not do so, he is liable for any resulting loss of capital, in accordance with item 4/4.

5. Shari'ah Non-Compliant Means for Protecting Capital

It is not permissible to protect the capital by Shari'ah-non-compliant means or means that result in violations of the Shari'ah, such as:

5/1 Stipulating that the investment manager is liable for loss of capital.

5/2 An undertaking by a third party to indemnify for loss of capital in the cases other than wilful misconduct or negligence of the investment manager with a right (of the third party) to have recourse to the investment manager.

5/3 A commitment by or obligating the investment manager to purchase the investment assets at their nominal price or at a price that was initially agreed upon.

5/4 An undertaking by a third party to guarantee the capital for a fee. This is a form of conventional insurance.

5/5 Protecting the capital by use of conventional hedging contracts such as futures, options and swaps.

6. Date of Issuance of the Standard

This Standard was issued on 24 Dhul-Qa'dah 1431 A.H., corresponding to 30 November 2010 A.D.

Adoption of the Standard

The Shari'ah Board adopted this Standard in its meeting No. (28) held in the Kingdom of Bahrain during the period of 22-24 Dhul-Qa'dah 1431 A.H., corresponding to 27-29 May 2011 A.D.

Appendix (A)
Brief History of the Preparation of the Standard

On 24 Dhul-Qa'dah 1428 A.H., corresponding to 20 December 2007 A.D., the General Secretariat decided to commission a Shari'ah consultant to prepare a juristic study on Protection of Capital and Investments.

In its meeting held in Kuwait, on 20 Shawwal 1430 A.H., corresponding to 9 February 2009 A.D., the Shari'ah Standards Committee discussed the draft of a Shari'ah Standard on Protection of Capital and Investments and made necessary amendments.

The revised draft of the Shari'ah Standard was presented to the Shari'ah Board in its meeting No. (24) held in the Kingdom of Saudi Arabia, during the period of 25-27 Jumada II, 1430 A.H., corresponding to 18-20 June 2010 A.D. The amendments that were deemed appropriate were included.

The General Secretariat held a public hearing in the Kingdom of Bahrain, on 27 Safar 1431 A.H., corresponding to 11 February 2010 A.D. All the comments made in the public hearing were listened to, and a member of the Shari'ah Board answered these comments and made commentary on them.

In its meeting No. (26) held in the Kingdom of Bahrain, during the period of 24-26 Rabi' I, 1431 A.H., corresponding to 10-12 March 2010 A.D., the Shari'ah Board discussed the amendments proposed by the participants in the public hearing and incorporated the amendments that it considered suitable.

In its meeting No. (28) held in the Kingdom of Bahrain during the period of 22-24 Dhul-Qa'dah 1431 A.H., corresponding to 28-30 November 2010 A.D., the Shari'ah Board discussed the draft of the Standard, incorporated

the necessary amendments that it deemed appropriate, and adopted the Standard.

In its meeting held in Al-Madinah Al-Minawwarah, on 30 Sha'ban 1436 A.H., corresponding to 17 June 2015 A.D., the Shari'ah Standards Review Committee reviewed this Standard. After deliberation, the committee approved necessary amendments, and the Standard was adopted in its current amended version.

Appendix (B)
The Shari'ah Basis for the Standard

- The basis for capital protection being a desirable objective is the Divine Command to adopt ways and means to protect wealth like having witnesses and documentation of the financial contracts and securing debt with mortgages and the like. Protection of wealth is one of the essential objectives that the Shari'ah has taken care of.
- The basis for the obligation of the manager to take due diligence to protect the investment is that his role regarding the investment is that of a fiduciary. This means that he should manage the investment in a way that serves the interest of the capital provider in his capacity of his fiduciary representative. He should thus use prudent means consistent with accepted standard practice to increase the funds.
- The basis for using permissible means to protect the investment is that all (financial) contracts are permissible by default unless proved otherwise. Furthermore, these instruments achieve the intent of the Shari'ah to safeguard wealth.
- The basis for the investment manager not being liable for the loss of the capital, except in cases of his wilful misconduct and negligence is the consensus of Muslim jurists.(2) That is because he takes the capital with the owner's permission and deals with it in the interest of the capital provider. He is thus the capital provider's representative in terms of possessing and managing the capital. This means that the loss or destruction of the capital in his possession is just like its loss or destruction while in the possession of its owner because he took it with his permission. Moreover, no person, including the manager is liable to anything without a specific command by Shari'ah.

(2) *"Al-Bahr Al-Ra'iq"* [6: 313]; *"Al-Bahjah Sharh Al-Tuhfah"* [2: 217]; *"Mayyarah 'Ala Al-'Asimiyyah"* [2: 131]; and *"Al-Mughni"* [7: 76].

- The basis for the impermissibility to stipulate an absolute guarantee to be provided by the manager, is that this condition strips partnership (Mudarabah and Musharakah) and agency contracts of their essential content, and turns them into a guaranteed loan contract. Moreover, these contracts are based upon trusteeship, and this condition violates their nature and implications; hence, it is void. Ibn Qudamah said, "The third type (i.e., of invalid conditions) is to stipulate what is not in the interest of the contract nor consistent with its nature and implications; e.g., stipulating that the partner is liable for the capital or for a share of the loss."[3] There is no disagreement among the jurists that this condition is void.[4]
- The basis for the opportunity cost not being compensated in the events of wilful misconduct or negligence is that it is non-existent wealth which has not been realised yet. However, realized profit after actual or constructive liquidation is treated like capital.

Shari'ah-Compliant Means for Protecting Capital

- The basis for stipulating equality among the partners in bearing loss is that partnership is based on equality between the partners. Stipulating that some partners should bear the loss more than others should violates the nature and implications of a partnership contract. Bearing the portion of loss that is supposed to be borne by another partner causes the latter partner to gain profit from that for which he has assumed no liability. The jurists agree that loss sharing in the partnership contract should be proportional to capital (contribution).[5]
- The basis for the permissibility to protect the capital with Takaful against any type of investment risks is that Takaful is an undertaking to make donations between the participants. It is not a contract to exchange counter-values (Mu'awadah). Its purpose is to achieve cooperation and solidarity among the participants. Hence, the Shari'ah prohibitions that apply to (conventional) commercial insurance do not apply to it.
- The basis for the permissibility of a third party's undertaking to bear the loss without the right of recourse to the manager is that, according to the

(3) *"Al-Mughni"* [5: 41].

(4) *"Al-Mabsut"* [15: 84]; *"Al-Bahjah Sharh Al-Tuhfah"* [2: 217]; *"Al-Hawi Al-Kabir"* [9: 113]; and *"Al-Mughni"* [7: 179].

(5) *"Bada'i' Al-Sana'i'"* [7: 517]; *"Hashiyat Al-Dusuqi"* [3: 353]; *"Tuhfat Al-Muhtaj"* [5: 292]; and *"A-Furu'"* [4: 403].

Shari'ah, this is an undertaking to make a voluntary donation. Therefore, it is permissible by the Shari'ah provided that the third party is independent from the manager so that his undertaking does not result in the manager becoming the guarantor.

- The basis for permissibility of deducting reserve amounts (from the profits) is that it is done with the consent of the relevant parties and is in the investors' interest as it strengthens the investment's financial situation. No deduction should be made from the manager's share because the liability for loss is borne by the capital providers, not by the manager.
- The basis for the permissibility of diversifying investment assets is that diversification achieves the interest of the investors. It does not fall under the prohibition of combining contracts in one contract because each contract is conducted independently of the other, whereby the manager divides the capital into parts and each part is invested independently in one type of contract or investment asset that differs from what the other portion of the capital is invested in. This is for the purpose of mitigating risks and diversifying returns. The parameters for each of these contracts may be sought by referring to the relevant Shari'ah Standard.
- The basis for the permissibility of obtaining securities and guarantees for deferred payment contracts is the Quranic Verse: ***{"And if you are on a journey and cannot find a scribe, then (you may resort to holding something as) mortgage, taken into possession"}***,[6] and ***{"…who produces it is (the reward of) a camel load; I guarantee it"}***.[7]
- The basis for the liability of the manager to bear the loss if he violates the Shari'ah-compliant conditions stipulated by the capital provider is the Quranic Verse: ***{"O you who believe! Fulfil (your) obligations"}***.[8]
- Fulfilling contractual obligations requires the fulfilment of the conditions stipulated in them. The Prophet (peace be upon him) said, *"Muslims are*

(6) [Al-Baqarah (The Cow): 283].
(7) [Yusuf (The Prophet Joseph): 72].
(8) [Al-Ma`idah (The Table): 1].

bound by their conditions (stipulated in contracts and undertakings)".[9] Breaching these conditions amounts to negligence from the manager. Hence, it is compulsory upon him to bear any loss arising from this breach.

Shari'ah Non-Compliant Means for Protecting Capital

- The basis for the prohibition of a third party's undertaking to bear the loss with the right of recourse to the manager is that this condition results in making the manager liable for the loss, which is prohibited by the Shari'ah.
- The basis for prohibiting the manager from undertaking to buy the investment assets at their face value or at a value initially agreed upon is that this condition results in the manager undertaking to bear the partial or complete loss of the assets' value, which is a forbidden condition as aforementioned.
- The basis for the prohibition of a third party's guarantee for a fee received in exchange for the guarantee is that it firstly entails excessive ambiguity because the extent of the loss is unknown at the inception of the contract, and because giving a guarantee in exchange for a fee, is prohibited by the Shari'ah.
- See Shari'ah Standard No. (20) on Sale of Commodities in Organized Markets for the basis of the prohibition of trading in options, futures and swaps.[10]

(9) Related by Al-Tirmidhi from the Hadith of Amr Ibn 'Awf, may Allah be pleased with him, in *"Kitab Al-Ahkam"*, Chapter on *"Ma Dhukira 'An Rasuli Allah, peace be upon him, Fi Al-Sulh"*, No. (1272); it is related also by Abu Dawud from the Hadith of Abu Hurayrah, may Allah be pleased with him, in *"Kitab Al-Aqdiyah"*, Chapter on *"Bab Fi Al-Sulh"*, No. (3120); also it is related by Al-Darqutni from the Hadith of 'A`ishah, may Allah be pleased with her, with the addition of "…that which is consistent with the truth", [2: 3]. It is an authentic Hadith when all its chains of transmission are taken into consideration; *"Taghliq Al-Ta'liq"* [3: 280]; and *"Fath Al-Bari"* [4: 451].

(10) See Resolution No. (63) 1/7 of the International Islamic Fiqh Academy regarding Financial Markets.

Appendix (C)
Definitions

Wilful Misconduct by the Manager

Wilful misconduct by the manager that renders him liable is to do what he is not allowed to according to the dictates of the Shari'ah, or the contract, or customary practice.

Negligence by the Manager

Negligence by the manager that renders him liable is to fail to do what it is required of him by the Shari'ah, or the contract, or customary practice.

Shari'ah Standard No. (40)

Distribution of Profit in Mudarabah-Based Investment Accounts

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

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

Preface

This Standard aims to indicate the controls and rulings on distribution of profits of investment accounts in Islamic financial institutions (Institution/ Institutions).[1] In this regard the standard covers three major aspects including: realization of profit, entitlement to profit and profit distribution.

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

Statement of the Standard

1. Scope of the Standard

This Standard covers investment accounts managed on the basis of Mudarabah and the principles and conditions of realization and entitlement to profit. The Standard also covers how profits are to be distributed between the institution as a Mudarib and the holders of investment accounts as Arbab al-Mal, and to discuss the procedural aspects of profit realization such as determination of the expenses to be charged to investment accounts and the allocations and reserves to be deducted from the profits. The standard does not cover the accounts managed on the basis of investment agency because such accounts require a separate standard.

2. Investment Accounts (Demand Deposits)

2/1 Definition and types of investment accounts

These are the amounts which the institution receives from investors on the basis of participatory Mudarabah (al-Mudarabah al-Mushtarakah). The holders of such accounts delegate the institution to invest their funds through Mudarabah. Investment accounts can be divided into two types. The first type is investment accounts that are managed on the basis of unrestricted Mudarabah where the Mudarib is delegated to invest the Mudarabah funds in any field of investment he deems suitable. The second type is investment accounts which are managed on the basis of restricted Mudarabah, where the Mudarib has to invest the Mudarabah funds in a specific type of investment to be determined by Rab al-Mal (owner of the capital). The relationship between the holders of these accounts and the institution is the typical relationship between the Mudarib (the work provider) and Rab al-Mal.

2/1/1 Unrestricted investment accounts

These are the amounts received from investors who authorize the institution to invest their funds on the basis of Mudarabah without restricting the investment of such funds to a specific project or investment program. The holders of the accounts and the institution share the profit, if any, according to the ratio specified for each of them either in the Mudarabah contract or in the application for opening the account. The holders of the accounts bear all the losses in proportion to their respective shares in the capital, except losses arising from transgression, negligence or breach of the contract, which have to be borne by the institution.

2/1/2 Restricted investment accounts

These are the amounts whose owners authorize the institution to invest them on the basis of Mudarabah in a specific project or investment program[2]. The holder of the account and the institution share the profit, if any, according to the ratio specified for each of them either in the Mudarabah contract or in the application for opening the account. The holder of the account bears all the losses in proportion to his share in the capital, except losses arising from transgression, negligence or breach of contract, which have to be borne by the institution.

2/1/3 Equality in investment opportunities

In principle, equality in investment opportunities should be ensured between shareholders' funds and the funds of the holders of the investment accounts in participatory Mudarabah. In case a different policy is to be adopted, the institution should disclose that before disposition, with due consideration to the relevant regulatory restrictions and the conditions of opening the accounts.

(2) Restricted investment accounts can be managed on the basis of investment agency.

2/2 The difference between an investment account and a current account and its likes

2/2/1 The current accounts are the amounts which the institution receives from clients who are not seeking investment. Such amounts represent loans which the institution has to guarantee their repayment on demand without any increment. The institution has the right to dispose of such amounts and invest them for its own benefit and under its own responsibility, preferably after indicating this in the application for opening the account.[3] As regards investment accounts, these are the amounts deposited with the institution on trust basis, and hence the institution is not committed to guarantee their repayment, except in case of transgression, negligence or breach of the contract.

2/2/2 The institution should guarantee full repayment of the amounts of the current accounts to their holders, whereas it should not assume the commitment to pay any fixed or variable increment on the principal amounts of such accounts, because such payment constitutes usurious interest. The institution is not committed to guarantee investment accounts. It is only committed to distribute their profit or loss among their holders as per the ratios agreed upon.

2/2/3 Saving accounts which carry no authorization for investing them to the benefit of their holders shall become subject to the rulings on current accounts, whereas those which carry such authorization shall become subject to the rulings on investment accounts.

2/2/4 The institution may charge fees (commissions) for the services of opening investment accounts. Such fee has to be a lump

(3) For more rulings on current accounts as regards, for instance, charging fees for keeping such accounts or distribution of prizes to them see Shari'ah Standard No. (19) on Loan (Qard).

sum amount which should preferably not exceed the average actual cost, and should be charged once at the time of opening the account.

2/2/5 In case of depositing coins or paper money by handing them over to the cashier the institution may charge a fee for transportation, storage and counting of the deposited amounts. This, however, does not include amounts transferred to the account of the institution.

2/2/6 In transference of money between accounts constructive possession is sufficient, whether for the same currency or different currencies, because the process involves exchange and transference. [see Shari'ah Standard No. (1) on Trading in Currencies]

2/2/7 The funds which the institution fails to transfer to owners because of change of address shall be kept in a suspended account for the specified period before being added to the charity account. If the addresses of the owners of such funds came to be known later on the funds should be paid out to them from the charity account. In this regard, a clause should be added to the conditions for opening the accounts indicating that the holders of the accounts agree to donate for charitable purposes any amounts which could not be transferred to them within a specific period due to change of address.

2/2/8 In principle, the institution should resort, through exchange of correspondence, to holders of the accounts when there is any change in the conditions or profit sharing ratios. However, due to the difficulty and cost involved in such process the institution may send notifications, or advertise the new changes in its website so that the implicit acceptance of the concerned parties is obtained if no protest is received from them within a specific period. The changes in question, which shall become effective starting from the beginning of the next period, should be incorporated in the conditions of the

accounts, with due reference to the procedure followed for their adoption.

2/2/9 It is permissible to stipulate the authoritative status of the documents and financial statements of the institution, unless such documents and statements are proved to be wrong by the accountholder. If dispute arises the two parties should resort to experts, arbitration or law.

2/2/10 The cost of proving the accusation shall be borne by the accountholder when he files the claim against the institution.

3. Realization of Profit

Realization of distributable profits should be subject to the following:

3/1 Safety of the capital

3/1/1 Realization of profit in investment accounts does not take place before protecting the capital. Any amount of profit distributed before ensuring such protection is considered as an advance payment, rather than realized profit [see item 5/3]. The profit authorized for investment at the end of the investment period is considered as part of the capital in the next period.

3/1/2 Actual and constructive liquidation

Realization of profit in investment accounts does not take place before the following steps:

3/1/2/1 Liquidation of Mudarabah assets, which can be either actual liquidation where all the assets are converted into cash and all debts are collected, or it can be constructive liquidation where, in addition to cash amounts, noncash assets are valued by experts, along with valuation of all debts with regard to possibilities of collection and appropriate allocations for bad debts.

3/1/2/2 Covering of the following expenses:

a) Expenses relating to utilization of the balances of the investment accounts by charging each operation with the direct expenses incurred in its execution.

b) The share of the balances of the investment accounts from shared expenses, excluding expenses relating to the institution's own activities.

Investment accounts should also not be charged with the expenses of the tasks which have to be performed by the Mudarib. Such expenses include the expenses of the investment departments and the bodies which endorse their decisions as well as the expenses of the follow-up and accounting departments. It is also permissible to specify a ceiling for the expenses above which all the expenses are to be borne by the Mudarib.

3/1/2/3 Deduction of the allocations and reserves relating to the investment, from investment income so as to arrive at distributable profit. In this case, allocations for bad debts and reserve for rate of returns have to be deducted from gross profit, whereas reserve for investment risks has to be deducted after deduction of the Mudarib's share.

3/2 In realization of the profit the following should be observed

3/2/1 When loss is incurred in one Mudarabah operation it can be covered from the profits of other operations, and if it exceeds the profits it should be covered from capital. What should really matter is the final result of liquidation at the end of the financial period specified by the institution. The loss of a certain financial period should not be covered from the profits of another period, except in the case of covering losses from reserves.

3/2/2 Due to the fact that unrestricted investment accounts of continuous participatory Mudarabah lack coincidence in the beginning and end of the process of depositing funds in the accounts, the profit from the operations which extend to succeeding periods has to be distributed over the whole period of such operations in proportion to the duration of each operation.

4. Entitlement to Profit

4/1 The method of profit distribution should be well known so that no room is left for uncertainty and dispute. Distribution of profits should also be in terms of ratios, and not at all by specifying a lump sum amount or a percentage of the capital for any party, or any other method that could lead to avoidance of sharing of the profit between the two parties.

4/2 Specification of profit ratios for the two parties should not be postponed beyond the time of signing the contract. When the two parties do not specify such ratios at the time of signing the contract normal practice can be sought - if any - as when, for instance, profit is normally shared on equal basis. If there is no normal practice to resort to the Mudarabah contract becomes null and void, the Mudarib is entitled to the wage normally paid for similar work, and the whole profit goes to Rab al-Mal.

4/3 The institution can specify different ratios for distribution of profits between itself and different categories of holders of investment accounts, or it can specify a unified ratio for all. The ratios for distribution of profits among the holders of the investment accounts can also be unified or varying on the basis of certain weights.

4/4 When one of the two parties stipulates a lump sum amount for himself the Mudarabah contract becomes null and void. This restriction, however, does not include the case when the two parties agree that if the profit exceeds certain limit or index the excess amount should be taken by one of them. If the profit is at that limit/index or below it shall be shared as agreed upon between the two parties.

4/5 It is impermissible to earmark the profit of a specific type or portion of the capital or the assets into which capital is converted, for one of the two parties. It is also impermissible to allocate the profit of a certain financial period or a specific transaction for one party, and the profit of another financial period or a specific transaction for the other.

4/6 The method agreed upon for distribution of profit can be fixed for the whole period, or variable according to specific sub-periods of partial liquidation.

4/7 When the Mudarib mixes the Mudarabah funds with his own funds, he becomes a partner by subscribing his funds and a Mudarib for the Mudarabah funds of the other party. In this case the profit has to be divided between the two amounts of capital, so that the Mudarib can get the profit of his work as well as the profit of his funds as a partner. The profit share of the Mudarib as a partner shall become subject to the same treatment of the shares of the holders of investment accounts. [see item 4/3]

4/8 In principle, the profit belongs to the institution and the holder of the account, yet the two parties can agree on allocation of a certain part of the profit to the benefit of a third party. [see Shari'ah Standard No. (13) on Mudarabah, item 8]

4/9 It is permissible for the accountholder to exit from the Mudarabah with all his funds or part of them. Such exit represents the desire of the accountholder to redeem his share in the Mudarabah assets without withdrawing the total amount deposited in his account or part of it. It is permissible for the institution in this case to specify the amount relating to the exit so that it can earn no profit, or less than the profit it would have earned in the absence of exit. Such arrangement constitutes exit on the basis of supply and demand, rather than deprivation from profit.

4/10 The ratios of the amounts deposited in the investment accounts which the institution retains for liquidity purposes – may be stated in the conditions of the accounts - has to be treated as follows:

4/10/1 The case could be that the bank never invests such amounts because they are withheld in the accounts of the central bank or the bank's treasury for the sake of meeting requests for withdrawal from investment accounts, hence there is no return for which a ruling can be indicated here.

4/10/2 Or the case may be that the bank utilizes such funds in short term or easy-to-liquidate investments so as to cater for applications for withdrawal from investment accounts - although the bank sometimes stipulates in the conditions of the accounts that such funds are allocated for liquidity purposes. In this case it is permissible for the bank to invest such funds without obtaining the consent of the holders of the accounts, because the bank is authorized for any disposition that serves the interest of the two parties of the unrestricted Mudarabah contract. When a return is earned from such investment it should be added to the investment base. The holders of the account will be entitled to a share in this profit in their capacity as Arbab al-Mal, and the bank is entitled to its share as a Mudarib, subject to the ratios agreed upon. If, instead, a loss is incurred from investment of the amounts, without any transgression or negligence from the side of the bank, it should be borne by the holders of the accounts in their capacity as Arbab al-Mal.

5. Distribution of Profit

5/1 Application of scoring method of profit distribution:

With due consideration to items 4/3 and 4/4, the scoring method for distribution of profit among the participants of general investment accounts can be used. Such method takes into account the amount contributed by each investor and the period of its stay in the investment (currency unit x time unit). Each account is given a certain number of scores depending on its amount and the period of stay of that amount in the investment even if depositing and withdrawal have repeatedly been done and the amount varied from time to time. The holders of the accounts are considered to have implicitly exchanged mutual relief from commitment (Mubara`ah) for any aspects that practically cannot be catered for.

5/2 There is no prohibition against setting an expected rate of return which is not considered to be binding if not achieved, even if it is

reached through a feasibility study. However, final distribution of profits should be based on realization of profit after actual or constructive liquidation, rather than on such expected rate of return.

5/3 It is permissible to pay advance amounts to the holders of the accounts before actual or constructive liquidations so that final settlement can be made later on. After actual or constructive liquidation the institution is committed to make necessary additions to, or deductions from, the advanced amounts so that each holder of an investment account receives his exact share of the profit.

5/4 Mutual relief from commitments (Mubara`ah) in case of exit should be stipulated in the contracts of the Mudarabah-based investment accounts. The stipulation should indicate that the exiting party reliefs the holders of the accounts (the depositors) from commitment towards his rights in any undistributed or non-apparent profit, as well as his rights in the remaining part of the reserves for investment risks and rate of return, and the remaining part of allocations for debts. Similarly, the stipulation should state that the holders of the accounts relief the exiting party from commitment towards any losses that have not yet become apparent. The stipulation should also indicate that on liquidation of the investment base the remaining parts of the above mentioned reserves and allocations shall be devoted to charitable purposes.

5/5 Institutions should liquidate Mudarabah and distribute the realized profit between the Mudarib and the holders of the investment accounts according to the conditions of the Mudarabah contract.

5/6 When the shareholders in their capacity as the Mudarib, decide - after liquidation of the Mudarabah and preparation of the profit and loss account - to relinquish part of their profit share to the benefit of the accountholders, the institution should disclose that.

6. Other Rulings on Investment Accounts

The rulings which have not been stipulated in this Standard can be seen in Shari'ah Standard No. (13) on Mudarabah.

7. Date of Issuance of the Standard

This Standard was issued on 26 Jumada II, 1430 A.H., corresponding to 19 June 2009 A.D.

Adoption of the Standard

The Shari'ah Board adopted the Standard on Investment accounts and Profit Distribution on its meeting No. (24), held in Al-Madinah Al-Munawwarah, on 25–26 Jumada II, 1430 A.H., corresponding to 18-19 June 2009 A.D.

Appendix (A)
Brief History of the Preparation of the Standard

In its meeting No. (10) held on 2–7 Rabi' I, 1424 A.H., corresponding to 3-8 May 2003 A.D., in Al-Madinah Al-Munawwarah, Kingdom of Saudi Arabia, the Shari'ah Board decided to issue a Shari'ah Standard on bank deposits and distribution of profits .

On 7 Dhul-Hajjah 1424 A.H., corresponding to 29 January 2004 A.D., the Shari'ah Standards Committee (1) decided to commission a Shari'ah consultant to prepare a study on bank deposits and distribution of profits.

In its meeting No. (16) held on 8–9 Jumada I, 1426 A.H., corresponding to 15-16 June 2005 A.D., in the Kingdom Of Bahrain, the Shari'ah Standards Committee (1) discussed the draft of the Standard and introduced necessary changes.

In its meeting No. (17) held on 8–9 Sha'ban 1426 A.H., corresponding to 8-9 September 2005 A.D., in the Kingdom of Bahrain, the Shari'ah Standard Committee (1) discussed the draft of the Standard and introduced necessary changes.

In its meeting No. (15) held on 22 Sha'ban 1426 A.H., corresponding to 30 September 2005 A.D., in Makkah Al-Mukarramah, the Shari'ah Board discussed the draft of the Standard, and decided, in the light of the discussions and observations of the meeting, to send the draft of the Standard to Shari'ah Standards Committee (1) for study.

In a meeting held in the Kingdom of Bahrain, on 1 Safar 1427 A.H., corresponding to 1 March 2006 A.D., the Shari'ah Standards Committees (1) and (2) discussed the draft of the Standard and introduced necessary changes in the light of the observations of the meeting.

In its meeting No. (17) held in Makkah Al-Mukarramah, on 26 Shawwal 1427 A.H., corresponding to 18 November 2006 A.D., the Shari'ah Board discussed the amendments suggested by the Shari'ah Standards Committees (1) and (2) and introduced necessary changes.

In its meeting No. (22) held in the Kingdom of Bahrain, on 28–30 Dhul-Qa'dah 1430 A.H., corresponding to 26-28 November 2008 A.D., the Shari'ah Board discussed the draft of the Standard and introduced necessary changes.

The Secretarial General of AAOIFI held a public hearing in the Kingdom of Bahrain on 6 Rabi' II, 1430 A.H., corresponding to 2 April 2009 A.D. More than 30 participants attended the public hearing as representatives of central banks, institutions, and accounting firms. The public hearing was also attended by Shari'ah scholars, university teachers and other interested parties. Several observations were made in the public hearing, and duly responded to by the members of the Shari'ah Standards Committees (1) and (2).

In its meeting No. (23) held in the Kingdom of Bahrain, on 15–17 Rabi' I, 1430 A.H., corresponding to 12-15 March 2009 A.D., the Shari'ah Board discussed the draft of the Standard and introduced necessary changes.

In its meeting No. (24) held in Al-Madinah Al-Munawwarah, on 25–26 Jumada II, 1430 A.H., corresponding to 18-19 June 2009 A.D., the Shari'ah Board discussed the draft of the Standard, introduced necessary changes and adopted the Standard.

Appendix (B)
The Shari'ah Basis for the Standard

- The current account is considered as a loan because the bank has to guarantee its repayment on demand. In this regard the International Islamic Fiqh Academy issued its resolution No. 86 (9/3) which stipulates that "Demand deposits (current accounts) whether in Islamic or traditional banks are loans in the strict Shari'ah sense. The receiving bank holds such deposits under guarantee and is committed by Shari'ah to repay them on demand. The fact that the receiving bank is solvent does not affect this ruling"

Rulings and Conditions relating to Profit

- Profit has to be known because it constitutes the object of contracting, and therefore ignorance about it nullifies the contract.
- It is impermissible in Mudarabah to specify the return for any of the two parties in terms of a lump sum amount or a certain percentage of the capital, because such specification eliminates profit sharing which constitutes a fundamental aspect of the Mudarabah contract. By such specification, the very essence of partnership will be lost when, for instance, the profit earned is just equal to the lump sum amount or percentage of the capital earmarked for one party.
- Permissibility of applying the scoring method of profit distribution is based on the fact that the funds of the participants in the same investment base have all contributed to achievement of the return as per their respective amounts and periods of stay in the accounts. The scoring method is the most equitable method of accounting in hand that can be used for assigning profit shares commensurate to the amounts and their periods of stay in the accounts. However, entering into investment on such basis necessitates mutual relief from commitments (Mubara'ah) among investors with regard to any part of entitlement that could not be catered

for through this method. It is a well established principle in Figh literature that much more exemptions can be allowed in partnership-based dealings (*Musharakat*) than in exchange-based dealings (Mu'awadah) and that division (Qismah) through approximation of shares is based on mutual consent.

- Charging the Mudarabah expenses in the way shown in the Standard takes into consideration what should be done by the Mudarib for the sake of carrying out his investment decisions on receipt of the funds, and his commitment to do the work which entails having the bodies required for that purpose. A resolution to this effect has also been issued by the Al Baraka Seminar (4/1).
- Impermissibility of charging interest for loans is based on the fact that such charge constitutes Riba. In this regard the international Islamic Fiqh Academy issued its resolution No. (10/2) stipulating that "whether such increment is charged for postponement of a defaulted debt, or as an interest on the loan stipulated since the time of signing the contract, both increments are forms of Shari'ah-prohibited Riba".
- Impermissibility of postponing specification of profit ratios for the two Mudarabah parties until the profit is earned is based on the fact that such postponement leads to Jahalah (ignorance) which could lead to dispute. On the contrary, agreement between the two parties - at time of distribution - on changing the ratios agreed upon or donating part of the profit is a right that the two parties may permissibly exercise.
- Impermissibility of final distribution of the profit between the stakeholders of the company before deduction of expenses, allocations and reserves is the Shari'ah principle that no profit is to be sought before preservation of the capital.
- Permissibility of distributing the profit on the basis of constructive liquidation and after ensuring the safety of the capital is based on acceptance of valuation in Shari'ah[4] in several applications including Zakah

(4) See the Forth Resolution of the Muslim World League in its 15th Session, held in Makkah Al-Mukarramah, on 21–26/10/1422 A.H.; Resolution No. 30(5/4) of the International Islamic Fiqh Academy; and Fatwa No. (2/8) of the 8th Seminar of the Al Baraka, Fatawa Al Baraka, (P. 134).

as well as theft incidents. In this context, the Prophet (peace be upon him) is reported to have said: *"When someone liberates a slave he owns with other parties, he should pay partners from his money, and if he has no money, the slave has to be equitably valued for him"*. (5)

- The Shari'ah basis for the ruling that no profit has to be sought in Mudarabah before preservation of the capital is the Hadith of the Prophet (peace be upon him) who said: *"A prayer performer is just like a merchant who obtains profit only after preserving his capital. Similarly a prayer performer cannot get his Nafilah (voluntary prayer) accepted before he performs Faridah (obligatory prayer)"*.(6) This Hadith indicates that profit sharing is inacceptable before preservation of the capital. This is so because profit is an increment which cannot be obtained before obtaining the principal.
- The Mudarabah contract becomes null and void when the two parties refrain from specifying profit sharing ratios and fail to find any established normal practice of profit sharing applicable to their case. This ruling is based on the fact that ignorance about profit, which constitutes the contracting object, must nullify the contract.
- Profit sharing ratios can be commensurate to shareholding ratios or not, because profit is deserved for contribution of funds, work or guarantee. When any of these three aspects is fulfilled there is no Shari'ah prohibition for the partners to specify profit sharing ratios on mutual consent. This viewpoint is adopted in the Hanbali School.(7)
- The Shari'ah basis for impermissibility of agreement between the two parties on charging the whole loss to one of them or using disproportionate ratios for loss distribution is the statement of Ali Ibn Abu Talib who is reported to have said: "Profit is to be distributed as per the agreement of

(5) *"Sahih Muslim"* [2: 1140].

(6) Related by Al-Bayhaqi in *"Al-Sunan"* quoting Ali Ibn Abu Talib. Al-Bayhaqi mentioned that the chain of transmission of this Hadith includes a weak narrator: *"Al-Mawsu'ah Al-Fiqhiyyah"* [38: 74].

(7) *"Al-Hidayah Sharh Al-Bidayah"* by Al-Mirghinani, [3: 3-8], Al-Maktabah Al-Islamiyyah; *"Bada'i' Al-Sana'i'"* by Al-Kasani, [6: 62-63]; and *"Al-Mubdi'"* by Ibn Muslih [5: 4], Al-Maktab Al-Islami, Beirut, 1400 A.H.

the two parties, whereas loss should be borne according to the ratios of contribution to the capital".[8] A condition which stipulates that the loss of one party should be borne by the other party is invalid because it is oppressive and would lead to reaping of unlawful gain by one party at the expense of the other.

- It is permissible for the two parties to stipulate a condition that when profit exceeds certain limit or index the whole additional amount should be taken by one of them, because such condition is permissible according to Shari'ah if it happens to be stipulated.
- It is impermissible to agree on earmarking the profit of a specific portion of the capital for one party and the profit of the remaining portion for the other, because such arrangement could jeopardize the process of profit sharing and lead to oppression.
- Permissibility of agreement between the two parties to change profit sharing ratios at any time, stems from the fact that the two parties are the sole owners of the profit, and agreement between them to change its distribution ratios does not entail a Shari'ah-prohibited act, such as discarding away the principle of profit sharing.[9]
- Permissibility of agreement on fixed or variable ratios of profit distribution is based on the validity of such agreement since it has been the result of mutual consent. The only restriction is that such agreement should observe the Shari'ah ruling that neither of the two parties should be deprived from his share in the profit.
- Regarding constructive liquidation a resolution has been issued by the Islamic Fiqh Academy of Makkah Al-Mukarramah.[10]

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(8) Related by Ibn Abu Shaybah in his *"Musannaf"* [4: 268], Maktabat Al-Rushd Press, Riyadh.

(9) See the proceedings of the 10th Al Baraka Seminar – Fatwa No. (8) and the 4th Al Baraka Seminar - Fatwa No. (5). This viewpoint is also supported by a Fatwa issued by the Shari'ah Board of the Faisal Islamic bank of Sudan (P. 107) and published in the Manual of Shari'ah Fatawa of the Center of Islamic Economic of the International Islamic Bank , (P. 53).

(10) The 4th Resolution of the 16th Session, held by the Islamic Fiqh Academy of the Muslim World League. This viewpoint has also been adopted by the 8th Al Baraka Seminar (Fatwa No. 2).

Appendix (C)
Definitions

Deposit (Wadi'ah)

Funds given to someone for safekeeping

Bank Deposit

Funds which individuals and institutions entrust the bank to keep, provided that the bank assumes the commitment to repay such funds or their equivalent to depositors or any other specific person, on demand or subject to the conditions agreed upon.

Demand Deposit (Current Deposit)

Demand deposit is the means whereby a current account is established. The current account can be defined as: The funds deposited by their owners with the bank so as to be ready for withdrawal on need. The bank assumes the responsibility of immediate repayment of such funds on demand, and without any type of prior notification.

Savings Deposit (Savings Account)

Small cash deposits which individuals cut from their incomes and pay to the bank so as to open saving accounts for them. The owners of such accounts have the right to withdraw the whole or part of the balances of their accounts at any time.

Shari'ah Standard No. (50)

Irrigation Partnership (Musaqat)

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

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

Preface

This Standard aims to explain the Shari'ah rules and requirements for Irrigation Partnership (Musaqat) and its applications in the activities of Islamic financial Institutions.[1]

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

Statement of the Standard

1. Scope of the Standard

This Standard covers the Shari'ah rules and requirements for Irrigation Partnership (Musaqat) and its applications in the activities of Islamic financial institutions. It does not cover other forms of agricultural partnership as they have separate Shari'ah standards dedicated to them.

2. Definition of Irrigation Partnership (Musaqat)

A contract between the owner of an orchard or its usufruct and a worker (irrigator) agreeing to share the produce according to specific ratios stipulated at the time of contract.

3. Permissibility and Description of the Contract

Irrigation Partnership (Musaqat) is a permissible contract that becomes binding on commencement of the work or if mutually agreed between the two parties not to terminate the contract before its expiry.

4. Elements of Irrigation Partnership

4/1 Offer and acceptance should be exchanged explicitly or implicitly by means of a recognised form of indication.

4/2 Each of the two parties should be legally competent.

4/3 The relevant trees should be identified, arable (productive), and in need of irrigation and plant husbandry.

5. Conditions of Validity (Prerequisites)

5/1 The contract should stipulate for each party a predetermined, defined, indivisible share of the produce.

5/2 The work should be restricted to the husbandry of the crop and trees. The owner may not (in this contract) demand any additional work from the worker (irrigator).

5/3 The contract is valid until the time of harvest or for a defined period in which the crop is normally enough for harvest.

6. Duties of the Worker (Irrigator)

6/1 The worker (irrigator) is obligated to care for the trees and crops as per agreement with the owner and customary requirements, including:

6/1/1 Carrying out plant husbandry by watering, pollinating, fertilising, weeding, maintaining and cleaning irrigation channels, pruning, controlling pests, harvesting and performing seasonal work that is usually required for each type of tree.

6/1/2 Not commissioning or subcontracting a third party to carry out his work without the permission of the owner. If he does so, the owner of the trees has the option to ratify the third party contract or reject it.

6/2 The worker (irrigator) may employ others to assist him to carry out part or all of the contracted work.

6/3 The worker (irrigator) acts in a fiduciary capacity and is not liable for any loss arising from other than wilful misconduct, negligence or breach of the terms of the contract. In such a case, he is liable to indemnify the owner against any actual loss caused, but remains entitled to his share of the crop.

7. Duties of the Owner of the Trees

The owner should facilitate for the worker (irrigator) full access to the trees (subject of contract), and remove any impediments which may hinder the work of the worker (irrigator).

8. Joint Duties of the Worker (Irrigator) and the Owner of Trees

8/1 After harvesting, the worker (irrigator) and the owner are obligated to take care of the crop, each in proportion to his share. Prior to harvesting, the worker (irrigator) is obligated to take care of the crop unless custom or a term of the contract dictates otherwise.

8/2 The worker (irrigator) and the owner are responsible for the expenses of the Irrigation Partnership in proportion to their shares, including any Takaful insurance, unless they agree otherwise.

8/3 The worker (irrigator) is solely responsible for performing the work customarily undertaken by workers (irrigators) in similar Irrigation Partnerships and such work does not entitle him to any increase in his share of the crop as he is already contractually obligated to carry it out. If he hires others to perform his work, their wage is his sole responsibility and should not be taken from the overall crop. The worker (irrigator) may hire, on the account of the Irrigation Partnership, others to perform work that is customarily beyond the scope of his duties.

8/4 If the worker (irrigator) refuses to complete the term of the Irrigation Partnership after commencing work or entering into the contract, the owner should demand performance from him. If the worker (irrigator) stops working before the crop materializes he is not entitled to any share. If he stops working after the crop materializes but before it is ready for harvest, a third party should be hired to complete the work and his wage should be deducted from the worker's (irrigator's) share after the crop is harvested and sold. If the worker's (irrigator's) share is not sufficient to pay the third party's wage, the worker (irrigator) must make up the difference. If the worker's (irrigator's) share of the crop is more than the third party's wage, he keeps the difference.

8/5 In an Irrigation Partnership (Musaqat) that is due to terminate when the crop materializes or is ready for harvest, if the owner does not enable the worker, and this occurs before the crop materializes, then the owner shall be requested to enable the worker (irrigator) to complete his work. If the owner does not enable the worker (irrigator), then the worker (irrigator) shall be entitled to a wage at the market rate for similar work. If this occurs after the crop materializes, the worker (irrigator) is entitled to his stipulated share of the crop.

9. Division of Produce

9/1 In principle, all recurring produce of the trees should be shared as part of the crop, such as fruits, palm leaves etc. unless the parties agree to restrict their sharing arrangement to just the fruits.

9/2 The worker (irrigator) is entitled to his share of the crop on an indivisible basis as soon as it materializes.

10. Contingencies in Irrigation Partnerships

10/1 If the crop does not materialize at all or is completely destroyed by a natural disaster, the worker (irrigator) is not entitled to anything. If the natural disaster destroys only part of the crop, the parties divide what remains according to their stipulated shares.

10/2 If the crop does not materialize during the stipulated term, the worker (irrigator) has the option either to stop working or to continue his work without a wage until the crop materializes and thereafter takes his share. If he stops working without a valid excuse, he foregoes his right to a share of the crop when it materializes. If he has a valid excuse, he is entitled to the portion of his share that corresponds to the period of time worked in proportion to the total time the crop took to materialize.

11. Trees Belonging to Third Parties and Usurped Trees

11/1 If it transpires that the trees belong to a third party, the crop will then belong to him (the third party). In this case, the worker (irrigator) is entitled to a wage or compensation from the other party (the usurping party) at the market rate for similar work but not exceeding (what would have been) his share of the crop.

11/2 If the worker (irrigator) enters into an Irrigation Partnership (Musaqat) with a party who, unbeknown to the worker (irrigator), has usurped the trees, then the produce, if any, will belong to the owner of the trees and the worker (irrigator) will be entitled to a wage at fair market rate. But if the worker (irrigator) knew that the trees were usurped, then he is not entitled to any remuneration.

12. Termination of Irrigation Partnership Contract (Musaqat)

The Irrigation Partnership (Musaqat) contract terminates upon the occurrence of any of the following:

12/1 Harvest and division of the crop, if the Irrigation Partnership was linked to the produce of a specific season.

12/2 Completion of the agreed term and division of the crop in accordance with Item 10/2.

12/3 Death of the worker (irrigator) or liquidation of the institution carrying out the work if the Irrigation Partnership (Musaqat) contract stipulates that the work is non-assignable. If there is no such stipulation, the successor has the option to complete the work on the same terms, either himself or by hiring workers (irrigators), in return for the deceased's (or liquidated institution's) share of the crop. If the successor chooses not to complete the work, the owner may complete the work himself or by hiring others and upon materialization of the crop, the successor of the worker (irrigator) is entitled to receive a wage at the market rate for similar work for the period of time worked by the deceased (or liquidated institution) but not exceeding his (or its) stipulated share of the crop.

12/4 Death of the trees that are the subject matter of the contract or inability of the trees to bear fruit.

12/5 Passing of a season without any fruit.

13. Revocation of Irrigation Partnership Contract (Musaqat)

13/1 Irrigation Partnership (Musaqat) contract is revocable by mutual consent of the two parties (Iqalah).

13/2 The owner can revoke the contract in the following situations:

13/2/1 When the worker (irrigator) is unable to perform the work, in which case the following apply:

13/2/1/1 If the worker (irrigator) is unable to work for a reason outside his control, such as an illness, he is entitled to receive a wage

at the market rate for similar work for the period of time worked.

13/2/1/2 If the worker (irrigator) is unable to work for a reason within his control, he is entitled to receive a wage at the market rate for similar work for the period of time worked. He is also liable to indemnify the owner for actual loss suffered, as determined by experts.

13/2/2 When the worker (irrigator) stops working and it is not possible to enforce him (to fulfil the terms of the contract).

13/3 The worker (irrigator) is entitled to revoke the contract if the owner refuses to allow him to work. [see item 8/5]

14. Zakat Due on Irrigation Partnership (Musaqat)

See Shari'ah Standard No. (35) on Zakat, item 5/4/9.

15. Some Applications of Irrigation Partnership (Musaqat) in Financial Institutions

15/1 The institution may enter into Irrigation Partnership (Musaqat) contracts with the owners of trees and then hire workers (irrigators) to carry out the work.

15/2 The institution can own trees and enter into Irrigation Partnership (Musaqat) contracts with other parties to carry out the work.

16. Date of Issuance of the Standard

This Shari'ah Standard was issued on 21 Safar, 1434 A.H., corresponding to 4 January 2013 A.D.

Adoption of the Standard

The Shari'ah standard on Irrigation Partnership (Musaqat) was adopted by the Shari'ah Board in its meeting No. (34) held during the period of 20-21 Safar, 1434 A.H., corresponding to 3-4 January 2013 A.D.

Appendix (A)
Brief History of the Preparation of the Standard

On 24 Dhul-Qa'dah 1431 A.H., corresponding to 30 November 2010 A.D., the Secretariat of AAOIFI decided to commission a Shari'ah consultant to prepare a juristic study on Irrigation Partnership (Musaqat).

In its meeting No. (30) held in the Kingdom of Bahrain, on 24-26 Jumada II, 1432 A.H., corresponding to 27-29 May 2011 A.D., the Shari'ah Board discussed the exposure draft of the standard and introduced the changes it deemed suitable.

In its meeting No. (31) held in the Kingdom of Bahrain, on 22-24 Dhul-Qa'dah 1432 A.H., corresponding to 20-21 October 2011 A.D., the Shari'ah Board also discussed the exposure draft of the standard and introduced the changes it deemed suitable.

In its meeting No. (32) held in Al-Madinah Al-Munawwarah, on 8-9 Rabi' II, 1433 A.H., corresponding to 1-2 March 2012 A.D., the Shari'ah Board continued its discussions on the draft exposure of the standard and introduced the changes it deemed suitable.

The Secretariat of AAOIFI held a public hearing in the Kingdom of Bahrain on 16 Jumada II, 1433 A.H., corresponding to 7 May 2012 A.D. The public hearing was attended by representatives of central banks, institutions, auditing firms, Shari'ah scholars, academics and others interested in this field. The members of the Shari'ah Board and the Shari'ah Standards Committee responded to a number of observations and comments raised by the participants.

In its meeting No. (33) held in Makkah Al-Mukarramah on 19-21 Shawwal 1433 A.H., corresponding to 6-8 September 2012 A.D., the Shari'ah Board

discussed the changes proposed at the public hearing and introduced the changes it deemed suitable to the draft exposure of the standard.

In its meeting No. (34) held in the Kingdom of Bahrain on 20-21 Safar 1434 A.H., corresponding to 3-4 November 2013 A.D., the Shari'ah Board discussed the exposure draft of the standard, introduced the changes that it deemed suitable and adopted the standard.

In its meeting No. (35) held in Al-Madinah Al-Munwwarah on 22-23 Shawwal 1434 A.H., corresponding to 29-30 September 2013 A.D., the Shari'ah Board continued its discussions on the exposure draft of the standard, and introduced the changes it deemed suitable, and adopted the standard.

Appendix (B)
The Shari'ah Basis for the Standard

Permissibility of Musaqat and Its Rationale

- The basis for the permissibility of Musaqat is the Sunnah, Ijma' and common sense. From the Sunnah, there is the Hadith narrated by Ibn Umar that the Prophet Muhammad (peace be upon him) gave the land of Khaybar to its inhabitants to work on and cultivate in return for half of its yield (fruits and plants).[2]

  Based on Ijma', the companions (may Allah be pleased with them) practiced Musaqat in Khaybar until Umar (may Allah be pleased with him) evacuated them therefrom, without any objection from whosoever. Ijma' or consensus (by Four Schools of Fiqh) as to permissibility of Musaqat was cited by prominent scholars Al-Bisyawi, Ibn Hazm and Al-'Utabi, Muwaffaq Al-Din Ibn Qudamah, Shams Al-Din Ibn Qudamah and Al-Shamakhi, the author of *"Ghayat Al-Bayan"*, Ibn Muflih and Al-Buhuti.[3]

  On the basis of common sense, Musaqat fulfils the interest of both parties, and is associated with no harm.

  Its permissibility may also be deduced in analogy with Mudarabah.

- The basis for bindingness of Musaqat once it has been entered into or undertaken is the overarching Quranic Verse: ***{"O you who believe! Fulfil (your) obligations"}***.[4]

(2) Related by Al-Bukhari, Chapter on Muzara'ah for half of the produce, and so on. Also, related by Muslim, Chapter on Musaqat for part of the fruits and plants.

(3) See *"Al-Mukhtasar"*, Al-Bisyawi, (P. 291); *"Al-Jami'"*, Abu Al-Hasan, [49: 4]; *"Al-Muhalla"*, [8/230]; *"Al-Diya"*, [18: 245]; *"Al-Mughni"*, [5: 549-552]; *"Al-Sharh Al-Kabir"*, [5: 557]; *"Al-Idah"* [6: 233]; *"Al-Bahr Al-Ra`iq"* [8: 64]; *"Al-Mubdi'"* [5: 46]; and *"Kashf Al-Qina'"* [3: 533].

(4) [Al-Ma`idah (The Table): 1].

Elements of Musaqat Contract

- The basis for stipulating legal competency in a Musaqat contract is the Prophet's Hadith: *"The Pen has been lifted from writing the deeds of three: The one who is asleep until one wakes up, the child until he/she becomes pubescent and the insane until he/she becomes sane"*.(5)
- The basis for the necessity for identification of trees (subject matter of the contract), and the stipulation of the trees being arable (productive) in usual circumstances is avoidance of Gharar. Trees that are not arable (productive) do not fit the purpose of Musaqat.
- The basis for the stipulation of irrigation and cultivation of trees is that work is one of the requisite elements of the contract (Arkan), and Musaqat is invalid in the absence of one of its requisite elements.

Prerequisites of Validity

- The basis for specification of a predetermined, common share for both parties to the contract is the Hadith narrated by Ibn Omar that the Prophet (peace be upon him) gave the land of Khaybar to its inhabitants to work on and cultivate in return for half of its yield (fruits and plants). The specification of lump-sum compensation will divert the contract away from the features of Musaqat. The determination of a known compensation is meant to avert impermissible obscurity (Jahalah).
- The basis for the confinement of work to fruit growing and tree cultivation is that this what entails work in Musaqat; if another form of work is stipulated in the contract, such a stipulation shall contradict the very nature of the contract, as it only fulfils the interests of one party at the expense of the other.
- The basis for making the term of Musaqat equal to the period ending with the time the produce materializes or over a term enough for the produce to materialize is the rules of justice in Shari'ah so that the trees owner does not exclusively benefit from the produce while the worker receives nothing. The produce is what the contract is meant to achieve after all, and therefore it is impermissible that the worker is devoid of his/her rights by shortening the term of Musaqat.

(5) Related by Abu Dawud in the Chapter on an insane stealing or becoming liable to punishment.

Obligations of the Worker (Irrigator)

- The basis for the worker's obligation to undertake normal care of the trees and for the produce of fruits is that the people of Khaybar were entrusted with the work, without anyone else being sent by the Prophet (peace be upon him) to take up some of Musaqat works.
- The basis for the prohibition of sub-contracting in Musaqat without prior permission is that the trees are not the property of the worker (irrigator), nor the worker is authorized by the owner of trees to do so. And notwithstanding, the owner may not accept that the worker (irrigator) assigns the Musaqat contract to a third-party irrigator.
- The basis for the permissibility of using the services of hired hands or the like by the worker (irrigator) is the general condition cited by the Prophet (peace be upon him) to the people of Khaybar that "they may seek the services of hired hands, but only at their own expense". However, the worker's responsibility/liability shall not cease to exist.[6]
- The basis for the Musaqat worker acting in a fiduciary capacity (rather than a position of liability) is that he/she is an agent on behalf of the owner in preservation and care of trees and fruits.

Obligations of Trees Owner

- The basis for the necessity to enable unfettered disposal of the trees for the worker is to allow the worker to perform his duties as per the contract.

Joint Obligations of the Worker and the Owner of Trees

- The basis for the joint responsibility of the owner of trees and the worker for the preservation of fruits before harvesting is that the owner may take the fruits after harvesting, However, before harvesting, the worker alone shall be responsible for the trees and fruits because the owner has granted him unfettered access to the trees.
- The basis for the division of expenses between the owner and the worker (from their respective shares) is that it is more just (closer to justice) so that no harm is inflicted upon either party because of the other.
- The basis for obligating the worker to complete the work is that Musaqat is a contract that becomes binding upon commencement of work, so that

(6) Related by Muslim, Chapter on Musaqat for part of the fruits and plants. Also, related by Abu Dawud, Chapter on Musaqat.

neither party shall have the right to revoke it unilaterally. And the basis for the non-entitlement of the worker to any compensation in case he stopped the work before materialization of the produce is that he abandoned his obligation toward completion of work and is thus not entitled to receive a share of the produce before materialization. And if the produce materializes, then another hand may be hired to complete the work at the expense of the worker because in such a case the worker (Al-Musaqi) is entitled to receive a share and shall not be deprived of it, and he shall complete the work, and such an obligation shall not be considered fulfilled unless work is completely carried out. Otherwise, the wage of the hired hands shall be deducted from the share of the worker (Al-Musaqi).

- The basis for obligating the owner of trees, in case he prevented the worker from carrying out the work of Musaqat, to completely fulfil the contract is that the Musaqat contract becomes binding upon commencement of work or upon commitment of non-revocation (of the contract). And in the event that the owner revokes the contract before the produce materializes, the basis for obligating the owner to pay out the prevailing market wages is that the time and effort of the worker shall have to be compensated. And in the event that the owner revokes the contract after the produce materializes, then the worker is only entitled to his share in the produce (but not the prevailing market wages).

Division of the Produce

- The basis for the inclusivity of division of recurring produce is that the worker contributes with his work to the produce and thus shall not be deprived of his respective share. This roughly conforms to the standpoint of Ibadis and Malkis jurists, and coincides with the opinion of some of Hanifis. It has reported that Abu Said Al-Khudri opined that the worker deserves a share in the palm racemes and cotton straws, unless there is a customary practice ('Urf) or a condition (Shart) to the contrary. Abu Amr Al-Qurtubi also said: "Torn palm leaves and fibers and cords shall be shared by both parties according to their respective shares in the fruits", and this conforms to the law of equity. (7)

(7) *"Bayan Al-Shar"* [40: 292 and 296]; and *"Al-Kafi"* [2: 107].

- The basis for specification of the worker's share as a common share is the Hadith narrated by Rafi' on the authority of Hanzhalah Ibn Qays Al-Ansari who said: *"I asked Rafi' Ibn Khadij about paying the rental of a land in gold and silver. He answered: 'There is no objection to it, as people in the times of the Prophet (peace be upon him) used to pay rental for plants growing on water ravines/flumes/gullies and high points of streams and some sorts of plants. However, the Prophet (peace be upon him) prohibited such practices because the produce was not properly identified: Some of it used to grow and some used to perish, and people, at that time, were confined to this kind of rentals"*.[8]
- The basis for the entitlement of the worker to his respective share upon materialization of the produce is that he has contributed to the materialization. It is the opinion of some of Shafis and the majority of Hanbalis, and it is also followed by Imamis.[9]

Contingencies in Musaqat

- The basis for non-entitlement of the worker to anything (reward or compensation) if the produce perished or destroyed by a natural disaster is that one of the effects of partnership entails that the subject-matter of division is the produce. Therefore, if the produce perished or destroyed, then there shall be no division. The same applies to the division of remaining produce in case of partial destruction due to a natural disaster.
- The basis for granting the worker the option, in case of non-materialization of the produce during the predetermined period of time, either to carry on his work gratis, or to stop working and lose his share in the produce, is as dictated by the rules of equity . The owner of trees benefits through keeping his trees, even if there is no produce. Any worker with an acceptable excuse is an exception, where he shall be entitled to his share for the worked period of time, as dictated by the rules of equity.

Trees Belonging to Third Parties and Usurped Trees

- The basis for the owner of trees being entitled to the fruits if it transpires that the trees belong to a third party is that in essence ownership of fruits shall

(8) Related by Muslim, Chapter on rental of lands, payment in gold and silver.

(9) *"Kashf Al-Qina'"* [3: 538]; *"Al-Mughni"* [5: 576]; *"Al-Mubdi'"* [5: 54]; *"Al-Rawdah"* [5: 160]; and *"Jami' Al-Maqasid"* [7: 376].

remain in the hands of the owner unless by virtue of a contract. However, the contract, in this case, is void. The basis for obligating the party who contracted with the worker to pay out the prevailing wage to the maximum of his stated share is that he worked on a commutative basis, and the contract was doubtful (not properly evidenced or documented); it is impractical to pay him the agreed compensation due to the ownership of the third party, who shall be entitled to the compensation; i.e., the prevailing wage, up to a maximum of his stated share because the contracting party did not commit to pay him more than his share, especially that no transgression was premeditated.

- The basis for entitlement of the owner of trees to take the fruits in case an usurper (Ghasib) of the trees contracted with someone else to carry out Musaqat works is that the fruits remain, in essence, owned by the owner unless by a contract to the contrary. And the contract here is void. The basis for obligating the usurper (Ghasib) to pay the worker who was unaware of usurpation is that it is tantamount to a paid work (work on a commutative basis) associated with a doubtful contract; it is impossible to pay him the agreed compensation because it belongs to someone else, who shall be entitled to the compensation; i.e., the prevailing wage. The worker shall be deprived of any payment if he is aware of usurpation because in such a case he becomes a transgressor, and he is among those referred to in the Hadith: *"Ill-gotten sapling shall have no right therein"*.[10]

Termination of Musaqat Contract

- The basis for termination of Musaqat contract upon completion of produce and division of the crop or passing of the agreed period of time or of a season without any fruit is the application of the contract that entered into by the two parties.
- The basis for termination of Musaqat contract upon the death of the worker or liquidation of the institution carrying out the work if Musaqat was subject to the condition of work commencement solely by him or the institution is that the condition was not met. The basis for granting the heirs (either through inheritance, in general, or by transfer of ownership, in particular)

(10) Related by Al-Bukhari, Chapter on wasteland rehabilitation. Also related by Malik, Chapter on building on wasteland.

the option either to carry on the work as per the set conditions or to stop it is that the heirs or the owners of the institution have had legally inherited this right. The basis for their entitlement to the prevailing wage is that their testator was entitled to the compensation by virtue of his efforts. So if he had died before the produce materialized, then he shall be entitled to the compensation. The basis for limiting the compensation, which is the prevailing wage, to a maximum of the testator's share in the produce is that the owner of trees did not commit to pay more than the worker's share. And if continuation of work by the heirs does not entitle them to more than the share of their testator in the produce, then how shall they deserve more without work?

- The basis for termination of Musaqat contract upon perishing of trees, subject matter of the contract, or inability of the trees to bear fruit is the Hadith stating: *"There should be neither harm nor malice"*, because the worker will be excessively harmed if he is obligated to work gratis (without compensation).

Revocation of Musaqat Contract

- The basis for revocation of Musaqat contract by mutual consent of the two parties is the Hadith of Prophet Mohammad (peace be upon him) stating: *"Anyone who consents to revoke the contract upon the request of a regretting counterparty, Allah shall forgive his regretful sins on the Day of Judgment"*.[11]
- The basis for obligation to pay the prevailing wage if the worker is unable to perform the work due to a reason out of his control is that the worker did exert an effort under a contract, therefore he shall be entitled to a compensation against that work, and that the work has not been performed in its entirety, and thus he is paid the prevailing market wage.
- The basis for liability of the worker to indemnify the owner for actual loss suffered for a reason within his control is that he caused such a loss, and therefore shall be liable.

(11) Related by Ibn Hibban, Chapter on Iqalah.

Shari'ah Standard No. (53)

'Arboun (Earnest Money)

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

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

Preface

This Standard aims to explain the Shari'ah rules relating to the payment of 'Arboun (Earnest Money) in sale contracts and its application in the activities of Institutions.[1]

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

Statement of the Standard

1. Scope of the Standard

This Standard covers the definition of 'Arboun (Earnest Money), the rules applicable to it and its applications in the activities of institutions in commutative financial transactions that do not require spot delivery of countervalues. It does not cover payments made prior to contract such as refundable security deposits, commissions or advance payments made subsequent to contracts that are not subject to options.

2. Definition of 'Arboun (Earnest Money)

2/1 Earnest money is paid by the buyer to the seller[(2)] at the time of contract on the basis that the buyer has the option to revoke the contract during an agreed period of time. If he confirms the contract, the earnest money is credited towards the price. If he does not confirm the contract or fails to pay the remaining price during the stipulated time, the seller is entitled to forfeit 'Arboun (Earnest Money).

2/2 An agreement to execute a contract in the future (an agreement to sell) is a promise and not a contract. If money is paid with the promise, it is not considered to be earnest money ('Arboun).

2/3 'Arboun (Earnest Money) can be paid in cash, in kind and with a usufruct.

3. Permissibility of Earnest Money

3/1 It is permissible to pay 'Arboun (Earnest Money) in commutative contracts that do not require spot payment of one or both countervalues whether the sale item is identified or is sold by description

(2) What applies to the buyer also applies to the lessee and the purchaser in an Istisna'a contract, and what applies to the seller also applies to the lessor and the seller in an istisna'a contract, etc.

for future delivery (*Ijarah Mawsufah Fi al-Dhimmah*), such as sales, Istisna'a contracts, leases of identified assets and of assets leased by description for a future date.

3/2 Payment of 'Arboun (Earnest Money) is not permissible in Salam and currency exchange contracts.

4. Option Period Arising from 'Arboun (Earnest Money) Payment

The option period arising from the payment of 'Arboun (Earnest Money) must be specified either by express stipulation of the parties, or by custom if there is an existing custom that specifies the option period.

5. Lapsing of the Option Arising from 'Arboun (Earnest Money) Payment

5/1 The buyer loses his right to revoke the contract if he informs the seller that he has confirmed the contract or disposes the sold item in a manner that indicates confirmation. The contract may stipulate conduct that indicates lapsing of the option and confirmation of the contract in order to avoid dispute. [see Shari'ah Standard No. (52) on Options to Reconsider]

5/2 If the option period expires without the buyer paying the remaining price to the seller and without the seller having agreed an extension, the contract is considered revoked and the buyer is not entitled to recover the 'Arboun (Earnest Money).

6. Ownership and Liability for the Sold Item During the Option Period

Prior to delivery, the seller is liable for any loss to the sale item. If it is destroyed or damaged before delivery to the buyer or delivery is not possible, the contract is void and the earnest money must be returned to the buyer. After delivery, the buyer is liable for the sale item. If it is destroyed or damaged after delivery to the buyer, the buyer's option is canceled and he is required to pay the balance (unpaid part of the price) to the seller.

7. Delivery of the Sale Item During the Option Period

The buyer may take delivery of the sale item during the option period, which does not on its own indicate confirmation of the contract unless the buyer's conduct indicates that he has accepted the sale item.

8. Increase in the Sold Item During the Option Period

8/1 Increase that is physically connected to the original is considered part of the original.

8/2 In principle, any growth in (increase to, and/or yield of) the sale item that is physically separate from it, which occurs during the option period whether prior to delivery or after delivery is considered part of the sale item. It is permissible for the party who is liable for the sale item to stipulate that any increase that is physically separate should belong to him, even if ultimate ownership of the sale item is not vested in him.

9. Disposal of the Sale Item Under 'Arboun (Earnest Money) Arrangement

9/1 If the sold item is identified, the seller is not entitled to dispose of it. If the seller does dispose of it by sale or lease or otherwise, his actions are subject to the rules relating to uncommissioned (Fodooli) disposals. If the buyer ratifies the seller's actions, he loses his option and is liable for the remainder of the price to the first seller. The first seller's disposal becomes binding and the first buyer is entitled to receive the sale price. If the first buyer does not ratify the seller's actions, the second disposal is void. [see Shari'ah Standard No. (23) on Agency and Acts of Uncommissioned Agent (Fodooli)]

9/2 If the sale is related to an identified item, the seller cannot deliver a different item even with same specifications, except with the consent of the buyer, in which case what the buyer has paid remains 'Arboun (Earnest Money).

9/3 If the buyer stipulates that he will offer the sale item to his clients during the option period and the seller accepts this, the buyer's right to revoke the contract remains valid during the option period, even after offering the item to his clients. The conclusion of a sale to one of his clients is deemed to be confirmation of the contract.

9/4 It is not permissible to negotiate/trade options arising from payments of 'Arboun (Earnest Money). [see Shari'ah Standard No. (20) on Sale of Commodities in Organized Markets]

10. Stipulating Refund of Earnest Money in the Contract

It is permissible for the buyer to stipulate a condition in the contract providing for a refund of earnest money in specific situations, such as the buyer's failure to obtain licenses from the relevant authorities.

11. Date of Issuance of the Standard

The Shari'ah Board issued this standard on 15 Muharram1435 A.H., corresponding to 8 November 2014 A.D.

Adoption of the Standard

The Shari'ah Board adopted the standard on 'Arboun (Earnest Money) in its meeting No. (39) held in the Kingdom of Bahrain on 13-15 Muharram 1435 A.H., corresponding to 6-8 November 2014 A.D.

Appendix (A)
Brief History of the Preparation of the Standard

On 19 Rabi' I, 1433 A.H., corresponding to 12 March 2012 A.D., the Secretariat of AAOIFI decided to commission a Shari'ah consultant to prepare a juristic study on 'Arboun (Earnest Money).

In its meeting No. (35) held in Al-Madinah Al-Munawwarah on 22-23 Shawwal 1434 A.H., corresponding to 29-30 September 2013 A.D., the Shari'ah Board discussed the exposure draft of the standard and introduced the changes it deemed suitable.

In its meeting No. (37) held in the Kingdom of Bahrain on 19-21 Jumada I, 1435 A.H., corresponding to 20-22 March 2013 A.D., the Shari'ah Board continued its discussions on the exposure draft of the standard, and introduced the changes it deemed suitable.

In its meeting No. (38) held in the Kingdom of Bahrain on 28 Sha'ban – 1 Ramadan 1435 A.H., corresponding to 26-28 June 2014 A.D., the Shari'ah Board continued its discussions on the exposure draft of the standard, and introduced the changes it deemed suitable.

The Secretariat of AAOIFI held a public hearing in the Kingdom of Saudi Arabia (Riyadh) on 28 Dhul-Hajjah 1435 A.H., corresponding to 22 October 2014 A.D. The public hearing was attended by representatives of central banks, institutions, auditing firms, Shari'ah scholars, academics and others interested in this field. The members of the Shari'ah Board and the Shari'ah Standards Committee responded to a number of observations raised by the participants.

In its meeting No. (39) held in the Kingdom of Bahrain on 13-15 Muharram 1435 A.H., corresponding to 6-8 November 2014 A.D., the Shari'ah Board discussed the changes proposed at the public hearing and introduced the changes it deemed suitable to the exposure draft of the standard, and adopted the standard.

Appendix (B)
The Shari'ah Basis for the Standard

- The basis for permissibility of 'Arboun (Earnest Money) is a narration that Nafi' Ibn Abdul-Harith purchased a building in Mecca to be used as a prison from Safwan Ibn Umayyah, provided that if Umar (may Allah be pleased with him) approves the sale, then the sale is considered to be effected by him (Umar) and on his behalf (Umar's), and if not, then Safwan shall be paid 400 dinars.

  Also, there is a narration that Ibn Sirin said: "A man said to a lessor of ride camels: prepare your camels, so that if I did not leave with you on so and so day, you get 100 dirhams. Then he did not leave with him". And Shurayh said: "He who voluntarily makes it incumbent upon himself to do something (with a condition and without coercion), then he shall have to honor the condition". Hence, 'Arboun is similar, where a buyer pays part of the price and says: "If I did not confirm the sale, the 'Arboun is yours to keep". Payment of the 'Arboun either at time of contract or later at the time of relinquishing it is valid.
- The basis for impermissibly of 'Arboun in *Sarf* and Salam contracts is that 'Arboun is embedded with a cooling-off option (*Khiyar al-Shart*), which according to the majority of Fuqaha (of the Four Schools of Fiqh) is impermissible in Sarf contracts (currency exchange transactions). This rule was deduced from the Hadith: *"Gold for gold, silver for silver... like for like, equal for equal, and hand to hand. If these types differ, then sell them as you find proper, provided it is hand to hand"*.

  Ibn Umar (may Allah be pleased with both of them) is reported to have said: "O, Messenger of Allah, hold on that I may ask you a question: I sell camels in Baqi', so that I sell for dinars and receive dirhams, and I sell for dirhams and receive dinars. I take so and so of this and pay so and so of that? Then the Prophet (peace be upon him) said: *"No harm that you apply*

the market rate unless you (you and the counterparty) leave the transaction session without settlement of dues". Therefore, this was an evidence on the requirement to take possession of both countervalues (Qabd) at the contracting session (*Majlis al-'Aqd*).

'Arboun is also impermissible in Salam contract, because in Salam, payment of the price (capital of Salam) shall be settled at the contracting session. The Prophet (peace be upon him) said: *"Whoever pays money in advance for dates (to be delivered later) should pay it for a known specified weight and measure (of the dates)…."*. This implies that unless the price is paid in full before the two parties leave the contracting session, the transaction is not deemed to be Salaf (or Salam).

- The basis for determination of a specific term for 'Arboun is to avoid Gharar that may result from an unknown term (Jahalah that involves 'Arboun term).
- The basis for the seller being liable for the object of sale before delivery and for the buyer being liable for it after delivery is the Shari'ah maxim: "Ownership (title) shall be established upon the conclusion of the contract, while liability is contingent upon delivery (Qabd)".
- The basis for attributing growth connected to the original is that it represents an integral part of it.
- The basis for attributing growth and yields, separate from the object of sale, to the object of sale is the saying of the Prophet (peace be upon him): *"Al-Kharaj Bi al-Daman"* (i.e., entitlement to revenue is based on bearing liability for the revenue-generating asset).

Shari'ah Standard No. (48)

Options to Terminate Due to Breach of Trust (Trust-Based Options)

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

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

Preface

This Standard covers the rules relating to options of buyers to revoke contracts where such options exist by operation of a Shari'ah rule as opposed to stipulation of the parties and which arise from the seller deceiving the buyer by statement or action or grossly overcharging him. It also covers the applications of such options to revoke in the activities of financial institutions.[1]

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

Statement of the Standard

1. Scope of the Standard

This Standard covers the rules relating to options of buyers to revoke contracts that arise immediately upon the seller deceiving the buyer by statement or conduct or grossly overcharging him in specific circumstances. It does not cover *Khiyarat al-Tarawwi* (options to reconsider) or *Khiyarat al-Salamah* (options to revoke due to incomplete performance) as they have separate Shari'ah Standards dedicated to them.

2. *Khiyar Al-Taghrir* (Option to Revoke on Grounds of Deception)

2/1 Definition of *Khiyar al-Taghrir*

The option to revoke on grounds of verbal deception is the right of a buyer to revoke a contract due to deception by the seller or a colluding party, inaccurately describing the sale item so that the buyer purchases it at a price higher than the market price.

2/2 Examples of verbal deception (*Taghrir*)

a) Deliberate misinformation regarding the original cost price or expense incurred in a Murabahah (markup), *Tawliyah* (sale at cost) or *Hatitah* (sale below cost) sale. [see Shari'ah Standard No. (8) on Murabahah]

b) Increasing the bid in an auction sale phantom bidding which is known as Munajashah or Najsh.

c) Inaccurate statements to mislead the buyer into thinking that the sale item meets his requirements, or falsely claiming that it is no longer available elsewhere in the market.

d) Deceptively inaccurate announcements about a company's performance in order to entice the public to buy its shares.

2/3 Causes

2/3/1 The buyer has the option to revoke the contract in the event of being verbally deceived.

2/3/2 The buyer may return the item within a period customarily acceptable for revocation.

2/4 Lapse of the option

2/4/1 The option to revoke on grounds of verbal deception lapses if the item is destroyed or consumed by the buyer before the deception is discovered, or if an impediment arises preventing return, or if the buyer fails to return it despite being able to do so.

2/4/2 If this option lapses, the sell is entitled to the full price of the item and the buyer is not entitled to any refund.

2/4/3 The seller is liable for expenses relating to the return of the item to the place of sale.

2/5 Transfer of the option

Khiyar al-Taghrir does not transfer to the heirs of its holder upon death of the owner.

3. *Khiyar Al-Tadlis* (Option to Revoke on Grounds of Deceptive Conduct)

3/1 Definition

Khiyar al-Tadlis is the option of a buyer to revoke a contract on grounds of deceptive conduct by the seller or a colluding party. Such conduct would be to portray the sale item different than its actual condition, inducing the buyer to think that it is in a better condition.

3/2 Prerequisites

3/2/1 The deception must result from the seller's conduct or instructions. If caused by something that is beyond the seller's control or by unforeseen circumstances, the option is invalid.

3/2/2 The buyer must be unaware of the deception.

3/2/3 The deception must be continuing. If the seller engages in a deceptive conduct but the sale item's condition eventually improves (to a condition not less than the original specification) before the contract is revoked, the buyer has no right of revocation.

3/3 Examples of deceptive conduct

3/3/1 False branding of products using counterfeit labels to promote sales.

3/3/2 Painting an old car to hide its age and give the impression that it is new.

3/3/3 Adding lubricants or other substances so that the product appears in a better condition.

3/4 Causes of *Khiyar al-Tadlis*

3/4/1 A buyer who is enticed by deceptive conduct may return the sale item or retain it.

3/4/2 The buyer may return the item within a period customarily acceptable for return.

3/4/3 The buyer is not entitled to compensation if he decides to retain the sale item.

3/5 Lapse of the option

The option to revoke on grounds of deceptive conduct lapses if the item is destroyed or consumed by the buyer after the deception is discovered, or if the buyer fails to return it despite being able to do so.

3/6 Transfer of the option

Khiyar al-Tadlis does not transfer upon death to the heirs of its owner.

4. *Khiyar Al-Ghabn* (Option to Revoke on Grounds of Price Gouging)

4/1 Definition

Khiyar al-Ghabn is a buyer's right to revoke a contract or accept it if it is discovered that the price paid exceeds the highest estimate given by experts in the market. The price gouging that triggers this

option is that which, according to the opinion of certified valuators, is deemed excessive in commercial custom.

4/2 Prerequisite

The buyer must be unaware of price gouging at the inception of the contract.

4/3 Examples of price gouging

4/3/1 Sale to a *Mustarsil*; i.e., a purchaser who does not negotiate the price because he trusts the seller not to overcharge him.

4/3/2 Collusion between brokers and sellers that leads to price spikes or increases of prices above fair market levels.

4/3/3 Exploiting the ignorance of exporters using deceptive statements in order to purchase items from them at a price lower than the prevalent price in the importer's country.

4/3/4 Acting as an intermediary between sellers and other market participants in order to sell items in the market for more than the prevalent price.

4/4 Causes of *Khiyar al-Ghabn*

4/4/1 The party deceived by price gouging has the right to revoke the contract; he may also accept it without recourse to refund.

4/4/2 If the party deceived by price gouging accepts the contract, then he is not entitled to seek any compensation. It is permissible for the two parties (the party deceived by price gouging and the seller) to mutually agree upon an indemnification amount instead of revocation.

4/5 *Khiyar al-Ghabn* lapses in the following situations

a) Destruction or consumption of the sale item or the occurrence of any change or defect in it. The attachment of a third-party right over the sale item has the same legal effect as its consumption.

b) Inaction of the buyer during the period enabling him to revoke, and after discovering price gouging in the sale item.

c) Any disposal of the sale item, by the buyer, after discovering price gouging.

4/6 Transfer of the option

Khiyar al-Ghabn does not transfer upon death to the heirs of its owner.

5. Date of Issuance of the Standard

This Standard was issued on 26 Jumada II, 1432 A.H., corresponding to 29 May 2011 A.D.

Adoption of the Standard

The Shari'ah Board adopted the Standard on Trust-Based Options in its meeting No. (30) held in the Kingdom of Bahrain during the period of 24-26 Jumada II, 1432 A.H., corresponding to 27-29 May 2011 A.D.

Appendix (A)
Brief History of the Preparation of the Standard

On 18 Jumada II, 1431 A.H., corresponding to 2 April 2010 A.D., the General Secretariat decided to commission a Shari'ah consultant to prepare a juristic study on Trust-Based Options.

In its meeting held in Dubai, on 24 Ramadan 1431 A.H., corresponding to 3 September 2010 A.D., the Shari'ah Standards Committee discussed the draft of a Shari'ah Standard on Trust-Based Options and made necessary amendments.

The revised draft of the Shari'ah Standard was presented to the Shari'ah Board in its meeting No. (29) held in the Makkah Al-Mukarramah, during the period of 28-30 Rabi' I, 1432 A.H., corresponding to 3-5 March 2010 A.D. The amendments that were deemed appropriate were included.

The General Secretariat held a public hearing in the Kingdom of Bahrain on 25 Jumada II, 1432 A.H., corresponding to 28 May 2011 A.D. The public hearing was attended by a number of representatives from central banks, institutions, accounting firms, Shari'ah scholars, academics and others interested in this field. All the comments made in the public hearing were listened to, and; the members of the Shari'ah Standards Committee then answered or commented on them and decided to accept some of them.

In its meeting No. (3) held in the Kingdom of Bahrain, during the period of 24-26 Jumada II, 1432 A.H., corresponding to 27-29 May 2011 A.D., the Shari'ah Board discussed the draft of the Standard, incorporated the necessary amendments that it deemed appropriate, and adopted the Standard.

In its meeting held in the United Arab Emirates, on 7 Sha'ban 1436 A.H., corresponding to 25 May 2015 A.D., the Shari'ah Standards Review Committee reviewed this Standard. After deliberation, the committee approved necessary amendments, and the Standard was adopted in its current amended version.

Appendix (B)
The Shari'ah Basis for the Standard

- Options to revoke sales on grounds of breach of trust are either permissible in Shari'ah by default or by stipulation in the contract.
- The basis for permissibility is that sale contracts should by default be free from defect.
- If then it is discovered that this was not the case and there was deception, verbally or by conduct or there was price gouging, the buyer has the right to revoke the contract.
- The basis for the permissibility for the option to revoke on the grounds of verbal deception because it contradicts the basic pillar of valid contracts in Shari'ah, which is mutual consent. That is because, without the verbal deception, the buyer would not have proceeded with the purchase. The same basis applies for deceptive conduct being a ground for revocation.
- The basis for the permissibility of revoking contracts on the grounds of price gouging with a trusting buyer is the Hadith stating: *"Overcharging a trusting buyer (Mustarsil) is forbidden"*.[2] A variant narration states: *"Overcharging a trusting buyer is Riba (usury)"*.[3]
- The basis for the lapsing of the option to revoke due to the disposal of the sale item by the buyer after having discovered the deception, verbally or by conduct, is that this disposal is equivalent to an explicit consent to waive this option.

(2) Related by Al-Tabarani (H: 3410)
(3) Related by Al-Bayhaqi (H: 10924 and 10925)

Shari'ah Standard No. (51)

Options to Revoke Contracts Due to Incomplete Performance

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

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

Preface

This Standard aims to explain the situations in which buyers have the option to revoke contracts due to reasons of defect, deal fragmentation and breach of description and how such options are exercised in the activities of Institutions.[1]

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

Statement of the Standard

1. Scope of the Standard

This Standard covers options to revoke contracts due to reasons of defect, deal fragmentation and breach of description. It does not cover options to revoke arising from breach of trust (dishonest inducement, deception and overcharging) or options of due diligence (cooling-off options, and options to revoke due to non-payment) as they have separate Shari'ah standards dedicated to them.

2. Option to Revoke Due to Defect

2/1 Definition

It is the option of a buyer to revoke or continue with the contract arising from a hidden defect that the buyer did not notice at the time of contract.

2/2 Conditions applicable to options to revoke due to defect

An option to revoke due to defect is subject to the following conditions:

2/2/1 Appearance of a material defect in the subject matter of the contract.

A material defect is a defect that renders the item defective according to custom, makes it unfit for purpose or diminishes its value.

2/2/2 The defective item being incapable of repair except by incurring cost.

2/2/3 The buyer being unaware of the hidden defect at the time of contract, irrespective of the seller's awareness of the defect at the time of the contract.

2/2/4 The contract not containing a clause excluding the seller's liability for defect (*Bay' al-Bara`ah*- sale on the basis of as is

where is). It is prohibited for the seller to exclude liability due to defect in Ijarah and Istisna'a contracts.

2/2/5 The hidden defect not being caused by the buyer.

2/3 Scope of the option to revoke due to defect

Options to revoke due to defect exist in commutative financial contracts such as sales, money exchange, division of wealth, settlement of debt by payment in kind and gift conditional upon receipt of consideration (*Hibat al-Thawab*).

2/4 Time limit

Defective items should be returned, after taking delivery of the object of sale and discovering the defect therein, within the period of time customarily allowed for revocation on such grounds.

2/5 Consequences of options to revoke due to defect

The buyer has the option either to revoke the contract and return the item or continue with the contract. If the buyer chooses to return the item after taking delivery, revocation is effected by mutual consent or court order. If the buyer has not taken delivery, and he has been aware of the defect before taking delivery, he can unilaterally revoke the contract by giving notice to the seller and is entitled upon revocation to a refund of the whole price by mutual consent or court order.

2/6 Conditions applicable to the return of sold items

Return of the item is subject to the following conditions:

2/6/1 Return of the item not resulting in the fragmentation of a package deal to which the seller does not consent. And the buyer shall be entitled to compensation against inferiority due to the defect (Arsh).

2/6/2 The item not being damaged or destroyed in the possession of the buyer, in which case the buyer is entitled only to compensation for the defect and is not entitled to return the item unless the seller accepts return of the damaged item.

2/6/3 There being nothing added to the item attached to it but did not grow out of it, which necessities a price rebate, such as the erection of a building on land. Return of the item is not prevented, if the addition to the item is physically connected to it and grows out of it; or is physically separate from it whether it grows out of it, such as dividends on shares and rent from leased assets, or does not grow out of it.

2/6/4 In cases where return due to the defect is impossible (impractical), the buyer shall be entitled to compensation against inferiority caused by the defect.

2/7 Impediments preventing the return of sold items

The option to return the sold item is impeded by the non-fulfilment of any of the conditions provided in item 2/2.

2/8 Abating (of the option)

The option to revoke due to defect ceases (abates) in the following situations:

2/8/1 If the defect ceases before the buyer returns the item or payment of Arsh (compensation against inferiority due to the defect).

2/8/2 If the buyer expressly waives his option to revoke.

2/8/3 If the buyer expressly accepts the defective item.

2/8/4 If the buyer's conduct implicitly indicates that he has accepted the defective item, such as continuing to use the item, delaying return of the defective item longer than is customarily acceptable and without an excuse, exploiting or benefitting from the defective item or transferring ownership of the item after discovering the defect.

2/8/5 If the defective item is destroyed by the buyer.

3. Option to Revoke Owing to Deal Fragmentation

3/1 Definition

The option to revoke a contract owing to deal fragmentation is the option of the buyer to revoke a contract (a package deal) that no

longer includes everything that was contracted for, resulting in the package deal becoming fragmented.

3/2 Conditions applicable to the option to revoke owing to deal fragmentation

The option to revoke a contract owing to deal fragmentation is subject to the buyer not knowing that the deal would become fragmented.

3/3 Types of deal fragmentation in which the option to revoke is granted

3/3/1 When a person sells his own property along with the property of another person in one package without the consent of the other person or when a partner sells the partnership property in one package without the consent of the other partner.

3/3/2 When it transpires that part of the sold item(s) is the property of a third party.

3/3/3 When part of the sold item(s) is destroyed before delivery (actual or constructive).

3/3/4 When part of the sold item(s) in a Salam contract is not available on the delivery date. [see Shari'ah Standard No. (10) on Salam, item 5/8]

3/4 Prerequisites

Deal fragmentation entitles the buyer either to revoke the contract or accept what remains of the deal and pay the portion of the price corresponding to it. The buyer is not entitled to any compensation unless there is a defect in what remains of the sold item(s).

4. Option to Revoke Due to Breach of Description

4/1 Definition

The option to revoke due to breach of description is the option of a buyer to revoke the contract if the sold item does not meet a condition stipulated in the contract, explicitly or implicitly, such as a car having a specific color.

4/2 Requirements of valid descriptions

4/2/1 The description must be permissible by the Shari'ah.

4/2/2 The description must be specific and free from ambiguity (Gharar).

4/2/3 The description must relate to the purpose of the buyer or be the basis of an increase in price or of greater quality in the item, such as a requirement that a car be automatic.

4/2/4 The breach of description must occur at or before the time of delivery (actual or constructive) and must not be a subsequent occurrence.

4/3 Consequences of the option to revoke for breach of description

4/3/1 If the item fails to correspond to the minimum requirements of a description, the buyer is entitled to return the item or accept it for its full price without any entitlement to compensation.

4/3/2 If it is not possible to return the item, the buyer is entitled to a partial refund for the breach of description equal to the difference in price between an item that fulfills the description and one that does not.

4/4 Timing and cessation of options to revoke due to breach of description

The option to revoke for breach of description, like the option to revoke for defect, is granted immediately subject to custom and ceases in the circumstances in which the option to revoke due to defect ceases. [see item 2/7]

4/5 Transfer

The option to revoke for breach of description can transfer to all types of successors and assignees.

5. Date of Issuance of the Standard

The Shari'ah Board issued this standard on 21 Safar1434 A.H., corresponding to 4 January 2013 A.D.

Adoption of the Standard

The Shari'ah Board adopted the standard on Options to Revoke Contracts Due to Incomplete Performance in its meeting No. (34) held in the Kingdom of Bahrain on 20–21 Safar 1434 A.H., corresponding to 3–4 January 2013 A.D.

Appendix (A)
Brief History of the Preparation of the Standard

On 14 Rabi' II, 1429 A.H., corresponding to 20 April 2008 A.D., the Secretariat of AAOIFI decided to commission a Shari'ah consultant to prepare a juristic study on Options to Revoke Contracts Due to Incomplete Performance.

In its meeting held on 29 Jumada II, 1431 A.H., corresponding to 12 June 2010 A.D., the Shari'ah Standards Committee, discussed the study and approved it and assigned to the Shari'ah researcher the preparation of the exposure draft of the standard.

In its meeting held in Dubai (United Arab Emirates) on 24 Ramadan 1431 A.H., corresponding to 3 September 2010 A.D., the Shari'ah Standards Committee discussed the exposure draft of the standard and made some changes in the light of the comments and remarks of the members.

In its meeting No. (32) held in Al-Madinah Al-Munawwarah, on 8–9 Rabi' II, 1433 A.H., corresponding to 1-2 March 2012 A.D., the Shari'ah Board discussed the exposure draft of the standard and introduced the changes it deemed suitable.

The Secretariat of AAOIFI held a public hearing in the Kingdom of Bahrain on 16 Jumada II, 1433 A.H., corresponding to 7 May 2012 A.D. The public hearing was attended by representatives of central banks, institutions, auditing firms, Shari'ah scholars, academics and others interested in this field. The members of the Shari'ah Board and the Shari'ah Standards Committee responded to a number of observations and comments raised by the participants.

In its meeting No. (33) held in Makkah Al-Mukarramah on 19-21 Shawwal 1433 A.H., corresponding to 6-8 September 2012 A.D., the

Shari'ah Board discussed the changes proposed at the public hearing and introduced the changes it deemed suitable to the draft exposure of the standard.

In its meeting No. (34) held in the Kingdom of Bahrain on 20-21 Safar 1434 A.H., corresponding to 3-4 November 2013 A.D., the Shari'ah Board discussed the exposure draft of the standard, introduced the changes that it deemed suitable and adopted the standard.

Appendix (B)
The Shari'ah Basis for the Standard

Option to Reconsider Due to Defect

- The basis for permissibility of the option to reconsider due to defect is the Hadith narrated by 'A`ishah (may Allah be pleased with her) that a man purchased a young serf, and then set him to work, then he found him to be "flawed" or "defective", so he returned him back (to the seller) on the grounds of the defect. Thereupon, the Prophet (peace be upon him) said: *"No yield without risk taking" and in another narration: "No gain without risk taking"*.[(2)] Also, there is the Hadith on a sheep whose udder is tied up in order to look like a one full with milk. If the defect, lack of milk, is unveiled, then the buyer shall have the option either to keep it or to return it along with a Sa' of dates. All Schools of Fiqh (Madhahib) embraced this option, and that the key principle in the contracts of sale is freedom from defects.
- The basis for the stipulation of freedom from defects is what the companions (may Allah be pleased with them all) used to practice, and Othman (may Allah be pleased with him) issued a rule in favor of using this option in presence of the companions.[(3)]
- The basis for the effect of the option either to return the subject matter or keep the entire price –which is the standpoint of Hanafis and Shafis- is that the buyer has the right to return the subject-matter due to defect and the absence of intactness as generally dictated by the contract. The basis for non-entitlement to compensation (Arsh) in the case where the buyer keeps the subject-matter is that descriptions (features) are not considered to form part of the price in this case, and because the buyer did not consent that the sold item was transferred for a less than its stated price. The Han-

(2) Related by Abu Dawud and Al-Tirmidhi.

(3) Related by Malik in *"Al-Muwatta`"*; and Al-Bayhaqi in *"Al-Sunan Al-Kubra"* and he rendered it as an authenticate: *"Jami` Al-`Usul"* [2: 34].

balis were of the opinions that in case of return, the buyer shall have the right to request Arsh, corresponding to the inferiority caused by the defect.

Option of Deal Fragmentation

- The basis for permissibility of deal fragmentation is that it is a type of defect (some Fiqh references categorized it under the option to reconsider due to defect) and it becomes binding upon returning of a part of the object of sale.[4]
- The basis for the stipulation that the buyer shall not harbor prior knowledge about the deal coming into a point of defragmentation is that his knowledge is viewed as evidence to consent, and that the defect is not hidden or concealed.
- The basis for the effect of the option of defragmentation being either termination or holding into the remainder of his share in the price is that discounting an amount from the price for the whole deal in lieu of the missing part of the deal represents compensation, and no more than it, because the price (compensation) is for the two parts and is divided between them both.

Option of Breach of Description

- The permissibility of this option is the opinion of the majority of Fuqaha, while other Fuqaha categorized this option under option of deception (*Khiyar al-Tadlis*).
- The basis for the establishment of compensation due to incorrect description is that it is practically similar to the option of freedom from defect, in the case of objection to return the object of sale. And in the case where the buyer accepts to keep the object of sale, then he will possess it for the entire price -without application of Arsh- because what is missing here is a description, and descriptions do not have their corresponding part of the price in this instance.
- The basis for transferability of this option upon death to heirs, whether general or special, is that it falls in the category of physical asset ('Ayn) ownership.[5]

(4) *"Al-Fatawa Al-Hindiyyah"* [3: 83].
(5) *"Fath Al-Qadir"* [5: 1345]; and *"Al-Bahr Al-Ra`iq"* [6: 19].

Shari'ah Standard No. (52)

Options to Reconsider (Cooling-Off Options, Either-Or Options, and Options to Revoke Due to Non-Payment)

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

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

Preface

This Standard aims to explain the Shari'ah rules relating to options to reconsider which contracting parties stipulate in their contracts (cooling-off options, either-or options, and options to revoke due to non-payment) and the application of such options in the activities of Institutions.[1]

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

Statement of the Standard

1. Scope of the Standard

This Standard covers options to reconsider (cooling-off options, either-or options, and options to revoke due to non-payment) that are stipulated by the parties to grant them time to reconsider the transaction. It does not cover options to revoke contracts due to incomplete performance (defect, deal fragmentation and breach of condition or description) or options to revoke contracts due to breach of trust (dishonest inducement, deception and overcharging) as they have separate Shari'ah Standards dedicated to them.

2. Cooling-Off Options

2/1 Definition of cooling-off options

Cooling-off options give one or both of the parties or a third party the right either to continue with the contract or to revoke it within a stipulated period of time. It is effected by any phrase indicating that it is non-binding and revocable during the period of the option.

2/2 Conditions of validity

Cooling-off options are subject to the following conditions:

2/2/1 The option must be stipulated in the contract unless it is implied by a pre-existing custom or the parties agree to subsequently include it in the contract.

2/2/2 The option must have a stipulated time limit. The option is not valid if a time limit is not stipulated or if it is unspecified, such as a stipulation to refer to an expert without stating a time limit, or if the time limit is indeterminate, such as stipulating that the option will end when a certain index reaches a particular value. There is no minimum or maximum time limit except if

it is contrary to what is customarily acceptable in relation to the subject matter of the contract.

2/2/3 The stipulated cooling-off period must coincide with the beginning of the contract period.

2/2/4 If the contract relates to several items, it must specify those items to which the option relates, as provided in item 2/8/3.

2/2/5 The subject matter must remain in the condition it was initially in when it was sold, in accordance with item 2/6.

2/3 Scope

Cooling-off options apply to binding financial contracts, such as sale, lease, transfer of debt, guarantee, division of wealth and Waqf. They do not apply to non-binding contracts such as unpaid agency or contracts which require payment in advance, such as Salam or which require spot payment of both countervalues such as currency exchange.

2/4 Consequences of cooling-off options

2/4/1 The owner of the option has the right to confirm the contract or revoke it during the stipulated period. If he does not revoke it during this period, the option lapses and the contract become binding.

2/4/2 The owner of the option may test the sold item and does not thereby lose his right to revoke the contract except if he does so repetitively without need or conducts himself as the owner of the sold item in a manner that is contrary to the terms of the contract and/or custom.

2/4/3 Where there is a cooling-off option, the parties are not required to make payment or delivery (the sold item to the buyer and the price to the seller) unless they agree otherwise. One or both parties may voluntarily make payment or delivery and the option does not lapse as a result, except if the conduct of the parties towards the countervalues indicates the intention to give or take ownership. If one party makes payment or

delivery, the other is entitled to hold back, in which case the first party is entitled to demand return of what they have paid/ delivered.

2/4/4 The owner of the option may offer the item to which the option relates for sale to third parties, and the option does not lapse until the sale is completed.

2/5 Effect of options to cool-off on ownership

2/5/1 If the option to cool-off is owned by both parties or just the seller, there is no transfer of ownership in either countervalue and legal rights related to the subject matter remain solely with the seller to the exclusion of the buyer.

2/5/2 If the option is owned by just the buyer, ownership of the sold item transfers from the seller to the buyer and the buyer's conduct as the owner of the sold item serves as confirmation of the contract.

2/5/3 If an item sold under option is destroyed while in the possession of the seller, it is the seller's loss. If it is destroyed in the possession of the buyer while the buyer owns the option, he is liable to pay its price. If it is destroyed in the possession of the buyer owing to his negligence or violation while the seller owns the option and decides to revoke the contract, the buyer is liable to pay its cost. If it is destroyed in the possession of the buyer without there being any negligence or violation on his part, he has no liability.

2/6 Rules relating to increase in the sold item during the option period

2/6/1 Anything that is physically connected and grows out of the original, such as agricultural produce (crops) or animal produce (livestock) belongs to the buyer if the buyer owns the option and confirms the contract. And it belongs to the seller of the seller owns the option, whether he confirms the contract or revokes it.

2/6/2 Anything that is physically separate and does not grow out of the original, such as compensation for damage to the sold item caused by a third party during the option period, belongs to the buyer if he chooses to conclude the contract. If he chooses to revoke the contract, it belongs to the seller.

2/6/3 Anything that is separate but grows out of the original, such as dividends on shares and rent from leased assets belongs to the seller.

2/7 Cessation and lapsing of cooling-off options

2/7/1 When the option period expires, the contract becomes binding.

2/7/2 When the owner of the option exercises his option to revoke the contract, then the contract terminates. It is required for the other party to know of the revocation for the revocation to be valid. If the owner of the option concludes the contract, whether expressly or implicitly, the contract becomes binding.

2/7/3 If the sold item is destroyed before physical or constructive delivery, the contract terminates.

2/8 Some applications of cooling-off options

2/8/1 The institution, whether as a seller or buyer, stipulates an option to reconsider whether or not it is worth selling or buying an item.

2/8/2 The institution stipulates an option to reconsider when purchasing items from suppliers in order to offer them to its clients without obtaining a binding promise from them to purchase the items. If the clients do not wish to purchase the items, the institution returns the items to the seller.

2/8/3 The institution stipulates an option to reconsider in relation to the whole or a part of a single deal. If the various items being sold are different from each other, the items to which the option relates must be specified. If they are fungible, such as wheat or rice, the percentage to which the option relates must be specified.

2/8/4 It is not permissible to use cooling-off options as a ruse to synthesise the effect of a benefit enjoyed by the lender in exchange for a giving a loan, which can occur if the buyer pays for an item purchased under option, uses the item during the option period and then returns it before the option period expires to receive his money back.

2/8/5 It is not permissible to use cooling-off options to avoid price fluctuations during the option period.

3. Option to Revoke Due to Non-Payment

3/1 Definition of option to revoke for non-payment

Options to revoke due to non-payment are options stipulated by sellers or buyers to enable them to revoke contracts if the other party fails to make payment of price or rent on the due date. Such options are not valid unless they are expressly stipulated.

3/2 Scope of option to revoke for non-payment

Options to revoke for non-payment are permissible in contracts that do not require spot payment at time of contract. They are not permissible in Salam and currency exchange contracts.

3/3 Prerequisites

The seller is entitled to revoke the contract if the buyer does not pay the price within the specified period.

3/4 Transfer

Options to revoke due to non-payment lapse upon the death of the owner of the option (whether it is the seller or the buyer).

4. Either-Or Options

4/1 Definition

4/1/1 Either-or options entitle the buyer to conclude the contract to purchase one or more item out of several items specified by the contract during a stipulated period of time. Such options are created by stipulation of the parties.

4/1/2 It is not required for the items being sold to be fungible or for their prices to be equal. If their prices are different, the price of each item must be specified.

4/1/3 The agreed option period must be specified and there is no minimum or maximum time limit.

4/2 Prerequisites

4/2/1 Either-or options make ownership attached to one or more of several items to which the option relates but not to any item or items in particular. If the buyer takes delivery of all of them, he is liable to pay for one of them and holds the remaining items on trust. If one of them is destroyed or damaged in his possession, he must purchase it for its price. If all items are destroyed and their prices are different, the buyer is liable to pay the average price of the items for the number of items purchased. For example, if there are three items and he purchased one of them with an option to choose which one, he is liable to pay one third of the price of each item.

4/2/2 If the items to which the either-or option relates are destroyed by an act of the seller after the buyer has taken delivery, the buyer is not liable.

4/2/3 If the option period expires without the buyer choosing which item or items he wishes to confirm, he is legally obligated to do so unless the seller chooses to revoke the contract.

4/2/4 If the buyer treats one of the items in which he has an option as though he owns them, his conduct is deemed to be confirmation of the contract for those items.

4/3 Transfer

Either-or options transfer to the heirs of the owner of the option upon his death who in which case enjoy all the rights of the original owner of the option.

5. General Rules Relating to Option to Reconsider

5/1 It is not permissible to sell or transfer options to reconsider.

5/2 It is permissible to have two or more options to reconsider in one contract.

6. Date of Issuance of the Standard

The Shari'ah Board issued this standard on 23 Shawwal 1434 A.H., corresponding to 30 December 2013 A.D.

Adoption of the Standard

The Shari'ah Board adopted the standard on "Options to Reconsider" in its meeting No. (35) held in Al-Madinah Al-Munawwarah, Kingdom of Saudi Arabia, on 22-23 Shawwal 1434 A.H., corresponding to 29-30 September 2013 A.D.

Appendix (A)
Brief History of the Preparation of the Standard

On 14 Rabi' II, 1429 A.H., corresponding to 20 April 2008 A.D., the Secretariat of AAOIFI decided to commission a Shari'ah consultant to prepare a juristic study on Options to Reconsider.

In its meeting held on 14 Safar 1430 A.H., corresponding to 9 February 2009 A.D., the Shari'ah Standards Committee, discussed the study, approved it, and assigned to the Shari'ah researcher the preparation of the exposure draft of the standard.

In its meeting held in Dubai, United Arab Emirates, on 24 Ramadan 1431 A.H., corresponding to 3 September 2010 A.D., the Shari'ah Standards Committee discussed the exposure draft of the standard and made some changes in the light of the comments and observations of the members.

In its 30th meeting held in the Kingdom of Bahrain, on 24-26 Jumada II, 1432 A.H., corresponding to 27-29 May 2011, the Shari'ah Board discussed the exposure draft of the standard and introduced the changes it deemed suitable.

In its meeting No. (31) held in the Kingdom of Bahrain, on 22-24 Dhul-Qa'dah 1432 A.H., corresponding to 20-22 October 2011 A.D., the Shari'ah Board continued its discussions on the exposure draft of the standard, and introduced the changes it deemed suitable.

The Secretariat of AAOIFI held a public hearing in the Kingdom of Bahrain on 6 Jumada II, 1434 A.H., corresponding to 16 April 2013 A.D. The public hearing was attended by representatives of central banks, institutions, auditing firms, Shari'ah scholars, academics and others interested in this field. The members of the Shari'ah Board and the Shari'ah

Standards Committee responded to a number of observations raised by the participants.

In its meeting No. (35) held in Al-Madinah Al-Munawwarah on 22-23 Shawwal 1434 A.H., corresponding to 29-30 November 2013 A.D., the Shari'ah Board discussed the changes proposed at the public hearing and introduced the changes it deemed suitable to the exposure draft of the standard, and adopted the standard.

Appendix (B)
The Shari'ah Basis for the Standard

Cooling-Off Option

- The basis for cooling-off option is the Hadith narrated by Habban Bin Munqidh, attributed to the Prophet (peace be upon him), saying: *"If you are concluding a deal say: 'There shall be no Khalabah (misleading marketing or showcasing of products), then you shall have a 3-day option'"*.(2)
- The basis for consideration of all expressions that imply the cooling-off option is the opinion of the Four Schools of Fiqh (Madhahib).(3) Imam Al-Nawawi said: "This expression (as mentioned in the Hadith related by Ibn Hibban: *"There shall be no Khalabah..."* is neither considered to be a kind of literal worship, nor a Shari'ah ruling that a religiously accountable person shall be aware of it".(4)
- The basis for the stipulation of timing for cooling-off conditions is that an untimed option results in Jahalah (obscurity or ambiguity) which may lead to dispute. This is the opinion of the majority of Fuqaha.
- The basis for the stipulation of attaching the option to the contract is that detachment contradicts the prerequisites of the contract, which entails that it takes effect immediately.(5)
- The basis for the stipulation of attaching the option to a binding contract is that its usability comes into existence only when attached to such a contract. The basis for invalidity of the stipulation of such an option in contracts that entail taking possession (Qabd) is that it contravenes Qabd stipulated in Sarf and in Salam.

(2) It has been related by Ibn Hibban. It is a Hadith with acceptable authenticity.
(3) *"Al-Fatawa Al-Hindiyyah"* [3: 39]; *"Al-Mughni"* [3: 529]; and others.
(4) *"Al-Majmu'"* [9: 210].
(5) *"Al-Mughni"* [3: 502]; *"Bada`i' Al-Sana`i'"* [5: 300]; and *"Al-Majmu'"* by Al-Nawawi, [9: 191].

- The basis for permissibility (but not the obligability) of delivery of the two countervalues is that delivery serves both selection and reconsideration, which are literally the purpose of the option.
- The basis for the situation where the option does not abate upon offering it for sale is that such a practice is meant to probe the fairness of the price. However, it does abate in case of actual sale because this serves as a testimony to acceptance, as the disposal of the object underlying the option is considered to be as the disposal by owners.
- The basis for effecting ownership upon sale is that the price does not change if the two parties opted for continuity of ownership, and this conforms to the Hanafi School, as opposed to Hanbalis.

If the option is rested with one party, then the position of this standard is based on a variety of perspectives. [see applications in the Shari'ah Standard No. (8) on Murabahah]

Option to Revoke Due to Non-Payment

- The basis for permissibility is Qiyas (analogical deduction) to the cooling-off option and reports dating back to the time of the companions. It was taken up by Hanafis, Malikis and Hanbalis. The wisdom behind its permissibility is the need for the buyer to reconsider/re-evaluate his knowledge about prices and for the seller to ensure that the proper price is quoted in order to avoid procrastination by the buyer.
- The basis for impermissibility in contracts in which taking possession (Qabd) is a stipulation –such as Sarf and Salam- is that it is inconsistent with the stipulations of their validity.
- The basis for abating of the option upon the death of its owner is that it constitutes a readiness and willingness to act, and therefore is not transferable to heirs.

Either-Or Option

- The basis for permissibility of the either-or option is Qiyas (analogical deduction) to the cooling-off option; since it conforms to Shari'ah injunctions- i.e., the cooling-off option- so it was permissible based on it, and due to the need of the buyer to employ it in case of hesitancy as to selection of the most needful from amongst a number of objects. The majority of Fuqaha adopted it though with different views on definition and scope.

- The basis for all issues pertaining to ownership is the application of the rules relating to Daman (liability) and destruction (of objects of sales) and to treat both parties according to rules of equity in relation to the price that needs to be paid if the subject-matter of the option is destroyed.
- The basis for the transferability of the option to heirs is that a testator has an established ownership in the objects subject matter of the option, and as such heirs shall need to identify their selection.
- The basis for impermissibility of sale and tradability of either-or options is that such options are construed to be mere readiness and willingness (to contract), which cannot be transferred or traded.
- The basis for combination of two options or more is that such combination does not contradict their prerequisites -i.e., the effectuating of sale on an immediate basis.

Shari'ah Standard No. (54)

Revocation of Contracts by Exercise of a Cooling-Off Option

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

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

Preface

This Standard aims to define contract revocation and in particular, revocation by exercise of a cooling-off option (*Khiyar al-Shart*), to distinguish it from other types of contract termination that resemble it, to explain its causes and conditions, impediments to it and its application in the activities of Islamic financial institutions.[1]

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

Statement of the Standard

1. Scope of the Standard

This Standard covers the stipulation of revocation of valid and binding contracts and the causes and consequences of and impediments to such revocation. It does not cover the expiry of contracts at the end of their contractual terms or nullification owing to the absence of a condition required by the Shari'ah.

2. Definition of Cooling-Off Options to Revoke

Revocation by exercise of a cooling-off option refers to the termination of a valid and binding contract by virtue of a stipulation in the contract giving one of the parties the option to revoke the contract.

3. Form of Cooling-Off Options to Revoke

A cooling-off option to revoke can be stipulated in the contract in any form that indicates it, and it is not required to use any specific word with the meaning of revocation.

4. Permissibility of Cooling-Off Options to Revoke

4/1 It is permissible for both parties to stipulate an option for one or both of them to revoke the contract in specific situations agreed in the contract, without violating Shari'ah rules.

4/2 Revocation by exercise of a cooling-off option is valid if its causes exist, its conditions are satisfied and there are no impediments. It is invalid if its causes do not exist, any of its conditions is not satisfied, if there is an impediment or it is contrary to Shari'ah.

5. Causes Triggering Revocation Rights

The cause that triggers the cooling-off option is the existence of one of the situations stipulated in the contract, the occurrence of which gives one or both parties a conditional right to revoke.

6. Conditions of Valid Revocation

The following conditions must be fulfilled for revocation to be valid:

6/1 Existence of the cause triggering the option to revoke at the time of the revocation.

6/2 Absence of any impediments.

6/3 Notification of the revocation given by the owner of the cooling-off option to the other party according to the requirements of custom.

6/4 Exercise of the cooling-off option to revoke by the owner of the option.

7. Impediments to Revocation

Revocation cannot take place in the following situations:

7/1 Destruction of the sale item caused by a natural disaster after delivery.

7/2 Destruction of the sale item caused by the buyer whether before or after delivery.

7/3 Conduct that transfers ownership and creates rights for third parties, such as selling or gifting the sale item resulting in ownership passing to a third party.

7/4 Expiry of the period specified in the contract for exercise of the cooling-off option.

8. Consequences of Revocation

Revocation nullifies the contract at the moment of revocation. Any growth in the sale item that is physically attached to it is considered part of it. Any growth in the sale item that is physically separate from it and occurs between the time of contract and revocation and before the buyer takes delivery belongs to the seller. If it occurs after deliver, it belongs to the buyer.

9. Waiver of Revocation Rights

If the owner of a cooling-off option chooses not to exercise his right to revoke and there is no specific recurring harm attributable to the cause

triggering the option, the buyer is deemed to have permanently waived the option. If the harm attributable to the cause triggering the option is recurring or continuous, the option is not waived. For example, if a leased asset breaks down and the buyer chooses not to revoke the contract and repairs the asset and then the asset breaks down again, the buyer is still entitled to exercise his option to revoke.

10. Payment for Waiver of Revocation Rights

10/1 It is not permissible to stipulate payment for waiver of revocation rights in a sale contract. In contracts that run for specified terms, such as leases (Ijarah), Istisna'a, debt transfer (*Hawalat al-Dayn*), share cropping (Muzara'ah), tree planting partnership (Mugharasah) and agency (Wakalah), it is permissible for one of the parties to waive their rights to the remaining period of the contract in return for a consideration agreed at the time of waiver.

10/2 Unforeseen circumstances resulting in non-exercise of a right to revoke are excluded from the above rule.

11. Application of Cooling-Off Options to Revoke

11/1 Cooling-off options to revoke may be stipulated in credit facility agreements to be triggered by events of default relating to solvency, potential insolvency before it occurs or breach of a restrictive covenant in the contract.

11/2 If the lessor stipulates in a lease contract that he is entitled to add a supplementary rental amount at the beginning of each lease period to cover the costs of maintenance, insurance and taxes levied on owners, and the lessee refuses to accept that, the lessor is entitled to revoke the contract. If the lessee has given a prior promise to purchase the leased asset, the lessor can exercise his rights under the promise and demand performance from the lessee provided that the supplementary rent for that lease period is not added to the purchase price.

11/3 A creditor is entitled to stipulate the right, after notifying the debtor, to accelerate all installments and the right to revoke the contract or

one of them in the event that the debtor fails to pay two or more instalments despite being solvent.

11/4 If the seller stipulates that the buyer provides security or surety or any other form of guarantee and the buyer fails to provide it, the seller is entitled to revoke the contract.

11/5 For other situations of revocation that apply in options to reconsider, options to revoke for incomplete performance and options to revoke for breach of trust, see the relevant Shari'ah Standards.

12. Date of Issuance of the Standard

The Shari'ah Board issued this standard on 15 Muharram 1435 A.H., corresponding to 8 November 2014 A.D.

Adoption of the Standard

The Shari'ah Board adopted the standard on Revocation of Contracts by Exercise of a Cooling-Off Option in its meeting No. (39) held in the Kingdom of Bahrain on 13-15 Muharram 1435 A.H., corresponding to 6-8 November 2014 A.D,

Appendix (A)
Brief History of the Preparation of the Standard

On 1 Sha'ban 1431 A.H., corresponding to 13 July 2010 A.D., the Secretariat of AAOIFI decided to commission a Shari'ah consultant to prepare a juristic study on Revocation of Contracts by Exercise of a Cooling-Off Option.

In its meeting held on 9 May 2012 A.D., the Shari'ah Standards Committee discussed the study and the exposure draft of the standard and introduced the changes it deemed suitable in the light of the comments and observations of the members.

In its meeting No. (34) held in the Kingdom of Bahrain on 20-21 Safar 1434 A.H., corresponding to 3-4 January 2013 A.D., the Shari'ah Board discussed the exposure draft of the standard, and introduced the changes it deemed suitable.

In its meeting No. (35) held in Al-Madinah Al-Munwwarah on 22-23 Shawwal 1434 A.H., corresponding to 29-30 September 2013 A.D., the Shari'ah Board continued its discussions on the exposure draft of the standard, and introduced the changes it deemed suitable.

In its meeting No. (37) held in the Kingdom of Bahrain on 19-21 Jumada I, 1435 A.H., corresponding to 20-22 March 2013 A.D., the Shari'ah Board continued its discussions on the exposure draft of the standard, and introduced the changes it deemed suitable.

The Secretariat of AAOIFI held a public hearing in the Kingdom of Bahrain on 6 Jumada II, 1434 A.H., corresponding to 16 April 2013 A.D. The public hearing was attended by representatives of central banks, institutions, auditing firms, Shari'ah scholars, academics and others interested in this field. The members of the Shari'ah Board and the Shari'ah Standards Committee responded to a number of observations raised by the participants.

In its meeting No. (38) held in the Kingdom of Bahrain on 28 Sha'ban - 1 Ramadan 1435 A.H., corresponding to 26-28 June 2014 A.D., the Shari'ah Board discussed the changes proposed at the public hearing, and introduced the changes it deemed suitable to the exposure draft of the standard, and adopted the standard.

In its meeting No. (39) held in the Kingdom of Bahrain on 13-15 Muharram 1435 A.H., corresponding to 6-8 November 2014 A.D., the Shari'ah Board discussed the exposure draft of the standard and introduced the changes it deemed suitable, and adopted the standard.

Appendix (B)
The Shari'ah Basis for the Standard

- Stipulation of cooling-off options apply only to binding contracts because nonbinding contracts are by their nature revocable by one or both parties.
- The validity of revocation by any form of language, that indicates it, is based on the general Shari'ah maxim: "Contracts are interpreted according to intent and inherent meaning of the parties and not by the words or forms used" (Maxims of Al-Majallah Al-'Adliyyah) and the statement of some jurists that the use of the technical word "Revocation" is designated by jurists and what is important is its meaning.(2)
- The existence of the cause triggering the option to revoke is required because revocation is contrary to the norm and rule that contracts are generally binding and that in principle consequences must flow necessarily from their causes, and that the cause must exist at the time of revocation.(3)
- The requirement that the other party be notified of revocation is based on the opinion of Abu Hanifah and Muhammad Ibn Al-Hasan, contrary to the opinion of the majority of jurists, because notification averts harm from the other party who, unaware of the revocation, may conduct themselves to their detriment.
- The four impediments to the exercise of cooling-off options are based variously on the following rationale: (I) Revocation would contradict the basic elements of the contract which have been validly established; or (II) revocation would contradict consent implied by conduct (implied terms have the same legal effect as express ones); or (III) revocation is impossible because the term of the contract has expired; or (IV) the subject matter of the option to revoke is deemed by law to have ceased to exist.

(2) *"Sharh Al-Minhaj Wa Hashiyat Al-Qalyubi"* [2: 195]
(3) *"Al-Furuq"* by Al-Qarafi [3: 269]; and *"Al-Qalyubi"* [2: 189]

- The basis for the ruling on the effect of revocation and that revocation nullifies the contract immediately, is the prevailing viewpoint of the Shafi'i and Hanbali schools. Revocation invalidates ownership in sale contracts. This ruling holds true for the asset sold (subject-matter of the contract), whereas increments in the asset sold (separate growth) from time of contracting until revocation and before delivery to buyer, belong to the seller who becomes the owner at or just prior to time of revocation.[4] When the buyer takes possession of the asset sold, any separate growth belongs to him.
- The basis for the rulings stated in item 9 regarding waiver of revocation right is the viewpoint which Al-Zarkashi has indicated in his book titled *"Al-Manthur Fi Al-Qawa'id"*.[5]
- The basis for impermissibility of stipulating compensation in the contract as a condition for waiver of revocation right, is based on analogy to Iqalah, which is considered as one form of contract revocation and has to be performed without any increase or decrease in considerations. Similarly, Shari'ah prohibits waiver of some rights (such as pre-emption and demarcation rights) against compensation.
- The basis for permissibility of stipulating, in the contract, compensation for waiver of the remaining periods of revocation right, in case of continuous contracts such as leasing, is the fact that the party who waives his right owns a benefit that makes him entitled to remuneration.
- The basis for applications of conditional revocation is the rulings indicated in the Shari'ah standard that relates to each application, because rulings on these applications are derived from these preceding standards.

(4) *"Ibn Abidin"* [4: 108] and *"Nihayat Al-Muhtaj"* [3: 434]
(5) *"Al-Manthur Fi Al-Qawa'id"* [2: 151]

Shari'ah Standard No. (49)

Unilateral and Bilateral Promise

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

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

Preface

This Standard aims to explain the concepts of unilateral promise/undertaking (promise) and bilateral promise/undertaking (bilateral promise); their various types and the enforceability of each type; the Shari'ah rules that govern them and the most important contemporary applications of each type in the activities of Islamic financial institutions.[1]

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

Statement of the Standard

1. Scope of the Standard

This Standard covers promises (unilateral and bilateral) given by certain parties for the purpose of concluding a contract or effecting a disposal, and explains when such instruments are binding and when they are not, the jurisprudential rules that govern them, and the most important contemporary applications of each type in the activities of Islamic financial institutions.

2. Definitions of Unilateral and Bilateral Promises

2/1 For the purpose of this Standard, a unilateral promise is given when a party informs another of its resolute intention (undertaking) to act in the future in the interest of the other, with the other having the option to avail itself of the promise. The party undertaking the promise is called the 'promisor', the party receiving the promise is called the 'promisee' (the beneficiary of the promise) and the action is called the 'promised action'.

2/2 Bilateral promise in this Standard refers to the exchange of two back-to-back promises between two parties, each promising to perform an act in the future relating to the same subject matter.

3. Types of Promises and the Shari'ah Rules Applicable to Them

3/1 Promising to perform an act that impermissible by the Shari'ah is prohibited, and fulfilling such a promise is also prohibited. Examples of such promises are those intended to be a ruse to circumvent the prohibition of interest-bearing (Riba) transactions.

3/2 Any promise in a loan contract that procures benefit for the lender, over and above the repayment of the debt, is prohibited by the Shari'ah even if the promise is granted in a document separate from the loan contract.

3/3 Any promise in a sale contract made by the buyer or the seller that results in a repurchase contract ('Inah) is prohibited by the Shari'ah, whether the promise is part of the sale contract or is given prior or subsequent to it, such as purchasing an item on credit and promising to sell it back on spot for a lower price or selling an item on credit and promising to buy it back on spot for a lower price (reverse 'Inah). The same prohibition applies if the parties collude with a third party to act as an intermediary in the repurchase.

3/4 It is permissible to promise to perform an action or a financial transaction and it is then a religious obligation to fulfill it, meaning that breaking a promise without an excuse is a sin. However, a promise is not legally binding except when there is a real need for it to be enforced, such as when the promisor causes the promisee to incur a liability as a result of the promise. For example, if a person instructs a merchant to purchase a specific item and then resolutely promises the merchant that he will buy this item from him. If the merchant purchases the item solely in reliance on the promise, the promisor is legally bound to purchase the item from him, failing which the promisor is required to indemnify the promisee (merchant/seller) for any actual loss suffered such that if the merchant is unable to sell the item for a price that covers the cost of the item, the promisor is required to make up the difference between the cost of the item and the price obtained by the merchant for it. Actual loss does not include opportunity cost.

3/5 A legally binding promise, as explained in item 3/4 above, is enforceable only against the promisor and is not enforceable against the promisee who has the option either to demand performance from the promisor or to waive it.

3/6 Fulfilling a benevolent promise (such as a promise to make a gift or lend an item) is a religious obligation but is not binding legally, except if the promise is conditional upon the promisee performing an action that causes the promisee to incur a liability, in which case it is legally binding. For example, if the promisor says to the promisee: "If you

buy this item from me, I will give you a gift of another specified item", fulfilling such a promise is a religious obligation and is legally binding.

3/7 It is permissible for a party to promise to enter into a commutative contract in the future and for the promisee to promise the first party to enter into a separate commutative contract with a different subject matter from that of the first promise. For example, the first party says, "I promise to sell you this item", and the other party says, "I promise to lease to you such and such property", neither of the two promises is legally binding except if a promisor causes a promisee to incur a liability, in which case such promise is binding. [see item 3/5]

3/8 When a promise is made to enter into a contract in the future, such contract is not effected automatically. The contract must be entered into at the relevant time by the exchange of offer and acceptance. Where the promise is legally binding, if the offer is made by the promisee, the promisor is bound religiously and legally to accept it. And if the offer is made by the promisor, the promisee has the option to accept or reject it.

4. Types of Bilateral Promise and the Rules Applicable to Them

4/1 A bilateral promise to perform an act that is prohibited by the Shari'ah is itself prohibited such as a bilateral promise to enter into one or more contracts with the intention to circumvent the prohibition of interest (Riba); e.g., a bilateral promise to enter into a sale and repurchase ('Inah) contract and a bilateral promise to enter into a sale and a loan.

4/2 Fulfilling a bilateral promise to perform an act that is permitted but not binding under the Shari'ah is a religious obligation on both parties but is not legally binding except in situations where an actual commercial transaction is not possible without a binding bilateral promise owing either to legal requirements or to general commercial custom, and the objective is not merely to provide financing, such as:

4/2/1 Bilateral promises in international trade conducted by means of documentary credits.

4/2/2 Bilateral promises in supply agreements.

4/3 The binding bilateral promises referred to in item 4/2 are not future contracts, which means that the promised contract is not effected automatically upon the promised date. The contract must be entered into at the relevant time by exchanging notices of offer and acceptance. Since the bilateral promise is binding on both parties, if any party makes an offer, the other party is religiously and legally bound by it. If one party defaults in fulfilling the promise, the other party can obtain a court injunction requiring them to conclude the contract. If it is not possible to conclude the contract and the promisee needs to mitigate his loss by concluding the same contract with a third party but is not able to recover his cost by means of such contract, the defaulting party is liable to indemnify him for actual loss suffered (not to include opportunity cost) if the price obtained under the new contract (with the third party) is lower than price promised by the defaulting party.

4/4 It is permissible for the two parties to enter into a master agreement for future transactions where each party has the option whether or not to enter into the future transaction. If the parties enter into a transaction, then the terms and conditions agreed in the general framework (master agreement) apply. An agreement containing a general framework (a master agreement) is a bilateral promise that does not bind any of the parties to enter into those transactions. For example, an institution and a client wishing to enter into Murabahah transactions can agree on a general framework which explains the transaction process and the terms and conditions. A general framework (a master agreement) is not considered to be a concluded transaction and the client is not required upon signing the framework to enter into a Murabahah contract. Rather, each party has an option. When the parties enter into the Murabahah contract by exchanging notices of offer and acceptance, the contract becomes subject to all the terms and conditions agreed upon in the general framework (master agreement) which are expressly reconfirmed and incorporated in every contract. [see Shari'ah Standard No. (37) on Credit Agreement]

5. Permissible Applications of Promises and Bilateral Promises

5/1 The promise given by the client in the Murabahah transactions conducted by institutions is legally binding by virtue of item 3/5 of this Standard. [see Shari'ah Standard No. (8) on Murabahah]

5/2 The promise given by the institution in Ijarah Muntahia Bittamleek transactions to grant the leased asset to the lessee as a gift conditional on that he pays all the lease installments is legally binding as in item 3/6 of this Standard. [see Shari'ah Standard (9) on Ijarah Muntahia Bittamleek]

The promise given by the institution in diminishing Musharakah transactions that it will lease its share of the asset to the other co-owner is legally binding and the promise given by the client that he will buy units of the institution's share at stipulated intervals are legally binding by virtue of item 3/5 of this Standard. [see para 5 of Shari'ah Standard No. (12) on Sharikah (Musharakah) and Modern Corporations]

6. Impermissible Applications

It is impermissible to enter into back-to-back bilateral promises for the purpose of circumventing the prohibition by Shari'ah of certain transactions, such as back-to-back derivatives as in items 3/1 and 3/7 of this Standard. [see para 5 of Shari'ah Standard No. (20) on Sale of Commodities in Organized Markets]

7. Date of Issuance of the Standard

This Standard was issued on 21 Safar 1434 A.H., corresponding to 4 January 2013 A.D.

Adoption of the Standard

The Shari'ah Board adopted the Standard on Unilateral and Bilateral Promise in its meeting No. (34), held in the Kingdom of Bahrain, during the period of 20-21 Safar 1434 A.H., corresponding to 3-4 January 2013 A.D.

Appendix (A)
Brief History of the Preparation of the Standard

On 14 Jumada II, 1430 A.H., corresponding to 7 June 2009 A.D., the General Secretariat decided to commission a Shari'ah consultant to prepare a juristic study on Unilateral and Bilateral Promise.

In a joint meeting held in the Kingdom of Bahrain, on 18 Safar 1428 A.H., corresponding to 8 March 2007 A.D., the Shari'ah Standards committees (1) and (2) discussed the study, approved it and required the consultant to prepare the exposure draft of the Standard.

In a further joint meeting held in Manama, the Kingdom of Bahrain, on 15 Jumada I, 1428 A.H., corresponding to 31 May 2007 A.D., the Shari'ah Standards Committees (1) and (2) discussed the draft of the Standard and necessary amendments were made in the light of the discussions and observations of the meeting.

In its meeting No. (19) held in Makkah Al-Mukarramah, during the period of 26-30 Sha'ban 1428 A.H., corresponding to 8-12 September 2007 A.D., the Shari'ah Board discussed the draft of this Standard and made the amendments which it deemed necessary.

The General Secretariat held a public hearing in the Kingdom of Bahrain on 8 Jumada II, 1429 A.H., corresponding to 12 June 2008 A.D. The public hearing was attended by a number of representatives from central banks, institutions, accounting firms, Shari'ah scholars, academics and others interested in this field. The members of the Shari'ah Standards Committees (1) and (2) duly responded to several comments and observations that were made in the public hearing.

In its meeting No. (21) held in Al-Madinah Al-Munawwarah, during the period of 21-48 Jumada II, 1429 A.H., corresponding to 28 June -2 July

2008 A.D., the Shari'ah Board discussed the amendments proposed by the participants in the public hearing and incorporated the amendments that it considered suitable.

In its meeting No. (25) held in the Kingdom of Bahrain, during the period of 2-4 Dhul-Qa'dah 1430 A.H., corresponding to 21-23 October 2009 A.D., the Shari'ah Board discussed the draft of the Standard, incorporated the necessary amendments that it deemed appropriate, and adopted the Standard.

Appendix (B)
The Shari'ah Basis for the standard

The International Islamic Fiqh Academy resolved: "In situations where a sale contract cannot be concluded because the seller does not own the commodity and there is a public interest in obligating both parties to sign a contract in the future by virtue of law or otherwise, or according to international norms and customs, as in the case of opening letters of credit for importing goods, bilateral promise can be made binding to the two parties". [Resolution No. (157) 6/17 on Bilateral Promise and Collusion in Contracts (Islamic Fiqh Academy Magazine), Issue No. (17), Vol. 3, (P. 681)]

Appendix (C)
Definitions

General Framework (Master Agreement)

An agreement representing mutual understanding and the exchange of non-binding bilateral promises to enter into transactions.

AAOIFI

هيئة المحاسبة والمراجعة للمؤسسات المالية الإسلامية

ACCOUNTING AND AUDITING ORGANIZATION FOR ISLAMIC FINANCIAL INSTITUTIONS

Shari'ah Standard No. (58): Buyback

Shari'ah Standard No. (58)

Buyback

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IN THE NAME OF ALLAH, THE MERCIFUL, THE VERY MERCIFUL

All praise be to Allah, the Lord of all the worlds. Peace and blessings upon our Prophet and our master Muhammad, all his family and his Companions.

PREFACE

This standard aims to outline the Shari'ah ruling of buyback, and its applications in the institutions[1].

And, Only Allah the Exalted guides to Success,,,

1 The word (Institution/Institutions) was used as a short form for Islamic financial institutions, and among them are Islamic banks.

TEXT OF THE STANDARD

1. Scope of the Standard

This Standard deals with the buyback of a tangible asset or a usufruct that has moved out of the ownership of the contracting party through sale or similar commutative contracts in terms of definition, Shari'ah ruling and its rules, provisions of buyback, and its applications within institutions.

[The Standard] does not address the buyback of a tangible asset or a usufruct that has moved out of the ownership of the contracting party through [contracts] other than sale, nor does it cover dispositions that result in the item returning to its seller by [arrangement] other than sale or rescission, like Wafa Sale and dissolution (*iqāla*).

2. Definition of Buyback:

For the purposes of this Standard, buyback is defined as the sale of a tangible asset, or a usufruct followed by the seller's acquisition of it from the buyer or another to whom ownership has passed by any means of ownership acquisition (*tamlluk*).

3. Shari'ah Ruling on Buyback and Its Rules

It is permitted to sell a tangible asset or a usufruct and then buyback it from the buyer or from another party, subject to the following rules:

3/1. The sale should be real, effectuating the transfer of ownership by virtue of Shari'ah and resulting in its consequences, such as the buyer's entitlement to the yield of the tangible asset and [buyer's] assumption of the risks (*taḥammul al-makhāṭir*) associated with price change and transfer of its risk of loss (*ḍamān al-halāk*) by taking its possession.

3/2. The subsequent purchase must occur via an independent contract that facilitates the transfer of ownership, whether by a verbal agreement or by action. It is not permitted [that subsequent purchase occurs] automatically upon the lapse of the duration without executing a contract.

3/3. The second contract should not be stipulated within the first contract.

3/4. There must not be a bilateral promise (*muwaʿada*) binding upon both the parties to enter into the second contract.

3/5. There must not be a collusion (*muwāṭa'*) or custom of buyback whereby the deferred price in the first or the second contract is higher; as this constitutes 'Inah, whether the second seller is the first buyer or another.

3/5/1. Prohibited scenarios in the presence of collusion or custom include:

3/5/1/1. Selling a [tangible] asset at a deferred price and then the first seller repurchasing [the sold asset] at a lower price for spot or for a deferred payment that falls due before the maturity of the first price.

3/5/1/2. Selling an [tangible] asset for cash and then purchasing it at a higher deferred price.

3/5/1/3. Selling a [tangible] asset on deferred payment terms and then purchasing it at a higher price for an even more extended deferment period.

3/5/1/4. Selling a [tangible] asset for spot and then purchasing it on a later date for a higher spot price.

3/5/2. Among the permitted scenarios for buyback, even if the deferred price is more [than the spot price]:

3/5/2/1. If the buyback is free of any collusion or customary practice.

3/5/2/2. If the price change is due to alterations in the asset's characteristics or value, not due to deferral or cash considerations.

3/5/2/3. If the buyer in the second contract is different than the first seller, and neither party is an entity wholly or majority-owned by the other.

3/5/2/4. If the price in one of the contracts is in a form other than cash.

3/6. Buyback must not result in deferred currency exchange (*ṣarf*), such as if the contracting parties collude for one to sell an asset in gold or currency and later buys it back on credit in silver or another currency.

4. Provision on Buyback

4/1. Buyback, under the aforementioned conditions, is considered among the permissible forms of contract combinations, as seen in Shari'ah Standard No. (25): Combination of Contracts.

4/2. If the seller retains legal registration of the sold asset, it is required to execute a document confirming the buyer's ownership, such as a counter deed or the like, provided that the seller's retention of the legal registration does not affect the buyer's ownership, entitlement to the asset's yield, or assumption of its risk of loss. The seller's possession of the asset is deemed a trust. The seller may stipulate a condition to pledge the asset to its deferred price or its preservation with a custodian, and the buyer may authorize the seller to collect its yield—such as returns, cash dividends, and bonus shares—and reinvest it for the buyer's

benefit, as well as authorizing voting at the general assembly or similar actions.

4/3. It is permitted to sell a commodity on deferred payment terms and then buyback it from the auction, even at a lower cash price, and similarly it is permitted to purchase a commodity on credit and then offer it in an auction for cash sale, even if the first seller is among the bidders.

4/4. It is not permitted to purchase a commodity on spot for the purpose of selling it on credit to a third party if there is collusion among all parties involved to resell [the commodity] to the first seller on spot for less than the deferred price.

5. Applications of Buyback in the Institutions

5/1. **Promise to Buyback.**

With due compliance with s. (3/3) of Shari'ah Standard No. (49): Unilateral and Bilateral Promise, it is permitted to sell with a promise from the seller alone to buyback or a promise from the buyer alone to resell subject to the following rules:

5/1/1. Both contracts (the first sale and the subsquent) must be for a spot price.

5/1/2. The promise to purchase or sell must be documented in a separate deed from the first contract.

5/1/3. The transfer of ownership must occur via a contract executed at the time of fulfilment of the promise, not merely upon the promise document.

5/1/4. The second party (the promisee) must not be obligated to enter into the second contract by the virtue of the regulation, custom, collusion, or the like.

5/1/5. The promise must not originate from a partner in a joint enterprise, a Mudarib, or an investment agent in a manner that leads to guaranteeing the capital or part of it.

5/1/6. It is not permitted to oblige the promisor to fulfil the promise in case of total loss of the asset promised for sale or purchase.

5/1/7. In the event of the promisor's repudiation (nukūl), the promisee is entitled to claim compensation for the actual damage incurred due to the repudiation, excluding any lost profit from the promised price. If it was promise to purchase, the actual damage is estimated by the difference between the cost and the price at which it is sold to a third party on the date the promise is performed. See: Shari'ah Standard No. (49): Unilateral and Bilateral Promise. It is not

permitted to stipulate [giving] any part of the price to the repudiating promisor. If it was promise to sell, the actual damage is estimated by the difference between the purchase price of the commodity on the date the promise is performed and the promised price.

5/2. **Lease of Asset on Ijarah Muntahia Bi Tameelk to the One who sold the Asset**

It is permitted to purchase a tangible asset and then lease it to the one who sold it under a Ijarah Muntahia Bitamleek. This is subject to the provisions detailed in s. 3/2, s. 8/5, and s. 8/6 of Shari'ah Standard No. (9): Ijarah and Ijarah Muntahia Bittamleek.

5/3. **Leasing back the Asset by the Lessee to Its Owner:**

It is permitted for the lessee to lease the tangible asset to its owner within the term of the first Ijarah, provided that this does not constitute 'Inah as specified in s. 3/4 of Shari'ah Standard (9): Ijarah and Ijarah Muntahia Bittamleek.

5/4. **Diminishing Musharaka with the Seller:**

5/4/1. This refers to the purchase of an undivided share in a tangible asset or project with a promise from the selling partner to gradually buy back the share of his partner. This is permitted under the conditions previously mentioned in s. 3, and with due compliance with the provisions in s. 5 of Shari'ah Standard No. (12): Sharikah (Musharakah) and Modern Corporations.

5/4/2. It is not permitted for a partner in a joint enterprise to extend to his partner a binding promise to buyback the share sold to that partner if the promise was for a specified price, [determined at] the time of undertaking the promise, regardless of the market value [of the share] at the time of performance [of the promise]; this contradicts the principle of sharing risk and reward. However, it is permitted if the buyback is at the market value or a price agreed by the contracting parties at the time of performance [of the promise]. See: s. (5/7) of Shari'ah Standard No. (12): Sharikah (Musharakah) and Modern Corporations.

5/4/3. It is permitted in a joint ownership partnership, if a partner sells his share to another partner with a promise to buyback it or with a promise from the other partner to resell it at the market value, a mutually agreed price at the time, or a specified price, with due compliance with s. (5/1) of this Standard. The buyer may lease his share to his partner, considering the conditions stated in s. (3) of this Standard. This does not overrule the provisions in s. (5/7) of

Shari'ah Standard No. (12): Sharikah (Musharakah) and Modern Corporations since they apply to joint enterprise.

5/5. **Commitment of the Investment Fund Manager to Purchase Investment Units:**

It is permitted for the investment fund manager to undertake to purchase investment units from investors upon their exit (*takhāruj*) from the fund, whether these units were previously sold to them by the manager directly or on behalf of others, provided that the purchase is at the market value of the investment unit at the time of exit.

5/6. **Repurchase Agreement (Repo and Reverse Repo):**

5/6/1. Definition:

It is a contract between two parties involving the sale of liquid financial assets at a cash price, followed by a repurchase from the buyer at a later date at a higher price, typically without the consequences of a sale.

The purpose of such agreements is liquidity management within institutions, whether at the level of central banks implementing monetary policies or commercial banks managing their cash liquidity in surplus or deficit situations. The contracting party selects its role in the agreement based on its objective; if desiring liquidity, it acts as the seller and the agreement is termed a repurchase agreement; if seeking to invest liquidity, it becomes the buyer, and the agreement is termed a reverse repurchase agreement.

5/6/2. Shari'ah Characterization and Provisions of Repurchase Agreement:

The Shari'ah characterization of a conventional repurchase agreement is that it is a *ribā*-based loan with interest, secured by financial assets; as the sale does not confer usual consequences such as the transfer of risk (*intiqāl al-ḍamān*) to the buyer or entitlement to yield, and the assets remain collateral, not the subject of the contract. The difference between the cash amount paid initially and the amount paid upon call back represents the loan interest, known as the repo rate. Hence, such agreements are prohibited by virtue of Shari'ah. Moreover, these financial assets are often prohibited, such as bonds and bank deposit certificates.

5/6/3. Shari'ah-Compliant Alternatives:

Institutions may adopt appropriate tools for managing their liquidity to meet their needs in addressing cash surpluses or

deficits in accordance with Shari'ah guidelines. The following are examples that achieve this purpose:

5/6/3/1. Selling Shari'ah-compliant securities or investment units, such as permissible stocks, Sukuks, investment units in Islamic funds, and undivided shares in Mudaraba or Musharaka deposits or investment agency, with a promise from the buyer to sell them back to the seller or a promise from the seller to buy them back from the buyer at a specified future date, with due compliance with the rules outlined in s. (3) and Para. (5/1).

5/6/3/2. Bilateral loans with points system, where creditor points are calculated based on the balance and duration of credit only, and debtor points are calculated similarly, with the following rules:

a. The points system must ensure fairness between the parties. Hence, it is not permitted to stipulate preferential terms or increase in points for [particular] party, whether stipulated at the time of borrowing or was a result as a penalty clause for delayed repayment of the counter-loan.

b. It is not permitted to convert the transaction into a monetary consideration, such as agreeing to convert points into cash amounts upon non-settlement of [the transaction].

c. At the time of calculating the bilateral loan, consideration should be given only to the principal of loan and its term, and not permitted to calculate interest charges for these loans.

5/6/3/3. Investment deposits, where the institution establishes an investment account offering flexibility in withdrawal for liquidity management purposes. The institution receiving funds manages this account through Mudaraba, Musharaka, or investment agency, with the following requirements:

a. It is not permitted for the institution, as an investment manager, to guarantee the capital or any part of it to Rab al-Maal. It is permitted to volunteer for reparation of the loss (*jabr al-khasāra*) upon its occurrence without prior condition.

b. It is not permitted for the institution, as an investment manager, to undertake to purchase the underlying assets

of those investments at their face value. It is permitted to promise to purchase at market value.

c. It is not permitted for the institution, as an investment manager, to undertake to guarantee a specified return. It is permitted to state an expected return on the investment without obligation to its realization.

d. It is not permitted that the agreement includes a clause that leads to the cessation of profit-sharing, such as agreeing that all profits up to a certain limit belong to one party and any excess to the other. It is permitted to stipulate a performance incentive clause for the manager, where both parties share in the profits and any excess profit beyond a specified limit accrues to the manager. See: Shari'ah Standard No. (56): Liability of Investment Manager.

5/6/3/4. Tawarruq with the Pledge of Securities, where if the institution (seeker of Tawarruq funds (*mustawriq*)) needs liquidity, purchases commodity on deferred payment terms then sells it on spot to someone other than the seller. If the institution has a cash surplus, it buys goods for cash then sells them on deferred payment terms to the seeker of Tawarruq funds. In both the instances, the Murabaha debt in both can be secured with a pledge of securities owned by the seeker of Tawarruq funds and held with the financier. In line with s. (4) and s. (5) of Shari'ah Standard No. (30): Monetization (*Tawarruq*), adherence to the following conditions is required:

a. The buyer of the commodity may not dispose of the commodity by selling it until he has acquired it and taken its possession in a manner recognized by the virtue of Shari'ah.

b. After the purchase and before the [on-sale], the commodity will be held at buyer's liability (risk).

c. The commodity may not be sold to the seller from whom it was purchased.

d. The pledged securities remain the property of the pledger (seeker of Tawarruq funds), with their yield for him and loss upon him. It is permitted to register [the commodity] in the name of the pledgee (creditor) for security purpose. The pledgee may stipulate that their

yield, such as cash dividends due to the owner, be pledged along with the principal. Also, it is permitted for the contracting parties to agree that such dividends be used to pay off or reduce the debt owed by the debtor (pledger). It is not permitted to stipulate that the pledgee disposes of the pledged financial securities by selling them.

6. Issuance Date of the Standard:

This Standard was issued on 13th Jumada al-Thani, 1438 AH corresponding to 12th March 2017 AD.

Endorsement of the Standard

The Shari'ah Board has endorsed the Standard re. Buyback in its 47th meeting held in Madinah during the period from 10th -13th Jumada al-Thani 1438 AH, corresponding to 9th-12th March, 2017 AD.

Supervisory Instructions for Implementation of the Standard

1. This Standard was issued on 13th Jumada al-Thani, 1438 AH corresponding to 12th March 2017 AD; whatever was stated in the Standard deems to amend whatever contradicts with it as per the previously issued Shari'ah Standards.

2. The supervisory authorities that enforce Shari'ah Standards may grant the Institutions that are subject to their supervision a grace period not exceeding (1) one calendar year to implement this Standard for the existing transactions upon issuance of the Standard.

3. Whatever was implemented based on the issued Shari'ah Standards stands valid based on the previously endorsed version of the [prior Standards] till the end of its tenure based on the [respective] contract.

Annexures

Annexure (A): History of Issuing the Standard

The Shari'ah Board decided on 13th July, 2010, corresponding to 1st Shaʿbān 1431 H., to assign a Shari'ah consultant to prepare a Shari'ah study on buyback agreements.

The Shari'ah Standards Committee in Jeddah discussed the study and the draft standard project on 29th March 2013, and adopted it with suitable amendments.

The Shari'ah Board discussed the draft standard project in its Meeting No. (35) held in Madinah during the period 29th-30th September 2013 corresponding to 22nd 23rd Shawwāl 1434 H. and made suitable amendments.

The Shari'ah Board discussed the draft standard project in its Meeting No. (36) held in the Kingdom of Bahrain during the period 28th -29th November 2013 corresponding to 25th 26th Muharram 1435 H. and made suitable amendments.

The General Secretariat held a hearing session in the Kingdom of Saudi Arabia in Riyadh on 22nd October 2014, corresponding to 28th Dhu al-Hijjah 1435 H., attended by over fifty participants representing central banks, institutions, accounting firms, Shari'ah scholars, university professors, and others concerned with this field. Comments raised during the session were heard and discussed.

The Shari'ah Board discussed the observations and suggestions from the hearing sessions in its Meeting No. (47) held in Madinah during the period of 9th – 12th March 2017 corresponding to 10th – 13th Jumada al-Thani 1438 H. made suitable amendments and adopted the Standard.

The Shari'ah Standards Drafting Committee reviewed the Standard in its meeting held in Medina on 12th March 2017, corresponding to 13th Jumada al-Thani 1438H. After deliberation and discussion and making some amendments related to the wording, the committee adopted the Standard and issued it officially.

Annexure (B): Basis of Shari'ah Rulings

- The basis for permissibility of repurchase of an asset ('Ain) or usufruct (Manfa'ah) already sold by the same person (the buyer) for a transaction void of Shart (prerequisite), binding Muwa'adah, or Muwataah (collusion) as to repurchase at the time of initial sale is that in principle, contracts and financial dealings are assumed to be permissible, in line with Allah's saying: "Allah has permitted sale", and "O, you believers! Never take each other's property/ wealth unjustly, but only in permissible ways of trading by mutual consent."
- The basis for impermissibility of repurchase at a deferred price exceeding the spot price is that this is tantamount to Einah and two sales in one (Bai'tan fi Bai'ah), and both are impermissible. This is based on a narration by Ibn Omar (may Allah be pleased with both of them) that the Prophet (peace be upon him) said: "if you practiced Einah sale, and you kept yourselves busy with plowing and planting, and left Jihad behind your back, Allah will subject you to disgrace, unless you revert back to your religion", and a narration by Abu Hurairah that the Prophet (peace be upon him) prohibited "two sales in one". Fuqaha were in agreement as to prohibit this type of sale. Ibn Rushd said: "but if he said: "I buy from you these clothes for cash provided that you buy it back from me on deferred terms, then it is unanimously impermissible. See Shari'ah Standard No. (25) on "Combination of Contracts".
- The basis for impermissibility of bilaterally binding Muwa'adah (mutual promise) as to repurchase at a deferred price exceeding the spot price is that this type of Muwa'adah is similar in concept to the above. See Shari'ah Standard No. (49) on Unilateral and Bilateral Promise.
- The basis for impermissibility of collusion as to repurchase at a deferred price exceeding the spot price is that this is tantamount to Einah, which is impermissible by Shari'ah.
- The basis for permissibility of repurchase in a collusion-free transaction or in cases where the price change is prompted by a change in the transaction or its value or currency, or in a tripartite context (re-selling to other than the seller) is the absence of Einah implication (), and as such the transaction is regarded permissible in essence.
- The basis for the stipulation of contract consummation before ownership transfer at the time of repurchase, and not to solely base it on a lapse of its duration, is that ownership doesn't transfer unless by way of a formulation (verbal or action-based), and the contract terms depend on it, such as stipulation of consent, knowledge [about transfer], and ability to deliver, and so on. In addition, it is lest that automatic transfer without contract consummation at the time would be tantamount to a contingent sale.
- The basis for permissibility that the buyer may retain the legal deed of the asset ('Ain), subject matter of the sale, is that ownership, from Shari'ah standpoint, transfers by way of offer and acceptance, while legal registration is meant for documentation purposes.
- The basis for permissibility of repurchasing a commodity at an auction, and even for a price lower than the deferred price is the absence of collusion between the two contracting parties. This is because of the possibility that the asset is purchased by other than the original seller, and because the price will be set and established based on the auction mechanism, and in which case the second sale is struck at market price rather than a pre-determined price.
- The basis for impermissibility of collusion with a third party to the effect that the commodity is resold to the original seller at a cash price lower than the deferred price is that it is tantamount to a stratagem for Einah, and the engagement of the third party does not change

the very essence of the transaction. This engagement is meant as a device to return the commodity to its original seller.

- The basis for impermissibility of the binding promise to purchase at a specified price by the Mudarib or managing partner or investment agent (Wakeel), is that it results in, and contrary to the contract's intended effect, the work provider (the worker) being liable for loss, while the worker only does his work in a fiduciary capacity, and shall not be held liable unless in cases of misconduct or negligence . Ibn Qudamah (may Allah bless his soul) is reported to have said: "the third category- of invalid/voidable stipulations/conditions is: the stipulation of anything that may be harmful/ detrimental as to the contract per se or its effects such as when the Mudarib is stipulated to guarantee the capital of Mudarabah or to cover loss" . Furthermore, the stipulation of guaranteeing capital by the worker will render the contract void of its intended implication and renders it a loan (associated with benefits); in essence, a loan differs from Mudarabah in the sense that money is guaranteed in the former, and not guaranteed in the latter. Hence, if the capital provider is a partner as to the profit made, Mudarabah will be tantamount to a loan associated with benefits .
- The basis for permissibility of leasing a purchased asset to the seller, along with a promise to enable ownership transfer is that the transaction is not viewed as Einah, which is impermissible, due to the following reasons:
  - That the rent (Ujrah) is paid against or in return for the usufruct (Manfa'ah), and it is renewable over the term of Ijarah. The subject matter of the contract of Ijarah differs from its counterpart in the first contract of sale.
  - That the validity of the transaction depends, among others, on the lapse of a period between the first sale and re-ownership, during which the asset's characteristic or value would change.
  - That ensuing ownership will usually be either through gift (Hibah) or purchase at a price lower than initial price.
- The basis for permissibility of leasing the asset back to its owner is that the lessee owns the usufruct, and hence it is permissible that he disposes of it by leasing it to the owner or others.
- The basis for impermissibility that a partner in a contractual partnership (Sharikat al-Aqd) undertakes to buy his partner's share at a predetermined price is that such a practice contradicts the intended effect of profit and loss sharing. However, if purchase is executed at market value, then it is permissible, because the market value reflects the profit or loss of a partnership at the time of execution.
- The basis for permissibility that a partner in an ownership partnership (Sharikat al-Mulk) undertakes to buy his partner's share at a predetermined price is that the partner here is a third party/ outsider with respect to his partner's share; neither party disposes unilaterally of the other's share without his permission, and such undertaking leads to no Shari'ah violation.
- The basis for the Shari'ah characterization of the repurchase agreement as an interest-bearing loan is that the essential consideration in contracts, from a Shari'ah perspective, is the real intention rather than forms. The transaction is, in essence, a loan extended by the purchaser of financial assets to the buyer of these assets, which are pledged as collateral to the benefit of the borrower (the buyer). The sale is not genuine (it is fictitious) and it does not lead to the intended effects of a sale, but is rather a means of security. The growth (increase in value) of these assets, and any profit/ dividends distributions during the interval between sale and repurchase (redemption) will solely belong to the buyer, who shall likewise bear any losses resulting from decrease in value. The buyer (borrower) cannot also dispose of these assets or extract benefit therefrom, as they only constitute a security for the debt

owed by the buyer (borrower). The majority of laws (positive laws) consider the transaction a loan, but not a sale.

- The basis for permissibility of back-to-back loans, extended on equal footing, is that the benefit extracted from the loan does not solely belong to the lender, but shall belong to both parties. In analogy to Suftajah (), the benefit belongs to both parties and shall not be confined to either one without the other. Ibn Qudamah is reported to have said: "it was narrated, on the authority of Imam Ahmad, that it is permissible; as it brings about benefits to both of them together. And Ata'a said: Ibn Al Zubair used to receive money (dirhams) from a folk in Makkah (Mecca), and provides them with a receipt thereof, instructing Musa'ab Bin Alzubair in Iraq to pay them an equivalent amount there. Ibn Abbas was inquired about that and he considered it valid. It was narrated that Ali (may Allah be pleased with Him) was quizzed about the same, and he did not see any issue therein. However, among those who raised issues in this regard, there are Ibn Sereen and Alnakh'ee. The right ruling is that it is permissible, as it is in both parties' interest, and no harm would be inflicted on either one. Shari'ah has not denied any harmless interest (Maslahah), but viewed it permissible. And this is because this is not considered impermissible by virtue of a textual source or not in the sense of a textual prohibition. Therefore, it was kept permissible . This might be the difference between back-to-back loans and the matter of "a loan against a loan: lend me and I lend you), which was considered impermissible by earlier Fuqaha. This matter is seen as one transaction embedded with a condition (Shart) to the benefit of the lender. However, back-to-back loans constitute a contractual set-up aiming to establish cooperation between the two parties, so that when one party is in need of cash, the other will lend him without any preference of one over the other. The condition (and I lend you) might be to the benefit to one party at a time, and to the benefit of the other at another; each is a borrower and lender.

Shari'ah Standard No. (36)

Impact of Contingent Incidents on Commitments

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

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

Preface

This Standard aims to illustrate the contingent incidents which come suddenly upon commitments and cause deviation from stipulated results.

Statement of the Standard

1. Scope of the Standard

This Standard covers the contingent incidents encountered in honoring the commitments that stem from application of Islamic modes of financing and investment by Islamic financial institutions (Institution/ Institutions).[1] It also covers the effects of such incidents on commitments.

The Standard, however, does not cover defects of will or the conducts that result from mutual consent of the two parties.

2. Definition of Contingent Incidents

Contingent incidents in this standard refer to those incidents which occur suddenly and cause significant influence on commitments that are properly stipulated. Therefore, contingent incidents are different from defects of will, which exist since the time of signing the contract, although their impact occurs later on. Contingent incidents are also different from termination of commitments on mutual consent of the two parties or as per the desire of any of them; when a party is entitled to such right by virtue of the contract.

3. Types of Contingent Incidents

From the standpoint of its influence, a contingent incident can be either of the type that necessitates amendments in the contract, or the type which constitutes an external reason for termination of the contract.

4. Contingencies Leading to Amendment of the Contract

The impact of such contingencies is confined to necessitating amendments in the contract rather than leading to its complete termination. Practical examples of such contingencies include the following among others:

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

4/1 Levy of custom duties or taxes after signing the contract. Such incident affects the commitment of the party who has to bear the new obligations by virtue of law or as per the stipulations of the contract.

4/2 Change in the prices of the commodities used in implementation of a contract in a way that subjects the contractor to serious harm. Actual harm in this case can be removed through reconciliation, arbitration or legal arrangements.

4/3 Prevention of importation of the goods to be delivered in fulfillment of a Murabahah or Ijarah contract. The actual harm caused to the client or the Institution can, in this case, be removed by resort to reconciliation, arbitration or law.

4/4 Change in laws leading to more financial commitments to be borne by one of the two parties. Determination of the party who shall bear the additional burden can be reached by resort to law or as per the stipulations of the contract.

5. Contingencies Which Constitute External Reasons for Termination of the Contract

This type of contingencies leads to termination of commitments without intervention of any of the two parties. Bearing of the consequences in this case is to be assigned to the competent party, as when an owner has to bear the consequences relating to what he owns. Examples of such contingencies include, among others:

5/1 When delivery becomes impossible or useless

In this case the fulfillment of the commitment becomes impossible or of no use; as when the commitment to supply the requirements of a conference could not be fulfilled before holding the conference. In such case the commitment shall become null and void if:

5/1/1 Failure to honor the commitment is absolutely inevitable.

5/1/2 Failure to honor the commitment originates from objective rather than personal reasons.

5/1/3 Failure to honor the commitment is caused by an external party.

5/2 Total or partial damage of the object of commitment

If the object of commitment is damaged before being delivered to the committing party, the loss should be borne by the committed party. Similarly, when the commitment object is completely damaged due to an act of the committing party, that party should bear the loss. In case of partial damage of the object of commitment before actual or legal delivery to the committing party, and if the damage is caused by a heavenly factor (Sabab Samawi) which the committed partly can by no means avoid, the committing party should have the right of option.

5/3 Entitlement to the object of commitment

If the object of commitment turned out to be owned by someone else other the committed party, the committing party becomes entitled to compensation. If the object of commitment is partly owned by someone else the commitment in that part becomes null and void, and the committing party shall have the right of option with regard to accepting or declining the remaining part of the commitment object. The committing party may choose to accept the remaining part as part of his compensation or he may terminate the contract due to fragmentation of delivery.

5/4 Termination of commitment due to excuses

When the emergence of an incidental excuse in Ijarah leads to abnormal harm, the harmed party has the right to terminate the contract. The party who encounters the incident may also terminate the contract if his excuse is obvious. If acceptability of the excuse is doubtful the issue may be resolved by mutual agreement, or resort to law. [see Shari'ah Standard No. (9) on Ijarah or Ijarah Muntahiah Bittamleek; and Shari'ah Standard No. (34) on Hiring of Persons]

5/5 Jawa`ih (calamities)

The term Jawa`ih refers to any incident (other than human acts) which cannot be avoided even if known. The effects of such incidents are – originally - noticeable in selling of fruits and other agricultural products, where the occurrence of an incident of this type leads to discounting the

price in proportion to the damage in the product. An example of this can also be seen in the "Ijarah Muntahia Bittamleek Contract". In this case the amount of rent in excess of the normal rent of similar property is dropped when ownership cannot be transferred to the lessor for a reason which the lessee cannot stop. [see Shari'ah Standard No. (9) on Ijarah or Ijarah Muntahia Bittamleek, item 8/8]

6. Date of Issuance of the Standard

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

Adoption of the Standard

The Shari'ah Board adopted the Standard on Impact of Contingent Incidents on Commitments in its meeting No. (23) held in the Kingdom of Bahrain on Thursday – Saturday 15-17 Rabi' I, 1430 A.H., corresponding to 12-13 March 2009 A.D.

Appendix (A)
Brief History of the Preparation of the Standard

In its meeting No. (14) held on 21–23 Rabi' I, 1426 A.H., corresponding to 30 April - 2 May 2005 A.D., in Dubai (U. A. E.), the Shari'ah Board decided to issue a Shari'ah Standard on Impact of Contingent Incidents on Commitments.

On 29 Jumada I, 1426 A.H., corresponding to 6 July 2005 A.D., the Shari'ah Standards Committee decided to commission a consultant to prepare a study on Impact of Contingent Incidents on Commitments.

The study was discussed in a joint meeting of the Shari'ah Standards Committees (1) and (2), held in Makkah Al-Mukarramah on 8–9 Rabi' I, 1427 A.H., corresponding to 6-7 April 2006 A.D. The Joint Committee then advised the consultant to introduce the necessary changes in the Standard, in the light of the discussions and observations of the meeting.

The revised draft of the Standard was discussed in another joint meeting of the Shari'ah Standards Committees (1) and (2), held in the Kingdom of Bahrain, on Thursday 21 Sha'ban 1427 A.H., corresponding to 14 September 2006 A.D. The consultant was again advised to introduce changes in the Standard as per the discussions and observations of the meeting.

In its meeting No. (20) held in the Kingdom of Bahrain, on 4-8 Safar 1429 A.H., corresponding to 11-15 February 2008 A.D., the Shari'ah Board discussed the Changes in the Standard which had been made by the joint meeting of Shari'ah Standards Committees (1) and (2), and introduced changes that it deemed necessary.

The Secretarial General of AAOIFI held a public hearing in the Kingdom of Bahrain on 24 Safar 1430 A.H., corresponding to 19 February 2009 A.D.

More than 30 participants attended the session as representatives of central banks, Institutions, and accounting firms. The session was also attended by Shari'ah scholars, university teachers and other interested parties. Several observations were made in the session, and duly responded to by the members of the Shari'ah Standards Committees (1) and (2).

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

Appendix (B)
The Shari'ah Basis for the Standard

- Permissibility of amending the commitment to absorb the impacts of contingent incidents is based on the fact that in such cases Muslims should strive for appropriate disposition without rushing to termination of the commitment. This rule is adopted by the various schools of Fiqh with regard to external incidents which take place without the intervention of any of the two parties.
- The ruling that the commitment shall become null and void if its fulfillment has become useless is based on the fact that implementation of a useless commitment is an act of futility, while there is no room for futility in Shari'ah legislation as indicated by Al-Shatibi and others.
- The basis for the ruling that commitment shall become ineffective when the object of the contract turns out to be owned by someone else other than the committed party, is that unlawful seizure is unrecognizable as a basis of ownership. The Prophet (peace be upon him) is reported to have said: *"An extorter is indebted with what he takes until he returns it back"*.(2)
- The basis for the rulings relating to Jawa`ih (calamities) is the Hadith(3) (Prophetic tradition) which states: *"The Prophet (peace be upon him) has forbidden Bay' al-Sinin (sale of agricultural produce for many years to come), and permitted value discounts on calamities"*. Therefore, rulings can be derived from this Hadith for similar cases when the object of the contract is lost due to an inevitable incident.

(2) Related by Ahmad in his *"Musnad"*; *"Ashab Al-Sunan"*; and Al-Hakim in his *"Mustadrak"*, quoting Samrah, and *"Al-Fath Al-Kabir"* [2: 232].

(3) This Hadith has been related by Muslim, Abu Dawud and Al-Nasa`i: *"Majma' Al-Zawa`id"* [1: 703].

Appendix (C)
Definitions

Contingencies Relating to Legal Competence

Incidental change in personal traits which leads to loss of competence and induce mal-disposition.

Defects of Will

Hidden matters which coincide with the inception of the contract and entail amendments of rights and duties when they occur.

Al-Jawa`ih

Catastrophes which hit the produce and damage it partially or totally, such as storms and the like.

Contingent Incidents (*force majeure*)

Abnormal incidents which justify procedures that are not allowed under normal circumstances. Examples of such incidents include wars, internal unrest, and natural catastrophes.[4] Describing such incidents as "heavenly" is to indicate the inability of human beings to avoid them. Examples of such incidents include, for instance, insanity forgetfulness and unconsciousness,

Heavenly Incidents

Incidents which human beings cannot avoid. It includes also the strict directives of Shari'ah in which the slaves of Allah, the Almighty, have no room for choice.[5]

(4) *"Mu'jam Mustalahat Al-Shari'ah Wa Al-Qanun"*, Dr. Abdul-Wahid Karam (P. 676).
(5) *"Mu'jam Mustalahat Usul Al-Fiqh"*, Dr. Qutb Mustafa Sano (P. 305).

Istihqaq (Entitlement)

Occurrence of the fact that someone else has the full right of total or partial ownership on the sold property.[6] It can also be defined as existence of other verifiable claims of right on the property which one party pledged to deliver to the other.[7]

(6) *"Al-Khiyar Wa Atharuh Fi Al-'Uqud"* (P. 478).
(7) *"Mu'jam Mustalahat Al-Shari'ah Wa Al-Qanun"* (P. 37).

Shari'ah Standard No. (5)

Guarantees

(Revised Standard)

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

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

Preface

The aim of this standard is to outline the Shari'ah rules governing guarantees, and to clarify the forms of guarantees that are permissible or prohibited. It also outlines some significant modern applications of guarantees as employed by Islamic financial Institutions (Institution/ Institutions).[1]

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

Statement of the Standard

1. Scope of the Standard

This standard covers securities (Guarantees) intended to secure obligations and protect debts against procrastination and default. Such securities may take the form of written documents, attestations, personal guarantees, mortgages, cheques and promissory notes. The standard also explains the permissible and prohibited forms of securities. It also intends to distinguish between liabilities and the assets held on trust.

The standard does not cover guarantees against torts.

2. General Rulings on Guarantees

2/1 Permissibility of guarantees and their relevance to contracts

2/1/1 A contract of guarantee is permissible in contracts of exchange, e.g. a contract of sale, or contract of rights, e.g. right of intellectual property. Such a guarantee contract does not affect the permissibility of the original contract in which it is required. It is, moreover, permissible to stipulate a guarantee into the body of an original at one time, because guarantee is appropriate to, or relevant in, contracts.

2/1/2 There is no objection in Shari'ah to include a number of guarantees in one contract, such as incorporating a personal guarantee together with a mortgage of security in the same contract.

2/2 Guarantees in trust (fiduciary) contracts

2/2/1 It is not permissible to stipulate in trust (fiduciary) contracts, e.g. agency contracts or contracts of deposits, that a personal guarantee or mortgage of security be produced, because such a stipulation is against the nature of trust (fiduciary) contracts, unless such a stipulation is intended to cover cases of miscon-

duct, negligence or breach of conditions or stipulations. The prohibition against seeking a guarantee in trust contracts is more stringent in Musharakah and Mudarabah contracts, since it is not permitted to require from a manager in the Mudarabah or the Musharakah contract or an investment agent or one of the partners in these contracts to guarantee the capital, or to promise a guaranteed profit. Moreover, it is not permissible for these contracts to be marketed or operated as a guaranteed investment.

2/2/2 It is not permissible to combine agency and personal guarantees in one contract at the same time (i.e. the same party acting in the capacity of an agent on one hand and acting as a guarantor on the other hand), because such a combination conflicts with the nature of these contracts. In addition, a guarantee given by a party acting as an agent in respect of an investment turns the transaction into an interest-based loan, since the capital of the investment is guaranteed in addition to the proceeds of the investment, (i.e. as though the investment agent had taken a loan and repaid it with an additional sum which is tantamount to Riba). But if a guarantee is not stipulated in the agency contract and the agent voluntarily provides a guarantee to his clients independently of the agency contract, the agent becomes a guarantor in a different capacity from that of agent. In this case, such an agent will remain liable as guarantor even if he is discharged from acting as agent.

2/3 Guaranteeing existing leased properties

The lessor bears the risk associated with the leased property and the lessee holds it on a trust basis. Hence, it is not permissible for the lessor to stipulate in the lease contract that the lessee provide a guarantee or mortgage of security, etc., so that he may use it to recover the amount of the lease rental if the leased property is damaged, unless such a stipulation is restricted to cases of misconduct, negligence or breach of contract. Therefore, the lessor is liable for the consequences of any damage to the leased property that is not caused

by the misconduct or negligence of the lessee, and is responsible for any related insurance expenses. The lessor also bears the expense of any major maintenance work required to keep the leased property in the condition necessary to provide the contractual benefits under the lease.

2/4 Written documentation and attestation

2/4/1 Documentation in writing is recommended by Shari'ah, whether such documentation is in the form of ordinary (private) or official documents. However, customary practice is applicable in the drawing up of such documents and in determining the documents that are relevant as proof (or have evidential value). It is prohibited to forge documents or to conceal their contents or to destroy them so as to bring about the loss of other peoples' rights.

2/4/2 Attestation in financial transactions is recommended by Shari'ah. It is also commendable, and in case of necessity it is obligatory, to give testimony. On the other hand, perjury is prohibited and is one of the major sins.

2/4/3 It is not permitted to scribe or witness acts prohibited by Shari'ah, such as certifying or witnessing borrowing on the basis of interest.

3. Personal Guarantees

3/1 Permissibility and types of personal guarantee

3/1/1 It is permissible for an Institution to stipulate that a customer should provide one or more guarantors to secure the debts owed by the customer.

3/1/2 Personal guarantees are divided into two types. One type is a guarantee where the guarantor has a right of recourse to the debtor, and this guarantee is offered at the request or with the consent of the debtor. The other type is a non-recourse guarantee, which is offered voluntarily by a third party without the debtor's request or consent (voluntary guarantee).

3/1/3 An Institution is not entitled to guarantee financial commitments without a right of recourse to the debtor, i.e. to be a non-recourse guarantor, unless the Institution is already authorised by its shareholders and investors to make donations or to perform acts of benevolence.

3/1/4 It is permissible to fix the duration of a personal guarantee. It is also permissible to set a ceiling on the amount to be guaranteed and it is permissible that the personal guarantee be restricted by, or be contingent upon, a condition. In addition, it is permissible that such a guarantee be made contingent upon a future event, for example, by fixing a future date at which liability will commence and, in this case, the guarantor may validly withdraw the guarantee, by notifying the creditor, before the prospective obligation to be guaranteed arises.

3/1/5 It is not permissible to take any remuneration whatsoever for providing a personal guarantee per se, or to pay commission for obtaining such a guarantee. The guarantor is, however, entitled to claim any expenses actually incurred during the period of a personal guarantee, and the Institution is not obliged to inquire as to how the guarantee produced has been obtained by the customer. [see item 7/1/1 and 7/1/2)]

3/2 Guaranteeing unknown (Majhul) and future debts

A valid guarantee may be given for debts, the exact amount of which is unknown. Similarly, a valid guarantee may be given for a debt that will arise in the future. However, it is permissible for the guarantor to withdraw such a guarantee before a future debt is actually created, after notifying the person having interest in the guarantee. This is called a "market (business) guarantee," or a "guarantee of contractual obligation." An example of this type is a third party's guarantee to refund the price to the buyer if it appears that the sold commodity belongs to a person other than the seller and this guarantee is known as *Daman al-Dark* (dealers/business misrepresentation guarantee).

3/3 The effect of a personal guarantee

3/3/1 The creditor is entitled to claim the amount of his debt from either the debtor or the guarantor and he has the choice of claiming his right from either of them. However, the guarantor is entitled to arrange the order of liability, for example, by stipulating (at the conclusion of the contract of guarantee) that the creditor shall first claim payment from the principal debtor and that the creditor is entitled to recourse to the guarantor for payment only if the principal debtor refuses to fulfil his obligation.

3/3/2 If the creditor discharges the debtor from the debt, the guarantor is also discharged automatically from his liability. However, if the creditor discharges the guarantor from liability, the debtor remains in debt. If the guarantor secures a discount that results in paying an amount less than the original debt, the guarantor is entitled to recover only the amount he has actually paid to the creditor; he cannot demand that the debtor pay the debt in full ignoring the discount. This rule is intended to prevent a procedure being used that potentially leads to Riba. However, if the guarantor reaches an agreement with the creditor to settle the debt using as consideration a commodity of a different type from that in which the original debt was designated, the guarantor is entitled to recover the exact amount of the commodity provided as consideration for the debt, or the exact amount of the debt, whichever is less.

3/3/3 It is permissible for a personal guarantee contract to be designated in a separate contract. It can also be concluded together with, or before, or after, the conclusion of the contract of a credit transaction.

3/3/4 If an Institution manages transactions on the basis of Mudarabah or Musharakah or investment agency, it is not permitted for it to guarantee the fluctuations of currency exchange rates so that the investors will recover their investment shares irrespective of the behaviour of the currency market. Such a guarantee is prohibited

because it is tantamount to the Mudarib or partner or investment agent guaranteeing the capital of other partners or investors, which is prohibited by Shari'ah. [see items 2/21 and 2/2/2]

3/3/5 If the contract of a credit transaction stipulates that the debtor shall provide a guarantor and the debtor fails to provide one, the Institution is entitled to initiate legal action to force him to provide a guarantor or to terminate the contract.

4. Mortgage (Rahn)

It is to make a financial asset or so tied to a debt so that the asset or its value is used for repayment of the debt in case of default. [see Shari'ah Standard No. (39) on Mortgage]

5. Cases of Achieving the Objectives of Securities

5/1 Bringing forward future instalments in case of default on payment

It is permissible to include a term in a debt contract to the effect that, if the debtor defaults on the payment of one or more instalments, some or all of the future instalments shall fall due immediately, provided the default was not caused by unforeseeable intervening events or force majeure. However, this term shall not be effective until the debtor has been served with a reminder notice and after a reasonable period of time has elapsed.

5/2 Termination of a sale on deferred payment terms in case of failure to pay

The seller is entitled, in a contract of sale on a deferred payment basis, to stipulate that if the buyer fails to pay the price within a certain period of time, the seller is entitled to revoke the contract and repossess the sold asset without recourse to the courts.

6. Some Contemporary Applications of Securities

6/1 Letters of guarantee

6/1/1 It is not permissible to take remuneration for issuing a letter of guarantee, whether it is with cover or without cover, if the remuneration is intended as consideration for the guarantee

per se, since the amount guaranteed and the duration of the guarantee are usually taken into consideration in computing remuneration.

6/1/2 Asking an applicant for a letter of guarantee to bear administrative expenses incurred in issuing a letter of guarantee of either type (i.e. preliminary or final) is permissible in Shari'ah, provided the remuneration for such expenses do not exceed the commission that others would charge for such services. Where full or partial cover is provided, it is permissible, in estimating the expenses for issuing a letter of guarantee, to take into account anything that will reflect the actual service to be rendered in providing a cover for the transaction.

6/1/3 It is not permitted for the Institution to issue a letter of guarantee in favour of an applicant who will use it to acquire an interest-based loan or to conclude a prohibited transaction.

6/2 Documentary credit

It is a written undertaking by a bank (known as the issuer) given to the seller (the beneficiary) as per the buyer's (applicant's or orderer's) instruction or is issued by the bank for its own use, undertaking to pay up to a specified amount (in cash or through acceptance or discounting of a bill of exchange), within a certain period of time, provided that the seller present documents for the goods conforming to the instructions.

In brief, a documentary credit is an undertaking by a bank to pay subject to conformity of the documents to the contractual instructions. [see Shari'ah Standard No. (14) on Documentary Credit]

6/3 Use of cheques or promissory notes

There is no Shari'ah objection to obtaining cheques or promissory notes from the debtor (unless not allowed by law) as a means to force the debtor to make timely payment of instalments in cash, whereby if the debtor pays on time such cheques or promissory notes shall be returned to him, and in the event of default on payment they

may be produced for recovery. The party providing these cheques or promissory notes as security is entitled to obtain an undertaking from the Institution that they will be used only for timely recovery of its due debts without any addition.

6/4 Insurance for doubtful or bad debts

It is permissible to subscribe to an Islamic insurance coverage as security for debt obligations and it is not permissible that debts be insured on a conventional insurance basis.

6/5 Freezing cash deposits (blocking withdrawals)

6/5/1 In order to secure the future payment of debts on a single payment or an instalment basis, it is permissible for the Institution to stipulate, that it is entitled to freeze the customer's investment account, or to revoke his right to withdraw money from such an account entirely or to block an amount in the account equivalent to the debt, which is the preferred option. Nevertheless, the customer remains entitled to share profits on the whole balance of the investment account after deducting the Institution's share for acting as a Mudarib.

6/5/2 In a credit transaction, it is not permitted for the Institution to stipulate a right to freeze the customer's current account. However, a stipulation of this kind is allowed where the customer has freely, willingly and absolutely agreed to his current account to be frozen.

6/6 Third party guarantees (voluntary undertakings to compensate an investment loss)

It is permissible for a third party, other than the Mudarib or investment agent or one of the partners, to undertake voluntarily that he will compensate the investment losses of the party to whom the undertaking is given, provided this guarantee is not linked in any manner to the Mudarabah financing contract or investment agency contract.

6/7 Underwriting the subscription of shares issued (subscription guarantee)

6/7/1 It is permissible for the Institution to undertake that it will underwrite the remaining shares offered for subscription after the expiry of the offer period, provided the shares are underwritten at the offer value without any consideration for the underwriting per se.

6/7/2 The underwriter is entitled to receive consideration for a service it provides other than the guarantee, such as conducting a feasibility study or marketing the shares.

6/8 Guarantees in tenders, security deposits in Murabahah transactions and 'Arboun (Earnest Money)

6/8/1 It is permissible to obtain guarantees for tenders and this includes both the amounts paid for participating in the bid (primary cash security for participating in the bid) and the amounts paid when the contract is awarded to the successful bidder (final cash security providing evidence of ability to complete the project). Such amounts shall be considered as being held on trust by the offeror of the bid on behalf of the successful bidder, and are not viewed as 'Arboun (Earnest Money). Hence, such amounts are recoverable if they are intermingled with other amounts of money (i.e. irrespective of any unwanted circumstances). Moreover, it is not permissible to confiscate such amounts of money, except in compensation for an equivalent amount of financial damage actually sustained in the tendering process. Such amounts may be invested in the benefit of the customer with his consent, unless he requests it to be credited to his current account.

6/8/2 It is permissible for the Institution, in the case of a unilateral binding promise, to take a sum of money called *Hamish Jiddiyyah* (security deposit) from the purchase orderer (customer) as security for his promise. This sum of money is held on trust, not as

'Arboun, because no contract has been established. The rules set out in item 6/8/1 apply here. Where the customer fails to honour his binding promise, the Institution is not permitted to retain the security deposit as such. Instead, the Institution's rights are limited to deducting the amount of any damage actually incurred as a result of the breach, namely the difference between the cost of the item to the Institution and its selling price to a third party.

6/8/3 It is permissible to take 'Arboun from a buyer or lessee when a sale or lease contract is concluded, on condition that, if the contract is not terminated within the specified period during which the option to terminate the contract remains valid, such an amount will be considered as part of the consideration for the contract and, if the buyer or lessee fails to perform the contract within this period, the seller or lessor is entitled to retain the amount. It is, however, preferable that the Institution should refund to the customer any balance remaining after deducting from the 'Arboun the amount of any damage actually sustained by it.

6/9 Priority right of recovery and the right to follow up

6/9/1 The Institution is entitled to recover first its tangible items that were sold to or manufactured for a customer and have not been paid for and can be identified among the assets of the customer.

6/9/2 The Institution is entitled to protect the integrity of the subject of a guarantee, such as a mortgaged asset, and pursue a legal action against misusing it if it is established that the person holding it is using it in a manner that may lead to losses to be borne by the Institution.

6/9/3 The rights of the parties holding mortgages of security shall be given priority over the rights of the parties who are unsecured. [see Shari'ah Standard No. (39)]

6/9/4 In the event of bankruptcy or liquidation, the parties in charge of the liquidation have a preferential right or priority over other creditors in recovering their rights; i.e. the cost of any services provided in the process of liquidation. [see Shari'ah Standard No. (43) on Insolvency]

7. Date of Issuance of the Standard

This Standard was issued on 29 Safar 1422 A.H., corresponding to 23 May 2001 A.D.

Adoption of the Standard

The Shari'ah Standard on Guarantees was adopted by the Shari'ah Board in its meeting No. (6) held on 25-29 Safar 1422 A.H., corresponding to 19-23 May 2001 A.D.

Appendix (A)
Brief History of the Preparation of the Standard

In its meeting No. (2) held in Mecca on 10-14 Ramadan 1420 A.H., corresponding to 18-22 December 1999 A.D., the Shari'ah Board decided to give priority to the preparation of a Shari'ah Standard on Guarantees.

On Tuesday 27 Ramadan 1420 A.H., corresponding to 4 January 2000 A.D., a Shari'ah consultant was commissioned to prepare a juristic study and an exposure draft.

In its meeting held in Bahrain on 18-19 Rabi' I, 1421 A.H., corresponding to 20-21 June 2000 A.D., the Shari'ah Committee discussed the juristic study and made certain amendments to it. The committee also discussed the exposure draft of the Standard in its meeting No. (6) held in Bahrain on 20-21 Jumada II, 1421 A.H., corresponding to 18-19 September 2000 A.D., and asked the consultant to make some amendments in light of the comments made by the members.

In its meeting No. (7) held in Bahrain on 5-6 Sha'ban 1421 A.H., corresponding to 1-2 November 2000 A.D., the Shari'ah Committee discussed the exposure draft and made some relevant amendments.

The revised exposure draft of the standard was presented to the Shari'ah Board in its meeting No. (5) held in Mecca on 8-12 Ramadan 1421 A.H., corresponding to 4-8 December 2000 A.D. The Shari'ah Board made further amendments to the exposure draft of the standard and decided that it should be distributed to specialists and interested parties in order to obtain their comments in order to discuss them in a public hearing.

A public hearing was held in Bahrain on 4-5 Dhul-Hajjah 1421 A.H., corresponding to 27-28 February 2001 A.D. The public hearing was attended

by more than 30 participants representing central banks, Institutions, accounting firms, Shari'ah scholars, academics and others who are interested in this field. Members of the Shari'ah studies committee responded to the written comments that were sent prior to the public hearing as well as to the oral comments that were expressed in the public hearing.

The Shari'ah Committee held its meeting No. (8) on 16-17 Dhul-Hajjah 1421 A.H., corresponding to 11-12 March 2001 A.D., to discuss the comments made about the exposure draft. The committee made the necessary amendments in light of both the written comments that were received and oral comments that took place in the public hearing.

The Shari'ah Board in its meeting No. (6) held in Al-Madinah Al-Munawwarah on 25-29 Safar 1422 A.H., corresponding to 19-23 May 2001 A.D., discussed the amendments made by the Shari'ah Committee, and made necessary amendments. The Shari'ah Board unanimously adopted some of the items of the standard and some items were adopted by the majority vote of the members of the Shari'ah Board, as recorded in the minutes of the meetings of the Shari'ah Board.

The Shari'ah Standards Review Committee reviewed the standard in its meeting held in Muharram 1433 A.H., corresponding to November 2011 A.D., in the State of Qatar, and proposed after deliberation a set of amendments (additions, deletions, and rephrasing) as deemed necessary, and then submitted the proposed amendments to the Shari'ah Board for approval as it deemed necessary.

In its meeting No. (38) held in Al-Madinah Al-Munawwarah, Kingdom of Saudi Arabia on 28 Sha'ban - 1 Ramadan 1435 A.H., corresponding to 26-28 June 2014 A.D., the Shari'ah Board discussed the proposed amendments submitted by the Shari'ah Standards Review Committee. After deliberation, the Shari'ah Board approved necessary amendments, and the standard was adopted in its current amended version.

Appendix (B)
The Shari'ah Basis for the Standard

Permissibility of Guarantees and Its Relevance to Contracts

The basis of the permissibility of stipulating guarantees in contracts is that it protects property, which is one of the objectives of Shari'ah. The other authorities mentioned in the standard in support of each kind of guarantee can be cited as authority for the permissibility of guarantees in contracts.

Guarantees in Trust Contracts

Assets held on trust must be returned to their owners in the manner in which they were received and in their original physical state promptly after the owners demand their return. Allah, the Almighty, says: ***{"Allah doth command you to render back your trusts to those to whom they are due"}.***[2] Since such assets are not subject to exchange, they are purposely meant either for custody with permission to use them, such as assets on deposit, or for charitable acts, such as a loan of tangible assets. Therefore, the persons holding such assets are considered by the owners from the beginning as capable of returning them to their owners on demand, making them trustees, and as a principle of Shari'ah, a trustee is not held liable (for loss of, or damage to, an asset held on trust), except in circumstances of misconduct, negligence or violation of the conditions agreed upon, because in other circumstances it is inconsistent with the fundamental principle of trusts for a trustee to be held liable.

Written Documentation and Attestation

Written documentation is recommended by Shari'ah. This is the opinion of the majority of Fuqaha, in contrast to Ibn Hazm who argued that written documentation is an obligation (i.e. if one did not put his financial

(2) [Al-Nisa` (Women): 58].

transactions in writing he has committed a sin) relying on the literal meaning of the Qura`nic verse: ***{"O ye who believe! When you deal with each other, in transactions involving future obligations in a fixed period time, reduce them to writing"}***[3] and the Quranic Verse: ***{"Disdain not to reduce to writing your contract for a future period, whether it be small or big".***[4] The majority of Fuqaha have also inferred that this verse itself excluded written documentation in the cases of trustworthiness, as the last part of the following verse says: ***{"And if one of you deposits a thing on trust with another, let the trustee (faithfully) discharge his trust and left him fear Allah his Lord."}***

It must be noted that customary practice is the basis in determining the form and evidential value of written documentation, because Shari'ah did not specify a particular manner of writing to be considered. As for the permissibility of attestation as documentation, the authority for that is the following Qura`nic verse: ***{"And get out two witnesses, out of your own men. And if there are not two men, then a man and two women, such as ye choose, for witnesses, so that if one of them errs, the other can remind her"}.***[5]

The evidential value of attestation according to traditional Fuqaha is stronger than that of written documentation. But in modern times, things have changed so that some laws rely on witnesses only in a very limited number of cases and paramount importance is given to written documentary evidence.

Personal Guarantees

Permissibility of personal guarantees

Personal guarantees derive their permissibility from the Qura`n, Sunnah, consensus and reasoning. In the Qura`n, Allah, the Almighty, says: ***{"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'"}.***[6] In Sunnah, there is the Hadith narrated by Salamah Ibn Al-Akwa', who said: "We were with the

(3) [Al Baqarah (The Cow): 282].
(4) [Al Baqarah (The Cow): 282].
(5) [Al Baqarah (The Cow): 282].
(6) [Yusuf (Joseph): 72].

Prophet (peace be upon him) when a deceased person was brought. They said, 'O Prophet of Allah, perform prayers on him.' He (peace be upon him) said, *'Has the deceased left anything?'* They said, 'No.' He (peace be upon him) said, *'Is he in debt?'* They said, 'Three dinars.' He said, *'Perform prayers on your companion.'* Abu Qatadah said, 'O Messenger of Allah, perform prayer on him, and I am responsible for his debt.' Then the Prophet (peace be upon him) performed prayers on him."(7) In another text of the Hadith, he (Qatadah) said: "I guarantee (to pay) his debt."(8)

The Fuqaha are unanimous on the permissibility of personal guarantees. Moreover, the need of people for personal guarantees to facilitate dealings with each other had also made them legitimate, particularly in the case of customers who lack a good credit record. In addition, personal guarantees encourage performance and prevent the contract from being breached and this security also justifies their permissibility.

The objection to taking consideration for personal guarantees is that giving a guarantee is one of the charitable acts that should be offered without consideration, and this ruling has generated consensus among the Fuqaha. Moreover, a personal guarantee indicates a readiness to give away the amount of a loan, which means that the guarantor will pay the loan (if the principal debtor fails to pay) and have recourse to the guaranteed person for fulfilment. Hence, it is not permissible to take consideration for a guarantee, because it is not permissible to take consideration for giving away the amount of the loan itself, since such consideration is considered to be Riba.

Guaranteeing unknown and future debts

The Shari'ah basis for the permissibility of guaranteeing the unknown is the general meaning of the Hadith: *"The guarantor is liable."*(9) because

(7) Related by Al-Bukhari in his *"Sahih"* [2: 800], Dar Ibn Kathir and Yamamah.

(8) *"Sunan Al-Nasa`i"* [7: 317]; *"Sunan Ibn Majah"*, [2: 804]; and Al-Bayhaqi in *"Al-Sunan Al-Kubra"* [4: 95].

(9) The Hadith has been related by Ahmad, Abu Dawud, and Al-Tirmidhi: *"Al-Darari Al-Mudiyyah"* [1: 399], Dar Al-Jil; Ibn Majah in his *"Sunan Ibn Majah"* [2: 804], Dar Al-Fikr; and Al-Bayhaqi in *"Al-Sunan Al-Kubra"* [6: 72], Maktabat Dar Al-Baz.

this Hadith makes no distinction between guaranteeing the known and the unknown since there is no harm or element of dispute arising due to uncertainty here, because the unknown transaction guaranteed will become certain and known, and the guarantor will know, after the debt is incurred, the actual obligation he undertakes. Another authority for the permissibility of guaranteeing what is not known is the Quranic verse: ***{"...for him who produces it, is (the reward of) a camel load and I will be bound by it".***[10] Here, the guarantor guaranteed a camel load although it was not yet a debt.

The evidence for the creditor's right to demand payment from either the debtor or the guarantor is that the debt is established as liability of both of them, hence the right to demand payment from either of them. The permissibility for stipulating that the creditor has first to ask for payment from the principal debtor and that he may ask the guarantor for payment only if the debtor fails to pay, is based on an opinion in the Maliki school of law[11] and it is also an opinion of the Hanafis.[12] These opinions argued that if the debtor is solvent then demanding payment from the guarantor is pointless, unless the debtor refuses to pay. So, the requirement that payment be first sought from the debtor has a Shari'ah basis as well as being a case of adherence to a principle of natural justice.

Bringing Forward Future Instalments in Case of Default in Payment

The basis for this condition is the Hadith of the Prophet (peace be upon him): *"Muslims are bound by the conditions they made,"*[13] and because payment on a deferred basis is the right of the debtor, and the debtor may choose to pay before time and relinquish the deferral of the date of payment entirely. If this is the case, the date of payment may also be based on default so as to strengthen the collectibility of the debt and secure payment on time. The basis of the rule enabling the creditor to demand payment of all instalments in the event of default, instead of waiting until each instalment

(10) [Yusuf (Joseph): 72]. ***"I will be bound by it"*** means being a guarantor.
(11) Ibn Rushd, *"Al-Bayan Wa Al-Tahsil"* [11: 291].
(12) *"Bada`i' Al-Sana`i'"* [7: 2423].
(13) Related by Al-Bayhaqi in *"Al-Sunan Al-Kubra"* [6: 79], Maktabat Dar Al-Baz; Al-Daraqutni in his *"Sunan Al-Daraqutni"* [10: 27], Dar Al-Ma'rifah; Ibn Abu Shaybah in his *"Musannaf"* [4: 450], Maktabat Al-Rushd; and Al-Tahawi in *"Sharh Ma'ani Al-Athar"* [4: 90], Dar Al-Kutub Al-'Ilmiyyah.

is due, is the possibility that during the period of delay in payment the debtor may find a means to conceal his assets and claim insolvency. The permissibility of this condition is confirmed by the Resolution No. (51) issued by the International Islamic Fiqh Academy.

Termination of a Sale on Deferred Payment Terms in Case of Failure to Pa

The basis for this is that the seller has consented to deferred payment only if it will not lead to a loss of what is due to him. This is the opinion of the majority of Fuqaha, as opposed to the Hanafis who have confined the creditor's right to litigation, unless he has stipulated the right to terminate the contract and "Muslims are bound by conditions they made."

Guarantees and Their Modern Applications

Letters of Guarantee

The basis of the rule that no remuneration may be taken for a guarantee per se is that it is a surety, and as such it is one of the contracts of charity since it involves a readiness to give away the amount of a loan for no consideration. The majority of Fuqaha agree that it is prohibited to take consideration for guarantee. However, issuing the letter of guarantee is a service that justifies charging fees.

The prohibition of issuing a letter of guarantee for unlawful acts is analogous to the prohibition of giving assistance in committing a sin. The Hadith: *"Allah curses the one who gives Riba and the one who takes it and the one who writes its contract and the two witnesses involved"*(14) also supports this ruling, because the personal guarantor has a stronger role in establishing and recovering a debt than the writer of the contract and the witness mentioned in the Hadith.

Documentary credits

The basis for the permissibility of charging fees for a documentary credit is that issuing a documentary credit is a service performed in the interest of the applicant for the documentary credit, for which the Bank has the right to charge fees.

(14) Related by Muslim in his *"Sahih"* [3: 1219], Dar Ihya` Al-Turath Al-'Arabi; and the five compilers of Hadith, and see: Al-Shawkani *"Nayl Al-Awtar"* [5: 296], Dar Al-Jil.

Use of cheques or promissory notes

The Shari'ah basis for obtaining cheques or promissory notes from the debtor as a guarantee is the general sources on the permissibility of guarantees in general.

Insurance for debts

Islamic insurance is based on the principle of donation, and Gharar is tolerable in such conditions. In Islamic insurance, the instalments that are paid are provided within a framework of donations organised for the mutual benefit of the contributors to the insurance fund. The permissibility of Islamic insurance is confirmed by the resolutions issued by the Islamic Fiqh Academy of the World Muslim League [15] and the International Islamic Fiqh Academy of the Organisation of Islamic Conference.[16] Although this form of insurance falls within the meaning of a guarantee, the guarantee here is not provided in return for conditional consideration as such, hence the permissibility of subscribing to an Islamic insurance coverage as security for doubtful or bad debts.

Freezing cash deposits

The basis for the permissibility of stipulating a right to freeze acustomer's investment account is the permissibility of pledging funds, in addition to the fact that the purpose behind such freezing is to be able to agree on a set-off if it appears that the pledgor of the balance is in debt to the bank. It is a form of mortgage to secure a possible future debt. The basis for the prohibition of stipulating a right to freeze a customer's current account is that such a right would be tantamount to a combination of a sale on deferred payment terms and a loan transaction; i.e., it amounts to a deferred sale with a condition to provide a loan, which is prohibited by Shari'ah.

Third party guarantees

The basis for third party guarantees is that they are a promise to volunteer to remedy a loss of capital under an investment contract with a party other

(15) The First Session, Resolution No. (5).
(16) Resolution No. 9 (9/2).

than the volunteer. This is a permissible act as a volunteer, as is evidenced in the Holy Qura`n: ***{"No ground (of complaint) can there be against such as do right,"}.***[17] A resolution passed by the International Islamic Fiqh Academy states as follows:

> "There is no Shari'ah objection to mention in the prospectus of the issue or in the documents of Muqaradah (Mudarabah) bonds the promise of a third party, who is independent personally and in terms of financial liability from the two parties to the contract, to volunteer an amount of money for no consideration to be allocated to make good a loss on a particular project. However, this is circumscribed with a condition that such a promise should be an obligation independent from the Mudarabah contract. In other words, the third party's performance of his obligation should not be a condition for the enforcement of the contract and the conditions and liabilities of the parties to the contract. As such, holders of the bonds or the manager of the Mudarabah are not entitled to claim that they may fail to honour their obligations relating to their contracts because the volunteer failed to fulfil his promise because the performance of their obligations takes into consideration the promise to volunteer."[18]

Underwriting the subscription of shares issued

If such underwriting is offered without consideration, it is considered as a personal guarantee for no consideration, and this is permissible in Shari'ah. However, if it is for consideration, the basis for its prohibition is what we have mentioned in respect to taking a commission for a guarantee. [see item 4/1]

Guarantees in tenders, security deposits in Murabahah transactions and 'Arboun (Earnest Money)

The basis for the permissibility of guarantees in tenders and earnest money is the afore-mentioned authority for guarantees in general. Both guarantees in tenders and security deposits are permissible because they facilitate obtaining compensation for actual damages in case of breach of contract. The basis for obtaining the earnest money to secure performance

(17) [Al-Tawbah (Repentance): 91].
(18) Resolution No. 30 (5/4)

is the practice of Umar Ibn Al-Khattab (may Allah be pleased with him) in the presence of some companions of the Prophet (peace be upon him), which has been permitted by Imam Ahmad. A resolution has been issued in connection with the permissibility of 'Arboun (Earnest Money) by the International Islamic Fiqh Academy.[19]

Priority right of recovery and the right to follow up

The basis for the permissibility of the priority of certain rights, such as those of liquidators, is that these rights are considerations that are determined by the judiciary on the basis of public interest. The basis for giving priority to a person whose assets per se have contributed to the increase of the bankrupt's assets, and have been located and identified, is the Hadith of the Prophet (peace be upon him): *"If one sells a commodity, and the owner thereof becomes bankrupt, and then he finds it without being altered, he has more right over it than the other creditors."*[20] A resolution in connection with the permissibility of preference was issued by the Second Fiqh Seminar hosted by Kuwait Finance House, based on a number of Fiqh rulings determining certain preferences that include priority in the recovery of debts. The right of following up the subject of a mortgage is based on the fact that the aim of the mortgage is to facilitate recovery of the amount of the debt and leaving the debtor without a right of follow-up will defeat this objective.

(19) Resolution No. 72 (3/8) in respect of 'Arboun (Earnest Money).

(20) Related by Al-Bukhari and Muslim with different texts as follows: *"If one finds his property without being altered in the possession of a bankrupt, he has more right over it than the other creditors"*: *"Sahih Al-Bukhari"* (H: 2402); and *"Sahih Muslim"* (H: 1559).

Appendix (C)
Definitions

Payables:

Debts that are absolutely payable and liabilities held on trust basis, either because of being contractually created, or because unjust enrichment has given rise to a liability for restitution.

Liabilities:

Liabilities held on trust basis, i.e., obligations that are not subject to compensation for any loss suffered except in circumstances of misconduct, negligence or violation of the conditions agreed upon.

Shari'ah Standard No. (39)

Mortgage and Its Contemporary Applications

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

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

Preface

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

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

Statement of the Standard

1. Scope of the Standard

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

2. Definition of Mortgage

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

3. Shari'ah Rulings on Mortgage

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

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

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

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

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

3/1/4 The mortgagee has the right to stipulate a condition that the mortgagor should appoint him or his representative as an agent who can sell the mortgaged asset and repay the debt out of its value in case of default, without resorting to judiciary. The mortgagor does not have the right to retreat from such agency once agreed upon.

3/1/5 The death of the mortgagor or the mortgagee has no effect on the validity of the mortgage contract. The respective inheritors shall substitute the dead party.

3/1/6 The mortgage contract is no longer valid when the mortgaged asset perishes unless a compensation for it is obtained (through solidarity insurance, for instance). The mortgage contract can also cease to be valid for other reasons such as termination of the contract by the mortgagee, settlement of or relief from the debt, or relinquishment of the mortgage right. Furthermore, the validity of the mortgage contract can also expire as a result of transfer of the ownership of the mortgaged asset (through sale, gift or will) on permission of the mortgagee; unless the new owner accepts to keep the mortgage contract. [see item 3/2/6]

3/1/7 The mortgagee has the right to keep the whole mortgaged asset for any part of the debt, unless he accepts partial releasing of the mortgage. On repayment of the debt the mortgagee has no right to keep the mortgaged asset as a collateral for a new debt for which the asset is not mortgaged, except when the two parties agree to keep the mortgaged asset as a collateral for any debt between them within a specific period.

3/2 Rulings relating to the mortgaged asset

3/2/1 The mortgaged asset should be a Shari'ah-permissible property. It should also be well specified (through pointing, naming or description) and can possibly be delivered.

3/2/2 In principle, the mortgaged object should be a tangible asset, yet it can be a debt, a cash amount, a fungible asset or a consumable commodity. Perishable objects can also be mortgaged as they can be sold and replaced by their value. Moreover, a mortgaged object can be a share of common property which can be identified and sold separately.

3/2/3 The same asset can be mortgaged to more than one mortgagee. If all mortgages are of the same rank the consent of all the parties has to be sought, and the mortgage right in the asset is to be shared among them in proportion to their respective debts. If the mortgages are ranked in such a way that a succeeding mortgagee should get his debt repaid only when his precedent mortgagee does, the consent of the succeeding mortgagee alone has to be sought.

3/2/4 The mortgaged asset is a trust in the hands of the mortgagee, the notary or the agent and is still owned by the mortgagor as long as it is mortgaged. Therefore when the mortgaged asset perishes in the hands of the mortgagee, the notary or the agent, for a reason other than transgression or negligence, no responsibility shall rest with him, and the debt shall still remain valid. If the perish of the mortgaged asset is due to transgression or negligence of the mortgagee, the agent or the notary he shall be held responsible for compensation at the value of the asset on the date of its perish, whereas the debt shall remain valid. In this case the two parties have the right to perform clearance arrangements between the debt amount and the value of the perished mortgage asset.

3/2/5 The mortgagor can mortgage an asset that is owed to him by the mortgagee, whether the asset is kept by the mortgagee

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

3/2/6 The mortgagor can mortgage a borrowed asset (borrowed mortgage), or a rented asset (rented mortgage), on permission of the owner in both cases. If a borrowed or rented mortgage is used for repayment of the defaulted debt, the owner of the asset should have the right of recourse on the mortgagor for compensation; in kind if the mortgaged asset is a fungible asset, or in value if otherwise. When a borrowed or rented mortgage asset perishes in the hands of the mortgagor, the mortgagor has to compensate the owner of the borrowed asset, whereas for the rented asset compensation is deserved only if the perish of the mortgaged asset is due to transgression or negligence of the mortgagor.

3/2/7 In a sale contract the seller has the right to stipulate a condition that the buyer, after actual or constructive possession of the good, should mortgage it to him against the deferred price.

3/2/8 Appreciation in the value of the mortgaged asset as well as its income is considered to be mortgaged along with the principal, unless the two parties agree otherwise.

3/2/9 The mortgagor can benefit from the mortgaged asset on permission of the mortgagee, whereas the mortgagee has no right at all to enjoy free of charge benefit from the mortgaged asset with or without the permission of the mortgagor. However, on permission of the mortgagor the mortgagee can utilize the mortgaged asset against the normal pay for similar assets. [see items 3/3/ and 4/3]

3/2/10 The mortgagor should bear all actual expenses relating to reparation of the mortgaged asset and its preservation against

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

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

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

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

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

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

3/4 Execution of the mortgage

3/4/1 With due consideration to item 3/1/4, the mortgagee has the right to claim the sale of the mortgaged asset in case of default. After repayment of the mortgagee's debt the remaining value of the mortgaged asset should be given to the mortgagor by virtue of the mortgage contract. If the sale value of the mortgaged asset happened to be less than the due debt, the difference shall be subject to Shari'ah rulings on normal debt, and the mortgagee should have the right of recourse on the mortgagor for settlement of such difference.

3/4/2 The mortgagee does not have the right to stipulate a condition that he should own the asset in case of default. Nevertheless, there is no prohibition for the mortgagee to purchase the mortgaged asset from the mortgagor at market value, and take the portion of the value to which he is entitled.

3/5/3 When the mortgagor is bankrupt, the mortgagee should have the priority over other debtors, for getting his debt repaid from the sale value of the mortgaged asset. If the sale value of the mortgaged asset is less than the mortgagee's debt, he becomes in the same standing with other debtors with regard to the excess indebtedness.

4. Mortgage of Financial Papers and Sukuk

4/1 It is permissible to mortgage the financial papers and Sukuk which can be issued and transacted according to Shari'ah, such as Islamic Sukuk and shares of Islamic financial Institutions. The shares of the companies whose original activities are permissible can also be added to this category. [see Shari'ah Standard No. (21) on Financial Paper: Shares and Bonds, item 3/4]

4/2 It is permissible to mortgage usufruct-based Sukuk which represent common shares in the usufructs of specific assets, or assets in the form of a specific indebtedness. This should be taken with due consideration to Shari'ah Standard No. (17) on Investment Sukuk, item 5/1/5/2.

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

5. Mortgage of Current Accounts and Cash Securities

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

6. Mortgage of Investment Units and Investment Accounts

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

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

7. Mortgage of What Will Be Owned

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

8. Insurance of the Mortgaged Asset

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

9. Zakah on the Mortgaged Asset

9/1 The owner of the mortgaged asset should pay Zakah if it is payable on the asset and its income or on its income only. The fact that the owner cannot dispose of the mortgaged asset does not relief him from payment of Zakah.

9/2 Zakah is payable on all cash mortgages such as current accounts, cash securities, units of investment funds, frozen investment accounts, Sukuk, Salam debts, and Istisna'a debts, subject to stipulations of Shari'ah Standard No. (35) on Zakah, items 5/1, 5/2 and 5/3.

10. Date of Issuance of the Standard

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

Adoption of the Standard

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

Appendix (A)
Brief History of the Preparation of the Standard

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

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

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

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

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

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

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

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

Appendix (B)
The Shari'ah Basis for the Standard

Shari'ah Rulings on Mortgage (item 3)

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

(2) [Al-Baqarah (The Cow): 283].
(3) Muhammad Ibn Abdul-Wahhab, *"Mukhtasar Al-Insaf Wa Al-Sharh Al-Kabir"* [1: 506], Matabi' Al-Riyadh, Riyadh, First Edition, Abdul-Aziz Ibn Zayd Al-Rumi et al (eds.). Electronic Copy, Al-Jami' Al-Kabir Program.
(4) Ala` Al-Din (Al-Mardawi), *"Al-Insaf"*, op. cit, [11: 206–207].
(5) Ala` Al-Din Al-Samarqandi, *"Tuhfat Al-Fuqaha`"*, op. cit, [2: 70].
(6) Ministry of Awqaf – Kuwait, *"Al-Mawsu'ah Al-Fiqhiyyah"*, the letter Ba, Bay' Wa Shurut, item 28.

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

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

(7) Mustafa Ahmad Al-Zarqa, *"Al-Madkhal Al-Fiqhi Al-'Am"*, published 1968, [1: 477-478].
(8) Ala` Al-Din Al-Samarqandi, *"Tuhfat Al-Fuqaha`"*, op. cit, [2: 70].
(9) Muhammad Al-Hajjar, *"Fath Al-'Allam Bi-Sharh Murshid Al-Anam Fi Al-Fiqh 'Ala Madhab Al-Sadah Al-Shafi'yyah"* [5: 19], Dar Ibn Hazm, Beirut, First Edition, 1418 A.H.
(10) Ibrahim Ibn Ali Ibn Yusuf Al-Shirazi Abu Ishaq, *"Al-Muhadhdhab Fi Fiqh Al-Imam Al-Shafi'i"* [1: 310], Dar Al-Fikr, Beirut. Electronic copy: Al-Jami' Al-Kabir Program.
(11) Ministry of Awqaf – Kuwait, *"Al-Mawsu'ah Al-Fiqhiyyah"*, the letter Ba, Bay' Wa Shurut, item 28.
(12) Ministry of Awqaf – Kuwait, *"Al-Mawsu'ah Al-Fiqhiyyah"*, the letter Ba, Bay', *"Ahkam Mushtarakah Bayn Al-Mabi' Wa Al-Thaman"*, item 60/D.

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

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

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

(13) Ala` Al-Din Al-Samarqandi, *"Tuhfat Al-Fuqaha`"*, op. cit, [2: 56].
(14) Ala` Al-Din (Al-Mardawi), *"Al-Insaf"*, op. cit, [11: 491]
(15) Ala` Al-Din Al-Samarqandi, *"Tuhfat Al-Fuqaha`"*, op. cit, [3: 53-54]
(16) Muhammad Ibn Abdul-Wahhab, *"Mukhtasar Al-Insaf Wa Al-Sharh Al-Kabir"* [1: 511], Al-Riyadh Press, Riyadh, First Edition, Abdul-Aziz Ibn Zayd Al-Rumi et al (eds.).
(17) In *"Al-Insaf"* Mortgage is defined as "documentation of a debt by an asset so that the debt can be repaid from the sale value of the asset when repayment from other sources is not possible". Al-Zarkashi said: "Mortgage is documentation of a debt by an asset or a debt". This viewpoint of Al-Zarkashi is reported by Ala` Al-Din (Al-Mardawi) in *"Al-Insaf"* printed with *"Al-Muqni'"*; *"Al-Sharh Al-Kabir"* and *"Al-Insaf"* [12: 359], Hujar Press, First Edition, 1995.
(18) According to the Shafi'i scholars "It is permissible to lend cash so as to be mortgaged. When the debt is due, if the debtor made repayment the case is obvious, otherwise the cash can be used for purchasing the asset required for settlement, or the same cash amount can be paid for settlement of the debt if it is a cash debt", Muhammad Al-Hajjar, *"Fath Al-'Allam"*, op. cit, [5: 27]. Permissibility of selling the mortgaged asset and mortgaging its value instead of it has also been indicated by the Hanbali scholars in several cases as when they state that "It is permissible to mortgage perishable objects for an outstanding debt, so that the sale income of such objects can be mortgaged", Shamsul-Din (Ibn Qudamah), *"Al-Sharh Al-Kabir"*, op. cit, [12: 368]. The Maliki scholars state that "It is impermissible to mortgage dinars, or dirhams or filses, or food stuffs in the form of mixed ingredients or what is measured in terms of volume and weight, without imprinting a mark on it so that the mortgagee would not be able to use the mortgaged object and return back a similar one", Abu Abdullah Muhammad Ibn Muhammad (Al-Maghribi), *"Mawahib Al-Jalil Li-Sharh Mukhtasar Khalil"*, Dar Al-Fikr, Second Edition, 1978, [5: 5].

perty,[19] a borrowed asset or a rented[20] asset.

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

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

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

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

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

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

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

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

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

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

Execution of the Mortgage (item 3/4)

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

Contemporary Applications of Mortgage

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

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

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

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

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

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

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

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

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

Contemporary Applications of Debt Mortgaging

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

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

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

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

Insurance of the Mortgaged Asset

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

AAOIFI

هيئة المحاسبة والمراجعة للمؤسسات المالية الإسلامية

ACCOUNTING AND AUDITING ORGANIZATION FOR ISLAMIC FINANCIAL INSTITUTIONS

Shari'ah Standard No. (56): Liability of the Investment Manager

Shari'ah Standard No. (56)

Liability of the Investment Manager

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IN THE NAME OF ALLAH, THE MERCIFUL, THE VERY MERCIFUL

All praise be to Allah, the Lord of all the worlds. Peace and blessings upon our Prophet and our master Muhammad, all his family and his Companions.

PREFACE

This Standard aims to outline the Shari'ah provisions of liability of the investment manager ([whether] Mudarib, investment agent or managing partner) in the cases of misconduct (*taʿaddī*), negligence (*taqṣīr*) or breach of conditions or otherwise, rulings on stipulating it or volunteering it, ruling on passing evidentiary burden (*ʿib' al-ithbāt*) upon the investment manager [to prove] no misconduct or negligence from his side, and what Shari'ah provisions result upon [imposing] the liability on the investment manager.

And, Only Allah the Exalted guides to Success,,,

TEXT OF THE STANDARD

1. Scope of the Standard

This Standard covers the scenarios of liability and non-liability of the investment manager, the concepts of misconduct (*taʿddī*) and negligence (*taqṣīr*), their forms, and their point of reference, the provisions resulting from the liability of the investment manager, and the provisions of a commitment (*iltizām*) by a third party.

The Standard does not cover the securities that are not related to the investment manager. For that, refer to: Shari'ah Standard No. (39): Pledge, Shari'ah Standard No. (5): Guarantees, and Shari'ah Standard No. (45): Protection of Capital and Investments.

2. Definition of the Investment Manager

2/1. **The investment manager** is anyone who undertakes the investment of funds of another person with [latter's] permission.

2/2. They are **forms of investment management**:

2/2/1. Mudaraba, that is a profit-sharing partnership where capital is provided by one side (Rab Al Maal) and the labour [carried] by the other side (Mudarib). Refer to Shari'ah Standard No. (13): Mudaraba.

2/2/2. Investment Agency (Wakala bi Al Istithmar) is the delegation (*ināba*) by the person of someone else in growing his funds [whether it was done] for or without a fee. Refer to Shari'ah Standard (46): Wakala bil Istithmar.

2/2/3. Authorizing (*tafwīḍ*) one of the partners to invest funds of the partnership. Refer Shari'ah Standard No. (12): Sharikah (Musharakah) and Modern Corporations.

3. Scenarios of Liability and No-Liability of the Investment Manager

3/1. The investment manager's possession [of the underlying] is a fiduciary possession [*yadd amāna*]. Hence, [the investment manager] is not liable unless there was misconduct, negligence, or breach of conditions. Refer s. (3/1/4/1) of Shari'ah Standard No. (12): Partnerships and Modern Corporations and s. (7/1) of Shari'ah Standard No. (46): Al-Wakalah bil-Istithmar (Investment Agency).

3/2. It is neither permitted to stipulate an absolute liability (*ḍamān muṭlaq*) on the investment manager nor permitted for him to volunteer [in

assuming] the risk at the time of [making] the investment contract.

3/3. It is not permitted for the investment manager to undertake, either explicitly or implicitly, assumption of the risk after [making] the investment contract.

3/4. Following the occurrence of a total or a partial loss, it is permitted for the investment manager to volunteer [in assuming] the liability upon his own free will.

3/5. **The prohibited forms of [assuming] the liability include:**

3/5/1. An undertaking by the investment manager to purchase the assets from Rab Al Maal for a specified price, such as: an undertaking [by the investment manager] to purchase the [underlying] assets from the [certificateholders] of Sukuks, that are based on Mudaraba, Musharaka and Wakala, or purchasing [the underlying assets] from a party representing [the certificateholders of Sukuk] for a price specified at the time of making the contract. It is permitted if the undertaking to purchase is at: the net asset value (NAV), the market value, the fair value, or a price agreed on at the time of purchase, in accordance with s. (3/1/6/2) of Shari'ah Standard No. (12): Partnerships and Modern Corporations and s. (2/2/1) and s. (2/2/2) of Shari'ah Standard No. (5): Guarantees.

3/5/2. An undertaking by the investment manager to assume the liability of losses arising from exchange rate fluctuations, with due compliance with s. (3/2) and s. (3/4) above and see: s. (3/3/4) of Shari'ah Standard No. (5): Guarantees.

3/6. It is not permitted to stipulate upon the investment manager what is usually not carried by him, wherein the purpose of [such stipulation] is to impose the liability (*taḥmīl al-ḍamān*) [upon the investment manager].

4. Commitment for Reparation of Loss by Third Party

4/1. It is permitted for a third party to give a commitment to Rab Al Maal for reparation (*jabr*) of loss in the capital or shortfall in the profits, or purchasing the investment assets for a specified value, subject to the following conditions:

4/1/1. the third party should be independent from the investment manager, and if there was a [common] shareholding between them, then it is required that the ownership holding of one party does not exceed 50% of the other. As an artifice (*ḥīla*) to this

[provision], it is not permitted to set up a company or a legal entity for this purpose specifically.

4/1/2. the obligor shall have no recourse to the investment manager for what was undertaken by [the obligor].

4/1/3. this undertaking shall be [extended] voluntarily.

4/2. A default of the third party to its undertaking or voidness of this undertaking shall not result in the vitiation (*fasād*) of the investment contract. See: s. (6/6) of Shari'ah Standard No. (5): Guarantees; s. (2/9/3) of Shari'ah Standard No. (1): Trading in Currencies; s. (3/1/4/3) of Shari'ah Standard No. (12): Partnerships and Modern Corporations; s. (5/1/8/7) of Shari'ah Standard No. (17): Investment Sukuk; and s. (1/4) of Shari'ah Standard No. (45): Protection of Capital and Investments.

4/3. **Commitment by the Service Agent**

4/3/1. A service agent in this Standard is someone whose duties are confined to providing non-investment services, such as leasing the assets, [procuring] their insurance, [maintaining the assets], or collection of asset revenues, and the like. The service agent shall neither be a Mudarib, a managing partner, or an investment agent nor shall it implement investment plans or make investment decisions.

4/3/2. Subject to the previous conditions, as set out in s. (4/1), the service agent shall be deemed a third party that may undertake for reparation of loss of the capital or shortfall in the profit (*jabr al-khasāra*) in accordance with the following conditions:

4/3/2/1. the service agent shall not be originally the party availing the financing in the transaction or the investment manager. In this scenario, the investment manager shall implement the investment plan or to make investment decisions.

4/3/2/2. the undertaking should be affected via a contract independent from the contract of the service agency, so that voidness of one of the contracts shall not [result] in voidness of the other contract.

4/3/2/3. In case the agency was for a fee, then the fee of the service agent shall not exceed the prevailing market rate of the fee for similar works, in order to avoid claiming a consideration for an undertaking which is not permitted pursuant to s. (4/1/3).

5. Misconduct and Negligence

5/1. **Definition of Misconduct and Negligence:**

5/2. **Misconduct (*taʿddī*)** is exceeding the limit that is authorized by Shari'ah and was agreed by the parties of contract out of the conditions that are attainable as per the practice or established by the acknowledged (recognized) custom (*ʿurf muʿtabar*); at [the time] of disposal of the subject of the contract (Mudaraba or investment agency), whether exceeding [of limit] was intentional or not.

5/3. In addition to the above, the contemporary forms of misconduct and negligence by the investment manager include the following:

5/3/1. not taking securities even when it is necessary.

5/3/2. not conducting a feasibility study despite its necessity by way of stipulation or custom (*ʿurf*).

5/3/3. not storing the commodities in a place appropriate for their storage.

5/3/4. Non-disclosure of what needs to be disclosed as per the custom (*ʿurf*) or the law.

6. Evidentiary Burden

As initial presumption (*al-aṣal*), the evidentiary burden (*ʿib' al-ithbāt*) for establishing that the misconduct or negligence was committed by the investment manager shall be borne by the party making such a claim, and not by the party refuting [such a claim] (i.e., the investment manager), as is usually the case with all the fiduciaries.

The evidentiary burden to establish the occurrence of the loss and absence of misconduct or negligence shall transfer to the investment manager in the following cases:

6/1. Stipulation in the contract of providing the evidentiary burden by the investment manager to be carried on absolute terms.

6/2. In case providing the evidentiary burden by the investment manager is mandatory by the legislative, regulatory, or supervisory authorities.

6/3. In case there are pieces of circumstantial evidence (*qarā'in*) that contradict the claim made by the investment manager of the occurrence of the loss or absence of misconduct and negligence [from his part], for example, a claim [by the investment agent] that loss has occurred despite the peer investments are profitable.

7. Implications of Imposing the Liability on the Investment

Manager

7/1. In case the liability (*ḍamān*) was established [upon the investment manager], then the liability shall include the capital amount and the profit amount that was realized before the occurrence of the loss due to negligence, misconduct, and breach of conditions [by the investment manager]. Also, [the liability] covers the capital gain realized upon establishing the liability. However, it shall include neither the lost profit (opportunity cost) nor the expected profits that were not realized.

7/2. In case Rab Al Maal delegated the investment manager to sell at a specified price and [later the investment manager] sold for less than that [price] without permission from the principal, then the agent shall be liable for the difference between the price sold by him and the price that was specified to him (1).

7/3. In case funds were paid to the Institution to be invested in the general pool [of the Institution], and the Institution did not invest in that pool [whereas] the pool made a profit, then the investor shall be entitled to a profit share in accordance with the percentage agreed on in the contract and shall be liable in case of loss (*khasārah*) or damage (*talaf*) in proportion to his capital amount that was contributed [in the general pool].

7/4. In case the subject of investment is a tangible asset (aʿyān), then the time taken into consideration for determining the extent of the liability shall be the date on which the loss (*khasāra*), shortage (*naqṣ*), or destruction (*halāk*) has occurred due to that misconduct.

7/5. **Continuity of the Contractual Relationship**

7/6. The investment manager shall not be automatically dismissed on grounds of misconduct, negligence, or breach of conditions unless it was stipulated in the contract. Also, [the investment manager] shall be dismissed upon dismissal by Rab Al Maal.

8. The Date of Issuing the Standard

This Standard was issued on 18th Ṣafar 1438 H. corresponding 18th November 2016.

(1) This what was concluded by the Shari'ah Board in its 45th Meeting held on 1st October 2016 in the Kingdom of Bahrain, and it is an amendment to what was stated in the Item No. (6/3/2) of Shari'ah Standard No. (23): Agency and the Act of Uncommissioned Agent (Fodooli).

Endorsement of the Standard

Shari'ah Board has endorsed the Standard re. Liability of the Investment Manager in its 46th Meeting held in the Kingdom of Bahrain during the 17th - 19th Ṣafar 1438 H. corresponding 17th – 19th November 2016.

Supervisory Instructions for Implementation of the Standard

1. This Standard was issued on 18th Ṣafar 1438 H. corresponding 18th November 2016; whatever was stated in the Standard deems to amend whatever contradicts with it as per the previously issued Shari'ah Standards.

2. The supervisory authorities that enforce Shari'ah Standards may grant the Institutions that are subject to their supervision a grace period not exceeding (1) one calendar year to implement this Standard for the existing transactions upon issuance of the Standard.

3. Whatever was implemented based on the issued Shari'ah Standards stands valid based on the previously endorsed version of the [prior Standards] till the end of its tenure based on the [respective] contract.

Annexure (A): History of Issuing the Standard

In its meeting No. 40 held on 28-29 Jumada I 1436 A.H. corresponding to 19-20 March 2015, the Shari'ah Board decided to commission a Shari'ah consultant for conducting a Shari'ah study on liability of an investment manager (as Mudarib, Wakeel, and partner).

The Kuwait Shari'ah Standards Committee discussed and approved the study in its meeting held on 6 June 2015. The committee commissioned the consultant to draft the standard's exposure draft.

The Kuwait Shari'ah Standards Committee discussed the exposure draft in its meeting held on 20 September 2015, and made the changes it deemed necessary.

The Shari'ah Board discussed the exposure draft in its meeting No. 42 held in Kingdom of Bahrain on 22-23 Safar 1437 A.H. corresponding to 4-5 December 2015, and made the changes it deemed necessary, and decided to present it to a public hearing.

On the directions of the Shari'ah Board, AAOIFI's General Secretariat held three public hearing sessions in three countries: in Kingdom of Morocco on 12 Rabii II 1437 A.H. corresponding to 22 January 2016, at Dar al Hadith Al Hassaniah (), Rabat; in Hashemite Kingdom of Jordan on 25 Rabii II 1437 A.H. corresponding to 4 February 2016 at Jordanian University (); and in Kingdom of Saudi Arabia on 4 Jumada I 1437 A.H. corresponding to 13 February 2016 in cooperation with the Saudi Judicial Society, where it was attended by a number of scholars and jurists and experts in addition to representatives of central banks, Islamic financial institutions, accounting and auditing firms, legal firms, academicians, and other interested parties. The exposure draft was discussed in detail, and the views, remarks, and feedback of scholars and experts were collected.

On its meeting No. (45), held in Kingdom of Bahrain from 28 Dhul Hijjah 1437 A.H. corresponding to 29 September 2016 A.D to 1 Muharram 1438 A.H corresponding to 2 October 2016, the Shari'ah Board discussed the views, remarks and feedback collected at the three public hearings, and made the changes it deemed necessary.

The respective adhoc subcommittee held an extended meeting on 3 November 2016 in Malaysia to discuss the issue relating to liability of a service agent. The subcommittee proposed a drafting and submitted it to the meeting No. (46) of the Shari'ah Board.

In its meeting No. (46) held on 17-19 Safar 1438 A.H. corresponding to 17-19 November 2016 in Kingdom of Bahrain the drafting of the issue relating to liability of a service agent, and made the changes it deemed necessary, and then adopted the standard.

The Shari'ah Standards Drafting Committee reviewed the standard in its meeting held on 19 Safar 1438 A.H. corresponding to 19 November 2016 A.D., and after elaboration and discussion, it made a number of changes relating to drafting, and then adopted and officially issued the standard.

Annexure (B): Basis of Shari'ah Rulings

- The basis for an investment manager acting in a fiduciary capacity is that under this standard, an investment manager is either a managing partner, or Mudarib, or an investment agent. Jurists (Fuqaha) are in agreement that those typically act as fiduciary and shall not be liable unless in cases of misconduct, mismanagement (performance deficiency) or contravention to contractual terms and conditions. This is because stipulating liability is deemed as a means to render an investment contract to a benefit-bearing loan.
- The basis for permissibility that an investment manager volunteers at own will and discretion to provide guarantee (Dhaman), wholly or partially, for realized losses is that he does so out of benevolence in this specific case, and there is no cause for blame upon the doers of good.
- The basis for impermissibility that an investment manager undertakes to purchase the assets from Sukuk holders or their agent at a specific price at the time of purchase, and also to guarantee losses arising from exchange rate fluctuations at the time of redemption (of investors' participations) is that the same may be tantamount to a guarantee stipulated in the contract, entirely in the former case and partially in the other. This is impermissible as mentioned above.
- The basis for permissibility that a third party undertakes to make up capital loss or profit shortage, in accordance with the stipulations set out in the standard, is that it constitutes an undertaking to donate, and such an undertaking does not raise any contravention to Shari'ah, and does not rules out that guarantee shall essentially be provided by the provider of funds (Rab Al Maal), and it does not turn out into guarantee by an investment manager. See the resolution of International Islamic Fiqh Academy No. 30 (5/4) regarding Muqaradah Sukuk and Investment Sukuk.
- The basis for that evidence as to misconduct, negligence or mismanagement shall be in essence provided by an investment manager against the party claiming occurrence (i.e., provider of funds- Rab Al Maal) is that the norm is presumption of non-occurrence of misconduct and negligence and mismanagement, and also the norm is presumption of non-liability of an investment manager, and hence the norm shall be applied in tandem unless proved otherwise by evidence.
- The basis for permissibility of the transfer of responsibility to provide evidence in case of loss to the investment manager, contrary to the norm, if stipulated in the contract, is that the investment manager in such case might have waived his right with consent. This raises no contravention to Shari'ah. And if it is made mandatory by a regulatory or supervisory authority, then it shall be deemed an unimpeded public interest (Maslahah Mursalah) enforced by ruling authorities and shall be heeded and complied with. However, in case opposing evidence is established, then the investment manager, in such case, becomes culprit, especially that he alone manages the funds while investors cannot get details about his management of their funds. See the resolution of International Islamic Fiqh Academy No. 212 (22/8).
- The basis for non-liability for opportunity cost in cases of misconduct or mismanagement is that it is non-existing and unrealized money (Mal), and it cannot lead to liability in case of misconduct or mismanagement. See the resolution of International Islamic Fiqh Academy No. 212 (8/22). However, realized profit shall be deemed and treated as capital.
- The basis for entitlement of the principal to the difference between the actual selling price and the stated price in case of the agent's breach to the contractual stipulation is the statement set out in Muntaha al-Iradat (2/196): "both the agent and Mudarib shall be held liable in case of purchase at a price exceeding the stated price or prevailing price (Thaman al-Mithl), and

shall also be held liable in case of selling at a price lower than the stated price (all what falls short of a stated level), and shall also be held liable in a sale for which no stated price was specified and which neither typically gives rise to, nor is domain for, Ghaban. This is in addition to a statement in Majlat al-Ahkam al-Adliyyah (article 1495), maintaining that: "if a principal set the price, the agent cannot sell for less than that price. And if the agent did so, the sale shall come into effect provided the permission of the principal. And in case the agent sold it for less than the specified price without the principal's permission, and the object of sale was handed over to the buyer, the principal has the right to hold the agent liable for the amount of shortage". This is also in addition to a statement in Majlat al-Ahkam al-Shari'eyyah (Hanbali), article 1234, maintaining that: "a sale at a price less than the price stated by the principal is a valid sale, and the agent shall be liable to cover the shortage in price. For example, if the principal instructed the agent to sell at 100, but the agent sold at 99, then the shortage of 1 shall be covered by the agent".

- The basis for entitlement of the investor to the percentage agreed on in the contract, and his liability in case of loss or destruction to the extent of his share in capital, in case the funds were paid to an institution in order to invest the same in a general pool of funds, and that the institution did not invest as such, is that the investor is deemed as partner by virtue of the contract, and that pooling (commingling of funds) is not a prerequisite for validity of partnership and corresponding effects: entitlement to profit or bearing of loss.
- The basis for setting the time used in determination of the value of a the subject-matter of guarantee (guaranteed object), in case the investment was in kind, as the date of loss or destruction or shortage, is that liability comes into effect because of misconduct or mismanagement. Then, the time of destruction resulting from misconduct or mismanagement shall be considered in determination of the value of a guaranteed object.
- The basis for not discontinuing an investment manager automatically due to misconduct or negligence or contravention to contractual terms and conditions, unless stipulated in the contract, is that the contract constitutes an authorization to act on a fiduciary basis (Amanah). So, if fiduciary responsibility is breached because of misconduct, the authorization shall continue unabated. Also, the act of an investment manager is based on the principal's permission and shall be valid as if there were no misconduct. In analogy with the case of a pledgee, the pledge does not become invalid due to misconduct, even if the pledgee was acting on a fiduciary basis, and so is the case of the agent.

Annexure (C): Definitions

Shari'ah Standard No. (14)

Documentary Credit

(Revised Standard)

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

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

Preface

The purpose of this standard is to define documentary credits, their characteristics, Shari'ah rules and regulations so as to facilitate transactions in them by the Islamic financial Institutions (Institution/Institutions).[1]

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

Statement of the Standard

1. Scope of the Standard

This standard covers documentary credit extended by an Institution, either on the basis of client orders or for the use of the institution itself, including all types and forms of documentary credit, the various stages of their execution and the relationships created between the parties to the transaction.

2. Definition, Types and Characteristics of Documentary Credit

2/1 Definition of documentary credit

A documentary credit is a written undertaking by a bank (known as the issuer) given to the seller (the beneficiary) as per the buyer's (applicant's or orderer's) instruction or is issued by the bank for its own use, undertaking to pay up to a specified amount (in cash or through acceptance or discounting of a bill of exchange), within a certain period of time, on condition that the seller presents documents for the goods conforming to the instructions.

In brief, a documentary credit is an undertaking by a bank to pay subject to conformity of the documents to the contractual instructions.

2/2 Procedural stages of documentary credit

2/2/1 The stage of concluding a credit contract: This stage precedes credit, and the contract concluded is usually a sale contract in which the seller stipulates that the price be paid through documentary credit, however, the contract may be a lease contract, agency with commission or any other contract.

2/2/2 The stage of requesting the opening of credit: At this stage the buyer requests the bank to open the credit so that the seller can be notified.

2/2/3 The stage of issuing credit and notifying the seller: At this stage, the bank issues and sends the letter of documentary credit to the buyer, either directly or through an intermediary bank.

2/2/4 The stage of executing the credit: At this stage, the beneficiary presents the documents stipulated in the letter of credit to the bank. The bank examines them in accordance with the credit conditions. If the documents conform to instructions, the bank accepts them, executes the credit and delivers the documents to the buyer, in case it is not the institution itself, after the receipt of partial or full payment of the value or receives a deed of commitment to pay on the date of maturity so that the buyer is able to receive the goods represented by the documents. If the documents do not conform to instructions, the bank reserves the right to accept, reject or seek amendment of the documents.

2/2/5 Coverage by correspondents: If more than one bank participate in the execution of credit, the accounts are settled in accordance with the terms of coverage agreed upon between the banks.

2/3 Types of documentary credit

2/3/1 Basic classification

Documentary credit is classified, according to the strength of the undertaking into two types; namely (I) revocable credit, which can be amended or cancelled without consulting the beneficiary, and (II) irrevocable credit, which cannot be amended or cancelled without the consent of the parties.

2/3/3 Other classifications

There are other classifications of documentary credit. These include the following:

- Transferable documentary credit: This credit entitles the beneficiary to request the executing bank to make the credit available, partially or totally, to another beneficiary or beneficiaries.
- Back-to-back credit, which means the credit issued is guaranteed by another credit.

- Revolving or renewable credit, which means the beneficiary can repeatedly submit new documents for new operations within the limits of the credit amount and during its permissibility.
- Red clause or advance payment credit whereby the bank is allowed to pay a certain percentage of the credit before submission of the documents, against an undertaking by the beneficiary to repay that amount if the goods are not shipped or the beneficiary fails to use the credit during the period of its permissibility. Such payment may be made against a letter of guarantee from the beneficiary.
- Import and export credit (depending on the issuing bank).
- Local and foreign credit.
- Confirmed and non-confirmed credits.
- Partial shipment and a non-partial shipment credit.
- On sight or immediate payment credit, deferred payment credit, acceptance credit and negotiable credit.
- Syndicated credit (partnership credit), which describes the state of participation by more than one bank due to the huge amount of credit granted with each bank providing a letter of guarantee, to the extent of its participation, to the leading bank.
- Standby credit (guarantee credit). This credit resembles letters of guarantee with a clause that payment is conditional upon beneficiary's (in this case the contractor's) failure to perform.

2/4 Characteristics of documentary credit

2/4/1 Dealing in documentary credit takes place on the basis of the documents alone and is executed without reference to the goods. Documentary credit, in essence, makes it binding for the bank to execute the credit whenever the beneficiary presents, within the duration of the validity of the contract, the documents required by the credit and conforming to the instructions.

2/4/2 Opening of credit by the buyer (orderer), though it may be acted upon with certainty, is not considered a final payment of the price of the goods. The buyer remains liable for the payment until the bank pays the value of the documents, however, the

seller (beneficiary) does not have a right to request payment from the buyer as long as the credit subsists and is valid. If the credit expires before the submission of the documents, the seller has the right to claim payment directly from the buyer, because expiry of the credit in itself does not amount to revocation of the sale contract.

2/4/3 The bank is obliged to pay the value of the credit to the beneficiary when the latter presents the documents that conform to instructions, except upon proof of fraud or forgery of the documents, or in the case of a court decision declaring the sale contract null and void.

2/4/4 Interpretation of the duties and obligations of the parties to documentary credit are subject to International Commercial Terms (INCOTERMS 2000) and the Uniform Customs and Practices for Documentary Credit (UCP 500) when reference is made to INCOTERMS in the sale contract and to UCP in documentary credit.

3. Shari'ah Ruling on Documentary Credit

3/1 Permissibility of documentary credit

3/1/1 Dealing in documentary credit includes agency for providing procedural services, the most important of which is the examination of documents, and the provision of institutional guarantee to the importer. As both agency and guarantee contracts are permissible, documentary credit becomes permissible subject to the conditions stipulated in this standard.

3/1/2 Opening of all types of documentary credit, its issuance and confirmation, on the basis of the client's order or for the institution itself, are permitted to an Institution. It is also permissible to an institution to participate, or play an intermediary role, in such dealings and to notify, amend or execute in any way such credit, either for its own use or on behalf of another institution or bank, according to the available forms of executing documentary credit, subject to item (3/1/3) below.

3/1/3 It is not permissible for the institution to undertake transactions in documentary credit, in accordance with what is stated in item (3/1/2), either for itself or on behalf of another as a client or institution or by way of collaboration, when such credit pertains to goods that are prohibited by the Shari'ah, or is based on a contract that is void or irregular (according to the Shari'ah) due to vitiating conditions or includes interest, either charged or paid, whether explicitly as in the case of loan upon payment by the beneficiary of amounts not fully or partially covered in similar credit, or impliedly, as in the case of discounts or trading (payment) on bills of exchange with deferred and delayed payments.

It is stipulated for the permissibility of the subject of documentary credit that the contract upon which reliance is placed be a contract that is valid in the Shari'ah insofar as its elements, conditions and type of transaction, whether currency exchange, ordinary sale or another, are concerned, and also with respect to its specific additional conditions.

3/1/4 The bank is obliged to execute the credit when it conforms to instructions, except upon proof of fraud or forgery of the documents, in which case it is under no obligation to execute it. Provided that if the contract concluded prior to opening of documentary credit is nullified by a court decision, the execution of the credit is subject to a new agreement.

3/2 The contract preceding the opening of credit

3/2/1 It is permissible for the seller to stipulate in the sale contract that payment be made through documentary credit. Such a condition is valid and its performance is binding upon the buyer.

3/2/2 It is permissible to secure international transactions using documentary credit provided that the secured transactions do not violate the rules of the Shari'ah.

3/2/3 When the contract stipulates that its interpretation is subject to INCOTERMS (issue 2000) or the United Nation's Convention in respect of the International sale of goods or any other reference, then such potential interpretation is circumscribed with a condition that it must not violate the rules of the Shari'ah. [see item 3/2/2]

3/3 Commissions and expenses in documentary credit

3/3/1 It is permissible for the institution to charge actual expenses incurred in issuing documentary credit. It is also permissible for the institution to charge a fee for providing the required services, whether such a fee is in the form of a lump sum or a certain percentage of the credit amount, provided that the duration of the credit is not considered in determining the commission. This rule applies to services rendered for both import and export credit, except where the amendment involves a rescheduling of the duration of the credit facility. It is, therefore, permissible for the institution to charge only the actual expenses incurred, in which case it will be a definite sum and not a percentage.

The Institution must abide by the following conditions:

a) The aspect of guarantee per se must not be taken into account when estimating fees for documentary credit. Accordingly, it is not permissible for an institution to charge an amount in addition to the actual expenses incurred if it endorses a credit facility issued by another bank, because endorsing a credit facility is an addition over guarantee. The rule for endorsement applies to participation in the issuance and endorsement of credit as well as issuance of standby credit (guarantee credit), as long as services or obligations are not required.

b) The issuance of a credit facility should not involve Riba bearing profits or become a means for such profits.

c) It is not permissible to use a combination of contracts in documentary credit as an excuse for involvement in the prohibited transactions, such as taking a commission for providing a guarantee or extending a loan.

3/3/2 The rule of item 3/3/1 above equally applies to receiving or payment of commissions and expenses and in a situation where the institution acts as an intermediary in these respects, irrespective of whether the transaction is between the institution and its client (the orderer or beneficiary) or between the institution and other institutions and banks.

3/3/3 The ruling of commission for providing letters of guarantee that was stated in the Shari'ah Standard No. (5) on Guarantees must be applied when determining commissions for the letters of guarantee that accompany documentary credits, such as letters of guarantee provided in the case of advance payment of a portion of the amount or the shipping guarantee that is issued for releasing the goods before the arrival of documents.

3/4 Guarantees in documentary credits

3/4/1 It is permissible for the institution to secure the obligations arising out of documentary credit, or to provide documentary credit as security for payment in favour of institutions and banks dealing with it. The institution may act as an intermediary for facilitating documentary credit using other permissible and acceptable forms of guarantee. It is, therefore permissible to use a number of means as a cover for documentary credit including cash, freezing of permissible accounts and negotiable instruments valid according to the Shari'ah, certificates of shares in real estate and withholding the documents of the credit that stand for the goods.

The cover of a documentary credit may be also one of the following: a transferable letter of credit; a back-to-back letter of credit; a letter of guarantee issued by the bank of the beneficiary

against the advance payment in case of advanced payment credits; a letter of guarantee issued by a bank participating in the issuance or confirmation of the credit; relinquishment receivables and commercial papers, such as bill of exchange and promissory notes. This item must be read together with item 3/4/2 below.

3/4/2 It is not permissible for the institution to accept the following types of guarantees: interest-based bonds, shares of companies that deal in prohibited activities, and interest-based receivables. It is also not permissible for the institution to provide any of these guarantees as security for its obligation to other institutions or banks or to act as an intermediary to facilitate such guarantees.

3/4/3 It is permissible for the institution and the applicant for documentary credit to agree on investing the cash cover of the credit in accordance with Mudarabah partnership.

3/5 Murabahah transactions in documentary credit

When a client intends to purchase imported goods from the institution through Murabahah financing of the documentary credit, the following must be observed:

3/5/1 Opening of documentary credit should not precede the conclusion of the sale contract between the orderer and the beneficiary (the seller) irrespective of the orderer having taken possession of the goods that are the subject-matter of the contract.

3/5/2 Institution should be the party who purchases from the supplier, and then sells to the client through Murabahah as per the rulings stated in Shari'ah Standard No. (8) on Murabahah, while taking into account item 2/2/2 in respect to cancellation of contract and item 3/1/3 in respect to agency in Murabahah.

3/6 Musharakah contract with the client to finance documentary credit for imported goods

3/6/1 In case the institution signs a partnership contract with the client to purchase goods prior to the opening of credit and before the client concludes a sale contract with the supplier, it is permissible to open the credit in the name of either partner. It is permissible for the institution, after receipt of the goods, to sell its share to a third party or to its partner through a spot or deferred payment Murabahah on the condition that the sale to the partner is not based on an earlier exchange of binding promises or stipulated in the Musharakah contract.

3/6/2 It is permissible for the institution to sign a partnership contract with the client in respect of goods purchased by the client on the condition that the institution does not sell its share to the client on a deferred payment basis.

3/7 General rules

3/7/1 If the credit transaction includes a provision that it is subject to the prevalent principles and practices that unify documentary credit, it is necessary to qualify such a statement with the stipulation that it will not violate Shari'ah rules and principles. It is preferable that the institution presents alternatives that could be agreed upon between the institution and the correspondent banks.

It is a requirement to explicitly state that a provision stipulating interest will not be acted upon, and also for trading activities that contravene the provisions of the Shari'ah. For valid substitutes. [see Shari'ah Standard No. (17) on Commercial Papers, items 5/2 and 5/3]

3/7/2 It is not permissible for the institution to discount accepted bills of exchange, i.e. to purchase these bills before maturity at less than their nominal value.

3/7/3 It is not permissible for the institution to trade in deferred payment documents or accepted bills of exchange, i.e. to purchase these instruments at less than their nominal value. It is also not permissible for the institution to act as an intermediary, whether by payment or notification, between the beneficiary and the issuing or confirming bank to facilitate such dealings.

3/7/4 It is not permissible for the institution to negotiate, for less than their nominal value, documents payable on sight or payable bills of exchange.

3/7/5 It is not permissible for the institution, as far as possible, to present bills of exchange that it undertakes to pay to clients whose debts to the institution are represented by these bills, so as to get them discounted by other banks that may accept them.

3/7/6 The institution should arrange its relationships with other institutions and correspondent banks on the basis of non-payment of interest and avoidance of prohibited transactions with respect to covering operations between the correspondent banks when such relationships involve settlement of inter-bank obligations resulting from documentary credit and other banking operations.

4. Date of Issuance of the Standard

This Standard was issued on 7 Rabi' I, 1424 A.H., corresponding to 8 May 2003 A.D.

Adoption of the Standard

The Shari'ah Standard on Documentary Credits was adopted by the Shari'ah Board in its meeting No. (10) held in Al-Madinah Al-Munawwarah during the period of 2-7 Rabi' I, 1424 A.H., corresponding to 3-8 May 2003 A.D.

Appendix (A)
Brief History of the Preparation of the Standard

In its meeting No. (5) held in Makkah Al-Mukarramah during the period of 8-12 Ramadan 1421 A.H., corresponding to 4-8 December 2000 A.D., the Shari'ah Board resolved to give priority to the preparation of a Shari'ah Standard on Documentary Credit.

On Monday 29 Ramadan 1421 A.H., corresponding to 25 December 2000 A.D., a Shari'ah consultant was commissioned to prepare a Shari'ah study and an exposure draft.

In its meeting held in the Kingdom of Bahrain on 15 and 16 Safar 1422 A.H., corresponding to 9 and 10 May 2001 A.D., the Shari'ah Studies Committee discussed the juristic study of the standard and requested the consultant to incorporate the necessary amendments in the light of the conclusions of the Committee and the observations of members. The Committee also discussed the exposure draft in its 10th meeting held in the Kingdom of Bahrain on 14 Rabi' I, 1422 A.H., corresponding to 6 June 2001 A.D., and made some amendments to the exposure draft.

In its meeting No. (11) held in Jordan on 18 and 19 Jumada II, 1422 A.H., corresponding to 6-7 September 2001 A.D., the committee further discussed the exposure draft of the standard and made amendments that were deemed necessary in preparation of the submission to Shari'ah Board.

The revised exposure draft of the standard was presented to the Shari'ah Board in its 8th meeting held in Al-Madinah Al-Munawwarah from 28 Safar to 4 Rabi' I, 1423 A.H., corresponding to 1116 May 2002 A.D. The Shari'ah Board made further amendments to the exposure draft and decided to defer its discussion in the public hearing until views crystallize

on the issue of the contract that is relied upon for documentary credit in the context of the deferment of its two counter-values, known as *Ta`jil al-Badalayn*.

The revised exposure draft of the standard was also presented to the Shari'ah Board in its 9th meeting held in Makkah Al-Mukrramah during the period of 11-16 Ramadan 1423 A.H., corresponding to 16-21 November 2002 A.D. The Shari'ah Board made further amendments to the exposure draft and decided that it should be distributed to specialists and interested parties in order to obtain their comments in preparation of its discussion in a public hearing.

A public hearing in Bahrain on 18 Dhul-Hajjah 1423 A.H., corresponding to 19 February 2003 A.D. The public hearing was attended by more than thirty participants representing central banks, institutions, accounting firms, Shari'ah scholars, academics and others interested in the field. The members of the Shari'ah Standards Committees (1) and (2), responded to the written comments that were sent prior to the public hearing as well as to the oral comments that were expressed in the public hearing.

The Shari'ah Standards Committees (1) and (2) held a joint meeting on 2 Muharram 1424 A.H., corresponding to 5 March 2003 A.D., to discuss the comments that were made during the public hearing as well as the observations received in writing. The two committees made amendments that were deemed suitable.

The Shari'ah Board in its meeting No. (10) held in Al-Madinah Al-Munawwarah during the period of 2-7 Rabi' I, 1424 A.H., corresponding to 3-8 May 2003 A.D., discussed the amendments made by the Shari'ah Standards Committee, and incorporated the amendments deemed suitable. The Shari'ah Board unanimously adopted some of the items of the standard and some items were adopted by the majority vote of the members of the Shari'ah Board, as recorded in the minutes of the meetings of the Shari'ah Board.

The Shari'ah Standards Review Committee reviewed the standard in its meeting held on Rabi' II, 1433 A.H., corresponding to March 2012 A.D., in the State of Qatar, and proposed after deliberation a set of amendments

(additions, deletions, and rephrasing) as deemed necessary, and then submitted the proposed amendments to the Shari'ah Board for approval as it deemed necessary.

In its meeting No. (41) held in Al-Madinah Al-Munawwarah, Kingdom of Saudi Arabia during the period of 27-29 Sha'ban 1436 A.H., corresponding to 14-16 June 2015 A.D., the Shari'ah Board discussed the proposed amendments submitted by the Shari'ah Standards Review Committee. After deliberation, the Shari'ah Board approved necessary amendments, and the standard was adopted in its current amended version.

Appendix (B)
The Shari'ah Basis for the Standard

Permissibility of Documentary Credit

The permissibility of documentary credit is based on the principle that it relies upon contracts that are valid according to the Shari'ah, such as Kafalah (personal guarantee), Wakalah (agency contract) and Qard (loan).

Shari'ah Categorization of Documentary Credit

- The basis for the permissibility of irrevocable documentary credit is a combination of a contract of guarantee and agency. To these two the Qard (loan) transaction is to be added. It derives permissibility from the contract of mortgage (Rahn) as well, because it secures payment. The contract of guarantee creates a liability for payment, while agency determines the performance of acts relating to operations such as communication of the credit notification and initiation of operations pertaining to follow-up and examination of document. The loan element comes into operation when the institution pays on behalf of the client in case of documentary credit that is totally or partially uncovered.[2]
- The basis for the permissibility of a revocable documentary credit is that it is a form of agency contract that is permitted by the Shari'ah. When a third party's right is attached to it, it becomes binding, and this occurs when it leads to acceptance or payment. A revocable documentary credit cannot be classified under the contract of guarantee for two reasons; namely (I) it conflicts with the requirements of guarantee; and (II) an option is not permissible in guarantee contracts.[3]
- The basis for the permissibility of the undertaking of the confirming bank and other similar undertakings of the banks that participate in

(2) Resolution No. (419) of the Shari'ah Board of the Al Rajhi Banking Corporation and Investment and Answer No. (71) of the Shari'ah advisor of Dallah Al Baraka.

(3) Ibn Qudamah, *"Al-Sharh Al-Kabir"*, [3: 59-60], 1951 A.D.

issuance or confirmation of the credit is that it is an act of back up guarantee, which is permissible in the Shari'ah.[4]

- The basis of permissibility of guarantee in irrevocable credit being qualified from the perspective of execution with the condition that documents presented conform to the conditions stipulated, is the ruling of the jurists that Kafalah (guarantee) accepts qualification through a stipulated condition.[5]
- The basis for the ruling that documentary credit terminates with implementation or expiry is that the guarantee for documentary credit is limited in time by a period, and this is the period of validity of the credit. It is permitted to place a time frame on guarantee.[6]
- The basis for the permissibility of the contract relied upon for documentary credit, as well as its conditions, is that it is a sale for which security is provided through guarantee, and this is compatible with the objectives of the contract.

Contract That Precedes the Opening of Credit

- The basis for the permissibility of making opening of documentary credit a condition in the sale contract preceding documentary credit is that such a condition is similar to a stipulation to provide a specific guarantor for payment, which is a valid condition acknowledged as an interest for the contract.[7]
- The basis for the permissibility of undertaking international sale contracts and their security through documentary credit is that upon examination, the international sale contracts that are secured through documentary credit pose a difficulty: Do they involve delay of the two counter-values that is prohibited by the Shari'ah?

(4) Ibid., [13: 25-26]; Ala' Al-Din Al-Samarqandi, *"Tuhfat Al-Fuqaha'"*, [3: 407].

(5) Ibn Abidin, *"Radd Al-Muhtar 'Ala Al-Durr Al-Mukhtar"*, [4: 265], Beirut: Dar Ihya` Al-Turath Al-'Arabi, n.d.

(6) Ibid. (P. 265). Ibn Qudamah, *"Al-Sharh Al-Kabir"*, [13: 25-26]; Al-Samarqandi, *"Tuhfat Al-Fuqaha'"*, [3: 402, 404 and 405]; Muhammad Al-Hajjar, *"Fath Al-'Allam Bi-Sharh Murshid Al-Anam Fi Al-Fiqh 'Ala Madhhab Al-Sadah Al-Shafi'iyyah"*, [5: 43], Beirut: Dar Ibn Hazm, 1418 A.H.

(7) See: Wizarat Al-Awqaf Al-Kuwaytiyyah, *"Al-Mawsu'ah Al-Fiqhiyyah"*, letter "Ba", "Bay'", *"Bay' Wa Shart"*, Para (28); Al-Samarqandi, *"Tuhfat Al-Fuqaha`"*, [2: 70]. Mustafa Ahmad Al-Zarqa, *"Al-Madkhal Al-Fiqhi Al-'Amm"*, 1986, (pp. 477-478); Muhammad Al-Hajjar, *"Fath Al-'Allam"*, [5: 19].

The members of the Board differed on this into those who prohibit them due to the cause indicated, and those who permit them -being in a majority with those permitting them disagreeing on the following points:

a) That these contracts -prior to the ascertainment of the goods- do not involve delay in the two counter-values rather they amount to bilateral promises, which are agreements to sell and do not amount to sale itself.

b) That they merely amount to extension of the session of the contract (*Majlis al-'Aqd*), with respect to the agreement, up to the time of ascertainment of the goods.

c) That they do not amount to a delay in the two counter-values, but they are permitted on the basis of general need.

d) That they are, *ab initio*, an exchange of a debt for a debt and this is permitted under the Shari'ah.

e) That the contract preceding the opening of documentary credit amounts to a sale contingent upon the opening of credit.

f) That these contracts do not involve delay in counter-values, because that is attained through a stipulation for delay, while there is no stipulation of delay in this case.

Commissions and Expenses in Documentary Credit

- The basis for the impermissibility of receiving compensation for guarantee for the aspect related to documentary credit is that a guarantee is preparatory to extending a loan, and this is not to be compensated. The four Fiqh schools are unanimous on the impermissibility of taking compensation for guarantee. This rule is endorsed by a resolution of the International Islamic Fiqh Academy,[8] a ruling of the Shari'ah Supervisory Board of the Faysal Islamic Bank of Sudan,[9] the Shari'ah Board of Al Rajhi Banking Corporation for Investment[10] and a resolution of the Shari'ah Fatwa and Supervisory Board of the Kuwait Finance House.

(8) International Islamic Fiqh Academy Resolution No. 12 (12/2).
(9) Fatwa No. (14) of the Shari'ah Supervisory Board of the Faisal Islamic Bank, Sudan.
(10) Resolution No. (297) of the Fatwas of the Shari'ah Supervisory Board of Kuwait Finance House.

- The basis for the permissibility of receiving compensation for an agency-related service in documentary credit, whether in a lump sum or as a percentage of a known amount, is that the amount is in lieu of services rendered by the institution, in its capacity as an agent of the client. The majority of the Fuqaha upheld the permissibility of charging wages for agency.(11) The Shari'ah Supervisory Board of Al Rajhi Banking Corporation for Investment has passed a resolution permitting receipt of payment including the services involved in documentary credit without referring to the aspect of guarantee.(12)
- The basis for the impermissibility of charging commissions in consideration for providing long or short term loans, discounting and trading (payment of the value) in documents and deferred payment bills of exchange or for providing facility, are the texts of the Qur`an and the Sunnah laying down the prohibition of Riba.(13)

Guarantees in Documentary Credit

- The basis for the permissibility of seeking guarantees explained in this Standard (item 3/4) is that collateral (Rahn) may be money, debt or tangible asset insofar as they might be lawfully owned or created according to the Shari'ah and because the debt to be secured may be a current or future obligation.(14)

(11) Ala` Al-Din Al-Mardawi, *"Al-Insaf"*, [13: 577].

(12) Resolution No. (419) of the Shari'ah Supervisory Board of Al Rajhi Banking Corporation for Investment.

(13) In its Resolution No. (372), the Shari'ah Supervisory Board of Al Rajhi Banking Corporation for Investment stipulated: "It is prohibited in documentary credit to collect from the client any interest at any stage of the credit" (for discounting and trading in commercial papers, see item 2/8 where the resolution provides the Shari'ah basis for this ruling). As regards commission for providing the facility, the facility is preparatory to extending a loan, and hence if commission is prohibited for giving the loan itself it would be obviously correct to prohibit commission for a mere readiness to do so. This conclusion has been adopted in the Al Baraka 8th Forum in its Fatwa No. (13) and the response of the Shari'ah advisor to Dallah Albaraka Group No. (1).

(14) See: Al-Samarqadi, *"Tuhfat Al-Fuqaha`"*, [3: 53-54]; Al-Mardawi, *"Al-Insaf"*, [13: 359]; Al-Hajjar, *"Fath Al-'Allam"*, [5: 44]; Ibn Qudamah, *"Al-Mughni"*, [6: 444-445]; Abu Abdullah Muhammad Ibn Muhammad, *"Mawahib Al-Jalil Sharh Mukhtasar Khalil"*, 2nd edition., [5: 5], Beirut: Dar Al-Fikr, 1978 A.D.; See also Islamic Fiqh Academy Resolution No. (86) 3/9, Jeddah; Fatwa No. (5) of Al Baraka's 5th Forum and Resolutions No. (19 and 283) of Al Rajhi Banking Corporation for Investment.

- The basis for not allowing the Institution to sell its share of partnership, in goods purchased by the client, for a delayed payment to the client is that this amounts to a sale-buy back arrangement (*Bay' al-'Inah*), which is prohibited by the Shari'ah.
- The basis for not allowing negotiability of documents payable on sight including bills of exchange for an amount lesser than their nominal value is that this adopts the form of the sale of debt, which is prohibited.

Appendix (C)
Definitions

Credit Documents

These are the documents relating to goods detailed in the credit. The documents are divided into two types: basic and additional documents. Basic documents include: Shipping documents, commercial invoice, marine insurance policy, certificate of origin, consulate invoice and promissory note. Additional documents include: Weights certificate, analysis certificate, review and inspection certificate, warehouse receipts, delivery orders, packing review/supervision certificate, test certificate, medical certificate and non-infection certificate. Such certificates are requested to verify certain attributes and characteristics of the commodity and to make sure that it is free of defects and infection. The certificates are required by the authorities of the importing or exporting country.

Bill of Lading

A bill of lading is the traditional source of shipping documents. It indicates the party authorized to receive the goods, whether it is the original beneficiary, a party in whose name the bill is backed as a collateral arrangement or an agent assigned to receive the goods. A bill of lading constitutes the practical execution of the shipping contract signed between the shipper and the marine carrier. Shipping is the responsibility of either the buyer or of the seller according to the type of International Sale Contract (Commercial Terms) adopted. A bill of lading is the only shipping document that can be backed.

Examination of Documents

It is the process of ensuring that the documents comply with the specifications indicated in the letter of credit. The general conditions for the integrity of documents are detailed through the following four conditions:

- That the documents are submitted during the validity of the credit.
- That they are complete in number.
- That they are complimentary and one document does not contradict another and that each contains the required information or each serves its function.
- That they conform to the conditions of the letter of credit.

In case any of these conditions is missing, for any one of these documents, it is obligatory upon the bank to reject the documents as a whole, even those that are not defective.

At Sight Credit

It is credit that has to be paid promptly at sight according to the value of the documents, by the issuing bank, the confirming bank or the paying bank, if the documents conform to the conditions of the credit.

Deferred Payment Credit

It is an undertaking given by the issuing, or confirming bank to pay at a future date, being the date fixed in the credit, the value of the documents if they conform to the conditions of the credit. It differs from acceptance credit insofar as the beneficiary does not present a promissory note with the documents.

Acceptance Credit

It is the acceptance of the bill of exchange attached to the documents or is signed on behalf of the bank; that is, the bank accepts the obligation of paying the nominal value on the date of maturity.

Negotiation of Documents

It is the payment of the value of the documents, or the purchase of the bill of exchange attached to them; that is, its discounting, whether it is to be paid at sight or after a known specified period.

Acceptance of Documents 'Under Reserve'

It occurs when the bank chooses to accept the documents at its own risk despite their non-conformance with the conditions of the credit, paying their value or accepting the bill of exchange attached to them, on the condition that

it reserves the right of recourse to the beneficiary if the issuing bank does not accept the discrepancies in the documents. The paying bank usually reserves this right by way of obtaining a letter of guarantee, covering the value of the documents, from the bank of the beneficiary.

Marine Letter of Guarantee

It is an undertaking given by the issuing bank to place the original bill of lading, when received, at the disposal of the carrier in lieu of receiving back a letter from him. The carrier in this case is relieved from all responsibility that may arise from the delivery of the goods to the importer, who gives an undertaking to the issuing bank for the acceptance of the documents regardless of any discrepancies in them. This type of letter is usually issued upon arrival of the goods when the documents are to follow or are delayed.

Correspondent Bank

It is the bank assigned by the issuing bank to notify the beneficiary of the credit. As a rule, the correspondent bank is under no obligation to pay the value of the credit; its role is confined to that of an intermediary. Correspondent banks are banks with which the institution makes certain arrangements for accepting or covering the value of the credits that it issues or confirms.

In case the beneficiary requests notification through a non-correspondent bank, the issuing bank sends its instructions to one of its correspondent banks asking it to process the notification through the bank nominated by the beneficiary.

Confirmation of Credit

It is the merging of the liability of the confirming bank with the liability of the issuing bank making both banks liable for fulfilling the conditions of payment of credit, when the beneficiary presents documents that meet the terms of the credit. The beneficiary has the right to claim payment severally from either bank or jointly from both banks.

The Paying Bank

It is a correspondent bank of the issuing bank in the currency of the credit to whom the issuing bank entrusts the payment of the value of the

credit on its behalf, but the paying bank is under no obligation for executing this trust.

The Covering Bank

Covering banks are types of correspondent banks with which the bank maintains an account and to whom it delegates the authority to cover disbursement and negotiation payments upon the first presentation.

Transferable Credit

It is irrevocable credit by means of which the beneficiary (first beneficiary) requests the bank assigned, or any other licensed institution, to make payment or to undertake to pay in the future or to accept or to negotiate so as to make the credit available, in whole or in part, to the beneficiary or beneficiaries.

Back to Back Credit

It is irrevocable credit issued for the same purpose as that of transferable credit whenever a credit is not transferable.

Revolving Credit

It is credit that is opened for a fixed value and duration, except that its value is renewed automatically when it is executed or utilised so as to enable the beneficiary to present documents for a new operation within the value of the credit, during the period of its validity, and for the number of times fixed for the credit.

Advance Credit or Red Clause Credit

It is credit bearing a paragraph written in red ink to invite attention to its instructions. In this credit, the authorised bank is assigned to pay certain amount according to percentage of the value of the credit to the beneficiary in advance before the goods are shipped and before the documents that necessitate payment are presented.

Credit Available for Negotiation

This is credit by which the issuing bank grants to the correspondent bank the legal authority to buy bills of exchange drawn on the basis of documentary

credit upon presentation of bills of exchange that are payable at sight by the issuing bank or are payable in the future to the issuer of documentary credit. Accordingly, the seller is able to receive the value of the credit (bills of exchange) upon presentation of required complete documents that obligate payment of the value of the credit.

AAOIFI

هيئة المحاسبة والمراجعة للمؤسسات المالية الإسلامية

ACCOUNTING AND AUDITING ORGANIZATION FOR ISLAMIC FINANCIAL INSTITUTIONS

The AAOIFI Shari'ah Standard No. (59): Sale of Debt

Shari'ah Standard No. (59)

Sale of Debt

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IN THE NAME OF ALLAH, THE MERCIFUL, THE VERY MERCIFUL

All praise be to Allah, Allah's blessings are upon our master Muhammad, and his family and all his companions.

Preface

This Standard aims:

to present basic information about the sale of debt, and

to present the types of sale of debt [as applied] by the Institutions[1] together with the relevant Shari'ah rules and their application.

And, Only Allah guides to Success,,,

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

Text of the Standard

1. Scope of the Standard

This Standard deals with the sale of the debt to the debtor and its sale to a third party, i.e., a party other than the debtor.

[This Standard] does not deal with (i) the discharge of debt (*istīfā' al-dayn*) by the debtor, whether in full or in part, if it does not take place through a commutative arrangement nor with (ii) novation (*ḥawāla*) or (iii) set-off (*muqāṣa*), since there is a separate standard for both.

2. Definition of Debt

Debt is an asset that is established and owed, irrespective of its cause of establishment. It may be in the form of money, commodities, or usufructs. It includes debts arising out of (i) a loan or (ii) a commutative contract (*ʿaqd muʿāwaḍa*), or (iii) misconduct or negligence.

3. Types of Sales of Debt

As far as the buyer is concerned, the sale of debt is one of the below two types:

3/1 Sale of debt to the debtor himself.

3/2 Sale of debt to a third party other than the debtor.

4. Sale of Debt to the Debtor

4/1 It is permitted for the creditor to sell to the debtor a debt that is previously established between them, subject to the following rules:

4/1/1 **The First Rule:** The sale shall not lead to *ribā*.

4/1/1/1 If the debt is a usurious commodity, then it must fall within one of the below conditions [rules]:

The First Condition: The consideration of the debt is a usurious commodity and not of the same kind of debt: it is required to take possession of the

consideration in the contract session even if there is a differencein the quantity. Such as:

the debt is in gold and is substituted with silver,

the debt is in wheat and is substituted with dates, or

the debt is in Egyptian Pounds and is substituted with Pounds Sterling.

The Second Condition: The consideration of the debt is a usurious commodity, and it is of the same kind of the debt: it is required that the quantities of the debt and its consideration are equal (*tamāthul*) and the possession of the consideration of the debt shall be transferred in the contract session. Such as:

the debt is in dates and is sold for another type of dates,

the debt is in sea salt and is sold against rock salt, Subject to what is stated in Item No. (4/1/1/2).

4/1/1/2 It is permitted for the creditor to recover his monetary debt, either in the whole or part, in a currency other than the currency in which the debt was established, subject to the following conditions:

a. Possession of the substitute of the debt should be transferred in the contract session so that no part of the debt amount, which has been converted into other currency, remains outstanding.

b. Discharge of the debt in another currency prior to the [stipulated] discharge time should not:

be stipulated [as a condition],

be [noticeable] by anticipation, or

a customary practice.

c. [Discharge of the debt] should be at the exchange rate prevailing on the day of settlement, if:

the debt was resulted out of a loan contract, or

there was a delay from the debtor in settling the debt when it matured.

4/1/1/3 In the contract of Salam, it is permitted to substitute the subject of Salam (the subject of sale), other than cash, after the maturity date by another asset without stipulating such substitution in the contract, whether such substitution is of the same or different kind, provided:

the substituting asset (*al-badal*) is fit to be the subject of Salam for the Salam capital, and

the market value of the substituting asset does not exceed the market value of the subject of Salam at the time of delivery.

For example, when the Salam contract is [for the sale of] gas, and it is substituted by oil. See Item No. (4/2) of theShari'ah Standard No. (10): Salam and Parallel Salam.

4/1/2 **The Second Rule:** The transaction shall not be a legal artifice (*ḥīla*) for *ribā*, such as when [the contracting parties] collude to have the buyerpay the cash amount on the spot in exchange for deferred deliveryof the commodity, and upon the delivery of the commodity, it is substituted for an amount more than the currency itself.

4/1/3 **The Third Rule:** The transaction shall not lead to establishing a new debt as an obligation upon the debtor with an increase upon the existing debt.

4/1/3/1 It is not permitted to sell the debt to the debtor in exchange for a new debt, which is established as an obligation upon him, if [the new debt] more than the [existing debt], and this shall be as a form of extinction of debt in debt (*faskh al-dayn*) by another debt which is prohibited as per Shari'ah.

4/1/3/2 It is not permitted to make the debt as the Salam capital,

for example, to make cash loans or financing receivables, which are owed to the Institution by the customer, as Salam capital. See Item No. (3/1/4) of the Shari'ah Standard No. (10): Salam and Parallel Salam.

4/1/3/3 All such things are prohibited, which may lead to an increase in the amount or the value of the debt against increasing the debt tenure or could be a means to it, irrespective of whether the debtor is solvent or insolvent. This includes the substitution of the debt by the creditor for a commodity and then selling it to the debtor for adeferred price higher than the amount of debt, and it is in the form of the prescribed sale of 'Inah.

4/1/3/4 Upon the request of a solvent debtor customer, it is permitted to execute a Murabaha contract, between the customer and the creditor Institution, pursuant to which new debt is established upon the customer that will be more than the first debt, even if the customer settles whole or part of the first debt using the sale price of the commodity that was purchased under the new financing. This is subject to the following rules:

a. The new Murabaha should be a financing transaction independent of the transaction that established the first debt, so that:

   [entering into the new Murabaha] will not be stipulated in the contract [of the first debt],

   it shall not be required in [the new Murabaha] contract, nor in the financing documentation, to settle the first debt using the selling price of what was purchased by the customer, and

   credit approval must be given for [the new Murabaha] because it is new financing.

b. The contract of new Murabaha should be a valid contract resulting [it's respective] Shari'ah effects, such as:

   the customer is entitled to take actual delivery of the subject of sale, and

   [the customer] is entitled to retain ownership [of the subject of sale], if the delivery was constructive,

be able to dispose of the subject of sale as he deems fit with no obligation to sell thereof.

What is stated in

the Shari'ah Standard No (8): Murabaha,

Shari'ah Standard No. (30): Tawarruq, and

Shari'ah Standard No. (20): Sale of Commodities in Regulated Markets

shall apply.

c. The customer shall be entitled to dispose of the sale price of the asset he purchased under the new Murabaha, as he deems fit, even if he deposits such the [selling] price in his account held with the Institution. Further, [the new Murabaha should] include the right for the customer to use [the selling price] by [him] as per his choice to settle the first debt after one working day following his receipt of the selling price or getting it deposited in his account.

If the new transaction is entered with a delinquent customer, then:

it is not permitted for the Institution to compensate itself, either directly or indirectly, for the delinquency [of the customer] in settling the first debt, and

the profit rate in the new Murabaha should not exceed the rate for such a customer if he was not delinquent.

4/2 It is not permitted to enter into an agreement between the creditor and the debtor at the time of origination of the debt to sell [the debt] to the debtor in the future. Likewise, a bilaterally binding promise between [the creditor and the debtor] is prohibited. Although, if the preceding rules, as mentioned in Item No. 4/1, were materialized in the promised sale, then it is permitted to have a unilaterally binding promise. Refer to Item No. (2/9) of the Shari'ah Standard No. (1): Trading in Currencies.

5. Sale of Debt to a Third Party other than the Debtor

5/1 It is not permitted to sell a monetary debt against cash or for a monetary debt. However, if the transaction is an assignment of debt, then it is not considered a sale of debt. See Shari'ah Standard No. (7): Hawala.

5/2 It is permitted to sell a monetary debt for a commodity with spot delivery or for a usufruct or service wherein its subject-delivery can be ascertained at the time of sale. Hence, it is not permitted to sell a monetary debt against a commodity with deferred delivery, for example, making a debt owed by a third party as the Salam capital. See Item No. (3/1/4) of Shari'ah Standard No. (10): Salam and Parallel Salam. Similarly, it is not permitted to sell [a monetary debt] for a usufruct or a service with unascertained subject-delivery.

5/3 It is not permitted to sell a commodity debt prior to taking its possession, whether it is sold against cash, commodity, usufruct, or service.

5/4 It is not permitted to sell the debt if it was a usufruct or a service that is due and described (*mawṣūfa fī dhima*) (where the subject of delivery is not specific), regardless of whether [such usufruct or service] are sold for cash, commodity, usufruct, or service.

5/5 It is not permitted to sell the debt to a third party if it has excessive *gharar* (uncertainty)[1], such as:

5/5/1 The debt is not established either by acknowledgment or by evidence.

5/5/2 Lack of knowledge (*jahāla*) of the amount of debt.

5/6 The consent of the debtor is not required for the sale of debt to a third party unless the debtor and the creditor have agreed otherwise.

5/7 The buyer shall have the rescission option for misrepresentation (*khayār al-taghrīr*) if the seller of the debt was aware of the debtor's insolvency or procrastination, but the buyer was not informed about that. See Item No. (2) of the Shari'ah Standard No. (48): Options for Breach of Trust.

6. Division of the Debt

6/1 It is permitted for the claimants in one debt to divide it among

(1) Refer to Shari'ah Standard No. (31): Controls on Gharar in Financial Transactions.

themselves in proportion to their respective shares so that each claimant shall reserve his respective share in it.

6/2 It is permitted for the claimants in multiple debts to divide the debts among themselves so that each claimant shall reserve a debt or more based on his share.

6/3 If what is owned by the partners includes debts, tangible assets, and cash, then it is permitted for them to agree [on an arrangement] where some of them will take debts, some will take cash, and others take tangible assets.

7. Transfer of Ownership of the Debt and Its Collateralization

7/1 Ownership of the debt and its risk are transferred to its buyer by the effect of any means, which customarily allows the buyer of the debt to claimthe debt.

7/2 If the debt is collateralized by an established pledge or an established guarantee, then the pledge and guarantee will transfer to the buyer along with the sold debt, if:

it was stipulated by the buyer upon the seller of the debt, or

it was admitted by the custom, and the pledgor or the guarantor has not stipulated non-assignability of the pledge or the guarantee.

7/3 The buyer of the debt may stipulate upon the seller of the debt to collateralize the debt by a Shari'ah compliant guarantee from a third party so that the buyer will purchase the debt that is collateralized with a guarantee. An example is the requirement to have Islamic insurance(Takaful) on the debt prior to its sale. Refer Item No. (6/4) of the Shari'ah Standard No. (5): Guarantees.

7/4 The buyer of the debt may stipulate upon the seller of the debt to guaranteethe debt that is owed by the debtor so that the buyer will have the rightof recourse upon the seller with regards to the portion of the debt that was not recovered.

8. Sale And Negotiability of the Debt When Combined with Other Assets

8/1 If:

the debt is part of the assets of an entity that is in existence and has

ongoing permissible activities, whether these activities were commercial, financial, industrial, related to real estate, services, agricultural,import-export, sale and purchase of commodities and the like,

then:

it is permitted to sell such an entity or its share of [the debt] without considering the provisions of the sale of debt in regard to [the portion] of the debts out of its assets whatever would be the ratio of debts, as long as such debts are generated from the turnover [of business] because such debts are ancillary to the activity [of the entity].

For example:

shares of joint-stock companies, including Islamic banks,

investment fund units,

Sukuks that are based on Mudaraba and investment agency provided the entity is not entirely composed of debt.

8/2 If:

assets of the Institution include debts, tangible assets, usufructs, and rights, and out of such assets, the Institution separated some debts, tangible assets, and the like, in a legally recognized entity wherein commingling of assets (*khulṭa*) is materialized (e.g., a special purpose company, or an investment portfolio, that is registered with the relevant authorities), and assets of the Institution are not turned over on an ongoing basis,

then:

the Institution may sell or securitize such an entity (entirely or a common share out of it) or issue Sukuk thereof, subject to the following rule:

8/2/1 The sale shall result in [its respective] Shari'ah effects, including transfer of ownership and risk to the buyer, as the buyer shall bear the risks [associated with] the asset. It is not permitted to stipulate that such risks will be borne by the seller at any stage of the process.

8/2/2 The ratio of tangible assets and other like assets shall exceed 50% of the value of the assets of the entity.

8/2/3 Upon issuance of Sukuk, the Institution should take all the necessary precautions to maintain the referred ratio by selecting the assets for the purpose of issuing Sukuk. Hence, if the ratio is no longer maintained due to a supervening event, which is acknowledged by a competent Shari'ah Board, then the Institution is required to forthwith restore the ratio within a period specified by the Shari'ah Board. In all instances, the ratio of the tangible asset shall not fall at any time below 33% of the value of the asset(s). Otherwise, the Sukuk-holders shall be notified that the Sukuks are no longer negotiable, except in accordance with the Shari'ah conditions for the trading of debts. If the Sukuk were listed on anexchange, it is required to delist, and the Sukuk-holders will be entitled to liquidate [their holding of] Sukuk, subject to compliance with the provisions of disposition of debts.

8/2/4 In case some of the debts of an entity's assets were settled, the entity must, upon purchasing new debts, abide by the rule set out in Item No. (5) of this Standard. It shall not be deemed as a turnover if:

there was the substitution of part of the debts, tangible assets, or other like assets of the entity, or

a new Murabaha was extended to the same debtor.

Due to this, Item No. (8/1) of this Standard shall not be applicable; rather, provisions mentioned in Item No. (8/2) of the Standard will apply.

8/3 If:

debts, other tangible assets, and the like were combined or separated for the purpose of selling them under one leg, without such assets being in an entity (where the principle of Shari'ah compliant commingling, asset out in paragraph (8/2), is materialized), for example: [debts and tangible assets] are:

combined in a sale contract,

subjected to accounting separation, or

separated in an account held with the Institution,

even if it was in the form of a portfolio that is not registered with the

relevant authorities,

then:

the provisions of the sale of debt, as set out in Para No. (5) of this Standard, apply.

8/4 If:

Sukuk are issued, and a part of their proceeds are utilized in executing the Murabaha transactions while the other part is utilized in tangible assets (e.g., the assets of Mudaraba, Ijarah, or service agency),

then:

trading of such Sukuk shall be subject to Item No. (8/2), provided that the Sukuk issuance shall not amount to guaranteeing what is not permitted as per Shari'ah.

9. Contemporary Practices of the Sale of Debt

9/1 Sale and Discounting of Commercial Papers:

9/1/1 It is permitted to sell a commercial paper to the debtor or to a third-party subject to considering the provisions of the sale of debt, as set out in Item No. (4) and Item No. (5) of this Standard.

9/1/2 It is not permitted to discount the commercial papers, but it is permitted to settle the commercial paper to its first beneficiary (the creditor), prior to its maturity, for an amount less than its value. See:

Item No. (6/1) of the Shari'ah Standard No. (16): Commercial Papers, and

Item No. (10) of the Shari'ah Standard No. (47): Rules for Profit Calculation in Financial Transactions.

9/2 Sale of Bonds:

9/2/1 It is not permitted to trade in Shari'ah non-compliant bonds, whether by their sale, purchase, assignment, or otherwise. See Item No. (5) of the Shari'ah Standard No. (21): Securities (Stocks and Bonds).

9/3 Trading in Salam Sukuk and Murabaha Sukuk:

9/3/1 It is not permitted to trade in Salam-based Sukuk and Murabaha-based Sukuk for a cash price. See Para No. (5) of this Standard and refer Item No. (5/2/14) of the Shari'ah Standard No. (17): Investment Sukuk.

9/3/2 It is permitted to exchange Salam Sukuk or Istisna' Sukuk with the debtor in accordance with the rule of sale of debt, as set out in Item No. (4/1) of this Standard. Further, see Item No. (4/1/1/3) of this Standard.

9/4 Trading in Financial Securities comprising of receivables:

9/4/1 Trading in financial securities, whose underlying assets comprise of debts owed by a third party, shall be subject to the rule set out inthis standard.

9/5 Securitization of Receivables:

9/5/1 Securitization of receivables is a mechanism for the conversion of debts to financial securities that can be traded in the money markets.

9/5/2 It is not permitted to trade in the financial securities, which are based on securitization of monetary debts unless their trading is against a commodity, a usufruct, or service wherein its subject-delivery was ascertained, and this shall be in accordance with Item No. (5/2) of this Standard.

9/6 Factoring:

9/6/1 Factoring is a contract whereby an institution assigns its trade receivables, which are invoiced in whole or only in specific types thereof, on a frequent basis to a factor, [a party] that takes the place of the creditor-institution with regards to the debts it assumes and stands obliged to pay its amounts to the institution immediately on the spot or upon maturity, regardless of whether these debts were recovered or not, and [this shall be] in return for a pre-agreed monetary amount.

9/6/2 As per Shari'ah, it is not permitted to deal in a contract of

purchasing the invoices on a discount (factoring), unless their purchase was for a commodity, or a usufruct or a service wherein the subject-delivery is ascertained, according to Item No. (5/2) of this Standard.

9/7 It is not permitted to sell the debt to a third party for another debt, which is owed to this party [i.e., the third party] by another party. Such as when two institutions agree to swap their portfolios of receivables that are [owed] by their customers.

10. Date of Issuance of the Standard

This Standard was issued on 22nd Rabīʿ Al-Ākhirah 1440 H., corresponding 29th December 2018.

Adoption of the Standard

The Shari'ah Standard on Sale of Debt was endorsed by the Shari'ah Board in its 65th meeting held in the Kingdom of Bahrain during 20-22 Rabīʿ Al-Ākhirah 1440 H. (corresponding to 27-29 December 2018).

Appendix (A)
Brief History of the Preparation of the Standard

The Shari'ah Board resolved on 4th Rabīʿ Al-Awal 1435H (corresponding to 4th February 2014) to assign one expert to prepare a detailed Shari'ah study on the sale of debt.

The sub-committee of the Shari'ah Standards discussed in its meeting held in Jeddah on 6th September 2015 the [presented] study and requested a few amendments from the researcher.

The sub-committee of the Shari'ah Standards discussed in its meeting held in Jeddah on 8th November 2015, the revised study and endorsed it and even discussed the draft of Standard, and made amendments as found suitable.

The sub-committee of the Shari'ah Standards continued discussing the draft of the Standard in its meeting held in Jeddah on 23rd December 2015, made amendments as found suitable, and submitted the draft to the Shari'ah Board.

The Shari'ah Board initiated discussing the draft of the Standard in its 48th Meeting held in the Kingdom of Bahrain between 15th to 18th Shaʿbān 1438H. (corresponding 12th to 15th May 2017) and made amendments which were found suitable, and it resolved to continue looking into the draft in its following meeting.

The Shari'ah Board continued discussing a draft of the Standard in its 49th Meeting held in the Kingdom of Bahrain between 1st -3rd Muḥarram 1439H (corresponding to 21st – 23rd September 2017) and made amendments which were found suitable, and it resolved to present the draft to the hearing sessions.

Pursuant to the directives of the Shari'ah Board to present the draft to the hearing sessions, the General Secretariat of AAOIFI held 5 hearing sessions in

The following locations: Riyadh on 23rd Rabī' Al-Awal 1439H (corresponding to 11th December 2017), Algeria on 26th Rabī' Al-Awal 1439H (corresponding to 14th December 2017), Sudan on 26th Rabī' Al-Awal 1439H (corresponding to 14th December 2017), Morocco on 27th Rabī' Al-Awal 1439H (corresponding to 15th December 2017), and Kuwait on 2nd Rabī' Al-Awal 1439H (corresponding to 20th December 2017). The hearing sessions were attended by various scholars, jurists, experts representing central banks and Islamic financial institutions, accounting, auditing and law firms, university professors, and other relevant persons in the field. The draft of the standard was discussed in detail, and all the comments and suggestions made by the scholars and experts were recorded.

The Shair'ah Board, in its 51st Meeting held in Makkah between 10th–13th Rabī' Al-Ākhir 1439H (corresponding to 28th – 31st December 2017), discussed the comments and suggestions which were made in the hearing sessions and made suitable amendments.

The Shari'ah Board continued discussing the draft of the Standard in its 52nd Meeting held in Madinah between 20th -22nd Jamādā Al-Ākhira 1439H (corresponding to 8th – 10th March 2018) and made suitable amendments.

The Shari'ah Board continued discussing the draft of the Standard in its 55th Meeting held in Madinah between 22nd – 24th Ṣafar 1440H. (corresponding to 1st – 3rd November 2018) and made suitable amendments.

The Shari'ah Board continued discussing the draft of the Standard in its 56th Meeting held in the Kingdom of Bahrain between 20th - 22nd Rabī' Al-Ākhir 1440H. (corresponding to 27th – 29th December 2018) and endorsed the Standard in its present version.

Appendix (B)
The Basis of Shari'ah Rulings

Introduction:

It is a well-known fact that the inception of Islamic banking, its spread and growth in synchrony with the contemporary requirements, needs of the customers and their interests developed in an unprecedented manner that was not found in earlier times and eras. This was followed by several juristic advances leading to innovative contractual arrangements and financial products of significant importance. Such arrangements clearly address the genuine needs and interests, averting any harm considering the obvious global competition.

All this has resulted in encouraging senior contemporary jurists to find acceptable Shari'ah compliant modes based on sound juristic interpretation of relevant texts, benefiting from legal maxims, general principles of Islamic law, and precedents inherited from previous renowned jurists. This was fulfilled in a collective exercise of sound *ijtihād* (juristic reasoning) based on Islamic legal maxims, legislative principles, juristic schools, and established Shari'ah foundations related to transactional topics.

4. Sale of Debt to the Debtor:

4/1: The basis of permitting the sale of an established and outstanding debt to the debtor:

- Contracts, as a rule, by default are valid and permitted.
- It is reported by the compilers of Sunan and Imām Aḥmad in his Musnad that Ibn ʿUmar (RA) said*: I used to sell camels in al-Baqīʿ, so as I sell with the price denominated in gold coins (dīnār) and collected in silver coins (dirham); and sell them denominated in silver coins collecting in gold coins, taking those from that and giving these out of that. I came to the Prophet (PBUH) and inquired (about the permissibility of my act), so he said: "there is no harm in this if it is at the rate of that day, as long*

as you do not depart without fully concluding the transaction"[1]. This Ḥadīth indicates the permissibility of selling a monetary debt, which is outstanding, to the debtor, and by analogy (*qiyās*) other matters can be permitted.

- The sale of such debt by the debtor is permitted because the debtor is considered as the possessor of what is owed by him. This is similar to permitting the sale of the usurped property (by its owner) to the usurper (being already in possession of the property).
- It would be an exercise of meaningless contriving formality if the creditor was required to take possession of the debt, intended to be sold, and then sell it to the same debtor.
- This contract will cause no harm (to any party) and achieves an evident interest, i.e., discharging the debtor from any outstanding amount owed by him and enabling the creditor to receive his debt settled by the debtor.

4/1/1/1 (a): the basis of requiring to take possession by the creditor of the consideration of the debt within the contract session (*majlis al-ʿaqd*) when a debt based on a usurious commodity is sold against a consideration in a usurious commodity of a kind different that of the debt:

- The Shari'ah evidence requiring immediate exchange (*taqābuḍ*) in all sale contracts where both of its considerations are subjected to the provisions of *riba al-nasī'ah*, and one of these evidences is what has been reported in an authentic Ḥadīth of the Prophet (PBUH): "*Gold for gold, silver for silver, wheat for wheat, barley for barley, dates by dates, and salt by salt through equal measure and immediate exchange. If these categories differ, then sell as you wish if it was through an immediate exchange*"[2].

4/1/1/1 (b): the basis of requiring equal quantity and taking possession of the counter-value in the contract session while selling debt with usurious commodity to the debtor against a counter-value which belongs to the same kind of the debt:

- The Shari'ah evidence requires equality in the quantity and immediate exchange while selling usurious commodity against

(1) Sunan Abū Dāwūd (3/250), Sunan al-Tirmidhī (3/535), Sunan al-Nisā'ī (7/281), Ibn Mājah (2/760), Musnad Aḥmad (9/390), Al-Mustadrak by al-Ḥākim.

(2) Ṣaḥīḥ Muslim (3/1211).

its similar kind, and this includes the prior Ḥadīth.

4/1/1/2: the basis of permitting the discharge of the debt in a currency other than its original currency:

- What was reported by Ibn ʿUmar (RA): "*I used to sell camels in al-Baqīʿ, so as I sell with the price denominated in gold coins and collected in silver coins; and sell them denominated in silver coins collecting in gold coins, taking those from that and giving these out of that. I came to the Prophet (PBUH) and inquired (about the permissibility of my act), so he said: "there is no harm in this if it is at the rate of that day, as long as you do not depart without fully concluding the transaction*"[1]. This Ḥadīth permits selling what's outstanding, in one of the monetary debts, against the other monetary debt to a party that owes the outstanding debt.
- The debtor is deemed to be the possessor of the monetary debt owed by him, so it is permitted to enter into a currency exchange of this amount by the debtor against another currency which is transferred in the contract session.

4/1/1/2 (a): the basis of requiring to take possession of the substitute of the debt in the contract session at the time of discharge from the debt in another currency:

- the requirement of immediate exchange as stated in the preceding Ḥadīth.

4/1/1/2 (b): the basis of requiring not to allow discharge from the debt in another currency by stipulating it as a condition, having it noticeable by anticipation, or being a customary practice:

- this would become a deferred *ṣarf*.

4/1/1/2 (c): the basis of requiring that when debt is discharged in another currency, then it shall be the exchange rate on the settlement day:

- what is reported by Ibn ʿUmar (RA) said*: I used to sell camels in al-Baqīʿ, so as I sell with the price denominated in gold coins and collected in silver coins; and sell them denominated in silver coins collecting in gold coins, taking those from that and giving these out of that. I came to the Prophet (PBUH) and inquired (about the permissibility of my act), so he said: "there is no harm in this if it*

(1) See reference in Basis No. 4.1.

is at the rate of that day, as long as you do not depart without fully concluding the transaction".[1] Hence the Prophet (PBUH) restricted the permissibility of recovering silver coins out of the gold coins, and visa-versa, and if it was not restricted, was done against the rate of that date, and

- not restricting the exchange rate by the rate of the settlement date might result in adversely impacting the debtor by accepting an increase of the currency rate against his indebtedness and his distress to settle his debt, and this shall constitute an increase in the debt against extending the loan or increase in the time of settlement. On the other hand, this may result in adversely impacting the creditor so that the debtor may reduce part of the creditor's rights via reducing the exchange rate, and the creditor shall be under compulsion to accept it because of the fear from the debtor to be unable to pay, to procrastinate or ingratitude on his part [while settling the debt].[2]

4/1/1/3: the basis of permitting substituting the subject of Salam with another thing, that is not money, after the maturity [of the Salam delivery time]:

- in principle, the contracts deemed to be permitted and valid, and
- this shall materialize an acknowledged Shari'ah objective which is the discharge of an obligation, and there is no Shari'ah objection if it was carried by observing its [respective] rules and provisions.

4/1/1/3: The basis of requiring the substituted asset to be fit as the subject of Salam against the capital of Salam:

- this could be a means for selling a usurious commodity against a usurious commodity on a deferred basis, so it was prohibited as the issue of In'ah.[3]

4/1/1/3: The basis of requiring not to have the market price of the substitute asset more than the market price of the subject of Salam at the time of delivery:

- this would lead the creditor making profits of that which he has

(1) *Ibid*.
(2) Sharḥ Mushkil al-Āthār by al-Ṭaḥāwī (3/284).
(3) Mughnī (4/128).

not assumed its risk, and it was proscribed to make profits without assuming its underlying risk[1], and

- this could result in a loan that results in a benefit [for the creditor]. It is mentioned in Muwaṭṭa that Imām Mālik said that there is a consensus among scholars that if a person entered into Salam contract over a slave, livestock, or merchandises, and all of it was described with a Salam delivery to be made by the end of the period, and if such period matured, then the buyer shall not sell what he purchased for a price more than the price of Salam prior to taking possession of the subject of Salam. In case the buyer does that, then it will be *ribā*, as the buyer gave the seller gold coins or silver coins, so he benefited from them, and when the delivery period of Salam was matured with no transfer of possession to the buyer, then the seller purchased from the party owning it [i.e., the buyer] for more than the Salam price, this implies that the seller received back what was the subject of Salam and further added from his side.[2]

4/1/3/1The basis of not permitting the extinction of debt in debt (*faskh al-dayn fī al-dayn*) which is the sale of the debt by the debtor against a new debt that is established as an obligation on [the debtor]:

- As per Ibn Mundhir, scholars have a consensus that [extinction] of debt by another debt is not permitted. This includes a person entering in a Salam contract with another person for food items, and when the delivery of Salam matured, then the seller enters in a Salam [sale] for food of larger quantity or sells that food owed by him for gold coins for a different delivery time. Hence, this implies that the debt has revolved into a similar debt. Further, he mentioned that there is a consensus among the scholars on prohibiting a person who owes gold coins from another person to enter in a Salam sale of food for the known period.[3]
- As per Ibn al-Subkī, there is a consensus on prohibiting the person who has a debt owed from another person to create any debt owed by the debtor that shall be different in the quality and value of debt. In reality, it shall be the sale of debt for what shall

(1) Ḥadīths as mentioned in Sunan Abū Dāwūd (3/283), Sunan al-Tirmidhī (2/526), Sunan al-Nisā'ī (7/288), Musnad Aḥmad (11.253), Muʿjam al-Ṭibrānī (3/207).
(2) Muwaṭṭā by Imām Mālik (2/659).
(3) Al-Ishrāf by Ibn al-Mundhir (6/44); Al-Ijmāʿ by Ibn al-Mundhir, 94.

turn out to be a debt[1],

- it is in the form of *ribā al-jāhiliyah,* which is the sale of debt against a new debt that is outstanding upon the debtor and is more than the original debt, and this implies an increase of debt against its deferment.

4/1/3/2: The basis of not permitting the making of debt as the capital of Salam:

- It is a form of extinction of debt in debt, and
- A juristic consensus is reported in proscribing it. As per Ibn Mundhir, scholars have a consensus that extinction of debt in debt is not permitted. This includes a person entering Salam with another person for food items, and when the delivery of Salam matured, then the seller enters into Salam for food of larger quantity or sells that food owed by him for gold coins for a different delivery time. Hence, this implies that the debt has revolved into a similar debt. Further, he mentioned that there is a consensus among the scholars to prohibit the person, who owes gold coins from another person, to enter in Salam [sale] of food for the known period.[2]

4/1/3/3: The basis of prohibiting all matters that may cause an increase of debt in terms of volume or value against an increase of the time of settlement:

- it is a form of *ribā al-jāhiliyah,* which is an increase of debt against deferment.

4/1/3/4: the basis of permitting the execution of Murabaha, made on the request of an indebted and non-insolvent customer, which will result in a new debt which is higher than the first debt even if the sale proceeds of the commodity [of the new Murabaha] were used, subject to abiding by the given rule, to settle the first debt:

- the rules will make the new Murabaha a new and independent Murabaha for the customer who owes a debt to the institution similar to any other financing; also, there could be a chance that there will be no proceeds of selling the commodity purchased on the new financing of Murabaha, so no settlement of [existing debt] will be made. In case proceeds were generated and the

(1) Takmilat al-Majmūʿ (10/106).
(2) Al-Ishrāf by Ibn al-Mundhir (6/44); Al-Ijmāʿ by Ibn al-Mundhir, 94.

customer settled the existing debt, then it will be upon his disposition, which the Institution has no authority over, and the sale proceeds are in the money, which cannot become specific (*muʿayyan*) by appropriation (*taʿyīn*).

4/2: the basis of prohibiting to carry a bilateral promise to sell the debt to the debtor if the promise was bilaterally binding:

- bilaterally binding promise in this form is a mean to artificially achieve *ribā*.

5: Sale of Debt to a Third Party Other than the Debtor

5/1: The basis of not permitting the sale of monetary debt against cash or against monetary debt:

- it contains *ribā faḍal* (ribā with excess) and *ribā al-nasī'a* (ribā of delay) if the counter-value was different in value of the monetary debt, and it would be *ribā al-nasī'a* if the counter-value was equal in value with the monetary debt.

5/2: The basis of permitting to sell the monetary debt to a third party against a present commodity, usufruct, or service, with specific subject matter:

- specific asset and its usufructs do not represent debt, so it will not result in the sale of debt against debt, and
- if the usufructs were attached to a specific asset, then they are treated as specific assets that is taken into possession. It was based on the scenario given by al-Dasūqī in *Al-Sharḥ al-Kabīr*[1] regarding the sale of debt, even if on a spot basis, to someone who does not owe it. This includes when a person has a debt owed by a person; then he sells it on credit to a third party. This does not imply disallowing the sale of debt to someone other than the party owing the debt against a specific asset (e.g., real estate) or usufruct of a specific asset when its transfer of possession is delayed. Hence, if (A) has a debt owed by (B), so it is permitted for (A) to sell the debt to (C) against a specific asset when its transfer of possession is delayed. Further, it is not permitted to sell the debt unless it was present (*ḥāḍir*) or the purchase [of the debt] was against cash. A specific asset (*muʿayyin*) and its usufructs, where transfer of possession is delayed is not [considered as] cash, because cash refers to what is not owed as a

(1) Sharḥ al-Kabīr by al-Dardīr and Ḥāshiyat al-Dasūqī (3/63).

liability. It is beyond doubt that specific asset and its usufructs are not owed as a liability, rather they [are deemed] as cash in this sense. Further, cash does not include money that is already taken into possession.

5/3: The basis of not permitting to sell a commodity debt prior to taking it into the possession:

- [such a sale] contains *gharar* (uncertainty).

5/4: The basis of not permitting to sell the debt against a usufruct or service, which will be delivered as per description (with unascertained subject-matter), that:

- [such a sale] contains *gharar* (uncertainty).

5/6: the basis of not having a requirement to secure permission from the debtor to sell the debt to a third party:

- applying the analogy of *ḥawālā* (novation),
- the creditor may demand his right on his own or by a party acting on his behalf.

5/6: The basis for requiring to seek permission from the debtor while selling the debt to a third party if it was stipulated between the creditor and the debtor:

- saying of the Prophet (PBUH) said: "*Muslims act up their conditions*."

6: Division of the Debt

6/1 and 6/2: The basis of permitting to divide single or several debts among the partners:

- Such a division is separation and not a sale.

6/3: The basis of permitting an agreement among the partners in a joint property (containing tangible assets, debt, and cash) that some [partners] will take debts and cash and some will take tangible assets:

- the division in this scenario is a form of *ṣulḥ* (settlement) among the partners.

7: Transfer of Ownership of the Debt and Its Collateralization

7/1: The basis of the transfer of debt and its risk to a buyer of the debt so as to

enable raising a claim for it:

- the risk of the subject of sale will transfer to the buyer either by taking the possession or *tamkīn* (enabling the buyer to take the possession), and the buyer of the debt is deemed to be the possessor if he was enabled to make a claim of the debt.

7/2: The basis of non-inclusion of the pledge or the guarantee in the sale of debt to a third party unless by stipulation:

- the sale of debt, when absolute, shall not include them. This was referred in Ḥāshiyat al-Dasūqī[1], where it was mentioned that if a person buys a debt, or receives it as a gift, which was backed by a pledge or a guarantee, then the pledge or the guarantee will not be included in [the acquired] debt or the gift unless it was stipulated to include the same with presence and acknowledgment of the guarantor of the guarantee. The Standard does not expressly require the presence of the guarantor and his agreement of the guarantee because establishment of the pledge or the guarantee stands for it.

7/3: The basis of permitting to stipulate a condition by the buyer of the debt upon the seller of the debt to be secured by a permitted guarantee:

- it is a condition that is suitable to the contract and has no Shari'ah prevention.

7/4: The basis of the permissibility of stipulating by the buyer of the debt on the seller of the debt to be secured by a permitted guarantee:

- it is a condition which is suitable to the contract) and has no Shari'ah prevention.

8. Sale and Negotiability of the Debt that is Joined with Other Assets

8/1: The basis of selling and trading the debt if it was part of assets of an entity in existence, which has ongoing activities, without observing the rulings of the sale of debt:

- the concept of appurtenance (*tabaʿīya*) as determined by Islamic jurisprudence, and
- permitting to sell a thing consequentially which cannot be sold independently. In case the entity is comprised purely of debts, then the

(1) Sharḥ al-Kabīr by al-Dardīr and Ḥāshiyat al-Dasūqī (3/63).

principle of appurtenance is disapplied, and the original rulings of the sale of debt shall be observed.

8/2: the basis of the permissibility of separating debts and tangible assets (and the like) in a legal entity which materializes the commingling principle as per Shari'ah, and disposing of the entity or by part of it without abiding by the rulings of sale of debt:

- formation of the entity will meet the requirements of the assemblage (*tarkīb*), which is required by Mālikīs in permitting the sale of jewelry ornamented by gold or silver for a price out of the same kind of the designed material without looking at its volume. As per al-Ḥaṭṭāb[1], the jewelry should be fixed on the ornament so that it will damage the ornament if removed. In case there is no damage, then this condition is not fulfilled. It is mentioned in Tawḍīḥ, that, as per al-Bājī, this includes stones with fixed jewel and decoration of fixed the sword.

8/2/1: The basis of requiring the buyer of the entity to assume the risk of the tangible assets (and the like) [that are part of the total] asset:

- it is among the Shari'ah requirements of the ownership,
- it is invalid, as per Shari'ah, to make the seller [continue] assuming the risk of the tangible assets [after their sale], and this will imply that the intention of the buyer is directed towards the debts and not the tangible assets, and thus the inclusion of the tangible assets with the debt in an entity will be superficial (*shaklī*) with no regard to treating the entity or its parts as a tangible asset.

8/2/2: The basis of requiring the percentage of tangible assets (and the like) to be more than 50% of the assets of the entity:

- the larger portion will be given the ruling of the whole, and this percentage is an opinion among Mālikīs – against the well-known opinion (*khilāf al-mashhūr*) - for the materialization of the concept of appurtenance based on the volume upon selling items ornamented with gold or silver if the price was of the same kind of the ornaments. As per al-Kharashī[2], the portion of the ornament is one-third or less, as per the popular view. As per al-Abī[3], there is a difference of view about appurtenant, and some said it's one-third, less than one-third,

(1) Mawāhib al-Jalīl (4/331).
(2) Sharḥ al-Kharashī (5/48).
(3) Ikmāl al-Muʿalim (5/487).

or half.

8/2/3: The basis of continuance to apply the ruling of trading of the Sukuk on its condition, if the value of the tangible assets (and the like) in the assets of the entity came down, due to a contingency after the issuance of the Sukuk, to a percentage not less than 33%:

- supervening matters (*umūr ṭāri'a*) cannot be repelled, although it is required to avoid it, and the maxim says: *yughtafar fī al-baqā' mā lā yughtafar fī al-ibtidā'* (what can be overlooked during the continuance cannot be overlooked at the inception),
- Less than a third is considered a little in many of the Shari'ah rulings.

8/2/3: The basis of the requirement of notifying the Sukuk-holders, if the value of the tangible assets (and the like) went below 33% of the assets of the entity, about non-negotiability of the Sukuks and their delisting:

- the impermissibility of the trading without abiding by the rulings of the sale of debt as it was given in the preceding Shari'a basis.

8/3: The basis of the requirement of observing the rulings of the sale of debt if debts were collected or separated from tangible assets (and the like) to be sold in a single leg without being held by a legal entity which materializes the Shari'ah principle of commingling:

- this does not fulfill the requirements of the assemblage (*tarkīb*), as mentioned in the basis of Item 8/2, and such is a proscribed artifice to trade in the debts without observing provisions related to their sale, as given in the Item (3/20) of AAOIFI Shari'ah Standard No. (21): Commercial Papers.

Shari'ah Standard No. (4)

Settlement of Debts by Set-Off

(Revised Standard)

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

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

Preface

The aim of this standard is to outline the rules governing the use of set-off in settling debts, the Shari'ah requirements and conditions applicable to set-off, what is permissible or not permissible in this procedure and the most significant practices of Islamic financial Institutions (Institution/ Institutions)[1] in this regard.

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

Statement of the Standard

1. Scope of the Standard

This standard covers the settlement of debt by way of set-off. The standard shall not apply to discharge of liability by way of transfer, waiving of obligation, composition, acquisition of a right payable or bilateral cancellation of a contract, as they are covered by their respective Standards.

2. Definition of Set-Off and Its Various Forms

A set-off is to extinguish a debt receivable by a debt payable. It is divided into two main forms: mandatory set-off and contractual set-off.

2/1 Mandatory set-off

A mandatory set-off is a set-off that occurs without the need for bilateral agreement or consent of both indebted parties and, in some cases of mandatory set-off, it is one party that is forced to comply with the request of the other party for set-off. It is divided into compulsory set-off (on both parties)[2] and set-off on demand (of the person with the superior debt whereby the other party is obliged to comply with the demand).

2/1/1 A compulsory set-off is the spontaneous discharge of two debts that is not contingent on the request or consent of both or either party.

2/1/2 The conditions of the permissibility of compulsory set-off are the following:

a) Each party should be a creditor and debtor simultaneously.

b) Both debts should be equal in kind, type, description and maturity. However, if the two debts are not equal in amount, a set-off will take place of an equivalent amount on both

(2) Compulsorily set-off is a set-off that occurs without a need to bilateral agreements or consents of the parties.

sides, and the party that is owed the larger debt will remain a creditor for the remaining balance.

c) Neither of the two debts should be encumbered by an obligation to a third party, such as the right of a mortgagee to one of the debts. The intention of this is to protect rights associated with the amount of the debt and belonging to third parties.

d) The set-off should not be arranged in a manner that results in violation of a rule of Shari'ah, such as Riba (usury) or *Shubhat al-Riba* (a transaction potentially involving Riba).

2/1/3 A set-off on demand is the discharge of two debts at the request of the creditor for the superior debt and his consent to forgo the excess of the amount or privilege he is owed over what he owes. This set-off will take place whether or not the creditor for the smaller debt consents.

2/1/4 The conditions of permissibility of a set-off on demand are the following:

a) Each party should be a creditor and debtor simultaneously.

b) The creditor for the superior debt, in terms of quality and duration, should consent to relinquish his additional right or privilege. An example of superiority in terms of quality is when the debt is secured by a mortgage, or when a third party has given a guarantee to pay the debt, and the owner of the secured debt consents to relinquish this guarantee. Superiority in terms of duration exists if the duration of one of the debts is shorter, or one debt is now due and the other is not yet due. In these cases, the debt which has the shorter duration or which is now due is superior.

c) Both debts should be similar in kind and type, but not necessarily in quality and date of maturity. However, if the two debts are not equal in amount, a set-off will take place of an equivalent amount on both sides, and the party that is owed the larger debt will remain a creditor for the remaining balance.

d) The set-off should not be arranged in a manner that results in violation of a rule of Shari'ah, such as Riba (usury) or a transaction potentially involving Riba.

2/2 Contractual set-off

2/2/1 A contractual set-off is the discharge of two debts by the consent of the two parties to extinguish their obligations towards each other.

2/2/2 The conditions of the permissibility of a contractual set-off are the following:

a) Each party should be a creditor and debtor simultaneously.

b) The two parties should mutually consent to the set-off.

c) The set-off should not be arranged in a manner that results in violation of a rule of Shari'ah, such as Riba or a transaction potentially involving Riba.

2/2/3 A contractual set-off is permissible even without the need for two debts to be similar in kind, type, description or maturity. This is because the agreement on contractual set-off means that each party has agreed to relinquish any extra privilege associated with his debt. A contractual set-off is also permissible if the two debts are not equal in terms of amount, in which case a set-off will take place of an equivalent amount on both sides, and the party that is owed the larger debt is entitled to request payment of the remaining balance. [see item 2/10 (a) of the Shari'ah Standards on Trading in Currencies]

3. Bilateral Exchange of Promises to Conclude a Set-Off in the Future

It is permissible for the Institution and its customers or other Institutions to exchange bilateral promises that debts that may be created between them in the future will be settled by way of set-off, in which case all the conditions mentioned in the items 2/1 and 2/2 will be applicable at the time of actual set-off. However, if the currencies of the two debts differ, a bilateral exchange of promise of set-off should be concluded on the basis

that a set-off will take place based on the current currency exchange rate at the time of actual set-off; this ruling is to prevent the practices of Riba by roundabout methods or by implied agreement for practicing Riba.

4. Application of the Rules of Set-Off to Some Modern Transactions

The followings are some rules of set-off to modern transactions:

4/1 Stipulating set-off between the customer and the Institution in respect of debts to the Institution arising out of sales on deferred payment. The agreement on contractual set-off of future debts, commonly known as set-off and consolidation, is a practice employed by a large number of financial Institutions. This form of set-off may take place either compulsorily or contractually depending on whether the situation that gives rise to this set-off meets the conditions of compulsory set-off or the conditions of contractual set-off. Moreover, by pre-stipulating this type of set-off in the agreement, a fresh agreement may be avoided at the time of set-off when the two currencies are different or when one of the debts is superior to the other.

4/2 A set-off may take place between a financial Institution accepting a cheque and the drawer of the cheque, through the clearing-house. This form of set-off may also take place either compulsorily or contractually depending on whether the state that gives rise to this set-off meets the conditions of compulsory set-off or the conditions of contractual set-off.

4/3 Set-off that is concluded among financial Institutions through international or national networking systems, such as credit card or debit card organisations. This form of set-off may be either compulsory or contractual depending on whether the state that gives rise to this set-off meets the conditions of compulsory set-off or the conditions of contractual set-off.

5. Currency Swaps

The currency swaps that are concluded on the basis of Riba are not permissible. This is because in this process it is the interest-based securities that are set-off against interest-based securities.

6. Date of Issuance of the Standard

This Standard was issued on 29 Safar 1422 A.H., corresponding to 23 May 2001 A.D.

Adoption of the Standard

The Shari'ah Standard on Settlement of Debts by Set-off was adopted by the Shari'ah Board in its meeting No. (6) held on 25-29 Safar 1422 A.H., corresponding to 19-23 May 2001 A.D.

Appendix (A)
Brief History of the Preparation of the Standard

In its meeting No. (2) held in Makkah Al-Mukarramah on 10-14 Ramadan 1420 A.H., corresponding to 18-22 December 1999 A.D., the Shari'ah Board decided to give priority to the preparation of a Shari'ah Standard on settlements of debt by way of set-off.

On Tuesday 27 Ramadan 1420 A.H., corresponding to 4 January 2000 A.D., one Shari'ah consultant was commissioned to prepare a juristic study and an exposure draft.

In its meeting held in Bahrain on 18-19 Rabi' I, 1421 A.H., corresponding to 20-21 June 2000 A.D., the Shari'ah Studies Committee discussed the juristic study and made certain amendments to it. The committee also discussed the exposure draft of the Standard in its meeting No. (6) held in Bahrain on 20-21 Jumada II, 1421 A.H., corresponding to 18-19 September 2000 A.D., and asked the consultant to make some amendments in light of the comments made by the members.

In its meeting No. (7) held in Bahrain on 5-6 Sha'ban 1421 A.H., corresponding to 1-2 November 2000 A.D., the Shari'ah Studies Committee discussed the exposure draft and made some relevant amendments.

The revised exposure draft of the standard was presented to the Shari'ah Board in its meeting No. (5) held in Mecca on 8-12 Ramadan 1421 A.H., corresponding to 4-8 December 2000 A.D. The Shari'ah Board made further amendments to the exposure draft of the standard and decided that it should be distributed to specialists and interested parties in order to obtain their comments in order to discuss them in a public hearing.

A public hearing was held in Bahrain on 4-5 Dhul-Hajjah 1421 A.H., corresponding to 27-28 February 2001 A.D. The public hearing was attended by

more than 30 participants representing central banks, Institutions, accounting firms, Shari'ah scholars, academics and others who are interested in this field. Members of the Shari'ah Studies Committee responded to the written comments that were sent prior to the public hearing as well as to the oral comments that were expressed in the public hearing.

The Shari'ah Studies Committee held its meeting No. (8) on 16-17 Dhul-Hajjah 1421 A.H., corresponding to 11-12 March 2001 A.D., to discuss the comments made about the exposure draft. The Committee made the necessary amendments in light of both the written comments that were received and oral comments that took place in the public hearing.

The Shari'ah Board in its meeting No. (6) held in Al-Madinah Al-Munawwarah on 25-29 Safar 1422 A.H., corresponding to 19-23 May 2001 A.D., discussed the amendments made by the Shari'ah studies committee, and made necessary amendments. The Shari'ah Board unanimously adopted some of the items of the standard and some items were adopted by the majority vote of the members of the Shari'ah Board, as recorded in the minutes of the meetings of the Shari'ah Board.

The Shari'ah Standards Review Committee reviewed the standard in its meeting held in Muharram 1433 A.H., corresponding to November 2011 A.D., in the State of Qatar, and proposed after deliberation a set of amendments (additions, deletions, and rephrasing) as deemed necessary, and then submitted the proposed amendments to the Shari'ah Board for approval as it deemed necessary.

In its meeting No. (38) held in Al-Madinah Al-Munawwarah, Kingdom of Saudi Arabia on 28 Sha'ban to 1 Ramadan 1435 A.H., corresponding to 26-28 June 2014 A.D., the Shari'ah Board discussed the proposed amendments submitted by the Shari'ah Standards Review Committee. After deliberation, the Shari'ah Board approved the necessary amendments, and the standard was adopted in its current amended version.

Appendix (B)
The Shari'ah Basis for the Standard

The basis for debt settlements by way of set-off is that it has been practised from time immemorial without any report of disapproval. Moreover, set-off is in line with the objectives of the Shari'ah as it encourages discharging individuals from liability of debt and set-off is one way of discharging debt liabilities without involving futile processes of debt recovery.

In addition, there is no Shari'ah objection to a set-off taking place on demand. The authority for this permissibility is that the person entitled to the superior debt has agreed to forgo the advantage attached to his debt and the Shari'ah will not object to such a gesture.

If set-off is executed contractually, it is then based on the prophetic Hadith stating; *"Muslims are bound by the conditions and agreements they have made, except a condition that has rendered the unlawful lawful or rendered the lawful unlawful."*(3)

(3) The Hadith has been related by Al-Tirmidhi in his *"Sunan Al-Tirmidhi"* [3: 634] edited by Ahmad Muhammad Shakir and others, Beirut: Dar Ihya` Al-Turath Al-'Arabi. Also, it has been related by Al-Bayhaqi in his *"Sunan Al-Bayhaqi"* [7: 248]; and Al-Manawi, *"Fayd Al-Qadir"* [6: 272], Egypt: Al-Maktabah Al-Kubra, 1356 A.H..

Appendix (C)
Definitions

Debt and Loan

A debt is any liability that is not in terms of a specified or defined item, whatever the cause of its establishment, i.e. whether its origin is in cash or in a commodity, or in a particular described benefit such as the benefit of using particular things or services of persons. For instance, the consideration in deferred sales and loans is described as a debt.

The relationship between a loan and a debt is that the latter is more general than the former, since every loan is described as a debt but the converse is not true. Not all debts originate from a loan. In this sense, a loan is but one cause of the creation of debt.

Due Debt

A due debt is a debt that is immediately payable or that is payable on the creditor's demand, whether on its original due date or, if it has been rescheduled and deferred, on its rescheduled due date.

Deferred Debt

A deferred debt is a debt the payment thereof is due at a certain time in the future, and it may also be due in periodic instalments over time.

Description

A description is a condition that distinguishes particular specimens of the same species from one other. For examples, conditions such as good quality and poor quality, or mortgage of security or personal guarantees, letters of guarantee and the freezing of the amount of cheques for payment which are attached to the debt are considered descriptions.

Ibra` (discharge)

An act by a person to discharge another person from a liability (owed by the latter to the former)

Reconciliation (Sulh)

An agreement to solve dispute between parties.

Iqalah (Mutual Rescission of Contract)

Revocation of a contract and cancellation of its effects with mutual consent of both parties.

Shari'ah Standard No. (7)

Hawalah

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

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

Preface

The aim of this standard is to explain the rulings, types, requirements and limitations of transfers (transfer of debts and transfer of rights), what is permissible or prohibited in this regard, and the applications of transfers in Islamic financial Institutions (Institution/Institutions).[1]

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

Statement of the Standard

1. Scope of the Standard

This standard covers Hawalah transactions that involve a change of debtor, i.e. transfer of debt. The scope of this standard does not cover banking remittances except the remittances that take the form of Hawalah (transfer of debt).

2. Definition of Hawalah

Hawalah of debt is the transfer of debt from the transferor (*Muheel*) to the payer (*Muhal Alaihi*). The transfer of right, on the other hand, is a replacement of a creditor with another creditor. The transfer of debt differ from transfer of right in that in transfer of debt a debtor is replaced by another debtor, whereas in a transfer of right a creditor is replaced by another creditor.

3. Permissibility of Hawalah

3/1 Hawalah is a legitimate and an independent contract made out of courtesy and is not a contract of sale. It is permitted in order to facilitate payments and recovery.

3/2 The acceptance of Hawalah is recommended for the transferee if the potential payer is known to be solvent and a person who honours payments. This is because Hawalah benefits the creditor and gives relief to the debtor. If the financial status and creditworthiness of the potential payer are unknown, then Hawalah becomes *Mubah* (permissible).

4. Form of a Hawalah Contract

4/1 A contract of Hawalah can be concluded by an offer from the transferor and acceptance from the transferee (*Muhal*) and the payer in a manner that clearly indicates the intention of the parties to conclude a Hawalah contract and the transfer of the liability or obligation in respect of

a debt from one party to another party. It is not necessary that the word transfer be used.

4/2 Hawalah is a binding contract. Therefore, it is not subject to unilateral termination.

4/3 It is a requirement that a transfer of debt take effect immediately, not to be suspended for a period of time and not to be concluded on a temporary basis or contingent on future events. However, it is permissible to defer payment of the transferred debt until a future specified date.

5. Types of Hawalah and the Applicable Rulings

5/1 Hawalah is divided into restricted and unrestricted Hawalah.

5/1/1 Restricted Hawalah is permissible. It is a transaction where the payer is restricted to settling the amount of the transferred debt from the amount of a financial or tangible asset that belongs to the transferor and is in the possession of the payer.

5/1/2 Unrestricted Hawalah is permissible. It is a kind of transfer of debt in which the transferor is not a creditor to the payer and the payer undertakes to pay the amount of the debt owed by the transferor from his own funds and to have recourse afterwards to the transferor for settlement, provided that the transfer for payment was made on the order of the transferor.

5/1/3 It is permitted to conclude a Hawalah on a spot payment basis. This is a Hawalah in which the debt transferred to the payer becomes payable on the spot, whether the debt has already fallen due and the obligation is then transferred to the payer for immediate settlement, or the transferred debt is yet to fall due and the transferee has required, as a condition for accepting the transfer, that it be paid immediately by virtue of transfer.

5/1/4 It is permissible to conclude a Hawalah contract on a deferred payment basis. This is a Hawalah in which the debt transferred to the payer is to be paid in the future, whether the payment of the debt is not yet due and was transferred as such to the payer,

or the payment of such debt is due but the payer required that it should be transferred for future payment at an agreed date. In the latter case, the payer cannot be asked for payment before the agreed date.

6. Conditions of Hawalah

6/1 The permissibility of Hawalah requires the consent of all parties, namely the transferor, the transferee and the payer.

6/2 The permissibility of a Hawalah requires that the transferor be a debtor to the transferee. A transaction in which a non-debtor transfers another is an agency contract for collection of the debt and not a transfer of debt.

6/3 It is not a condition in a Hawalah that the payer be a debtor to the transferor. If the payer is not a debtor to the transferor, the Hawalah will be an unrestricted Hawalah. [see item 5/1/2]

6/4 It is a condition that all Hawalah parties be legally competent to act independently.

6/5 It is a condition in Hawalah that both the transferred debt and the debt to be used for settlement be known and transferable.

6/6 It is a condition for concluding restricted Hawalah that the transferred debt or the transferred portion of the debt be equal to the debt owed to the transferee in terms of kind, type, quality and amount. However, the transferor may transfer a lesser amount of a debt owed to the transferee to be settled from a larger amount owed by the transferor on condition that the transferee be entitled only to the equivalent amount of his debt.

7. Effect of Hawalah on the Relationship between the Transferor and the Transferee

7/1 A valid Hawalah discharges the transferor from both the debt liability and any claims in respect of it. In other words, the transferee will have no right of recourse against the transferor for payment. However, if

the acceptance of the transfer was based on the condition that the payer must be solvent, then the transferee will have a right of recourse if the payer is not solvent.

7/2 The transferee is entitled to have a right of recourse against the transferor in situations of (I) death of the payer in bankruptcy, (II) liquidation of an Institution that is the payer in the case of bankruptcy before payment of the debt, (III) the payer is declared bankrupt in his lifetime, or he denies concluding the Hawalah contract and has taken a judicial oath to this effect and there is no evidence to prove otherwise and (IV) the Institution that is the payer is declared bankrupt by a court order.

8. Effect of Hawalah on the Relationship between the Transferor and the Payer

After the conclusion of a restricted Hawalah, the transferor is no longer entitled to reclaim from the payer an amount transferred to the payer in respect of the debt to be settled, because the right to receive this amount has now passed to the transferee.

9. Effect of Hawalah on the Relationship between the Transferee and the Payer

9/1 The transferee is entitled to claim the amount of the debt assigned to him through Hawalah from the payer in accordance with conditions of Hawalah contract. The payer, on the other hand, is obliged to pay him and has no right to refuse payment.

9/2 The payer takes the place of the transferor in respect to all rights, legal protections and obligations. The transferee in restricted Hawalah takes the place of the transferor in respect to all rights, legal protections and obligations against the payer.

10. Effect of Death and Bankruptcy on a Hawalah Transaction

10/1 A Hawalah shall not be annulled by the death of the transferor or liquidation of a transferor Institution. The transferee is the sole owner of the amount of the debt payable by the payer and, after

a Hawalah transaction, such a debt cannot be included in the assets of the transferor that are available to be distributed, after death or liquidation, among creditors on a pro rata basis.

10/2 A Hawalah transaction shall not be annulled due to the death of the payer or the liquidation of the Institution acting as payer. In these cases, the transferee will have the right of recourse against the estate of the payer for recovery, a personal guarantor, if any, or pre-distribution assets of the liquidation. However, if the payer dies in the state of bankruptcy, then the transferee shall be entitled to have recourse to the transferor. [see item 7/2]

10/3 A Hawalah transaction shall not be annulled due to the death of the transferee and the heirs shall replace the transferee. The Hawalah will also not be void in case of liquidation of a transferee Institution in which case the liquidator takes the place of the Institution for settlement.

11. Termination of a Hawalah Liability

A Hawalah liability will come to an end by settlement of the debt or by a mutual agreement to terminate it or by the debt being written-off by the transferee.

12. Modern Applications of Hawalah Rules

12/1 Withdrawals from a current account

An issuance of a cheque against a current account is a form of Hawalah if the beneficiary is a creditor of the issuer or the account holder for the amount of the cheque, in which case the issuer, the bank and the beneficiary are the transferor, the payer and the transferee respectively. If the beneficiary is not a creditor to the issuer of the cheque, then this is not a Hawalah transaction because there can be no Hawalah transaction without an existing debt. In the absence of a debt, the transaction becomes an agency contract for recovery of the amount of the debt on behalf of the transferor, which is permissible by Shari'ah.

12/2 Overdrawing from an account or overdraft

If the beneficiary of the amount of a cheque is a creditor to the issuer, then issuing a cheque against the account of the issuer without a balance is unrestricted transfer of debt if the bank accepts the overdraft. If the bank rejects the overdraft, then this is not considered a transfer of debt, in which case the potential beneficiary may have recourse to the issuer.

12/3 Travellers' cheques

The holder of a travellers' cheque, the value of which has been paid by him to the issuing Institution, is a creditor to such an Institution. If the holder of the travellers' cheque endorses the cheque in favour of his creditor, it becomes a transfer of debt in favour of a third party against the issuing Institution that is a debtor to the holder of the traveller's cheque. This is a restricted transfer of debt and the amount of the debt is the value of the cheque for which the Institution received payment.

12/4 Bills of exchange

12/4/1 A bill of exchange is a form of Hawalah if the beneficiary is a creditor to the drawer. The drawer is, in this case, the transferor who gives orders for the paying bank to pay a certain sum of money at a specified date to the defined beneficiary. The party executing payment of such amount of money is the payer whereas the beneficiary, i.e. the holder of the bill, is the transferee. If the beneficiary is not a creditor of the drawer, then the issuance of the bill of exchange becomes an agency contract to recover or collect the amount of the bill of exchange on behalf of the drawer.

12/4/2 In the absence of a debt obligation between the drawer and the paying bank, the issuance of a bill of exchange becomes an unrestricted Hawalah.

12/5 Endorsement of a negotiable instrument

12/5/1 An endorsement of a negotiable instrument in a manner that transfers title to its value to the beneficiary is a form of Hawalah if the beneficiary is a creditor to the endorser. If the beneficiary is not a creditor to the endorser, the endorsement becomes one of agency contract for collection of the amount of the debt.

12/5/2 An endorsement of a bill of exchange on behalf of a client who requires the Institution to transfer, after collection, the amount of the instrument into his account is not a Hawalah. This is a contract of agency that is permissible with or without consideration.

12/5/3 Subject to item 12/5/1, it is permissible for the first beneficiary from a bill of exchange to endorse it in favour of any other party. The second beneficiary may also endorse such a bill of exchange in favour of a third party and so on, in which case the revolving of endorsements is a form of successive Hawalah which is not objectionable in Shari'ah.

12/5/4 It is not permissible to discount bills of exchange by transferring the ownership of their value, before their due date, to an Institution or others for a discounted immediate payment. This is because the transaction in this manner is a form of Riba.

12/6 Transfer of money (remittances)

The request of a customer for the Institution to transfer a certain amount of money in the same currency from his current account to a particular beneficiary is a transfer of debt if the applicant is a debtor to such a beneficiary. The fee that the Institution gains from this transaction is consideration for the delivery of the money and it is not an additional amount gained by the Institution over the amount transferred. However, if a remittance is to take place in a currency different from that presented by the applicant

for the transfer, then the transaction consists of a combination of currency exchange and a transfer of money that is permissible. [see item 2/11 of the Shari'ah Standard on Trading in Currencies]

13. Date of Issuance of the Standard

This standard was issued on Rabi' I, 1423 A.H., corresponding to 16 May 2002 A.D.

Adoption of the Standard

The Shari'ah Standard on Hawalah was adopted by the Shari'ah Board in its meeting No. (8) held in Al-Madinah Al-Munawwarah on 28 Safar - 4 Rabi' I, 1423 A.H., corresponding to 11-16 May 2002 A.D.

Appendix (A)
Brief History of the Preparation of the Standard

In its meeting No. (5) held in Makkah Al-Mukarramah on 8-12 Ramadan 1421 A.H., corresponding to 4-8 December 2000 A.D., the Shari'ah Board decided to give priority to the preparation of a Shari'ah Standard on Hawalah.

On 29 Ramadan 1421 A.H., corresponding to 25 December 2000 A.D., a Shari'ah consultant was commissioned to prepare a juristic study and an exposure draft.

In its meeting held in Bahrain on 15-16 Safar 1422 A.H., corresponding to 9-10 May 2001 A.D., the Shari'ah Studies Committee discussed the juristic study and made certain amendments to it. The committee also discussed the exposure draft of the Standard in its meeting No. (10) held in Bahrain on 14 Rabi' I, 1422 A.H., corresponding to 6 June 2001 A.D., and asked the consultant to make some amendments in light of the comments made by the members.

In its meeting No. (11) held in Jordan on 17 Jumada II, 1422 A.H., corresponding to 5 September 2001 A.D., the Shari'ah Studies Committee discussed the exposure draft and made some relevant amendments.

The revised exposure draft of the standard was presented to the Shari'ah Board in its meeting No. (7) held in Makkah Al-Mukarramah on 9-13 Ramadan 1422 A.H., corresponding to 24-28 November 2001 A.D. The Shari'ah Board made further amendments to the exposure draft of the standard and decided that it should be distributed to specialists and interested parties in order to obtain their comments in order to discuss them in a public hearing.

A public hearing was held in Bahrain on 29–20 Dhul-Hajjah 1422 A.H., corresponding to 2-3 February 2002. The public hearing was attended by

more than 30 participants representing central Institutions, Institutions, accounting firms, Shari'ah scholars, academics and others who are interested in this field. The members responded to the written comments that were sent prior to the public hearing as well as to the oral comments that were expressed in the public hearing.

The Shari'ah Standards Committee in its meeting held on 21-22 Dhul-Hajjah 1422 A.H., corresponding to 6-7 March 2002 A.D., in the Kingdom of Bahrain discussed the comments made about the exposure draft. The Committee made the necessary amendments, which it deemed necessary in light of both the discussions that took place in the public hearing, and the written comments that were received.

The Shari'ah Board in its meeting No. (8) held on 28 Safar – 4 Rabi' I, 1423 A.H., corresponding to 11-16 May 2002 A.D., in Al-Madinah Al-Munawwarah discussed the amendments made by the Shari'ah Standards Committee, and made the necessary amendments, which it deemed necessary. Some paragraphs of the standard were adopted by the unanimous vote of the members of the Shari'ah Board, while the other paragraphs were adopted by the majority vote of the members, as recorded in the minutes of the Shari'ah Board.

The Shari'ah Standards Review Committee reviewed the standard in its meeting held in Rabi' II, 1433 A.H., corresponding to March 2012 A.D., in the State of Qatar, and proposed after deliberation a set of amendments (additions, deletions, and rephrasing) as deemed necessary, and then submitted the proposed amendments to the Shari'ah Board for approval as it deemed necessary.

In its meeting No. (39) held in the Kingdom of Bahrain on 13-15 Muharram 1435 A.H., corresponding to 6-8 November 2014 A.D., the Shari'ah Board discussed the proposed amendments submitted by the Shari'ah Standards Review Committee. After deliberation, the Shari'ah Board approved necessary amendments, and the standard was adopted in its current amended version.

Appendix (B)
The Shari'ah Basis for the Standard

Permissibility of Hawalah

The contract of Hawalah derives its permissibility from the Qur`an, the Sunnah, Ijma' (consensus of Fuqaha) and reasoning. Abu Hurayrah (may Allah be pleased with him) narrated that the Prophet (peace be upon him) said: *"Default on payment by a solvent debtor is unjust, and if anyone of you is transferred to a solvent person, he must accept the transfer."*(2) In another text of the Hadith, related by Ahmad and Al-Bayhaqi, the Prophet (peace be upon him) said: *"If one is referred to a solvent person for the recovery of his right, such a person must accept the transfer"*. The Prophet's order that the creditor must accept the transfer means transfer of debt is legal, otherwise he would not give that order.

The permissibility of Hawalah has enjoyed unanimity in Muslim societies and communities from time immemorial and there is no report that anyone has disapproved of it.(3)

The acceptance of a Hawalah contract is recommended for the transferee if the potential payer is known to be solvent and keeps his promises in respect to payments because it benefits the creditor and gives relief to the debtor from liability by the transfer.

The basis that a Hawalah transaction is also *Mubah* (permissible) for the transferee if the financial status and creditworthiness of the potential payer are unknown is that the order in the above-mentioned Hadith does not make it a condition that the payer be solvent for the permissibility of Hawalah. If

(2) *"Sahih Al-Bukhari"* [3: 123]; and *"Sahih Muslim"* [3: 119].

(3) Ibn Qudamah, *"Al-Mughni"* [4: 336]; Al-Buhuti, *"Kashshaf Al-Qina'"* [3: 382]; Al-Buhuti, *"Sharh Muntaha Al-Iradat"* [2: 134]; Ibn Nujaym, *"Al-Bahr Al-ra`iq"* [6: 269]; and Al-Zayla'i, *"Tabyin Al-Haqa`iq"* [4: 171].

the payer is not solvent then the acceptance of the Hawalah by the transferee remains permissible.

A Hawalah Contract is Binding

If all its conditions are met, a Hawalah contract becomes binding without any difference of opinion among the scholars.

Form of a Hawalah Contract

The contract of Hawalah cannot be concluded on a deferred basis or subject to the happening of a particular event, as it has the character of a contract of (immediate) exchange. This is because by virtue of the Hawalah contract both the transferee (the payee) and the payer have immediately entered into a new contractual relationship. Also, a Hawalah cannot be concluded on a temporary basis nor can it be contingent on future events, because this conflicts with the nature of Hawalah which is the immediate transfer of the debt to the payer.[4]

Types and Rulings of a Hawalah Contract

- The scholars have unanimously endorsed the permissibility of restricted Hawalah, whether it is restricted to a debt owed to the transferor by the payer or it is restricted to the value of a tangible good belonging to the transferor in the possession of the payer. The unrestricted Hawalah is permitted by the Hanafis only. They based this permissibility on the Prophet's order that a Hawalah deal must be accepted, without indicating that the payer must be a debtor to the transferor or not. This shows the permissibility of both the unrestricted and restricted Hawalah.[5]
- The basis for the permissibility of a deferred Hawalah contract is that the payer is liable to make payment to the payee (transferee) by virtue of Hawalah. This permissibility is analogous to the permissibility of a deferred guarantee contract. As a matter of principle, a right that is due by virtue of Hawalah is similar to a right that is due by virtue of a guarantee

(4) Ibn Abidin, *"Radd Al-Muhtar"* [5: 349]; *"Durar Al-Hukkam Fi Sharh Majallat Al-Ahkam"* [2: 52]; and *"Al-Mawsu'ah Al-Fiqhiyyah Al-Kuwaytiyyah"* [18: 191-192].

(5) Al-Kasani, *"Bada`i' Al-Sana`i'"* [6: 16]; Al-'Ibadi, *"Al-Jawharah Al-Nayyirah"* [1: 316]; Al-Zayla'i, *"Tabyin Al-Haqa`iq"* [4: 174]; and *"Majallat Al-Ahkam Al-'Adliyyah"*, article (686).

contract. Since the latter can be concluded on a deferred basis, so a Hawalah transaction.[6]

- The basis for the permissibility of *Hawalat al-Haqq* (transfer of a right) as advocated by the Hanafis is that its essence is similar to suretyship which is permitted by all four schools of Islamic law, regardless of the name of the contract in this regard.[7] Again, *Hawalat al-Haqq* does not significantly differ from restricted transfer of debt. If one looks at the change of creditor, then the transaction is one of transfer of rights, and if one looks at the change of debtor, it is a restricted transfer of debt. The differences between transfer of debt and transfer of right are evident in some forms, such as when the creditor makes a gift of the amount of his debt claim against the payer to a person who is not a debtor to the transferor. Here, there are not two debts, hence there is a transfer of right and not a restricted Hawalah because of the lack of two debtors, as the transferor here is not a creditor of the beneficiary from the gift.

Conditions of Hawalah

- The basis for the necessity of the consent of all the three parties in a Hawalah contract is as follows:
  a) The transferor is required to consent because he might not want a third party to pay the debt on his behalf. Therefore, his consent is necessary for the permissibility of the Hawalah contract.
  b) The transferee must also consent to the Hawalah contract because the Hawalah contract necessitates a transfer of his right to payment from the transferor as debtor to another person (the payer), and people differ in various aspects when it comes to payment of debts.
  c) The payer must also consent in the unrestricted Hawalah because the effect of the Hawalah contract is to make the payer liable for payment and, as a principle; there is no liability without there first being an acceptance of such liability.[8]

(6) Al-Sarakhsi, *"Al-Mabsut"* [20: 71-72]; Ibn Nujaym, *"Al-Bahr Al-Ra`iq"* [6: 270]; *"Durar Al-Hukkam"* [2: 52]; and Al-Balkhi, *"Al-Fatawa Al-Hindiyyah"* [3: 298].
(7) Wahabah Al-Zuhayli, *"Al-Fiqh Al-Islami Wa Adillatuhu"* [5: 171].
(8) Ibn Abidin, *"Radd Al-Muhtar"* [5: 341]; and Mullah Khasru, *"Durar Al-Hukkam"* [2: 308].

- The basis for the requirement that the transferred debt or the transferred part of a debt be equal to the payable debt in kind, type, quality or amount is to avoid Riba. However, this condition does not mean that the liability of the transferor must be similar in quantity to the liability of the payer towards the transferor in order to make a Hawalah contract valid. In other words, a Hawalah contract is permissible even if the amount of one of the two liabilities is either greater or lesser than the other liability provided that the transferee will be paid only an amount equivalent to his debt. For example, one can transfer the right to his creditor to collect 10 dinars, the equivalent amount of his debt, out of the 20 dinars he is owed. The transferor may also direct the transferee to collect five dinars being his right against the payer out of the ten the transferor owes the transferee. Therefore, the similarity in amount that is required here is that the transferee must not take more than the actual amount of his debt. The intention of this is to avoid Riba.[9]

Effect of Hawalah on the Relationship Between the Transferor and the Transferee

- The reason for saying that the transferor is discharged from liability after the conclusion of a Hawalah transaction is because this is the legal effect of Hawalah. Hawalah means that the other party (the transferee) is deemed to have received his right to payment by the payer outright, which connotes its obligatory nature. Therefore, the transaction cannot be reversed for the simple reason that if something is transferred then it cannot be argued that it remains in the same place. This means the transferee is not entitled to ask the transferor for payment and the payer, on the other hand, becomes liable for payment.[10]
- The right of the transferee to have recourse, in the event of non-performance by the payer, to the transferor as advocated by the Hanafis is based on a Hadith. It is reported that Uthman Ibn Affan was asked about a situation in which a transfer of debt is concluded and the transferee

(9) Al-Ruhaybani, *"Matalib Uli Al-Nuha"* [3: 325]; Al-Buhuti, *"Kashshaf Al-Qina'"* [3: 308]; *"Hashiyat Al-Dusuqi 'Ala Al-Sharh Al-Kabir"* [3: 327]; and Al-Sawi, *"Hashiyat Al-Sawi 'Ala Al-Sharh Al-Saghir"* [3: 426].

(10) Ibn Qudamah, *"Al-Mughni"* [4: 338].

found the payer had died in a state of bankruptcy. The answer was that the transferee is entitled to return to the transferor for payment, as the right of a Muslim cannot go unfulfilled.[11] This report reveals that the transferor has a right of recourse to the original debtor if the payment is not attained due to bankruptcy or death of the payer.

- The Hadith that says, Muslims are bound by the conditions they made[12] is the basis for the view of the majority of jurists that the transferee has a right of recourse to the transferor if he had stipulated that he accepts the transfer on the basis that the payer is solvent and is capable of paying the amount of the debt. Moreover, this stipulation serves the purpose of the contract; hence, termination of the contract takes place if such a condition is not met.[13]

The Effect of Hawalah on the Relationship Between the Transferor and the Payer

The basis for the rule that the transferor loses his claim over the amount of the debt against the payer after the Hawalah transaction is that the right to this claim has shifted to the transferee by virtue of the contract of Hawalah.

The Effect of Hawalah on the Relationship Between the Transferee and the Payer

The basis for the rule that the transferee no longer has a financial claim against the transferor is that the contract of Hawalah transfers the liability to pay to the payer.[14]

The right of the payer to be entitled to all rights associated with the securities that were available to the debtor (the transferor) is based on the fact that these securities are associated with the debt of the transfer or, which are the subject matter of the Hawalah contract. These rights are

(11) Ibn Qudamah, *"Al-Mughni"* [4: 339].

(12) This Hadith has been related by Al-Bayhaqi in *"Al-Sunan Al-Kubra"* [6: 79] and [7: 249], Maktabat Dar Al-Baz; and Al-Daraqutni in his *"Sunan Al-Daraqutni"* [10: 27], Dar Al-Ma'rifah.

(13) Ibn Qudamah, *"Al-Mughni"* [4: 339]; Al-Buhuti, *"Kashshaf Al-Qina'"* [3: 387]; and Al-Buhuti, *"Sharh Muntaha Al-Iradat"* [2: 136].

(14) Al-Balkhi, *"Al-Fatawa Al-Hindiyyah"* [3: 297], *"Durar Al-Hukkam Fi Sharh Majallat Al-Ahkam"* [2: 36]; and Al-Kasani, *"Bada`i' Al-Sana`i'"* [6: 18].

therefore transferable with the transfer of the debt liability. Hence, the payer is entitled to all these rights as well.[15]

Effect of Death and Bankruptcy on a Hawalah Contract

The basis that the death of the transferor will not affect the Hawalah contract is that the transferor, after the Hawalah contract, is not entitled to the transferred debt.[16] In addition, the reason why the death of the payer will not affect the Hawalah contract is that the heirs or the guarantor of the payer, if any, will be liable for payment.[17]

The practices of overdrafts, negotiable instruments and endorsing cheques and bills of exchange are valid because they are practical applications of the concept of Hawalah.

Transfer of Money (Remittances)

The International Islamic Fiqh Academy has issued a resolution in respect to the permissible solutions for the combination of transfer of money (banking remittances) and currency exchange.[18]

(15) *"Al-Mawsuah Al-Fiqhiyyah Al-Kuwaytiyyah"* [18: 225]; *"Qanun Al-Mu'amalat Al-Sudani"*, article (510); and Jordanian Civil code, Article (1005).

(16) Al-Babarti, *"Al-'Inayah Sharh Al-Hidayah"* [7: 249]; Al-Zaylai, *"Tabyin Al-Haqa`iq"* [4: 174]; Ibn Abidin, *"Tanqih Al-Fatawa Al-Hamidiyyah"* [1: 293]; Malik, *"Al-Mudawwanah"* [4: 126-127]; Ibn Nujaym, *"Al-Bahr Al-Ra`iq"*, [6: 274]; and Al-Kasani, *"Bada`i' Al-Sana`i'"* [6: 17].

(17) *"Durar Al-Hukkam Fi Sharh Majallat Al-Ahkam"* [2: 36]; and *"Al-Mabsut"* [20: 72].

(18) International Islamic Fiqh Academy Resolution No. 8 (1/9).

Appendix (C)
Definitions

Hawalah

Hawalah is the transfer of a debt liability from the transferor to the payer (i.e. it is a process of changing debtors and creditors)

Muheel (the transferor)

The transferor is the principal debtor and who usually refers his creditor to a third party for the collection of the debt. In some forms of Hawalah, he may be a creditor.

Muhal

Muhal or the transferee is the creditor or the party who accepts the offer to collect his due from the transferor's debtor. He is also known as Muhal Lahu or Muhtal Lahu.

Muhal Alaihi

Muhal Alaihi is the party accepting the debt liability that will be collected from him by the transferee. He is also called Muhtal Alaihi.

Hawalat al-Haqq

The transfer of a right from one creditor to another

Shari'ah Standard No. (3)

Procrastinating Debtor

(Revised Standard)

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

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

Preface

The purpose of this standard is to explain the Shari'ah rulings applicable to the transactions of Islamic financial Institutions[1] relating to solvent debtors and/or guarantors procrastinating in settling their obligations and contractors delaying in fulfilment of their obligations, which invokes penalty stipulated in the contract.

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

Statement of the Standard

1. Scope of the Standard

This standard covers cases of default on the part of a solvent debtor or a solvent guarantor, and the case of a contractor or concessionaire who is late in completing work and thus becomes a debtor by virtue of a penalty clause.

The standard does not cover debtors who are insolvent or bankrupt, or debtors who delay payment for an established Shari'ah reason.

2. Shari'ah Ruling

2/1 Default in payment by a debtor

2/1/1 Default in payment by a debtor who is capable of paying the debt is *Haram* (prohibited).

2/1/2 It is not permitted to stipulate any financial compensation, either in cash or in other consideration, as a penalty clause in respect of a delay by a debtor in settling his debt, whether or not the amount of such compensation is pre-determined; this applies both to compensation in respect of loss of income (opportunity loss) and in respect of a loss due to a change in the value of the currency of the debt.

2/1/3 It is not permitted to make a judicial demand on a debtor in default to pay financial compensation, in the form either of cash or of other consideration, for a delay in settling his debt.

2/1/4 The procrastinating debtor is liable for legal and other expenses incurred by the creditor in order to recover his debt.

2/1/5 The creditor is entitled to apply for the sale of any asset mortgaged as collateral for the debt, for the liquidation of the debt. He is equally entitled to stipulate that the debtor must give a mandate

to the creditor to sell the mortgaged asset without recourse to the courts.

2/1/6 Unless failure to pay was caused by force majeure, it is permissible to stipulate that all outstanding instalments become due once the procrastinating debtor fails to pay an instalment. It is preferable that this clause is implemented only after notifying the debtor and after the lapse of a reasonable period of time. [see Shari'ah Standard No. (5) on Guarantees (item 5/1)]

2/1/7 In the case of a Murabahah sale, if the asset that was sold is still available in the condition in which it was sold, and the buyer has defaulted in the settlement of the price and has later become bankrupt, then the seller (the Institution) is entitled to repossess the asset instead of initiating procedures to obtain a bankruptcy order.

2/1/8 It is permissible in contracts involving indebtedness (such as Murabahah) to stipulate an undertaking by the debtor, that in case of procrastinating in payment, the latter will donate an amount or a percentage of the debt to be spent for charitable causes through the Institution.

2/2 Guarantor

a) It is permissible for a creditor to demand that a debt be settled by the debtor or the guarantor of the debtor, unless the guarantor stipulated that the settlement must first be sought from the debtor.

b) All rulings applicable to debtors in default are equally applicable to guarantors in default.

2/3 Contractor

It is permissible to include penalty clauses in contracts for construction, Istisna'a and supply contracts. In case of a refusal to pay the amount due under a penalty clause, the rulings relating to default by a debtor would be applicable. It is permitted to deduct the amount from outstanding amounts due to the contractor.

2/4 Non-material punishments for default in payment

The Institution is entitled to include the name of a debtor in default in a list of undesirable customers (black list) and to send a warning admonition to other companies about the defaulting debtor, either when there is an inquiry from other companies about the debtor or when such 'black lists' are exchanged between companies directly.

2/5 General rulings

2/5/1 The Institution is entitled to [monitor and] investigate [the financial status and activities] of a defaulting debtor through all permissible and legitimate means.

2/5/2 The Institution may accept a payment from a debtor who is in default that is in excess of the amount of the debt, provided there is no contractual condition whether written or verbal, or custom or mutual agreement relating to this additional amount.

2/5/3 It is permissible for the Institution to stipulate in a contract dealing with indebtedness that, if the debtor is late in making payment, the Institution is entitled to recoup the amount due from any of the accounts of the customer with the Institution, whether current accounts or investment accounts. This may be done without getting any further consent of the debtor provided the balance in the account is of the same currency as that of the debt. If, however, the currency is different, then the rate of exchange to be used must be the then prevailing rate of exchange.

2/6 Establishment of default in payment

Default in payment is established when, following a normal demand for payment, a debtor who has not proved that he is insolvent fails to settle the debt on its due date.

3. Date of Issuance of the Standard

The Standard was issued on 27 Safar 1421 A.H., corresponding to 31 May 2000 A.D.

Adoption of the Standard

The Shari'ah Standard on Procrastinating Debtor was adopted by the Shari'ah Board in its meeting No. (4) held on 25-27 Safar 1421 A.H., corresponding to 29-31 May 2000 A.D.

Appendix (A)
Brief History of the Preparation of the Standard

In its meeting No. (1) held in Bahrain on Saturday 11 Dhul-Qa'dah 1419 A.H., corresponding to 27 February 1998 A.D., the Shari'ah Board decided to give priority to the preparation of a Shari'ah standard on procrastinating debtor.

On Saturday 11 Dhul-Qa'dah 1419 A.H., corresponding to 27 February 1999 A.D., a Shari'ah consultant was commissioned to prepare a juristic study and an exposure draft.

In its meeting held in Bahrain on 13-16 Rabi' I, 1420 A.H., corresponding to 27-30 June 1999 A.D., the Shari'ah Studies Committee discussed the juristic study and introduced certain amendments to it. The Committee further discussed the exposure draft of the standard in its meeting No. (3) held in Bahrain on 9-11 Rajab 1420 A.H., corresponding to 18-20 October 1999 A.D., and asked the consultant to make additional amendments to reflect the comments made by the members.

The revised exposure draft of the standard was presented to the Shari'ah Board in its meeting No. (2) held in Mecca on 10-15 Ramadan 1420 A.H., corresponding to 18-22 December 1999 A.D. The Shari'ah Board made further amendments to the exposure draft of the standard, and decided that the amended exposure draft should be distributed to specialists and interested parties to obtain their comments in order to discuss them in a public hearing.

A public hearing was held in Bahrain on 29–30 Dhul-Hajjah 1421 A.H., corresponding to 4-5 April 2000 A.D. The public hearing was attended by more than 30 participants representing central banks, Institutions, accounting firms, Shari'ah scholars, academics and others who are interested

in this field. Members of the Shari'ah Studies Committee responded to the written comments that were sent prior to the public hearing as well as to the oral comments that were expressed in the public hearing.

The Shari'ah Studies Committee held its meeting No. (5) on 22-24 Muharram 1421 A.H., corresponding to 26-28 April 2000 A.D., to discuss the comments made about the exposure draft. The Committee made the necessary amendments, which it deemed necessary in light of both the discussions that took place in the public hearing, and the written comments that were received.

The Shari'ah Board in its meeting No. (4) held on 25–27 Safar 1421 A.H., corresponding to 26-28 May 2000 A.D., in Al-Madinah Al-Munawwarah discussed the amendments made by the Shari'ah Studies Committee, and made the necessary amendments, which deemed necessary. Some paragraphs of the standard were adopted by the unanimous vote of the members of the Shari'ah Board, while the other paragraphs were adopted by the majority vote of the members, as recorded in the minutes of the Shari'ah Board.

The Shari'ah Standards Review Committee reviewed the standard in its meeting held in Muharram 1433 A.H., corresponding to November 2011 A.D., in the State of Qatar, and proposed after deliberation a set of amendments (additions, deletions, and rephrasing) as deemed necessary, and then submitted the proposed amendments to the Shari'ah Board for approval as it deemed necessary.

In its meeting No. (38) held in Al-Madinah Al-Munawwarah, Kingdom of Saudi Arabia on 28 Sha'ban - 1 Ramadan 1435 A.H., corresponding to 26-28 June 2014 A.D., the Shari'ah Board discussed the proposed amendments submitted by the Shari'ah Standards Review Committee. After deliberation, the Shari'ah Board approved the necessary amendments, and the standard was adopted in its current amended version.

Appendix (B)
The Shari'ah Basis for the Standard

Default on the Part of a Debtor

The debtor must settle his debt when it is due. Default in payment by a debtor who is able to settle the debt is prohibited. The Prophet (peace be upon him) says: *"Default in payment on the part of a solvent debtor is unjust."*(2) He (peace be upon him) also says: *"Delay in payment by a solvent debtor would be a legal ground for his being publicly dishonoured and punished."*(3) Moreover, he (peace be upon him) approved the statement of Salman Al-Farisi to Abu Al-Darda` saying: "Give everyone his right."(4) Muslim scholars have agreed on the permissibility of a debtor being punished in such circumstances.(5) However, an insolvent debtor should be granted a grace period.

(2) Related by Al-Bukhari in his *"Sahih"* [2: 999], Dar Al-Qalam edition, Damascus, 1401 A.H./1981 A.D.; Muslim in his *"Sahih"* [10: 288], Al-Maktabah Al-Misriyyah edition with the commentary of Al-Nawawi, Cairo, 1349 A.H./1930 A.D.; and Ahmad in his *"Musnad"* [2: 71 and 345], Al-Maktab Al-Islami edition, Damascus.

(3) Related by Ahmad in his *"Musnad"* [4: 388-399], and all relators of Hadith except Al-Tirmidhi, Al-Bayhaqi, Al-Hakim and Ibn Hibban who deemed it authentic. Al-Bukhari deemed it 'suspended'. In his *"Fath Al-Bari"*, Ibn Hajar has said: "Its chain of transmission is good": *"Nayl Al-Awtar"* [5: 240], Mustafa Al-Babi Al-Halabi edition, Cairo, 1378 A.H./1951 A.D.; and *"Fayd Al-Qadir"* [5: 400], Mustafa Muhammad edition. Cairo, 1371 A.H./1938 A.D.

(4) Related by Al-Tirmidhi from Abu Juhayfah quoting the statement of Salman (may Allah be pleased with him) which the Prophet (peace be upon him) approved when mentioned to him saying: *"Salman has said the truth."* Al-Tirmidhi said: "It is an authentic Hadith": "*Sunan Al-Tirmidhi"* [2: 66], Bulaq Edition.

(5) *"Bada`i' Al-Sana`i'"* [7: 173], Dar Al-Kitab Al-Arabi, Beirut, 1982 A.D.; *"Al-Muhadhdhab"* [3: 245], Dar Al-Qalam edition, Damascus, 1417 A.H./1996 A.D.; *"Al-Mughni"* [4: 501], Maktabat Riyad Al-Hadithah, Riyadh; *"Hashiyat Qalyubi"* [2: 288], Dar Al-Fikr edition, Beirut, no date; *"Mu'jam Al-Mustalahat Al-Iqtisadiyyah"*, (P. 314); The International Institute of Islamic Thought edition, Virginia, USA, 1415 A.H./1995 A.D.; and *"Dalil Al-Mustalahat Al-Fiqhiyyah Al-Iqtisadiyyah"*, (P. 274), Kuwait Finance House edition, Kuwait, 1412 A.H./1992A.D.

Stipulation of, or Legal Claim for, Compensation for Late Payment of the Debt

It is not permitted to stipulate as a condition of a contract involving indebtedness that in case of default the debtor should pay compensation, or to have a legal claim for compensation against a defaulting debtor, whether such arrangements are made at the beginning of the contract or on its maturity, since this would constitute Riba and any such stipulation or arrangement is null and void. This is because the Prophet (peace be upon him) says: *"Muslims are bound by their contractual conditions, except those that render impermissible what is permissible or render permissible what is impermissible."*(6) There is also the reason that, during the pre-Islamic period, lenders who charged interest used to say to their debtors: "Do you want to settle now or to pay an additional amount for a further period of credit?". The prohibition of any loan which requires a payment in excess of the amount lent has also been reported on the authority of many companions from the Prophet (peace be upon him). On this basis, a decision was reached by the International Islamic Fiqh Academy which reads as follows: "It is impermissible from the Shari'ah perspective to stipulate a condition of compensation in the case of delay in the settlement of a debt".(7)

No penalty clause may be applied in the case of a delay in settling a debt, as any increase in the amount of the debt is Riba; this is in contrast to the application of a penalty clause to other cases of delay, such as delay in fulfilling construction or Istisna'a contracts. As the judgement on this issue by the court is binding, it is therefore not permitted to stipulate such a condition directly in the contract creating a debt or to enforce it subsequently by recourse to the judiciary.

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(6) This Hadith has been narrated by a number of the companions and it was related by Ahmad in his *"Musnad"* [1: 312]; Ibn Majah through a good chain of transmission [2: 783], Mustafa Al-Babi Al-Halabi edition, Cairo, 1372 A.H./1952 A.D.; Al-Hakim in his *"Mustadrak"*, Hyderabad edition, India, 1355 A.H.); Al-Bayhaqi in his *"Sunan"* [6: 70 and 156] and [1: 133], Hyderabad edition, India, 1355 A.H.; and Al-Darqutni in his *"Sunan"* [4: 228] and [3: 77], Dar Al-Mahasin Lil-Tiba'ah edition, Cairo, 1372 A.H./1952 A.D.

(7) International Islamic Fiqh Academy Resolution No. (51); and *"Majallat Majma' Al-Fiqh Al-Islami"*, No. 6 [1: 193]; and No. 6 [2: 9].

Litigation Expenses

A defaulting debtor must bear the litigation expenses and other expenses relating to his default in payment as he is the cause of the expenses.[8]

Disposal of a Mortgaged Asset

It is permissible for the creditor to demand the selling of a mortgaged asset and other properties belonging to a debtor which are in his possession for the purpose of liquidation and recovery of the debt. Furthermore, it is permissible for the creditor to obtain a mandate from the debtor to sell the mortgaged assets or other properties of the debtor, because such disposal is permissible for the creditor, and such a practice would speed up the procedures for disposing of the charged asset.[9]

Maturity of Instalments in the Case of Instalment Credit

It is permissible for the creditor to impose the condition that, if the debtor is late in paying one instalment, all the instalments become due. To this effect, there is a decision by the International Islamic Academy of Fiqh, the text of which reads as follows: "It is permissible for a seller on deferred credit terms sale to impose the condition that instalments become due before their original due date in case of the delay of the debtor in paying some of the instalments, so long as the debtor consented to this condition when the contract was agreed".[10] Such a condition would be valid, as there is no Shari'ah text to the contrary, and it serves a lawful interest of the creditor.[11] Giving prior notice to the debtor before giving effect to such

(8) Some of the jurists have stated this such as Ibn Taymiyyah in *"Al-Ikhtiyarat"* and in "*Mukhtasar Al-Fatawa*" (P. 346), Al-Mawardi in *"Al-Insaf"* and Sheikh Muhammad Ibn Ibrahim Al Al-Shaykh (see: Paper by Sheikh Ibn Mani' in the Fourth Fiqh Conference (pp. 226-227), organized by Kuwait Finance House 1416 A.H./1995 A.D.

(9) *"Al-Rawd Al-Murbi'"*, (P. 74), 2nd edition, Dar Al-Turath, Cairo.

(10) International Islamic Fiqh Academy Resolution No. (51); *"Majallat Majma' Al-Fiqh Al-Islami"* No. 6 [1: 193] and No. 7 [2: 9]. This has been reinforced by the Resolution No. 64 (2/7); see: *"Majallat Jami'at Al-Malik 'Abd Al-'Aziz"*, Al-Iqtisad Al-Islami, (P. 89).

(11) Ibn Abidin says; "If one says, I have invalidated the deferred period and I have abandoned it, the debt becomes due on the spot": *"Hashiyat Ibn Abidin"* [5: 157], Dar Al-Fikr edition, Beirut, 1399 A.H./1979 A.D. The Shari'ah Supervisory Council of the Kuwait Finance House has supported this in its Fatwa No. (542). *"Al-Fatawa Al-Shar'iyyah Fi Al-Masa'il Al-Iqtisadiyyah"*, Kuwait Finance House, [4: 18].

a condition is merely of the nature of a reminder, so as to provide him with reasonable time for payment.

The Right to Repossess a Sold Asset

If an asset sold by Murabahah or another sales contract is still available to the seller, and the purchaser has defaulted in the payment of the price, and subsequently has become bankrupt, then the seller is entitled to repossess the sold asset instead of initiating legal proceedings to obtain a bankruptcy order. This judgement is based on the report of Abu Hurayrah (may Allah be pleased with him) that the Prophet (prayers and peace of Allah be upon him) said: If one party has sold an asset and the other party (the purchaser) has become bankrupt, and the former party has managed to retain the asset, then he is more qualified to take possession of the asset in preference to the other creditors.(12)

A Commitment on the Part of the Debtor to Make a Donation in Case of Default

The permissibility of stipulating a condition, whereby the debtor in case of default is obliged to donate a sum of money (in addition to the amount of the debt) to be spent by the creditor (the Institution) on charitable causes, is because this has been considered as an instance of the commitment to make a donation, which is well established in the Maliki school of law. This is the opinion of Abu Abdullah Ibn Nafi' and Muhammad Ibn Ibrahim Ibn Dinar, two Maliki jurists.(13)

Guarantor

A guarantor is liable for anything for which the debtor whose debt is guaranteed is liable, because standing as a surety adds one obligation to another with respect to the liability. This is in line with the Quranic verse expressing the statement of Prophet Yusuf (peace be upon him) saying: ***{"... and I will be a guarantor to it"}***.(14) Also, the Prophet (peace be upon

(12) This Hadith has been related by Al-Bukhari in his *"Sahih"* [2: 846]; and Muslim in his *"Sahih"* [10: 221]. Also, see: *"Al-Muhadhdhab"* by Al-Shirazi [3: 253], Dar Al-Qalam edition, Damascus 1417 A.H./1996 A.D.

(13) See the book entitled: *"Tahrir Al-Kalam Fi Masa'il Al-Iltizam"* by Al-Hattab and the legal opinions of the Fourth Fiqh Conference organized by the Kuwait Finance House.

(14) [Yusuf (Joseph): 72].

him) affirmed the suretyship of Abu Qatadah in respect of the debt of a deceased person, when Abu Qatadah said; "I take responsibility as surety for both (two dinars), O Messenger of Allah."[15] It is a principle of law that the demand for payment from either the debtor or guarantor is permissible, as this is the very essence of suretyship, so long as there is no stipulation that the demand be in sequence; that is, it must start with the debtor and once he refuses to pay, payment will be demanded from the guarantor, because this sequence is a valid stipulation and believers are bound by their stipulations.

Contractor or Concessionaire

It is permissible to impose penalty clauses in contracts for constructions, Istisna'a and supply contracts, as such clauses are included in what may be validly stipulated as part of the contract. This does not render the impermissible permissible, or vice versa, and it complies with the Hadith of the Prophet (peace be upon him): *"Muslims are bound by contractual conditions, except those that render impermissible what is permissible or render permissible what is impermissible."*[16] Also, this is based on the statement of Shurayh (may Allah confer mercy upon him) saying: "Whoever has bound himself by a contractual condition voluntarily without any coercion, is bound by that condition". The International Islamic Fiqh Academy has also issued a decision which states: "It is permissible to include in an Istisna'a contract a penalty clause according to what is agreed upon by the two contracting parties provided that there are no unusual circumstances.[17] In addition, it is a juristic principle in the Hanbali school of law. This is also what has been decided by consensus of the Council of the Eminent Scholars of Saudi Arabia, in the following words: "The council has decided by consensus that a penalty clause that is stipulated in a contract is a valid and enforceable stipulation".[18] It is well known that the stipulation of the penalty clause is permissible only for non-financial obligations.

(15) Related by Al-Bukhari in his *"Sahih"* [2: 800-803]; Ahmad and others.
(16) This Hadith has been previously explained under Note No. (5).
(17) International Islamic Fiqh Academy Resolution No. 56 (3/7); see also the Journal of the Academy vol. 2, issue No. (7), (p. 223).
(18) Research papers by the Eminent Scholars of the Kingdom of Saudi Arabia, vol. 1, the penalty clause, Maktabat Ibn Khuzaymah edition, Riyadh, 1412 A.H.

Non-Material Penalties Applied to the Debtor in Case of Default

The grounds for such penalties lie in the jurists' decision which is based on their interpretation of the Hadith of the Prophet (peace be upon him): *"Delay in payment by a solvent debtor would be a legal ground for his being publicly criticised and punished"*.[19] A public complaint about his default in payment is not a prohibited slander; on the contrary, there is an obligation to warn other companies about his character, as this falls under the category of advice which it is a duty to give.

General Provisions

a) The monitoring of the affairs of the default debtor, is a kind of pursuing that has been established by the Shari'ah jurists. This pursuit is intended to make recovery from the defaulting debtor out of assets that he may have concealed from the knowledge of the creditor. In the circumstances, such pursuit does not constitute interference in the affairs of others.

b) The debtor may, entirely at his own discretion without any condition or customary practice, pay an additional amount when settling the debt, and this is part of good settlement following the saying of Allah: ***{"...No ground (of complaint) can there be against the Muhsinun (good-doers)..."}***.[20] Also, the prophetic Hadith says: *"Verily the best of you is he who is the best in the settlement of debt."*[21] The Prophet (peace be upon him), occasionally used to pay an additional amount when settling a debt. The permissibility of this practice depends on the discretionary nature of this extra payment and the absence of any stipulation or customary practice of making such a payment, since the existence of such a customary practice would be inconsistent with the condition that the extra payment be entirely discretionary and not stipulated.

c) It is permissible to accept the extra amount paid by the debtor following the proofs mentioned earlier.

(19) This Hadith has been previously explained under Note No. (3).
(20) [Al-Tawbah (Repentance): 91].
(21) Related by Al-Nasa`i on the authority of Al-'Irbad Ibn Sariyah: *"Fayd Al-Qadir"* [3: 497].

d) A stipulation by an Institution that it may recover amounts owing to it by a defaulting debtor by right of set-off from accounts of the debtor that are kept by the Institution is valid, since believers are bound by their stipulations. This right of set-off, even though it does not require the consent of the debtor, should preferably be documented in the contract that establishes the indebtedness, in order to shorten the procedures in case of dispute. This right is based on the amicable right of recovery that is based on Shari'ah evidence including the saying of the Prophet (peace be upon him) to the wife of Abu Sufyan: *"Take (from his property) what would suffice you and your child amicably."*[22]

(22) Related by Al-Bukhari and Muslim: *"Al-Lu`lu` Wa Al-Marjan"*, No. (1115).

Appendix (C)
Definitions

Default in payment

Delay in the settlement of an obligation or in paying an amount due for payment, without any legitimate reason.

Procrastinating debtor

A debtor who is solvent but refuses to pay a debt that is due, without any legitimate reason, after receiving the normal demand for payment.

Penalty clause

An agreement between two parties to a contract stipulating a pre-determined amount of compensation that will be due to the obligee, should the obligor delayed carrying it out.

Shari'ah Standard No. (43)

Insolvency

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

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

Preface

This Standard aims to describe the rules of insolvency and the circumstances that precede it, whether they are faced by the institutions, companies or individuals, both businessmen and non-businessmen, with whom financial institutions[1] deal.

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

Statement of the Standard

1. Scope of the Standard

This Standard covers the Shari'ah rules relating to the causes and consequences of insolvency, whether faced by an institution or its institutional or individual business and non-business customers. It also addresses the judicial declaration of insolvency over an institution and its consequences, and in particular, the sale of its assets, the distribution of the proceeds among the creditors and how insolvency is revoked.

It does not cover financial difficulties (as defined by Islamic jurisprudence), liquidity shortfalls or delays in payment that do not lead to a declaration of insolvency.

2. Definitions of Insolvency and the Declaration of Insolvency

Insolvency (Iflas): When the debt due of a person exceeds his assets.

Declaration of insolvency (Taflees): A judge's declaration that a debtor is insolvent, preventing him from disposing of his assets.

3. Shari'ah Ruling on Insolvency

3/1 A person whose debts exceed his assets has a moral obligation in Shari'ah to refrain from any action that may harm the creditors, even if he has not been declared insolvent.

3/2 The competent authorities should declare a person insolvent when his debts exceed his assets and sequester his assets if his creditors demand it, subject to the conditions mentioned in item 4/3.

3/3 When a debtor is declared insolvent, the declaration must be documented and certified as required by official procedures.

4. Stages of Insolvency

4/1 First stage: The creditors make a demand upon the debtor to pay the debt due to the creditors pro-rata and to refrain from making

donations, providing loans or disposing of or acquiring assets preferentially. The creditors can seek the assistance of concerned authorities in this regard.

4/2 Second stage: If the debtor refuses to pay what he owes to the creditors, the creditors are entitled to file a claim against him as a step towards seeking a declaration of insolvency. They can petition the competent authorities to seek to:

4/2/1 Prevent the debtor from making donations;

4/2/2 Prevent the debtor from providing loans;

4/2/3 Prevent the debtor from giving preferential treatment (for example to certain creditors or in the disposal or acquisition of assets);

4/2/4 Prevent the debtor from admitting financial liability to those who may be the subject of preferential treatment such as his blood relatives connected by up to four vertical steps (for example, a first cousin, who is connected vertically via the grandparents); and such as affiliates, subsidiaries and group entities of institutions;

4/2/5 Prevent the debtor from pre-paying debts that are not yet due;

4/2/6 Prevent the debtor from transferring any of his assets to some of the creditors or selling to or purchasing from them preferentially; and

4/2/7 Prevent the debtor from travel that causes harm to the creditors without appointing a surety to ensure his attendance if required, providing guarantors.

4/3 A declaration of insolvency requires:

4/3/1 An application made by creditors demanding that a debtor whose due debts exceed his assets be declared insolvent, subject to item 5/5; or

4/3/2 An application made by the debtor himself, except when the competent judicial authority considers his application to be fraudulent.

4/4 The creditors are not required to prove that they are the sole creditors. If another creditor appears before the distribution, he is entitled to a pro-rata share of the distribution. If a creditor appears after the distribution, the rule set out in item 8 shall apply subject to statutory procedures so long as they are not inconsistent with the rules and principles of Shari'ah.

4/5 The court has the sole authority to declare a person insolvent.

5. Consequences of Insolvency

Declaration of a debtor's insolvency gives rise to the following consequences:

5/1 An admission by a debtor, who has been declared insolvent, of any liability to another person relating to his sequestered assets has no legal effect, whether such admission relates to a debt incurred before or after the declaration of insolvency, unless the creditors accept that such debt was incurred before the declaration of insolvency.

5/2 The debts owed to creditors are attached to the existing property of the debtor at the time of sequestration as well as to any property that accrues to him without his dealing, such as gifts. All his property remains in his ownership until it is determined that such property be sold and that the proceeds be distributed among the creditors.

5/3 The debtor's acts of sale, gift or endowment subsequent to the declaration of insolvency have no legal effect, with the exception of acts relating to previous transactions, such as terminating a defective contract and exercising an option to terminate. Such lack of legal effect applies during the period of uncertainty that precedes the declaration of insolvency, as assessed by the competent authority.

5/4 After declaration of insolvency, all the debtor's subsequent acts of sale, purchase, admission (of liability) or guarantee, are attached to his future liability and not to the sequestered assets. He can be required to discharge such subsequent liabilities after revocation of the sequestration. Those whose rights attach to his liability are not entitled to share the sequestered assets with the creditors.

5/5/1 All of the debtor's undue debts become due despite the creditors of such undue debts having no present right to demand a declaration of his insolvency. The creditors of undue debts are entitled to share the sequestered assets with the creditors of due debts.

5/5/2 If the lessee becomes insolvent during the Ijarah term, the lessor shall be entitled, on a pro-rata basis along with other creditors, to the amount of rent corresponding to the period during which the usufruct was enjoyed. For the remaining period, the lessor shall have the option either to terminate the Ijarah contract or to carry on with it so that he has claims on the insolvency assets for the rent of the remaining period, while enabling the lessee to enjoy the usufruct unless the court considers continuity of the Ijarah to be in the interest of creditors, in which case the lessor shall receive the rent amount in full.

5/6 It is permissible, with the approval of the creditors, to agree to reduce undue debt that was accelerated by the declaration of insolvency and guarantors are liable to pay the reduced amount, rather than the amount originally guaranteed.

5/7 Undue debts owed to the insolvent debtor do not become due upon insolvency; all outstanding debts owed to the insolvent debtor before the declaration of insolvency (even if not yet due) are included in the insolvency assets (and are distributed to the creditors as and when they are paid).

5/8 After distribution, creditors have no legal right to demand any unpaid debt from the debtor. However, the debtor has a moral obligation in Shari'ah to pay all the debts in full.

6. Right of Claw-Back of an Item Sold to the Debtor Prior to the Declaration of Insolvency (the Right of Claw-Back)

The right of claw-back gives a creditor who sold an item to the insolvent debtor the right to demand return of the specific item if it is among the

sequestered assets or to have claims on these assets. This right shall be established for the seller who has not received any part of the selling price.

7. Sale of the Sequestered Assets and Allowances Made for the Insolvent Debtor

7/1 The concerned authorities will order the sale of the sequestered assets -other than the assets described below- whether they are in currencies different to the currency in which the insolvency is being administered, fungibles, stocks, commodities (goods or merchandise) or real estate. A reasonable period of time should be allowed before selling real estate assets, and assets should be sold in the order provided above. A survey of market prices should be conducted to ensure that a better price could not be achieved at auction. If the price offered is less than the value of the asset, the auction should be repeated to obtain the value of the asset. Otherwise, it should be sold at whatever price is achieved on the third auction. If possible, it is recommended to make the sale subject, for a reasonable period of time, to an option to reverse the sale.

7/2 Excluded from the sale are the insolvent debtor's tools of trade; whatever he needs to continue his business; a suitable home and basic expenses for him and his dependents. If his home exceeds his requirements, it should be sold and replaced by one that is suitable for him. The same applies mutatis mutandis to institutions.

7/3 The debtor is not required to earn or take out a loan if the proceeds of sale are not sufficient to pay off his debts.

8. Distribution of the Insolvent Debtor's Assets Among the Creditors

8/1 It is preferable to expedite the distribution but not with such excessive haste that it harms the insolvent debtor. It is not necessary to delay the distribution until all insolvency assets are sold. The proceeds may be distributed as and when they are received, which is required if the creditors demand it, taking into consideration the statutory procedures of insolvency provided that they do not conflict with the rules and principles of the Shari'ah are observed.

8/2 The judge should start the distribution with assets that are of the same denomination as the debt.

8/3 The following order should be observed during distribution:

8/3/1 Priority should be given to paying the fees of the administrators and their assistants who manage the process of sale and distribution.

8/3/2 Next in order should be secured creditors, as per the rules of granting security.

8/3/3 Non-employee contractors (such as tradesmen) and lessors of transport vehicles are entitled to declare a lien over any of the insolvent debtor's property in their possession in order to recover their full fees from the insolvency assets, and such property reverts to the insolvency assets once the fees are paid.

8/3/4 A person who finds a specific item of his property in the insolvency assets has a preferred claim over it. Such property may include safety deposits, portfolios, investment funds, the capital of Mudarabah or investment agency, and the share of a non-insolvent partner in a partnership managed by the institution declared insolvent and the insolvency assets in the case of an insolvent partner.

8/3/5 The rest should be distributed among the creditors, with each creditor receiving an amount pro-rata to his share of the total debt.

8/3/6 If a debt is discovered after the distribution, the new creditor should obtain his share from each of the existing creditors, either by mutual consent or through litigation.

9. Rules Specific to Institutions

9/1 The following items are included in the insolvency assets:

9/1/1 Current accounts held with the institution, because these are liabilities of the institution which must be borne by it alone and which should not be borne by the investment accountholders;

9/1/2 All debts outstanding against the institution.

9/2 Investment vehicles that are independent of an (insolvent) institution in their fund sources and revenues are not part of the insolvency assets. Such investment vehicles include restricted deposits, funds, portfolios and *Sukuk* assets that are not wholly or partially owned by the institution and in which the institution's responsibility is limited to managing on a paid agency or Mudarabah basis.

9/3 Any assets held by the institution as custodian, such as securities belonging to third parties and safety deposit boxes, are not part of the insolvency assets.

10. Revoking the Declaration of Insolvency

10/1 Upon distribution of the insolvent debtor's assets to the creditors, the declaration of insolvency is revoked by the court and announced according to the requirements of convention or statute.

10/2 After the declaration of insolvency is revoked, if an asset is discovered that came into the ownership of the insolvent debtor prior to the declaration of insolvency without reciprocal consideration, such as a gift, it is sequestered to be distributed among the creditors whose debts were outstanding before the declaration of insolvency. If statute restricts applications for a declaration of insolvency unless after expiry of a limitation period, the outstanding debt remains a liability of the debtor based on morality/religious credence.

10/3 If the insolvent debtor enters into a credit transaction after revocation of his declaration of insolvency and then owns property through new transactions, and is thereafter declared insolvent a second time, the creditors of the first insolvency are not entitled to a share of the assets of the second insolvency. If however, the new property came into his ownership without reciprocal consideration, such as a gift, the creditors of the first insolvency are entitled to a share of the assets of the second insolvency based on morality/religious credence.

11. Date of the Issuance of the Standard

This Standard was issued on 14 Jumada II, 1431 A.H., corresponding to 28 May 2010 A.D.

Adoption of the Standard

The Shari'ah Board adopted the Standard of Insolvency in its meeting No. (27) held in the Kingdom of Bahrain during the period of 12-14 Jumada II, 1431 A.H., corresponding to 26-28 May 2010 A.D.

Appendix (A)
Brief History of the Preparation of the Standard

On 14 Jumada II, 1430 A.H., corresponding to 7 June 2009 A.D., the General Secretariat decided to commission a Shari'ah consultant to prepare a juristic study on Insolvency.

In its meeting held in Dubai, United Arab Emirates, on 20 Shawwal 1430 A.H., corresponding to 9 October 2009 A.D., the Shari'ah Standards Committee discussed the draft of a Shari'ah Standard on Insolvency and made necessary amendments.

The revised draft of the Shari'ah Standard was presented to the Shari'ah Board in its meeting No. (25) held in the Kingdom of Bahrain, during the period of 2-4 Dhul-Qa'dah 1430 A.H., corresponding to 21-23 October 2009 A.D. The amendments that were deemed appropriate were included.

The General Secretariat held a public hearing in the Kingdom of Bahrain, on 27 Safar 1431 A.H., corresponding to 11 February 2010 A.D. All the comments made in the public hearing were listened to, and a member of the Shari'ah Board answered these comments and made commentary on them.

In its 26th meeting held in the Kingdom of Bahrain, during the period of 24-26 Rabi' I, 1431 A.H., corresponding to 10-12 March 2010 A.D., the Shari'ah Board discussed the amendments proposed by the participants in the public hearing and incorporated the amendments that it considered suitable.

In its meeting No. (27) held in the Kingdom of Bahrain, during the period of 12-14 Jumada II, 1431 A.H., corresponding to 26-28 May 2010 A.D., the Shari'ah Board discussed the draft of the Standard, incorporated

the necessary amendments that it deemed appropriate, and adopted the Standard.

In its meeting held in the United Arab Emirates on 7 Sha'ban 1436 A.H., corresponding to 25 May 2015 A.D., the Shari'ah Standards Review Committee reviewed this Standard. After deliberation, the committee approved necessary amendments, and the Standard was adopted in its current amended version.

Appendix (B)
The Shari'ah Basis for the Standard

- The basis for prohibiting a person overwhelmed by debts from disposals that harm the creditors is the Hadith, *"Allah will pay (the debts of) a person who takes the wealth of others with the intention of repaying it. But the one who takes it with the intention of destroying it, Allah will destroy him"*.
- The basis for the obligatory ruling of insolvency and interdiction against the one who has more debts than he can pay is the act of the Prophet (peace be upon him), who interdicted Mu'adh Ibn Jabal (may Allah be pleased with him) and sold his property for the debts against him and distributed it among his creditors.(2) This is the stance of the majority, who include Abu Yusuf and Muhammad. This is also the formal legal opinion of the Hanafis as against Abu Hanifah.
- The multiplicity of three stages is the Maliki opinion, and this is what the (modern) legal codes also uphold. In insolvency, it is essential to consult these rules and the ruling of the court.
- The basis for the requirement that the insolvency should be demanded by the owners of due debts is that there is no demand (warranted) for undue debt. Even if such a demand is made of the debtor, he does not have to pay it because the deferred period has a share in the price.
- The basis for the right of a debtor to request a declaration of his own insolvency is the Shafi'i opinion and the fact that it is in his interest to stabilize his financial situation. The Standard excludes fraudulent insolvency according to the satisfaction of the court.
- The basis for the requirement of a judicial ruling for insolvency is the act of the Prophet (peace be upon him) in the case of Mu'adh. Also, in-

(2) This has been related by Al-Bayhaqi by both *muttasil* (fully connected) and *mursal* (incomplete) chains of transmission, but the mursal narrations are more correct: *"Sunan Al-Bayhaqi"* [6: 48]; and *"Talkhis Al- Habir"* [3: 37], as in *"Al-Mawsu'ah"* [5: 301].

solvency needs consideration and Ijtihad; therefore, a judicial decision is required for it.

- The basis for non-enforcement of an insolvent's confession regarding the right of others to his property -except with the approval of the creditors- and the non-enforcement of his dispositions that transfer ownership is that they prevent harm to the creditors, as per the Hadith: *"No harm and no reciprocal harm"*.
- The basis for the attachment of new dispositions to the liability of the insolvent is that the right of the creditor is attached to the property existing at the time of insolvency. Thus there is no harm in the attachment of new dispositions to the liability of the debtor because his liability is fit for such a commitment.
- The basis for the view that gives the creditor the right to reclamation -a view accepted by the Malikis, Shafi'is, Hanbalis and some of the earliest scholars (the Salaf) as well as the majority of (modern legal) systems- is the Hadith related by Al-Bukhari and Muslim[3] that affirms the right to recourse for the seller when he finds the exact commodity with the insolvent buyer. He has the option to take it or to leave it and become a partner of the creditors in the distribution of the price. It is subject to the following conditions:
  a) The insolvent should be alive at the time of recourse. In the case of an institution or company, it should remain existent.
  b) The insolvent remains liable for all of the compensation due. If the seller has received part of it, he will be given an option regarding the remainder.
  c) The whole asset should remain in the ownership of the insolvent. If all or part of it has been destroyed, or if it has left his ownership through sale, or gift, or endowment, the right to reclamation will be cancelled regarding the remaining part except when the transaction involves multiple parties.
  d) The asset should not be in a condition where it is mingled with something from which it cannot be distinguished, nor can its characteristics have changed to the point that the original name for it no longer applies or that its value has been reduced.

(3) See: *"Fath Al-Bari"* [5: 66]; and *"Sahih Muslim"* [3: 1193].

e) The right of another person should not relate to it, e.g., when the insolvent has pledged it as security, except when the owner of the right (the mortgagee) renounces his right to the mortgage.

The right to reclamation is the cancellation of the sale. It can take place verbally or by a substitute means. It takes place immediately and does not need the decision of a judge, or the knowledge of the competent authority, or the ability to deliver.

Besides that, if the asset or its value or its feature decreased, or an inseparable increase occurred in it, like an increase in the weight of livestock, and he chose reclamation, he will only have that. But if the increase is separate, it would belong to the insolvent.

The right to reclaim land is not precluded by any building built on it by the insolvent nor by any trees he planted on it. The creditor will be given an option between having the insolvent remove the building and the trees, with the creditor bearing liability for any damage (to what is moved), or taking the building and trees and paying their price. In case of cultivated land, the crop will remain until harvest, free of any charge.

- The basis for the other view, which does not recognize the right to reclamation, is that the Hadith related by Al-Bukhari and Muslim contravenes the implication of a Shari'ah principle; i.e., the liability of the insolvent remains operative and the creditor's right regarding that liability remains stable. This group cited the Hadith: *"Anyone who died or went insolvent, and some of his creditors found exactly their property, they are on a par with the other creditors"*.(4)

  Mursal Hadiths are valid evidence according to those who take this view. They are Hanafis and some of the Salaf.(5)

- The basis for non-inclusion of all types of deposits of safekeeping in the insolvency assets is that they are not the property of the insolvent; inter-

(4) This has been related by Al-Daraqutni by a mursal chain of transmission. See also *"Al-Mawsu'ah Al-Fiqhiyyah"* [5: 311].

(5) See: *"Al-Mawsu'ah Al-Fiqhiyah"* [5: 311], for the documentation of the reference works of the madhhabs that affirm the right of reclamation and for the details related to the right of reclamation.

diction only occurs regarding his property, not the property of others entrusted to him.

- The basis for the requirement of a court ruling to rescind the interdiction of an insolvent is that it demands due consideration and Ijtihad, just as with a declaration of insolvency.

Appendix (C)
Definitions

I'sar

The present inability to discharge the financial obligations established in one's liability.

Prudential or Precautionary or Preventive Interdiction

Expedited and streamlined interdiction aiming at placing the debtor's assets under judicial supervision so that the creditor precludes the existence of a threat to his receipt of the full payment of his debt.

Shari'ah Standard No. (19)

Loan (Qard)

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

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

Preface

This standard aims to elaborate the rules of the Shari'ah for loan (Qard). Among these are the rules for a benefit (Manfa'ah) arising from a loan whether or not this is stipulated (in the contract), just as it includes the regulations of the Shari'ah that must be followed by Islamic financial institutions (Institution/Institutions).[1] Likewise, the Standard includes the Shari'ah rules for some applications that the institutions need to implement, like current accounts, perquisites in return for loans, service charges for loans, and mutual overdrafts between the institution and its correspondents.

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

Statement of the Standard

1. Scope of the Standard

This Standard covers loans and the accompanying benefits or costs irrespective of the institution being a lender or a borrower.

The Standard does not cover what is not a loan (Qard), like the price in a credit sale and investment accounts, because they have standards specific to them.

2. Definition of Qard

Qard is the transfer of ownership in fungible wealth to a person on whom it is binding to return wealth similar to it.

3. Elements (Arkan) of a Loan (Qard) Contract and Its Conditions

3/1 The contract of loan (Qard) is concluded through offer and acceptance by the use of the words Qard and Salaf or any other word or act that conveys the meaning of Qard.

3/2 The legal capacity for making a donation is stipulated for the lender.

3/3 The legal capacity to undertake transactions is stipulated for the borrower.

3/4 It is stipulated for the subject-matter of the contract that it be known fungible (Mithli) marketable wealth.

3/4/1 The borrower comes to own the subject-matter of Qard (the wealth loaned) through possession, and he becomes liable for (the repayment of) a similar subject-matter.

3/4/2 The applicable rule is the return of an amount similar to the loan amount at the place where it was delivered.

4. Rules for Excess Benefit Stipulated in the Qard Contract

4/1 The stipulation of an excess for the lender in loan is prohibited, and it amounts to Riba, whether the excess is in terms of quality or

quantity or whether the excess is a tangible thing or a benefit, and whether the excess is stipulated at the time of the contract or while determining the period of delay for satisfaction or during the period of delay and, further, whether the stipulation is in writing or is part of customary practice.

4/2 It is permissible to stipulate the satisfaction (repayment) of Qard at a place other than that where the loan was made.

5. Rules for Excess Benefit Not Stipulated in the Contract

5/1 It is not permissible to the borrower to offer tangible property or extend a benefit to the lender during the period of the Qard when this is done for the sake of Qard, unless giving of such benefits is a practice continuing among the parties from a time prior to the contract of Qard.

5/2 An excess over Qard is permissible in terms of quantity or quality, or offering of tangible property or extending of a benefit, at the time of satisfaction when it is not stipulated or is part of custom, irrespective of the subject-matter of Qard being cash or kind.

6. Stipulation of a Period in Qard

It is permissible to stipulate a period in Qard. The borrower is, therefore, under no obligation to return it prior to the termination of the period nor can the lender demand it back prior to the end of the period. If, however, no period is stipulated, it is binding upon the borrower to return its substitute (*Badal*) on demand.

7. Stipulation of a Contract in Qard

It is not permissible to stipulate a contract of Bay' (exchange, sale) or Ijarah or other commutative contract within the contract of Qard.

8. Stipulation of a Reward for Raising Loans for Another

It is permissible to stipulate a reward for raising loans for another as long as it is not a fictional device (*Hilah*) for dealing in Riba. [see item 8/3/2 of Shari'ah Standard No. (15) on Ju'alah at the end of which it is stated "with the condition that the transactions are not employed for raising interest bearing loans through stipulations, customary practice or dealings among Institutions"]

9. Service Charges for Qard

9/1 It is permissible to a lending institution to charge for services rendered in loans equivalent to the actual amount directly spent on such services. It is not permissible to the institution to charge an amount in excess of such a service charge. All charges in excess of the actual amount spent are prohibited, and it is necessary to ensure precision in the determination of the actual charges so that they do not lead to an excess that can be deemed a benefit. The fundamental rule is that each loan bears its own specific charges, unless this becomes difficult as in the case of a group or common loan, in which case there is no restriction in the way of bearing direct collective charges for all the loans on the basis of the entire sum. It is necessary that the method of determining the charges be laid down by the Shari'ah Supervisory Board of the institution in detail, and this is to be done by distributing the expenses incurred among all the loans and each loan is to bear its share proportionately. An explanation of such circumstances is to be presented before the Board along with suitable documents.

9/2 Indirect expenses incurred in rendering services for loans are not included in actual expenses, like the salaries of the employees, the rentals of space, assets and means of transport as well as other management and general expenses of the institution.

10. Key Modern Applications of Qard

Among the most important modern applications of Qard are the following:

10/1 Current accounts

10/1/1 The reality of current accounts is that these are loans and not deposits. Thus, the institution comes to own the amounts and a liability to repay the amount is established against it.

10/1/2 It is permissible for the institution to demand wages for services rendered to the holders of the current accounts.

10/1/3 It is permissible for the institution to render services related to deposits and withdrawals to the owners of the current accounts with or without compensation like chequebooks and ATM cards and the like. There is no restriction on the institution

if it distinguishes between owners of current accounts with respect to what relates to deposits and withdrawals, like exclusive booths for receiving the owners of some accounts, or like distinguishing between the types or cheques.

10/2 Perquisites for Qard

It is not permitted to the institution to present to the owners of current accounts, in lieu of such accounts, material gifts, financial incentives, services or benefits that are not related to deposits and withdrawals. Among these are exemptions from charges in whole or in part, like exemption from credit card charges, deposit boxes, transfer charges and letters of guarantee and credit.

The perquisites and incentives that are not specific to current accounts are not governed by this rule.

10/3 Charges on credit cards for cash withdrawals from ATMs

10/3/1 The charges imposed on cards for cash withdrawals from bank teller machines are a charge for services and are independent of the loan.

10/3/2 It is necessary that the charges imposed on credit cards for cash withdrawals from bank teller machines be an amount that is certain within the limits of reasonable charges excluding profit from Qard. It is not permissible to link the charge to the amount withdrawn. It is not permissible to the institution to slice the withdrawals as a device for obtaining repeated charges just as it is not permissible (for this purpose) to take into account the period of repayment of the amount withdrawn. Where there is a difference in currencies, the application of the rate for the prevailing currency is stipulated. [see also item 4/5, Shari'ah Standard No. (2) on Credit and Charge Cards]

10/4 Overdrafts between the institution and its correspondents

In order to avoid interest between the institution and its correspondents, there is no restriction if the institution comes to

an agreement with other correspondent banks to place a ceiling upon the overdrafts of one drawn upon the other without any claims for profits (interest). [See item 2/4/a of Shari'ah Standard No. (1) on Trading in Currencies]

11. Date of Issuance of the Standard

This Standard was issued on 30 Rabi' I, 1425 A.H., corresponding to 19 May 2004 A.D.

Adoption of the Standard

The Shari'ah Standard on Qard was adopted by the Shari'ah Board in its meeting No. (12) held in Al-Madinah Al-Munawwarah during the period of 26-30 Rabi' I, 1425 A.H., corresponding to 15-19 May 2004 A.D.

Appendix (A)
Brief History of the Preparation of the Standard

In its meeting No. (8) held in Al-Madinah Al-Munawwarah during the period of 28 Safar to 3 Rabi' I, 1423 A.H., corresponding to 6-11 May 2002 A.D., the Shari'ah Board decided to issue the Shari'ah Standard on Qard (loan).

On 24 Rajab 1423 A.H., corresponding to 1 October 2002 A.D., the Shari'ah Standards Committee decided to commission a Shari'ah consultant to prepare an exposure draft on the Shari'ah Standard on Loan (Qard).

In its meeting No. (7) held in the Kingdom of Bahrain on 16 Muharram 1424 A.H., corresponding to 19 March 2003 A.D., the Shari'ah Standards Committee (1) discussed the Shari'ah study and required the consultant to incorporate necessary amendments in the light of the discussions and observations of the members.

In its meeting No. (8) held in the Kingdom of Bahrain during the period of 16-17 April 2003 A.D., the Shari'ah Standards Committee (1) discussed the exposure draft of the standard on Qard and made necessary amendments in the light of the discussions and the observations of the members. The Committee discussed the exposure draft of the standard in its meeting held on 25 and 26 Rabi' II, 1424 A.H., corresponding to 25 and 26 June 2003 A.D., and incorporated necessary amendments in the light of the discussions and observations of the members.

The Committee discussed the exposure draft of the standard in its meeting No. (9) held it Amman, the Hashimite Kingdom of Jordan, on 23 and 24 Jumada I, 1424 A.H., corresponding to 23 and 24 July 2003 A.D., and made necessary amendments in the light of the discussions and observations of the members.

The revised exposure draft of the Shari'ah Standard was presented to the Shari'ah Board in its meeting No. (11) held in Makkah Al-Mukarramah during the period of 2-8 Ramadan 1424 A.H., corresponding to 27 October-2 November 2003 A.D. The Shari'ah Board made amendments to the exposure draft of the standard and decided that it be sent to specialists and interested parties in order to obtain their comments in preparation for the discussion of the exposure draft in a public hearing.

A public hearing was held in the Kingdom of Bahrain on 29 Dhul-Qa'dah 1424 A.H., corresponding to 21 January 2004 A.D. The public hearing was attended by more than fifteen participants representing central banks, institutions, accounting firms, Shari'ah scholars, academics and others interested in the field. The members of the Shari'ah Standards Committees (1) and (2), responded to the written comments that were sent prior to the public hearing as well as to the oral comments that were expressed in the public hearing.

The Shari'ah Standards Committees (1) and (2) in a joint meeting in the Kingdom of Bahrain on 30 Dhul-Qa'dah 1424 A.H., corresponding to 22 January 2004 A.D., discussed the comments that were made during the public hearing as well as the observations received in writing. The Committees made amendments that were deemed suitable.

The amended exposure draft was presented to the Drafting Committee in its meeting held in the Kingdom of Bahrain on 25 Safar 1425 A.H., corresponding to 15 April 2004 A.D.

The Shari'ah Board in its meeting No. (12) held in Al-Madinah Al-Munawwarah during the period of 26-30 Rabi' I, 1425 A.H., corresponding to 15-20 May 2004 A.D., discussed the amendments suggested by the Shari'ah Standards Committee and the Drafting Committee, and incorporated the amendments deemed suitable. The Shari'ah Board unanimously adopted some of the items of the Standard and some items were adopted by the majority vote of the members of the Shari'ah Board, as recorded in the minutes of the meetings of the Shari'ah Board.

Appendix (B)
The Shari'ah Basis for the Standard

- The basis for stipulating that wealth given as Qard be known is to enable the borrower to return a similar substitute of the wealth of Qard.
- The basis for the rule that the borrower does not come to own the wealth lent except through possession is that the contract of Qard is one in which commutative aspect and that of donation stand combined, however, the act of donation is predominant. It is for this reason that the rule is similar to that for gift (Hibah) in which ownership is transferred with the taking of possession.
- The basis for the rule that the subject-matter of Qard be a fungible item is that it is only such an item that can be returned by the borrower. Further, fungible items are compensated through similar substitutes in usurpation and destruction.
- The basis for the obligation of returning the counter-value of Qard at the same place where it was granted, when there is no contrary stipulation, is that this is the governing rule.

Stipulation of an Excess in the Counter-Value of Qard

- The basis for the prohibition of stipulating an excess in the counter-value of Qard for the lender are evidences from the Qur`an, the Sunnah, consensus of Fuqaha (Ijma') as well as rational arguments that convey the prohibition of Riba (usury) in Qard.

Stipulation of Repayment in a Land (Place) Other Than That of Qard

- The basis for the permissibility of repayment in a land other than that where Qard was granted so as to provide a facility to the borrower whether or not the lender benefits from this, is as follows:
  1. The reports[2] from the Companions, may Allah be pleased with them, which indicate the permissibility of stipulating repayment in

(2) *"Al-Musannaf"* by Ibn Abu Shaybah [6: 279]; and *"Al-Sunan Al-Kubra"* by Al-Bayhaqi, [5: 352].

a land other than that where Qard was made. This is a view upheld by the Malikis and the Hanbalis and it was preferred by Ibn Taymiyyah and Ibn Al-Qayyim Al-Jawziyyah.

2. The stipulation of repayment in a land other than that of the Qard is in the interest of both the lender and the borrower without causing injury to either along with the existence of a need. The Shari'ah does not lay down the prohibition of interests that bear no injury. In fact it lays down their permissibility. It does prohibit those that are injurious, but here the benefit is mutual and they are cooperating to arrange this. It, therefore, belongs to the category of cooperation and participation.
3. The basic rule in transactions (Mu'amalat) is permissibility, and the stipulation of repayment of a loan in a land other than that of the Qard is not expressly prohibited by the texts, nor is the meaning expressly stated in the texts so that prohibition could be extended through analogy. Thus, the repayment falls under the rule of permissibility.

Stipulation of a Period in Qard

- The basis for the permissibility of stipulating a period in Qard, for Qard can be delayed by stipulating a period, are evidences about the permissibility of a period of delay, the obligation of abiding by conditions and contracts, for the realisation of the purposes of the Qard, and for repelling injury.

Stipulating a Contract of Sale within the Contract of Qard

- The bases for the prohibition of stipulating a contract of sale within the contract of Qard are the following:
  1. The saying of the Prophet (peace be upon him): *"A Salaf (loan) and sale (in one contract) are not permitted nor are two conditions in a sale nor the profit from a thing for which the liability for loss is not borne nor the sale of what you do not have"*.[3]

(3) Related by Abu Dawud. The text of this Hadith belongs to him as narrated from Abdullah Ibn Amr Ibn Al-'Ass (may Allah be pleased with him), chapter on the person who =

2. The underlying reasoning is that the word Salaf in the words of the Prophet (peace be upon him): *"A Salaf (loan) and sale (in one contract) are not permitted"*, means Qard. The Hadith indicates the impermissibility of combining a Qard and a sale in a single contract. The generality of its meaning includes the impermissibility of stipulating a contract of sale in a contract of Qard as well as the impermissibility of stipulating a Qard contract within a contract of sale.
3. The stipulation of a contract of sale within a contract of Qard is a means towards obtaining an excess in Qard as he may oblige him with respect to the price for the sake of Qard, and in this way the Qard will be created with a stipulated excess, which is Riba. These are means that, by agreement, are to be prevented and blocked.
4. The stipulation of a contract of sale within a contract of Qard removes the contract of Qard from its main purpose, which is to provide a facility. The reason is that Qard is not a commutative contract, it is rather a contract of piety and virtue; thus, it is not valid if compensation is stipulated in it. If Qard is linked to a commutative contract, it will receive a part in the compensation and this will take it out of its required purpose. This will nullify it and nullify the commutative contract linked to it as well.

- The basis for the prohibition of a stipulation by the lender that the borrower gives him a gift is that in reality this amounts to Qard with an excess that is stipulated for the benefit of the lender and this excess is the gift. Thus, it amounts to prohibited Riba and removes the contract from the category of a compassionate contract moving it to one of Riba. Further, this stipulation

= sells what he does not have, *"Kitab Al-Buyu'"*, (H: 3504): *"Sunan Abu Dawud"* [3: 283]; Al-Tirmidhi, chapter on the disapproval of selling what one does not have, *"Kitab Al-Buyu'"* (H: 1234): *"Sunan Al-Tirmidhi"* [3: 526-27]; Al-Nasa`i, chapter on two conditions in a sale, *"Kitab Al-Buyu'"* (H: 4644): *"Sunan Al-Nasa`i"* [7: 340]; Ahmad in *"Musnad Al-Mukthirin Min Al-Sahabah"* (H: 6633): *"Musnad Ahmad"* [2: 3730] through different channels, all of them: From Ayyub, who said: "Amr Ibn Shu'ayb related to me saying, 'My father related to me from ...' till he mentioned Abdullah Ibn Amr reporting it". The Hadith is deemed *hasan* Hadith, but rises to the level of *Sahih Li-ghayrihi* due to its numerous channels.

generates a benefit for the lender and the Jurists have unanimously agreed that any contract that yields a benefit stipulated for the lender is impermissible. The benefit in this stipulation is that the lender will benefit from a second loan from the borrower, and this benefit is not in lieu of anything other than the very Qard that he gave him.

Stipulation of a Reward for Raising Loans on the Basis of Credit-Worthiness

- The basis for permitting the stipulation of a reward for raising loans on the basis of credit status is that this is a counter-value for a service rendered, and this is what is upheld by the Jurists that a reward may be acquired for recommendations and lending of status.

Charges for Services Actually Rendered

- The basis for the permissibility of the lender charging only what is equivalent to the actual costs incurred is that these are in lieu of the costs alone. The lender is doing a favour and the person doing a favour is not to be penalised. The basis for the prohibition of charging in excess of this is that in such a case it would amount to an excess in lieu of the Qard. Resolution No. 13 (1/3) was issued by the International Islamic Fiqh Academy (OIC) regarding the recovery of actual costs.

Material Benefits at the Time of Repayment That Are Not Stipulated

- The basis for the permissibility of giving an excess, in terms of quantity or quality, at the time of repayment by way of generosity and goodwill, when these are neither stipulated nor is there a practice of paying them, is the Hadith reported from Abu Rafi', may Allah be pleased with him, that the Messenger of Allah (peace be upon him) borrowed a very young camel from a man and then wished to present to him one of the camels of the Sadaqah (Zakat), so he asked Abu Rafi` to repay the man his camel. Abu Rafi' returned it to him and said, "I do not find anything there except a full grown four year old camel." The Prophet (peace be upon him) said, *"Give him this camel. The best people are those who do better in of repayment"*.[4] It is reported from Abu Hurayrah that a man came to the

(4) Related by Muslim in his *"Sahih"* in the Book of *"Musaqat"*, chapter on the person who borrows may return what is better.

Messenger of Allah (peace be upon him) seeking alms. The Messenger of Allah (peace be upon him) borrowed food amounting to one-half of a Wasq and gave the man this. When the lender came demanding his loan, he gave him a full Wasq saying, *"One-half of this is your repayment and the other half is a present from me"*.(5)

Material Benefits Not Stipulated Prior to Repayment

- The basis for the prohibition of material benefits not stipulated prior to repayment, unless these benefits are not for the sake of Qard or in lieu thereof, are the following:
  1. From Anas Ibn Malik, may Allah be pleased with him, who said: "The Messenger of Allah (peace be upon him) said, `When one of you grants a Qard and a gift is made to him by the borrower or he offers him a free ride on his animal, he is not to accept this from him, unless such a practice was prevalent among them prior to the Qard.'"(6)
  2. Reports of precedents laid down by the Companions, may Allah be pleased with them, which indicate the prohibition of accepting the gift of the borrower and other types of benefits, unless there is an evidence that this is not for the sake of the loan, and that the lender responds with a similar gift or adjusts it as repayment of the debt.

Current Accounts

- The basis for the determination that current accounts constitute loans (Qurud), are the following:
  1. That the bank comes to own the deposits in the current accounts and has the right to undertake transactions in the amounts and to seek growth in them (through investment). Further, it is under an obligation to return a similar amount on demand. This is the very meaning of Qard, which is the giving of wealth to one who benefits from it -that is, employs it and consumes it in pursuit of his aims- and then returns its counter-value. This differs from Wadi'ah (deposit) in the terminology of Fiqh, which is wealth deposited with a person for safe-custody so that he does not employ the wealth and returns this very wealth to the owner.

(5) Related by Al-Bayhaqi, *"Al-Sunan Al-Kubra"*, [5: 351].
(6) Related by Ibn Majah in his *"Sunan"* (H: 2457).

2. It is binding on the bank to return a similar amount on demand for the current deposit, and it guarantees such return even upon loss of the wealth, whether or not it was negligent. This is the purpose of the contract of Qard, as against Wadi'ah in Fiqh terminology insofar as the Wadi'ah is a trust in the possession of the custodian, thus, if it is destroyed due to his transgression or negligence, he is held liable for it, but if it is destroyed without such transgression or negligence, he is not liable. Resolution No. 86 (3/9) was issued by the International Islamic Fiqh Academy (OIC) regarding the status of current accounts.

- The basis for the permissibility of the bank demanding service charges -for maintaining current accounts- for the services rendered, is an excess over the duty owed by it, because it is entitled to such charges in lieu of the acts undertaken by it and services rendered to the client.
- The basis for the permissibility of the owner of a current account utilising a chequebook and ATM card without compensation are the following:
  1. The additional benefit arising out of this issue is common for both parties -the lender and the borrower- as both benefit from it, thus, both benefits are set off against each other. In fact, the benefit that goes to the client through the issuance of a chequebook and an ATM card is secondary and is not a primary benefit insofar as the bank has set up this system for serving its own numerous aims and objectives, thus, the benefit accruing to the bank from this system is a primary benefit, while the realisation of the benefit for the client from this system is a consequence of the employment of this system by the bank for its aims and objectives.
  2. The benefit derived by the owner of a current account -the lender- from this system without a counter-value is not a benefit separate from the Qard. In fact, it is a means for the satisfaction of the loans acquired by the bank insofar as these are ways for the repayment of loans for every lender as when he demands them.
- The basis for the prohibition of presents and gifts, when the underlying cause is Qard, insofar as the bank gives these presents and gifts to one who gives it a Qard, is that these are by way of gifts to the lender prior to

the satisfaction of the loan when these are due to the Qard.[7] As for the basis of presents and gifts in general, they are not related to Qard and there is no suspicion about them.

Overdrafts between the Institutions and Their Correspondents

- The basis for the permissibility of overdrafts between institutions and their correspondents is general need and that the benefit derived from this practice is not specific to the lender alone. In fact, the benefit is mutual. Further, it does not fall under the category of Qard rather it is a step for transacting with one who deals with you. Thus, the issue does not resemble the case of "You give me a loan and I will give you a loan."[8]

(7) Resolution No. (355) of the Shari'ah Board of Al Rajhi Banking Corporation was issued with respect to presents and gifts in lieu of loans (Qurud).

(8) *"Al-Mughni"* by Ibn Qudamah, [6: 436]; Resolutions and Recommendations of Al Baraka, No. (8/10) and (11/6); Shari'ah Rulings on economic Matters, issued by Bayt Al-Tamwil Al-Kuwayti, [1: 178].

Appendix (C)
Definitions

Benefit Arising from Qard

It is a benefit or an interest that is derived by the lender in a contract of Qard due to this contract.

Current Accounts

These are loans that constitute the current accounts insofar as the bank comes to own these amounts and it is possible for the owner of these accounts to withdraw these amounts at any time he likes.

Mithlis (Fungibles)

These are cash, things subjected to cubic measure, weight, linear measure and very similar countable things that do not differ to an extent that their difference will lead to a difference in their value.

Qimis (Non-Fungibles)

These are types of wealth whose difference, one from another, leads to a difference in their value, as in the case of animals.

Legal Capacity for Donation

It is the ability of the subject (Mukallaf) to grant wealth or a benefit to another in the present or in the future without compensation in lieu thereof and with the usual intention of piety and the doing of good.

Legal Capacity to Undertake Transactions

It is the ability of a person to commit an act or to issue a statement in a manner that is acknowledged by the Shari'ah, and the underlying basis is discretion, reason and puberty.

Deficient Legal Capacity for Execution

It is the ability of a person to undertake certain transactions and not others so that the execution of such transactions depends upon ratification by another.

Shari'ah Standard No. (35)

Zakah

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

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

Preface

This standard aims to identify the Zakah base for Islamic financial Institutions (Institution/Institutions),[1] and indicate the different types of zakatable assets and the liabilities (debts of the Institution) and allocations that have to be deducted from them. The standard also aims to illustrate the payable Zakah rates, and indicate the specific heads of Zakah disbursements.

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

Statement of the Standard

1. Scope of the Standard

This standard covers identification of the Zakah base for Institutions (including Islamic insurance companies) as well as the subsidiary and the mother company of the Institution (the company). This will be done through identification of the items of financial statements that should or should not be included in calculation of the Zakah base, and the liabilities or allocations that should or should not be deducted from Zakatable assets. The standard also covers payable Zakah rates, disbursement of Zakah funds on the eight categories of Zakah recipients, and the rulings pertaining to disbursement.

2. Procedural Rulings

2/1 Methods of calculation of Zakah base

There are two methods for calculation of Zakah base: the first is the method of net assets, and the second is the method of net investment assets. The two methods have different bases of assessment, yet if such difference is well recognized the final outcome will be the same. This standard is based on the net assets method.

Net Assets Method

2/1/1 Calculation of Zakah base by using the net assets method is done as follows:

Zakah base = Zakatable assets – (liabilities payable during the financial year as at the date of the balance sheet + all installments of liabilities of the financial year which will become due during the coming financial period + rights of the holders of non-restricted investment accounts + minority rights +sovereign rights +waqf rights + charitable rights + rights of non-profit-earning organizations that have no specific owner).

Zakatable assets include: cash and the like, receivables (minus) doubtful debts, assets prepared for trading (such as goods, financial papers and real estate), and financing assets (Mudarabah, Musharakah, Salam, Istisna'a…..). Deductions from financial assets include fixed assets relating to them as well as deductible allocations as shown in item 7.

2/1/2 Assets prepared for trade are to be assessed in terms of their expected cash value (selling market value) at the time when Zakah is due.

2/1/3 In determination of zakatable assets in agriculture and livestock other than articles of trade, application of the ratios and rates specified by Shari'ah should be observed.

2/2 Direct payment of Zakah by the institution

2/2/1 The institution or the company is committed to pay Zakah under the following cases:

a) Enactment of an enforceable Zakah law.

b) Stipulation of commitment to pay Zakah in the articles of association.

c) Issuance of a Zakah commitment resolution by the general assembly.

2/2/2 When the Institution accepts agency for payment of Zakah on behalf of all or some of its equity holders or the holders of investment accounts, funds should be available - or submitted by the principals of such agency - for payment of Zakah on their behalf.

2/2/3 There should be coordination between the mother Company and its subsidiaries with regard to payment of Zakah so as to avoid double payment.

2/2/4 In case of establishing a Zakah fund, or preparing Zakah accounts, clearance by the Shari'ah Board of the institution or the company should be obtained. Clearance by the Shari'ah

Board is particularly required for disbursement of the Zakah funds, when performed directly by the institution/company, or through an accredited Zakah agency. Moreover, a comprehensive report on Zakah disbursements should be presented to the Shari'ah Board on annual basis.

2/2/5 In the absence of any of the conditions indicated in item (2/2/1) above, payment of Zakah shall become the responsibility of shareholders and holders of the investment accounts. In this case the Institution or the company has to indicate the amount of Zakah payable per share or per a given balance of an investment account.

2/3 Zakah-related financial statements

2/3/1 The Balance sheet

Due to the fact that Zakah relates to ownership of zakatable assets, what matters to the Institutions in Zakah calculation is the financial data included in the balance sheet of the institution (the budget), which comprises assets, liabilities, and their related allocations.

2/3/2 Income statement

Income statement (profit and loss account) does not form a basis for Zakah calculation, yet it is referred to for knowing the income or profit of the income-earning fixed assets. In order to pay Zakah the Institution should not necessarily be making profits. Incurring losses by the Institution does not prevent Zakah from becoming due. The Institution is still committed to pay Zakah, except when its liabilities (debtors) absorb all its assets.

3. General Rulings

3/1 Shari'ah definition of Zakah, status (Hukm) of Zakah in Shari'ah, and Zakatable funds

3/1/1 Zakah is a right which becomes due in certain types of wealth, and disbursable to specific categories of recipients. It is an in rem duty when its conditions are satisfied.

3/1/2 Zakah is obligatory on gold, silver, currencies, trade articles, livestock (camels, cows and goats), agricultural produce, minerals and *Rikaz* (treasures).

3/1/3 Zakah is not obligatory on wages, salaries and income from free occupations at the time of receiving such income; whereas it is obligatory on that portion of such income which remains unexpended for a whole year.

3/1/4 Zakah is not obligatory on fixed assets which generate income and which are not acquired for trade, such as leased assets. Nevertheless, at the end of the year, Zakah is obligatory on the remaining portion of the income generated by these assets.

3/1/5 Zakah is not obligatory on public wealth (public sector) or the insurance funds of public institutions.

3/1/6 Zakah is not obligatory on the charitable Waqf (*al-Waqf al-Khayri*). As regards the family Waqf (*al-Waqf al-Ahli*) the beneficiaries should pay Zakah, at the end of the year, from that portion of the Waqf income which remains unexpended.

3/1/7 The above ruling which relates to exemption of charitable Waqf from Zakah is also applicable to trust funds as well *Irsad* (allocation) of public funds and properties for (non-profiteering) educational, charitable, and social Institutions, which have no specific owner, even if such institutions make profits.

3/2 Conditions for Zakah obligation

3/2/1 Full ownership

Full ownership materializes when nobody else has a right in the asset in question, the owner can dispose of the asset the way he likes, and the owner of the asset is the sole owner of the income generated from the asset. In this case, no matter if the asset is

allocated for any specific purpose other than settlement of debts (for instance, no matter if it is allocated for implementation of investment projects).

3/2/2 *Nisab* (Zakatable wealth stratum)

The *Nisab* for gold regardless of its form is 85 grams of pure gold or its equivalent in currency (paper or coins), and the same *Nisab* is also applicable to articles of trade after valuation, as well as to extracted minerals. For silver, the *Nisab* is 595 grams of pure silver. The *Nisab* which is widely recognized as applicable to articles of trade is that of gold. *Nisab* for Zakah on livestock is shown at the end of this standard.

3/2/4 Al-Hawl (Zakah year)

The Zakah year for cash and commercial assets as well as livestock is a lunar year (354 days). In case of adopting the solar year for cash and commercial assets, the Zakah rate becomes 2.577%.(2) As regards agricultural products no consideration is to be given to the Hawl (Zakah year) because what matters is harvesting. Similarly what should be considered for minerals and Rikaz (treasures) is their extraction.

3/3 Applicable Zakah rate

The rate of Zakah applicable to gold, silver, currencies and articles of trade is 2.5% - with due consideration to item 3/2/3 above - , whereas the rate applicable to agricultural produce is one tenth (10%) for the produce of non-irrigated lands, half of the tenth (5%) for the produce of irrigated lands, and three quarters of the tenth (7.5%) for the produce of partially irrigated lands. Zakah rates applicable to livestock are shown at the end of this standard.

4. Fixed Assets

4/1 Operational fixed assets

Zakah is not obligatory on operational fixed assets such as the premises of the institution and its equipments; or on intangible assets such

(2) In a leap year the rate is 2.5775

as patent rights, trademarks and computer software. Zakah is also not obligatory on moveable assets acquired for operation (other than those prepared for trade) such as spare parts and tools used for further production, even when such assets are kept in the warehouses.

4/2 Income-generating fixed assets

There is no Zakah on fixed assets which generate income like *Mustghallat* (leased assets), if such assets are not acquired for trade. Nevertheless, Zakah is obligatory, at the end of the year, on the unexpended portion of the income generated by such assets, by adding that portion of income to the other zakatable assets and applying the Zakah rate.

Income-earning fixed assets appear in the financial statements under the following items:

4/2/1 Mustaghallat (leased assets such as real estate properties, transportation vehicles..etc.). At the end of the year, the unexpended rental of these assets is to be subjected to Zakah by adding it to other zakatable assets.

4/2/2 Real estate investments: At the end of the year, the unexpended income of these assets is to be subjected to Zakah by adding it to other zakatable assets.

4/2/3 Capital projects under implementation (which are not for trading)

If a project of this type happens to generate income at some of its stages of implementation, Zakah is obligatory on the unexpended part of that income, after adding it to zakatable assets at the end of the year. If such projects are being implemented for trading purposes. [see item (5/2/6/3)]

4/2/4 Investments in shares with the aim of retaining them (*Nama`*)

If it is possible to know through the company what is the exact amount of Zakatable assets (cash, articles of trade and repayable debts) per share, Zakah can be levied on that amount, otherwise Zakah is to be levied on the portion of zakatable assets per share,

which has to be reached through estimation. If the company has no zakatable assets, Zakah is obligatory on the remaining part of the net income at the end of the year.

As far as shares owned for non-trading purposes are concerned, no allocation for deterioration in the value of share investments should be made from the zakatable assets. Regarding shares acquired for trading purposes, the ruling on articles of trade (item 5/2) should be applied.

4/2/5 Investment in the shares of subsidiaries

In, accounting, a subsidiary is the entity in which the mother company owns 50% of the shares. The process of Zakah payment in this case starts with calculating the Zakah of the subsidiary independently, and then the mother company pays its share of Zakah in proportion to its shareholding in the subsidiary. The remaining part of the Zakah of the subsidiary is to be paid by the other parties (minority rights). Such arrangement holds true when the subsidiary does not pay its Zakah directly.[3]

5. Zakatable Assets

5/1 Liquid or easy-to-liquidate current assets

Such assets which include cash assets and assets which can be converted into cash (quasi cash), are shown in the financial statements under the following items:

5/1/1 Cash in hand: Zakah has to be paid from these funds. If such funds are in foreign currency Zakah should be paid from the equivalent amount in local currency as per the prevailing exchange rate on the date when Zakah is due.

5/1/2 Gold and silver assets in any form: Zakah on such assets is to be assessed on the basis of their net weight or cash value.

(3) From a Shari'ah point of view, the same ruling is applicable when the mother institution owns less than 50% of the shares of the subsidiary.

5/1/3 Bank balances: bank balances constitute the following items in the financial statements:

5/1/3/1 Current accounts

Institutions and companies should pay Zakah from their current accounts with other Institutions, because such accounts constitute debts that will certainly be settled. Current accounts include those with the central bank as well as those with other banks. When the Institution obtains interest in such accounts (though it is prohibited) it should pay Zakah from the principal amounts and donate the whole amount of the interest for charitable purposes. For the banks or the Institutions which receive such deposits current accounts constitute liabilities. [see item 6/3/1]

5/1/3/2 Investment accounts

a) The owners of these accounts should pay Zakah from the investment balances as well as the profits, whether such accounts represent short or long term deposits, and even if drawing from the account is restricted by the investment Institution or the owner. If these accounts are invested through permissible modes, what really matters is their share in the investment assets, rather than their share in the invested amounts. Consequently due consideration has to be given to the nature of the assets representing the invested amounts.

As for the institutions in which the accounts are invested, an account of this type represents a trust (Amanah) rather than a liability, and therefore these Institutions should pay Zakah only on their share of the profits or their commissions, as part of their cash assets.

b) When the investment accounts earn interests (though prohibited) Zakah is payable from the principal, while the entire amount of interest should be donated for charitable purposes. As for the banks in which these interest bearing accounts are deposited, the principal amounts (excluding interest) represent liabilities. [see item 6/3/2]

5/1/4 Bonds, Sukuk and funds

5/1/4/1 Bonds and treasury bills (which represent debts and involve interest – though prohibited): Zakah from the principal of the bond (cost of the bond) should be paid, whereas the entire amount of interest should be donated for charitable purposes. As regards the issuing banks, the nominal value of these bonds and bills represent a liability. [see item 6/3/2]

5/1/4/2 Investment Sukuk of different types: Their owners should pay Zakah on the basis of the underlying assets of these Sukuk, and as indicated in this Standard. As for the Institutions which manage the assets or keep the investment Sukuk, the Sukuk represent a trust (Amanah) rather than a liability, and therefore these Institutions should pay Zakah only on their share of the profits or their commissions, as part of their cash assets.

5/1/4/3 Investment Funds in their different forms: Zakah has to be paid on the basis of the underlying assets of the fund, and as indicated in this Standard.

5/1/5 Amounts retained for documentation of the deal

5/1/5/1 *Hamish Jiddiyyah* (security deposit): This refers to the advance amount which the client pays in order to confirm his binding pledge. Such amount is supposed to cover any harm caused by recoiling of the client from completion of the deal: Zakah on such amount

shall be paid by the client. If the amount is deposited in a current account it shall become subject to the rulings shown in item 5/7/3/1 and if it is deposited in an investment account it shall become subject to the rulings indicated in item. [5/1/3/2]

5/1/5/2 The initial security for entering bids as well as implementation security: are to be ducted from the zakatable assets of the Institution which receives them, while the owner of such amount has to pay Zakah it annually as part of his assets, unless he has not been enabled to invest it before refund. When several years elapse before refund, Zakah for one year has to be paid. If such amounts are deposited in an investment account it shall become subject to the rulings stipulated in item. [5/1/3/2]

5/1/5/3 Cash security charged to individuals and Institutions for obtaining certain services such as telephone and electricity services, or security paid on renting shops and equipments: Zakah should be paid by the owner of such amount on refund, and for one year, unless he has been enabled to invest the amount before refund. If the owner of the amount has been enabled to invest it before refund Zakah has to be paid subject to the rulings stated in item. [5/1/5/2]

5/1/5/4 'Arboun (Earnest Money): To be deducted from the zakatable assets of the buyer, while the seller should pay Zakah from it as part of his Zakatable assets, since he will get the amount if the contract is concluded or not.

5/2 Commodity current assets (Articles of Trade)

5/2/1 Articles of trade include anything offered for sale such as real estate and moveable assets, whether the good is being sold in

its current state or after manufacturing, and when it is acquired through buying or otherwise. To be subject to Zakah payment such goods should not necessarily be obtained through buying, the mere intention to offer them for sale is quite sufficient.

5/2/2 Articles of trade should be valued at selling market price in the place where they exist, and according to the method of their sale (retail, or wholesale, or if both whichever the predominant). Articles of trade should not be valued at cost or market price whichever the less. However, when other methods of valuation are extremely difficult, valuation at cost can be used for Zakah purposes. When there is a price change during the period between the date of accrual and date of payment of Zakah, the price at the date of Zakah accrual should be adopted.

5/2/3 When the articles of trade are subject to another type of Zakah treatment (e.g., when the articles of trade are livestock or agricultural produce) they should become subject to Zakah on articles of trade only.

5/2/4 In principle, Zakah on articles of trade is to be paid in cash, yet in case of trade recession it can be paid in kind (from the same articles of trade), provided that the interest of Zakah recipients could, thus, be achieved.

5/2/5 Zakah has to be paid on the goods earmarked for the buyer after concluding the contract, even if he has not yet possessed them.

5/2/6 Applications relating to commodity current assets in the items of financial statements

5/2/6/1 Commodity stocks prepared for Trade, raw materials in their different forms, and goods for sale in their original form or after being manufactured by adding them to other materials: To be valued for Zakah purposes at selling market price.

If a good of this type is defective it shall be valued at its selling market price and as per the method of its sale (retail, or wholesale, or if both whichever the predominant). If the good in question is a slow-moving item it can be valued for Zakah at its market price and in its current form. When an allocation is made for such goods it should not be deducted from zakatable assets.

5/2/6/2 Goods in process: To be valued for Zakah at their current market price on the day of Zakah accrual, and if it is not possible to know their market value, they could be valued at cost.

5/2/6/3 Works under implementation (constructions): To be valued for Zakah in their current state on the day of Zakah accrual.

5/2/6/4 Industrial accessories (spare parts) used in production equipment: are not part of Zakatable assets.

5/2/6/5 Goods in transit: To be valued for Zakah at market price in the place where they are found.

5/2/6/6 Goods to be sold by others on commission (by agency): To be valued for Zakah at market price in the place where they are found.

5/2/6/7 Goods imported through documentary credits covered by the Institution, including the expenses of opening the credit and the amounts retained by intermediary banks: Zakah should be paid on the amounts retained for the credit, and not the expenses. When the goods are owned Zakah has to be paid from them on the basis of their market value.

5/2/6/8 Goods prepared for export through documentary credits to the benefit of the Institution: The amounts retained

for the credit, are neither subject to Zakah nor are they deductable from zakatable assets, since they have not yet been possessed. However, Zakah has to be paid on the goods that are still held by the Institution as part of its finished goods or goods in process.

5/2/7 Intangible rights prepared for trade such as copy right, patent right, trademarks, and computer software: should be subject to Zakah on articles of trade.

5/2/8 End of the year stock of raw materials (primary materials) which are normally used as ingredients and remain as components of the goods manufactured for trade: Should be valued for Zakah at their market value before entering the process of manufacturing. No Zakah is payable on supporting materials which do not represent ingredients of or remain as components of the manufactured goods, such as fuel and cleaning materials.

5/2/9 Finished goods and goods in process being manufactured for trade: are subject to the same rate applicable to Zakah on articles of trade. Finished goods and goods in process should be valued in their current state and at market price.

5/2/10 Rapping and packing materials: are not to be included in valuation of goods for Zakah if such materials are not prepared for trade separately. Nevertheless, if such materials increase the value of the goods they should be included.

5/3 Receivables of the institution or the company

5/3/1 If the debt owed to the Institution is a cash amount the Institution should pay Zakah on it annually - whether such debt is due or not - since the Institution will certainly receive it. As for bad debts (non-repayable debts) and doubtful debts the Institution does not have to pay Zakah except for one year after collection of such debts, and as per the rulings indicated in item 6/2.

5/3/2 The institution can postpone Zakah on its outstanding debts until full or partial collection. On collection, the Institution has to pay Zakah for the whole past period. When a specific debt is partially doubtful, and an allocation is made for doubtful debts, the doubtful part of the debt can be deducted from Zakatable assets, if the total amount of such debt has initially been included in the these assets.

5/3/3 When the debt owed to the institution by another party comprises interest that has arisen from the process of lending and borrowing or from rescheduling of the debt; the Institution should pay Zakah on the principal only and donate the whole amount of interest for charitable purposes. It should, however, be noted that interest bearing deposits and loans as well as discounting of receipt papers are strictly prohibited dealings which should be avoided.

5/3/4 Applications relating to Receivables in the items of financial statements

5/3/4/1 Debtors: Zakah shall be paid on the amounts payable to the Institution against goods or services sold on debt. In this respect, due consideration should be given to the above-mentioned items.

5/3/4/2 Loans, overdraft accounts, and debt bonds including discounted bonds (zero coupon) and accepted bills (discounted bills): Zakah is payable on the value paid for purchasing the bond, whereas interest – though prohibited – should become subject to the rulings indicated in item 5/3/4.

5/3/4/3 Receipt papers (bills and promissory notes): Zakah shall be paid on the principal of the debt (amount of the paper), including the increment added to the price, if the paper relates to a commodity sold on debt. It shall be noted here that the case will remain the same whether

the debt represented by the paper is due or not, since no difficulty is going to be encountered in its collection. If the paper comprises interest the rulings indicted in item 5/3/4 regarding interest should be observed.

5/3/4/4 Amounts retained from contracts: Such guarantee amounts are held by the clients to ensure that the Institution is going to honor its commitments. If the Institution has not been enabled to invest these retention amounts it should not pay Zakah on them. However, on receipt of the amounts the Institution has to pay Zakah on them for only one year.

5/3/4/5 Advance payments on signing contracts: No Zakah shall be paid on them, since they are no longer owned by the Institution.

5/3/4/6 Prepaid expenses: No Zakah is payable on such amounts which represent expenses of forthcoming financial periods, since they are no longer owned by the Institution.

5/3/4/7 Accrued income: It represents income of the current period which has not yet been received, and it shall be subject to Zakah on debts as indicated in item 5/3/1.

5/3/4/8 Legal deposit: It refers to the amount retained by a bank on request of the concerned authorities for the sake of awarding license to the Institution. The Institution cannot withdraw or dispose of such amount except on permission of the concerned authorities. If the institution has not been enabled to invest the retained amount it shall pay Zakah on it for only one year at the time of refund. If such deposit involves interest (though prohibited) the rulings indicated in item 5/3/4 should be applied.

5/3/4/9 Murabahah debtors: It indicates the amounts owed by purchasers. Zakah in this case is payable on total price including profits, as indicated in item 5/3/1.

5/3/4/10 Debtors of Salam goods purchased by the Institution and not yet received: the Institution should pay Zakah on Salam capital if the goods have been purchased for trading purposes. When the goods are purchased for operating or income generating purposes the rulings indicated in item 4/1 and 4/2 should be applied. As regards the Salam capital received by the seller of the goods, such income is subject to Zakah as part of the seller's cash assets.

5/3/4/11 Debtors of Istisna'a goods sold by the institution: This item represents the balance of amounts due to the Institution as per delivery dates of the Istisna'a commodity. Such amounts are part of Zakatable assets, and Zakah has to be paid on them under the category of current assets, because they constitute cash amounts.

5/3/4/12 Debtors of Istisna'a goods purchased by the institution: When such goods are purchased for the sake of trading, the debt relating to them (the price which the Institution is committed to pay to the seller) should be included in zakatable assets, and subjected to Zakah as per item 5/3/1.

5/3/4/13 Investment in shares for the sake of trading: Should become subject to the Zakah rate applicable to articles for trade. Valuation has to be at market price, yet in the absence of any market for such shares, valuation can be made by experts.

5/3/5 Debtors in an insurance portfolio

As indicated in the Shari'ah standard on Islamic Insurance the contributions of policyholders constitute a fund which has an independent financial liability, and the contributor is supposed to have given the premium as a donation. Consequently, the insurance fund is not committed to pay back any excess amounts to policyholders [items 2 and 5/5 of the Shari'ah Standard No.

(26) on Islamic Insurance]. In view of this no Zakah is payable by the insurance portfolio.

5/4 Zakah on agricultural produce and fruits

5/4/1 The *Nisab* for agricultural produce and fruits is 653 kilograms. No consideration should be given to the *Hawl* (Zakah year) because what matters here is harvesting. The applicable Zakah rate is one tenth (10%) for the produce of non-irrigated lands, half of the tenth (5%) for the produce of irrigated lands, and three quarters of the tenth (7.5%) for the produce of partially irrigated lands.

5/4/2 In calculation of the *Nisab* different types of the same kind of produce can be added together, such as the different types of the same kind of grain or fruit, whereas different kinds of produce or fruits cannot be added together. Each kind of produce or fruit should have its separate *Nisab*. It makes no difference when the agricultural produce or fruits owned by the same Institution or company are in different geographical locations.

5/4/3 *Khars* (estimation by experts) can be adopted when the agricultural products or fruits are ripe. One fourth or one third can be deducted and left to the owner and the rest becomes subject to Zakah on the basis of *Khars* after the produce is dried. Zakah can also be paid in terms of value.

5/4/4 Works under implementation (constructions) relating to agriculture are not part of Zakatable assets.

5/4/5 Production requirements such as fertilizers and insecticides are not part of zakatable assets, and should not be deducted from the Zakah base unless they have been obtained through debt.

5/4/6 Rapping and packing materials are not part of zakatable assets.

5/4/7 Expenses relating to irrigation, land development, irrigation channels and soil woks shall not be deducted from zakatable assets.

5/4/8 Cost of delivery to recipients shall be deducted from zakatable assets.

5/4/9 Zakah on the produce of a rented agricultural land should be paid by the tenant. In case of Muzara'ah or Musaqat, Zakah shall be paid by the two parties proportionately.

5/4/10 Subsidies and concessions related to agriculture: Cash subsidies shall be included in the Zakah base as part of liquid assets subject to item 5/3/1, whereas free-of-charge land and equipment should not.

5/5 Zakah on minerals

5/5/1 Minerals here include all stuffs of this kind extracted from the earth or the sea whether in liquid, solid or gaseous form.

5/5/2 The *Nisab* for minerals is what has reached in value 85 kilograms of gold. *Nisab* is to be assessed for quantities extracted continuously. If extraction is suspended for an abnormal period assessment of *Nisab* shall start at the time when extraction is resumed again. The Zakah rate applicable to minerals is 2.5%. If the extracted minerals are owned by the state no Zakah shall be paid on them, otherwise minerals are the property of their extractor, and he should pay Zakah on them. [see Shari'ah Standard No. (22) on Concession Contracts]

5/5/3 Pearl, coral and fish extracted from the sea for trade should become subject to the Zakah rate applicable to articles of trade.

5/6 Zakah on livestock

Nisabs and Zakah rates for livestock (camels, cows and goats) are shown at the end of this standard. Livestock that reaches the *Nisab* is subject to Zakah, whether owned for milk or progeny. The animals shall become subject to the Zakah rate on livestock, only if they are fed through free grazing, most of the year. If the animals are owned for trade they shall become subject to the Zakah rate on articles of trade.

5/6/1 It makes no difference if the animals which belong to the same owner are found in the same place or different places. Mixed ownership can also be recognized so that the animals owned by more than one person are treated as if they are owned by a single person, when such animals share the same facilities.

5/6/2 Animals owned for trade should become subject to the Zakah rate on articles of trade. Valuation has to be at selling market price.

5/6/3 Working animals, such as animals used in land plowing, irrigation and carrying are not part of zakatable assets.

5/6/4 Animals other than camels, cows and goats are not subject to Zakah payment, unless they are owned for trade. If such animals are used for production rather than trade they should not be included in zakatable assets.

5/6/5 When animal products such as milk and wool are owned for trade they should become subject to Zakah on articles of trade.

5/6/6 Zakah is not payable on horses, mules, donkeys and all other animals used for work or adornment, unless owned for trade.

5/6/7 Zakah is not obligatory on chickens acquired for production, which should be treated in the same way as Mustaghallat (productive assets such as leased properties). [see item 4/2]

5/6/8 Chickens, milk and stocks of animals are subject to Zakah on articles of trade when they are owned for trade purposes.

6. Liabilities

6/1 Classification of liabilities

Liabilities in financial statements comprise items which are not debts owed by the Institution in the strict sense of Shari'ah. Such items include for instance the capital of the company, the reserves and the profits. The debts included under the item of liabilities comprise the following:

6/1/1 Non-current (long term) liabilities which refer to debts that become due after one year. Such debts usually arise from purchase of fixed assets on debt, in addition to other long term entitlements.

6/1/2 Current (short term) liabilities which refer to debts that become due within one year.

6/2 Debts owed by the institution

6/2/1 If the debts owed by the Institution have arisen from obtaining current zakatable assets for the purpose of trade they should be deducted from the Zakah base.

6/2/2 If the debts owed by the Institution have arisen from obtaining non-zakatable fixed assets, they should not be deducted from the Zakah base.

6/2/3 When it is difficult to know the amount of debt that has arisen from acquiring zakatable assets, the ratio of zakatable assets to total assets should be used for assessment of such debt which has to be deducted from the Zakah base. If, for instance, zakatable assets constitute 40% of total assets, 40% of total debts should be deducted from the Zakah base.

6/2/4 If the debt owed by the Institution has arisen from a Shari'ah-banned practice such as borrowing with interest, unpaid interests should not be deducted from zakatable assets, because impermissible commitments cannot lead to a Shari'ah-recognizable debt.

6/3 Applications relating to current liabilities in the items of financial statements

6/3/1 Current accounts: The balances of current accounts should be deducted from the zakatable assets of the Institutions with which such accounts are deposited. Similarly, the principal as well as the profits of investment accounts should be deducted from the zakatable assets of the Institutions entrusted with

investing these accounts to the benefit of their holders. In the case of investment accounts the share of the Mudarib or agency fees earned by the Institution shall be excluded from the deductable amount.

6/3/2 Creditors: This item refers to the amounts payable to the creditors of the institution during the Zakah year. Such amounts which usually arise from obtaining goods, equipment, or services on debt should be deducted from zakatable assets.

6/3/3 Creditors of sold goods of Salam: It refers to those who purchased goods from the Institution through Salam and have not yet received them. The goods constitute a debt, because they have not yet been delivered, and therefore, the amount of Salam capital should be deducted from the zakatable assets.

6/3/4 Creditors of sold goods of Istisna'a: The goods constitute a debt because the Institution has entered in a commitment to make them, and it is yet to do so. Hence, such goods shall become subject to the rulings indicated in item 6/3/6.

6/3/5 Creditors of purchased goods of Istisna'a: This indicates the debt commitment of the Institution when it purchases goods through Istisna'a. The balance of this item should be deducted from Zakatable assets.

6/3/6 Payment papers: It includes bills and order bonds issued to importers of deferred goods and services, or bills and order bonds issued for interest free borrowing; if such papers will fall due in the next Zakah year. Such assets should be deducted from zakatable assets.

6/3/7 Short term loans and overdraft accounts shall be subject to the rulings indicated in item 6/3/2.

6/3/8 Accrued expenses: It is the expenses which relate to the current period and is to be paid during the next period. Such expenses should be deducted from zakatable assets.

6/3/9 Prepaid income: If such income relates to services which have not yet been provided no Zakah has to be paid on the exact portion of it which relates to the undelivered services; because such income is not finally owned, and the Ijarah (hiring) contract for provision of the services could be terminated on occurrence of an excuse or a *force majeure* situation. Consequently prepaid income for undelivered services should be deducted from zakatable assets.

Nevertheless, cash amounts of earnest money forwarded on conclusion of written or verbal exchange-based (Mu'awadah) contracts are considered to be owned by the Institution or the company, and Zakah has to be paid on them even if the goods in question have not been delivered. That is to say such amounts should not be deducted from zakatable assets.

6/3/10 Due taxes: Tax amounts that relate to the current period, but has to be paid in the next period should be deducted from zakatable assets.

6/3/11 Security amounts paid by clients to guarantee fulfillments of their commitments and settlement of periodical bills should be deducted from zakatable assets.

6/3/12 Minority rights which refer to other shareholders' equity in the subsidiary, and which appear in the consolidated financial statements should become subject to the rulings indicated in item 4/2/5.

7. Provisions

7/1 Definition of provisions

Provisions represent the amounts retained from revenues at the end of the financial period so as to cater for probable shortage of assets, or to meet imprecisely determined or unforeseen commitments of the Institution. Since provisions are estimates of probable loss amounts and unspecified commitments, they have to be totally or partially returned back to the profit and loss account (income statement), if

the debt is collected or the commitment is fulfilled, or if the provision amount is more than it should have been.

7/2 Classification of provisions

Regarding provisions, the following should be observed:

7/2/1 Provisions relating to fixed assets: Such provisions are nondeductible from Zakah assets, since fixed assets are not part of the Zakah base.

7/2/2 Provisions relating to current assets: Since Zakah is calculable on the basis of market value, provisions relating to current assets are not considered as part of liabilities to be deducted from zakatable assets. If, for any reason, current assets are valued for Zakah calculation at book value which happens to be more than exchange value, the difference between book value and market value pertinent to provisions should be deducted from Zakatable assets.

7/2/3 Provisions relating to liabilities: Liability provisions which aim to cover imprecisely determined commitments of the company such as provisions for: end of service benefits, staff leaves, taxation, and indemnities, shall be reasonable so as not to become secret reserves. Whenever exaggeration in such provisions is discovered, the excess amount should be removed.

7/2/4 In the cases when the provision is deductable from assets interest should not be deducted if it happens to be involved in it. Deduction from assets in this case should include only the Shari'ah-recognizable commitment. It should, however, be noted that interest bearing deposits and loans are strictly prohibited by Shari'ah. [see item 6/2/3]

7/3 Applications relating to provisions

7/3/1 Provision for redemption of pre-operating expenses: It is the cumulative amount of the redeemed part of pre-operating expenses. This provision is not deductable from zakatable assets.

7/3/2 Provision for deterioration in the value of investments in shares purchased for acquisition: This provision is meant to cater for price decline in financial markets, or book value, below cost; in case of valuation at cost or market value whichever the less. Such provision is not deductable from zakatable assets.

7/3/3 Provision for perishable or slow moving goods: In case of slow moving goods the provision is to cover probable declines in value due to expiry, obsolescence of type, or slow marketing. This provision is not deductable from zakatable assets.

7/3/4 Provision for probable declines in the prices of goods or financial papers: This provision is usually made to cater for declines which actually take place, and it is not deductable from Zakatable assets.

7/3/5 Provision for leaves: It is the amount deducted from revenues so as to cater for the commitment of the institution to compensate staff for leave entitlements. This provision is not deductable from Zakatable assets.

7/3/6 Provision for end of service and retirement benefits or pension salary of staff: It refers to the amounts deducted from revenues for meeting payment of such obligations. Such amounts are not deductable from Zakatable assets because they are allocated for disbursement, but not yet disbursed. They can be deducted only when they are actually paid or when they become due for payment during the current year, but not yet settled.

7/3/7 Provision for indemnity: It refers to the estimated amounts deducted from revenues in order to cater for a confirmed commitment relating to an initial legal verdict (before appeal) stipulating the payment of a specific amount as indemnity to a certain party. Such provision is estimated according to the amounts mentioned in the verdict, and it should not be deducted from Zakatable assets until it becomes due for payment by virtue of a final verdict.

7/3/8 Provision for maintenance: It is an amount allocated for spending, but not yet spent. It is not deductable from Zakatable assets.

7/3/9 Provision for insurance of fixed assets: This provision refers to the amounts charged to the revenues of the company to substitute the premiums that will be paid to insurance companies. This provision is estimated as per the amounts of its components. It should not be deducted from Zakatable assets because it comprises amounts that have been allocated for spending, but still owned by the company.

7/3/10 Provision for decrease in the price of currencies: It is the amount charged to the revenues of the company to cater for probable decline of the prices of foreign currencies against the price of the currency used in the financial statements of the company. It is assessed on the basis of the difference between the two prices (purchase price and market price). Such provision is not deductable from zakatable assets, because what matters is the prevailing exchange price at the time of valuation of Zakatable assets.

7/3/11 Provision for taxes: It refers to the estimated amounts deducted from the revenues of the company for settlement of the unpaid taxes of the current year. Such provision is assessed according to size of activity during the current financial period, besides the tax level in the previous financial periods. This provision is not deductable from Zakatable assets.

8. Reserves

8/1 Definition of reserves

Reserves are amounts deducted from profits by virtue of law (statutory reserves), or as required by articles of association of the Institution, or on the basis of a decision by the general assembly (voluntary reserves). Reserves provide necessary funds for many purposes such as future expansion, facing probable losses, distribution of profits in the years when no profits are realized, and distribution of the accumulated amounts of the reserves when they are no longer needed.

8/2 Nature and Shari'ah status (Hukm) of reserves

8/2/1 Both types of reserves (statutory and voluntary) are not deductable from zakatable assets, because in Shari'ah they are not considered to constitute debt obligations owed by the company, although it is referred to under liabilities. Since reserves are owned by the company they should be subject to Zakah as part of Zakatable assets, in case of applying the net assets method of Zakah assessment.

8/2/2 In spite of the fact that the capital account and the issuance premium provide sources of funding for the company they are not considered to be part of its debt obligations, even if capital is usually referred to under liabilities. Therefore, capital account and issuance premium are not deductable from Zakatable assets.

8/3 Applications relating to reserves

8/3/1 Revaluation reserve (capital reserves): It results from revaluation of fixed assets at current market value, and since fixed assets are not subject to Zakah, such reserve is not deductable from Zakatable assets.

8/3/2 Income reserve: It refers to that part of distributable profit which is retained by an administrative decision in provision for future need. It is not a debt obligation owed by the Institution, and therefore should not be deducted from Zakatable assets.

8/3/3 Reserve of profits earned from share purchasing operation (institution's treasury shares): This reserve results from the act of the Institution when it purchases and sells its own shares. It is not deductable from Zakatable assets, since it is part of the profits.

8/3/4 Reserve of profits declared for distribution: It refers to the profit declared by the board of directors, but the decision for its distribution has not yet been taken.

8/3/5 Reserve of retained profits: This reserve comprises the profits earmarked for transference to forthcoming years. It constitutes one type of income reserves, and is not deductable from Zakatable assets.

9. Eight Heads of Zakah Disbursement

The heads of Zakah disbursement are the eight categories specified by the Verse which states: ***{"As-Sadaqat (here it means Zakat) are only for the Fuqara' (poor), and Al-Masakin (the poor) and those employed to collect (the funds); and for to attract the hearts of those who have been inclined (towards Islam); and to free the captives; and for those in debt; and for Allah's Cause (i.e., for Mujahidun - those fighting in the holy wars), and for the wayfarer (a traveller who is cut off from everything); a duty imposed by Allah. And Allah is All-Knower, All-Wise."}***[4] Shari'ah Supervisory Boards of the institutions may specify the meaning and appropriate way of application, for each one of these categories.

10. Rulings Relating to Zakah Disbursement

10/1 The Zakah payer (institution) cannot discharge of his Zakah commitment by relieving his debtors from their debt obligations. This, however, does not mean that Zakah recipients cannot repay their debts out of the Zakah amounts which they receive from their creditors, provided that such arrangement does not involve collusion or a pre-stated condition.

10/2 In principle, Zakah is to be paid as soon as it is due, yet it can be delayed - for not more than one year – due to shortage of funds, or if its distribution is made according to a certain time schedule, or for any other obvious interest.

10/3 Institutions should establish a special fund or account for Zakah.

10/4 In principle, Zakah should be spent on its eight heads, yet if need arises Zakah funds can be utilized in investment projects.

(4) [Al-Tawbah (Repentance): 60]

However, such projects should, at the end, be owned by the Zakah recipients, or put under the supervision of the competent Shari'ah body entrusted with collection and distribution of Zakah. Nevertheless, investment of Zakah funds should be after fulfilling the urgent needs of Zakah recipients, and on availability of sufficient safeguards against losses.

10/5 Zakah does not cease to be valid by prescription.

10/6 Zakah can be paid before its due time, subject to specific conditions on which Shari'ah boards should be consulted.

10/7 Zakah can permissibly be paid in terms of the equivalent value of the subject commodity.

10/8 Zakah should not necessarily cover all the eight heads of its disbursement. It can permissibly be confined to some of them.

10/9 Zakah funds can be transferred from place of payment to another place due to an obvious interest to be judged by the Shari'ah boards of the institutions.

11. *Nisab* and Zakah Rate for Livestock (An'am)

11/1 *Nisab* and Zakah rate on camels

From	To	Obligatory Zakah Rate
1	4	Nothing
5	9	1 goat
10	14	2 goats
15	19	3 goats
20	24	4 goats
25	35	Bint Makhad camel (at the second year of age)
36	45	Bint Labun camel (at the third year of age)
46	60	Hiqqah camel (at the fourth year of age)
61	75	Jaza'ah camel (at the fifth year of age)
76	90	2 Bint Labun
91	120	2 Hiqqah
121	129	3 Bint Labun
130	139	1 Hiqqah + 2 Bint Labun
140	149	2 Hiqqah + 1 Bint Labun
150	159	3 Hiqqah
160	169	4 Bint Labun
170	179	1 Hiqqah + 3 Bint Labun
180	189	2 Hiqqah + 2 Bint Labun
190	199	3 Hiqqah +1 Bint Labun
200	209	4 Hiqqah or 5 Bint Labun
210	219	1 Hiqqah + 4 Bint Labun
220	229	2 Hiqqah + 3 Bint Labun
230	239	3 Hiqqah + 2 Bint Labun
240	249	4 Hiqqah + 1 Bint Labun
For more than 249, one Hiqqah for every 50 camels and one Bint-labun for every 40 camels.		

11/2 *Nisab* and Zakah rate on cows

From	To	Obligatory Zakah Rate
1	29	Nothing
30	39	Tabee'a or Tabee'ah (at 2nd year of age)
40	59	Musinnah (at 3rd year of age)
60	69	2 Tabee'a or 2 Tabee'ah
70	79	Musinnah + Tabee'a or Tabee'ah
80	89	2 Musinnah
90	99	3 Tabee'a or 3 Tabee'ah
100	109	Musinnah + 2 Tabbee'a or 2 Tabee'ah
110	119	2 Musinnah + Tabee'a or Tabee'ah
120	129	3 Musinnah or 4 Tabee'a or 4 Tabee'ah
For more than 129, one Tabee'a or one Tabee'ah for every 30 cows and one Musinnah for every 40 cows.		

11/3 *Nisab* and Zakah rates on goats

From	To	Obligatory Zakah Rate
1	39	Nothing
40	120	1 goat
121	200	2 goats
201	399	3 goats
400	499	4 goats
For more than 499, one goat for every 100 goats.		

12. Date of Issuance of the Standard

This Standard was issued on 30 Dhul-Qa'dah 1429 A.H., corresponding to 28 November 2008 A.D.

Adoption of the Standard

The Shari'ah Board adopted the draft of the Standard on Zakah in its meeting No. (22) held in the Kingdom of Bahrain on 28–30 Dhul-Qa'dah 1429 A.H., corresponding to 26-28 November 2008 A.D.

Appendix (A)
Brief History of the Preparation of the Standard

In its meeting No. (13) held on 26-30 Sha'ban 1425 A.H., corresponding to 10-15 October 2004 A.D., in Makkah Al-Mukarramah, The Shari'ah Board decided to issue a Shari'ah standard on Zakah.

On 1 Ramadan 1425 A.H., corresponding to 16 October 2004 A.D., the Secretariat General decided to commission a Shari'ah consultant to prepare a study on Zakah.

A joint committee composed from Shari'ah Committees (1) and (2) was held on Thursday 8 Rabi' I, 1427 A.H., corresponding to 6 April 2006 A.D., in Makkah Al-Mukarramah. In that meeting the committee discussed the study, cleared it, and asked the consultant to introduce necessary changes in the light of the observations and suggestions made in the meeting.

In its meeting No. (17) held in Makkah Al-Mukarramah, on 26 Shawwal – 1 Dhul-Qa'dah 1427 A.H., corresponding to 18-23 November 2006 A.D., the Shari'ah Board discussed the amendments made by the joint committee and introduced the changes that it deemed necessary.

The Secretarial General of AAOIFI held a public hearing in the Kingdom of Bahrain on 18 Safar 1428 A.H., corresponding to 8 March 2008 A.D. More than 30 participants attended the session as representatives of central banks, institutions, and accounting firms. The session was also attended by Shari'ah scholars, university teachers and other interested parties. Several observations were made in the session, and duly responded to by the members of the Shari'ah Standards Committees (1) and (2).

In its meeting No. (18) held on 12–16 Jumada II, 1428 A.H., corresponding to 27 June – 1 July 2007 A.D., in Al-Madinah Al-Munawwarah, the

Shari'ah Board discussed the amendments proposed by the public hearing, and introduced the changes that it deemed necessary.

In its meeting No. (20) held in the Kingdom of Bahrain, on 4-8 Safar 1429 A.H., corresponding to 11-15 February 2008 A.D., the Shari'ah Board discussed the changes introduced by the joint meeting of Shari'ah Committees (1) and (2), and introduced necessary changes.

In its meeting No. (22) held in the Kingdom of Bahrain, on 28-30 Dhul-Qa'dah 1429 A.H., corresponding to 26-28 November 2008 A.D., the Shari'ah Board adopted the Standard after discussing it and introducing necessary changes.

Appendix (B)
The Shari'ah Basis for the Standard

It is impossible to imagine a debt arising from commodities purchased through Salam, because the capital (price) has to be paid in advance. The Salam buyer has to pay Zakah on the Salam capital which he receives.

Appendix (C)
Definitions[5]

Method of Net Investment Assets

Paid-up Capital + Reserves + Provisions which have not been deducted from assets + Retained Profits + Net Income + Liabilities which are not payable during the current financial period as at the date of the Balance Sheet + Total installments of the coming financial period + net fixed assets and additional investments which are not for trade such as real estate for leasing + carried forward losses.

(5) For easy reference, most of the terms have been defined in the text of the rulings indicated in this standard.

AAOIFI

هيئة المحاسبة والمراجعة للمؤسسات المالية الإسلامية

ACCOUNTING AND AUDITING ORGANIZATION FOR ISLAMIC FINANCIAL INSTITUTIONS

The AAOIFI Shari'ah Standard No. (60): Waqf

Shari'ah Standard No. (60)

Waqf
(The Revised Standard)

This standard was prepared with

the Assistance and Cooperation of

Future Investment

& Sponsorship of

Saad and Abdulaziz Al Musa Endowment

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IN THE NAME OF ALLAH, THE MERCIFUL, THE VERY MERCIFUL

All praise be to Allah, the Lord of all the worlds. Peace and blessings upon our Prophet and our master Muhammad, all his family and his Companions.

Preface

This standard aims to present the rulings of Waqf that form the basis for practical applications of Waqf and the role of institutions [1] in the overseership of Waqf, its management and investment.

And, Only Allah guides to Success,,,

1 The word (Institution/Institutions) was used as a short form for Islamic financial institutions, and among them are Islamic banks.

Text of the Standard

1. Scope of the Standard

This standard deals with the definition of Waqf, its types, its rulings, its constituting elements, conditions of each constituting element, expenses of Waqf, means of deriving benefit from Waqf, ways of developing it, rulings related to Waqf overseership and its management, and what can be adopted by the Institution in developing the sources of Waqf and means of its investment.

This standard will deal neither with detailed rulings of dynasty Waqf nor those related to *irṣad* (state endowment) or financial trust, despite their semblance to Waqf in certain aspects.

2. Definition, ruling, constituting elements and conditions of Waqf

2/1. Definition of Waqf: appropriation [allocation for a particular purpose] of an asset and donating its benefit[2].

2/2. Types of Waqf

There are several types of Waqf based on various considerations.

2/2/1. based on the Waqf beneficiary, Waqf is divided into:

2/2/1/1. **Charitable Waqf:** its revenue and benefit will be for general charitable causes, like poor persons, research centres and universities.

2/2/1/2 **Private or Dynasty Waqf:** its revenue and benefit will be for the progeny or relatives of the Waqif or other **specific** persons, and this includes Self Waqf [Waqf on oneself], and in the event of the non-existence of the designated Waqf beneficiaries, then it shall turn into Charitable Waqf.

2/2/1/3 **Joint Waqf:** wherein the beneficiaries of the Charitable Waqf and the Private Waqf jointly share the revenue and benefit of the Waqf.

2/2/2 Based on the Waqf asset, Waqf can be divided into:

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2 **Translation Note:** Such that the asset is not sold, gifted, donated or encumbered to facilitate its usufruct for the named beneficiary/ies.

2/2/2/1 Specific Waqf Assets: are those Waqf where the Waqif's intention aimed to appropriate specifically an asset as it is, e.g., Waqf of real estate, and this includes Waqf of usufructs and Waqf of moral rights.

2/2/2/2. Investment Waqfs: these are those Waqf where the Waqif's intention aimed to develop by turnover and deployment based on commercial considerations, and not the appropriation of its tangible assets, rather the purpose is the sustainability of the Waqf through its assets or via their substitutes, e.g., cash Waqf and Waqf companies.

2/3. Ruling on Waqf: in principle, Waqf is a recommended act (*mandūb*), and it is binding upon the Waqif from the instance of the creation of Waqf, and he cannot resile from it.

2/4 Constituting elements (*arkān*) and conditions of Waqf: constituting elements of Waqf: (the form of creation, the Waqif, Waqf asset and Waqf beneficiaries), and each constituting element has its [specific] conditions and rulings, as follows:

2/4/1. **Form of Creation (*ṣīgha*) of Waqf**

2/4/1/1. An offer from the Waqif creates Waqf through any means which indicate the same expressed verbally, in writing, or through any other means indicating the same. It does not require acceptance of the Waqf Beneficiary, whether he was specific or not.

2/4/1/2. The form of Waqf creation must be conclusive [*jāzima*] as Waqf cannot be concluded with an undertaking to create Waqf.

2/4/1/3. The initial presumption is that [creation] of Waqf must come into effect immediately [*nājiz*]. It is also permitted for the Waqf to be:

contingent upon a condition, e.g., the Institution creates a Waqf over some of its assets subject to the approval of the supervisory authority, or

deferred to a future date, e.g., [the Waqif] says: *my shares in ABC company are [subject of] Waqf with effect from the beginning of the coming year.*

2/4/1/4. If the Waqif makes Waqf contingent upon his death, then it is deemed to be a bequest, and therefore it will take effect only upon Waqif's death; but it shall not exceed one-third of his estate. In this case [being a bequest], it is permitted for him to resile from the Waqf [bequest].

2/4/1/5. The initial presumption is that Waqf will be perpetual. However, if stipulated by the Waqif, it may be limited to a period or restricted by a certain condition. Hence, upon maturity of the term of Waqf or occurrence of the condition, the Waqf asset shall return to the [original] owner or his heirs.

2/4/1/6. An unrestricted Waqf, wherein the Waqif does not specify the beneficiary of the Waqf, is valid. In this case, it shall be made available for charitable causes as deemed fit by the overseer or the court.

2/4/1/7. It is prohibited to create Waqf for a Shari'ah non-compliant purpose. If such a Waqf is created, its purpose must be changed to a Shari'ah compliant one.

2/4/1/8. It is invalid for the debtor to create a Waqf if it should be detrimental to [his] creditors.

2/4/2. Legal Personality of Waqf

Waqf is an autonomous juridical person with an independent financial liability that allows Waqf to obligate or take obligation (to be liable). Hence, Waqf is separate and independent from the overseer and the Waqf beneficiaries.

2/4/3. Waqif

2/4/3/1. The Waqif must have the legal capacity to donate his possessions with reference to Item No. (2.4.5.).

2/4/3/2 If the Waqif is *de jure* a juridical person, then it is required that Waqf is created by a resolution from the owners or who has the authority to take such an action, provided it does not contravene the laws and regulations.

2/4/3/3. Waqf by a person interdicted for prodigal grounds is not concluded. However, a Waqf by a person interdicted for being indebted is contingent upon the authorization of the creditors. The same will be the case if the person's debts exceed the [value] of his assets, even if the

person was not subjected to a ruling of bankruptcy or interdiction.

2/4/3/4. Waqf during terminal illness is deemed to be a bequest.

2/4/3/5 Waqf by a non-Muslim is valid subject to observing rulings and conditions of Waqf.

2/4/4. Waqf Beneficiary:

2/4/4/1. A Waqf beneficiary must be a Shari'ah compliant entity (*mubāḥ*).

2/4/4/2. It is valid to stipulate that the Waqf beneficiary is the Waqif, e.g., to say: "*I made this Waqf for myself and then for charitable causes*".

2/4/4/3. The Waqf [remains] valid if the Waqf beneficiary is discontinued. Upon discontinuation of Waqf beneficiary, it will be used for similar charitable causes.

2/4/4/4. It is not required that a Waqf beneficiary exists at the time of [creation of] Waqf.

2/4/4/5. It is permitted for the Waqif to single out some of his children as Waqf beneficiaries or to increase the shares if there is a valid reason, e.g., poor persons, divorcees, or people with special needs.

2/4/5: Waqf Asset

2/4/5/1 The following is required in the Waqf asset:

a. It should be a Shari'a-wise appraisable asset (*māl mutaqawwim*), and it should be known or to be known.
b. The Waqif should own the Waqf asset in full ownership, or it should be appurtenant to an asset owned by the Waqif, e.g., to create Waqf of yet-to-be-declared dividends on shares held by him.

2/4/5/2. If the Waqf was created with an option to rescind that is held by a third party, then [creation of such Waqf] will be contingent upon the authorization from the one who holds the option. If such authorization is granted, the Waqf will take effect from its creation; otherwise, Waqf will be deemed null and void from the start.

2/4/5/3. It is valid to create a Waqf which a third party may claim under the pre-emption rights. If the Waqf asset was granted to [the third party]

according to pre-emption (*shufʿa*) rights, then the Waqif must deploy the received consideration in a similar type of Waqf.

2/4/5/4 If the pledgor makes a Waqf over the pledge, then Waqf is valid, and its enforceability is dependent on one of the following cases:

a. The waiver by the pledgee of his rights in the pledge.
b. settlement of the debt.
c. part of the pledge remains after recovering the debt out of the pledge; Waqf will be enforced over what remains.

Whenever Waqf is enforced in any of the above cases, its enforceability shall be from the time of its creation.

2/4/6 It is permitted to create Waqf over real estate, including movable items, which are appurtenant ancillaries meant to be there permanently.

2/4/7. It is permitted to create Waqf of movable assets, such as vehicles, machinery, equipment, production tools, websites, and digital applications.

2/4/8. It is permitted to create Waqf over Shari'ah compliant moral rights, such as books' copyrights or patents, to donate their revenues or usufruct [for Waqf beneficiaries].

2/4/9. A person who took possession of assets via prohibited means is required from him, as per Shari'ah, to forfeit such assets by disbursing them to charitable causes. It is permitted for him to create a Waqf of a such asset for general charitable causes, and it is not permitted for him to benefit from this Waqf in any manner.

2/4/10. A person who possesses assets of prohibited yield (e.g., bonds) must terminate his/such possession and disburse the proceeds in charitable causes. If he creates Waqf over these assets for general charitable causes, Waqf is valid if those assets are substituted with assets with permissible yield.

2/4/11. It is permitted to create Waqf over a common share of an asset, whether divisible or indivisible. If the common share of the asset is leased, the Waqf is entitled to receive its share of the rent. The Waqf portion may be leased through temporal or spatial usufruct sharing, and the beneficiaries will be entitled to the revenues related to the Waqf portion.

2/4/12 It is permitted to create Waqf of usufructs by the owner of the usufructs.

Such a Waqf will be utilized for usage, exploitation, or leasing. If, for example, [the Waqif], being a lessee, owns the usufructs, then it is required that:

the Waqif is not prevented by the lessor from subleasing, and

the term of Waqf should not be longer than the lease period.

2/4/13. Cash Waqf

2/4/13/1. It is permitted to create Waqf over cash even if it is an outstanding debt, e.g., the current account balances. Benefiting from it can be either by extending a Shari'ah compliant loan or investing the amount in a Shari'ah compliant manner. This includes establishing Waqf funds which shall have the purpose of raising funds, investing them, and extending loans. Any excess cash over the Waqf amount will be the yield which shall be disbursed to the Waqf beneficiaries.

2/4/13/2. It is permitted to create Waqf over investment accounts on a perpetual or timed basis, and rulings of cash Waqf shall apply to them.

2/4/13/3. If cash Waqf is invested in buying assets, then these assets will be deemed to be something other than the Waqf asset instead of the cash. It will be permitted to sell these assets for a more beneficial investment for the Waqf. The Waqf asset shall remain the cash amount.

2/4/13/4. The nominated money at the time of Waqf creation shall constitute the Waqf asset. There is no influence of change in the purchasing power on the value of the cash Waqf assets. It is permitted for the Waqif to stipulate that part of Waqf revenues will be added to the cash Waqf asset.

2/4/13/5. Shari'ah compliant modes of hedging should be followed to protect the principal amount of the cash Waqf and to hedge against the risk of foreign currency fluctuations and change of its value, as given in the Shari'ah Standard (45): Protection of the Capital and Investment.

2/4/14. Waqf of Companies and Shares

2/4/14/1. It is permitted to create a Waqf over: companies, a portion of companies, or shares of the shareholding companies, all being Shari'ah compliant. In that case, the Waqf asset shall be those specific assets and

no disposition of such assets is permitted except following the substitution conditions mentioned in Item N°. (10/1/5). However, such companies' asset turnover is allowed under the regulations and commercial norms, as those companies are categorized as investment Waqfs. See Item N°. (2/2/2/2).

2/4/14/2 Increase in the [market] value of Waqf shares constitutes a capital gain on the Waqf asset and not revenue, whereas bonus shares that are sourced from earnings [of the company] represent revenue [of Waqf] unless the Waqif stipulated to add them to Waqf asset.

2/4/14/3. If the Waqf company, or a company where many shares were Waqf assets, is liquidated, then rulings of substitution will be applied as per Waqif's stipulation and as required by the interest of the Waqf and Waqf beneficiaries.

2/4/14/4. Upon Waqf of shares, the company's Memorandum of Association and the legal framework upon which the company was established shall be deemed as conditions of the Waqif unless [these conditions] violate the principles and rulings of Shari'ah.

2/4/15. Waqf of Investment Funds and Sukuks

2/4/15/1. It is permitted to create Waqf over investment Sukuks and Shari'ah compliant units of investment funds, whether Waqf was perpetual or temporary,:

a. If Waqf of units of investment funds and Sukuks were on a perpetuity basis, then the periodic distributions shall be disbursed in the avenues of Waqf disposal. Upon cancellation [of the units of investment funds or Sukuks], their [proceeds of cancellation] shall be reinvested: in other Sukuks or units of other investment funds as applicable or any investment asset that generates revenues for Waqf as stipulated by the Waqif and required by the interest of the Waqf and Waqf beneficiaries.
b. If the Waqf of Sukuk and units of investment funds is temporary, then periodic distributions shall be disbursed in the avenues of Waqf disposal in compliance with the following:

- since Sukuk and investment funds are different in their types, revenues, periodic distributions and redemption, the basis for determining the [base Waqf] asset and profit shall be:

the type of Sukuk and investment funds, and

the terms and conditions of the offering document or prospectus,

to the extent they do not conflict with the Waqif stipulation.

- In the case of Waqf of Sukuk or units of investment funds, the initial presumption is that the Waqf asset will be those particular Sukuks and units unless the Waqif has stipulated that the Waqf is for the value [of Waqf asset].

- If Waqf is over the value [of Waqf asset], the rulings of cash Waqf shall apply. However, if Waqf is over those Sukuk and investment units in particular, then at the end of the Waqf period or upon cancellation of [Sukuk or investment units], the Shari'ah position varies based on the following:

1). If the period of Waqf is longer than the period of Sukuks or investment funds, then what is stated in Item No. (2/4/15/1/A) shall apply upon cancellation.

2). If the period of Waqf is shorter than the term of Sukuk or investment funds, the Waqif shall recover the [same] number of [Sukuk and investment funds] at the end of the Waqf period.

3). If the Waqf period is the same as the term of Sukuk or investment funds, then whatever amount paid at the time of cancellation shall be for the Waqif, unless the amount is paid as a return [of Sukuk and investment units], in which case it shall be treated as Waqf revenues.

2/5. Waqf Deed

2/5/1. To preserve and protect the Waqf from loss and infringement, the Waqf should be documented through officially acceptable means. Under all circumstances, the current procedures of legal authentication should be adopted to document the Waqf.

2/5/2. The Waqf Deed shall include the following:

preamble,

the purpose of creation,

name of the Waqif, along with what establishes his identity, legal competence and ownership,

specifying the subject of Waqf and describing it in such a precise manner that removes any ambiguity,

avenues of Waqf disposal,

Waqf conditions,

determining the overseer, his duties and his remuneration,

concluding statement,

witnesses,

signature of the Waqif, and

date when the Waqf comes into effect.

2/6. Conditions in Waqf:

2/6/1. The Waqif may stipulate, with regard to his Waqf, any condition that is not contrary to the rulings of Shari'ah and that does not prejudice the Waqf or adversely impacts its asset. These stipulated conditions must be complied with. All such stipulated conditions of each Waqif must be read or interpreted in light of the prevailing customs in his time and place.

2/6/2. The Waqif may stipulate that:

he or his heirs will benefit from Waqf during his lifetime or for a defined period,

to spend [from Waqf revenues] on oneself or his heirs from Waqf, or

to settle his debts from there.

2/6/3. The Waqif may stipulate that the revenue of charitable Waqf will be disbursed [first] to the poor from his progeny, and then [the remaining] shall be disbursed for charitable causes.

2/6/4. A condition shall be deemed void if it:

contains what is prohibited in Shari'ah,

prejudices the Waqf,

adversely affects its asset, or

cannot be implemented.

In this case, the Waqf remains valid, while the condition shall be considered void. An example of such a condition is to stipulate the non-dismissal of the overseers under any circumstances.

Similarly, a condition shall be void if it obstructs the interest of Waqf or is prejudiced in benefiting from it. An example of such a condition is to stipulate that the disbursement always begins with [the Waqf] beneficiaries, even if the Waqf requires maintenance and repair.

2/6/5. If the Waqif stipulates that the Waqf beneficiary shall benefit from the Waqf in a specific way, this condition must be complied with.

It is permitted for the Waqf beneficiary to benefit [from the Waqf] personally or through a third party, even if it is through leasing it to this third party, unless the Waqif has stipulated that the benefit will be availed only personally by the Waqf beneficiary.

2/6/6. The Waqif may stipulate in the Waqf the [right to] amend the terms and conditions of the Waqf provided it does not prejudice the essence of Waqf.

3. Waqf Overseership (Naẓārah)

3/1. The Overseer (Nāẓir): is a person who takes up the duty of Waqf's supervision and management, developing its resources, protecting its assets, disbursing its revenues in the avenues of Waqf disposal as per the stipulation of Waqif, and he is responsible for the management of the Waqf. Such a person may be an individual, a group of people, a committee, a ministry, or the like. The overseer may discharge the duty by himself or by appointing someone else. The overseer may also be referred to as *mutawalī*. However, this does not preclude addressing him with other titles as per prevalent norms and customs, such as *al-amīn* (trustee) and the like.

3/2. Appointing the Overseer:

3/2/1. Waqf overseership is a right established for the interest of Waqf.

3/2/2. The initial presumption is that the appointment of the overseer is the right of the Waqif in compliance with the prevailing laws and regulations of

the [relevant] country. If the Waqif has not appointed an overseer, the relevant authorities should appoint one.

3/3. Restrictions to Overseership

3/3/1. Waqf overseership is [firstly] subject to the [relevant] Shari'ah rulings, and then the conditions stipulated by the Waqif provided they are not in conflict with Shari'ah rulings nor with the interest [of Waqf] as determined by the overseer, with the prior approval of the Waqif or the relevant authorities.

3/4. Independence of Waqfs:

3/4/1. Waqfs must be independent of the public treasury funds in terms of their administration, finance and accounting. Revenues of Waqfs must be disbursed to their specified avenues of disposal under the recognized financial and accounting principles, which do not contradict Shari'ah rulings. In all cases, the state's role in taking care of Waqfs and protecting them should be given due regard.

3/5. Eligibility criteria of the overseer: The eligibility criteria of the overseer, whether he is an individual or a member of a board of overseership, are moral probity (*ʿadālah*), sanity (*ʿaql*), discretion (*rushd*), and competence (*kifāyah*).

3/6. Duties of the Overseer: the following are among the duties of the overseer:

3/6/1. Implementation of Waqif's stipulated conditions.

3/6/2. Management, maintenance, development and investment of the Waqf.

3/6/3. Adopting the prevailing practices to protect Waqf assets, such as:

securing insurance for the Waqf asset if its nature requires so, provided the insurance is Shari'ah compliant and under the provisions mentioned in Para No. (4) [of the Standard], and

establishing a special purpose vehicle to protect Waqf [against risks which may arise] from the investment of its funds, incurring a debt against it or

extending a debt on its behalf.

3/6/4. Representing Waqf, defending its rights, paying legal fees concerning the claims against Waqf and expenses of documentation of Waqf deeds.

3/6/5. To collect the Waqf revenues and disburse the same to avenues of Waqf disposal, and to settle the liabilities of Waqf and financial entitlements of relevant parties.

3/6/6. To comply with the conditions of substitution as stated in Item No. (10/1/5) in respect of exchange, substitution or replacement of Waqf.

3/6/7. To prepare the accounts of Waqf, separate from other accounts, under the prevailing accounting principles and bases.

3/7. Powers of the Overseer: the overseer has the following powers:

3/7/1. To lay down the framework for the management of Waqf and look after its affairs in a manner that would protect the interest of Waqf.

3/7/2. To lay down policies, procedures and manuals that secure the interest of the Waqf and to amend the same in line with the interest of the Waqf.

3/7/3. To consider the interest and assess the needs of avenues of Waqf disposal [such as the Waqf beneficiaries] without contravening the conditions of the Waqif.

3/7/4. To delegate some of his powers to someone if needed.

3/7/5. The overseer has a fiduciary capacity [while holding Waqf assets]; therefore, he shall not be held liable for other than misconduct, negligence, or breach of Waqif's terms and conditions.

Examples of negligence are non-compliance with the principles, bases and parameters of good governance, accounting, and management in line with the prevailing practices.

3/8. Prohibited Acts of the Overseer: the overseer is barred from the following acts:

3/8/1. Non-compliance with Shari'ah rulings and conditions stipulated by the Waqif.

3/8/2. Any act of misconduct or negligence with regard to Waqf.

3/8/3. Favouritism (*muḥābah*) or any act raising doubt (*shubha*) of favouritism, such as leasing the Waqf assets to himself, to his son, who is under his guardianship, or someone whose testimony is not acceptable in his favour (e.g., one of the spouses, ancestors, decedents who are not under his guardianship), in violation of good governance principles and practises.

3/8/4. Lending the Waqf [asset for no consideration] to a party other than the Waqf beneficiary, in which case the overseer shall be liable for the fair rent.

3/8/5. Pledging the Waqf asset or availing a debt against it without compliance with provisions of Para (5) and Para (6).

3/9. Remuneration of the Overseer:

3/9/1. The overseer is entitled to remuneration for [discharging] his duties unless he waives [right to claim] the same. For the avoidance of any dispute, it is preferable to stipulate the remuneration of the overseer in the Waqf deed, and it shall be disbursed from the revenues of the Waqf.

3/9/2. If the Waqif specifies the remuneration of the overseer, it shall be disbursed accordingly. However, if the Waqif has not specified the remuneration, it shall be specified by the relevant authorities, if any. Otherwise, the overseer shall be entitled to receive his remuneration at the prevailing market rate.

3/9/3. The remuneration of the overseer may be a fixed lump sum or a percentage of the [Waqf] revenue.

3/9/4. The remuneration of the overseer may be reconsidered by the relevant authorities when the need arises.

3/9/5. In case the total revenue [of the Waqf] is less than the remuneration of the overseer, priority shall be given to the maintenance expenses and similar necessary expenditures to ensure the continuance of Waqf. The outstanding remuneration amount shall remain a liability against the Waqf.

3/10. Dismissal of the Overseer:

3/10/1. The overseer can dismiss himself, even if the Waqif has appointed him, and he should inform the Waqif about the same or the relevant authorities within a reasonable period.

3/10/2. The Waqif may dismiss the overseer, if:

[the Waqif] has stipulated in the Waqf deed that he may dismiss [the overseer],

the dismissal is in the interest of the Waqf, or

the overseer has committed any misconduct or negligence.

3/10/3. If the overseer has committed an act of misconduct, negligence, or breach of any conditions stipulated in the Waqf deed, the judge or the relevant authority may dismiss the overseer, whether the overseer was appointed by the Waqif, another judge or by the relevant authority.

4. Maintenance of Waqf

4/1. Maintenance or repair of the Waqf [asset] is given priority over other expenditures [of Waqf disposal], considering the interest of the Waqf in prioritizing the maintenance tasks and their execution. Maintenance and reconstruction of damaged Waqf assets are not subject to [express] stipulation from the Waqif.

4/2. It is permitted to allocate an annual amount out of Waqf revenues for maintenance and repair subject to being in line with the technical and accounting bases and standards, even if the Waqif does not stipulate [such an allocation]. Investing the allocated amount should be in modes which can be liquidated easily. The investment revenues are added to the allocated amount, and the surplus shall be returned to the Waqf beneficiaries.

4/3. If the amounts [available] for maintenance or repair are insufficient, the overseer may allow the lessee of the Waqf asset to carry out maintenance and repair under commonly accepted technical norms. In this case, the lessee will have the priority to remain as a lessee of the Waqf [asset] till he recovers the debt of Waqf that is owed to him.

5. Indebting the Waqf

There are two situations where the Waqf can incur a debt:

5/1: **First Situation:** indebting [the Waqf] in the case of tangible Waqf assets:

In this situation, it is permitted to incur debt [against the Waqf] through

Shari'ah compliant borrowing, purchase with deferred payment, or securing Shari'ah compliant financing, provided that the profit of the financing is at a fair rate, and [the debt] is incurred [to cover necessary costs] to preserve and sustain the Waqf asset in the absence of sufficient revenues to cover those costs to ensure the continuance of the Waqf benefits and to avoid the risk of disruption of the Waqf asset.

This includes, for example:

the necessary maintenance and refurbishment of Waqf [asset],

fulfilling the financial obligations of Waqf (e.g., fees and utility bills),

payment of dues owed to those in charge of Waqf and its employees.

However, it is not permitted to incur debt against the Waqf for other than essential purposes, [even] if it may serve an interest or result in an additional benefit for the Waqf unless it is stipulated by the Waqif or with the permission of the relevant authorities. [In all cases of incurring debt], the ability of Waqf revenues to bear the burden of financing and its settlement must be taken into consideration.

5/2. **Second Situation**: Indebting in the case of investment Waqfs:

It is permitted to incur debt in this situation for developing Waqfs under [the prevailing] commercial practises, provided the interest of the Waqf and adequacy of their revenues to settle these obligations are taken into consideration.

6. Pledge of Waqf [Asset]

6/1. It is not permitted to pledge tangible Waqf assets even when availing a debt against the Waqf.

6/2. It is permitted to pledge the investment Waqfs whenever it is permitted to incur a debt against them as per the criteria mentioned in Item (5/2), and this includes raising a request to issue a bank guarantee or letter of credit backed by funds of investment Waqfs.

7. Lending Waqf's funds and Guaranteeing a Third-party through Waqf

It is not permitted to lend funds of Waqf, and Waqf cannot be the guarantor of third party's debts unless this act:

is stipulated by the Waqif,

is among the purposes of Waqf, or

serves the interest of Waqf with the permission of the relevant authority,

and this shall be documented with sufficient guarantees.

8. Investment of Waqf [Revenue]

8/1. If the Waqif stipulates investing part of Waqf revenue or the investment is made during the waiting period for the beneficiaries, it is permitted to invest revenue of Waqf where it does not affect its distribution to Waqf beneficiaries.

8/2. Upon investing revenue of Waqf or investment Waqfs, it is required to

take all the means that will ensure growth and protection of the Waqf and

make use of the modern and Shari'ah compliant ways for investment following its requirements,

subject to observing the Shari'ah rulings of Waqf and conditions stipulated by the Waqifs.

8/3. Assistance from experts specializing in investment (e.g., Islamic financial institutions) should be sought out.

8/4. Ijarah constitutes one of the modes of investment for the Waqfs. Hence, the Ijarah of Waqf asset is valid. The initial presumption is that the term of the Ijarah of Waqf asset should not be long as per the customary consideration unless there is an evident interest in carrying out such an act. It is preferable in the long-term Ijarah that the rent is variable linked with a disciplined and a known benchmark, and the rent should be at least the fair rate. Refer to Shari'ah Standard No. (9) on Ijarah and Ijarah Muntahia Bitamleek.

8/5. It is not permitted to lease tangible Waqf assets or usufructs for less than the fair rent unless there is a preferred interest in doing so. If the Waqf assets were leased for less than the fair rent, with no preferred interest and for a

flagrantly disadvantageous rent, then the overseer will be liable to pay the difference, and he should demand termination of the contract unless the lessee accepted the increase.

8/6. Waqf lands can be developed using Shari'ah compliant modes of investment, and some of them are:

8/6/1. To apply the mode of Istisna on the Waqf land, that could be through Built-Operate-Transfer (BOT). Refer to Item (3/2/1) of Shari'ah Standard No. (11): Istisna and Parallel Istisna.

8/6/2. To apply the mode of Diminishing Mursharaka ending with the transfer of ownership to the Waqf through crowdfunding from the Waqf and on the side of financing through participation in constructing the buildings. The land of Waqf will not be the subject of Musharaka, but the buildings' rental revenues will be shared until the Waqf takes ownership of all the buildings. Refer to Item (5/8) of Shari'ah Standard No. (12): Partnership (Musharaka) and Modern Companies.

8/6/3. To apply Ijarah Musuwfa Bi Dima (Forward Ijarah) ending with the transfer of ownership to Waqf through the financier's leasing of specified buildings which will be constructed on the Waqf lands, and the lease will end via transfer of ownership of the buildings to the Waqf. Refer to Item (3/5): Ijarah and Ijarah Muntahia Bitamleek.

8/6/4. Applying [the structure of] Sukuk Ijarah on the Waqf land. Refer to Shari'ah Standard No. (17): Investment Sukuk.

8/7. While managing the Waqf, ensuring adherence to the best management practices and governance standards.

9. Avenues of Waqf Disposal *(maṣārif)*

9/1. The permissible avenues of Waqf disposal are not confined to a particular field and are variant based on time, location, and prevailing circumstances.

9/2. Waqf revenue should be specifically disbursed as laid down by the Waqif.

9/3. It is not permitted to change the avenue of Waqf disposal unless there is a necessity to do and that is done after approval from the relevant authorities.

9/4. What remains out of the Waqf revenue, after meeting the necessary needs of Waqf and its avenues of disposal (as specified by the Waqif), shall be either invested for the interest of Waqf as it is stated in Item (8), or

disbursed in the charitable causes, if available, which should be similar to causes stipulated by the Waqif. Otherwise, such a surplus will be disbursed to general charitable causes.

9/5. What shall be owned by the Waqf would be under any of the following cases:

9/5/1. The **First Situation** is through substitution or selling some of the Waqf assets. In this case, the substituting asset shall have the rulings applicable to the substituted assets.

9/5/2. The **Second Situation**: is a result of Waqf revenue. In this case, rulings of Waqf revenue shall apply to it.

9/5/3. The **Third Situation:** it is a donation to the Waqf. Hence, if the donor has intended it to constitute a Waqf, then rulings of Waqf shall apply, as per the detail set out in Item (2/2/2). If the donor intended other than Waqf, e.g., gift or charity, then the donated asset will be owned by the Waqf and will not be recognized as a Waqf asset.

9/6. After [obtaining] permission from the relevant authority and prevalence of a preferred interest, the overseer may allocate part of Waqf revenue to be redeployed in the Waqf asset itself, unless and until the Waqif has stipulated otherwise. If the Waqf beneficiaries were specific parties, then their consent is required, provided such an act materializes an interest for the Waqf and elation of the Waqf beneficiaries.

9/7. A portion of Waqf revenues should be allocated for the future needs of Waqf, and the remaining surplus will be subjected to what is mentioned in Item (9/4).

9/8. There is no objection to creating reserves out of the Waqf revenues that will be in the interest of the Waqf. If the cause of reserve creation ceases, then the reserve shall be disbursed in the avenues of Waqf disposal.

9/9. It is permitted to intermingle the incomes of various Waqfs if their disposal avenue is the same and the purpose is to distribute the revenues to the same avenue. Each Waqf remains independent from the other in terms of financial status, remuneration of the overseer, and so on. The same applies to permitting the commingling of incomes where Waqfs have unknown or discontinued disposal avenues.

9/10. Competition at the Waqf Disposal (*izdiḥām fī al-maṣaraf*)

9/10/1. In the case of competition of avenues of Waqf disposal, that amount shall be disbursed out of the revenue, which shall be for the preservation of the Waqf asset and then disbursing what is related to Waqf's obligations towards its administrative employees and relevant parties dealing with it. Anything other than that will be complied with as per Waqif's stipulation in the sequence of disposal, and each disposal shall have its portion as per the share.

9/10/2. If Waqf is a usufruct which is difficult to be enjoyed by [all] the Waqf beneficiaries at the same time, or the Waqf is for restricted persons who are at par in their entitlement in a way that not all of them can enjoy the usufruct, then the enjoyment of the usufruct Waqf asset can be derived via usufruct sharing (*muhaya'a*). If the usufruct sharing is not feasible, then it will be permitted for the Waqf beneficiaries to have a settlement (*ṣulḥ*) in a way that some of them enjoy the usufruct, and the remaining beneficiaries are compensated by the usufructuary party.

9/10/3. If the Waqf was for restricted persons and specific persons and there is a shortfall in the [Waqf] revenue, the shortfall applies to all the beneficiaries in proportion to their shares.

9/10/4. If payment to Waqf administrative employees is among the avenues of Waqf disposal (e.g., the overseer or the custodian) and a shortfall in the revenues arises, the following shall be considered:

9/10/4/1. If a portion of one of them is less than or not less than the fair remuneration, but he consented to it, or someone is found to carry the same job, then the respective remuneration will not be increased.

9/10/4/2. If a portion of one of them is less than the fair remuneration and no one is found to carry the job, then he shall be given what makes it up to the fair remuneration. If an increment is not possible, the overseer may consider the interest of the Waqf by downsizing the administrative employees up to a sufficient number.

10. Supervening Matters in Waqf

10/1. Substitution of Waqf

10/1/1. Substitution (*istibdāl*) of Waqf assets: transfer of Waqf assets from one place to another.

10/1/2. It is permitted to substitute Waqf assets in the following cases and by

observing the conditions of substitution as set out in Item (10/1/5):

10/1/2/1. If it is permitted as per stipulation from the Waqif.

10/1/2/2. If utilities of the Waqf assets are suspended, or it is impossible to enjoy the usufruct, then it is permitted to substitute the Waqf asset with a better asset of the same kind.

10/1/2/3. If the unification of obsolete Waqfs (*awqāf mutaṭila*) will result in their revival, they shall be merged into one Waqf as per the share of each Waqf.

10/1/2/4. If the substitution will result in an evident Shari'ah benefit for the Waqf, which cannot be materialized without substitution, then it is permitted to substitute the Waqf asset with a better asset of the same kind.

10/1/2/5. If [the subject of] Waqf is among the investment Waqfs where it's a commercial custom to substitute the assets for investment purposes.

10/1/3. It is required to substitute Waqf assets if the subject [of Waqf] turned prohibited, e.g., someone created Waqf of permissible shares, which turned later on into prohibited shares. Refer to Item (3/4/8) of Shari'ah Standard No. (21): Commercial Papers (Shares and Bonds).

10/1/4. If the overseer or a partner in the Waqf of common share wanted a division of the Waqf that is indivisible, then the party which refrained will be compelled to sell, and the price of Waqf share will be deployed in a similar Waqf. Similarly, if the Waqf overseer or a partner in a common share Waqf demands the division, the party which refrains will be compelled to partition for divisible assets.

10/1/5. Conditions of Waqf Substitution

In all the above cases of substitution, all the following conditions are required to be fulfilled:

10/1/5/1. The substitution shall achieve what shall be in the interest of Waqf.

10/1/5/2. [Chances of] Suspicion and favouritism in the substitution are dismissed.

10/1/5/3. The substituting asset shall not be less in value or lower in revenue generation from the substituted asset based on the evaluation [provided by] fair experts.

10/1/5/4. To initiate the purchase of the substituting asset immediately except

when the need requires to find out a suitable substituting asset.

10/1/5/5. Substitution of the tangible Waqf assets should be according to the approval from the relevant authority, if any, or based on a valid Shari'ah pronouncement.

10/2. Discontinuation of the Waqf beneficiary body: if the Waqf beneficiary body, whether one or more, is discontinued, then [the avenues of] Waqf [disposal] will be the body which comes next to [the discontinued beneficiary] if the Waqif has arranged the sequence of the beneficiary bodies; otherwise Waqf disposal will be disbursed in bodies of similar [nature]. If there were no similar bodies, then it would be disbursed in general charitable causes. See Item (10/1/2/3) [of the Standard].

11. End of Waqf

Temporary Waqf will end by the expiry of its term. Restricted Waqf will end by the occurrence of the restriction. Waqf will end with the total loss of the Waqf asset, whether Waqf is temporary, restricted, or perpetual.

12. The Date of Standard Issuance

This Standard is issued on 30th Jamādā al-Ākhirah 1440 H. corresponding to 7th March 2019.

Endorsement of the Standard

Shari'ah Board has endorsed Waqf Standard in its 57th Meeting held in the Kingdom of Bahrain during the 30th Jamādā al-Ākhirah – 2nd Rajab 1440 H. corresponding 7-9 March 2019.

Supervisory Instructions for Implementation of the Standard

1. This Standard was issued on 30th Jamādā al-Ākhirah corresponding to 7th March 2019; whatever was stated in the Standard deems to amend whatever contradicts with it as per the previously issued Shari'ah Standards.

2. The supervisory authorities that enforce Shari'ah Standards may grant the Institutions that are subject to their supervision a grace period not exceeding (1) one calendar year to implement this Standard for the existing transactions upon issuance of the Standard.

3. Whatever was implemented based on the issued Shari'ah Standards stands valid based on the previously endorsed version of the [prior Standards] till the end of its tenure based on the [respective] contract.

Annexures

Annexure (A): History of Issuing the Standard

Based on a proposal from Future Investment (for endowments and wills) to develop a new standard on Waqf to be issued by the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIF). Hence, the Shari'ah Board resolved in its Meeting No. (47), held in Madinah between 10th Jamādā al-Ākhirah 1438 H (corresponding 9th March 2017) and 13th Jamādā al-Ākhirah 1438 H (corresponding 12th March 2017), to endorse the project and dedicated an advisory subcommittee that was given the job to prepare the draft of the standard which was decided to be prepared by the Future Investment.

Hence, the working committee of the project held ten extensive meetings in Riyadh and discussed a draft of the project and made amendments as found suitable.

The subcommittee of the project had four meetings in Riyadh, discussed a draft of the project, made amendments as found suitable, and submitted the draft to the advisory committee.

The project's advisory committee held two meetings in Riyadh to discuss a draft of the project and made amendments as found suitable and submitted to the Honorable members of the AAOIFI Shari'ah Board.

The Shari'ah Board discussed in its Meeting No. (50), held in the Kingdom of Bahrain from 27th Ṣafar 1439 H (corresponding 16th November 2017) to 29th Ṣafar 1439 H (corresponding 18th November 2017) at the headquarters of AAOIFI Secretariate in Bahrain, the draft of the project and made amendments as found suitable, and it resolved to present it in the hearing sessions.

Based on the directives of the Shari'ah Board to present the draft during the hearing session, the General Secretariate held five hearing sessions in the following locations: Riyadh on 23th Rabīʿ al-Awwal 1439H (corresponding 11th December 2017), Algeria on 26th Rabīʿ al-Awwal 1439H (corresponding 14th December 2017), Sudan on 26th Rabīʿ al-Awwal 1439H (corresponding 14th December 2017), Morocco on 27th Rabīʿ al-Awwal 1439 H (corresponding 15th December 2017), and Kuwait on 2nd Rabīʿ al-Ākhir 1439 H (corresponding 20th December 2017). These sessions were attended by several scholars, jurists and experts representing central banks, Islamic financial institutions, accounting, auditing and legal firms and academicians from universities, besides people of interest in the field. The standard draft was discussed in detail, and all the observations and suggestions were noted.

The Shari'ah Board discussed in its Meeting No. (52), held in Madinah between 20th Jamādā al-Ākhirah 1439 H (corresponding 8th March 2018) and 22nd Jamādā al-Ākhira 1439 H (corresponding 10th March 2018), the observations and suggestions made during the five hearing sessions, and it made the amendments as found suitable.

The Shari'ah Board discussed in its Meeting No. (53), held in Madinah between 10th Shaʿbān 1439 H (corresponding 26th April 2018) and 12th Shaʿbān 1439 H (corresponding 28th April 2018), the draft of the standard and it made amendments as found suitable.

The Shari'ah Board discussed in its Meeting No. (54), held in Oman between 26th Dhūl al-Ḥajj 1439 H (corresponding 6th September 2018) and 28th Dhūl al-Ḥajj 1439 H (corresponding 8th September 2018), the draft of the standard and it made amendments as found suitable.

The Shari'ah Board discussed in its Meeting No. (55), held in Madinah between 22nd Ṣafar 1440 H (corresponding to 1st November 2018) and 24th Ṣafar 1440 H (corresponding to 3rd November 2018), the draft of the standard and it made amendments as found suitable.

The Shari'ah Board discussed in its Meeting No. (56), held in the Kingdom of Bahrain between 20th Rabīʿ al-Ākhir 1440 H (corresponding 27th December 2018) and 22nd Rabīʿ al-Ākhir 1440 H (corresponding 29th December 2018), the draft of the project and it made amendments as found suitable.

The Shari'ah Board discussed in its Meeting No. (56), held in the Kingdom of Bahrain between 30th Jamādā al-Ākhira 1440 H (corresponding 7th March 2019) and 2nd Rajab 1440 H (corresponding 9th March 2019), the Shari'ah Basis of the standard and endorsed the standard in its present form.

The Committing for Drafting Shari'ah Standards reviewed in its meeting, held in Bosnia and Hersey on 21st Dhūl al-Ḥajj 1440 H (corresponding 22nd August 2019), the standard. After deliberation, discussion and affecting amendments related to drafting, it is decided to endorse the standard and issue it officially.

Annexure (B): Basis of Shari'ah Rulings

2. Definition, ruling, constituting elements and conditions of Waqf

2/3: The basis of the permissibility of Waqf of an asset as a form of a recommended act (*nudub*):

- what is commanded in Quran regarding committing charity and spending for righteousness causes,
- what is mentioned in Ḥadīth: (***When a man dies, his acts come to an end, but three, recurring charity, ….)***[3], and this is considered to be Waqf.[4]
- Ḥadīth of ʿUmar (RA) when he was directed by the Prophet (PBUH) to create Waqf over his plot of land in Khaybar.[5]
- the practice of Prophet's Companions[6], like ʿUthmān(R.A.)[7], Abū Ṭalḥa(R.A.).[8]
- The scholarly consensus on Waqf's permissibility.[9]

The basis of Waqf's binding nature and non-permissibility to resile from it:

- The statement of the Prophet (PBUH)***: "If you wish, you can keep it as a Waqf to be used for charitable purposes".*** Hence, ʿUmar (RA) gave the land in charity on the condition that the land would neither be sold nor given as a gift nor passed as an inheritance.[10] This indicated preventing the Waqif from disposing of the Waqf asset. It was indicative of its binding nature.
- Prohibition in taking back the charity, as the Prophet (PBUH), proscribed ʿUmar (RA) by saying: "… ***nor take back your alms which you have given, even if the seller were willing to sell it for one Dirham, for he who takes back his alms is like the one who swallows his vomit***".[11]

2/4/1/1. The basis of Waqf's conclusion by whatever is indicative of it:

- In all the contracts, what needs to be taken into account are the intended objectives (*maqāṣid*) and meanings, not words and forms, and

reference to custom (*dalālat al-ʿurf*) is to be taken into consideration.

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3 Ṣaḥīḥ Muslim (1631).

4 Asnā al-Maṭālib (2/457), Tuḥfat al-Muḥtāj (6/235), Najm al-Wahhāj (5/453).

5 Ṣaḥīḥ al-Bukhārī (2737).

6 Dhakhīrah (6/323).

7 Ṣaḥīḥ al-Bukhārī (2778).

8 Ṣaḥīḥ al-Bukhārī (2769), Ṣaḥīḥ Muslim (998).

9 Dhakhīrah (6/323).

10 Ṣaḥīḥ al-Bukhārī (2737), Ṣaḥīḥ Muslim (1632).

11 Ṣaḥīḥ al-Bukhārī (1490), Ṣaḥīḥ Muslim (1620).

The basis for not requiring acceptance from a non-specific Waqf beneficiary

- Acceptance cannot be envisaged from a [non-specific party]. And if the Waqf beneficiary is specific, then its acceptance can be envisaged even impliedly if the Waqf beneficiary does not respond.
- The ruling of Waqf's continuous and voidness of the right of the party returning is based on Ḥanafī school because the one who returned Waqf has no power to void Waqf, but he has the power to deprive himself of it.

2/4/1/3. The basis for permitting suspension of Waqf (*taʿlīq*) or making it effective from a future date:

- The initial presumption is that [stipulating] conditions *per se* are valid and permissible.
- The analogy upon permitting suspended manumission and the future effect of the bequest, and the Shari'ah is overall eager for manumission, charity, and donation.
- The underlying cause of preventing suspension of the contracts or making them effective from a future date is *gharar* (excessive uncertainty), which is non-effective in donation contracts (e.g., Waqf). Refer to Shari'ah Standard No. (31): Contracts of Gharar in Financial Transactions.

2/4/1/5. The basis of permitting a Waqf limited by a time:

- Some of the Shari'ah texts referring to the Waqf are general in nature. Hence, these texts apply to perpetual as well as temporary Waqf.
- Waqf is a form of donation, and its [scope] is broadened and [carrying it is] encouraged.
- Allah's pleasure can be sought by creating Waqf for a body that [may be] discontinued since two benefits can be achieved out of this: firstly, it remains Waqf throughout the term [of Waqf], and, secondly, it benefits the Waqif because there might be a probability that he needs Waqf assets in the future. There is no denying that it results in encouragement to institute Waqf, and it fulfils the needs of upcoming charitable institutions. This is the view of the Mālikī school and reported narration of Abū Yūsuf among Ḥanafīs. Also, the Resolution of International Islamic Fiqh Academy No. 181 (7/19) was issued on these lines.

2/4/1/6. The basis for not stipulating to mention avenues of Waqf disposal:

- Waqf is a form of alienation (*izālat milk*) to seek Allah's pleasure; by the analogous reasoning, it will be valid as the case of absolute charity, absolute vows (*nadhar*) and sacrifices, and bequest.

2/4/2: The basis of establishing a juridical personality for Waqf and having a financial status independent from the person and liability of the overseer:

- Waqf is suitable to establish the rights for or against the overseer. Hence, if the overseer incurred a debt against the Waqf, so the debt will not be owed by the overseer, and if the beneficiary of Waqf delays in settling what is due to him, then he shall be Waqf's debtor and not of the overseer because the overseer cannot discharge the debtor from the debt.

3/4/3/3. The basis of non-conclusion of the Waqf by a person interdicted on the prodigal grounds or the suspension of Waqf, to be made by a person interdicted for a debt, until creditors' permission was secured:

- Prodigal (*safah*) is of supervening factors of the capacity,
- To repel the harm from the creditors.

2/4/3/5: The basis of the validity of Waqf made by non-Muslim:

- The analogy upon all the transactions, contracts and donations,
- Waqf is not merely an act to seek Allah's pleasure, and it is reported that Ḥakīm b. Ḥizām R.A. told the Prophet PBUH: "*Messenger of Allah, do you think if there is any reward (of the Lord with me on the Day of Resurrection) for the deeds of religious purification that I performed in the state of ignorance, such as charity, freeing an enslaved person, cementing of blood-relations? Upon this, he (the Prophet PBUH said to him:* ***You have accepted Islam with all the previous virtues you had practised***".[12] Hence, the Prophet PBUH called his charity a virtue and endorsed him when he called them charity. This indicates the validity of a donation made by a disbeliever, and the Waqf is one such donation.

2/4/4/2. The basis of permitting self-Waqf:

- The analogy upon the charity given to self.
- What is reported in Ḥadīth that "a man said: Messenger of Allah, I have a dinar. He said: ***Spend it on yourself***."[13], and a Ḥadīth stated by the Prophet (PBUH): "***Start with yourself and spend it on yourself***".[14]
- The reason is that if it was permitted to stipulate part of the Waqf for himself, it would be permitted to make the entire Waqf exclusive during his lifetime, similar to the bequest.

2/4/4/3. The basis of the validity for the Waqf beneficiary to be a body that will be discontinued:

- In Waqf, perpetuity is not a condition.

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12 Ṣaḥīḥ al-Bukhārī (1369), Ṣaḥīḥ Muslim (5646).

13 Sunan Abū Dāūd (1691), Sunan al-Nisā'ī (2535), Masnad Aḥmad (7419).

14 Ṣaḥīḥ Muslim (997).

- The result of a discontinued Waqf will be the same as a non-discontinuing Waqf.[15]

2/4/4/4: The basis of permitting the creation of Waqf for the benefit of those who are non-existing at the time of creating the Waqf:

- Narratives reported from the Companions of the Prophet(PBUH) wherein Waqf was for the benefit of a progeny which has not yet been born.
- Waqf is a form of an ongoing charity (*ṣadaqa jāriyah*) which implies including those who will be in the future.

2/4/4/5. The basis of permitting to exclusively allocate some of the children by increasing their share of Waqf for a valid purpose:

- It was reported that al-Zubayr(RA) made his residential properties held for the charity that could be used by his daughters, who were divorced, provided they did cause harm to the property or their stay would cause harm to them. If [the daughter] marries someone, she will not be entitled to anything.[16]

2/4/5/1 (a): the basis of permitting the Waqf asset to be something that leads to knowledge:

- Ignorance can be absolved in gift contracts, and Waqf is one of the gift contracts.

2/4/5/2. For the enforceability of the Waqf, the basis of stipulating that third-party right is not tied up with the Waqf:

- The analogy upon the sale contract and all the dispositions of transfer of the ownership, because encumbrance with third party right will prevent enforceability of disposition of such thing, e.g., a debt tied up with the estate, a pledge tied up with the subject of the sale.
- If Waqf is tied up with a third-party right, it will cause harm for the one who has the right and [result] to annual his right.[17]

2/4/5/4 (a): The basis of enforceability of Waqf of the pledged asset upon the waiver from the pledgee of his right in the pledge:

- The pledgee has the right to prevent the pledgor from disposing of the

15 Lisān al-Ḥukkām, p. 295.

16 Sunan al-Bayhaqī (11930), Muṣannaf Ibn Abī Shayba (20933).

17 Durar al-Ḥukkām (2/134-135), Al-Bayān fī Madhhab al-Shāfiʿī (6/82), Tuḥfat al-Ḥabīb (3/70).

pledged asset, and the pledgee's waiver forfeits such a right[18].

2/4/7. The basis of the validity of movable Waqf (even if it is independent):

- The saying of the Prophet (PBUH): "***As far Khālid, he kept his armour and weapons for Allah's Cause***".[19]
- The Waqf asset can be sold, and its usufruct passed on under the *commodate* loan.
- The Waqf asset can be enjoyed by retaining the asset
- With such a form of Waqf, appropriation of the asset occurs, and the enjoyment of the usufruct is enabled.[20]
- This is the opinion of the majority of the jurists, and the Resolution of International Islamic Fiqh Academy No. 181 (7/19) is in line with it.

2/4/8: The basis of the validity of Waqf over moral rights:

- These are worthy assets recognized by Shari'ah, and they can be taken into ownership, and their ownership can be transferred. Hence, Waqf of such assets is permitted.
- The Resolution of International Islamic Fiqh Academy No. 181 (7/19) was issued in this regard.
- Refer to Shari'ah Standard No. (42): Financial Rights and How They Are Exercised and Transferred.

2/4/9. The basis of permitting Waqf of those assets which were possessed through prohibited means:

- This forms a discharge of liability by renouncing it through creating a Waqf over it for general causes of charity.

2/4/11. The basis of the validity of Waqf over a common share:

- Ḥadīth of the Prophet PBUH: "***O Banī Najjār! Suggest a price for your orchard***" They replied, "*By Allah! We will demand its price from none but Allah.*"[21]. Hence, Banū Najjār instituted Waqf over [an orchard] that they owned as a common share.
- ʿUmar R.A. has created Waqf over the land of Thamgh, palms of Al-Akwaʿ and the enslaved person who is there, hundred shares [of ʿUmar R.A.] in (the land of) Khaybar, the enslaved person who was there in addition to the

18 Al-Sharḥ al-Kabīr ʿalā al-Muqniʿ (12/411) and (12/424).

19 Ṣaḥīḥ al-Bukhārī (1468), Ṣaḥīḥ Muslim (983).

20 Al-Mughnī (6/36), Al-Mustadrak ʿalā Majmūʿ al-Fatāwā (4/89).

21 Ṣaḥīḥ al-Bukhārī (428), Ṣaḥīḥ Muslim (524).

hundred shares in the valley which were given by the Prophet(PBUH) to him.[22]

- The Resolution of International Islamic Fiqh Academy No. 181 (7/19) was issued in the same line.

2/4/12: The basis of the validity of Waqf over usufructs:

- Usufructs are assets; they are subsumed under the generality of the evidence of Waqf.
- The Resolution of International Islamic Fiqh Academy No. 181 (7/19) was in line with that.

2/4/13/1: The basis of the validity of cash Waqf:

- the Shari'ah objective of Waqf is achieved in such a kind of Waqf, and money cannot be specific by identification; rather, its substitute will be in its place.
- One group of the earlier jurists of Islam adopted the view of the validity of cash Waqf, and this is the view of Mālikīs and was said by the later Ḥanafīs and later Ḥanbalīs.
- The Resolution of the International Islamic Academy of Fiqh No. 140 (6/15) was issued in this regard.
- As per *Sharḥ al-Kharshī ʿalā Mukhtaṣar Khalīl*, the view of the Mālikī school is to permit Waqf over a thing which cannot be known, particularly food and gold and silver coins. The utility of such things replaces tangible assets' continuance.[23].

2/4/13/4. The basis that the change in the purchasing power will not affect the value of cash Waqf assets:

- The analogy upon such assets not getting affected by cash loans.

2/4/13/5. The basis of the permissibility of the hedging for protecting the capital of cash Waqf and hedging from the risk of foreign currency fluctuation:

- It takes Waqf's objective of permanence Waqf's Institution into consideration,
- One of the Shari'ah objectives is to the preservation of wealth (*ḥifẓ al-māl*).
- Since the oversee holds the Waqf in possession of trust (*yadd amāna*), it requires that the disposition of Waqf should achieve the interest of the Waqf following the customs.

22 Sunan Abū Dāūd (2879).

23 Sharḥ al-Kharashī ʿalā Mukhtaṣar Khalīl (7/80).

2/4/14/1. The basis of permitting Waqf of companies or shares thereof or stocks of joint-stock companies:

- Permissibility of Waqf common share.

2/4/15/1. The basis of permitting Waqf of investment Sukuk and units of investment funds:

- Permitting any Waqf of a common share, cash and limited term Waqf.
- It's a form of donation which is broadened and encouraged to be carried out.
- The resolution of International Islamic Fiqh Academy No. 181 (7/19) was in line with that.

2/5/1. The basis of the permissibility of authentication of Waqf:

- Mother of Saʿd bin ʿUbāda R.A. died in his absence. He said, "*O Allah's Messenger (PBUH)! My mother died in my absence; will it benefit her if I give ṣadaqa on her behalf?*" The Prophet (PBUH) said, "***Yes***," Sa`d said, "*I make you a witness that I gave my orchard called Al Makhraf in charity on her behalf.*"[24].
- What was narrated in the Waqf created by ʿUmar R.A. that was written by Muʿayqīb and was witnessed by Abdullah b. al-Arqam (R.A.).[25]
- It comes under the generality of evidence for the permissibility of authentication of the debts and all the transactions.

2/6/1. The basis of permitting stipulation in Waqf and the requirement of acting under the Shari'ah compliant conditions stipulated by the Waqif:

- The generality of Ḥadīth says: (***and the Muslims will be held to their conditions, except a condition that prohibited a permitted act, or permitted a prohibited act***)[26].

2/6/2. The basis of permitting stipulation of allowing the Waqif or his heirs to make use of Waqf for Waqif's lifetime or to be used for a known period:

- Permissibility of self-Waqf
- The Prophet (PBUH) endorsed the Waqif to consume the produce of Waqf[27], and it is not permitted to consume it without stipulation; it was an indication of the validity of such a condition[28]. If it is valid for the Waqif to

24 Ṣaḥīḥ al-Bukhārī (2756).

25 Sunan Abū Dāūd (2789).

26 Sunan al-Tirmidhī (1352).

27 Muṣannaf Ibn Abū Shayba (20939).

28 Al-Hidāya fī Sharḥ Bidāyat al-Mubtadī (3/19).

stipulate [disposal of] the revenue to other people for a known period, so his stipulation [of revenue disposal] for himself or his heirs [will be] foremost [valid].

2/6/4. The basis of the voidness of a condition containing a prohibited matter (*ḥarām*) or a condition that prejudices Waqf or impacts its asset:

- What was stated in Ḥadīth: (***and the Muslims will be held to their conditions, except the condition that prohibited a permitted act, or permitted a prohibited act***).[29]
- The initial presumption is that stipulating the conditions is permissible unless it is against the intention of Shari'ah or the intention of the contract, and no obedience of human beings is allowed by disobeying Allah.[30]

3. Waqf Overseership

3/2/1. The basis for appointing an overseer for Waqf:

- What was mentioned in Ḥadīth: "***there would be no harm if its guardian of the Waqf***".[31]
- The interest of Waqf requires someone who will manage Waqf by investing in it, collecting its resources, and disbursing them among the beneficiaries.

3/3/1. The basis of requiring the overseer to abide by the conditions stipulated by the Waqif:

- Waqf is a donation, and the donation can be subject to restriction by stipulation.

3/5. The basis of requiring moral probity (*ʿadālah*), sanity (*ʿaql*), discretion (*rushd*), and capacity in the overseer:

- Overseership is a form of guardianship over a third party. Hence, these qualities were considered, as with the custodian and the protector.[32].

3/7/4: The basis that the overseer holds the Waqf in possession of trust:

- The analogy upon the administrative employees of charity (*ṣadaqa*), the custodian, the agent, and the overseer who are supposed to carry what is required from them following the duties of overseership and to refrain

29 Sunan al-Tirmidhī (1352).

30 Majmūʿ al-Fatāwā (31/49).

31 Ṣaḥīḥ al-Bukhārī (2737).

32 See: Asnā al-Maṭālib (2/471), Mughnī al-Muḥtāj (3/553), Al-ʿAzīz Sharḥ al-Wajīz (6/290), Al-Tajrīd li-Nafʿ al-ʿAbīd (3/214).

from what is not permitted as prohibitions of overseership[33].

3/8/3: The basis of preventing the overseer from leasing the Waqf asset to himself or his child:

- As human nature, there is a fear of committing favouritism for himself or his child and not choosing what will be more favourable for the Waqf[34].

3/8/4. The basis for preventing to lend of Waqf assets to a third party other than the Waqf beneficiary:

- It amounts to the loss of what is required to be invested.

3/9/1. The basis of the overseer's entitlement to remuneration:

- The saying of the Prophet PBUH: "***My heir will not distribute dīnār or dirham, but whatever I leave, excluding the provision for my wives and my servants, should be charity***."[35].
- What was stated in ʿUmar R.A.'s Waqf deed: "*its administrator could eat in a reasonable and just manner, and he also could feed his friends without intending to be wealthy by its means*."[36].

3/9/4. The basis of relooking into the remuneration of the overseer by the relevant authorities, if the need arises:

- The overseer's duty is subjected to evaluation, and it differs from time to time.

4. Maintenance of Waqf:

4/1. The basis of giving preference to maintenance, and it's like, over avenues of Waqf disposal:

- The intention of Waqf is the permanence and continuity of its revenue, and it cannot be permanent and continue to function without [carrying] maintenance of its assets.

4/2. The basis of permitting allocating an annual amount out of Waqf revenues for maintenance and repair:

- This constitutes part of the recognized interests of Waqf and means to protect it[37], and [the prevailing] custom is applied in its likes.

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33 Al-Qawāʿid by Ibn Rajab, p. 64.

34 Al-Baḥr al-Rāʾiq, (5/254).

35 Ṣaḥīḥ al-Bukhārī (2776), Ṣaḥīḥ Muslim (1760).

36 Ṣaḥīḥ al-Bukhārī (2737), Ṣaḥīḥ Muslim (1632).

37 Asnā al-Maṭālib (2/475), Ḥāshiyta Qalyūbī wa ʿUmayrah (3/109), Mughnī al-Muḥtāj (3/551).

5. Indebting Waqf

5/1. In the case of tangible Waqf assets, the basis of permitting to incur debts as a liability upon the Waqf for maintenance, construction of the Waqf assets or paying the financial obligation or salaries of Waqf employees:

- These constitute the interests of Waqf, and their suspension will result in the suspension of the Waqf.[38]

5/2. The basis of permitting to incur debts as a liability upon the Waqf to grow investment Waqf:

- Customs, the intention of the Waqif and nature of function [of such Waqfs].

6. Pledging Waqf

6/1. The basis of preventing pledge of Waqf assets:

- Pledge contrary to the provision of Waqf in terms of appropriation. For pledge is securing a debt by a tangible asset in which the sale of the tangible asset is permitted to discharge the debt, wherein in Waqf, the sale of the [Waqf] asset is not permitted[39].

6/2. The basis for permitting the issuance of bank guarantees against Waqf funds in those cases when a pledge of Waqf assets is allowed:

- It is the same as pledging these funds.

7. Lending Waqf Funds and Guaranteeing a Third-party by Waqf Funds

The basis of preventing lending of Waqf funds:

- The analogy of preventing to lend funds of minors,
- This may result in a loss of Waqf funds[40] unless lending were more secure for the funds, then lending would be permitted[41], as the case of lending orphans funds would result in their preservation, and it was the practice of Prophet (PBUH)'s Companions (R.A.), as Abdullah bin ʿUmar (RA) used to have funds for orphans, so he used to lend them for protecting them

38 Al-ʿUqūd al-Dariyyah fī Tanqīḥ al-Fatāwā al-Ḥāmidiyyah (1/187-188).

39 Fatḥ al-Qadīr by Ibn al-Humām (6/220), Al-Dhakhīrah (6/324) (6/325), Al-Ḥāwī al-Kabīr (3/332), (7-511-513), Baḥar al-Madhhab (7/208-210), Al-Wasīṭ fī al-Madhhab (3/462), Al-Majmūʿ Sharḥ al-Muhadhdhab (9/245), Kifāyat al-Akhyār (1/254).

40 Asnā al-Maṭālib (2/472), Al-Ghurar al-Bahiyyah (3/376).

41 Asnā al-Maṭālib (2/214).

from loss[42]. Similar practice was reported by al-Zahrī[43].

8. Investment of Waqf

8/1: the basis of permitting investment of Waqf proceeds in those cases where distribution to the beneficiaries is not affected:

- It is carried out in the interest of the Waqf and results in preserving and growing the funds.
- The Resolution of International Islamic Fiqh Academy No. 140 (15/6) was issued on the same line.

8/2. The basis of the requirement to adopt means for developing and preserving the Waqf:

- The role of the overseer is to preserve and build the Waqf and strive to develop it[44]. This could be achieved by adopting modern, safe means to develop and preserve the Waqf.

8/5. In exception when there is a preferred interest, the basis of preventing Ijarah of tangible Waqf assets [for a rent] less than the fair rent:

- Repelling favouritism (*dar' al-muḥāba*), preserving Waqf, and preventing wasting its revenues.
- The maxim says: *inna taṣarruf al-nāẓir alā al-waqf manuwṭ bi al-maṣlaḥa,* the overseer's disposition of Waqf is contingent upon the interest thereto.[45].

9. **Avenues of Waqf Expenditure**

9/1. The basis of diversification of avenues of Waqf disposal:

- The analogy upon the avenues of disbursement in the charity.

9/2. The basis of requiring disbursing Waqf revenues in things specified by the Waqif:

- Specifying a particular body by the Waqif implies that the Waqif overlooked any other body[46].
- This stipulation by the Waqif is like all his conditions which should be complied with.
- The analogy upon Wakala and the bequest and what Allah has said about

42 Sunan al-Bayhaqī.

43 Muṣannaf ʿAbd al-Razzāq.

44 Al-Tajrīd li-Nafʿ al-ʿAbīd (3/214), Al-Inṣāf (7/67), Muntahā al-Iradāt (3/363).

45 Al-Akhbār al-ʿIlmiyyah min al-Ikhtiyārāt al-Fiqhiyyah p. 256, Majmūʿ al-Fatāwa (31/67), al-Furūʿ (7/360).

46 Kashshāf al-Qināʿ (4/267).

the bequest: "***Then, whoever changes it after he has heard it, its sin will only be on those who change it***."[47].

9/4: The basis of disposing of the surplus of investment revenue or disbursing it in charitable causes is similar to the condition laid down by the Waqif:

- Taking into consideration the interest of Waqf and achieving the purpose of Waqf.
- By the analogy upon the absolute and discontinued Waqf.
- Not disbursing the Waqf will expose it to loss.[48].
- The practice of ʿUmar(RA) in distributing Kiswa of Kaʿba among the pilgrims.
- The practice of ʿAlī (RA) in distributing surplus Zakah among pre-emancipation enslaved people (*mukātab*).[49]

9/6. The basis of allocating part of Waqf revenues to be part of the Waqf asset:

- An interest of Waqf that is recognized and considered.
- Taking into consideration the objectives of Waqifs.

The basis of requiring permission of Waqf beneficiaries if they were specific and exclusive:

- The beneficiaries are entitled to the Waqf revenue. Hence the revenues cannot be disposed of without the permission of the beneficiaries.

9/7. The basis for encouraging to allocate of part of excess Waqf revenue:

- Taking into consideration the interest of Waqf.

9/8. The basis of permitting the creation of reserves out of Waqf revenues as per the interest of Waqf:

- Assist in adapting means to preserve, build, maintain, repair, and settle the debt of the Waqf.
- The objective of the Waqf and the Waqif is the sustainability of the revenue.

9/9. The basis of commingling sources of Waqf if their avenue of expenditure was the same:

- All of them are for the cause of Allah, but considering the allocation is obligatory if not considering it will result in wasting the Waqf specified for

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47 Quran, 2:181.

48 Al-Majmūʿ Sharḥ al-Muhadhdhab (15/361), Asnā al-Maṭālib (2/475), Tuḥfat al-Muḥtāj (6/284), Nihāyat al-Muḥtāj (5/396), Mughnī al-Muḥtāj (3/551), Futūḥāt al-Wahhāb (3/591).

49 Majmūʿ al-Fatāwā (31/18).

a particular purpose, based on the maxim: *dafʿ al-mafsada muqaddam alā jalab al-maslaḥa* (repulsion of harm has precedence over acquisition of interest).

9/10/1. The basis of giving preference to what shall be in the interest of preserving the Waqf asset in the case of competing avenues of Waqf disposal:

- It shall preserve the Waqf asset[50]
- By analogy, the estate in giving preference to the rights of the deceased (e.g., debts of the deceased, funerary expenses) over [the inheritance portions of] the heirs.

9/10/3. The basis of the shortfall impacting the exclusive and specific Waqf beneficiaries upon the shortage of revenues:

- By analogy upon [the distribution of portions] of inheritance [lesser] than the obligatory portions [entitled] for the heirs in case [applying] the *ʿawal* (reduction) [to adjust all the portions to be allocated].
- By analogy upon the creditors of a bankrupt.

10. Supervening Matters in Waqf

10/1/3. The basis of requiring substitution of the Waqf asset if the underlying subject of Waqf turned into a prohibited one:

- One of the conditions of Waqf asset is that it should be permissible (*mubah*) [Shari'ah compliant],
- The statement of the Prophet PBUH: "***Allah is Good, and He, therefore, accepts only that which is good***."[51],
- By analogy, the person who repents from [earning] prohibited earnings.
- By analogy, the horse is subjected to Waqf and decorated with prohibited items, and its ornaments are sold, and proceeds are spent on the horse.[52].

10/1/5/2. The basis of requiring to negate suspicion or favouritism in the substitution:

- The overseer ought to take care of his dispositions to combine overseership with what shall result in the benefit and elation of the Waqf and not combine overseership with suspicion.[53]
- One of the conditions of substitution is that it should be in the interest of Waqf, whereas favouritism causes harm against the Waqf, and the maxim

50 Al-Baḥar al-Rā'iq (5/230-232), Asnā al-Maṭālib (2/475), Tuḥfat al-Muḥtāj (6/284).

51 Ṣaḥīḥ Muslim (1015).

52 Al-Mustadrak ʿalā Majmūʿ al-Fatāwā (4/91).

53 Baḥr al-Rā'iq (5/254).

is: The maxim says: *inna taṣarruf al-nāẓir alā al-waqf manuwṭ bi al-maṣlaḥa,* (overseer's disposition of Waqf is contingent upon the interest thereto).[54]

10/1/5/5. The basis for requiring permission from relevant authorities for substitute tangible Waqf assets:

- It will be for the protection of Waqf and more support in meeting the interest of Waqf.
- To establish the public guardianship of the state on the Waqfs.

54 Al-Wasīṭ fī al-Madhhab (4/256), Al-Bayān fī Madhhab al-Shāfiʿī (8/75), Al-Majmūʿ Sharḥ al-Madhhab (15/344), Tuḥfat al-Muḥtāj wa Ḥawāshīhā (9/133), Nihāyat al-Muḥtāj wa Ḥawāshīhā (7/447), Futūḥāt al-Wahhāb (5/142), Al-Mughnī (6/8), Al-Mubdiʿ (5/166).

Annexure (C): Definitions

Revenue of Waqf:
It's the mesne profit generated from the Waqf asset, e.g., revenue, rent of real estate, and income.

Waqf Deed:
A deed or a document wherein the Waqif writes his contract of Waqf, and its conditions, specify the Waqf asset, Waqf beneficiaries and the overseer. It has various names and forms based on different times and places of use; it would be in the form of a deed by the court known as Waqf Deed (*ṣakk al-waqfiyah*), simple paper, electronic file etc. Some Islamic jurists even referred to it as *Kitāb al-Waqf* (the book of Waqf)

Waqf Funds:
It has various meanings in the usage of the institutions and bodies related to Waqfs, and one of them is Waqf of investment funds as per the known technical-cum-financial meaning in the field of investment, which is the closest when Waqf Funds are referred to.

Bonus Shares:
These are shares issued out of the company's reserves and result in increasing the company's capital. These shares are distributed among the shareholders against the percentage of shares they are holding.

Investment Funds:
It is a form of joint investment that aims to provide a chance for investment through collective participation in the business's profits and is run against specified fees or sharing of profits.

Spatial Usufructuary Division
Division of usufructs of jointly held tangible assets will be availed on a sequential and … basis, e.g., one of the partners to enjoy the benefits for a year and the other for the coming year.

Temporal Usufructuary Division
Temporal division of usufructs of jointly held tangible assets, e.g., an agreement to allow one of the partners to enjoy the benefits of harvesting half the plot and the remaining half to be used by the other partner, or an agreement that one of the partners will stay at the upper floor of the residential property and the other will stay in the lower one.

Special Purchase
It's a company with special nature, has specified liability, is established for a specific purpose and comes to an end by the end of this purpose. Usually, it is used for legal and accounting purposes.

Financial Trust:
An amount paid by a person known as (the originator of the trust) to another party known as (the trustee of the trust) to hold and invest the amount for a third party known as (the beneficiary of the trust). It could be temporary or perpetual.

Irṣād:
It's a form of allocation by the ruler from the holdings of the Islamic exchequer (*bayt al-māl*) for the public interest, and it is not consisted of Waqf as per some Islamic jurists.

Shari'ah Standard No. (22)

Concession Contracts

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

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

Preface

The purpose of this Standard is to indicate the rules that govern Concession Contracts for utilization of minerals, water and the likes (Utilization Concession), or construction of projects (Construction Concession), or management of government facilities and projects that provide services to the public (Management Concession). The Standard also highlights the Shari'ah adaptation of such contracts, as well as their underlying procedures, rights and duties. Moreover, it portrays application of Concession Contracts by Islamic financial Institutions (the Institution Institutions).[1]

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

Statement of the Standard

1. Scope of the Standard

This Standard covers the basic Shari'ah rulings relating to Concession Contracts for utilization, construction or management of projects, and provides guidance to Institutions on application of such contracts. It does not cover legal or consensual concession rights, which are subsidiary rights. This standard does not cover franchises as it should be dealt with by a separate standard.

2. Definition of Concession

Concession in this context refers to the act of an authorized party granting another party the right of utilizing, constructing or managing a project for agreed upon consideration.

3. Permissibility of Concession Contracts

3/1 The concession contracts described in this Standard are permissible, as set out in the Shari'ah rulings, unless those contracts comprise an element that does not conform to the rules and principles of Islamic Shari'ah. Such contracts are considered to be among the devices that facilitate realization of public interest or the interests pursued by the two contracting parties.

3/2 There is no Shari'ah objection to taking on the procedures required to the offering of concession rights against specific fees or any compensation stipulated in the contract, unless the deal constitutes an element of Riba (usury), Gharar (uncertainty), or any other Shari'ah-banned practices.

4. Offering the Concession Right

When offering concession rights, due consideration should be given to justice, equality of chances, and realization of public interest.

5. Concession Contracts for Utilization of Minerals, Water and the Like (Utilization Concession):

5/1 Definition of utilization concession contracts

A Utilization Concession contract is an agreement between the State and a natural or legal person (Institution) according to which the latter becomes the sole owner of the right of extracting and producing the minerals, water or any other object in question against a specific remuneration, as is shown in item 5/3 below.

5/2 Formal procedures of utilization concession

5/2/1 Granting a survey license

The State has the right to require natural or legal persons to obtain permission (license) before conducting survey in a certain area against payment of a specific amount of fee or rent to the State. Such a license does not grant its holder the right of the sole surveyor in that area nor does it grant him the right to conduct works relating to extraction through mining and construction of the required facilities.

5/2/2 Granting exploration licenses

The State has the right to require natural or legal persons to obtain permission (license) before conducting exploration in a certain area for a certain period against payment of a specific amount of fee or rent to the State. Such exploration license may entitle its holder the right to become the sole explorer in that area and the right of conducting the works required for exploration.

5/2/3 Obtaining utilization concession

The exploration licensee, after discovering the minerals, water or any object in question, becomes eligible for the exclusive right of obtaining the utilization concession in the area specified in the license, unless the license stipulates otherwise.

5/2/4 If until the end of the exploration period, the holder of the exploration license (the licensee) does not discover the minerals, water or for whatever the license has been obtained then the licensee is not entitled to utilization concession at the end of that period.

5/2/5 Notwithstanding the procedural order stated in preceding paragraphs, the State may offer exploration or utilization concessions directly, and without resorting to the above-mentioned procedures.

5/2/6 When the State requests a specialized body to conduct survey or exploration on its behalf, the contractual relationship becomes subject to the rulings of "Ijarah" and "Ju'alah". In this case Shari'ah Standard No. (9) on Ijarah and Ijarah Muntahia Bittamleek, as well as Shari'ah Standard No. (15) on Ju'alah, should be referred to.

5/3 Shari'ah perspective on utilization concession contracts

Utilization of minerals, water resources and the likes cannot take place without exploration, which entails an unknown amount of effort. Whereas the remuneration to which the holder of concession is entitled, is usually a well-defined lump sum amount or percentage share of the output. The Shari'ah classifies such contracts as a form of Ju'alah, where the State is the "*Ja'il*" *(Ju'alah initiator)*, the licensee Institution is the "*'Amil*" (hired party) and the specific amount to be received by the latter is the "*Ju'l*" (compensation amount). [see Shari'ah Standard No. (15) on Ju'alah]

5/4 Scope of utilization concession contracts

Since utilization concession contracts are concluded between the State on the one hand and natural or legal persons on the other, the following should be observed:

5/4/1 When adopting the Fiqh viewpoint that considers minerals to be the property of the State, whether such mineral have been extracted from a State-owned or a privately-owned land,

concession contracts may be applied to all types of lands, whether State- or privately-owned.

5/4/2 When adopting the Fiqh viewpoint that gives the right of utilization of minerals to the owner of the land or its usufruct against a fee payable to the State, the following types of lands should not become subject to concession contracts:

5/4/2/1 Privately-owned lands whether vacant or built on.

5/4/2/2 Wastelands that have been contracted for development according to the relevant Shari'ah stipulations and legal rulings.

5/4/2/3 Lands allotted by the State to natural or legal persons, whether through change of ownership title or for temporary utilization.

5/5 Requirements of obtaining the utilization concession

A holder of a utilization concession is entitled to undertake all the activities required for utilization, such as establishing refineries and treatment laboratories, acquiring transportation devices and facilities, etc. The holder becomes the sole owner of such rights throughout the period of the concession license thereof.

5/6 Continuity of utilization

Concession contracts usually indicate the commitment of the licensee to continue utilization as per contract or the prevailing customary practices. In case the licensee ceases utilization without a reasonable excuse, the licensee may be given a reasonable grace period to restart again and preserve utilization, otherwise the State has the right to cancel the license thereof.

5/7 Product pricing and purchase by the State

5/7/1 The State has the right to determine in advance the way in which the licensee should dispose of his share of the extracted products and the value to be paid to him taking into account public interest

5/7/2 In addition to its own share in the product, the State has also the preemptory right of purchasing the quantities it needs from the output, according to the prevailing prices and contractual terms.

5/8 Expiry of utilization concession contracts

A utilization concession contract expires at the end of its specified period, or when the two parties agree to prematurely cancel it. The contract can also be cancelled when there remains no more output to be utilized. Moreover, each of the two parties has the right to revoke the contract when the other party breaches a contractual condition or commitment. In this case the breaching party has to compensate the other party for any consequent actual damages.

6. Concession Contracts for Construction of Projects (Construction Concession)

6/1 Definition and forms of a construction concession contract

6/1/1 Definition of a construction concession contract

A Construction concession contract is a contract between the State and another party according to which the latter constructs a specifically defined project usually related to public utilities.

6/1/2 Forms of construction concession contracts:

Construction concession contracts may take several forms including the following:

6/1/2/1 When the licensee constructs the project according to certain specifications, on a piece of land owned by the State, and the State becomes the owner of the project, while the licensee is entitled to the usufruct of the project for a specific period. After this period, the ownership of the usufruct is transferred to the State.

6/1/2/2 When the licensee constructs the project according to certain specifications on a piece of land owned by the State, and the project and its usufructs become

the property of the licensee for a specific period after which the ownership of the project (and its usufruct) goes to the State.

6/1/2/3 When the licensee constructs the project according to certain specifications on a piece of land owned by the State, and the project becomes a property of the State, while the two parties agree to share the revenue for a specific period after which the project belongs to the licensee.

6/1/3 In all three cases set out in 6/1/2, the licensee becomes entitled to collection of fees or rent for provision of services to the public.

6/2 Shari'ah perspective on construction concession contracts:

Construction concession contracts vary with regard to their Shari'ah adaptation, according to the following conditions:

6/2/1 If the commitment of the licensee includes construction works as well as provision of materials, which is the predominant case, the contract is that of "Istisna'a". The value of the contract is the right which enables the licensee to utilize the project for one's own benefit for a specific period before handing it over to the State.

6/2/2 If the project is constructed on a piece of land that the licensee obtained on lease from the State against handing over the project thereto after a specific period, the contract is that of "Ijarah" and the rent is the project itself which will be handed over to the State at the end of the contractual period.

6/3 Remuneration for construction concession contracts

6/3/1 When the remuneration for construction of the project is determined in terms of the right to utilize the project for a specific period, the contract is considered as "Istisna'a" against a price determinable in terms of utilizing the constructed facility for a specific period before handing it over to "al-Mustasni'".

6/3/2 If the remuneration for the construction of a project is determined in terms of a certain amount of money, the licensee retains the ownership of the project to ascertain one's right to get the price through utilization of the project. Licensee has also the right of arranging a clearance deal with the licensor so that the licensee can receive the full price and hand over the project to the licensor before the end of the contract period. Otherwise, the licensee keeps on utilizing the project until the receipt of the full amount agreed upon.

7. Application of Utilization Concession Contracts by Institutions

Institutions can apply utilization concession contracts either through direct relationship with the State, or by playing an intermediary role in the contract between the State and the licensee. Application of such contracts may take place in one of the following forms:

7/1 Ju'alah

It is possible to apply Ju'alah or Parallel Ju'alah where the licensee receives a specific share of the output as remuneration.

7/2 Ijarah

Ijarah contract may be applied where the State gives the land on lease to the licensee for a rent payable as a predetermined share of the output. The licensee may, in turn, give the land on lease to a third party to establish the project thereon (sub-contracting).

7/3 Mudarabah

Mudarabah may be applied where the State provides the land to the licensee to utilize it on the basis of a predetermined rate of profit sharing. The Institutions may either implement the project directly or through two-steps Mudarabah.

7/4 Musharakah

In utilization concession contracts, Musharakah - whether fixed or diminishing - may be applied as follows:

7/4/1 In fixed Musharakah, the Institution contributes a share in the required capital besides the State or the party that executes the

concession license, and the Musharakah continues up to the end of the contract's period.

7/4/2 In diminishing Musharakah, the Institution contributes a share in the required capital, and undertakes (the Institution or the party that executes the concession license) to sell its share in the project gradually to the State.

8. Application of Construction Concession Contracts by Institutions

Institutions may apply construction concession contracts whether through direct relationship with the State, or by entering as an intermediary party in the contract between the State and the licensee. Application of such contracts may take place in one of the following forms:

8/1 Ijarah and Ijarah Muntahia Bittamleek

In this case, the licensee hires the land from the State with the aim of constructing the project thereon and presenting the project back to the State based on Ijarah Muntahia Bittamleek. The licensee may, use a sub-contract of operating or diminishing Ijarah, to rent out the land to another party to construct the project thereon.

8/2 Istisna'a

Istisna'a and Parallel Istisna'a contracts may be applied where the State is "al-Mustasni'" and the Institution becomes "al-Sani' (the licensee is a parallel Mustasni')" and the price of the product is the income generated from the fee or rent collected from the public for provision of the services.

8/3 Musharakah

In construction concession contracts Musharakah, whether fixed or diminishing, may be applied as follows:

8/3/1 In fixed Musharakah, the Institution contributes a share in the required capital besides the State or the party that executes the concession license, and the Musharakah continues up to the end of the contract's period.

8/3/2 In diminishing Musharakah, the Institution contributes a share in the required capital, and undertakes (the Institution or the party that executes the concession license) to sell its share in the project gradually to the State.

9. Disposing of the Concession License

Since the concession license is a financial right, its owner may dispose it of through selling, leasing, mortgaging, partnership or securitization according to Shari'ah rulings, as well as the conditions imposed by the licensor.

10. Management Concession Contracts

10/1 Definition of management concession contracts

These are contracts between the State and other parties according to which the right of managing public utilities and providing services to the public is given against a specific price.

10/2 Shari'ah perspective on management concession contracts

10/2/1 When the price for offering management concession is determined as a lump sum amount of money or a percentage of total income, the contract between the State and the licensee is that of Ijarah. The licensor in this case has the right to receive rent for offering the concession license, in addition to the amount/percentage of income the licensor deserves during the period of the contract. If the price of the management concession is a percentage of the profit (net income after expenses and allocations), the contract between the State and the licensee becomes Mudarabah wherein the capital is the original facility or the project itself.

10/2/2 In both cases mentioned in item (10/2/1) above, the contract between the State and the project's utilizer is either that of Ijarah or *Bay'* (sale) contract, as per the nature of the activity in question.

10/3 Cancellation of the management concession contract

Management concession contract is a fixed-term contract. It may be rescinded by the State when the licensee breaches a condition or fails to meet one's contractual obligations. The licensee may also rescind the contract on condition that the licensee takes the measures that ascertain the provision of the services to the public.

10/4 Pricing of services

It is permissible for the licensor to fix or adjust the price of the services to be delivered by the licensee in a way that leads to establishing justice and preservation of the interests of both the licensee and the beneficiaries.

10/5 Observation of the contract's conditions

The licensor has the right to perform (directly or through deputation) monitoring and inspection to ascertain observation of the conditions and specifications stipulated in the contract. It has also the right to impose penalties stipulated in the contract, in case of breach of contractual obligations on the part of the licensee.

11. Date of Issuance of the Standard

This Standard was issued on 22 Rabi' I, 1426 A.H., corresponding to 2 May 2005 A.D.

Adoption of the Standard

The Shari'ah Board has adopted the Standard on Concession Contracts in its meeting No. (14) held in Dubai on 21–22 Rabi' I, 1426 A.H., corresponding to 30 April – 2 May 2005 A.D.

Appendix (A)
Brief History of the Preparation of the Standard

The Shari'ah Board decided in its meeting No. (7) held on 9–13 Ramadan 1422 A.H., corresponding to 24–28 November 2001 A.D., in Makkah Al -Mukarramah to issue a Shari'ah Standard on Concession Contracts.

On 12 Jumada I 1423 A.H., corresponding to 22 July 2002 A.D., the Shari'ah Standards Committee decided to commission a Shari'ah consultant to prepare a draft standard on concession contracts.

In its meeting No. (5) the Shari'ah Standards Committee (2) held on 1 Rajab 1423 A.H., corresponding to 8 September 2002 A.D., in the Kingdom of Bahrain, the committee discussed the Shari'ah study and advised the consultant to introduce the necessary amendments, in light of the discussions and observations of its members.

In the joint meeting of the Shari'ah Standards Committees (1) and (2) on 21 January 2004 A.D., held for discussing the observations made in the public hearing that had been convened on the same day in the Kingdom of Bahrain, the committee discussed the draft standard on concession contracts and introduced necessary changes. The committee also requested the consultant to review the document in light of the discussion and comments of its members.

The committee once again discussed the draft standard in its meeting in Dubai on 28 Rabi' I, 1425 A.H., corresponding to 16 June 2004 A.D., and made further changes therein.

The revised draft of the standard was then submitted to the Shari'ah Board in its meeting No. (3) held in Makkah Al-Mukarramah on 26-30 Sha'ban 1425 A.H., corresponding to 10–14 October 2004 A.D. The Board

made some changes on the document and decided to present it to some experts for their comments before discussing it later in the public hearing.

A public hearing was held in the Kingdom of Bahrain on 15 Safar 1426 A.H., corresponding to 25 March 2005 A.D. and attended by more than 35 participants representing central banks, Institutions, accounting firms, Shari'ah scholars academics and other concerned parties. Several comments were made before and after the public hearing. Some members of the Shari'ah Standards Committees (1) and (2) responded to the queries raised during the session.

In the meeting of the Shari'ah Standards Committees (1) and (2), held in the Kingdom of Bahrain on 15-16 Safar 1426 A.H., corresponding to 25-26 March 2005 A.D., the comments made during the public hearing were discussed and some appropriate changes were made.

The Shari'ah Board convened its meeting No. (14) on 21–23 Rabi' I, 1426 A.H., corresponding to 30 April – 2 May 2005 A.D., in Dubai (U. A. E) and adopted the Standard.

Appendix (B)
The Shari'ah Basis for the Standard

Concession for Utilization of Minerals

- The right of the State to regulate survey or exploration of minerals, water and the like by offering exclusive rights of utilization, stems from the fact that such an act by the State leads to realization of public interest and prevention of disputes. This reasoning is adopted by the fuqhaa who argue that development of wasteland requires State permission. The basic assumption here, knowingly, is that when the State disposes of public property, its act is supposed to be that of serving the cause of public interest, which should always surpass private interest.
- The distinction between survey on the one hand, and exploration and concession on the other, and the fact that only the latter two can enable the licensee to have the exclusive status as a contractor, stems from the fact that survey is based on mere expectation, while exploration is like *Tahjir* (retention) in wasteland development, which usually precedes utilization. Thus, offering the exclusive right to the explorer can be based on the saying of the Prophet (peace be upon him): *"Whom who develops a piece of wasteland shall become its owner."*(2)
- The ruling that gives the one who discovers the minerals the priority in utilizing them is extracted from the fact that exploration resembles wasteland development, which entitles to ownership of the developed land.
- The alternate viewpoint of the Maliki School, which considers minerals as the property of *Bayt al-Mal* (treasury) even when discovered in a private land, leans towards the fact that no body, the landlord included, can claim the honor of bringing these minerals into being. Putting the mi-

(2) This Hadith has been Related by Al-Bukhari in his *"Sahih"* [3: 139], Al-Shaab Publications, 1378 A.H.

nerals at the disposal of the State, therefore, does not leave any room for dispute between the property owner and the one who discovers the minerals.

- The viewpoint of the majority of the Fuqaha, including the Maliki School, that the minerals are the property of the landowner, focuses on their perspective that deems land ownership as underground resources. Moreover, the fact that the *Kharaj* imposed on land is one fifth indicates that the remaining four fifths are the property of the landowner.
- Eligibility of the holder of the concession for utilization of minerals to other rights pertaining to production and transportation devices is due to the fact that such rights constitute the complementary requirements. This reasoning also holds true for eligibility of the licensee to the easement rights pertinent to one's license.
- The condition that the licensee should sustain the activity in question originates from the Shari'ah ruling on the case of a person who retains a piece of wasteland for a period of time without developing it. In this connection it has been narrated that Caliphate Umar Ibn Al-Khattab said: "When somebody develops a piece of wasteland that had been left for three years undeveloped by its original owner, the land becomes the property of the developer"(3)
- Eligibility of the State to purchase the quantity it requires from the output of the project is justifiable by the need to realize public interest without harming the licensee, since purchasing takes place according to the procedures and conditions available to other clients. With regard to the right of the State to fix the price of the product, the justification is hinged on the need to prevent social injury that could result from charging unduly high prices by licensee.
- The State is given the right of amending concession contracts for minerals when necessary, because the acts of the State are normally considered to be in pursuance of public interest, which should always surpass private interest.

(3) Related by Abu Yusuf in *"Al-Kharaj"* (P. 61), Dar Al-Ma'arif edition. Al-Hafiz said in *"Al-Dirayah"* that this Hadith has been narrated by reliable people.

Concession for Construction of Projects

- Project construction contracts are permissible because they come under commitments that should be honored by virtue of the divine ordain of Allah, Exalted be He, Who says: ***{"fulfill (all) obligations"}***[4] and also the Hadith of the Prophet (peace be upon him): *"Muslims honor all their obligations except those which permit prohibited deeds or prohibit permitted deeds"*[5]
- Permissibility of remunerating the licensee by allowing him to benefit from the project before handing it over to the licensor, relates to the fact that in Istisna'a, temporary benefiting from the product may constitute the price of its production. That is to say, the price can be either money or usufruct including that of the product in question. This viewpoint has been confirmed by a similar resolution of the Al Baraka Seminar.[6] The other viewpoint referred to in this Standard is that the price should be fixed first, and then the licensee is given the chance to utilize the project until he gets the remuneration agreed upon, regardless of any specific period of time. The basis for this viewpoint is that a predetermined period may not be sufficient for getting the full price. This viewpoint, therefore, seems to visualize the relationship between the State and the Institution as a management relationship, as well as a clearance arrangement with regard to the price to be paid and the period of utilization.
- Permissibility for Institutions to enter into concession contracts with the State directly or as intermediaries is clear because they do this in a permissible contractual form such as Ju'alah, Mudarabah, Musharakah, Istisna'a and Ijarah. All these contractual forms are permissible whether performed directly or though entering as an intermediary between the State and the other original party to the contract.

(4) [Al-Ma`idah (The Table): 1]

(5) Narrated by several companions of the Prophet (peace be upon him) and quoted by: Ahmad [1: 312], Ibn Majah [2: 784], Mustafa Al-Babi Al-Halabi, Cairo, 1372 A.H./1952 A.D.); Al-Hakim (Hyderabad Publications, India, 1355 A.H.); Al-Bayhaqi [6: 70 and 156], [10: 133], Hayderabad Publications, India, 1355 A.H.); Al-Daraqatni [4: 228], [3: 77], Dar Al-Mahasin, Cairo, 1372 A.H./ 1952 A.D.).

(6) Resolutions and Recommendations of the 17th Seminar of Al Baraka, Resolution No. 13/2, (P. 220).

Management Contracts

- Permissibility for the State to offer concession licenses for management of public utilities is justified by the fact that the State has the right of regulating such facilities and collecting fees, and therefore it can transfer this right to a second party. The management contract in this case is Ijarah and the government has the right of identifying the lessee on the ground of common interest.
- Permissibility of fixing the contract's value in terms of money is that the deal is considered as Ijarah, and determination of the contract's value as a specific share of the project's income could embody uncertainty (*Jahalah*) pertaining to the possibility of realizing the agreed upon amount during the contract's period. The relationship between the State and the licensee, in this sense, is considered as an Ijarah deal. If such relationship is considered as Mudarabah, the basis for determination of the contract's value will become a given share of the project's profit, which can be determined only after preservation of the project's capital, which is the managed asset in this case. The Hanbalis permit Mudarabah on income-generating assets like animals. The reason behind the justification for sharing the net profit after allocations is the preservation of the project's capital.
- Permissibility for licensor to rescind the contract when the other party breaches a condition or fails to fulfill an obligation is derived from the commitment of Muslims to honor contractual obligations according to the Hadith of the Prophet (peace be upon him) stating: *"Muslims shall honor their obligations"*[7]

(7) Narrated by several companions of the Prophet (peace be upon him) and quoted by: Ahmad [1: 312], Ibn Majah [2: 784], Mustafa Al-Babi Al-Halabi, Cairo, 1372 A.H./1952 A.D.); Al-Hakim (Hyderabad Publications, India, 1355 A.H.); Al-Daraqatni [4: 228] and [3: 77], Dar Al-Mahasin, Cairo, 1372 A.H./ 1952 A.D.).

Shari'ah Standard No. (32)

Arbitration

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

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

Preface

This Standard aims to define Arbitration and indicate its conditions and scope. It also discusses the Shari'ah status of arbitrators, arbitration document and verdicts, methods of initiating and implementing arbitration, and how arbitration is implemented in Islamic financial institutions (Institution/ Institutions).[1]

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

Statement of the Standard

1. Scope of the Standard

This standard covers arbitration as practiced in financial transactions and other activities and relationships which take place among institutions, or between Institutions and their clients or employees or other parties; whether inside or outside the host country of the institution.

2. Definition of Arbitration

2/1 Arbitration is an agreement between two parties or more to designate an external party for resolving a dispute between them through issuance of a binding verdict.

2/2 Arbitration in this standard refers to (Islamic Arbitration) which observes the rules and conditions of Shari'ah.

3. Forms of Resorting to Arbitration and Arbitration Parties

3/1 Arbitration can be sought through agreement of the two parties at the time of dispute, or in fulfillment of a previous agreement between them to seek arbitration instead of resorting to law. Arbitration can also be legally imposed on the two parties.

3/2 Seeking Islamic arbitration should be stipulated in the agreements in which the two parties cannot be forced to resort to laws that contradict with Shari'ah.

3/3 Arbitration parties are the two (or more) conflicting parties who seek arbitration.

4. Permissibility of Arbitration

Arbitration is permissible whether it is sought by two natural or legal persons, or by a natural person and a legal person.

5. Shari'ah Status of Arbitration

5/1 Arbitration is binding in the following cases:

a) When it is stipulated as a condition in the contract

b) When the two parties agree on seeking arbitration on dispute, and pledge to observe its verdicts.

5/2 Arbitration is not binding for an arbitrator who is not entitled to remuneration. Such an arbitrator can terminate himself after accepting the task. If the arbitrator is paid for his job, arbitration becomes binding for him. In this latter case, if the arbitrator terminates himself after accepting the task, he should bear any actual harm that may result from his act. [see Shari'ah Standard No. (34) on Hiring of Persons]

6. Basic Elements of Arbitration

6/1 The basic element of arbitration is its form, which refers to the process of exchange of offer and acceptance between the two parties seeking arbitration, and the arbitrator.

6/2 Valid arbitration has to fulfill the following requirements:

6/2/1 Existence of dispute between two parties or more, around a permissible right.

6/2/2 Agreement between the two parties on arbitration, and their mutual consent on accepting the verdicts of the arbitrator.

6/2/3 Acceptance of the arbitrator to do the arbitration task.

7. Scope of Arbitration (What Should Be Resolved Through Arbitration in Shari'ah)

7/1 Arbitration is permissible in whatever a party is entitled to relinquish his right in.

7/2 Arbitration is impermissible in the following cases:

7/2/1 What constitutes a right of Allah, Glory be to Him, such as Hudud (Shari'ah penalties).

7/2/2 Cases that entail proving or disproving of a verdict that concerns a third party.

7/3 When the arbitrator issues a verdict on an issue that should not be resolved through arbitration; his verdict is null and void.

8. Characteristics and Appointment of the Arbitrator

8/1 An Arbitrator shall have the full eligibility for performing his task.

8/2 In principle, an arbitrator shall be a Muslim. However, a non-Muslim arbitrator could be appointed when acute need so requires, in order to arrive at a Shari'ah-accepted verdict (in this regard, item 11/1 below shall be observed).

8/3 It is permissible to appoint one arbitrator or more, and – preferably – the number of arbitrators is to be odd, otherwise, the two parties (the seekers of arbitration) may appoint a chairman for the arbitration panel, whose vote shall be the casting vote when other votes are equal.

8/4 Each of the dispute parties may appoint one arbitrator, and the appointed arbitrators may appoint a final arbitrator if they are permitted to do so by the disputing parties.

8/5 When any of the two parties refrains from appointing an arbitrator from his own side as per the contract, the other party has the right to resort to the judiciary for appointing an arbitrator to represent the refraining party, provided that the arbitration condition in the contract does not specify another way for appointing such arbitrator.

8/6 The arbitrator has no right to appoint an alternate arbitrator to replace him, without the permission of the party that appointed him, because he has been accepted as an arbitrator in person. However, the arbitrator could have this right if arbitration is assigned to an Institution or an arbitration committee whose members are appointed with due consideration for its declared conditions of selection.

8/7 An agent or a Mudarib does not have the right of accepting arbitration, except with the consent of the principal for the agent and the owners of

the capital for the Mudarib, or on the basis of a clause in the Mudarabah conditions such as conditions in investment accounts. No one should become part of the arbitration on behalf of an institution that has a legal personality except its official representative.

9. Arbitration Document

9/1 The arbitration document originates from agreement of the two parties of the dispute on arbitration, and acceptance of the arbitrator to perform the task, and is called (the arbitration contract) or (the arbitration agreement).

9/2 The arbitration document should include the names of the two parties of the dispute, the name of the arbitrator, the overall subject of dispute, the date specified for arbitration and the fees payable to the arbitrator if any.

9/3 The arbitration condition is the commitment of the two parties of the arbitration contract or agreement to resolve their disputes through arbitration. If such condition is stipulated in any agreement or contract, there will remain no need for agreement on arbitration at the time of dispute.

9/4 The arbitrator should apply the rulings of Shari'ah. If he is obliged to apply a certain law, he should still not violate the rulings of Shari'ah.

9/5 The two parties of the arbitration have the right to impose any permissible limitation on the arbitration so as to serve a permissible purpose of their own. Permissible limitations may include, for instance: issuance of the verdict within a specific time limit or in view of a certain School of Fiqh or a certain law that does not contradict the Shari'ah; or consultation with exerts specified in name or by description. In the latter case, however, the arbitrator is not bound to accept the viewpoints of the experts.

9/6 When the period specified for arbitration expires without issuance of the verdict, the arbitrator becomes terminated, unless the two parties agree on extending the period. The arbitration period starts at the

time when the arbitration document has been signed by all the parties seeking arbitration, and ends up at the time when the arbitration verdict has been signed by all these parties.

9/7 It is permissible to conclude a verbal arbitration contract, however, Institutions should document the arbitration verdict in writing.

9/8 Acceptance of arbitration does not require attestation in the arbitration document, though such attestation is preferable.

10. Methods of Judgment, Procedures and Proving in Arbitration

10/1 The arbitrator is free to use any legally accepted method of judgment, such as confession, evidence (attestation), oath taking, or refraining from oath (Nukul), while he should not make judgment on the basis of his own opinion. When the arbitrator rejects an attestation, his rejection should not constitute a reason for denial of that attestation in other arbitrations or in the judiciary, unless the same attestation is also rejected by the judiciary.

10/2 The arbitrator has the right to request all the documents and proofs relating to the dispute, or copies of such documents verified in comparison to originals. He has to show such documents to the two parties so as to seek their opinions on them. The arbitrator has also the right to request verbal or written statements from the two parties of the dispute or the witnesses, and to consult experts if needed.

10/3 The Arbitrator is neither required to follow the procedural rules of the judiciary, nor is he obliged to observe laws, unless such laws are part of public order.

10/4 The arbitrator is not supposed to stick to the legally stipulated rules of evidence. Instead, he has the right to make use of any other evidence, provided that the acceptance of that evidence does not contradict with the rules of Shari'ah.

10/5 The arbitration verdict is issued by consensus or majority and in the case of equal votes the party which includes the chairman is considered to have the casting vote, unless some other arrangements are proposed in the arbitration document or the rules of the arbitrating entity.

11. Issuance of the Arbitration Verdict

11/1 A valid arbitration decision should lead to a verdict that conform to the rules of Shari'ah.

11/2 The final arbitration decision should resolve all points of dispute and lead to fair specification of the rights of the arbitration parties. When arbitration ends up with partial resolution of the points of dispute, arbitration is incomplete since it has not enabled the disputing parties to avoid resorting to legal suing. In this case, the disputing parties have the right to demand a further decision from the arbitrator so as to resolve the remaining points of dispute.

11/3 Arbitration should not go beyond the subject matter of dispute, because tackling of any further issue does not fall within the mandate of the arbitrator, unless the two parties of the dispute agree to add it.

11/4 The arbitrator has the right, subject to his own discretion or on request of the disputing parties, to issue a commentary on the arbitration decision, or introduce corrections for any material mistakes that might be involved therein.

11/5 The arbitrator can issue his decision in a number of preparatory or partial decisions, or identify the responsibility without estimating indemnification.

11/6 It is preferable that the Shari'ah or basis of the arbitration decision be mentioned (reasoning), yet this does not constitute a condition for valid arbitration, unless the law so requires.

11/7 In principle the arbitration decision is to be issued in a session attended by the arbitrators if they are many (or most of them, after invitation). It can also be issued by circulation among members after being prepared by the final arbitrator, or the chairman of the arbitration panel, or any other authorized member. In the case of issuance by circulation, consensus among members should be reached.

11/8 The arbitration decision is to be issued under the signature of all members of the arbitration panel (when they are many) including those who raise objections against it, and objecting members should be allowed to state their objections on the document. The arbitration decision may also be issued under the signature of most of the members, after indicating the reasons that made some members refrain from signing. Nevertheless, the decision has to be issued at the knowledge of all members as per the minutes of the session convened for that purpose.

11/9 The arbitration decision includes: the text of the verdict; names, identities and addresses of the two parties of the dispute; reference to the date and number of the arbitration document; summary of the subject matter of dispute; claims of the two parties of the dispute and the supporting documents; names of witnesses and experts whose help was sought if any; names of arbitrators, date and place of issuing the verdict; signatures of arbitrators; signatures of the parties of dispute if possible; and reasons of the decision reached unless the arbitration document comprises exemption from such reasoning and there is no legal condition to that effect.

11/10 The arbitration decision should not necessarily be issued in the presence of the two parties of the dispute, although it is better to be so for shortening the procedure of communicating it to them.

11/11 It would be better to include in the conclusion of the arbitration decision a request or a recommendation to the judiciary or the concerned legal authorities to use every permissible means for its implementation.

11/12 The arbitration decision should not necessarily meet the consent of the two parties of the dispute. It should spontaneously be binding to them, unless it is revoked for being counter to the rules of Shari'ah or public order.

11/12 The arbitration decision can be issued on the basis of reconciliation as prescribed by Shari'ah or on the basis of consensual agreement.

12. Communication and Validity of the Arbitration Decision

12/1 The arbitration decision shall be communicated to the two parties of the dispute through the normal procedures, unless a specific way of communication is identified in the arbitration document or by any other legal authority.

12/2 The validity of the arbitration decision does not require attestation of witnesses on communication of the decision to the two parties of the dispute or the consent of these parties to it, although such attestation is recommendable for avoiding conflict.

12/3 The validity of the arbitration decision does not require its official registration or submission to the concerned court, yet this has to be done if it is required for legitimizing the implementation of the decision. In that case, the date specified for finalization of such procedure should be observed.

12/4 If the arbitration decision is written in more than one language, the language to be adopted in case of dispute should be specified.

12/5 A signed copy of the arbitration decision shall be handed over to each of the two parties of the dispute, while each one of the arbitrators (if many) shall retain a signed copy as well.

13. Implementation of the Verdict (the Form of Implementation), or Its Revocation

13/1 In principle, the two parties of the dispute should implement the arbitration verdict willingly. In case one party refrains from doing so, the other party has the right to present the verdict to judiciary for execution. Therefore, arbitration should not be resorted to if its verdict cannot be implemented.

13/2 For legitimizing the execution of the arbitration verdict, it is permissible to approach courts that do not observe the rules of Shari'ah.

13/3 The arbitrator does not have the right to retreat from his verdict, unless when he declares that he has committed a mistake in it.

However, in case of committing a mistake, the arbitrator can cancel or amend his verdict in view of the rules of the Islamic Shari'ah and in the way that would ensure justice.

14. Arbitration Expenses and the Arbitrator's Fees

14/1 It is permissible for the arbitrator, if he is not a volunteer or a government employee designated for doing arbitration, to receive fees for the task. The amount or percentage of such fees should be indicated in the conditions of arbitration in case of Institutional arbitration, or agreed upon in the arbitration document.

14/2 When the arbitration process leads to incurring of any expenses, such as transportation expenses for the arbitrator, witnesses and experts, or typing expenses, or fees payable to the arbitrator, the arbitration decision must specify the party that should bear them. It should be noted here that the expenses pertaining to the application of any of the disputing parties should be borne by that party alone, whereas common expenses are to be shared by the dispute parties, unless it is proved that one party has been deliberately intending to cause harm to the other through such expenses. In this latter case, the party that has been intending to cause harm should bear such expenses. All these preceding points hold true in the absence of a prior agreement which assigns the payment of the expenses to a specific party or to the condemned party.

15. Date of Issuance of the Standard

This Standard was issued on 30 Sha'ban 1428 A.H., corresponding to 12 September 2007 A.D.

Adoption of the Standard

The Shari'ah Board adopted the Standard on Arbitration in its meeting No. (19) held on 26-30 Sha'ban 1428 A.H., corresponding to 8-12 September 2007 A.D., in Makkah Al-Mukarramah, Kingdom of Saudi Arabia.

Appendix (A)
Brief History of the Preparation of the Standard

On 12 Rajab 1427 A.H., corresponding to 6 August 2006 A.D., the Shari'ah Board decided to issue a standard on Arbitration.

On 21 Sha'ban 1427 A.H., corresponding to 14 September 2006 A.D., a joint meeting of the Shari'ah Standards Committees (1) and (2) was held in the Kingdom of Bahrain, and discussed the study. The meeting requested the consultant to introduce necessary amendments in the light of the discussions and observations of the joint committee members. The meeting discussed also the Standard on Arbitration which was ready in the same session, and introduced necessary changes in it, in the light of the discussions that took place.

In its meeting No. (17) held in Makkah Al-Mukarramah, on 27 Shawwal – 1 Dhul-Qa'dah 1427 A.H., corresponding to 18-23 November 2006 A.D., the Shari'ah Board discussed the changes in the standard which had been made by the joint meeting of Shari'ah Standards Committees (1) and (2), and introduced changes that it deemed necessary.

The Secretarial General of AAOIFI held a public hearing in the Kingdom of Bahrain on 18 Safar 1428 A.H., corresponding to 8 March 2007 A.D. More than 30 participants attended the session as representatives of central banks, institutions, and accounting firms. The session was also attended by Shari'ah scholars, university teachers and other interested parties. Several observations were made in the session, and duly responded to by the members of the Shari'ah Standards Committees (1) and (2).

In its meeting No. (19) held in Makkah Al-Mukarramah, on 26 Sha'ban – 1 Ramadan 1428 A.H., corresponding to 8-12 September 2007 A.D., the Shari'ah Board discussed the amendments that had been suggested in the public hearing, introduced changes that it deemed necessary and adopted the Standard.

Appendix (B)
The Shari'ah Basis for the Standard

- In one sense, arbitration seems like agency on behalf of the two parties, although it also seems to involve private custodianship in another sense.
- According to Shari'ah arbitration could take place verbally, yet it is preferable – for Institutions in particular – to document it in writing. In order to be legally accepted, arbitration needs to be written and signed by the arbitrators and the parties of the dispute.
- In principle, selection of arbitrators should be subject to the same Shari'ah conditions for selection of judges including non-partiality. In case of necessity, some of these conditions could be dropped such as the condition that the arbitrator should be a Muslim. Nevertheless, a non-Muslim arbitrator should not issue a verdict that contradicts with Shari'ah.

Appendix (C)
Definitions

Sulh (Reconciliation)

It refers to a request of relinquishment of what the arbitrators consider to be the right of one of the two parties of the dispute. Such request shall not be made to a party who is an agent, unless he is delegated to do reconciliation. Preferably, the issuance of a reconciliation decision is to be based on a clear clause in the arbitration document indicating that arbitrators have the right to pursue reconciliation.

Consensual Settlement

It refers to the case when the two parties of the dispute agree, outside the arbitration task, on a settlement which they both accept, and request the arbitrators to issue a decision based on that settlement. The arbitrators in this case shall concur to the request of the two parties, unless the proposed settlement is impermissible, or contrary to public order.

Arbitration Document

It is a document signed by the two parties to pursue arbitration on a dispute which has arisen between them.

Arbitration Agreement

It is a prior condition or a contract stipulating resort to arbitration when dispute arises.

Material Mistakes

It refers to unintentional mistakes in names or numbers, when proofs or documents indicate the aspects which need correction.

Institutional Arbitration

It is the selection of an Institution that comprises competent arbitrators to resolve the dispute. In this case, there is no need for designating the arbitrator in name.

Shari'ah Standard No. (29)

Stipulations and Ethics of Fatwa in the Institutional Framework

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

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

Preface

The purpose of this standard is to indicate the meaning of Fatwa (Shari'ah opinion), elucidate the eligibility conditions for issuance thereof, and define its appropriate means and scope. The standard also aims to identify the observed methods of Fatwa presentation and explain how an erroneous Fatwa can be rectified.

Statement of the Standard

1. Scope of the Standard

This standard covers the area of Fatwa because it is one of the tasks assigned to Shari'ah Supervisory Boards (Board/Boards) of the Islamic Financial Institutions (Institution/Institutions).[1]

2. Definition of Fatwa and Istifta` (Seeking Fatwa)

2/1 The term Fatwa refers to a Shari'ah opinion presented to a person who seeks it with regard to an incidence that has already occurred (the Fatwa incidence) or is expected to occur. It does not refer to answering queries pertaining to hypothetical incidences.

2/2 Istifta` refers to the act of seeking the Shari'ah opinion on an incidence that has already occurred or expected to occur.

3. Shari'ah Ruling on Fatwa and Istifta`

3/1 Originally, Fatwa is a collective duty that can be discharged of by any one of those who are able to do it. Fatwa could, however, become the personal duty of the individual if he happens to be the only one in the community who is eligible to issue it.

3/3 The board has to provide Fatwa to the Institution by virtue of their relationship.

3/4 It is the duty of the Institution to seek Fatwa on incidences that actually occur or are expected to occur. It should also seek Fatwa for every operation that it intends to pursue.

3/5 Although the seeker of the Fatwa is free to use his best efforts to determine the most appropriate source (both in terms of knowledge and integrity) from whom he will seek the Fatwa, yet according to

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

the rules and regulations, Institutions have to seek Fatwa from their own boards.

4. Scope of Fatwa (Content)

Fatwa in Institutions is confined to operational financial rulings and issues pertaining to them such as some rulings on worshipping, as well as permissibility and prohibition in some concerns such as Zakah.

5. Conditions on Mufti (Fatwa Issuers)

5/1 A board member shall be well versed in Fiqh (Islamic Jurisprudence), well informed of the contributions of diligent Fiqh scholars, and has the ability to use the Shari'ah-accepted methods of deriving reasonable rulings on emerging issues. He shall also be known for his discernment, cautiousness and knowledge about the circumstances and traditions of people, and should always remain alert against the different means of human misbehavior. Competence in Fiqh is usually manifested by the vast reputation of the scholar or his distinguishable contributions especially in the area of financial transactions performed by institutions.

5/2 Issuing Fatwa to institutions does not require competence in all areas of Fiqh. Fatwa can be issued by a scholar who is competent only in the area of financial transactions performed by institutions.

5/3 The member of the Board shall have no personal interest in the matter for which the Institution seeks Fatwa.

6. Duties of the Institution That Seeks Fatwa

6/1 The Institution is obliged to follow the Fatwa once it is issued regardless of whether it meets the satisfaction of the management or not. This obligation holds true when the Fatwa entails enforcement or prohibition of a certain act. When the Fatwa entails permissibility of the act in question, the institution has the right to refrain from following it, if it believes that for practical needs it has to do so. In this case, however, rejection of the board Fatwa should be reported to the General Assembly of the institution.

6/2 Fatwa should be sought again if there are new developments that should be presented to the Board. New developments may include change or improvement of conception, occurrence of new circumstances, or non-existence of some of the underlying reasons of the previous Fatwa.

6/3 The institution should not follow the Fatwas of other Shari'ah Advisory Boards except with permission of its own Board.

6/4 The institution should not demand Fatwa according to a specific *Madhab* (School of Fiqh) even if it is the official school in its host country, or the school that official Fatwa bodies adhere to. However, attention should be given to situations where the legal or judiciary system in the country observes a specific school, and the issue in question may be taken to the courts in the future.

7. Methods and Means of Fatwa

7/1 Fatwa should basically be founded on what has been explicitly stated in the Qur`an and the Sunnah along with what has been supported by Ijma' (consensus of Fuqaha) or proved by Qiyas (analogical deduction). After resorting to the preceding sources, the judgment of the Mufti (issuer of the Fatwa) with regard to the different viewpoints of the Fuqaha (scholars of Fiqh); i.e, Istihsan (Shari'ah approbation) and *Maslahah Mursalah* (public interest) may be considered as the basis for issuance of Fatwa.

7/2 Fatwa should not be based on a personal viewpoint that does not cater for the sources referred to in item (1/7) above, or contradict with the general texts of the Qur`an and the Sunnah that have explicit indications. Moreover, Fatwa shall also not fall in disparity with well-established Ijma' or the general rules derived from the Qur`an and the Sunnah.

7/3 Absence of explicit directives in the Qur`an and Sunnah on a given issue, or non-existence of the issue in the prevailing Fiqh literature, do not justify refraining from seeking Fatwa on that issue. Fatwa in this case may be derived through Shari'ah-sanctioned rules and methods of deduction.

7/4 The board may coordinate with the Institution to transfer the Fatwa, if necessary, to a board that is considered to be more reliable due, for instance, to its larger membership, or its inclusion of more specializations, such as Fiqh academies, AAOIFI Board and the Supreme Shari'ah boards.

7/5 Among the means that may be used for reaching the appropriate Shari'ah ruling on a given issue are the following:

7/5/1 Building detailed knowledge about the issue of the Fatwa through questioning the one who seeks it, consulting other boards, resorting to experts and specialized parties, and taking into consideration the prevailing norms and tradition.

7/5/2 Tracing the Shari'ah ruling on the issue in the different schools of Fiqh, and exerting due endeavors to ascertain if the issue encounters the existence of contradicting proofs, or it is an issue that has not been specifically dealt with in the Qur`an and the Sunnah or discussed by the Fuqaha.

7/5/3 Making use of collective Fatwas, such as the resolutions of the Islamic Fiqh Academy, other Shari'ah Advisory Boards, seminars, and conferences.

7/6 The board should issue Fatwa whenever the Institution approaches it for that purpose, except when it feels that the Institution may use the Fatwa for committing a impermissible action. In that case, the board may either refrain from issuing the Fatwa, or make it subject to certain restrictions.

7/7 Endeavors should be made for disseminating the Fatwas of the Institution and exchanging them with other Institutions and related bodies.

8. Fatwa Controls

8/1 Derivation of presumptive indications from the texts, or usage of unattested narrations about the Prophet (peace be upon him) should be avoided. Moreover, all the Sunnah texts used for supporting the Fatwa should be well-documented.

8/2 Fatwa issuers, while issuing the Fatwa, shall signify keenness to quote *Ijma'* and opinions of diligent Fuqaha from their accredited sources, as well as concentration on those opinions which have gained more accreditation in each School of Fiqh, and should resort to available Fiqh literature on principles of issuing Fatwa.

8/3 When the Fatwa offers the chance for choice between two permissible actions, preference shall be given to the easier. If choosing one of the two permissible actions would result in realization of a lawful interest while choosing the other would leave the door open for blight, leaving the door open for blight should be avoided, and efforts shall be exerted to resolve the repercussions that may subsequently result.

8/4 Fatwa issuers shall not always pursue Shari'ah exemptions to make matters easier for Institutions. A Shari'ah exemption should be sought only when it results from thorough examination of the issue and appropriate reasoning. Moreover, it has to be ensured that making use of the Shari'ah exemption does not embody a related act that the Fuqaha unanimously consider as prohibited, or lead to issuing different Fatwas for two identical incidences. Misuse of Shari'ah exemptions in this manner is known in Fiqh as "*Talfiq*" (fabrication).

8/5 Fatwa issuers shall not direct Institutions to impermissible tricks for escaping Shari'ah restrictions, or violating the objectives of Shari'ah legislation.

8/6 Fatwa shall not be issued hastily, declaring (for instance) prohibition of an act for the mere sense of condemnation that the one feels towards new habits and traditions, unless such habits and traditions contradict with the rules and principles of the Shari'ah. Similarly, declaring permissibility of an act shall not come for the mere sake of following rules and traditions.

8/7 It shall be made clear, when necessary, that declaring permissibility of an act is by no means amount to recommending that act or making a call for performing it.

9. Text of Fatwa

9/1 The Fatwa shall be clearly stated so that it may not be misunderstood by the layman, or taken to mean different things to those who have bad intentions.

9/2 When there are more than one Fiqh opinion on the same issue, the board shall declare the specific opinion that it subscribes to. If the issue is controversial the board has to explain the specific bases of its choice.

9/2 When the Fatwa has more than one aspect all such aspects have to be clearly indicated.

9/3 In principle, mentioning the proof is not an underlying condition for issuing the Fatwa, and the Institution has no right to impose it as a condition for accepting it. However, the board has to refer to the bases of its Fatwa.

9/4 The Fatwa statement shall be precise, concise and free from any confusing details and preachy expressions that have nothing to do with serving the purpose. If, however, the subject requires detailed statement for the sake of public interest or so as to convince the regulatory and supervisory bodies, it would be better to add such expressions, in order to justify the ruling, indicate the goal behind it, and warn against falling into blights.

9/5 There is no harm to provide more information than what has been requested by the seeker of the Fatwa in order to leave no room for confusion, or to distinct the opinion from other similar opinions, or to serve a future need of the Fatwa seeker.

10. Fatwa Manuscript (Document)

10/1 In principle, Fatwa can be issued by uttering, signaling or acting, but for Institutions it should be written to become an evidence or a document that can be referred to.

10/2 Fatwa shall be started by the Verse of *Basmalah* (i.e., In the name of Allah, the Most Gracious, the Most Merciful), along with praise to Allah and blessings on Prophet Muhammad (peace be upon him).

At the end of the Fatwa, the same expressions could be repeated or, in stead, expressions like *"Allahu A'lam"* (Allah knows best) could be introduced to indicate closing up of the Fatwa statement.

10/3 Fatwa shall be clearly handwritten or typed, and each page of it shall be initialed. It should also carry the date of its issuance and the official stamp of its issuing source, if such stamp is available.

10/4 Clear linkage between the Fatwa request and the Fatwa statement should be indicated. Preferably, there shall be a precise summary of the question.

10/5 When the Fatwa is issued by the concerned board of the Institution, the content of the Fatwa shall be stated in the formal proceedings of the board meeting.

11. Retreat from a Mistaken Fatwa

11/1 The board has to retreat from its Fatwa if it is proved to be wrong on reviewing, or on examination by a higher body. In such case, the board has to inform the Institution so as to rectify the ruling and its consequent effects. The Institution on its part has to correct all the actions that had been based on the wrong Fatwa and refrain from adopting it any more.

11/2 The board, on its own initiative or on request of the institution, has the right to review a previous Fatwa even if such revision would lead to issuing a new Fatwa that contravenes the former one. In such case, the Institution has to follow the new Fatwa in the future and rectify the effects and repercussions of the old one.

12. Morals of Fatwa (Ethics of Fatwa Issuers)

12/1 Being slow and cautious in explaining the Fatwa, and avoiding over-courage in making Fatwa decisions.

12/2 Avoidance of issuing different Fatwas, on the same subject and the same issue, according to the source of the Fatwa request.

12/3 Fatwa issuer should avoid issuing Fatwa when he is mentally involved in a personal affair that leaves him no room for offering correct judgment.

12/4 Keeping the secrets of the Institution and its employees, as well as the application mechanisms, which have been revealed to the board in the Fatwa process. Dealing with such secrets should not surpass the limits of illustrating the Fatwa, to indulge into unnecessary disclosure of information on technical means and procedures of application.

13. Date of Issuance of the Standard

This Standard was issued on 1 Dhul-Qa'dah 1427 A.H., corresponding to 23 November 2006 A.D.

Adoption of the Standard

The Shari'ah standard on Controls and Ethics of Fatwa in the Institutional Framework was adopted by the Shari'ah Board in its meeting No. (16) held in Al-Madinah Al-Munawwarah on 1 Dhul-Qa'dah 1427 A.H., corresponding to 23 November 2006 A.D.

Appendix (A)
Brief History of the Preparation of the Standard

The Shari'ah Board decided in its meeting No. (14) held in Dubai (U.A.E) on 21–23 Rabi' I, 1426 A.H., corresponding to 30 April – 2 May 2005 A.D., to issue a Shari'ah Standard on Controls and Ethics of Fatwa in the Institutional Framework.

On 29 Jumada I, 1426 A.H., corresponding to 6 July 2005 A.D., the Shari'ah Standards Committee decided to commission a Shari'ah consultant to prepare a study on Controls and Ethics of Fatwa in the Institutional Framework.

The study was discussed in a meeting of a joint committee comprising Shari'ah Standards Committees (1) and (2) held in Makkah Al-Mukarramah on 8–9 Rabi' I, 1427 A.H., corresponding to 6–7 April 2006 A.D., and the consultant was advised to incorporate necessary changes, in the light of the discussions and observations raised in the meeting.

The revised draft of the Standard was submitted to the Shari'ah Board in its meeting No. (16) held in Al-Madinah Al-Munawwarah on 7–12 Jumada I, 1427 A.H., corresponding to 3–8 June 2006 A.D. Further changes were introduced in the draft and the board decided to send it to the concerned experts for review and observations before discussing it in a public hearing.

AAOIFI then held, in the Kingdom of Bahrain on 6 Rajab 1427 A.H., corresponding to 31 July 2006 A.D., a public hearing which was attended by more than 30 participants representing central banks, institutions, accounting firms, Shari'ah scholars, university teachers and other interested parties. Several observations were made in the session to which the members of the Shari'ah Standards Committees (1) and (2) duly responded.

In its meeting No. (17) held in Makkah Al-Mukarramah on 26 Shawwal – 1 Dhul-Qa'dah, 1427 A.H., corresponding to 18–23 November, 2006 A.D., the Shari'ah Board accepted the changes proposed by the participants in the public hearing and adopted the Standard (unanimously for some clauses and with the majority for others), as indicated in the minutes of the Board's meetings.

Appendix (B)
The Shari'ah Basis for the Standard

- Fatwa is considered as a collective duty that can be discharged of by any one of those who are able to do it, because it is one of the religious functions that serve public interest. Therefore, what is required is to have someone in the Muslim community who can issue Fatwa, rather than to have each and every individual of the community able to do so. Fatwa would become the duty of a specific individual or a group only if that individual or group is the only one who can issue it. If Fatwa were to become the duty of every member of the society, things would be more complicated.[2]
- It is the duty of the institutions to seek Fatwa because otherwise they would not be able to meet their commitments to observe the rules of the Islamic Shari'ah. Therefore, Institutions should approach the boards for obtaining Fatwa. Similarly, it is the duty of the board to issue Fatwa to the Institution due to the relationship that binds the two by virtue of the decision of the general assembly (equity owners) of the Institution.
- Acceptance of the Fatwa of a Shari'ah scholar whose knowledge is confined to only one branch of Fiqh, such as financial transactions in institutions, is based on the viewpoint that Ijtihad (reasoning) and Fatwa may be made partially.[3]
- Preventing the Institution to adopt the Fatwas of other boards, except when allowed by its own board to do so, stems from the need to bar the way to any tendency of fabrication or attempt to pursue Shari'ah exemptions without observing their relevant controls or their context and circumstances, an act which leads to adoption of irrelevant Fatwas.
- Permissibility of referring the Fatwa to a higher Shari'ah board or to a Fiqh forum for reconsideration, or making use of collective Fatwa, rests on the

(2) *"Sifat Al-Fatwa Wa Al-Mufti Wa Al-Mustafti"*, Ibn Hamdan Al-Hanbali (P. 52)
(3) ibid. (P. 28).

fact that an opinion that gains support from a large group of eligible scholars is likely to be more reliable. Moreover, collective Fatwa may facilitate more coordination, and avoidance of discrepancies in the Fatwas of the different boards on the same subject.

- Withdrawal or refraining from dissemination of a certain Fatwa for fear of being misused is based on the principle of *Sadd al-Zara`i'* which advocates the prohibition of a permissible act if it would (certainly or probably) lead to blight.
- Pursuing Shari'ah exemptions is prohibited because it leads to relaxation of the rules of the Islamic Shari'ah and induce loss of keenness to observe them. Therefore, some Fuqaha hold that pursuing Shari'ah exemptions amounts to *Fisq* (rebellion against Allah's Obedience).(4)
- Choosing the easier ruling when two alternative options are available is supported by the Qur`an in Allah's Saying: ***{"Allah intends for you ease, and He does not want to make things difficult for you"},***(5) and by the Sunnah in the Prophetic Hadith stating: *"Make things easier not harder..."*.(6) All these directives are to be considered after reviewing the specific proofs.(7)
- The controls relating to the text of the Fatwa are meant to ensure that the Fatwa would achieve its goal without deviating to an invalid meaning. As indicted by Ibn Hamdan(8) in his book *"Sifat Al-Fatwa"*, drawing attention to these controls and what the ancestor Fuqaha had said about them is meant to ensure the appropriateness of the Fatwa.
- Permissibility of offering additional information with the Fatwa is shown by the statement of the Prophet (peace be upon him) when he was asked about using seawater for *Wudu`* (ablution): *"Seawater is pure and sea carcasses are permissible"*.(9)

(4) *"I'lam Al-Muwaqqi`in"* by Ibn Al-Qayyim [1: 222]; and *"Sifat Al-Fatwa Wa Al-Mufti Wa Al-Mustafti"* by Ibn Hamdan (P. 32).
(5) [Al-Baqarah (The Cow): 185]
(6) *"Sahih Al-Bukhari"* (H: 69); and *"Sahih Muslim"* (H: 1734).
(7) *"Rasm Al-Mufti"* by Ibn Abidin (P. 11).
(8) *"Sifat Al-Fatwa Wa Al-Mufti Wa Al-Mustafti"* by Ibn Hamdan (pp. 58–66).
(9) *"Sunan Ibn Majah"* (H: 386 and 388).

- The controls on the Fatwa document aim to preserve Fatwa from being misused.[10]
- The ruling that a wrong Fatwa should be rectified is supported by the incident when the Caliphate Umar in one case issued a Fatwa that denied some of the brothers the right of inheritance, and later on he issued another Fatwa that granted such brothers the inheritance right. Having done so he said: the former case was subject to my previous Fatwa, and the new one is subject to the new Fatwa.[11]
- Avoidance of hasty Fatwa should be observed because it was the practice of the *Sahabah* (Companions of the Prophet) and the other leading Fuqaha who succeeded them. In issuing Fatwa, one should not feel shy to say: I do not know, or to postpone the Fatwa until he is in a position to answer it properly.[12]

(10) See more elaborations on *"Sifat Al-Fatwa Wa Al-Mufti Wa Al-Mustafti"* by Ibn Hamdan (P. 63).
(11) *"Jama' Al-Jawami'"* by Al-Subki (with elaborations by Al-Mahalli) [2: 391].
(12) *"Sifat Al-Fatwa Wa Al-Mufti Wa Al-Mustafti"* by Ibn Hamdan (pp. 6-11).

Appendix (C)
Definitions

- Judgment entails the issuance of a verdict which is binding to the two litigants. In this sense, Fatwa differs from judgment as the latter entails offering a Shari'ah ruling without enforcing commitment towards it. Fatwa also differs from education, because the latter is not restricted to a specific incident. Therefore, Fatwa is quite distinct from an initiation to teach Shari'ah rulings, or a mere act of seeking knowledge about hypothetical incidences.

Shari'ah Standard No. (47)

Rules for Calculating Profit in Financial Transactions

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

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

Preface

This Standard aims to explain the rules and methods of calculation and distribution of profits in financing or investment activities of Institutions.[1]

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

Statement of the Standard

1. Scope of the Standard

This Standard covers profit, its validity in Shari'ah and rules and methods of calculating and distributing it. It also explains who is entitled to profit earned from the financing and investment activities of the institutions. This Standard does not cover profit distribution in investment accounts because that is provided in a separate Standard.

2. Definition of Profit and Methods of Calculation

In the context of this Standard, Profit means the amount generated in excess of the original capital or of the cost in the operations of financing and investment activities. Calculation of profit refers to the methods used to determine the amount of profit in the institution's operations.

3. Permissible and Impermissible Profit

3/1 Permissible profit is that which results from a permissible transaction such as a sale, lease or partnership, in compliance with Shari'ah rules relating to contracts.

3/2 Impermissible profit is that which results from a prohibited transaction such as interest-based contracts, trade in forbidden commodities and/or invalid contracts.

4. Determining the Profit Rate in Transactions

4/1 There is no upper limit for profits, provided that the transaction is based on mutual consent, with due consideration for values of kindness, contentment and clemency.

4/2 In principle, it is impermissible for a regulator to cap profits. However, in monopoly situations, extraordinary circumstances and cases of clear public interest, it is permissible to fix the profit rate, provided it is not prejudicial.

5. Increasing the Profit Rate for Credit Sales over Cash Sales

It is permissible to increase the profit in credit sales as compared to cash sales, provided that it is incorporated into the price and that the amount of debt is not increased due to any late payment.

6. Determining Profit in Amounts or Percentages

6/1 The profit in a Murabahah contract may be stipulated as a fixed amount added to the cost price, or as a percentage of the cost price.

6/2 It is permissible to resort to a well-established benchmark/index mutually agreed upon between the parties in determining the profit during the undertaking stage (Wa'd) or when concluding the transaction. In all cases, the total price, the dates and amounts of the installments, if any, must be stipulated and must not vary with the movement of the benchmark/index. [see Shari'ah Standard No. (8) on Murabahah, item 4/6]

7. Setting Different Ratios or Rates for Profit Distribution in Mudarabah Financing

7/1 In Mudarabah financing it is permissible to set different profit ratios or rates as per the different tenors of the Mudarabah. The different rates may also be triggered upon the profit of either party reaching a specified hurdle rate. In all cases, no party to a Mudarabah contract may be totally deprived of profit. [see Shari'ah Standard No. (13) on Mudarabah, item 8/5]

7/2 It is permissible for the capital provider to stipulate that the mudarib does not employ the funds in investment activities where the expected profit rate falls below a specific percentage, taking into consideration that it is not permissible to either guarantee the capital, or the profit or both. [see Shari'ah Standard No. (46) on Investment Agency]

8. Profit Distribution in Shari'ah-Compliant Deferred Transactions

8/1 It is permissible to adopt customary accounting practices that are required by supervisory and/or regulatory bodies for calculating and distributing profit in deferred transactions across several financial

periods, provided they are in accordance with Shari'ah. Whenever possible, AAOIFI's Accounting Standards shall be adopted in this process.

8/2 When preparing their financial statements, institutions must avoid any methods of profit calculation or distribution that are misleading or deceptive.

9. **The Institution Must Disclose Its Method of Profit Calculation** and allow its clients to inquire about such methods. Likewise, it must disclose such methods when mentioning profit in its advertising campaigns and product marketing brochures in order to prevent any deception. In contracts, Institution must disclose the total price or the cost price and the profit, either as a lump sum or as a percentage of the cost price. Where profit rate is time-bound, it is impermissible to re-schedule debt obligations through increasing the profit and/or total amount by extending the duration.

10. **It Is Permissible to Adopt Shari'ah-Ccompliant Customary Accounting Practices to Calculate Profit** based on the length of the financing period such as a calculation method that determines profit for the entire period on the basis of an annualised percentage of the total amount of financing provided or a calculation method that determines profit on the basis of an annualised percentage of the amount of financing outstanding according to an amortised payment schedule, provided that it does so transparently and with full disclosure and that the total sale price is stated as a fixed amount.

11. **It Is Permissible for the Institution to Grant Its Client a Rebate for Early Payment** provided that this rebate was not stipulated in the contract, taking into consideration regulatory directives.

12. **Contractual Relationship Between the Institution and Its Client Is Not Affected by the Method Adopted in Booking Its Profits** in its internal records, as in separating the profit account from the expense account. Institutions should regularly upgrade their systems and computer software in order to be consistent with Shari'ah standards and rulings.

13. Date of Issuance of the Standard

This Standard was issued on 26 Jumada II, 1432 A.H., corresponding to 29 May 2011 A.D.

Adoption of the Standard

The Shari'ah Board adopted this Standard in its meeting No. (30) held in the Kingdom of Bahrain during the period of 24-26 Jumada II, 1432 A.H., corresponding to 27-29 May 2011 A.D.

Appendix (A)
Brief History of the Preparation of the Standard

On 14 Rabi' I, 1429 A.H., corresponding to 20 April 2008 A.D., the General Secretariat decided to commission a Shari'ah consultant to prepare a juristic study on Calculating Profit in Financial Transactions.

In its meeting held in Kuwait, on 24 Ramadan 1431 A.H., corresponding to 28 January 2010 A.D., the Shari'ah Standards Committee discussed the draft of a Shari'ah Standard on Calculating Profit in Financial Transactions and made necessary amendments.

The revised draft of the Shari'ah Standard was presented to the Shari'ah Board in its 28th meeting held in the Kingdom of Bahrain, during the period of 12-14 Dhul-Qa'dah 1431 A.H., corresponding to 20-22 October 2010 A.D. The amendments that were deemed appropriate were included.

The General Secretariat held a public hearing in the Kingdom of Bahrain, on 25 Jumada II, 1432 A.H., corresponding to 28 May 2011 A.D. All the comments made in the public hearing were listened to, and a representative of the Shari'ah Board answered these comments and made commentary on them.

In its meeting No. (30) held in the Kingdom of Bahrain, during the period of 24-26 Jumada II, 1432 A.H., corresponding to 27-29 May 2011 A.D., the Shari'ah Board discussed the amendments proposed by the participants in the public hearing and incorporated the amendments that it deemed appropriate, and adopted the Standard.

In its meeting held in Al-Madinah Al-Munawwarah, on 30 Sha'ban 1436 A.H., corresponding to 17 June 2015 A.D., the Shari'ah Standards Review Committee reviewed this Standard. After deliberation, the committee approved necessary amendments, and the Standard was adopted in its current amended version.

Appendix (B)
The Shari'ah Basis for the Standard

- The basis for not stipulating a maximum profit limit is the Quranic Verse: ***{"…except it be a trade amongst you, by mutual consent"}***.[2] This ruling is also confirmed by Resolution No. (46) 5/8 of the Islamic Fiqh Academy, which states: "There is no fixed specific profit rate that traders are bound by."
- The basis for the permissibility of increased profit/price in a deferred/credit sale is the Quranic Verse: ***{"Allah has permitted sale"}***[3] as referring to the deferred sale in order for the comparison between it and interest, which also involves an increase, to be valid. Accounting Standard No. (20) has been issued on deferred sales.
- The basis for the permissibility of using different rates in Mudarabah transactions is because such a provision does not disrupt the sharing of profits by all parties.

(2) [Al-Nisa` (The Women): 29].
(3) [Al-Baqarah (The Cow): 275]

Shari'ah Standard No. (28)

Banking Services in Islamic Banks

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

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

Preface

The purpose of this standard is to indicate banking services provided by Islamic financial Institutions (Institution/Institutions),[1] and the Shari'ah opinion on the fees charged for such services.

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

Statement of the Standard

1. Scope of the Standard

This standard covers the most important banking services that do not involve lending and borrowing, and which the Institutions render to their customers, directly or through other parties, with the aim of facilitating internal and external operations and activities performed by these customers.

It does not cover loan and investment services, or other banking services for which separate Shari'ah standards have already been issued, such as trading in currencies, debit and credit cards, investment accounts, and investment Sukuk.

2. Types of Banking Services and Their Shari'ah Status

Institutions may provide banking services against fees payable in lump sum or as a percentage share of the value of the service in question, as indicated in the following cases:

2/1 Custodian services

Institutions may receive Shari'ah-accepted documents and financial papers from their customers as a custodian of such documents/ financial papers, and may charge fees for such services.

2/2 Contracting agency services

A customer may use the institution as an agent for concluding contracts such as sale, purchase, and lease contracts, against a fee payable to the institution.

2/3 Subscription arrangement services

2/3/1 The institution may act as an agent of the founding shareholders of a Shari'ah-accepted and technically licensed joint stock company, in performing the various steps of the public issue, or issuing new

shares to increase the capital of the company, and may receive fees for such services. However, the fees thus earned by the Institution should not comprise any remuneration for extending credit, if it happens to be part of the service.

2/3/2 The Institution may arrange, and receive fees for, engaging a third party to underwrite the subscription. The Institution may also underwrite the subscription itself, without charging any fees for the mere act of underwriting. However, the Institution may charge the actual expenses it incurs in providing other services like conducting studies or marketing the shares. [see Shari'ah Standard No. (5) on Guarantees, item 6/7]

2/4 Services of conducting studies and consultancies

2/4/1 The institution may conduct, against a fee or free of charge, feasibility studies or other studies relating to issuance of shares.

2/4/2 The institution may act as an agent of its customers, for a fee or free of charge, in performing services that relate to real estate properties (residential buildings, commercial blocks, offices, etc.) as well as movable assets.

2/5 Collection and payment services

2/5/1 The institution may accept requests of its customers to collect their dues with, or pay their commitments to other parties. For instance, it can perform collection of cheques, debt notes, and promissory notes from debtors, or vouchers of shares and Sukuk owned by the customers, and deposit the proceeds in their accounts. It can also make payments on behalf of its customers and charge their accounts. For all such services, the Institution may receive fees from the customers or their agents.

2/5/2 The institution may pay wages and salaries on behalf of its customers.

2/5/3 The institution may execute standing collection and payment orders.

2/5/4 The institution should refrain from collection when it realizes that it involves an impermissible practice, or leads to discounting of a commercial paper. [see Shari'ah Standard No. (16) on Commercial Paper, item 5]

2/6 Accounts' services

2/6/1 The institution may provide additional services to the owners of its investment or current accounts when they desire so, and charge fees for such services.

2/6/2 The institution may provide free services to the owners of its investment or current accounts, provided that the services rendered to the owners of the current accounts are not set as a precondition or constitute a traditionally observed prerequisite for opening the account. [see Shari'ah Standard No. (19) on Loan (Qard), item 10/2]

2/7 Services of safe deposit vaults

2/7/1 The institution may provide the services of leasing safe deposit vaults to its customers. This is done through signing a contract according to which the Institution allocates a safe deposit vault within its premises for the customer to use against a specific fee. The deal here is based on Ijarah (hiring) contract that entitles the customer to the vault's usufruct.

2/7/2 The institution is responsible for ensuring the safety of the vault. However, it does not guarantee the safety of items kept in vault except in case of misconduct or negligence in keeping the vault.

2/8 Services of cards and their related bodies

See Shari'ah Standard No. (2) on Debit Card, Charge Card and Credit Card.

2/9 Zakah account services

See Shari'ah Standard No. (35) on Zakah, item 2/2.

2/10 Suretyship services

See Shari'ah Standard No. (5) on Guarantees, item 6

2/11 Cheques services

See Shari'ah Standard No. (16) on Commercial Papers, item 3/3 and item 7.

3. Date of Issuance of the Standard

This Standard was issued on 12 Jumada I, 1427 A.H., corresponding to 8 June 2006 A.D.

Adoption of the Standard

The Shari'ah standard on Banking Services in Islamic Banks was adopted by the Shari'ah Board in its meeting No. (16) held in Al-Madinah Al -Munawwarah on 7–12 Jumada I, 1427 A.H., corresponding to 3-8 June 2006 A.D.

Appendix (A)
Brief History of the Preparation of the Standard

The Shari'ah Board decided in its meeting No. (10) held on 2–7 Rabi' I, 1424 A.H., corresponding to 3–8 May 2003 A.D., in Al-Madinah Al-Munawwarah to issue a Shari'ah Standard on Banking Services and Facilities in Islamic Banks.

On 29 Safar 1425 A.H., corresponding to 19 April 2004 A.D., the Shari'ah Standards Committee (2) decided to commission a Shari'ah consultant to prepare a draft standard on Banking Services and Facilities in Islamic Banks.

In the meeting of the Shari'ah Standards Committee (2) on 14-15 Safar 1426 A.H., corresponding to 24-25 March 2005 A.D., in the Kingdom of Bahrain, the committee discussed the study and advised the consultant to incorporate the necessary changes, in the light of the discussions and observations of the Committee members.

In the meeting No. (17) of the Shari'ah Standards Committee (1) held on 8-9 Sha'ban 1426 A.H., corresponding to 8-9 September 2005 A.D., in the Kingdom Of Bahrain, the Committee discussed the draft standard and introduced necessary changes therein.

The Shari'ah Board discussed, in its meeting No. (15) held on 22–26 Sha'ban 1426 A.H., corresponding to 26-30 September 2005 A.D., in Makkah Al-Mukarramah, the draft of the Standard, and decided, in the light of the discussions and observations of the members, to send it to Shari'ah Standards Committee (1) for review.

A joint committee comprising the members of Shari'ah Standards Committees (1) and (2) discussed the Standard in a meeting held on 1 Safar 1427 A.H., corresponding to 1 March 2006 A.D., in the Kingdom of Bahrain, and incorporated necessary changes.

The revised draft of the Standard was submitted to the Shari'ah Board in its meeting No. (16) held in Al-Madinah Al-Munawwarah on 7–12 Jumada I, 1427 A.H., corresponding to 3–8 June, 2006 A.D. The Shari'ah Board made further changes in the document and decided to send it to the concerned experts for review and observations before discussing it in a public hearing.

AAOIFI then held, in the Kingdom of Bahrain on 6 Rajab 1427 A.H., corresponding to 31 July, 2006, the public hearing which was attended by more than 30 participants representing central banks, Institutions, accounting firms, Shari'ah scholars, university teachers and other interested parties. Several observations were made in the session to which the members of the Shari'ah Standards Committees (1) and (2) duly responded.

The Shari'ah Board adopted, in its meeting No. (17) held in Makkah Al-Mukarramah on 26 Shawwal – 1 Dhul-Qa'dah, 1427 A.H., corresponding to 18–23 November, 2006 A.D., the Standard (unanimously for some clauses and with the majority for others), as indicated in the minutes of the Board's meetings.

Appendix (B)
The Shari'ah Basis for the Standard

- It is permissible for the Institutions to provide banking services that do not involve interest-based lending and borrowing, because such services serve a permissible interest of the clients.
- Institutions may charge fees for providing banking services, because the fees so charged constitute a remuneration which the Institutions deserve for the tasks they perform, since it is permissible in Shari'ah to get reward for performing tasks that result in permissible benefits to others.
- The fee charged by the institutions may be a lump sum amount or a percentage of the value of the service, because when the percentage remuneration is calculated it becomes like the lump sum amount.

AAOIFI

هيئة المحاسبة والمراجعة للمؤسسات المالية الإسلامية

ACCOUNTING AND AUDITING ORGANIZATION FOR ISLAMIC FINANCIAL INSTITUTIONS

Shari'ah Standard No. (61): Payment Cards

Shari'ah Standard No. (61)

Payment Cards

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IN THE NAME OF ALLAH, THE MERCIFUL, THE VERY MERCIFUL

All praise be to Allah, the Lord of all the worlds. Peace and blessings upon our Prophet and our master Muhammad, all his family and his Companions.

PREFACE

This Standard aims to outline types of payment cards and their characteristics, outlining Shari'ah provisions and rules related to their issuance by the Institutions, specifying the contractual relationship between the related parties and presenting the most significant practices of cards in the institutions[1].

And, Only Allah the Exalted guides to Success,,,

1 The word (Institution/Institutions) was used as a short form for Islamic financial institutions, and among them are Islamic banks.

TEXT OF THE STANDARD

1. Scope of the Standard

This standard deals with payment cards which are issued by the Institutions to their customers, whether [these cards] were primary or supplementary, in order to enable them to withdraw cash, pay prices of goods and services, or to guarantee payment [of prices], and it includes the following types:

1/1. Debit Card (out of the balance)
1/2. Prepaid Card
1/3. Charge Card (non-revolving credit card)
1/4. Credit Card (revolving credit card)

It also addresses the key practices of the cards in the institutions.

In case the term credit card was used in the Standard; then it includes credit card with or without revolving balance.

2. Parties to the Cards, and [Shari'ah] Characterization of their Relationship

2/1. The cards have five parties, which are:

2/1/1. The card issuer
2/1/2. The cardholder (the customer)
2/1/3. The card acceptor (the merchant)
2/1/4. The Acquirer (bank of the merchant)
2/1/5. The card network.

2/2. Shari'ah Characterization of Relationship among the Parties of the Card

2/2/1. The relationship between the card issuer and the cardholder:

2/2/1/1. Upon issuance of the card, [it will be] the relationship of provision of services (khadmāt) to the cardholder represented in issuing the card [by the cardholder] and its continuation to be valid for use.

2/2/1/2. Upon usage of the card: the relationship where the cardholder novates the card acceptor to the card issuer that pays out of the balance of the cardholder held with [the card issuer]; the card issuer pays the card acceptor out of its own funds so that the paid amount shall be a debt to be claimed from the cardholder; and the relationship would be of guarantee if the card was used to block an amount or to deduct an amount to secure what shall be outstanding on the cardholder.

2/2/2. The relationship between the acquirer and the card acceptor: the relationship of provision of services, which include providing payment terminals (POS devices) to the card acceptor and organizing its dealing with the card network and an agency for recovery.

2/2/3. The relationship between the card network with other parties of the card: the relationship of provision of services to these parties, such as settlement of payments and intermediation in carrying out operations.

3. Characteristics of the Cards:

3/1. Characteristics of the Debit Card

3/1/1. This card is a settlement instrument and not a credit instrument (lending or financing), so it is linked to the available balance in the account of the cardholder held with the card issuer.

3/1/2. This card entitles the cardholder to use it in cash withdrawal or settling prices of the goods and services by deducting from the available balance whether in card's currency or in other currencies.

3/1/3. This card is issued for a fee or free.

3/1/4. Mostly, the customer does not bear any fees or cost for using this card except for cash withdrawal at ATMs of an institution other than the card issuer; or using it in paying the prices of goods and services in a currency other than the currency of the card balance.

3/1/5. The acquirer and the card issuer levy a charge amount as a percentage of the prices of the goods and services which are paid using the card.

3/1/6. The Institution (or the bank) charges a fee as a lump sum or a percentage of the withdrawn amount on each transaction of cash withdrawal carried through its [ATM] machines using cards issued by other institutions (or banks).

3/2. Characteristics of Prepaid Card:

3/2/1. This card is a settlement instrument and not a credit instrument (lending or financing), so the cardholder deposits with the card issuer a balance specifically for the card.

3/2/2. The card issuer may let holder of this card to have balance of the card in a particular currency or in currencies different than the local currency.

3/2/3. This card has characteristics which are like the debit card, and s. (3/1) can be seen.

3/3. Characteristics of Charge Card:

3/3/1. This card is a credit instrument via lending within a specific limit for a period specified at the start, and it is also a settlement instrument.

3/3/2. This card is used in settling prices of goods and services or guaranteeing them, and withdrawing cash, within a specific limit whether it was in the currency of the card or in other currencies.

3/3/3. The arrangement of this card does not provide facilities of revolving credit to the cardholder (paying the debited amount in instalments), as [the cardholder] is supposed to settle the price of the merchandises or the withdrawn cash within the specified period.

3/3/4. In case the cardholder delays in settling what he owes to [entities other than] Institutions beyond the specified period, then pre-agreed interest amounts will be due on him. However, Institutions do not charge any interest amounts.

3/3/5. The card issuer does not, usually, levy a charge amount on the cardholder for the goods and services paid for by the card. However, [the card issuer] receives from the acquirer a commission amount as a specified percentage of the prices of goods and services which were settled using the card.

3/3/6. The institution (or the bank) charges a fee as a fixed amount or a percentage of the withdrawn amount on each transaction of cash withdrawal from its ATM using cards issued by other institutions (or banks).

3/3/7. The card issuer shall be obliged to settle to the merchant, through the card network, the prices of the goods and services.

3/3/8. The cardholder shall be obliged to the card issuer to settle the amounts due on the card against cardholder's usage of the card, whether it was prices of the goods and services or the amounts of cash withdrawal.

3/4. Characteristics of Credit Card:

3/4/1. This card is a credit instrument via lending against interest within a particular [credit] limit which is revolving over periods specified by the card issuer, and it is a settlement instrument as well.

3/4/2. This card is used in settling prices of goods and services, guaranteeing [the prices], or withdrawing cash within the granted credit limit, whether it was in the currency of the card or other currency.

3/4/3. In a case other than the cash withdrawal, the cardholder is given a grace period to settle what is owed by him without interest. Also, he is allowed to defer the payment (revolving the credit through

lending) within a specified period which will incur interest [on the outstanding balance].

3/4/4. What is stated in s. (3/3/5-8) shall apply on this card.

4. Shari'ah Ruling on Types of Cards

4/1. Debit Card:

4/1/1. This should not result in lending against interest like overdrawing the card against a consideration.

4/1/2. Fee of current account card should not be exclusively exempted or lowered if the cards for the saving or investment accounts are issued for a fee or without lowering them. Refer: s. (10/2) of Shari'ah Standard No. (19): Loan (Qard), s. (2/6/2) of Shari'ah Standard No. (28): Banking Services in Islamic Banks, s. (3/5/1) of Shari'ah Standard No. (55): Competition and Prizes.

4/1/3. Offering [this card] should not be contingent on reaching the balance of the current account of the cardholder to a specified amount if the card issuer issues the card against or without a fee that is less than the actual direct cost of its issuance, or the cardholder receives benefits for which the card issuer pays a consideration. Refer: s. (10/2) of Shari'ah Standard No. (19): Loan Qard, and s. (2/6/2) of Shari'ah Standard No. (28): Banking Services in Islamic Banks.

4/2. Prepaid Card:

4/2/1. Dealing with such a card should not lead to lending on interest, for example allowing to use more than the balance (overdrawing the balance) against a consideration.

4/2/2. Rulings of *ṣarf* (currency exchange) shall apply on conversion of the balance or its part to a currency (or group of currencies) other than the local currency. Refer to Shari'ah Standard No. (1): Trading in Currencies.

4/3. Charge Card

4/3/1. Dealing with such a card should not lead to lending on interest, and this includes stipulating on the cardholder [to pay] interest amounts if he delays in settling what is owed by him. Refer: s. (2/1/8) of Shari'ah Standard No. (3): Procrastinating Debtor, and s. (5/6) of Shari'ah Standard No. (8): Murabaha.

4/3/2. When the card issuer demands depositing the cash amount as a guarantee, it should not stipulate on the cardholder to deposit [the amount of guarantee] in the current account. Rather, [the cardholder] will be given the option to deposit in the current or investment account. Refer: s. (2/5/3) of Shari'ah Standard No. (8): Murabaha.

4/4. Credit Card

It is not permitted for the Institutions to issue revolving credit cards by extending a loan which will be settled by the cardholder in deferred instalments against interest. Practices of revolving credit card in the Institutions can be referred in the following Para.(6).

5. General Rulings:

5/1. Fees on Cards:

Fees (and commissions) on cards, whether they are primary or supplementary, and the provisions associated with them, categorized into two types

5/1/1. Fees that are not permitted to be more than the actual direct cost1 and such fees are the ones charged by the card issuer from the cardholder and are linked to the loan in the credit card, such as fees of issuance, renewal and replacement, fee of cash withdrawal from ATMs of the issuing institution, fee of limit increase, and fees for converting the used amounts into instalments. Also, the cost of currency exchange if the card was used in a currency other than the currency of the card. Refer: s. (9) of Shari'ah Standard No. (19): Loan (Qard).

5/1/2. Fees not restricted to be the actual cost, rather they can be as per the agreement, and they are, except for the above, for example:

5/1/2/1. The fees that are charged by the acquirer from the card acceptor, and part of it may go to the card issuer and card network provided the cardholder shall not bear such fees in cards based on lending.

5/1/2/2. Subscription fees and service charges paid by the card issuer to the card network.

5/1/2/3. Fees charged by the card issuer in cards that do not involve lending, such as [fees on] the cash withdrawal, card issuance, renewal, replacement, limit increase or exchange rate, etc.

5/1/2/4. The fees charged by the Institution, as the owner of the ATM, for cash withdrawal or other services delivered using the machine in case the Institution was not the card issuer. In case the Institution, as the owner of the ATM, was the card issuer, then requirements, as given in the s. (5/1/1), are observed and the Institution is not permitted to increase the fees of using the machine more than the fees charged by the Institution from the cardholders of other Institutions (and banks).

(1) See definition of direct actual cost in the Appendix (C).

5/2. Effect of Card Cancellation on the Fees

5/2/1. In case the cardholder cancels the card post its issuance; then the card issuer may not return any part of the amount of the issuance fees.

5/2/2. In case the cardholder requests for cancelation of the card once it was made available to him against fees for services other than the issuance, irrespective whether [the services] were offered immediately upon the issuance, card activation, or by usage of the card, and such services continued for a period of the validity of the card or for a period shorter [than validity of the card] and remained available for use, then the card issuer may stipulate upon approving the cancelation to retain the fees of such services on proportionate basis for the period [starting] from the time of making it available till its cancelation.

5/2/3. In case the fees were not distributed against the issuance and other service respectively and were charged overall for an aggregate amount without differentiation, so the card issuer, at the time of accepting the cancelation, may retain an amount of the fees on proportionate basis for the period which elapsed from the time of issuing the card till its cancelation.

5/2/4. In the case of card cancelation, if the card issuer cannot retrieve [an amount] against the services from the actual provider and it was not possible to make the services available to another cardholder, so [the card issuer] may similarly not return the amounts of the fees to the cardholder even if it approved cancelation of the card, provided it was stated in the agreement of card issuance.

5/2/5. In case the card was cancelled by the card issuer for a valid Shari'ah reason attributed to its holder, so the cancelation will be subjected to the ruling of cancelation at the request of the cardholder. However, in case the cancelation was for a reason not attributed to the cardholder, then the card issuer may return to the cardholder the issuance fees and other services fees on proportionate basis for the remaining period of the card.

5/3. Institution's joining the membership of the card network

5/3/1. It is permitted for the Institutions to join the membership of the card network provided avoiding any Shari'ah violations which might be stipulated by such corporations, such as interest amounts or penalty on the lending, if any.

5/3/2. It is permitted for the Institutions to pay to the card network the amounts of the subscription fees, services charges and other fee unless it includes payment of interest amounts.

5/3/3. It is permitted for the Institutions to receive incentive amounts from the card network for issuing cards managed by such corporations.

5/4. Currency Exchange and Payment of Gold and Silver prices through the cards:

It is permitted to carry currency exchange (*ṣarf*) and to pay the price of gold and silver using the debit card, prepaid card or credit card.

5/5. Using Card in other currencies:

5/5/1. In case the card was used [in a transaction] of other currency, then the currency exchange rate should take into account what is stated in s. (5/1/1) and s. (5/1/2).

5/5/2. In case the price of the goods or the service was in another currency, and the card acceptor made it possible to pay the price in the currency of the card, then it is permitted for the cardholder to choose paying in the currency of the card, and what was paid by him will be for the price in other currency after exchanging it to the currency of the card through an independent entity providing the service. This currency exchange is not required to abide by the actual cost.

5/5/3. It is permitted for the acquirer to agree with the card network to settle the amounts owed to [the acquirer] in a currency other than the currency of price of goods or services provided: knowing the exchange rate and taking into account what was stated in s. (4/1/1/2) of Shari'ah Standard No. (59): Sale of Debt.

5/6. Features Provided by the card issuing institutions or the card network:

5/6/1. It is not permitted for the card-issuing Institution to provide the cardholder with benefits which are prohibited as per Shari'ah, such as conventional life insurance, free access to prohibited places or offering prohibited gifts.

5/6/2. It is permitted to provide the cardholder benefits permissible as per Shari'ah for free such as gifts, giving priority to the cardholder to get services, receive discounts on the prices while making bookings at the hotels, airlines, or restaurants, receiving air-miles, talk times, free night stay at hotels, receiving cash back as a percentage of the price merchandises or services, and so on. By taking into account what was stated in s. (4/1/2) and (4/1/3). It is not permitted to increase fees of the card in return for: the feature of returning a percentage of the price of the merchandises or the services, lowering the price, any feature contingent on usage of the card, or a feature which has no known limit. Refer: s. (3/6/2/2/b-

2) of Shari'ah Standard No. (55): Competitions and Prizes. In the case of lending-based card, it is not permitted to increase its fees beyond the actual cost of such features.

5/6/3. Taking into account what is stated in s. (5/6/2), among the benefits granted by the card-issuing Institution to the cardholder; Islamic insurance (Takaful) on the persons, protection from theft or loss of the card or theft of the amounts withdrawn using the card, or something else which can be which can be insured in accordance with Islamic insurance. Shari'ah Standard No. (26): Islamic Insurance can be referred. The Institution, with the consent of the cardholder, may obtain an additional Islamic insurance for the benefit of the cardholder and deduct the subscription amount from him, whether this would be for or without a commission amount for the institution.

5/6/4. It is permitted for the cardholder to take advantage of the benefits offered by the card network out of the type given above or otherwise, provided the benefits are acceptable as per Shari'ah, and the card-issuing Institution should inform the cardholder about these benefits, in accordance with what is resolved by its Shari'ah Board.

5/6/5. In case the card-issuing Institution grants a discount on the fees of the services or prizes to the cardholder, then take into account: s. (3/5/4) and s. (3/6/2/2) of Shari'ah Standard No. (55): Competitions and Prizes.

5/7. Returning Goods and Services

In case the cardholder returned the goods or the service that were purchased by him using the card, then it is permitted for the card issuer to demand from the cardholder to pay what might be incurred by the card issuer in the form of fees or exchange rate differences in accordance with the agreement between the cardholder and the card issuer. The cardholder has no right to revert to the card acceptor for the fees or the exchange rate differences even if returning [of the goods] was due to a defect in the goods unless the card acceptor knew about the defect and concealed it.

5/8. Using Cards in getting cash:

5/8/1. It is permitted to use the card in withdrawing cash from ATMs provided taking into account what was mentioned in s. (5/1/1) and s. (5/1/2)

5/8/2. It is not permitted to use the card at the card acceptor to get cash in the currency of the card less than the amount that is required to be paid by the cardholder which will be entered by the card acceptor in its payment terminal (POS).

5/9. Marketing and Promotion for Cards:

5/9/1. Upon marketing and promoting the card, the card issuing Institution should comply with the requirements of transparency and disclosure especially related to the amounts of fees and the profit percentage along with avoiding misguiding and tempting to excessive consumption.

5/9/2. The card issuing Institution must stipulate on the cardholder not to transact the card in what shall be prohibited as per Shari'ah, and it has the right to cancel the card in that a case. The institution should take the available technical precautions to avoid occurring of such transactions.

6. Applied Practices of Revolving Credit Cards in the Institutions

6/1. Card based on Qard Hasan with Fees

6/1/1. This card is based on lending the cardholder within the range of the credit limit available to him, then the amount owed by him due to card usage will be settled in monthly equal instalments to be paid on specified dates without an increase in the principal amount of the loan against settlement in instalments. The card-issuing Institution may charge the cardholder fees, (it could be referred as fare), such as fees of issuance, renewal or replacement, fee of cash withdrawal, or fee of card limit increase, and such fees are in account of providing operational and banking services, entries of the transactions, settlement of the amounts due on the cardholder and payments of the cash withdrawal. These fees are waivable based on the card usage by the cardholder. All this will be stated in the agreement of card issuance which contains terms and conditions of the card usage.

6/1/2. Shari'ah Ruling

It is permitted to issue such a card provided abiding by all the fees as stated in the s. (5/1).

6/2. Covered Card

6/2/1. The modus operandi of this card works on the basis of providing the cardholder a liquidity cover for the card which shall be credited to its account. [The cardholder] may, either provide the cover from the liquidity available with him or made available via a financing [extended] by the card issuer wherein the card issuer authorizes him to use the card pursuant to Shari'ah conditions that are agreed upon, among these conditions: specifying the percentage of the used amount of the cover that is required to be paid periodically.

In case [the cardholder] uses the card afterwards, even in cash withdrawal, then settlement of the amount due and payment of cash withdrawals will be out of the cash cover owned by the cardholder. In case the cover was provided via financing, then the card issuer may lower the due financing instalment according to the condition of cover usage during the period of instalment.

6/2/2.Shari'ah Ruling

6/2/2/1. It is permitted to issue this card with the following conditions:

a. The cardholder should not be required to deposit cover of the card in a current account, rather the cardholder should have an option to have the card account (i.e., account of the cover) either as a current account or an investment-based account. Refer: s. (2/5/3) of Shari'ah Standard No. (8): Murabaha.

b. b. To state that the card issuer will not be obligated to lower the instalments of the financing receivables, and in case the card issuer chooses to lower one of the instalments. then it is not required to repeat that in the future.

6/2/2/2. The fees of this card will be subjected to what was stated in s. (5/1/2).

6/2/2/3. In case provision of the cover for this card was through a loan (interest free) [extended by] the card issuer, or if there was a case of lending by the card issuer to the cardholder between the settlement of the amounts arising out of the use of the card and their settlement out of the card cover, so the fees of card will be subject to the rulings of the lending-based card. Similarly, if the card issuer authorizes the cardholder to use the card beyond the amount of its cash limit, then the increase will take this ruling, and to take into account what was mentioned in s. (5/1/1).

6/3. Card based on Tawarruq Consequential to Lending

6/3/1. The modus operandi of this card is based on issuing a credit card, and upon the specified time of settling the amount, which is due upon the cardholder as a result of his card usage and established as a loan owed to the card issuer, the cardholder may settle the amount out of the liquidity available with him or to enter into Tawarruq via Murabaha from the card issuer to settle the amount due on the cardholder. In that case, the cardholder will be required to settle the Murabaha instalments of the commodity purchased by him from the card issuer on credit. The card issuer may execute

Murabaha-based Tawarruq through agency (wakāla) or being intermeddler (*faḍāla*) on behalf of the cardholder.

6/3/2. Shari'ah Ruling

It is not permitted to design [(structure)] a card based on lending from the card issuer to the cardholder (without interest) and then rollover of the loan liability (*qalb al-dayn*) via Tawarruq [carried with] the cardholder to settle the loan amount, [which will result] in a debt owed by the cardholder that is more than the [base] loan liability. Refer: s. (4/1/3/4) of Shari'ah Standard No. (59): Sale of Debt.

7. Date of Issuing the Standard

This Standard was issued on 17th /Jamad Al Ākhira 1442 H. corresponding to 30th January 2021.

Endorsement of the Standard

Shari'ah Board has endorsed the Standard re. Payment Cards in its 67th Meeting held virtually during 15th – 17th Jamādā al-Ākhirah 1442 H. corresponding 28th – 30th January 2021.

Supervisory Instructions for Implementation of the Standard

1. This Standard was issued on 17th /Jamad Al Ākhira 1442 H. corresponding to 30th January 2021; whatever was stated in the Standard deems to amend whatever contradicts with it as per the previously issued Shari'ah Standards.

2. The supervisory authorities that enforce Shari'ah Standards may grant the Institutions that are subject to their supervision a grace period not exceeding (1) one calendar year to implement this Standard for the existing transactions upon issuance of the Standard.

3. Whatever was implemented based on the issued Shari'ah Standards stands valid based on the previously endorsed version of the [prior Standards] till the end of its tenure based on the [respective] contract.

Annexures

Annexure (A): History of Issuing the Standard

The Shari'ah Board, in its Meeting No. (1) held on Saturday, 11th Dhul-Qa'dah 1419 H., corresponding to 27th February 1999, in the Kingdom of Bahrain, decided to prioritize the preparation of the Shari'ah standard for debit and credit cards. Based on that a Shari'ah advisor was tasked with preparing the Shari'ah study and a draft of the standard.

In the Shari'ah Studies Committee meeting held in the Kingdom of Bahrain from 27th – 30th June 1999, corresponding to 13th -16th Rabi' al-Awwal 1420 H, the Committee discussed the Shari'ah study and made some amendments to it. The Committee also discussed the draft standard in its Meeting No. (3) held in the Kingdom of Bahrain from 18th – 20th October 1999, corresponding to 9th -11th Rajab 1420 H., and requested the advisor to make the necessary amendments based on the discussions and comments provided by the members.

The revised draft project was presented to the Shari'ah Board in its Meeting No. (2) held in Makkah from 18th – 22nd December 1999, corresponding to 10th – 15th Ramadan 1420 H., where the Shari'ah Board made amendments to the draft standard and decided to send it to experts and interested parties to receive their comments in preparation for discussion in a hearing session.

A hearing session was held by the authority in the Kingdom of Bahrain on 4th – 5th April 2000, corresponding to 29th -30th Dhul-Hijjah 1421 H., attended by more than thirty participants representing central banks, institutions, accounting offices, Shari'ah scholars, university professors, and others involved in this field. Comments presented, both those submitted before and during the hearing session, were listened to, and members of the Shari'ah Studies Committee responded and commented on them.

The Shari'ah Studies Committee, in its Meeting No. (5) held on April 26-28, 2000 AD, corresponding to 22-24th Muharram 1421 AH, discussed the comments made during the hearing session and the comments sent in writing to the authority and made suitable amendments.

The Shari'ah Board, in its Meeting No. (4) held in Medina from May 29-31, 2000 AD, corresponding to 25-27th Safar 1421 AH, discussed the amendments made by the Shari'ah Studies Committee, made further suitable amendments, and adopted the standard by consensus on some paragraphs and by majority on others as recorded in the council's meeting minutes, and the standard was issued at that time as number (2).

Due to new developments in bank card transactions and the increase of new applications in banks, the diversity of their types, and the details associated with them, the Shari'ah Board in its Meeting No. (14) held in the United Arab Emirates from April 30 - May 2, 2005 AD, corresponding to 21-23rd Rabi' al-Awwal 1426 AH, tasked a Shari'ah advisor with preparing a Shari'ah study on contemporary applications of the revolving credit card in institutions.

The Joint Committee for Shari'ah Standards in the Kingdom of Bahrain, in its meeting held on May 31, 2007 AD, corresponding to 15th Jumada al-Awwal 1428 AH, discussed the draft standard project and recommended postponing the issuance of the standard.

The Shari'ah Standards Committee in Dubai - at the request of the Shari'ah Board - in its meeting held on September 14, 2015 AD, corresponding to 1st Dhul-Hijjah 1436 AH, discussed the draft

standard project, made the amendments it deemed appropriate, and raised it to the Shari'ah Board.

The Shari'ah Board began discussing the draft standard project and made suitable amendments in its Meeting No. (48) held in the Kingdom of Bahrain from May 12-15, 2017 AD, corresponding to 16-19th Sha'ban 1438 AH.

Based on the recommendation of the Shari'ah Board to meet with officials from Visa, the General Secretariat – hosted by Alinma Bank in Riyadh – held a meeting with senior officials from Visa at the bank's headquarters, with some members of the Shari'ah Board in attendance; to understand the technical and procedural matters and how cards operate.

Given the importance of this meeting and at the request of the members of the Shari'ah Board for another meeting; the General Secretariat – hosted by Alinma Bank in Riyadh – at the bank's headquarters held another meeting with officials from Visa for the same purpose.

The Shari'ah Board continued discussing the draft standard project and made suitable amendments in its Meeting No. (57) held in the Kingdom of Bahrain from March 7-9, 2019 AD, corresponding to 30th Jumada al-Thani - 2nd Rajab 1440 AH.

The Shari'ah Board completed the discussion of the draft standard project in its Meeting No. (60) held in the Kingdom of Bahrain from November 7-9, 2019 AD, corresponding to 10-12th Rabi' al-Awwal 1441 AH, with a representative from Visa present at this meeting to understand some of the intricate technical matters affecting the rulings on cards, then the Shari'ah Board made the amendments it deemed appropriate, concluded the discussion of the draft, and directed the Secretariat to present it at hearing sessions.

The General Secretariat held two hearing sessions in Riyadh on December 21, 2019 AD, corresponding to 24th Rabi' al-Thani 1441 AH, and in Dubai on January 25, 2020 AD, corresponding to 30th Jumada al-Awwal 1441 AH, attended by a number of scholars, jurists, and experts representing central banks, Islamic financial institutions, accounting, auditing, and law firms, university professors, and others involved in this field. The draft standard was discussed in detail, and comments and suggestions related to it were collected from the scholars and experts.

The Shari'ah Board began reviewing and discussing the comments and suggestions from the hearing sessions in its Meeting No. (61) held online on August 20-22, 2020 AD, corresponding to 1st and 3rd Muharram 1442 AH.

The Shari'ah Board continued reviewing and discussing the comments and suggestions from the hearing sessions in its Meeting No. (62) held online on September 24-26, 2020 AD, corresponding to 7th and 9th Safar 1442 AH.

The Shari'ah Board continued reviewing and discussing the comments and suggestions from the hearing sessions in its Meeting No. (63) held online on October 22-24, 2020 AD, corresponding to 5th and 7th Rabi' al-Awwal 1442 AH.

The Shari'ah Board continued reviewing and discussing the comments and suggestions from the hearing sessions in its Meeting No. (64) held online on November 26-28, 2020 AD, corresponding to 11th and 13th Rabi' al-Thani 1442 AH.

The Shari'ah Board continued reviewing and discussing the comments and suggestions from the hearing sessions in its Meeting No. (65) held online on December 24-26, 2020 AD, corresponding to 9th and 11th Jumada al-Awwal 1442 AH.

The Shari'ah Board completed the review and discussion of the comments and suggestions from the hearing sessions in its Meeting No. (66) held online on January 28-30, 2021 AD, corresponding to 15th and 17th Jumada al-Thani 1442 AH, made suitable amendments, and unanimously adopted some paragraphs of this standard, and by majority on others as recorded in the council's meeting minutes.

The Shari'ah Standards Drafting Committee began reviewing the wording of the standard in its meeting held online on February 17, 2021 AD, corresponding to 5th Rajab 1442 AH, and after deliberation and discussion, it made the amendments it deemed appropriate.

The Shari'ah Standards Drafting Committee continued reviewing the wording of the standard in its meeting held online on February 18, 2021 AD, corresponding to 6th Rajab 1442 AH, and after deliberation and discussion, it made the amendments it deemed appropriate.

The Shari'ah Standards Drafting Committee continued reviewing the wording of the standard in its meeting held online on February 21, 2021 AD, corresponding to 9th Rajab 1442 AH, and after deliberation and discussion, it made the amendments it deemed appropriate.

The Shari'ah Standards Drafting Committee completed the review of the wording of the standard in its meeting held online on February 22, 2021 AD, corresponding to 10th Rajab 1442 AH, and after deliberation and discussion and completing the review of the wording of all items of the standard, it referred some matters for discussion in the Shari'ah Board's meeting again.

The Shari'ah Board discussed these matters referred by the Drafting Committee in its Meeting No. (67) held online on February 25, 2021 AD, corresponding to 25th Rajab 1442 AH, and made some amendments.

Annexure (B): Basis of Shari'ah Rulings

2/2 Shari'a characteriscation of the relationship between the parties of the cards

2/2/1/2 the basis of [considering] the relationship between the card issuer and the cardholder at the time of using the card as novation:

- It would be restricted novation if the assignee (i.e., the card issuer) pays from the debt owed by the cardholder to the card issuer or from the money of the cardholder held in the custody of the issuer,
- However, if the issuer paid from its own funds, then it would be an absolute [unrestricted] novation which is permitted, even if the cardholder has no debt owed to the issuer and no money held with the issuer. This comes under the generality of the Hadith: *"when one of you is transferred (the claim for his debt) to a wealthy person he should accept (the transfer)"*[3]. As per Imam Al Sarkhsi in Al Mabsut: in an absolute novation, it is not requried to have funds [owed by] the transferror to the transferred party or in his possession, unless the transferee [owed a debt] to the transferee then he will not have a recourse. In case the novation is absolute then [the transferror] will settle the funds and then claim an equalivent amount from him [i.e. ?]. See Item No. (5/1/2) of Shari'ah Standard No. (7): Hawala with its Shari'a Basis.

4. Shari'a Ruling for the Types of Card

4/1 Debit Card

4/1 The basis of permitting issuing the debit card based on the conditions stated in the Item:

- Its issuance at that time will not result in a Shari'ah prohabition,
- The principle in the transcation is permissibility.

4/1/2 The basis of prohabiting from the waiver or the discount as referred in this Item:

- The current accounts are adapted in Shari'a as loan, and singling them out via waiver or discount, without other accounts, will turn them as loan against interest.

4/1/3 The basis of the prohabation as referred in this Item:

- It leads to loan against interest.

4/2 Prepaid Card

4/2 The basis of permitting issuance of preparid card as per the conditions stated in the Item:

- Its issuance at that time will not result in a Shari'ah prohabition,
- The principle in the transcation is permissibility.

4/3 Non-Revolving Credit Card

4/3 The basis of permitting issuance of non-revolving credit card as per the conditions stated in Item:

- Its issuance at that time will not result in a Shari'ah prohabition,
- The principle in the transcation is permissibility.

4/4 Non-revolving Credit Card:

4/4 The basis of prohabting issuance of revolving credit card as per the way mentioned in the Item:

- It is based on a contract which allows the cardholder to obtain revolving loan over a period of time against riba-based increment, and the riba on loan is prohabited as per Quran, Sunnah, the consensus, and the rational.

5. General Rulings:

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3 Ṣaḥīḥ Muslim, Hadith No. (1567).

5/1 Fees on Cards

5/1/1 The basis of prohibiting [charging] an increase over the actual and direct cost for the fees stated in the Item:

- It would be an artifice [to charge] an increase over the loan [amount], so would be a loan that carries benefit [for the lender] and subsumed under the generality of the Prophet (PBUH)'s statement: (It is not permitted to sell with a loan).

The basis of permitting to [charge] the actual direct cost:

- It is not an increase [over and above] the loan [amount],
- It is the right of lender to take that cost because he is benevolent and there is no way against those good in deeds, and it is supported by the Quranic verse: (*And the one who owes should give the dictation*) till (*And neither scribe nor witness should be harmed*), and it serves as evidence that the charges of writing the debt deed fall on the debtor for their [actual] amount. Also, the International Islamic Fiqh Academy issued its Resolution No. 13 (1/3) regarding the actual costs of Qard.

5/1/2 The basis of permtting not restricting the fees, as mentioned in this Item, with actual cost:

- These fees are against various services which are offered by the merchant bank or card scheme network, such as intermediation in carrying out the operations and setting-off the payments, and these does not include lending. Hence, the credit granted to the cardholder in lending-based cards is from the issuer and not those entities. In case the card did not contain lending [from the issuer], then the fees that is charged by the issuer is against the services which is not matter of suspicion of lending against interest.

5/1/2/1 The basis of prohabiting to burden the customer with fees, which are deducted by the mechant bank from the card acceptor, in a lending-based card:

- A part of the fees is directed to the lender who is the issuer, so it will be the case of a loan carrying benefit [for the lender].

5/2 Impact of Cancelling the Card on the Fees

5/2/1 The basis of permitting not returning any part of the issuance fees in the scenario referred in the Item:

- Such fees are against a specific job which was done by the issuer through issuance of the card, and pursuant to Shari'ah, [the service provider] is entitled upon completion of the job.

5/2/2 The basis of giving the issuer the right to retain the fees mentioned in the Item on a pro-rata basis:

- [The service provider] is entitled for the fee by enabling to take possession of the usufruct, and this can be estimated by the period which elapsed from the time of making that usufruct available.

5/2/3 The basis of requiring to return the fees which correspond the period after [the card] cancelation in this scenario:

- Such fees do not correspond with the benefit [provided to the cardholder].

5/2/4 The basis of [considering] the permissibility if the service fee cannot be recovered from the original service provider as mentioned in the Item:

- The party responsible for these charges is the cardholder, and in case it was stated in the issuance agreement that such fees will be borne [by the cardholder] upon the cancelation of the card then he will be liable [to pay] such fees.

5/2/5 The basis of the requirement to return the fees for the remaining period in the scenario mentioned in the Item:

- The card issuer has not allowed the cardholder the derivation of benefits for the remaining period, and the fee becomes due upon enabling to take possession [of the usufruct].

5/3 Institution's Joining Membership of Card Scheme Networks

5/3/1 The basis of permissibility of joining the card scheme network with the condition stated in the Item:

- The principle in the transcation is permissiblity
- The primary duty of these corporation is the intermidation between the contracting the parties and settling the payments, and as per Shari'ah, it is permitted to charge a fee for such a duty.

5/3/3 The basis of permitting the issuer to receive promption amounts from the card scheme network:

- These amounts are against promotion for a permissible act for which it is permitted to take prizes.

5/4 Using the Card in the Currency Exchange and Payment of the Price of Gold and Silver

5/4 The basis of permitting to use the cards in the currency exchange and paying the price of gold and silver:

- Payment using these cards will materialize the possession through holding the amount in favour of the card acceptor at the time of its usage, and this will not be affected due to delay in the cash settlements or giving the cardholder a grace period for settling the amount to the card issuer

5/5 Using the Card in another Currency

5/5/2 The basis of not requiring to restrict the exchange [rate] by the actual cost, upon selection of payment in the currency of the card that is different from the price of the purchased goods or services:

- The exchange would be from an entity seprate from the card issuer, so there is no objection of a loan combining with the service of exchange if the card was based on lending.

5/5/3 The basis of permitting the merchant bank to agree with the card scheme network to settle the amount owed to the network in a different courency, as per the condition stated in the Item and the conditions in the referred Item:

- This is a form of [currency] exchange liability upon the settlment, and its permissibility is established as per the Prophetic Sunnah, and Shari'ah Basis under the Item No. (4/1/1/2) of Shari'ah Standard No. 59: Sale of Debt can be referred.

5/6 Benefits Given by the Card Issuing Institutions or the Card Scheme Networks:

5/6/2 The basis of permitting to give the cardholder free benefits that are Shari'ah compliant:

- It is a form of gift, and [existance of] ignorance does not affect its [permisisbility], and it shall not be affected if the card is based on lending or indebtness, because [the benefits] are given by the lender or the creditor.

However, the basis of non-permissibility of increasing the card fees for the benefit of cash-back, any benefit dependent on the card usage, or [any benefit] which has no known limit:

- This shall be *gharar* (uncertainty), and will come under the form of gambling, with the probality of *riba al-fadl* (riba of excessibility) if the prices [of the beneifts] were redeemed or decreased to the extend of increasing the fees.

5/7 Returing the Goods and Services

5/7 The basis of permitting the issuer to ask the cardholder [to pay] the fees or currency rate differences that were incurred as a cost for returning the goods or the services:

- What was stated by the jurists that the burden of returning [the goods] will be borne by the buyer if there was a defect in the goods. Various underlying causes were indicate by jurists for this ruling, among them are:
  1. Buyer's possession of the sold goods is a liability-based possession a not a trust-based possession, and if the asset was guranateed in specific then its returning becomes guranteed, and any liability-based possession is required [to bear] the burden of returning, unlike the case of turst-based possession, as it was mentioned in Hadith: "*Every person is responsible for what he took until he delivers it back to its owner".*
  2. Taking possession of the goods by the buyer will constitute its possession, the basis of principle implies that the expenses of returning are on the party which took the possession.
  3. The right of returning the goods relates to the buyer, and the costs of returning are among the necessities of the returning.

It was mentioned in Tuhfat Al Muhtaj that the buyer bears the expenses of returning the subject of sale to the place of contracting after the rescission [of the sale] due to defect or other [causes]. Similarely, in any liability-based possession, the possessor will be liable for the expenses of returning, unlike the case of trust-based possession. It was stated in Tabeen Al Haqaiq that the expenses of returning are borne by the party which took possesision [of the subject matter]. In Kashshaf Al Qina' by Al Bahuti it was mentioned that the buyer is not bound by the expenses of returning the subject of sale after the dissolution, unlike the rescission due to defect, wherein the buyer is bound to bear the expenses of returning because rescission due to defect is by force on the seller unlike dissolution where rescission was by consent from [both] of them.

However, the basis of charging the seller, if he knew the defect [in the subject of sale] and concealed it, by the fees and currency exchange difference that were incurred by him in returing [the goods], :

- If the seller caused a harm to the buyer, then he should [be the one] to remove it. Some jurists considered the seller as violator of religious injuctions (fasiq) and his testmony is turned down if he concealed defect of the goods. Hence, he would be charged with the expenses of returning [the subject of sale] as a discretionary sanction. As per Maliki jurists, there is detailing regarding burdening the returning expenses when the seller is swindling or non-swindling. It was mentioned in Sharh Al Kharshi on Mukhtasar Khalil that the swindling seller is supposed to return the subject of sale to the place where it was taken into possession by the buyer (i.e., the place where the buyer took the possession and took the subject of sale away to other place). The seller bears the charges of transferring the subject of sale from the house of the buyer.

5/8 Using the Cards in Obtaining Cash

5/8/1 The basis of permtting to use the car in cash withdrawl from ATMs subject to controls specific to the withdrawl fees:

- The carholder may withdraw from the balance in his account, or borrow from the card issuer without consideration for the lending, and both the acts have no Shari'ah objections.

5/8/2 The basis of not permitting to use the card at the card acceptor for obtaining a cash amount in the currency of the card which is sells than [the amount] bound [to be paid] by the card holder:

- Existance of riba of exess between what is paid by the card acceptor and what is received by the card acceptor from the card issuer is more than [what is paid by the card acceptor].
- In case the paid amount was in a currency different from the currency of the card then

5/9 Marketing and Promotion of Cards

5/9 The basis of requiring to abide by the principles of transparency and discolosure and prohabiting misleading:

- Hadith incidicating towards it, for example, the Hadith: *(The parties to sale have an option as long as they have not parted, excpet in sale with an option), if they tell the truth and make everything clear they will be blessed in their transaction, but if they conceal anything and lie the blessing on their transaction will be blotted out), and the Hadith: ("and he who treats us dishonestly does not belong to us).*

The basis of prohabiting to indulge in excessive consumption:

- ???
- ???

6 Practices of Revolving Credit cad in the Institutions

6/1 Qard Hasan Card with Fees

6/1/2 The basis of requiring to restrict the fees [on cards] by the actual direct cost, as it was stated in the Item No. 5/1/1:

- The card is based on lending, and not restricting in the fees by the actual direct cost which will make it an artifice for an increase on the loan.

6/2 Covered Card:

The basis of not obligating the cardholder to deposit cover of the card in a current account:

- The current accout is [juristically] adapated as a loan, so obligating the cardholder to deposit the cover in a current account will lead to stipluation of a loan in a commutative [arrangement] (financing); and this shall fall under the general proscription of [combing] a loan [contract] and a sale [contract].

a. The basis of stating [that there is] no obligation on the issuer to lower the financing installment, and the issuer will not be obligated to repeat whatever discount given by it:
   - An obligation to do so will make the financing installments (which are the consideration in the commutative) unknown, and the purpose of stating about no obligation to give repeatative discount is to keep the discount subjected purely to issuer's choice, and a custom [of discounting] is not created through repeatation.

6/2/2/2 The basis of applying the mentioned Item on the fees of this card:

- This card is not based on lending, so it is not required to restrict the fees by the actual direct cost.

6/3 Card based on Tawarrruq sequential to Lending

6/3/2 The basis of not permitting to design the card as per the way given in the clause:

- Revolving the debt (qalab al-dayn) via Tawarruq from the issuer (i.e., the lender) with the cardholder (i.e., the borrower), which is conditioned for settling the loan amount, would be a [juristic] artifice to delay settlment of the loan with realization of an increase in it.

Annexure (C): Definitions

Actual Direct Cost in Cards based on Lending: is what is paid by the card issuer to a third party for the purpose of issuing, delivery, carrying operations of the card and recovery of the due amount from the cardholder, such as the fee amounts to be paid to the card scheme network, charges of card delivery, amounts paid to ATM owners (other than the issuer), amounts paid to recovery agencies as well as lawyers etc. In case these charges were shared with other cards, then it should be estimated on proportionate basis provided the estimation is fair. The actual direct cost does not include the cost of funds, opportunity cost, salaries of staff, rent of premises, furniture or transport means, and similar general and administrative expenses of the issuer. Refer to the Item No. (9/2) of the Shari'ah Standard No. (19): Loans. In case of confusion in estimating any item of the actual direct cost, then precaution is required to take the lower to rule out the side of prohibition, because the card is based on lending. In all the cases, it is not permitted to realize profits for the issuer from claiming this cost.

Shari'ah Standard No. (24)

Syndicated Financing

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

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

Preface

The purpose of this standard is to highlight syndicated financing operations that take place either between Islamic financial Institutions (Institution/Institutions),[1] or between these Institutions and conventional banks.

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

Statement of the Standard

1. Scope of the Standard

This standard covers syndicated financing operations, whether those arranged among Institutions, or between them and conventional banks, and the Institution-agent relationships relating to such operations.

2. Definition of Syndicated Financing

It refers to the participation of a group of institutions in a joint financing operation through one of the Shari'ah-compliant modes of financing. The accounts of the syndicated financing operation are kept independent from the accounts of the participating Institutions.

3. Projects Financed Through Syndication

Syndicated financing should be channeled towards investment activities that are permissible in Shari'ah. It should not be totally or partially directed towards projects that encounter Shari'ah restriction or constitute Riba.

4. Modes of Providing Syndicated Financing to Customers

Syndicated financing should be provided to customers through Shari'ah-compliant modes of financing, including the following:

4/1 Sale through bargaining, Murabahah or installments.

4/2 Ijarah and Ijarah Muntahia Bittamleek.

4/3 Salam and Parallel Salam.

4/4 Istisna'a and Parallel Istisna'a.

4/5 Mudarabah.

4/6 Muzara'ah, Musaqat and Mugharasah.

4/7 Investment Sukuk.

5. Participation of the Institutions with Conventional Banks in Syndicated Financing

5/1 Originally, syndicated financing shall take place among Islamic financial Institutions.

5/2 There is no Shari'ah restriction against participation of conventional banks and Islamic financial Institutions in syndicated financing, as long as subscription and utilization of funds are arranged according to Shari'ah-compliant forms.

5/3 Originally, the syndication should be led by an Islamic financial Institution. However, there is no Shari'ah restriction against appointing a conventional bank to lead the syndication and initiate, on its own or with Islamic financial Institutions, the mechanisms and conditions of operation management. Assigning the role of the Musharakah lead manager to a conventional bank as indicated above is acceptable only if the contracts, projects financed and the modes of financing are all Shari'ah-compliant.

5/4 Arrangement, implementation and follow up of syndicated financing operations should take place under supervision of the Shari'ah supervisory boards of the Institutions participating in the syndication. Preferably, a joint committee of the Shari'ah supervisory boards of these Institutions could be formed and delegated to make decisions that become binding to all parties.

5/5 It is not prohibited for Islamic financial Institutions to provide syndicated financing to certain parts of a project that also receives financing for its remaining parts from other sources through conventional modes. This could be done on condition that the accounts and lead manager arrangements of the two types of financing are kept separate. It is well known that usurious lending and borrowing is a Shari'ah-impermissible practice and the responsibility thereof falls right on the party who commits it.

6. Shari'ah-Compliant Methods of Arranging the Relationship Between the Syndication Parties

The relationship between the Institutions participating in a syndicated financing operation may be arranged in one of the following forms:

6/1 **Mudarabah:** The syndication manager acts as a Mudarib and becomes the exclusive operation manager according to the Mudarabah contract. [see Shari'ah Standard No. (13) on Mudarabah, item 8/9]

6/2 **Musharakah:** The institutions participate jointly in providing the funds and bearing any losses proportionately, whereas profits are shared as agreed upon. In this case, the Institutions may select a joint committee to undertake management, or they may delegate one of them to manage the company against an increase in its profit share or a lump sum payment. A separate management contract in this case should be signed with the selected Institution. [see Shari'ah Standard No. (12) on Sharikah (Musharakah) and Modern corporations]

6/3 **Paid agency:** In this case, the work to be done should be clearly defined, along with estimation of the period of agency. The agent shall become entitled to remuneration whether profit is actually materialized or not. Furthermore, the agent may be given a bonus as a lump sum amount or a share of profits above a certain limit. [See Shari'ah Standard No. (23) on Agency and the Act of an Uncommissioned Agent (Fodooli)]

6/4 **Non-paid agency:** The lead manager in this case undertakes to manage the operations for no reward, and the financing Institutions share the profit.

7. Preparatory Tasks and Commissions

7/1 It is permissible for the leading Institution to receive commission for performing the preparatory tasks such as conducting feasibility studies, organization, mobilization of participatory funds, preparations of contracts etc. The commission thus obtained may be equal to, less or more than the actual cost the Institution incurs for carrying out such tasks. Furthermore, an Institution performing such tasks against the commission may or may not be a lead manager.

7/2 Musharakah It is not permissible to receive commitment commission. [see Shari'ah Standard No. (17) on Investment Sukuk and Shari'ah Standard No. (8) on Mudarabah, item 2/4/1]

8. Provision of Guarantee and Suretyship by the Syndication Manager

8/1 In dealing with the syndication funds the lead manager (being a Mudarib, partner or an agent) is considered as a trustee, and therefore he should not guarantee these funds except in case of miscon-

duct, negligence or breach of conditions embodied in syndication arrangement. [see Shari'ah Standard No. (5) on Guarantees, item 2/2/2]

8/2 It is not permissible for the Institution that manages the syndication as a Mudarib, partner or an agent to guarantee the debtors of his partners, or to guarantee the contributions of these partners against exchange rate fluctuations. [see Shari'ah Standard No. (5) on Guarantees and Shari'ah Standard No. (23) on Agency and the Act of an Uncommissioned Agent (Fodooli)]

9. Exchange Rates

9/1 A specific currency should be fixed for the syndicated financing operation. However, the participating parties may pay their contributions in other currencies on condition of revaluating the contributions in terms of the syndication currency, and according to the prevailing exchange rate on the same day of contributions payment.

9/2 It is permissible for any of the participating Institutions to receive all its profits and entitlements in a currency other than the currency of the syndication on the condition of revaluing the receipts in terms of syndication currency and , according to the prevailing exchange rate on the day of receiving such amounts.

9/3 It is impermissible for the investment agent or any other party of the Musharakah or the Mudarabah to provide a commitment to safeguard any other party against exchange rate fluctuations. [see Shari'ah Standard No. (1) on Trading in Currencies, item 2/9/3]

10. Exit in Syndicated Financing

10/1 It is permissible to agree on a closed syndicated financing operation that does not allow premature exit.

10/2 It is permissible for an Institution to dispose of its share in the investment to an external or internal party before liquidation, as per the contract conditions, and at the value agreed upon, if the physical assets and usufructs of the company exceed its cash money, debts and financial rights. If the company's cash money, debts and finan-

cial rights are predominant, Shari'ah rulings on currency exchange and debt-related transactions should be referred to and applied. It is, however, not permissible to agree beforehand on such transfer of shares at nominal value or on guarantee of a certain limit of profits. [see Shari'ah Standard No. (17) on Investment Sukuk and Shari'ah Standard No. (21) on Financial Paper (Shares and Bonds)]

11. Date of Issuance of the Standard

This Standard was issued on 23 Rabi' I, 1426 A.H., corresponding to 2 May 2005 A.D.

Adoption of the Standard

The Shari'ah standard on Syndicated Financing was adopted by the Shari'ah Board in its meeting No. (14) held in Dubai on 21–22 Rabi' I, 1426 A.H., corresponding to 30 April – 2 May 2005 A.D.

Appendix (A)
Brief History of the Preparation of the Standard

The Shari'ah Board decided in its meeting No. (10) held on 2 – 7 Rabi' I, 1424 A.H., corresponding to 3–8 May 2001 A.D., in Al-Madinah Al-Munawwarah to issue a Shari'ah Standard on Syndicated Financing.

On 7 Dhul-Hajjah 1424 A.H., corresponding to 29 January 2004 A.D., the Shari'ah Standards Committee decided to appoint a Shari'ah consultant to prepare a draft standard on Syndicated Financing.

In its meeting No. (11) held on 25-26 Safar 1425 A.H., corresponding to 15-16 April 2004 A.D., in the Kingdom Of Bahrain, the Shari'ah Standards Committee (1) discussed the Shari'ah study and advised the consultant to make necessary changes in the light of the discussions and observations of its members.

In its meeting No. (12) held on 28 Rabi' II, 1425 A.H., corresponding to 16 June 2004 A.D., in Dubai (U.A.E) the Shari'ah Standards Committee (1) discussed the draft Standard on Syndicated Financing, introduced some changes and asked the consultant to make further necessary changes in the light of the discussions and observations of its members.

Once again, the committee discussed the draft standard in its meeting held on 24–25 Rajab 1425 A.H., corresponding to 9–10 September 2004 A.D., and made further changes in the light of the discussions and observations of its members.

The revised draft of the standard was then submitted to the Shari'ah Board in its meeting No. (13) held in Makkah Al-Mukarramah on 26-30 Sha'ban 1425 A.H., corresponding to 10–14 October 2004 A.D. The Board made some changes in the document and decided to present it to some experts for their comments before discussing it in a public hearing.

A public hearing was held in the Kingdom of Bahrain on 15 Safar 1426 A.H., corresponding to 25 March 2005 A.D., and attended by more than 35 participants representing central banks, financial Institutions, accounting firms, Shari'ah scholars, academics and other concerned parties. Several comments were made before and after the public hearing. Some members of the Shari'ah Standards Committees (1) and (2) responded to the quires made during the session.

In the meeting of the Shari'ah Standards Committees (1) and (2), held in the Kingdom of Bahrain on 15-16 Safar 1426 A.H., corresponding to 25-26 March 2005 A.D., the comments made during the public hearing were discussed and some changes were made in the document.

The Shari'ah Board held its meeting No. (14) on 21–23 Rabi' I, 1426 A.H., 4 April – 2 May 2005 A.D., in Dubai (U.A.E) and adopted the Standard.

Appendix (B)
The Shari'ah Basis for the Standard

Permissibility of Syndicated Financing

- Permissibility of syndicated financing is derived from Musharakah, which encounters no Shari'ah restriction.

Projects Financed Through Syndication

- The ruling that syndicated financing should be directed only towards activities that do not entail dealing in a Shari'ah-impermissible commodity or service, is dictated by the need to abide by the directives outlined in the Holy Qur`an verses and the noble Hadith of the Prophet (peace be upon him). These divine sources prohibit usury, alcoholic drinks, drugs, gambling, pork, illegitimate carcasses, prostitution, nightclubs, statues, etc, as well as impermissible acts like deception, bribe, cheating in weight and measurement, and all types of prohibited sales, etc.[2]

Participation of Institutions with Conventional Banks in Syndicated Financing, and Permissibility of Assigning the Role of the Lead Manager to a Conventional Bank

- Partnership between a Muslim and a Non-Muslim is not prohibited or cannot be judged right away as invalid, except in case of Shari'ah-banned dealings. This is so because what really matters is the conformity of the deal in question to the rulings of Shari'ah, rather than whether the deal has been made by a Muslim or a Non-Muslim. This viewpoint has been adopted by the Al Baraka Seminar,[3] as well as the Fourth Fiqhi

(2) For a detailed account of prohibited dealings, their various modern forms, and the Shari'ah bases of their prohibition. See: Dr. Ahmad Muhiddin Ahmad: Operations of Islamic Investment Companies in the International Market, (pp. 27–43).

(3) The text of the Fiqhi opinion is "There is no Shari'ah restriction on participation of conventional banks with Islamic banks in a syndicated financing that observes Shari'ah rulings in its operations, on condition that conventional banks should not assume the entire task of managing the operations, or making decisions on Shari'ah related issues.", Resolution No. (9/1), The Fatawa of the Al Baraka Seminars (P. 151).

Seminar of the Kuwait Finance House (1995). This case also does not come under the Hadith stating that the Prophet (peace be upon him) prohibited involiving in partnership with a Jew or a Christian unless purchase and sale take place by the hands of the Muslim.[4] It is clear that the emphasis of prohibition here relates to avoidance of Riba and invalid contracts, and therefore, no justification for prohibition will remain if due preventive measures against prohibited practices are well catered for. Also, the viewpoint of the Shafi'i, Maliki, Hanbali and Hanafi Schools[5] who advocate *Karahah* (disinclination towards the deal) does not include this case. The reason is that the Musharakah can avoid Shari'ah-banned practices by explicit reference to the firm commitment of the conventional Institution that leads the syndication to Shari'ah rulings in transactions, besides tightening the control and supervision of the Shari'ah boards of the participating Institutions throughout the various stages of the syndicated financing operation.

Preparatory Tasks and Commissions

- Permissibility of receiving commissions for performing preparatory tasks, originates from the fact that such tasks are beneficial to the partners and do not embark on any Shari'ah-impermissible practice. As regards the justification for the ruling that the commission can be equal to, less or more than the actual cost of providing the tasks, it is because the two parties are free to make what is known as a permissible condition, or resort to mutual consent. This same viewpoint was the Fiqhi opinion of the Al Baraka Seminar as well as the Fiqhi Seminar of the Kuwait Finance House (1995).[6]

(4) See: *"Al-Majmu' Sharh Al-Muhadhdhab"* [14: 93].

(5) Ibn Qudamah, *"Al-Mughni"* (Part 4); Al Nawawi, *"Al-Majmu'"* [13: 504]; Al-Buhuti, *"Sharh Muntaha Al-Iradat"* [2: 319]; *"Al-Mudawwanah"* [5: 70]; and Al-Kasani, *"Bada`i' Al-Sana`i'"* [6: 61].

(6) The text of the Fiqhi opinion of the Al Baraka Seminar is "The preparatory tasks performed by the bank that creates the operation entitles it to a remuneration which could be equal to, less or more than the actual cost of performing the tasks". The Fiqhi opinion of the Fourth Seminar of the Kuwait Finance House is "The preparatory tasks performed by the bank that initiates the operation entitles it to remuneration to be determined through mutual consent, whether the bank has been assigned the role of management or not."

- Receiving commitment commission is prohibited because such commission is paid for exercising the right of contracting, which is a matter of will and desire, rather than a subject matter of compensatory deals.[7]

Provision of Guarantee and Suretyship by the Lead bank

- A lead bank should not provide guarantee except in case of misconduct and negligence. Being a partner in the operation, it is supposed to be holding the assets as a trustee, and hence, it should not provide any guarantee. Stating such guarantee in the contract constitutes a violation of the Shari'ah rulings on trusteeship. When the managing bank commits misconduct or negligence, or resort to fraud and trickery in the studies it prepares, it should then indemnify the partners for the injury it has deliberately caused to them.
- A bank that manages the syndication through Mudarabah or Musharakah should not provide a warranty cover against default of the debtors of its partners, or guarantee the contributions of these partners against exchange rate fluctuations, because provision of guarantee by a partner or a Mudarib to his other partners/owners of the capital is prohibited by Shari'ah.
- When the bank manages the syndication as an agent, it may provide a warranty cover for the debtors of his partners in a separate contract and without referring to warranty in the agency contract. The justification here is that the bank does not provide such warranty in its capacity as an agent of the partners, and the warranty thus provided against default of the debtors will remain valid even if the agency contract is revoked.

Exchange Rates

- Permissibility for the parties of the syndication to make their contributions in currencies other than that of the syndication on condition that such contributions be revaluated according to the prevailing exchange rates is derived from a Hadith narrated by Ibn Umar (may Allah be pleased with him). Ibn Umar said: "When I told the Messenger of Allah (peace be upon him) that I used to sell camels at Al-Baqi' in dinars and receive the value in dirhams, he (peace be upon him) said: *'No harm if you apply the exchange rate of the same day and finalize the deal with your partner before leaving*

(7) Shari'ah Standards, AAOIFI, Shari'ah Standard on Murabahah.

each other'."[8] This case also implies combining currency exchange and Hawalah (transfer of money), which has been approved by a resolution of the Islamic Fiqh Academy.[9]

- The Hadith narrated by Ibn Umar also justifies the fiqhi opinion that the participating Institutions can stipulate receiving their profits and other entitlements in a currency other than that of the syndication, and according to the prevailing exchange rate on the day of receiving such profits and entitlements.
- Prohibition of commitment of one party of the Musharakah or Mudarabah to safeguard the other party against exchange rate fluctuations is because such commitment leads to the impermissible case of a partner or a Mudarib provides to the other partner guarantee against loss of capital.

Controls on Disassociation

- Participating Institutions can agree on a closed syndicated financing operation where premature exit is not allowed. Such a condition is regarded as a proper condition in Shari'ah, and it does not contradict with the aim of the contract. Moreover, imposing a condition against premature exit does not lead to permitting what Shari'ah has prohibited or prohibiting what it has permitted, nor does it seem to be a probable cause of future dispute.[10] Therefore such condition should be honored in abidance to the divine order of Allah, Exalted be He, in the holy Qur`an: ***{"O you who believe! Fulfill (all) obligations..."}***[11]
- Agreement beforehand on exit at nominal value or on guaranteeing a certain amount of profit is prohibited because such condition entails exact Riba, or a suspicion of it. Moreover, it involves other Shari'ah-

(8) Related by Abu Dawud, Al-Nasa`i, Ibn Majah and Al-Hakim who deemed it authentic. Al-Zahabi agreed with Al-Hakim. The Hadith has been narrated both as *Marfu'* (Traceable) Hadith to the Prophet, and *Mawquf* (Discontinued) Hadith to Ibn Umar, *"Al-Talkhis Al-Habir"* [3: 29].

(9) International Islamic Fiqh Academy Resolution No. 184/9.

(10) Regarding contractual conditions see: *"Tabyin Al-Haqa`iq"* [4: 43]; Ibn Al-Humam, "*Sharh Fath Al-Qadir"* [5 :215]; Al-Buhuti, *"Kashshaf Al-Qina'"* [3: 192–193]; Al Nawawi, *"Al-Majmu' Sharh Al-Muhadhdhab"* [9: 364–368]; and "*Al-Khurashi 'Ala Mukhtasar Khalil"* [5: 80–81].

(11) [Al-Ma`idah (The Table): 1].

impermissible practices like the case of one party providing a guarantee against the loss of the share of the other party in the capital, or guarantees a predetermined rate of profit for him.

Shari'ah Standard No. (37)

Credit Agreement

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

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

Preface

This Standard aims to indicate the various types of credit facilities and their most important applications as well as the returns and commissions which result from them. The Standard also covers the Shari'ah rulings pertaining to credit facilities so as to be observed by Islamic financial institutions (Institution/Institutions).[1]

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

Statement of the Standard

1. Scope of the Standard

This standard covers credit facilities and the returns and commissions arising from them, whether such facilities are practiced between the Institution and its clients or between the institution and other institutions.

2. Definition of Credit Facilities

2/1 The term credit refers to the financial transaction according to which one of the two parties becomes indebted to the other. Indebtedness in such transactions can arise at the beginning of the transaction, and this is known as direct cash credit such as loans and discounting of commercial papers. Instead, indebtedness could be only probable at the end of the transaction, and that is incidental credit, such as bank suretyship, letters of guarantee, bills of acceptance, and letters of documentary credit. The term "credit facilities" is used to denote credit in both cases. The concepts of credit and credit facilities are more comprehensive than the concept of financing which relates to the case of actual deferment of one of the two transacted objects.

2/2 According to this standard, credit facilities in institutions can be divided into the following types:

2/2/1 Cash facilities: This type includes the transactions in which the Institution presents funds, whether in the form of cash - as is the case in *Qard Hasan* (benevolent loan), Musharakah and Mudarabah; or in the form of an asset or usufruct - as is the case in Murabahah and lease financing. It should be noticed here that Musharakah and Mudarabah do not result in a debt owed by the client except in case of transgression or negligence.

2/2/2 Incidental facilities: This type includes the transactions which result in an incidental commitment owed by the Institution such as suretyship and letters of guarantee.

2/3 Transactions that entail instant delivery of the transacted objects are not considered as part of credit facilities.

2/4 The decision of granting credit facilities:

It refers to the approval of the Institution to enter into a credit facility with a specific client. The approved facility will be subject to a specific financial limit that can be used during a specific period of validity and subject to a certain date of maturity. The credit facility would also comprise specific conditions relating to guarantees, method of repayment and regulatory requirements. The decision of granting the facility is usually issued in the form of a letter addressed from the Institution to the client, indicating that the letter does not constitute any commitment from the part of the Institution unless transactions are actually commenced. Similar to letters of granting facilities, letters for renewal or extension of the period of already approved facilities also carry the same conditions.

2/5 Using credit facilities

It refers to commencement of the client to utilize the facility by submitting a request for a letter of guarantee or a letter of credit, or making a pledge to purchase a commodity or hire an asset through the Institution.

3. Types of Credit Facilities

3/1 Types of traditional credit facilities used by banks:

3/1/1 Loans

Loans refer to facilities payable on a specific date agreed upon between the traditional financial Institution and the client. Loans can be extended directly to the client, or through participation with other traditional financial Institutions, or through acquisition of bonds issued by the client.

3/1/2 Overdraft

Overdraft is a facility which the traditional financial institution puts at the disposal of the client to draw from it on need, up to a specific limit and within a given period.

3/1/3 Discounted papers

Discounted papers comprise commercial papers and bonds to order discounted in the traditional financial institution.

3/1/4 Issued credit cards

In this traditional form of credit facility, the indebtedness which can arise from using the credit card is determined for each client within a certain limit, and he can repay it in installments along with the interest.

3/1/5 Documentary credits

Documentary credits are among the facilities which traditional financial Institutions extend to their clients. In this case the Institution assumes the commitment to pay to beneficiaries the value of the credits opened for its client, whether the value of such credits is due on sight of the documents or on a date thereafter.

3/1/6 Bank acceptances

This type of facilities which traditional financial Institutions offer to their clients entails a commitment from the Institution, for the benefit of a client or for its own benefit, to pay to beneficiaries the value of the accepted papers when they are due.

3/1/7 Bank guarantees

Traditional financial Institutions offer this type of facility to their clients. In such facility the bank, upon request of its client, undertakes to pay to a third party the amounts indicated in the guarantees, on request and within a specific period.

3/1/8 Foreign exchange operations

Foreign exchange operations constitute a traditional facility offered to clients in deferred contracts of buying and selling foreign currency.

3/2 Types of Islamic credit facilities used by institutions

3/2/1 Murabahah and Musawamah

Murabahah and Musawamah are two types of sale transactions which constitute methods of financing used by Islamic financial institutions to cater for client needs for owning moveable as well as immovable assets. Contrary to Musawamah, in Murabahah the cost incurred by the Institution for obtaining the good must be indicated. [see Shari'ah Standard No. (8) on Murabahah]

3/2/2 Mudarabah

Mudarabah is a method of financing which institutions use for financing various economic activities. According to this method the institution enters the deal as the partner who subscribes the funds (Rab al-Mal) while the other partner (Mudarib) subscribes the work and performs the managerial duties. The two parties agree, within the contract, on a specific method for profit sharing, while the entire loss has to be borne by Rab al-Mal, unless it is due to transgression or negligence of the Mudarib. [see Shari'ah Standard No. (21) on Financial Papers: Shares and Bonds]

3/2/3 Permanent Musharakah and diminishing Musharakah

Musharakah is a method of financing in which the institution joins the client as a shareholder in the capital of a certain project or operation. In this case the two parties share the profits and losses according to a predetermined method specified in the contract.

3/2/4 Operational-cum-financing Ijarah

It is a method used for financing clients' needs for usufructs and assets. According to this method the institution purchases the assets and rents them to clients for specific periods, against periodical amounts of rent stipulated in the contract. [see Shari'ah Standard No. (9) on Ijarah and Ijarah Muntahia Bittamleek]

3/2/5 Istisna'a

Istisna'a is a method through which the institutions provide finance to their clients. In this case the institution assumes the commitment of manufacturing the equipment or the good, or constructing the buildings or the different types of capital assets according to the specifications agreed upon. The institution which provides finance in this manner has the right to sign a Parallel Istisna'a contract with another party to manufacture the asset in question.

3/2/6 Salam

Salam is a method of financing which institutions use for extending finance to owners of farms and merchants who want to spend on their business as well as on their personal needs. Under this mode of financing the Institution has the right to arrange Salam with another party through a parallel Salam contract.

3/2/7 Other financing operations

Finance can also be extended to clients through other financing operations which include among others: *Qard Hasan*, customer overdraft balances, letters of guarantee and letters of credit.

4. Shari'ah Status of Offering Credit Facilities

The decision to offer a credit facility and the facility agreement are considered as means of mutual understanding and exchange of non-binding promises for entering into transactions. The Shari'ah status of actual utilization of the facilities depends on the type of contract to be used.

5. Shari'ah Rulings on Credit Facilities

5/1 It is impermissible to use any of the traditional facilities mentioned in item 3/1 if it involves interest or would lead to an interest-bearing loan as is the case in guarantees and uncovered credits, or it would result in deferment of one of the two transacted objects as is the case in currency exchange contracts. [see Shari'ah Standard No.

(14) on Documentary Credit; Shari'ah Standard No. (2) on Debit, Charge and Credit Cards; and Shari'ah Standard No. (1) on Trading in Currencies]

5/2 The institution is not committed to pay any compensation to the client on rejection of his application to utilize the approved facilities, whereas the client also is free to use the facilities within the specified period or not. When the client refrains from using the facilities, he is not committed to pay any compensation to the Institution.

5/3 Returns and commission on credit facilities

5/3/1 First type: Commissions and returns which arise before contracting

5/3/1/1 Commission for credit study

The institution is permitted to take commission for the credit study it prepares internally or through an external party, so as to know the credit worthiness of the client and his ability to honor his commitments within the period agreed upon. Entitlement of the Institution to such commission is due to fact that the client has benefited from the study regardless of whether the study has led to acceptance or rejection of his request. The study shall become the property of the client who has the right to take it.

5/3/1/2 Commission for offering credit facilities

This commission refers to the amount which the Institution charges against allocating and specifying the limit of the facility. The institution usually charges such commission whether the deal is finalized or not. However, it is impermissible for the Institution to obtain commission for offering credit facilities, because the mere indication of willingness to enter into a lending and borrowing transaction does not justify remuneration. [see item 2/4/2 of Shari'ah Standard No. (8) on Murabahah]

5/3/1/3 Commission for renewal or extension of credit facilities

This type of commission should be treated in the same way like commission for offering credit facilities. [see item 5/3/1/2 above and Shari'ah Standard No. (8) on Murabahah]

5/3/1/4 Cost of preparing the contracts and forms pertaining to the transaction

5/3/1/4/1 The cost of preparing the contracts to be signed between the Institution and the client should be shared between the two parties, unless the contract indicates otherwise. Such charge should be fair and commensurate with the actual work load so as not to comprise an implicit fee for commitment or for offering the credit facility.

5/3/1/4/2 When Murabahah (or any other mode of financing) is used through syndicated financing the arranging Institution has the right to charge arrangement fees which has to be borne by the participants of the syndication. [see items 2/4/3 and 2/4/4 of Shari'ah Standard No. (8) on Murabahah]

5/3/1/5 Cost of the feasibility study of the project

The institution has the right to charge the cost of the feasibility study it prepares, when the client requests such a study for his own interest, and the cost of the study is agreed upon beforehand. [see item 2/4/5 of Shari'ah Standard No. (8) on Murabahah]

5/3/1/6 *Hamish Jiddiyyah* (security deposit)

The institution may charge the seriousness margin which refers to an amount of earnest money forwarded by the client at the stage of offering his binding pledge in Murabahah. In case of retreatment of the client

from concluding the contract the amount of actual harm caused to the institution shall be deducted from the seriousness margin. [see item 7/8/2 of Shari'ah Standard No. (5) on Guarantees]

5/3/2 Second type: Commissions and returns which arise on signing of the contract

5/3/2/1 Commitment fee

The institution should not charge the commitment fee which relates to traditional facilities of interest-bearing loans, whether in the case of direct loans or the indebted-current (overdraft) loans. Such fee which traditional institutions charge to the client even if he has not used the facility, is also known as the "loan fee", or the "indebted-current facility fee", or the "financing fee". [see item 2/4/1 of Shari'ah Standard No. (8) on Murabahah]

5/3/2/2 'Arboun (Earnest Money)

It is permissible for the institution to charge such earnest money which constitutes part of the price paid in advance in sale and lease contracts. Such amount is owned by the seller or the landlord when the buyer or the tenant uses his right of terminating the contract. [see item 7/8/3 of Shari'ah Standard No. (5) on Guarantees]

5/3/2/3 Guarantee return

The institution should not obtain any returns on the guarantee relating to documentary credits, letters of guarantee, and bank suretyship, except actual expenses, whereas it can obtain returns for agency in documentary credits. [see item 7 of Shari'ah Standard No. (5) on Guarantees; and item 3/3 of Shari'ah Standard No. (14) on Documentary Credit]

5/3/2/4 Return on debt rescheduling

5/3/2/4/1 The institution should not obtain returns against extending the date of repayment of debts in all credit facilities. It should charge only the actual expenses of the rescheduling transaction. [see item 5/7 of Shari'ah Standard No. (8) on Murabahah; Shari'ah Standard No. (3) on Procrastinating Debtor, and item 3/3/1 of Shari'ah Standard No. (14) on Documentary Credit]

5/3/2/4/2 Renewal and extension of facilities should be done by entering into new contracts, rather than by extending the duration of the ongoing ones.

6. Obtaining Guarantees on Credit Facilities

The institution has the right to use permissible forms of guarantee in order to ascertain the fulfillment of the commitments of its client. [see item 3/4/1 of Shari'ah Standard No. (14) on Documentary Credits, and item 4/1/1 of Shari'ah Standard No. (5) on Guarantees]

7. Date of Issuance of the Standard

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

Adoption of the Standard

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

Appendix (A)
Brief History of the Preparation of the Standard

In its meeting No. (14) held on 21–23 Rabi' I, 1426 A.H., corresponding to 30 April – 2 May 2005 A.D., in Dubai (U. A. E.), the Shari'ah Board decided to issue a Shari'ah Standard on Credit Agreement.

On 24 Jumada I, 1427 A.H., corresponding to 20 June 2006 A.D., the Secretariat General decided to commission a consultant to prepare a study on Credit Agreement.

The study was discussed in a joint meeting of the Shari'ah Standards Committees (1) and (2), held in the Kingdom of Bahrain, on 19 Shawwal 1427 A.H., corresponding to 10 November 2006 A.D. The Joint Committee then advised the consultant to introduce the necessary changes in the Standard, in the light of the discussions and observations of the meeting.

The revised draft of the Standard was discussed in another joint meeting of the Shari'ah Standards Committees (1) and (2), held in the Kingdom of Bahrain, on 15 Jumada I, 1428 A.H., corresponding to 31 May 2007 A.D. The consultant was again advised to introduce changes in the standard as per the discussions and observations of the meeting.

The draft of the standard was discussed once again in a joint meeting of the Shari'ah Standards Committees (1) and (2), held in the State of Kuwait, on 21 Jumada I, 1428 A.H., corresponding to 7 June 2007 A.D. Further changes were introduced in the document in the light of the discussions and observations of the meeting.

In its meeting No. (19) held in Makkah Al-Mukarramah, on 26-30 Sha'ban 1428 A.H., corresponding to 8-12 September 2007 A.D., the Shari'ah Board discussed the changes in the standard which had been made by the consultant and introduced changes that it deemed necessary.

In its meeting No. (20), held in the Kingdom of Bahrain, on 4-8 Safar 1429 A.H., correponding to 11-15 February 2008 A.D., the Shari'ah Board discussed the changes introduced by the joint meeting of the Shari'ah Standard Committees (1) and (2), and introduced the changes which it deemed necessary.

The Secretarial General of AAOIFI held a public hearing in the Kingdom of Bahrain on 34 Safar 1430 A.H., corresponding to 19 February 2009 A.D. More than 30 participants attended the session as representatives of central banks, institutions, and accounting firms. Shari'ah scholars, university teachers and other interested parties also attended the session. Several observations were made and duly responded to by the members of the Shari'ah Standards Committees (1) and (2).

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

Appendix (B)
The Shari'ah Basis for the Standard

Shari'ah Basis for Charging a Fee for Preparation of the Credit Study

The credit study is a detailed study on the financial and credit position of the client so as to facilitate assessment of his credit worthiness and ability to honor commitments. According to Shari'ah, this task as such can constitute a remunerable service apart from the financing contract. The institution can even stipulate a condition that the study should be prepared by a third party. Charging the client for the credit study is also justified by the fact that the benefit from the study is shared between the financier and the financed party, rather than confined to the former only. The fee for the study should not necessarily be equal to the actual cost of its preparation, since it is a service which can be performed independently within the contract. Therefore, the credit agreement fee is considered as a fee payable for the effort exerted in preparation of the study as an independent service, irrespective of its results.

In this regard, the Shari'ah Board of Aayan Company for Leasing and Finance issued a Fatwa (Fatawa Aayan: 189), indicating permissibility of charging such fees. The text of that Fatwa runs as follows:

> "When the clients of Aayan Company wish to sign with Aayan Company permissible investment or financing contracts through Mudarabah, Musharakah or any other mode of financing, and if Aayan Company, for that purpose, needs to conduct a study on the financial status of these clients and their legal eligibility for concluding such contracts, it is permissible for Aayan Company to sign special contracts with these clients so that Aayan Company prepares the required study. For preparation of the study, Aayan Company may charge a fee to be paid by the clients on the basis of

the special contracts which should be completely separate from the financing and legal contracts pertaining to the deals in question. The prepared study should become the property of the client once he pays the cost of its preparation, and therefore Aayan Company should not deprive him the right of obtaining it. Aayan Company should handover the study to the client so that he can be able to use it in his deals with Aayan Company or with any other party".

Appendix (C)
Definitions

Financing

Financing takes place only when one of the two objects of the transaction is deferred such as loan, discounting of bills, simple credit, Murabahah, Salam and Istisna'a. Financing may not take place in suretyships, letters of guarantee, letters of documentary credits and bank acceptances. Therefore, the term financing is more special than the term credit. That is to say, any financing is credit, but any credit does not always lead to financing.

Indebted-Current

This is one of the traditional forms of extending loans to customers. In this case the customer (borrower) is given access to draw from an account opened for this purpose (the indebted-current account) up to a certain maximum limit which constitutes the amount of the loan, and within a specific period. A maximum date will also be specified for repayment of the drawn amounts. Such account is usually made subject to the following terms:

- The customer has to pay interest on the amounts he draws actually.
- The customer should pay a commitment fee calculable as a percentage of the total amount of the loan. Such amount is paid in addition to interest and is considered as Riba (usury).

The indebted-current account differs from the direct loan in that interest in the case of the former is paid at the end of the transaction's period. In the indebted-current account also interest is calculable on the basis of the amounts that have been actually used by the customer (the debit balance).

Facility Limits

The maximum limit of the facility is the total amount of the facility that has been approved by the institution. Such amount is extended through a specific mode of financing (Murabahah, Ijarah, letter of guarantee, documentary

credit ….etc.). It constitutes the maximum exposure limit for the institution with regard to the specific client.

Credit Policy

Credit policy refers to the precautionary measures adopted by the Institution with the aim of safeguarding its funds in the light of rules and regulations and in view of the resolutions of its Shari'ah Supervisory Board and the prevailing principles and traditions in the field of its activities.

Credit Study

The credit study is the process of identifying the credit worthiness of the client and his ability to honor his commitments within the specified period. It also aims to assess the suitability of the type, size and currency of the requested financing to the activity to be financed, and to what extent the financing is commensurate with the resources and capabilities of the client in general. Moreover, the credit study indicates - subject to the nature of financing operations - the suitable guarantees to be requested from the client, whether for the debts and entitlements stemming from the operations or against transgression and negligence from his part. The final result of the study presents a clear recommendation on whether the client is to be offered the facility subject to certain conditions, or his application should be rejected on the basis of specific reasons.

The credit study covers the financial standing, cash flow, activity results, income, and expenses of the client. It also covers other various aspects such as past experience of the institution with the same client, image of the client, and his ability to manage his activity and stand any difficulties he may encounter while practicing such activity.

Facility Agreement

This agreement is signed between the client who applies for the facility and the institution when the decision to offer the facility is issued. The agreement indicates the type and amount of the facility as well as the guarantees and profit margin, or profit sharing ratio in case of Musharakah in Islamic transactions. Such agreement is not considered to be binding for the client before entering into the actual contracts.

Shari'ah Standard No. (44)

Obtaining and Deploying Liquidity

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

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

Preface

This Standard aims to define liquidity and the methods of obtaining, deploying and utilising it within Institutions.[1]

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

Statement of the Standard

1. Scope of the Standard

This Standard covers what is meant by liquidity and the permissible means of obtaining and deploying it.

2. Definition of Liquidity and Liquidity Management

2/1 Liquidity refers to cash or that which can be easily converted to cash.

2/2 Liquidity management means achieving a balance between obtaining liquidity as swiftly and cheaply as possible and investing and deploying it effectively.

Liquidity is achieved in various ways depending on where it is being utilised. For example, in institutions it is the ability to cover withdrawals; in the money market it is the ability to swiftly convert securities into cash; and with Sukuk and investment funds, it is the ability to redeem or sell them in the secondary market.

3. Need to Utilise Liquidity in Institutions

Institutions need liquidity to meet numerous requirements, such as:

3/1 To distribute profits, which may rely on the liquidation of assets, see Shari'ah Standard No. (40) on Distribution of Profit in Mudarabah-Based Investment Accounts.

3/2 To discharge liabilities by selling inventory assets and converting them to cash to pay what is owed to creditors, to face contingent liabilities, or liquidate investment vehicles or the institution itself, and similarly to expand its activities, or to achieve capital adequacy or to improve its credit rating, see Shari'ah Standard No. (43) on Insolvency.

4. Obtaining and Deploying Liquidity

4/1 Obtaining and deploying liquidity through interest-bearing loans is prohibited by the Shari'ah, whether transacted directly or through

overdrafts or interest-bearing or commission-based facilities. Any liquidity support made available by supervisory or regulatory bodies (such as central banks) must be provided only through Shari'ah-compliant modes, such as Mudarabah and investment agency.

4/2 Permissible modes of obtaining liquidity include:

4/2/1 Selling commodities on a Salam (deferred delivery) basis, receiving payment up-front, and then purchasing the relevant commodities for delivery on the maturity date. It is permitted to secure a promise to sell (from a third party commodity broker) to mitigate the risk of fluctuation between the sale price and purchase price. [see Shari'ah Standard No. (10) on Salam and Parallel Salam]

4/2/2 Istisna'a concluding an Istisna'a-based sale contract stipulating advance payment -although advance payment is not obligatory- and concluding a parallel Istisna'a-based purchase contract stipulating deferred or installment payment. [see Shari'ah Standard No. (11) on Istisna'a and Parallel Istisna'a]

4/2/3 The institution selling some of its assets for immediate cash and then, if required, leasing the asset back on rent payable in arrears, taking into consideration what has been stated in Shari'ah Standard No. (9), item 5/8, on Ijarah and Ijarah Muntahiah Bittamleek.

4/2/4 Financing working capital to expand the institution's activities

This involves the institution inviting investors to participate in financing its working capital on a Mudarabah or Musharakah basis for a specified period of time determined by its liquidity requirements and with the ability to liquidate the Mudarabah or Musharakah at the end of such period. The investors enter into the Mudarabah or Musharakah by contributing their capital while the institution contributes its current assets, after valuation, as its share of the capital of the Musharakah or Mudarabah. The institution's fixed assets do not form part of

the Musharakah; rather, fixed assets are either lent or leased to the venture and rental payments are accounted as expenses of the Mudarabah or Musharakah.

4/2/5 Issuing investment Sukuk to expand the institution's activities

This involves issuing the types of investment Sukuk explained in Shari'ah Standard No. (17) on Investment Sukuk in order to obtain funds from Sukuk investors and undertake projects required of the institution. The institution may securitise some of its assets by selling them to Sukuk subscribers, managing the assets on their behalf and promising to purchase them at the market price or at a price to be agreed. If the institution is only the lessee and not the manager of the Sukuk assets, it may promise to purchase them at face value.

4/2/6 Tawarruq

This should be done in accordance with Shari'ah Standard No. (30) on Tawarruq.

4/2/7 Interest-free loan

An application of interest-free loans is outlined in Shari'ah Standard No. (26) on Islamic Insurance in item 10/8 regarding loans given by the Takaful operator to the Takaful fund.

5. Liquidity Should Only Be Deployed Using Shari'ah-Compliant Modes, which include:

5/1 Purchasing commodities in cash and selling them for deferred payment through Musawamah or Murabahah contracts.

5/2 Leases, lease contracts that end in ownership and forward leases, whether for tangible assets or services.

5/3 Purchasing commodities on a Salam basis (immediate payment for deferred delivery), then selling them after taking physical or constructive delivery, whether personally or by appointing the seller, in a separate contract, to sell the commodities to his customers.

5/4 Istisna'a and parallel Istisna'a, which involve the institution commissioning the manufacture of products or projects on an Istisna'a basis with immediate payment for deferred delivery upon completion and then selling the same manufactured products to a third party through a second Istisna'a contract for deferred price and delivery, without linking the two contracts, or procuring the sale by appointing the manufacturer as an agent, through a separate contract, to sell the manufactured product or project to his customers.

5/5 Musharakah and Mudarabah which involve the institution as the capital provider.

5/6 Investment agency, which involves the institution appointing another institution or those with whom it deals to act as its agents.

5/7 Subscription to purchase Shari'ah-compliant stocks, investment Sukuk or shares in investment funds.

5/8 International commodity trading in the financial markets in accordance with Shari'ah.

5/9 Currency trading in accordance with Shari'ah.

6. Date of the Issuance of the Standard

This Standard was issued on 14 Jumada II, 1431 A.H., corresponding to 28 May 2010 A.D.

Adoption of the Standard

The Shari'ah Board adopted the Standard of Obtaining and Deploying Liquidity in its meeting No. (27) held in the Kingdom of Bahrain during the period of 12-14 Jumada II, 1431 A.H., corresponding to 26-28 May 2010 A.D.

Appendix (A)
Brief History of the Preparation of the Standard

On 24 Dhul-Qa'dah 1428 A.H., corresponding to 3 December 2007 A.D., the General Secretariat decided to commission a Shari'ah consultant to prepare a juristic study on Obtaining and Deploying Liquidity.

In its 25th meeting held in the Kingdom of Bahrain, during the period of 2-4 Dhul-Qa'dah 1430 A.H., corresponding to 21-23 October 2009 A.D., the Shari'ah Standards Committee discussed the draft of a Shari'ah Standard on Obtaining and Deploying Liquidity and made the necessary amendments.

The General Secretariat held a public hearing in the Kingdom of Bahrain, on 27 Safar 1431 A.H., corresponding to 11 February 2010 A.D. All the comments made in the public hearing were listened to, and a member of the Shari'ah Board answered these comments and made commentary on them.

In its meeting No. (26) held in the Kingdom of Bahrain, during the period of 24-26 Rabi' I, 1431 A.H., corresponding to 10-12 March 2010 A.D., the Shari'ah Board discussed the amendments proposed by the participants in the public hearing and incorporated the amendments that it considered suitable.

In its meeting No. (27) held in the Kingdom of Bahrain, during the period of 12-14 Jumada II, 1431 A.H., corresponding to 26-28 May 2010 A.D., the Shari'ah Board discussed the draft of the Standard, incorporated the necessary amendments that it deemed appropriate, and adopted the Standard.

In its meeting held in the United Arab Emirates, on 7 Sha'ban 1436 A.H., corresponding to 25 May 2015 A.D., the Shari'ah Standards Review Committee reviewed this Standard. After deliberation, the committee approved necessary amendments, and the Standard was adopted in its current amended version.

Appendix (B)
The Shari'ah Basis for the Standard

- The basis for the definition of liquidity as referring to cash and whatever is easily converted into cash is that the traditional terminology for liquidity is Tandid (literally, to convert to cash), actually or by estimation. Actual Tandid means converting commodities into cash by selling them. Tandid by estimation means evaluating commodities in order to arrive at the expected monetary value that can be realized from them.
- The basis that profit distribution depends on the availability of liquidity is that there cannot be any profit except after the protection of the capital, and this protection is realized by liquidating the assets.
- The basis for the prohibition of procuring liquidity through interest-based loans is the prohibition of any type of Riba (usury). The supervisory bodies are the entities most responsible for overseeing that the institutions' liquidity is compliant with Shari'ah. This is because it is these bodies that have licensed the institutions to operate by Shari'ah-compliant procedures and prohibited them from that which violates the Shari'ah.
- The basis for the Shari'ah-compliant methods of obtaining liquidity is provided in the Shari'ah standard for each method.
- The basis for the Shari'ah-compliant methods of deploying liquidity is provided in the Shari'ah standard for each method.

Appendix (C)
Definitions

Diversification of Liquidity

The deployment of liquidity in various instruments; for example, purchasing short-term, medium-term and long-term Sukuk to protect investments from sharp fluctuations in the returns.

Liquidity Preference

It means to hold on to cash instead of deploying it. That is for the purpose of financing current purchases, or investing it in securities whose prices are expected to decline, or paying for contingent expenses.

Liquidity Balance

It means reconciling the need to obtain liquidity and the need to deploy it.

Liquidity Surplus

The availability of liquidity exceeding the institution's needs.

Liquidity Deficit

The need for liquidity in order to meet financial requirements.

Good Liquidity

It is based on two principles: The best price and the shortest period for obtaining it.

Liquidity Risk

It is the risk of having to sell commodities or securities at a loss in order to procure liquidity.

Shari'ah Standard No. (55)

Competitions and Prizes

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

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

Preface

This standard aims to explain the concept, types, forms, prerequisites and the relevant Shari'ah rulings relating to competitions and prizes and their applications in Islamic financial Institutions (Institution/Institutions).[1]

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

Statement of the Standard

1. Scope of the Standard

This standard sets out the Shari'ah rulings relating to competitions, prizes, and promotional gifts, and the Shari'ah rulings pertaining to their application or sponsorship by the Institutions.

The standard does not cover incentives offered to improve performance of Institutions' clients and employees and directors. Nor does it cover job-related competitions and reverse auctions. It also doesn't cover the Shari'ah rulings on Ju'alah in activities other than competitions, as this is covered by a separate standard.

2. Competitions

2/1 Definition of a competition

It is a contest between two parties or more for the purpose of determining the best amongst them.

2/2 Kinds of Competitions

A competition may be held for no compensation (reward) or for a compensation (reward) paid by all, some, or one of the competing participants or by others. A reward-based competition makes payment of the reward binding upon the party committed to paying it.

2/3 Shari'ah Rules for Competitions

2/3/1 Competitions are permissible subject to following conditions:

2/3/1/1 If the competition is in a permissible activity such as scientific, cultural and sports competitions.

2/3/1/2 If the competition does not include (nor leads to) anything prohibited by Shari'ah, such as:

a) Failure to perform a Shari'ah obligation such as prayer and fasting.

b) Instigating feuds, prejudices, and unwarranted tensions and conflicts.

c) Violating Shari'ah dress code and impermissible intermingling of men and women.

d) Inflicting damage on individuals, the society, animals, or the environment.

2/3/2 In addition to what is set out in item (2/3/1), reward-based competitions are permissible subject to the following conditions:

2/3/2/1 If the competition is clearly known and well-defined in such a way that removes any ambiguity (Jahalah) as to its timing, location, type, particulars, tools, and mode of operation.

2/3/2/2 If the reward is offered by a third party or one of the competitors (competing participants). Therefore, if the reward is offered by more than one competitor, it is not permissible.

2/3/3 Organizing and Sponsoring Competitions by the Institution:

Subject to item (2/2/2), it is permissible for the Institution to organize or sponsor competitions in compliance with the following parameters:

2/3/3/1 The expenses for the competition, including the reward, should be covered by the Institution out of its own funds (shareholders' funds), and not from the funds of the investment accounts.

2/3/3/2 Due consideration must be paid to public interest and appropriate priorities, without indulging in extravagance.

2/3/3/3 The competition must be approved by the Institution's Shari'ah Supervisory Board.

3. Prizes

3/1 **Definition:** a prize is a gift given to a natural or legal person for having accomplished a specific assignment.

3/2 **Promotional prize:** a prize used to promote specific goods or services or to attract investors to specific markets or commercial stores, either by way of holding a draw, points accumulation, or through gifts given upon purchases of goods or services.

3/3 Shari'ah ruling on promotional prize based on draw

3/3/1 It is permissible to conduct a draw in order to give a prize without stipulating the purchase of any goods or services.

3/3/2 The goods and services offered as prizes or stipulated to be purchased for entering into the draw must be Shari'ah compliant.

3/3/3 Subject to the following conditions, it is permissible to stipulate the purchase of certain goods or services to qualify entering into a draw,

3/3/3/1 The price of the goods and services (the purchase of which is stipulated for having the right to enter into the draw) is not increased vis-à-vis the same goods or services not conferring such a right.

3/3/3/2 The purchase of the goods or services stipulated for entering into the draw is intended irrespective of the prize. In addition, the Institution should make this known to the public when announcing the draw. If it is reasonably known that the customers will not buy such goods or services except for the purpose of winning the prize, then it is not permissible to organize a draw in this case.

3/3/3/3 The draw should offer equal chances of winning to all customers.

3/3/3/4 Organizing the prize is not meant to harm others.

3/3/3/5 It is impermissible to charge a fee for entering into the draw, either directly or indirectly, such as increasing phone call rates above the normal tariff.

3/4 Draw in case of multiple entitlements

If a prize is meant for one or a limited number of persons, and a larger number becomes entitled to it, then a draw may be resorted to in order to determine the winner(s).

3/5 Prizes offered by Institutions

3/5/1 **Prizes for current accounts:** it is impermissible to assign prizes exclusively to holders of current accounts. See item 2/10, Shari'ah Standard No. (19) on Loan (Qard). The same ruling applies to the current accounts, joined with the investment accounts, which represent minor percentage with lower weightage as compared to overall accounts, because it may be a stratagem to impermissible prizes on current accounts.

3/5/2 **Prizes for investment accounts:** it is permissible for an Institution to offer prizes to holders of investment accounts, subject to the following conditions:

3/5/2/1 The prizes are not paid out of the funds of investment accounts or the profits of investment account holders or charity accounts. However, the prizes may be paid out of the funds of shareholders.

3/5/2/2 The payment of such prizes does not lead to guaranteeing the invested capital or a part thereof, such as announcing a prize valued at SR 50,000 for every investment of SR 1 million as this will lead to a guarantee of a part of the capital, which is impermissible.

3/5/2/3 The chance to win the prize is provided to every holder of an investment account or a subcategory thereof. In case the prizes are limited in number, the winner (s) shall be determined through a draw.

3/5/3 Prizes on financing, currency exchange, and fund transfers

A prize offered on financing, currency exchange services and fund transfers and awarded based on a draw is permissible provided that no additional amount is charged on financing or services fees in return for the prize. If the prize is awarded to every customer or is based on points accumulation, then items (3/6/1) and (3/6/3) below shall apply.

3/5/4 Prizes on bank cards

It is permissible to offer prizes on holding or using ATM cards and/or credit cards,[2] subject to the following conditions:

3/5/4/1 The cardholders do not incur any charges in return for their participation in the draw, either through direct payment or by debiting their respective accounts.

3/5/4/2 The fees charged on the cards during the draw period shall not exceed ordinary fees. This shall be subject to item (3/5/1).

3/5/4/3 The prizes shall not be confined exclusively to cards linked to current accounts, where the cardholder has no right to link the card to his investment account.

3/6 Promotional prizes and gifts:

3/6/1 Promotional gifts: Types and Shari'ah ruling

There are many types of promotional gifts, including:

3/6/1/1 **First type:** A seller offers a specified gift for one who buys a good or service.

Shari'ah ruling: This type is permissible be it in cash or in kind; and is subject to the same Shari'ah ruling regarding the increase in the object of sale.

(2) For the purposes of this standard, whatever applies to credit cards, also applies to debit cards and charge cards.

3/6/1/2 **Second type:** A seller offers an unspecified gift along with a good or service.

Shari'ah ruling: It is permissible by Shari'ah, provided that the price is not increased against the gift.

3/6/1/3 **Third type:** A seller offers a buyer a gift, by increasing the quantity of the sold goods.

Shari'ah ruling: It is permissible by Shari'ah as it is considered a reduction in price.

3/6/2 Prizes in the form of commercial discounts: Types and Shari'ah ruling

3/6/2/1 **Promotional discounts:** a discount given by a seller to a buyer on the price of a good or service, or on prevailing sale prices, or prices fixed by manufacturers, in order to promote sales or to maintain the loyalty of the customers.

The following are some types of commercial discounts:

3/6/2/1/1 **Bulk discount:** It is offered to customers who buy large quantities of goods.

3/6/2/1/2 **Seasonal discount:** It is offered by a seller at certain times, such as for the purpose of stock clearance of unsold goods or of old models or to obtain liquidity. All these types of discounts are permissible by Shari'ah; as it constitutes a sale of goods or services at below market price.

3/6/2/2 Discount cards

These are the cards given by a seller to a buyer to enable him to purchase a commodity or service at a discounted rate. This type of cards may be issued by the seller himself or by an independent third party that has a commercial contract with the seller for the discount program.

Shari'ah ruling:

3/6/2/2/1 If a discount card is without any subscription fee, it is permissible as it constitutes a promise (Wa'ad) to voluntarily reduce the price (on the basis of Tabarru'), even if there is some ambiguity because ambiguity in Tabarru' is forgiven by Shari'ah.

3/6/2/2/2 If a discount card is against a subscription fee, it may be one of the following types:

If the card issuer is a third party that charges the fee against which other entities provides the discounts, then the card is permissible, because the issuer, in this case, is deemed to be a broker.

If the card issuer is the same entity that offers discounts, it may have two scenarios:

Scenario (1): Where a discount is associated with other services or benefits that may be a consideration for the fee; then the card is permissible because the discount is incidental to the other services.

Scenario (2): Where the subscription fee of the card is exclusively for providing discounts and for no other services, then such a card is not permissible as it involves Gharar and Jahalah.

3/6/2/3 **Discount coupon:** It constitutes a specific amount of discount for coupon holders.

Shari'ah ruling: The ruling differs across different types of discount coupons:

First type: A free or complementary coupon; it is permissible.

Second type: A coupon issued against a fee; it is subject to the same ruling as set out in item (3/6/2/2) with respect to discount cards.

Third type: A coupon that gives its holder a specific discount along with the right to enter into a prize draw; it is subject to the same ruling as set out in item (3/3) with respect to prize draws.

3/6/3 Prizes given on points (loyalty programs)

According to such programs, points are given to customers by an entity against the purchase of goods or services, either from the same entity or its subsidiaries or affiliates, enabling them to exchange accumulated points for goods or services on a complementary basis or at a discounted rate under specific terms and conditions. Examples are loyalty programs offered by hotels, airlines, and telecommunication companies, etc.

Shari'ah ruling:

If these programs are without subscription fee, it is permissible to avail of them as they are on a voluntary basis (Tabarru'). Moreover, if entering into the program is subject to a subscription fee, then it is permissible only when it enables the member to have some services or benefits that are valuable in Shari'ah. It is permissible for a member, if at the time of purchase of a good or service some points required for that purpose are lacking, that he purchases new points for cash and it is also permissible to use those purchased points, because the use of these points is deemed to be payment of a part of the price. It is incumbent on the Institution to resort to its Shari'ah Supervisory Board for ensuring the Shari'ah ruling about the terms and conditions of such a program.

4. Date of Issuance of the Standard

This Shari'ah Standard was issued on 30 Rajab 1437 A.H, corresponding to 7 May 2016 A.D.

Adoption of the Standard

The Shari'ah Board adopted the Standard on "Competitions and Prizes" in its meeting No. (43) held in the Kingdom of Bahrain on 1-3 Jumada II 1437 A.H., corresponding to 10-12 March 2016 A.D.

Appendix (A)
Brief History of the Preparation of the Standard

On 24 Safar 1434 A.H., corresponding to 6 January 2013 A.D., the Secretariat of AAOIFI decided to commission a Shari'ah consultant to prepare a juristic study on competitions and prizes as well as draws and promotions.

In its meeting held on 2 February 2015 A.D., the Kuwait Shari'ah Standards Committee discussed the study and requested the consultant to prepare a draft standard.

The Committee discussed the exposure draft standard in its meeting held on 6 June 2015 A.D., and requested the consultant to introduce necessary amendments and relevant practical applications.

In its meeting held on 30 November 2015 A.D., the Committee finalized discussion of the draft standard, and decided to submit it to the Shari'ah Board for discussion.

In its meeting No. (42), held in the Kingdom of Bahrain on 22-23 Safar 1437 A.H., corresponding to 4-5 December 2015 A.D., the Shari'ah Board discussed the exposure draft standard, and introduced the changes it deemed suitable. Then, the Board decided to present the draft standard to a number of public hearings.

In view of the Board's decision, the Secretariat of AAOIFI held three public hearings: in the Kingdom of Morocco on 12 Rabi' II A.H., corresponding to 22 January 2016 A.D., at the headquarters of the Dar El Hadith El Hassania , Rabat; in The Hashemite Kingdom of Jordan on 25 Rabi' II 1437 A.H., corresponding to 4 February 2016 A.D., at the University of Jordan; and in the Kingdom of Saudi Arabia on 4 Jumada I 1437 A.H., corresponding

to 13 February 2016 A.D., in cooperation with the Saudi Justice Society (Qadha'). The public hearings were attended by a host of prominent Shari'ah scholars and justices, experts representing central banks and Islamic financial institutions, accounting and auditing firms, and legal firms, and the academia, among others. The draft standard was discussed in detail, and remarks and comments of scholars and experts were collected.

In its meeting No. (43) held in the Kingdom of Bahrain on 1-3 Jumada II 1437 A.H., corresponding to 10-12 March 2016 A.D., the Board discussed the remarks and comments collected from the three public hearings, made the changes it deemed necessary, and adopted the standard.

In its meeting held in Al-Madinah al-Munawwarah on 30 Rajab 1437 A.H., corresponding to 7 May 2016 A.D., the Shari'ah Standards Drafting Committee reviewed the Standard. After elaboration, a few changes were suggested with regard to the Standard's wording, and the Committee adopted the standard and submitted it for official issue.

Appendix (B)
The Shari'ah Basis for the Standard

The Basis for Permissibility of Competitions (in general):

The Qur'anic Verse telling what Yusuf's brothers said to their father: ***{"They said: O our father, indeed we went racing each other and left Yusuf (Joseph) with our possessions, ..."}***.[3] Al-Mawardi said: "They [Yusuf's brothers] addressed their father [i.e., Jacob] with such a saying which he did not object [their going to a racing competition]. This serves as evidence to its permissibility in Jacob's religious code which was not later superseded by abrogation and is still therefore applicable thence".[4]

In the Sunnah, Abu Hurairah reported the Prophet (peace be upon him) as having said: *"There shall be no prizes awarded on racing competitions unless on camelback, horseback (or the like), or by throwing a spear"*.[5] There is also a narration by Abdullah Ibn Umar (may Allah be pleased with them both) stating: *"The Prophet (peace be upon him) established a racing competition between slender horses from Al-Haifaa' to Thaniyyat Al-Wada'a, and then established another between ordinary horses (non-slender horses) from Thaniyyat Al-Wada'a to Bani Zuraiq Mosuqe. Abdullah was among those who raced on horseback"*.[6]

It was also reported that Anas (may Allah be pleased with him) said: *"The Prophet (peace be upon him) had a she-camel called al-Adhbaa' that was invincible in racing. Then, a Bedouin came in on the back of a young she-camel (under 6 years old) and managed to surpass her in the race. This distressed Muslims very much so that the Prophet (peace be upon him) came*

(3) [Yusuf (Joseph): 17].
(4) Al-Mawardi: Ali Ibn Muhammad, *"Al-Hawi Al-Kabir"*, [15: 180].
(5) Abu Dawud, *"Al-Sunan"* [H: 2574].
(6) Al- Bukhari, *"Al-Sahih"*, [H: 410 and 2715], and Muslim: *"Al-Sahih"*, [H: 1870].

to notice it and said; 'verily Allah will bring down whatever rises high in this world'."[7]

It was also reported that Ayishah, Mother of the Believers, (may Allah be pleased with her) accompanied the Prophet (peace be upon him) in one of his travels. She said: *"I raced with him [i.e., the Prophet (peace be upon him)] and I could surpass him in the race on my feet. However, while I gained weight I raced him again and he defeated me, saying: 'this for that'."*[8]

The Basis for Permissibility of Granting Prizes in Competitions:

The noble Hadith: *"There shall be no prizes awarded on racing competitions unless for races on camelback, horseback (or the like) or for throwing a spear"*. Sabq, the word used in this Hadith, involves the prizes awarded therein. The above saying of the Prophet (peace be upon him) stands as evidence for the permissibility of prizes in competitions.

(7) Al-Bukhari, *"Al-Sahih"*, Chapter on Jihad (Fighting for the Cause of Allah), [H: 2717].
(8) Abu Dawud: "*Al-Sunan*", Chapter on Jihad, Section on Racing on Feet, [H: 2578]. And Ibn Majah: *"Al-Sunan"*, Chapter on Marriage, Section on Congeniality with Women, [H: 1979].

Appendix (C)
Definitions

Linguistically, the Arabic word Sabq means the situation of being at the front of competing runners, and at a foremost position in different walks of life in general. Meanwhile, the Arabic word Sabaq (i.e. award or Ju'l for winners of a race) is the amount of money awarded in a competition.[9]

Competition (Musabaqah): Technically, it is a contract that involves carrying out a permissible work (task/ job) based on a competition amongst a number of people in order to recognize the best performer. The contract might or might not involve payment of a reward (prize).[10]

Sports Encounters: Sports that involve competing in archery [or the like].[11]

Tahrish (Provocation): Provoking and agitating animals to fight each other [as in cockfights and the like].

Prize: Linguistically, it refers to something that is given gratis. Technically, it is a gift given to a natural or legal person(s) for having accomplished a specific, permissible work by way of winning over other comparable competitors [in a competition].

Current Accounts: Amounts of money deposited with banks where banks are bound to pay them back to the account holders whenever they wish.

Investment Deposits: Amounts of money deposited with banks for specified periods. Withdrawals are not allowed before the expiration of these periods. These deposits come in two types: term deposits and savings deposits.

(9) Ibn Manzur, Muhammad Ibn Makram, *"Lisan Al-Arab"*, [10: 153], Dar Sader, Beirut.
(10) Al-Shithri, Sa'd Ibn Nasir Ibn Abdul-Aziz, *"Al-Musabaqat Wa Ahkamuha Fi Al-Shari'ah Al-Islamiyyah"* (with adaptation).
(11) Al-Ansari, Zakariyya Muhammad Ibn Zakariyya, *"Asna Al-Matalib Fi Sharh Rawd Al-Talib"*, [4: 234].

Shari'ah Standard No. (6)

Conversion of a Conventional Bank to an Islamic Bank

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

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

Preface

The aim of this standard is to explain procedures, mechanisms and treatments that are required for converting a conventional bank to an Islamic bank (bank/banks)[1] that observes the rules and principles of Shari'ah in its operations and financial relationships, and, at the same time, embraces the objectives and functions of Islamic banking services. The standard also includes an outline of significant Islamic banking activities that constitute alternatives to conventional banking practices that are in place prior to conversion.

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

Statement of the Standard

1. Scope of the Standard

This standard covers fundamental mechanisms for converting a conventional bank to a bank that complies with Shari'ah rules and principles right after the decision to undertake immediate comprehensive conversion within a particular designated period that is announced, whether such a decision comes from within the bank or from outside the bank to be converted by outside parties interested in converting it. The standard covers the time frame required for the conversion, the effect of conversion on the methods used to solicit and receive deposits, and the method to be used to invest such deposits. The standard provides guidance on how to treat the receivables and liabilities realized by the bank prior to the conversion, whether or not such receivables and liabilities are received or paid. The standard includes a treatment of the prohibited assets that are in the possession of the bank before conversion and the appropriate ways of disposing of them.

The standard does not cover activities of the converting bank that are naturally permissible or the profit made by permissible means, as these are not the subject matter of the conversion. This is because there is no Shari'ah objection to the bank continuing such activities or employing them for its own benefit. The standard also does not cover activities of Islamic windows or departments or units in conventional banks.

2. Time Frame for the Conversion

2/1 It is necessary that all Shari'ah requirements be executed in the process of converting a conventional bank to a potential Islamic bank. It is also necessary that the Shari'ah rules and principles be observed in respect of all new transactions after conversion. In principle, the transactions that are concluded before the decision to convert must be ceased or disposed of immediately. It is not permissible to delay clearing out non-permissible transactions

unless such delay becomes a necessity or a pressing need. Thus, the circumstances surrounding the conversion must be taken into consideration in order to avoid the risk of failure or a breakdown of the bank's operations, taking into account that the provisions of this standard will be applied to accommodate the situation.

2/2 If the bank did not decide on an immediate and comprehensive conversion as per item 2/1 and decided to adopt a gradual or partial conversion, then it is not regarded as a converted bank and may not be granted a licence as an Islamic bank unless the conversion process is completed. The shareholders are required to accelerate the process of conversion in order to free themselves from the sin of impermissible activities. This standard may be used as a guideline for identifying the steps of conversion.

2/3 The impermissible profits realised and transactions concluded during the period of conversion can be treated as per the explanation in items 8-11.

3. Necessary Measures for Conversion

3/1 For the success of the process of conversion, it is necessary that the bank set up all necessary procedures, create the required tools, explore alternatives to non-permissible financial practices, and train and promote the personnel required for proper implementation of the procedures of conversion.

3/2 The appropriate administrative arrangements must be in place, including changing the bank's operating license if required by the supervisory authorities, and amending the bank's by-laws (memorandum and articles of association) through the required procedures so that they include objectives and operational measures that are appropriate to Islamic banking. The by-laws must be cleansed from anything that contradicts the nature of Islamic banking.

3/3 Restructuring the organizational structure of the bank and its employment procedures, conditions and employee statutes to fit the situation of conversion.

3/4 Formation of a Shari'ah supervisory board and an internal Shari'ah compliance department in accordance with the Governance Standards issued by Accounting and Auditing Organization for Islamic Financial Institutions.

3/5 Reformatting or designing standard contracts or specimens or exemplars of documents that comply with Shari'ah rules and principles.

3/6 Opening accounts with local or international Islamic banks and revamping of the accounts that are maintained with local or corresponding conventional banks [see, item 4 (b)]. Any dealings with conventional banks must be limited to the magnitude of the need to do so.

3/7 Preparing a special programme for preparing personnel and training them to deal with the application of Islamic banking practices.

3/8 Taking necessary measures for the implementation of accounting, auditing, governance, and ethics standards issued by Accounting and Auditing Organization for Islamic Financial Institutions.

4. Dealings with Banks

4/1 Exerting all possible efforts to adapt the ways of dealing with central banks regarding deposits, liquidity needs or otherwise in a way that does not conflict with the rules of Shari'ah, especially rules that govern Riba transactions. The possible alternatives to the reserve amount required by law include, among others, depositing receivables represented by commercial paper to be paid later by customers instead of accepting the freezing of the cash account. The bank can also finance government projects using Islamic instruments. Among the possible alternatives for the purpose of set-off is for the bank to maintain current accounts that accrue no interest or disposing of the interest earned, if that is impossible, and adapting the ways of dealing with the central bank for acquiring liquidity, for example, by the opening of investment accounts for the central bank.

4/2 Revamping the transactions with conventional banks on the basis of Riba free transactions and the application of instruments acceptable by Shari'ah.

4/3 Intensifying transactions with Islamic financial Institutions through bilateral exchange of current or investment accounts and considerable cooperation in the areas of remittances, documentary credits and syndicated financing.

5. Providing Banking Services in Permissible Ways

In providing banking services, it is not permissible for the bank to receive interest as compensation for services rendered. It is a requirement that an Islamic alternative be worked out, such as treatment of uncovered documentary credits through Murabahah, Musharakah or Mudarabah in accordance with the rules of Shari'ah. It is not permissible to take a commission for providing a mere facility. However, the commission may be linked to expenses incurred for the execution of the credit facility accordingly.

6. Effect of Conversion on the Interest Based Receivables and Their Shari'ah Alternatives

6/1 All traces of conventional transactions whereby the bank originated monetary assets and is liable to pay interest for them must be liquidated. This is the rule whether such transactions involve individuals, banks or central banks. This liquidation includes, among others, the conditions relating to the deposits, preference shares, investment bonds and interest-based certificates that were issued by the bank before the decision for conversion. [see item 9]

6/2 The bank must confine itself to permissible operations for acquiring the necessary funds to operate or to meet its liabilities. Examples of such operations are:

6/2/1 The shareholders may increase their share capital in order to increase the bank's capital and provide a basis for attracting investment accounts and current accounts.

6/2/2 Issuance of Islamic certificates such as Mudarabah, Musharakah or Ijarah certificates within the parameters of Shari'ah.

6/2/3 Concluding Salam contracts whereby the bank acts in the capacity of a supplier, or Istisna'a contracts whereby the bank

acts in the capacity of a manufacturer or builder with the condition that the contract price of the Istisna'a is paid to the bank in advance, although the deferment of payment of the price in Istisna'a is allowed by Shari'ah.

6/2/4 Concluding a sale-and leaseback deal by selling some of the assets of the bank for liquidity and leasing them back by means of an Ijarah contract. This transaction must take into account the Shari'ah Standards on Ijarah and Ijarah Muntahia Bittamleek whereby the contract of sale must be independent from the contract of lease, i.e. the two contracts must remain separate from each other.

6/2/5 Concluding Tawarruq deals in line with Shari'ah principles by buying a commodity on a deferred payment basis and selling it to a third party, other than the previous seller, for immediate payment.

6/3 If the capital of the bank has increased due to non-permissible transactions or the accumulation of reserves based on non-permissible transactions, then its treatment must be in accordance with the treatment of non-permissible receivables or other non-permissible assets in the possession of the bank as discussed below. [see items 8 and 10]

7. Effect of Conversion on Investments

7/1 All interest-based investment instruments must cease to be used and must be replaced by permissible investment instruments such as Mudarabah, all Shari'ah-nominate partnerships, diminishing Musharakah, sharecropping partnerships (agricultural, planting or irrigation partnership) or financing by way of deferred sales, Murabahah, Salam, Istisna'a, operating Ijarah, Ijarah Muntahia Bittamleek or other permissible financing and investment instruments.

7/2 All possible efforts must be exerted to terminate all interest-based loans that the bank has made before the decision to convert, whether such loans are medium-term or long-term facilities, followed by converting

the principal amounts to financing instruments in accordance with the rules and principles of Shari'ah. If the bank is unable to terminate some of these loans, then the bank must dispose of the interest earned in the manner explained in item 10/2.

8. Treatment of the Bank's Non-Permissible Existing Receivables before the Decision to Convert

8/1 Non-permissible assets of the bank originated or acquired before the decision to convert

Starting from the financial period in which the bank decides to convert, the following must be done:

8/1/1 If a conventional bank is acquired with the intention to convert it to an Islamic bank, the new owners are not obliged to dispose of interest and impermissible earnings that have been earned before such acquisition.

8/1/2 If a conventional bank is converted by its existing shareholders into an Islamic bank, then the process of disposing of interest and impermissible earnings should be considered as commencing at the beginning of the financial period in which the conversion starts to take effect. However, for any impermissible earnings that have been distributed prior to conversion, it is necessary, on ethical grounds, for the shareholders and depositors to whom these earnings have been distributed to dispose of them personally. The bank is not bound to do so.

8/1/3 Revenues not yet received that are of doubtful permissibility are not subject to compulsory disposal, whether they were earned before or during the financial period in which the bank decides to convert. The same rule applies to revenues of doubtful permissibility that have been already received because of a belief that they are permissible on the basis of (I) an interpretation of a person who is qualified to perform *Ijtihad* on issues that are subject to personal juristic interpretation, (II) juristic position of an authoritative school of Shari'ah or (III) the opinion of some eminent and knowledgeable scholars.

8/1/4 If the bank has rights to prohibited non-monetary assets, it may receive them with the intent to destroy them. If the bank is entitled to receive consideration for supplying non-permissible assets or services, the bank may receive the consideration with the intent to donate it to charity. The same rule applies to any income that has been acquired from non-permissible assets during the period in which the bank decides to convert. In both cases, the customer should not be allowed to avoid paying the amount receivable or the consideration, otherwise such a customer would end up being entitled to two counter-values of the same transaction: the good or service supplied and the price payable for it.

8/1/5 If the bank is converted and it has, among its tangible assets, impermissible commodities, the bank is obliged to destroy them. If the bank has sold some of these commodities and is yet to receive the price thereof, the price must be received and be donated to charity.

8/1/6 If the property assets of the bank are locations designated for non-permissible activities, they should be changed to locations designated for permissible operations and services.

9. Treatment of Non-Permissible Liabilities before the Decision to Convert, Whether the Conversion Is Internal or External

9/1 Internal conversion

9/1/1 If the liabilities are in the form of payment of interest, the bank should employ all lawful means to avoid paying such interest. This rule does not apply to the principal amounts of debts or loans. The bank should not pay interest except on the basis of dire need.

9/1/2 If the liabilities are in the form of obligations to provide non-permissible services, then the bank is obliged to make every effort to terminate such liabilities, by refunding the consideration, even if it has to pay compensation for non-fulfilment of such obligations.

9/2 External conversion through acquisition of the bank by parties interested in converting it.

If the purchaser is capable of negotiating a deal that could exclude all non-permissible receivables (e.g. interest and non-permissible assets) from the acquisition deal in a way that will make the seller solely liable for non-permissible liabilities, then the Shari'ah requires that the purchaser do so. However, if the acquisition cannot be concluded unless all assets of the bank including the non-permissible assets and receivables are acquired, then the purchaser is required by Shari'ah to act as quickly as possible to dispose of non-permissible liabilities even if the purchaser has to suggest to the creditors of the bank an earlier repayment for a discount.

9/3 Treatments for impermissible mortgages

The shareholders must accelerate the redemption of all impermissible mortgages attached to the assets of the bank. In the case of external conversion, the buyer must stipulate that the seller replaces impermissible mortgages with permissible ones.

10. Disposal of Impermissible Earnings

10/1 All impermissible earnings acquired by the bank before conversion that need to be disposed of as per the rules in this standard must without delay be paid to charity, unless it is difficult to do so, for example, where complete disposal promptly will lead to the collapse of the bank or bankruptcy. In this case, the implementation of conversion can reasonably take place gradually.

10/2 Any interest and other non-permissible earnings should be channelled to charity and general public utilities. It is not permissible for the bank to use this money, directly or indirectly, for its own benefit. Examples of charitable channels include, among others, training people other than the staff of the bank, funding research, providing relief equipment, financial and technical assistance for Islamic countries or Islamic scientific, academic Institutions, schools, anything to do with spreading Islamic knowledge, and

similar channels. The charity money must go to these channels in accordance with the resolutions of the Shari'ah Supervisory Board of the bank.

11. Zakah Obligation on the Bank before the Decision to Convert

When the conversion is initiated by outsiders who acquired the conventional bank for the purpose of converting it, then they are not obliged to make Zakah payment for the past financial periods because the Zakah for previous periods is the liability of the previous owners. The Zakah liability will start to exist for the new owners from the date of the decision to convert. For the purpose of discharging the responsibility to pay Zakah, the owners may apply the Shari'ah Standard No. (35) on Zakah. However, if the decision to convert was made by the shareholders and the Zakah was not paid for the previous financial periods, the shareholders are obliged to pay Zakah for these periods. They must take into account that they are obliged to pay Zakah even if the revenues and the money earned are impermissible because the shareholders are obliged in the first place to dispose of all accrued interest and impermissible earnings. So, the payment of Zakah is part of the obligation to dispose of impermissible earnings and interest.

12. Date of Issuance of the Standard

This Standard was issued on 4 Rabi' I, 1424 A.H., corresponding to 16 May 2002 A.D.

Adoption of the Standard

The Shari'ah Standard on Conversion of a Conventional to an Islamic bank was adopted by the Shari'ah Board in its meeting No. (8) held in Al-Madinah Al-Munawwarah on 28 Safar - 4 Rabi' I, 1423 A.H., corresponding to 11-16 May 2002 A.D.

Appendix (A)
Brief History of the Preparation of the Standard

In its meeting No. (5) held in Makkah Al-Mukarramah on 8-12 Ramadan 1421 A.H., corresponding to 4-8 December 2000 A.D., the Shari'ah Board decided to give priority to the preparation of a Shari'ah Standard on Conversion of a Conventional bank to an Islamic Bank.

On Monday 29 Ramadan 1421 A.H., corresponding to 25 December 2000 A.D., a Shari'ah consultant was commissioned to prepare a juristic study and an exposure draft.

In its meeting held in Bahrain on 15-16 Safar 1422 A.H., corresponding to 9-10 May 2001 A.D., the Shari'ah Studies Committee discussed the juristic study and made certain amendments to it. The committee also discussed the exposure draft of the Standard in its meeting No. (10) held in Bahrain on 14 Rabi' I, 1422 A.H., corresponding to 6 June 2001 A.D., and asked the consultant to make some amendments in light of the comments made by the members.

In its meeting No. (11) held in Jordan on 17 Jumada II, 1422 A.H., corresponding to 5 September 2001 A.D., the Shari'ah Studies Committee discussed the exposure draft and made some relevant amendments.

The revised exposure draft of the standard was presented to the Shari'ah Board in its meeting No. (7) held in Makkah Al-Mukarramah on 9-13 Ramadan 1422 A.H., corresponding to 24-28 November 2001 A.D. The Shari'ah Board made further amendments to the exposure draft of the standard and decided that it should be distributed to specialists and interested parties in order to obtain their comments and discuss them in a public hearing.

A public hearing was held in Bahrain on 29 –20 Dhul-Hajjah 1422 A.H., corresponding to 2-3 February 2002 A.D.. The public hearing was attended by more than 30 participants representing central Institutions, Institutions, accounting firms, Shari'ah scholars, academics and others who are interested in this field. The members responded to the written comments that were sent prior to the public hearing as well as to the oral comments that were expressed in the public hearing.

The Shari'ah Standards Committee in its meeting held on 21-22 Dhul-Hajjah1422 A.H., corresponding to 6-7 March 2002 A.D., in the Kingdom of Bahrain discussed the comments made about the exposure draft. The Committee made the necessary amendments, which it deemed necessary in light of both the discussions that took place in the public hearing, and the written comments that were received.

The Shari'ah Board in its meeting No. (8) held on 28 Safar – 4 Rabi' I, 1423 A.H., corresponding to 11-16 May 2002 A.D, in Al-Madinah Al-Munawwarah discussed the amendments made by the Shari'ah Standards Committee, and made the necessary amendments, which it deemed necessary. Some paragraphs of the standard were adopted by the unanimous vote of the members of the Shari'ah Board, while the other paragraphs were adopted by the majority vote of the members, as recorded in the minutes of the Shari'ah Board.

Appendix (B)
The Shari'ah Basis for the Standard

Gradual Clearance of Non-Permissible Previous Transactions

The basis for the permissibility of gradual clearance of non-permissible previous transactions due to necessity or need and in accordance with the rules of Shari'ah is because it is not feasible for the converting bank to clear all non-permissible transactions immediately. Therefore, the bank must dispose of the effects of impermissible transactions because this is feasible.

Necessary Procedures and Mechanisms for Conversion

Since the realisation of the conversion is dependent on the procedures and mechanisms mentioned in this standard, these procedures and mechanisms thus become permissible or in certain circumstances their use becomes obligatory when the conversion will not be realised without applying these procedures and mechanisms. This is because conversion is obligatory, and if an obligation can be realised only by means of a particular way or tool, then the use of such a tool also becomes an obligation.

Providing Banking Services

The basis for the permissibility of providing banking services that are not related to giving loans on an interest-bearing basis is that such an operation is a practical application of Ijarah and an agency contract with remuneration. If providing these services involves Riba then the operation becomes impermissible as it is a Riba-based transaction that is prohibited by Shari'ah.

Attracting Investments

The conversion necessitates doing away with the conventional methods of attracting investment funds such as interest-bearing deposits, which should be replaced by the application of Mudarabah and Musharakah contracts or acting as an investment agent. The basis for the impermissibility of using conventional methods of attracting investments is the Saying of Allah,

the Exalted: ***{"But Allah has permitted trade and forbidden usury"}.***[2] The basis for terminating all previous impermissible transactions is the Saying of Allah, the Exalted: ***{"Give up what remains of your demand for usury"}.***[3] Also, a number of Shari'ah boards have issued resolutions for the treatment of pre-conversion liabilities that involve payment of interest by using Shari'ah acceptable instruments and the conversion of interest-based bonds to Islamic certificates and shares.[4] The Fiqh Academy under the auspices of the Muslim World League has issued a resolution confirming the permissibility of Tawarruq (which is one of the instruments that can be used to acquire liquidity).[5]

Investment of Funds

- The basis for the rule that the bank must cease investing through making loans and receiving interest is that this is Riba and paying or receiving Riba is prohibited.
- The basis for the alternatives to interest-based transactions provided in this standard is the authorities that are mentioned for each investment instrument in details in the Fiqh books[6] and the Shari'ah Standards.

Treatment of Impermissible Rights of the Bank before the Decision to Convert

- The basis for not obliging the bank to dispose of impermissible intangible assets from the previous financial period, i.e. before the year of conversion, is because the management of the bank cannot change rights originating in the previous financial period, as the responsibility and authority for doing so ends at the end of the previous financial period. As for the shareholders (the owners), they are obliged person-

(2) [Al-Baqarah (The Cow): 275].

(3) [Al-Baqarah (The Cow): 278].

(4) *"Qararat Al-Hay`ah Al-Shar'iyyah Li Sharikat Al Rajhi"*: Fatwa No. (106 and 200); *"Fatawa Nadwat Al Baraka"* [11: 6]; *"Fatwa Hay`at Al-Fatwa Wa Al-Raqabah Al-Shar'iyyah li Bayt Al-Tamwil Al-Kuwayti"* No. (415).

(5) *"Qararat Majma' Al-Fiqh Al-Islami Al-Tabi' Li Rabitat Al-'Alam Al-Islami"*, the session held in 1419 A.H.

(6) See: Chapters on Mudarabah, partnerships, agency contract, sales, Ijarah, etc. in different Fiqh books and also the Shari'ah rules for investment and financing instrument issued by Accounting and Auditing Organisation for Islamic Financial Institutions.

ally to dispose of any dividends from non-permissible earnings that were distributed to them, because the responsibility of shareholders remains even after termination of the responsibility of the management at the end of the financial period, i.e. the end of financial period does exonerate shareholders from responsibility.

- The basis for allowing the bank to keep impermissible earnings and income of doubtful permissibility earned on the basis of an interpretation of a person who is qualified to perform *Ijtihad* on issues that are subject to personal juristic interpretation and the juristic position of an authoritative School of Shari'ah, etc., is that the Shari'ah validates actions that occur on the basis of an interpretation that one believes to be valid until such an interpretation is proved incorrect. The scholars are unanimous that in times of social unrest due to the actions of insurgents who believe in their cause by interpretation or *Ijtihad* to the effect that they have a right to do so, the insurgents are entitled to items of property they acquire during this time, even if they realise later that they were wrong and end their act of insurgence.(7)
- The basis for destroying the bank's non-permissible tangible assets in the possession of others before the year of conversion is that these assets are worthless by Shari'ah Standards since they are impermissible. This is because disposing of a prohibited thing is an obligation as in the case when the verse that prohibited liquor was revealed people discharged the wine that was in their possession.

Treatment of Non-Permissible Liabilities of the Bank before the Decision to Convert

- The basis for the rule that the bank should refrain from paying interest after the conversion is because such interest is not, by the Shari'ah Standard, a valid debt that should be honoured. Again, repentance through conversion necessitates refraining from prohibited acts including payment of interest. The principle of necessity is the basis for allowing payment of interest if the bank could not refrain from doing

(7) See Ibn Qudamah, *"Al-Mughni"* [12: 250-251], Hajr publication, 2nd edition 1413 A.H., edited by Abdullah Al-Turki and Abdul-Fattah Al-Hulw.

so because of lack of legal protection and the possibility that the bank may be subject to punishment that may prevent the avoidance of paying interest. The payment of interest due to necessity is supported by saying of Allah, the Exalted: ***{"Whoever disbelieved in Allah after his belief, except him who is forced thereto and whose heart is at rest with Faith..."}***[8] and the saying of the Prophet (peace be upon him): *"Verily, Allah, the Exalted, Has forgiven my ummah those act done by mistake, forgetfulness and compulsion"*.[9]

- The basis for making a distinction between the principal loan and interest is because the loan contracts per se are valid. It is the interest associated with the loan that is forbidden. This is the view of the Hanafi jurists who say that the loan contract itself is valid and the condition to pay interest is void.[10] Again, the basis for this ruling is the legal maxim that says acts of Muslims must be deemed valid as far as possible even if their acts are based on a non-preferable juristic view.[11]
- The basis for the requirement that the outside buyer interested in converting the conventional bank should exert all possible effort to exclude impermissible rights is that the payment of interest is the responsibility of the seller. Such interest would have no bearing on the buyer of the bank as the seller's right to receive such interest can be taken into account in computing the price to be paid for the bank. If the buyer is unable to convince the seller in this respect, the principle of necessity becomes applicable with regard to payment of interest. The basis for extinguishing Riba-based loans as soon as possible even if such an act will impose on the buyer the need to suggest to the creditor/s early payment of these loans for a discount is the principle of *Da' Wa Ta'jjal* (discount for acceleration of payment) that was endorsed by the resolution of International Islamic Fiqh Academy provided the discount was not agreed upon earlier.[12]

(8) [Al-Nahl (The Bees): 106].
(9) The Hadith is related by Ibn Majah, *"Sunan Ibn Majah"* [1: 695].
(10) See Al-Sarakhsi, *"Al-Mabsut"* [12: 25-26], Dar Al-Ma'rifah.
(11) See Ibn Al-Humam, *"Fath Al-Qadir"* [9: 114], Dar Al-Fikr; Al-Sarakhsi, *"Al-Mabsut"* [7: 86]; Al-Kasani, *"Bada`i' Al-Sana`i'"*, [3: 79], [4: 5], [7: 149 and 177], (Dar Al-Kutub Al-'Ilmiyyah).
(12) International Islamic Fiqh Academy Resolution No. 64 (2/7).

- The basis for requiring that the purchaser accelerate the redemption of all impermissible mortgages attached to the assets of the bank is because Riba is prohibited; hence, securing payment of Riba by personal guarantees or mortgages is also prohibited. It must be noted that the graveness of securing Riba by personal guarantee is greater than graveness of securing Riba by writing and attestation, which were mentioned in the saying of the Prophet (peace be upon him): *"Allah curses the one who take (earn) Riba, the one who gives it, the one who scribe it and the two witnesses"*.[13]

Treatment of Impermissible Tangible Assets Acquired by the Bank Before the Decision to Convert

- The basis for destroying the existing tangible assets of the bank after conversion has already been explained. The basis for donating to charity receivables earned from trading in such assets has also been explained earlier. The basis for transforming the locations that were used for impermissible services to locations for permissible services is that the prohibition does not concern the location itself, rather the prohibition relates to the use of the location.

Disposal of Impermissible Rights

- The basis for the requirement that impermissible earnings be donated to charity is that these revenues are not permissible for the person who earns them. This is evidenced by the order of the Prophet (peace be upon him) that the usurped goat be given to war prisoners.[14]
- The basis for indicating charity as a way of disposing of impermissible earnings is that by transferring the ownership of these earnings, the characterisation of prohibition in respect to these earnings is changed and they become permissible for the beneficiary. Again, a thing which is prohibited for one person is not necessarily prohibited for another person, i.e. when it is prohibited for one, it may be permissible for other.

(13) The Hadith has been related by Muslim in his *"Sahih"* [3: 1219], verified by Muhammad Fu`ad Abdul-Baqi, Dar Ihya Al-Turath Al-'Arabi.

(14) The Hadith has been related by Al-Daraqutni, *"Sunan Al-Daraqutni"* [4: 285]; and *"Nayl Al-Awtar"* [9: 18].

The International Islamic Fiqh Academy has issued a resolution in support of this ruling.[15]

- The basis for allowing delay in disposal of non-permissible earnings if such disposal will lead a total breakdown of the activities of the bank or its bankruptcy is that the Fuqaha were of the view that a repentant may use impermissible earnings to cover his unavoidable needs. However, the Institution is not entitled to benefit whatsoever, i.e. directly or indirectly, from the earnings that must be disposed of. This is because such benefit adds value to the asset of the Institution.
- The channels for disposing of impermissible earnings include, as well as those mentioned in this standard, all other channels of disposal that the Shari'ah Supervisory Board of each Institution will regard as appropriate channels for disposal of impermissible earnings.

(15) International Islamic Fiqh Academy Resolution No. 13 (1/3).

Shari'ah Standard No. (17)

Investment Sukuk

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

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

Preface

The aim of this standard is to elaborate the Shari'ah rules for the issuance and trading of investment Sukuk (certificates) as well as the elaboration of their types, characteristics, Shari'ah regulations and the conditions for the issuance of Sukuk and dealings in them for trading by Islamic financial institutions (institution/institutions).[1]

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

Statement of the Standard

1. Scope of the Standard

This standard covers investment Sukuk. These Sukuk include Sukuk of ownership of leased assets, ownership of usufructs, ownership of services, Murabahah, Salam, Istisna'a, Mudarabah, Musharakah, investment agency and sharecropping (Muzara'ah), irrigation (Musaqat) and agricultural (Mugharasah) partnerships. The standard does not cover shares of joint stock companies, certificates of funds and investment portfolios.

2. Definition of Investment Sukuk

Investment Sukuk are certificates of equal value representing undivided shares in ownership of tangible assets, usufruct and services or (in the ownership of) the assets of particular projects or special investment activity, however, this is true after receipt of the value of the Sukuk, the closing of subscription and the employment of funds received for the purpose for which the Sukuk were issued.

In this standard, Sukuk have been designated as Investment Sukuk in order to distinguish them from shares and bonds.

3. Types of Investment Sukuk

Investment Sukuk are of different types, and among these are:

3/1 Certificates of ownership in leased assets

These are certificates of equal value issued either by the owner of a leased asset or a tangible asset to be leased by promise, or they are issued by a financial intermediary acting on behalf of the owner with the aim of selling the asset and recovering its value through subscription so that the holders of the certificates become owners of the assets.

3/2 Certificates of ownership of usufructs

3/2/1 Certificates of ownership of usufructs of existing assets

These are two types:

3/2/1/1 Certificates of equal value issued by the owner of an existing asset either on his own or through a financial intermediary, with the aim of leasing the asset and receiving the rental from the revenue of subscription so that the usufruct of the assets passes into the ownership of the holders of the certificates.

3/2/1/2 Certificates of equal value issued by the owner of the usufruct of an existing asset (lessee), either on his own or through a financial intermediary, with the aim of subleasing the usufruct and receiving the rental from the revenue of the subscription so that the holders of the certificates become owners of the usufruct of the asset.

3/2/2 Certificates of ownership of usufructs of described future assets

These are certificates of equal value issued for the purpose of leasing out tangible future assets and for collecting the rental from the subscription revenue so that the usufruct of the described future asset passes into the ownership of the holders of the certificates.

3/2/3 Certificates of ownership of services of a specified party

These are certificates of equal value issued for the purpose of providing services through a specified provider (such as educational benefits in a nominated university) and obtaining the service charges in the form of subscription income so that the holders of the certificates become owners of these services.

3/2/4 Certificates of ownership of described future services

These are certificates of equal value issued for the purpose of providing future services through described provider (such as educational benefits from a university without naming the educational institution) and obtaining the fee in the form of

subscription income so that the holders of the certificates become owners of the services.

3/3 Salam certificates (Salam Sukuk)

These are certificates of equal value issued for the purpose of mobilising Salam capital so that the goods to be delivered on the basis of Salam come to be owned by the certificate holders.

3/4 Istisna'a certificates (Istisna'a Sukuk)

These are certificates of equal value issued with the aim of mobilising funds to be employed for the production of goods so that the goods produced come to be owned by the certificate holders.

3/5 Murabahah certificates (Murabahah Sukuk)

These are certificates of equal value issued for the purpose of financing the purchase of goods through Murabahah so that the certificate holders become the owners of the Murabahah commodity.

3/6 Musharakah certificates (Musharakah Sukuk)

These are certificates of equal value issued with the aim of using the mobilised funds for establishing a new project, developing an existing project or financing a business activity on the basis of any of partnership contracts so that the certificate holders become the owners of the project or the assets of the activity as per their respective shares, with the Musharakah certificates being managed on the basis of participation or Mudarabah or an investment agency.

3/6/1 Participation certificates

These are certificates representing projects or activities managed on the basis of Musharakah by appointing one of the partners or another person to manage the operation.

3/6/2 Mudarabah Sukuk

These are certificates that represent projects or activities managed on the basis of Mudarabah by appointing one of the partners or another person as the Mudarib for the management of the operation.

3/6/2 Investment agency Sukuk

These are certificates that represent projects or activities managed on the basis of an investment agency by appointing an agent to manage the operation on behalf of the certificate holders.

3/7 Sharecropping certificates (Muzara'ah Sukuk)

These are certificates of equal value issued for the purpose of using the funds mobilised through subscription for financing a project on the basis of Muzara'ah so that the certificate holders become entitled to a share in the crop according to the terms of the agreement.

3/8 Irrigation certificates (Musaqat Sukuk)

These are certificates of equal value issued for the purpose of employing the funds mobilised through subscription for the irrigation of fruit bearing trees, spending on them and caring for them on the basis of a Musaqat contract so that the certificate holders become entitled to a share in the crop as per agreement.

3/9 Agricultural certificates (Mugharasah Sukuk)

These are certificates of equal value issued on the basis of a Mugharasah contract for the purpose of employing the funds for planting trees and undertaking the work and expenses required by such plantation so that the certificate holders become entitled to a share in the land and the plantation.

4. Characteristics of Investment Sukuk

4/1 Investment Sukuk are certificates of equal value issued in the name of the owner or bearer in order to establish the claim of the certificate owner over the financial rights and obligations represented by the certificate.

4/2 Investment Sukuk represent a common share in the ownership of the assets made available for investment, whether these are non-monetary assets, usufructs, services or a mixture of all these plus intangible rights, debts and monetary assets. These Sukuk do not represent a debt owed to the issuer by the certificate holder.

4/3 Investment Sukuk are issued on the basis of a Shari'ah-nominated contract in accordance with the rules of Shari'ah that govern their issuance and trading.

4/4 The trading of Investment Sukuk is subject to the terms that govern trading of the rights they represent.

4/5 The owners of these certificates share the return as stated in the subscription prospectus and bear the losses in proportion to the certificates owned (held) by them.

5. Shari'ah Rulings and Regulations

5/1 Issuance of investment Sukuk

5/1/1 It is permissible to issue investment certificates by way of subscription on the basis of any of Shari'ah-nominated investment contract.

5/1/2 It is permissible to issue certificates for (to securitize) assets that are tangible assets, usufructs and services by dividing them into equal shares and issuing certificates for their value. As for debts owed as a liability, it is not permissible to securitize them for the purpose of trading.

5/1/3 The issue contract has all the legal effects of the contract upon which the issued certificates are based. This occurs after closing of the subscription and the allotment of the certificates.

5/1/4 The two parties of the issue contract are the issuer and the subscribers.

5/1/5 The relationship between the two parties to the issue contract is determined on the basis of the type of contract and its status in the Shari'ah as well as the following description:

5/1/5/1 Certificates of ownership of leased assets

The issuer of these certificates is seller of a leased asset or an asset to be leased on promise, the subscribers are the buyers of the asset, while the funds mobilised

through the subscription are the purchase price of the asset. The certificate holders jointly own the assets through an undivided ownership sharing the profits and losses on the basis of the partnership that exists between them.

5/1/5/2 Certificates of ownership of usufructs

a) Certificates of ownership of the usufruct of existing assets

The issuer of these certificates is the seller of usufruct of an existing asset, the subscribers are buyers of such usufruct, while the funds mobilised through subscription are the purchase price of the usufruct. The certificate holders become joint owners of the usufruct sharing its benefits and risks.

b) Certificates of ownership of described usufruct to be made available in the future

The issuer of these certificates is the seller of usufruct of an asset to be made available in the future as per specification. The subscribers are buyers of the usufruct through, the funds mobilised through subscription are the purchase price of the usufruct. The certificate holders become joint owners of the undivided usufruct sharing its benefits and risks.

c) Certificates of ownership of services

The issuer of these certificates is the seller of services, the subscribers are buyers of the services, while the funds mobilised through subscription are the purchase price of the services.

The certificate holders are entitled to sell the profits of all the types that are listed at (a), (b) and (c) and are entitled to the income from the resale of such usufruct.

5/1/5/3 Salam certificates (Salam Sukuk)

The issuer of the certificates is a seller of the goods of Salam, the subscribers are the buyers of the goods, while the funds realised from subscription are the purchase price (Salam capital) of the goods. The holders of Salam certificates are the owners of the Salam goods and are entitled to the sale price of the certificates or the sale price of the Salam goods sold through a Parallel Salam, if any.

5/1/5/4 Istisna'a certificates (Istisna'a Sukuk)

The issuer of these certificates is the manufacturer (supplier/seller), the subscribers are the buyers of the intended product, while the funds realised from subscription are the cost of the product. The certificate holders own the product and are entitled to the sale price of the certificates or the sale price of the product sold on the basis of a Parallel Istisna'a, if any.

5/1/5/5 Murabahah certificates (Murabahah Sukuk)

The issuer of the certificates is the seller of the Murabahah commodity, the subscribers are the buyers of that commodity, and the realised funds are the purchasing cost of the commodity. The certificate holders own the Murabahah commodity and are entitled to its sale price.

5/1/5/6 Musharakah certificates (Musharakah Sukuk)

The issuer of the certificates is the inviter to a partnership with him in a specific project or determined activity. The subscribers are the partners in the Musharakah contract. The realised funds are the share contribution of the subscribers in the Musharakah capital. The certificate holders own the assets of partnership with the accompanying profits and losses and are entitled to their share in the profits of the partnership, if any.

5/1/5/7 Mudarabah certificates (Mudarabah Sukuk)

The issuer of these certificates is the Mudarib, the subscribers are the owners of capital, and the realised funds are the Mudarabah capital. The certificate holders own the assets of Mudarabah and the agreed upon share of the profits belongs to the owners of capital and they bear the loss, if any.

5/1/5/8 Certificates of investment agency (Wakalah Sukuk)

The issuer of these certificates is the investment agent, the subscribers are the principals and the realised funds are the entrusted capital of the investment. The certificate holders own the assets represented by the certificates with its benefits and risks, and they are entitled to the profits, if any.

5/1/5/9 Muzara'ah certificates (Muzara'ah Sukuk)

a) The issuer of these certificates is the owner of the land (the principal owner or owner of the usufruct of the land). The subscribers are the cultivators on the basis of a Muzara'ah contract (the cultivators or their assignees). The realised funds are the cultivation cost.

b) The issuer of these certificate may be the cultivator (the worker), the subscribers are the owners of the land (investors whose subscription amounts are used to buy the land); and the certificate holders are entitled to a share of the produce of the land as per agreement.

5/1/5/10 Musaqat certificates (Musaqat Sukuk)

a) The issuer of these certificates is the owner (or owner of usufruct) of the land that consists of trees; the subscribers are those who assume the obligation of irrigation through a Musaqat contract, while the realised funds are the maintaining cost of the trees.

b) The issuer of these certificates may be the irrigator (the worker) and the subscribers are the owners of the land (investors whose subscription amounts are used to irrigate the land). The certificate holders are entitled to a share of the produce of the trees as per agreement.

5/1/5/11 Mugharasah certificates (Mugharasah Sukuk)

a) The issuer of these certificates is the owner of land suitable for planting (trees), the subscribers are those who assume the obligation of planting on the basis of a Mugharasah contract, while the realised funds are the cost of maintaining the plantation.

b) The issuer may be the planter (the owner of the work), the subscribers are the owners of the land (investors whose subscription amounts are used to undertake plantation in the land), and the certificate holders are entitled to a share in both the trees and the land as per agreement.

5/1/6 The relationships between the parties, namely the issuer and the subscriber shall be governed by applicable contracts of issuing Sukuk. The mere conclusion of the contract will give rise to legal effects with respect to rights and obligations of the parties.

5/1/7 The issuance of the prospectus represents the issuer's invitation to subscription in which case the act of subscription represents an offer. As for acceptance, it is issuer's approval of the subscription, unless it is expressly stated in the prospectus that it is an offer. In this case, the prospectus will be considered as an offer and the subscription becomes an acceptance.

5/1/8 The following shall be observed in the prospectus of issue:

5/1/8/1 The prospectus must include all contractual conditions, adequate statements about the participants in the issue,

their legal position and rights as well as obligations, such as statements about the issue agent, issue manager, originator, investment trustee, the party covering the loss, payment agent as well as others along with the conditions of their appointment and dismissal.

5/1/8/2 The prospectus of Sukuk must include the identification of the contract on the basis of which the certificates are to be issued, such as sale of tangible leased assets, Ijarah, Murabahah, Istisna'a, Salam, Mudarabah, Musharakah, Wakalah, Muzara'ah, Mugharasah or Musaqat.

5/1/8/3 The contract that forms the basis of the issue must be complete with respect to its elements and conditions and should not include conditions that conflict with its objectives and rules.

5/1/8/4 The prospectus must explicitly mention the obligation to abide by the rules and principles of the Shari'ah, and that there is a Shari'ah Supervisory Board that approves the procedures of the issues and monitors the implementation of the project throughout its duration.

5/1/8/5 The prospectus must state that the investment of the realised funds and the assets into which the funds are converted will be undertaken through Shari'ah-compliant modes of investment.

5/1/8/6 Taking into account item 3/1/5 of the Shari'ah Standard No. (12) on Sharikah (Musharakah) and Modern Corporations, the prospectus must state that each owner of a certificate participates in the profit and bears a loss in proportion to the financial value represented by his certificates.

5/1/8/7 The prospectus must not include any statement to the effect that the issuer of the certificate accepts the liability to compensate the owner of the certificate up to the nominal value of the certificate in situations

other than torts and negligence nor that he guarantees a fixed percentage of profit. It is, however, permitted to an independent third party to provide a guarantee free of charge, while taking into account item 7/6 of Shari'ah Standard No. (5) on Guarantees. It is also permitted to the issuer of the certificate to offer some tangible or personal guarantees with respect to its wrongful acts or negligence, while taking into account item 3/1/4/3 of Shari'ah Standard No. (12) on Sharikah (Musharakah) and Modern Corporations as well as the contracts stated in that standard.

5/1/9 It is permissible for the institution to undertake to underwrite the unsubscribed issue, in which case the obligation of the underwriter is based on a binding promise. The underwriter should not receive any commission in lieu of such underwriting taking into account item 4/1/2/4 of Shari'ah Standard No. (12) on Sharikah (Musharakah) and Modern Corporations.

5/1/10 It is permissible to issue Sukuk on a short-term, medium-term or long-term basis in accordance with the principles of the Shari'ah. The Sukuk may also be issued without specifying a period depending upon the nature of the contract underlying the Sukuk issue.

5/1/11 It is permissible for the issuer or the certificate holders to adopt permissible methods of managing risk, of mitigating fluctuation of distributable profits (profit equalisation reserve), such as establishing an Islamic insurance fund with contributions of certificate holders, or by participating in insurance (*Takaful*) by payment of premiums from the income of the shares of Sukuk holders or through donations (*Tabarru'at*) made by the Sukuk holders.

5/2 Trading of Sukuk and their redemption

5/2/1 It is permissible, after closing subscription, allotment of Sukuk and commencement of activity, to trade in and redeem investment

Sukuk that represent common ownership of tangible assets, usufructs or services. As for trading or redemption prior to the commencement of activity, it is necessary to observe the rules of the contract of *Sarf* (currency exchange) along with the rules for debts (receivables) when liquidation is complete and the assets are receivables or when the assets represented by the Sukuk are sold for a deferred price.

5/2/2 In the case of negotiable Sukuk, it is permissible for the issuer to undertake, through the prospectus of issue, to purchase at market value, after the completion of the process of issue, any certificate that may be offered to him, however, it is not permissible for the issuer to undertake to purchase the Sukuk at their nominal value

5/2/3 The certificates may be traded through any known means, that do not contravene the rules of the Shari'ah, such as registration, electronic means or actual transmission by the bearer to the purchaser.

5/2/4 It is permissible, immediately upon issue and up to the date of maturity, but after the passing of ownership of the assets to the holders of the Sukuk, to trade in Sukuk that represent ownership of existing leased assets or assets to be leased on promise.

5/2/5 It is permissible for the issuer to redeem, prior to maturity, certificates of ownership of leased assets at the market price or at a rate agreed upon, at the date of redemption, between the certificate holder and the issuer.

5/2/6 It is permissible to trade in securities of ownership of usufructs of tangible assets prior to a contract for sub-leasing the assets. When the assets are sub-leased, the certificate represents rent receivables, which makes it a debt owed by the second lessor subject to the rules and regulations for disposal of debts.

5/2/7 It is permissible for the issuer to redeem Sukuk of ownership of the usufruct of tangible assets from the holder, after allotment

and payment of the subscription price, at the market price or at a price agreed upon between the parties at the time of redemption, on the condition that the subscription amount or redemption price is not deferred. [see item 3/4 of Shari'ah Standard No. (9) on Ijarah and Ijarah Muntahia Bittamleek]

5/2/8 It is not permissible to trade in certificates of ownership of usufructs of a described asset before the asset from which usufruct is to be made available is ascertained, except by observing the rules for disposal of receivables. When the asset is ascertained, trading in Sukuk of usufructs of such asset may take place.

5/2/9 It is permissible to trade in securities of ownership of services to be provided by a specified party prior to sub-leasing such services. When the services are sub-leased, the certificate represents rent receivables to be collected from the second lessee. In this case, the certificate represents a debt and is, therefore, subject to the rules and regulations of disposal of debts.

5/2/10 It not is permissible to trade in securities of ownership of services to be provided by a party to be specified in the future before the source from which the services would be provided is identified, except by observing the rules for dealing in debts. When the source of services is identified, trading in such Sukuk may take place.

5/2/11 It is permissible to set up a parallel Ijarah on tangible assets by employing the same description for the usufruct that was provided to the holders of the Sukuk in cases detailed in items 5/2/8 and 5/2/10 provided the two lease contracts remain independent.

5/2/12 It is permissible for the second buyer of the usufruct of existing and specified assets to resell them. The buyer is also entitled to issue certificates in this respect.

5/2/13 It is permissible to trade in or redeem Istisna'a certificates if the funds have been converted, within the period of the Istisna'a, into assets owned by certificate holders. If the realised funds are immediately paid as a price in a parallel Istisna'a contract or the manufactured item is submitted to the ultimate purchaser, then trading in Istisna'a certificates is subject to rules of disposal of debts.

5/2/14 It is not permissible to trade in Salam certificates.

5/2/15 It is not permissible to trade in Murabahah certificates after delivery of the Murabahah commodity to the buyer. However, trading of Murabahah certificates is permissible after purchasing the Murabahah commodity and before selling it to the buyer.

5/2/16 It is permissible to trade in Mudarabah, Musharakah and investment agency certificates after closing of subscription, allotment of the certificates and commencement of activity with respect to the assets and usufructs.

5/2/17 It is permissible to trade in Muzara'ah and Musaqat certificates after closing of subscription, allotment of certificates and commencement of activity with respect to the assets and usufructs. This rule applies when the certificate holders own the land. Thus, trading in these certificates is not allowed where the certificate holders act as workers (who undertake to provide agricultural or irrigation works) in which case trading in these certificates is not permissible before the maturity of the fruits and plants.

5/2/18 It is permissible to trade in Mugharasah certificates after closing of subscription, allotment of certificates and commencement of activity irrespective of the certificate holders being owners of the land or workers.

6. Date of Issuance of the Standard

This Standard was issued on 7 Rabi' I, 1424 A.H., corresponding to 8 May 2003 A.D.

Adoption of the Standard

The Shari'ah Standard on Commercial Papers was adopted by the Shari'ah Board in its 10th meeting held on 2-7 Rabi' I, 1424 A.H., corresponding to 3-8 May 2003 A.D.

Appendix (A)
Brief History of the Preparation of the Standard

In its meeting No. (7) held in Makkah Al-Mukarramah during the period of 9-13 Ramadan 1422 A.H., corresponding to 24-28 November 2002 A.D., the Shari'ah Board decided to give priority to the preparation of the Shari'ah Standard for Investment Sukuk.

On Saturday 14 Shawwal 1422 A.H., corresponding to 29 December 2002 A.D., a Shari'ah consultant was commissioned to prepare a juristic study and an exposure draft on the Shari'ah Standards for Commercial Papers.

In its 2nd meeting of Committee (1), held in the Kingdom of Bahrain on 4-5 Safar 1423 A.H., corresponding to 17-18 April 2002 A.D., the Shari'ah Standard Committee discussed the exposure draft of the Shari'ah Standard on Investment Sukuk and asked the consultant to make additional amendments to reflect the comments made by the members of the committee.

In its meeting No. (4) held on 16 and 17 Rabi' I, 1423 A.H., corresponding to 28-27 June 2002 A.D., the committee discussed the exposure draft and made necessary amendments as per the comments and observations of the members and in the light of the recommendations of AAOIFI's First Fiqh Forum in respect to requirements of trading in investment portfolios held in Amman (The Hashimite Kingdom of Jordan) on 16 Rabi' I, 1423 A.H., corresponding to 27 June 2002 A.D.

In its meeting No. (5) held on 2 and 3 Rajab 1423 A.H., corresponding to 9-10 September 2002 A.D., and decided to merge the exposure of this Standard with the exposure draft of the Standard on Securitisation. In its meeting No. (6) held on 19 Rajab 1423 A.H., corresponding to 26 September 2002 A.D., in the Kingdom of Bahrain, the Committee further discussed the

exposure after the merger, made some amendments and decided to present it to the Shari'ah Board.

The revised exposure draft of the Shari'ah Standard was presented to the Shari'ah Board in its 9th meeting held in Makkah Al-Mukarramah during the period of 11-16 Ramadan 1423 A.H., corresponding to 16-21 November 2002 A.D. The Shari'ah Board made further amendments to the exposure draft of the Standard and decided that it should be distributed to specialists and interested parties in order to obtain their comments in order to discuss them in a public hearing.

A public hearing was held in Bahrain on 18 Dhul-Hajjah 1423 A.H., corresponding to 19 February 2003 A.D. The public hearing was attended by more than thirty participants representing central banks, institutions, accounting firms, Shari'ah scholars, academics and others who are interested in this field. Members of the Shari'ah Standards Committees (1) and (2) responded to the written comments that were sent prior to the public hearing as well as to the oral comments that were expressed in the public hearing.

The Shari'ah Standards Committees (1) and (2) held a joint meeting on 2 Muharram 1424 A.H., corresponding to 5 March 2003 A.D., to discuss the comments made about the exposure draft. The two committees made the necessary amendments in light of both the written comments that were received and oral comments that took place in the public hearing.

The Shari'ah Board in its meeting No. (10) held in Al-Madinah Al-Munawwarah during the period of 2-7 Rabi' I, 1424 A.H., corresponding to 3-8 May 2003 A.D., discussed the amendments made by the Shari'ah Standards Committee, and made necessary amendments. The Shari'ah Board unanimously adopted some of the items of the Standard and some items were adopted by the majority vote of the members of the Shari'ah Board, as recorded in the minutes of the meetings of the Shari'ah Board.

Appendix (B)
The Shari'ah Basis for the Standard

- The basis for the permissibility of issuing investment certificates is that such certificates are usually issued on the basis of Shari'ah-nominated contracts. Hence issuance of Sukuk on the basis of any of these contracts becomes acceptable as well.
- The basis for considering the issue prospectus as an offer and the fact of subscription as an acceptance is that valid contracts take place on the basis of anything that indicates consent without specifying a particular form of expression. It is thus not objectionable that an offer comes from one person and acceptance from a large number of persons.
- The basis for the right of certificate holders to management is that they own the property that their certificates represent, and management is part of ownership.
- The basis for permissibility of trading in investment Sukuk when such Sukuk represent shares in tangible assets or usufruct is that the trading is, in fact, on the assets and usufructs. Since these assets may be traded so too the certificates that represent them.
- The basis for impermissibility of trading in Salam certificates is that the certificate represents a share in the Salam debt in which case the certificates is subject to rules of debt trading.
- The basis for permissibility of trading in Istisna'a certificates after conversion of the realized funds into assets is that such assets represent properties that can be disposed of. The basis for the impermissibility of trading in Istisna'a certificates in case of using the realized funds as a price in a parallel Istisna'a and in case of delivering the manufactured asset to the ultimate purchaser is that the certificate represents the price in the liability of the purchaser. The price then is a monetary debt for which trading of the Sukuk at this stage is subject to the rules of debt trading.

- The basis for the impermissibility of trading in Murabahah certificates after the commodity is sold and delivered to the buyer is that the certificates represent a monetary debt against the buyer, in which case trading is not permissible except in accordance with the limitations of debt trading. However, if purchase of the commodity has taken place and is yet to be sold, trading in these certificates is permissible because the certificates represent assets that can be traded.

Appendix (C)
Definitions

Securitisation (Tawreeq)

Securitisation is known in Arabic terminology as *Taskik* (issues) and *Tasnid* (securities). Securitisation is a process of dividing ownership of tangible assets, usufructs or both into units of equal value and issue securities as per their value.

Issue Contract

Issue contract is the contract that form basis for issuance of the investment certificates.

Issuer of Investment Certificate

Issuer of investment certificate is the party who uses the realised funds in a Shari'ah-compliant investment instrument. The issuer could be a firm, an individual, a government or a financial institution. The issuer may delegate, for a consideration or commission, the process of arranging the operation of the issue to a financial intermediary, which may be stipulated by the issue prospectus.

Issue Agent

It is an intermediary institution that manages the process of issue and performs all procedural arrangements pertaining to the issue on behalf of the issuer against a specific fee to be agreed upon or to be stated in the prospectus of issue. The relationship between the issuer and the issue agent is governed agency contract with remuneration.

Issue Manager

Issue manager is the intermediary institution that acts for remuneration on behalf of the subscribers in executing the issue contract.

Payment Underwriter

Payment underwriter is the intermediary institution that undertakes to pay dues of certificate holders after when realised.

Investment Manager

Investment manager is the party appointed by the issuer or the issue manager to perform all or part of investment operations as indicated in the issue prospectus.

Investment Trustee

Investment trustee is the intermediary financial institution charged with protecting the interests of certificate holders, supervising the performance of the issue manager and safe custody of documents and guarantees for consideration stipulated in the issue prospectus on the basis of agency contract

Trading of Certificates

Trading of certificates refers to disposal of the ownership right contained in the certificate through selling, pledging, gift or any other permissible means of disposal.

Muzara'ah (Sharecropping)

Sharecropping is partnership in crops in which one party presents land to another for cultivation and maintenance in consideration for a common defined share in the crop.

Musaqat (Irrigation)

Irrigating partnership is a partnership that depends on one party presenting designated plants/trees that produce edible fruits to another in order to work on their irrigation in consideration for a common defined share in the fruits.

Mugharasah (Share-Agriculture)

Agricultural partnership is a partnership in which one party presents a treeless piece of land to another to plant trees on it on the condition that they share the trees and fruits in accordance with a defined percentage.

Exposure DRAFT
of Shari'ah Standard No. (62)

Sukuk

مسودة المعيار الشرعي رقم: (٦٢)

الصُّكوك

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الخصائص الرقابية (النظامية) لصكوك الشِّق الأَول من رأس المال **(٨-٣-١-١)**	The regulatory characteristics of Tier 1 Capital Sukuk (8-3-1-1)
أحكام وضوابط صكوك الشِّق الأول من رأس المال **(٨-٣-١-٢)**	Provisions and rules for Tier-1 Sukuk (8-3-1-2)
صكوك الشق الثاني من رأس المال (Tier 2 Capital Sukuk) **(٨-٣-٢)**	Tier 2 Capital Sukuk (8-3-2)

The regulatory characteristics of Tier 2 Capital Sukuk (8-3-2-1)	الخصائص الرقابية (النظامية) لصكوك الشِّق الثاني من رأس المال **(٨-٣-٢-١)**
Provisions and rules for Tier-2 Sukuk (8-3-2-2)	أحكام وضوابط صكوك الشِّق الثاني من رأس المال **(٨-٣-٢-٢)**
Dissolution of Tier-2 Sukuk upon the dissolution of the originator at the end of its term (8-3-2-4)	تصفية صكوك الشِّق الثاني من رأس المال عند تصفية الجهة المنشئة لانتهاء مدَّتها **(٨-٣-٢-٤)**
Stages of calculating and distributing the profit of the general pool of the originator of Tier-1 Sukuk and Tier-2 Sukuk based on Partnership, Mudaraba, or Investment Agency (8-3-2-3)	مراحل حساب وتوزيع ربح الوعاء العام للجهة المنشئة لصكوك الشِّق الأول، وصكوك الشِّق الثاني من رأس المال القائمة على الشركة أو المضاربة أو الوكالة بالاستثمار **(٨-٣-٢-٣)**
Trading, Redemption and Cancelation of Sukuk (9)	تداول الصكوك واستردادها وإطفاؤها **(٩)**
General Provisions of Trading [the certificates of] Sukuk (9-1).	الأحكام العامَّة للتَّداول **(٩-١)**
Special provisions for trading (as per the financing mode of Sukuk) (9-2)	الأحكام الخاصَّة للتَّداول (بحسب صيغة الصُّكوك) **(٩-٢)**
Listing of Sukuk in the Financial Markets (9-3)	إدراج الصكوك في الأسواق المالية **(٩-٣)**
Redemption and Cancelation of Sukuk (9-4)	استرداد وإطفاء الصكوك **(٩-٤)**
Provisions of the Special Purpose Vehicle (SPV) in Sukuk (10)	أحكام المنشأة ذات الغرض الخاص في الصكوك **(١٠)**
Expenses, Profits and Losses on Sukuk (11)	النفقات والأرباح والخسائر في الصكوك **(١١)**
Expenses (Costs and Taxes) (11-1)	النفقات (والمصروفات والضرائب) **(١١-١)**
Profits and Losses (11-2)	الأرباح والخسائر **(١١-٢)**
Bankruptcy of Sukuk Issuances (12)	إفلاس إصدارات الصكوك **(١٢)**
Shari'ah Governance of Sukuk (13)	الحوكمة الشرعية للصكوك **(١٣)**
The Shari'ah Board of Sukuk (13-1)	الهيئة الشرعية للصكوك **(١٣-١)**
Duties, powers and responsibilities of the Shari'ah Board of Sukuk (13-1-1)	مهمات الهيئة الشرعية للصكوك وصلاحياتها ومسؤولياتها **(١٣-١-١)**
Fatwa Document of the Shari'ah Board of Sukuk (13-1-2)	وثيقة فتوى الهيئة الشرعية للصكوك **(١٣-١-٢)**
Shari'ah Audit of Sukuk (13-2)	التدقيق الشرعي للصكوك **(١٣-٢)**
The Governing Law of Sukuk	القانون الحاكم للصكوك **(١٤)**

بسم الله الرحمن الرحيم

In the name of Allah, the Merciful, the Most Merciful

الحمد لله رب العالمين، والصلاة والسلام على أشرف المرسلين، سيدنا ونبينا محمد، وعلى آله وصحبه أجمعين.

All praise be to Allah, the Lord of all the worlds. Peace and blessings upon our Prophet and our master Muhammad, all his family and his Companions.

التقديم

يهدف هذا المعيار إلى بيان حقيقة الصكوك وموجوداتها والمخاطر والضمانات المتعلقة بها، وإصدارها، وأنواعها، وتداولها وانتهائها، وأحكام المنشأة ذات الغرض الخاص في الصكوك، والنفقات والأرباح والخسائر في الصكوك، وإفلاس إصدارات الصكوك، والحوكمة الشرعية للصكوك، سواء أكانت المؤسسات المالية الإسلامية (المؤسسة، المؤسسات)[1] جهةً منشئةً للصكوك أم مصدرة لها أم مستثمرةً فيها أم منظمةً لإصدارها أم غير ذلك.

Preamble

This standard aims to present [the following aspects of] Sukuk: its core base, its underlying assets, its risks and related securities, its issuance, its types, its trading (negotiability) and the maturity, provisions of special purpose vehicle in Sukuk, its expenses, profits, and losses, bankruptcy of the issuance of Sukuk, its Shari'ah governance, irrespective if the Islamic financial institutions (referred as the Institution(s))[2] are the originator, issuer, investor, or arranger of Sukuk.

والله سبحانه وتعالى الموفق،،،

Only Allah the Exalted and Hallowed Guides to Success

1 استخدمت كلمة (المؤسسة/ المؤسسات) اختصاراً عن المؤسسات المالية الإسلامية، ومنها المصارف الإسلامية.

2 The term (institution(s) is used here to refer, in short, to Islamic financing institutions, including Islamic banks.

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Text of the Standard

نص المعيار

1. The Scope of the Standard

This Standard deals with various types of Sukuks. It does not deal with shares of companies, certificates of investment deposits, units of funds and investment portfolios.

1. نطاق المعيار

يتناول هذا المعيار الصُّكوك بأنواعها المختلفة، ولا يتناول أسهم الشركات، وشهادات الودائع الاستثمارية ووحدات الصناديق والمحافظ الاستثمارية.

2. Definition of [Certificates of] Sukuks

2-1. [Certificates of] Sukuks are investment securities of equal value for common share that establish ownership of assets (tangible assets, usufructs, rights, debts, cash, or a mix of [all of] them or some of them) that are already in existence or that will be acquired or created, and it will implicate rights for the certificateholder arising from its interest in ownership of those underlying assets and obligations on [the certificateholder] to the extent of its share in them.

2-2. If the issuance of Sukuk was carried against underlying assets that are already in existence and moved off the balance sheet of the originator so that this entity has no longer a control over the underlying assets in any capacity, and was under no obligation to purchase [the underlying assets] from the certificateholders, even upon cancellation (dissolution) of Sukuk, and the certificateholders may cancel [the certificates of] Sukuk by selling the underlying assets to a third party, then [such an issuance] is deemed to be securitization. See: s. (7-1).

2. تعريف الصكوك

2-1. هي أوراق مالية استثمارية متساوية القيمة، لحصص شائعة في ملكية موجودات (أعيان أو منافع أو حقوق أو ديون أو نقود أو خليط منها أو من بعضها) قائمة فعلاً، أو سيتم تملكها أو إنشاؤها، تُرتب حقوقًا لحاملها ناشئة عن حصته في ملكية تلك الموجودات والتزامات عليه بقدر حصته فيها.

2-2. إذا تم إصدار الصُّكوك على موجودات قائمة فعلًا، وأُخرجَت هذه الموجودات من ميزانية الجهة المنشئة، ولم يعد لهذه الجهة سيطرة عليها بأي صفة كانت، ولم تكن متعهدةً بشرائها من حملة الصكوك، ولو عند إطفاء (تصفية) الصُّكوك، وإنما لهم أن يطفئوها ببيع الموجودات للغير؛ فإنَّ هذا يعدُّ تصكيكًا (وقد يطلق عليه اصطلاح التوريق – Securitization). وينظر البند (٧-١).

3. Characteristics of Sukuk

Sukuks have characteristics that distinguish them

3. خصائص الصكوك:

للصكوك خصائص تميِّزها عن السَّندات التَّقليدية، أهمها:

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from conventional bonds, the most important of which are:

3-1. Sukuks are not based on lending against interest.

3-2. The principal amount and the profit amount of Sukuk will not be recognised automatically as an obligation owed by the originator once the subscription to [the certificates of] Sukuk and the payment of the principal amount were carried out.

3-3. Sukuks are an investment instrument wherein their owners share the reward (*ghunm*) [as well as] the liability (*ghurm*) of the underlying assets of the Sukuk that are owned jointly by [the certificateholder] with the other owners (holders) of the [certificates of] Sukuk of the same issuance. Also, it is usually a financial instrument for the originator.

3-4. Sukuks are issued on the basis of one or more Shari'ah contracts in accordance with Shari'ah rules that regulate issuance, trading and maturity of Sukuks.

3-5. Risks of Sukuk are not confined to credit risks of the originator; And its credit rating is not limited to the financial worthiness of this entity.

3-1. أنها لا تقوم على أساس الإقراض بفائدة.

3-2. أنَّ رأس مالها وربحها لا يَثبتان التزامًا في ذمة الجهة المنشئة بمجرد الاكتتاب فيها ودفع رأس المال.

3-3. أنها أداة استثمارية يشارك مالكها في غُنْمِ وغُرْمِ موجوداتها، التي يملك حصَّة فيها على سبيل الاشتراك بين مالكي (حاملي) صكوك الإصدار الآخرين، كما أنها تكون في الغالب أداة تمويلية للجهة المنشئة.

3-4. أنها تَصدر على أساس عقد شرعي أو أكثر، بضوابط شرعية تنظِّم إصدارها وتداولها وانتهاءها.

3-5. أنَّ مخاطرها لا تنحصر في المخاطر الائتمانية للجهة المنشئة؛ ولا يقتصر تصنيفها الائتماني على الملاءة المالية لهذه الجهة.

4. Parties to the Issuance of Sukuk

There are several parties [involved] in the issuance of Sukuk, the most important of which are:

4-1. The Originator: is the entity seeking financing and the beneficiary from the proceeds of Sukuk.

4-2. The Issuer: is the entity that undertakes the process of offering Sukuks for subscription, and it is often a special purpose vehicle, and it may be the originator itself. See: s. (7-2-8).

4. أطراف إصدار الصكوك:

لإصدار الصُّكوك عدة أطراف، أهمها:

4-1. الجهة المنشئة (Originator): وهي الجهة المتموِّلة المستفيدة من حصيلة الصكوك.

4-2. المصدِر (Issuer): وهو الجهة التي تتولى عملية طرح الصكوك للاكتتاب، وتكون غالبًا منشأةً ذات غرض خاص، وقد تكون الجهة المنشئة نفسها هي المصدر. وينظر البند (٧-٢-٨).

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4-3. The Trustee: is the party representing the certificateholders and is usually a special purpose vehicle (SPV).

4-4. Certificateholders of Sukuk: are investors in the Sukuk, whether they subscribe [the certificates] upon issuance or purchase them from the secondary market.

4-3. الأمين (Trustee): هو الممثل لحملة الصكوك، ويكون في الغالب المنشأةَ ذات الغرض الخاص.

4-4. حملة الصكوك (Sukukholders): وهم المستثمرون في الصكوك، سواء اكتتبوا فيها عند الإصدار أو اشتروها من السوق الثانوية.

5. The Underlying Assets of Sukuk

5-1. Components of the Underlying Assets of Sukuk:

5-1-1. It is permitted that the underlying assets of Sukuk are tangible assets, usufructs, services, rights, cash, or debts, either [held] individually or in combination (through comingling (*khulṭa*)).

5-1-2. It is required that the underlying assets of Sukuk are permissible by virtue of Shari'ah. Hence, it is not permitted to issue Sukuk against assets wherein all or some of them are prohibited as per Shari'ah. Such as, issuance of Sukuk that is based on the assets of commercial stores that house wines, pork, or other prohibited items, or if the Sukuk are issued against factories that produce what is forbidden, or [issued against] assets, some of which are deposits or debts that accrue interest, and these prohibited elements were excluded from the total assets, and similarly if some of the assets are leased in an activity that is prohibited by virtue of Shari'ah and it cannot be excluded from the total underlying assets. However, if the underlying assets of Sukuk were shares, s. (5-1-4) shall apply on them.

5-1-3. If the underlying assets, against which the Sukuks are issued, include debts, then what

5. موجودات الصكوك:

5-1. مكونات موجودات الصكوك:

5-1-1. يجوز أن تكون موجودات الصكوك أعيانًا أو منافع أو خدمات أو حقوقًا أو نقودًا أو ديونًا، إمَّا مفردةً أو مجتمعةً (خلطة).

5-1-2. يجب أن تكون موجودات الصكوك مباحةً شرعًا، فلا يجوز إصدار الصكوك على موجودات كلِّها أو بعضُها محرَّمٌ شرعًا؛ كأن يكون إصدار الصكوك على موجودات محلات تجارية في مخازنها خمور أو لحم خنزير أو غيرها من المحرمات، أو أن يكون إصدارها على مصانع تُنتِج ما هو محرَّم أو على موجودات بعضها ودائع أو ديون ترتَّبت عليها فوائد، ولم تستثن هذه المحرَّمات من جملة الموجودات. ومثله ما إذا كان بعض الموجودات مؤجرًا في نشاط محرم شرعًا، ولم يستثن من جملة الموجودات. أما إذا كانت موجودات الصكوك أسهمًا فينطبق عليها ما يأتي في البند (٥-١-٤).

5-1-3. إذا كانت الموجودات التي يتم إصدار الصُّكوك

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is stated in Para. (8) of Shari'ah Standard No. (59): Sale of Debt shall apply on such assets. The underlying assets in the form of cash shall be treated as debts in terms of requiring or not requiring to comply with the provisions of currency exchange (*ṣarf*) at the time of issuance and trading of Sukuk [certificates].

عليها تشتمل على ديون، فينطبق عليها بحسب الحال ما ورد في الفقرة (٨) من المعيار الشرعي رقم (٥٩) بشأن بيع الدَّين. وتعامل الموجودات من النقود معاملة الديون من حيث اشتراط مراعاة أحكام الصَّرف أو عدم اشتراط ذلك عند إصدار الصُّكوك وفي تداولها.

5-1-4. If the underlying assets of Sukuk, or some of them, are shares, then [such shares are] required to be what is permitted to be owned by virtue of Shari'ah in accordance with the conditions given in s. (3-4) of Shari'ah Standard No. (21): Financial Papers (Shares and Bonds), unless the portion owned by the certificateholders in the shares is a portion that influences decisions of the company that enables its [owner] to convert the company to carry [its business] in accordance with the rulings and principles of Shari'ah. If it was so, it is required from the certificateholders, upon acquiring these shares, to convert the company to function in accordance with rulings and principles of Shari'ah. With due compliance with s. (3-3) of Shari'ah Standard No. (21) Financial Papers (Shares and Bonds).

5-1-4. إذا كانت موجودات الصكوك أو بعضها أسهمًا فيجب أن تكون مما يجوز تملكه شرعًا، وفق الشروط الواردة في البند (٣-٤) من المعيار الشرعي رقم (٢١) بشأن الأوراق الماليَّة (الأسهم والسَّندات)، ما لم تكن حصة حملة الصكوك من الأسهم حصةً مؤثرةً في قرار الشركة تمكِّن من تحويلها لتعمل وفق أحكام ومبادئ الشريعة الإسلامية، فإن كانت كذلك، وجب حينئذ على حملة الصكوك بعد تملكهم لهذه الأسهم تحويل الشركة إلى العمل وفق أحكام ومبادئ الشريعة الإسلامية. ويراعى البند (٣-٣) من المعيار الشَّرعي رقم (٢١) بشأن الأوراق المالية (الأسهم والسَّندات).

5-1-5. If the issuance of Sukuk takes place on the basis of purchasing the underlying assets by the certificateholders from the originator, then [underlying assets] should be purchased at their market value or closer to it, in order to prevent a sham purchase [*ṣūrī*]. See: s. (8-1-1-1-d-5-3) and s. (8-1-1-1-d-6-3).

5-1-5. إذا كان إصدار الصكوك يتم على أساس شراء حملة الصكوك لموجودات من الجهة المنشئة، فالواجب أن تُشتَرى بقيمتها السوقية أو قريبًا منها، منعًا لصورية الشراء. وينظر البند (٨-١-١-١-د-٥-٣) والبند (٨-١-١-١-د-٦-٣).

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5-1-6. If the underlying assets [of Sukuk] are pledged in a *riba*-based [interest-bearing] loan, then it is not permitted to issue Sukuk against them. Similarly, after the issuance, it is not permitted to pledge the underlying assets of Sukuks in an interest-bearing loan. See: s. (3-3-1) of Shari'ah Standard No. (39): Pledge and Its Contemporary Practices.

5-1-6. إذا كانت الموجودات مرهونة في قرض ربوي، فلا يجوز إصدار صكوك عليها، كما لا يجوز أن تُرهَن موجودات الصكوك بعد الإصدار في قرض ربوي. وينظر البند (٣-٣-١) من المعيار الشرعي رقم (٣٩) بشأن الرهن وتطبيقاته المعاصرة.

5-2. Requirements of Ownership of the Underlying Assets of Sukuk

5-2-1. The underlying assets of Sukuk are required to be such that transfer of their ownership to the certificateholders is acceptable by virtue of Shari'ah and law. If [transfer of the ownership] is not acceptable, then it is not permitted to carry sale of [of the underlying assets] to the certificateholders.

5-2-2. Certificateholders' ownership of the underlying assets of Sukuk should result in their ability to dispose of them, bear their risk and be entitled to their returns, whatever is the legal nature of this ownership. It is not permitted to stipulate that the certificateholders collectively be prevented on absolute basis to have [the right] of recourse to those underlying assets and selling them to a third party. Hence, it is not permitted to restrict the disposal of the underlying assets of Sukuk expect to what is acceptable to be restricted as per Shari'ah. See: s. (5-2-5-1), s. (7-3-2-8) and s. (9-4-5).

5-2-3. It is required that the contract of purchase (or sale) of the underlying assets of Sukuk is valid and enforceable by virtue of Shari'ah and law. Among the things that are not permitted are:

5-2-3-1. a stipulation that the contract remains in effect, even if it appears that it is invalid

5-2. متطلبات ملكية موجودات الصكوك:

5-2-1. يجب أن تكون موجودات الصكوك مما يقبل انتقال الملك شرعًا وقانونًا إلى حملة الصكوك، فإن كانت لا تقبل ذلك فلا يجوز بيعها لحملة الصكوك.

5-2-2. يجب أن يترتب على ملكية حملة الصكوك لموجوداتها القدرة على التصرف بها، وتحمل ضمانها واستحقاق عوائدها، أيًّا كانت الطبيعة القانونية لهذه الملكية، ولا يجوز النص على منع حملة الصكوك مجتمعين من الرجوع على تلك الموجودات وبيعها للغير منعـًا مطلقـًا؛ إذ لا يجوز تقييد التصرف في موجودات الصكوك إلا بما يُقبل التقييد به شرعـًا. وينظر البند (٥-٢-٥-١) والبند (٧/ ٣/ ٢/ ٨) والبند (٩/ ٤/ ٥).

5-2-3. يجب أن يكون عقد شراء (أو بيع) موجودات الصكوك صحيحًا ونافذًا شرعًا وقانونًا، ومما لا يجوز:

5-2-3-1. النص على أنَّ العقد يبقى منتجًا لآثاره وإن

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or unenforceable.

ظهر أنه عقد غير صحيح أو غير نافذ.

5-2-3-2. a stipulation that the contract of purchase of the underlying assets of Sukuk from the originator will be suspensive (*mu'allaq*) on the occurrence of an event in the future.

5-2-3-2. النص على أنَّ عقد شراء موجودات الصكوك من الجهة المنشئة معلقٌ على تحقق أمرٍ في المستقبل.

5-2-3-3. a provision that if it appears that the contract of purchase of the underlying assets of Sukuk, [carried] with the originator is invalid or unenforceable then restitution takes place by obliging the originator to pay an amount that exceeds the purchase price. See: s. (7-2-3).

5-2-3-3. النصُّ على أنَّه إن ظهر أن عقد شراء موجودات الصكوك من الجهة المنشئة غير صحيح أو غير نافذٍ فإن التراد (Restitution) يقع بإلزام الجهة المنشئة بدفع مبلغ يزيد على ثمن الشراء. وينظر البند (٧/ ٢/ ٣).

5-2-4. It is required that the Sukuk deed should represent a common share in the underlying assets of Sukuk and the rights and obligations arising out of them. Hence, it is not permitted to present the Sukuk deed as that the underlying asset owned by the certificateholders, so that their right is confined to what they paid for subscription in Sukuk with specified [amount of] profit.

5-2-4. الواجب أن تكون وثيقة الصكوك (Certificates) ممثلة لحصة شائعة في موجودات الصكوك وما ينشأ عنها من حقوق والتزامات، فلا يجوز إظهار الوثيقة على أنها هي الموجودات المملوكة لحملة الصكوك، بحيث ينحصر حقهم بموجبها فيما دفعوه للاكتتاب في الصكوك مع الربح المحدد.

5-2-5. Among the requirements for documenting the transfer of the title of the underlying assets to certificateholders is to move those assets out of the balance sheet of the originator, if it is the seller of [the underlying assets], and to record them in the balance sheet of Sukuk in the name of the certificateholders or in the balance sheet of those who represent [the certificateholders], such as the SPVs. However, if legal, tax, or procedural reasons, or the like, require not registering the underlying assets in the name of the certificateholders or their representatives, and allows to continue keeping the underlying assets registered in the name of the originator and in its balance sheet, then

5-2-5. من لوازم توثيق انتقال ملكية الموجودات إلى حملة الصكوك إخراج تلك الموجودات من ميزانية الجهة المنشئة إن كانت هي البائع لها، وتقييدها في ميزانية الصكوك باسم حمَلة الصكوك أو في ميزانيةِ من يمثلهم كالمنشأة ذات الغرض الخاص. أما إذا اقتضت أسباب قانونية أو ضريبية أو إجرائية أو نحوها عدم تسجيل الموجودات باسم حملة الصكوك أو من يمثلهم، وإبقاءها مقيدة باسم الجهة المنشئة وفي ميزانيتها، فيجب أن

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the following conditions must be fulfilled:

تتوافر الشروط الآتية:

5-2-5-1. [Such an act] should not prejudice ownership of the underlying assets held by the certificateholders or their representatives or affect their ability to dispose of the underlying assets, or their entitlement to returns of the underlying assets, or their bearing the onus of ownership (*'abb al-milkiyyah*) of the underlying assets or the consequences of loss of the underlying assets (*tabi't al-halāk*). See: s. (5.2.2) of this Standard and s. (4-2) of Shari'ah Standard No. (58): Repurchase.

5-2-5-1. أن لا يُخل ذلك بملكية حملة الصكوك أو من يمثلهم لموجوداتها، أو يؤثر في قدرتهم على التصرف بها أو استحقاقهم لعوائدها أو تحملهم أعباء ملكيتها أو تبعة هلاكها. وينظر البند (٥-٢-٢) من هذا المعيار والبند (٤-٢) من المعيار الشرعي رقم (٥٨) بشأن إعادة الشراء.

5-2-5-2. a legally valid deed should be signed establishing certificateholders' title of the underlying assets, such as counter document and the like. With a stipulation in the deed or in other Sukuk documents, such as the base prospect, the right of certificateholders to request that the assets be registered in the name of the certificateholders or in the name of their representative in the circumstances that require this. See: s. (4-2) of Shari'ah Standard No (58): Repurchase.

5-2-5-2. أن يتم توقيع وثيقة معتدٍّ بها قانونًا تُثبت ملكية حملة الصكوك لموجوداتها، كسند ضدٍّ ونحوه. مع النص فيه أو في غيره من مستندات الصكوك، كنشرة الإصدار، على حق حملة الصكوك في طلب تسجيل الموجودات باسمهم أو باسم من يمثلهم في الأحوال التي تقتضي ذلك. وينظر -البند (٤-٢) من المعيار الشرعي رقم (٥٨) بشأن إعادة الشراء.

5-2-5-3. the originator, in whose name the underlying assets are registered, should not appear before the third parties as the owner of the underlying assets, and this includes: originator's creditors may compete along the certificateholders (*muzāḥama*) for those underlying assets in the event of insolvency, bankruptcy or winding up of Sukuk. With due compliance with s. (8-3-2-2-d-3) and s. (12-2).

5-2-5-3. أن لا تَظهر الجهة المنشئة المسجَّلة الموجودات باسمها في مواجهة الغير بمظهر المالك للموجودات، ومن ذلك أن يكون لدائنيها مزاحمة حملة الصكوك في تلك الموجودات حال إعسارها أو إفلاسها أو تصفيتها. ويراعى ما يأتي في البند (٨-٣-٢-٢-د-٣) والبند (١٢-٢).

5-2-5-4. That this does not lead to making Sukuk's

5-2-5-4. أن لا يؤدي ذلك إلى جعل رأس مال الصكوك

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principal amount, profits or returns a direct financial obligation owed by the originator with no regard to certificateholders' ownership of the underlying assets of Sukuk. See: s. (3-2).

وأرباحها أو عوائدها التزامًا ماليًا مباشرًا في ذمة الجهة المنشئة دون الاعتداد بملكية حملة الصكوك لموجوداتها. وينظر البند (٣-٢).

5-2-5-5. That the documentation of Sukuk does not include what implies negating certificateholders' ownership of Sukuk's underlying assets or the possibility that certificateholders are not the owners of the underlying assets, such as stipulating in the base prospect that the ownership of the assets is not established for the certificateholders if the law does not consider its establishment wherein the [real] situation is that the [particular] law does not recognize such a title (ownership) held by the certificateholders or its recognition has not been confirmed. It is required in all cases to stipulate that, by virtue of Shari'ah, certificateholders' ownership is established in all the cases.

5-2-5-5. أن لا تتضمن مستندات الصكوك ما يفيد نفي ملكية حملة الصكوك لموجوداتها أو احتمال أن لا يكونوا مالكين لها، كأن يُنصَّ في نشرة الإصدار على أن ملكيَّة الموجودات لا تَثبت لحملة الصكوك إن كان القانون لا يعتدُّ بثبوتها، والحال أن القانون لا يُثبتها لهم، أو أنَّه لم يتم التأكد من ثبوت ملكية حملة الصكوك لتلك الموجودات. والواجب في جميع الأحوال النص على أن الملكية ثابتة لهم شرعًا بآثارها.

5-2-5-6. To state in the notes of the financial statements of the originator that the underlying assets of Sukuks are owned by certificateholders.

5-2-5-6. أن يتم النص في إيضاحات القوائم المالية للجهة المنشئة على أن موجودات الصكوك مملوكة لحملتها.

5-2-5-7. If the originator breaches [the condition], it has sold the underlying assets, that were kept in its name to another party, then its disposal is invalid by virtue of Shari'ah, and the certificateholders have the right to hold their right of ownership of those assets. If this is not possible due to the applicable law, then the originator is required to arrange, [for the certificateholders], similar assets or to be liable to the certificateholders for the market value [of the underlying assets] unless the certificateholders agree otherwise.

5-2-5-7. أنه إذا خالفت الجهة المنشئة فباعت الموجودات التي أبقيت باسمها إلى جهة أخرى فإن تصرفها غير صحيح شرعًا، ويحق لحملة الصكوك أن يتمسكوا بحقهم في تملك تلك الموجودات، فإن تعذر ذلك من أجل القانون المطبق فإنه يجب على الجهة المنشئة أن تأتي لهم بموجودات مثلها أو تضمن لهم قيمتها السوقية، إلا إذا رضي حملة الصكوك بغير ذلك.

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5-2-6. In the event that the underlying assets of Sukuk are registered in the name of the SPV, so the SPV must represent the certificateholders and should not be owned by the originator. See: s. (10-6) and s. (10-7).

5-2-6. في حال تسجيل موجودات الصكوك باسم المنشأة ذات الغرض الخاص، فيجب أن تكون ممثلةً لحملة الصكوك وأن لا تكون مملوكة للجهة المنشئة. وينظر البند (١٠-٦) والبند (١٠-٧).

5-2-7. If it appears that there is [claim of] Shari'ah entitlement (*istiḥqāq sharʿī*) from a third party, and it is established that the assets sold to the certificateholders were not owned by the originator seller, then the sale is void by virtue of Shari'ah. If this entity has received the price, it is required to return [the price] unless it arranges assets owned by it to be sold to the certificateholders pursuant to a new contract. These new sale items replace the sale items to be delivered earlier and all the provisions related to the Sukuk shall be applied to [the new sale items].

5-2-7. إن ظهر استحقاق شرعي من جهة ثالثة، وثبت أن الموجودات التي بيعت لحملة الصكوك لم تكن مملوكةً للجهة المنشئة البائعة، فالبيع باطلٌ شرعـًا. وإذا كانت هذه الجهة قد تسلمت الثمن، فإن الواجب عليها رده إلا أن تأتي بموجودات مملوكة لها لتبيعها لحملة الصكوك بعقدٍ جديد، وتقوم هذه المبيعات الجديدة حينئذ مقام المبيعات الأولى المستحَقة، وتأخذ جميع الأحكام المتعلقة بالصكوك.

5-2-8. If the ownership of the underlying assets returns to the originator after it has sold the underlying assets to the certificateholders, as in the case of a challenge to the validity of the certificateholders' ownership of the assets. It is necessary to return to the certificateholders the price for which they purchased the assets from the originator.

5-2-8. إذا رجعت ملكيَّة الموجودات إلى الجهة المنشئة بعد أن باعتها لحملة الصُّكوك، كما في حال الطَّعن في صحَّة ملكيَّة حمَلة الصُّكوك للموجودات، فإن الواجب أن تَرُدَّ لهم الثَّمن الذي اشتروا به الموجودات منها.

5-2-9. After the underlying assets being sold by the originator to the certificateless, if it was not possible for the originator to deliver the underlying assets to the certificateholders due to the withdrawal of originator's license for a matter that is not attributed to the originator. The originator is required to return to the certificateholders the price for which the underlying assets were purchased by the certificateholders from the originator. If the withdrawal of the

5-2-9. إذا تعذَّر على الجهة المنشئة تسليم الموجودات لحمَلة الصُّكوك بعد أن باعتها لهم بسبب سحب التَّرخيص منها لأمر لا يرجِع إليها، فإن الواجب أن تَرُدَّ لهم الثَّمن الذي اشتروا به الموجودات منها. وإذا كان سحب التَّرخيص لأمر راجع إلى الجهة المنشئة بعد أن انتقل ضمان الموجودات إلى

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license, attributed to the originator, takes place after the transfer of the risk of the underlying assets to the certificateholders, the originator is required to guarantee the underlying assets in favour of the certificateholders by [providing] a similar substitute or [paying] value of the underlying assets at upon their alienation (*fawāt*) if arranging a substitute is not possible.

حملة الصكوك فيجب عليها ضمان الموجودات لحمَلة الصُّكوك بمثْلها، أو بقيمتها وقت فواتها عليهم إن تعذَّر المِثْل.

6. Risks of Sukuk, It Securities and Undertaking to Purchase its Underlying Assets:

6. مخاطر الصكوك، والضمانات فيها، والتعهد بشراء موجوداتها:

6-1. Risks of Sukuk

6-1. مخاطر الصكوك:

6-1-1. Types of Risks of Sukuk

6-1-1. أنواع مخاطر الصكوك:

Sukuk [carry] types of risks, the most important of which are:

تشتمل الصكوك على أنواع من المخاطر، أهمها:

6-1-1-1. Ownership (Title) Risk

6-1-1-1. مخاطر الملكية:

Title risks include the risks of loss of the underlying assets of Sukuk, depletion of their value, or settling their financial burdens. The certificateholders bear these risks as long as the assets are owned by them, and it is not permitted to stipulate upon the originator to bear these risks except when:

تشتمل مخاطر الملكية على مخاطر هلاك موجودات الصكوك أو نقص قيمتها أو دفع أعبائها المالية. ويتحمَّل حملة الصكوك هذه المخاطر ما دامت الموجودات مملوكة لهم، ولا يجوز اشتراط تحمُّل الجهة المنشئة تلك المخاطر، إلا:

6-1-1-1-a. [the originator] is a trustee of the underlying assets and some of these risks occur due to originator's misconduct, negligence, or breach of the terms of the contract.

6-1-1-1-a. أن تكون أمينةً على الموجودات ويقع شيء من تلك المخاطر بسبب تعديها أو تقصيرها أو مخالفتها شروط التعاقد.

6-1-1-1-b. [the originator] is a third party that undertakes to guarantee. Taking into account what will come in s. (6-2-2).

6-1-1-1-b. أن تكون طرفًا ثالثًا تعهد بالضمان. ويراعى ما يأتي في البند (٦-٢-٢).

6-1-1-2. Credit Risk

6-1-1-2. مخاطر الائتمان:

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هي مخاطر عدم قدرة الجهة المنشئة على الوفاء بالالتزامات المالية التي ثبتت في ذمتها وفقًا للشروط والأحكام الشرعية لعقود ومستندات الصكوك، وتختلف شروط ثبوت هذه الالتزامات باختلاف طبيعة العلاقة التعاقدية بين حملة الصكوك أو من يمثلهم وبين الجهة المنشئة. ويتحمَّل حملة الصكوك هذه المخاطر، ولهم تقليلها ما أمكن بالضمانات المشروعة من الجهة المنشئة. وينظر البند (٦-١-٢-١) والبند (٨-١-١-١-أ-٣) والبند (٨-١-١-١-ج-٣).

It is the risk of the originator's inability to fulfil the financial obligations that it owes in accordance with the Shari'ah terms and conditions of the Sukuk contracts and documents. The conditions for establishing these obligations vary according to the nature of the contractual relationship between the certificateholders, or the party representing them, and the originator. Certificateholders bear these risks, and they have the right to minimize the risks as much as possible through Shari'ah compliant securities [provided] by the originator. See: s. (6-1-2-1), s. (8-1-1-1-a-3) and s. (8-1-1-1-a-3).

6-1-1-3. مخاطر السوق:

يدخل في هذه المخاطر تغُّير معدَّل المؤشر المعتمَد في حساب عوائد موجودات الصكوك، وفقًا للضوابط الشرعية لاستخدام مثل هذا المؤشر، وتَغيُّر سعر الصكوك في السوق بعد إصدارها. ويتحمَّل حملة الصكوك هذه المخاطر. وينظر الفقرة (٥) من المعيار الشرعي رقم (٢٧) بشأن المؤشرات.

6-1-1-3. Market Risk

Included in these risks is the change in the rate of the index adopted in calculating the returns of the underlying assets of Sukuk, in accordance with the Shari'ah rules for using such an index, and the change in the market price of the Sukuk after its issuance. The certificateholders bear these risks. See: Para. (5) of Shari'ah Standard No. (27): Indexes.

6-1-1-4. مخاطر الصرف:

هي مخاطر سعر صرف رأس مال أو عوائد الصكوك، أو غيرها من الحقوق أو الأعباء المالية المتصلة بملكية موجودات الصكوك، عند صرفها إلى عملة أخرى غير عملة الإصدار. ويتحمل حملة الصكوك هذه المخاطر. وينظر البند (١١-١-٣).

6-1-1-4. Exchange Rate Risk

It is the risk of the exchange rate of the principal or the returns of Sukuk, or other financial rights or financial burdens related to the ownership of the underlying assets of Sukuk, when they are exchanged into a currency other than the currency of the issuance of Sukuk. Certificateholders bear these risks. See: s. (11-1-3).

6-1-1-5. مخاطر التوزيعات الدورية:

هي مخاطر عدم كفاية عوائد موجودات الصكوك لدفع مبالغ التوزيعات الدورية المتوقعة في آجالها المحددة.

6-1-1-5. Risk of Periodic Distributions

It is the risk of inadequacy of returns of the underlying assets of Sukuk to pay the amounts of the expected periodic distributions at their specified

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deadlines. Certificateholders bear these risks.

ويتحمل حملة الصكوك هذه المخاطر.

6-1-2. Hedging of Sukuk Risks

6-1-2. التحوط من مخاطر الصكوك:

6-1-2-1. Hedging via securities and protection by Shari'ah compliant means:

6-1-2-1. التحوط بالضمانات والحماية بالوسائل المشروعة:

Sukuk risks can be hedged via Shari'ah compliant securities and means to protect capital and investments. See: Shari'ah Standard No. (5): Guarantees, Shari'ah Standard No. (45) Protection of Capital and Investments, and Shari'ah Standard No. (56) The Liability of the Investment Manager.

يمكن التحوط من مخاطر الصكوك بالضمانات والوسائل المشروعة لحماية رأس المال والاستثمارات. وينظر المعيار الشرعي رقم (٥) بشأن الضمانات، والمعيار الشرعي رقم (٤٥) بشأن حماية رأس المال والاستثمارات، والمعيار الشرعي رقم (٥٦) بشأن ضمان مدير الاستثمار.

6-1-2-2. Hedging via Reserve Account

6-1-2-2. التحوُّط بحساب احتياطي:

6-1-2-2-a. **Definition of the Reserve Account and its [Shari'ah] Provisions**

6-1-2-2-أ. **تعريف الحساب الاحتياطي وحكمه:**

6-1-2-2-a-1. It is an account (fund) that is formed from the excess amounts of the periodic distributions that are realized through investing the underlying assets of Sukuk or returns or instalments of those assets.

6-1-2-2-أ-1. هو حساب (صندوق) يتم تكوينه من المبالغ الزائدة عن التوزيعات الدورية التي تتحقق من استثمار موجودات الصكوك أو من عوائد أو أقساط تلك الموجودات.

6-1-2-2-a-2. It is permitted to create a reserve account to face the risks of decreased profits or loss of capital, to be funded with a share of realized profits, provided that the base prospectus specifies how [such a reserve] is formed, the method of dealing with its balance, methods of disbursement from it, and the rules for its distribution at the time of redemption or cancellation of Sukuk, and it is required to be an actual account to which accounting entries are carried out.

6-1-2-2-أ-2. يجوز إنشاء حساب احتياطي لمواجهة مخاطر انخفاض الأرباح أو خسارة رأس المال، يموَّل بحصة من الأرباح المحققة، على أن تُحدِّد نشرة الإصدار كيفية تكوينه، وطريقة معاملة رصيده، وطرق الصرف منه، وضوابط توزيعه عند استرداد أو إطفاء الصكوك. ويجب أن يكون حساباً فعلياً تُجرى عليه القيود المحاسبية. وينظر البند

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(٨-١-٢-٤-و).

6-1-2-2-a-3. If commutative-based Sukuk contain an agreement for the originator to pay part of the debt instalment and keep the remainder in a reserve specifically for the certificateholders, then it is not permitted in any way for whatever balance of this reserve to be transferred to the originator at the time of cancelation of Sukuk.

6-1-2-2-أ-3. إذا كان في صكوك المعاوضات اتفاق على دفع الجهة المنشئة جزءًا من قسط الدين والاحتفاظ بالباقي في احتياطيٍ خاصٍ بحملة الصكوك، فلا يجوز بأي وجهٍ أن يؤول ما قد يبقى من رصيد هذا الاحتياطي إلى الجهة المنشئة عند إطفاء الصكوك.

6-1-2-2-b. **Types of Reserve Account**

6-1-2-2-ب. **أنواع الحساب الاحتياطي:**

6-1-2-2-b-1. *Joint reserve account*: its balance is deducted from the realized profit that is jointly held by the certificateholders and the originator (Mudarib or partner), and it is formed to address fall in profits below a certain level, or reparation of the capital loss [*jabr al-khasārā*] in a Mudaraba or a partnership, in cases where the originator does not guarantee the loss, provided in the Mudaraba only the share of the certificateholders in the balance of the account is used to offset the loss of their capital. Whereas, in the partnership, the share of each party in the balance of the account is used for reparation of its share in the loss.

6-1-2-2-ب-1. الحساب الاحتياطي المشترك: ويُقتَطَع رصيده من الربح المحقق المشترك بين حملة الصكوك والجهة المنشئة (المضارب أو الشريك)، ويتم تكوينه لمواجهة انخفاض الأرباح عن مستوى معين، أو جبر خسارة رأس المال في المضاربة أو الشركة، في الأحوال التي لا تضمن فيها الجهة المنشئة الخسارة. على أنه في حال الخسارة لا يستخدم في المضاربة إلا حصة حملة الصكوك في رصيد الحساب لجبر خسارة رأس مالهم، وأما في الشركة فتستخدم حصة كل طرف في رصيد الحساب لجبر حصته في الخسارة.

6-1-2-2-b-2. ***Special Reserve Account***: Its balance is deducted from the share of the certificateholders in the profits, and it is

6-1-2-2-ب-2. الحساب الاحتياطي الخاص: ويُقتَطَع رصيده من نصيب حملة الصكوك في

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الربح، ويتم تكوينه لمواجهة انخفاض أرباحهم عن مستوى معيَّن أو جبر خسارة رأس مالهم في الأحوال التي لا تضمن فيها الجهة المنشئة الخسارة.

formed to address a fall in their profits from a certain level or for reparation of the loss of their capital in cases where the originator does not guarantee the loss.

6-1-2-2-ج. **تغطية العجز في الحساب الاحتياطي:**

6-1-2-2-c. **Covering the shortfall in the reserve account:**

6-1-2-2-ج-1. لا يجوز للجهة المنشئة أن تلزم بمقتضى شرط ملفوظ أو ملحوظ بالتبرع لحساب الاحتياطي أو إقراضه، سواءٌ لجبر خسارة حملة الصكوك أو لمواجهة نقص التوزيعات الدورية أو لكليهما. ومن الإلزام الممنوع؛ النص على أنه عند عدم إقراض الجهة المنشئة حملة الصكوك لسد العجز؛ فإن من حق حملة الصكوك حينئذ الاسترداد المبكر لها.

6-1-2-2-c-1. It is not permitted for the originator to be under an obligation, pursuant to a stated or a foreseeable condition, to donate or to lend to the reserve account, whether for reparation of certificateholders' loss or to meet the shortfall of periodic distributions, or both. It would be a forbidden form of obligating (*ilzām*); to stipulate that in case of non-lending by the originator to the certificateholders to cover the shortfall; then [the certificateholders] will have the right for early redemption of Sukuk.

6-1-2-2-ج-2. لا يجوز أن تلتزم الجهة المنشئة بالتمويل من قبلها لسد العجز في الحساب الاحتياطي، ويجوز أن تقدم تمويلاً في حينه دون التزام سابق، كما يجوز لها أن تلتزم بالحصول على تمويلٍ من غيرها لصالح حملة الصكوك، متوافق مع أحكام ومبادئ الشريعة الإسلامية، لسد العجز في الحساب الاحتياطي، بشروط:

6-1-2-2-c-2. It is not permitted for the originator to be under an obligation to provide financing from its side to cover shortfall in the reserve account. It is permitted [for the originator] to extend financing at that time without prior commitment. Also, it is permitted [for the originator] to commit securing a Shari'ah compliant financing [for the certificateholders of Sukuk] from another party to fund the shortfall in the reserve account, with the following conditions:

6-1-2-2-ج-2-1. أن يتم سداد التمويل من حصة حملة

6.1.2.2.c.2.1. If the purpose of the financing is limited to reparation of the certificateholders' loss of the

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principal amount or to make up for the shortfall in the periodic distributions, the financing shall be paid out of the share of the certificateholders in the profits.

الصكوك في الأرباح، إذا كان الغرض من التمويل مقتصراً على جبر خسارة حملة الصكوك في رأس المال أو جبر النقص في التوزيعات الدورية.

6.1.2.2.c.2.2. This should not lead to imposition of liability (*taḍmīn*) on the originator up to the principal amount or the profit amount of Sukuk, such as, [the originator] bears [the liability] to settle part of the financing that exceeds the percentage of its share in the capital of the company on which the Sukuk is based or to exceed the percentage of its share in the profits.

6-1-2-2-ج-2-2. أن لا يؤدي ذلك إلى تضمين الجهة المنشئة رأس مال الصكوك أو ربحها؛ كأن تتحمل سداد حصةٍ من التمويل تفوق نسبة حصتها في رأس مال الشركة التي تقوم عليها الصكوك أو نسبة حصتها في الربح.

6.1.2.2.c.2.3. the originator adheres to the financing conditions stated in the Sukuk documents without being obliged to grant [the financing], including the margin of financing profit, if it is stated. In case [granting of financing] was not stated and the financing was [extended by] the originator, so it is not permitted to have the profit margin higher than the prevailing [rate] in the market.

6-1-2-2-ج-3-2. أن تتقيد الجهة المنشئة بشروط التمويل المنصوص عليها في مستندات الصكوك دون التزام منها بمنحه، ومن ذلك هامش ربح التمويل إن كان منصوصاً عليه، فإن لم يكن منصوصاً عليه وكان التَّمويل من الجهة المنشئة، فلا يجوز أن يكون هامش الربح أعلى من السَّائد في السوق.

6.1.2.2.c.2.4. The originator shall not bear the consequences of not obtaining the financing on its terms, if the originator cannot do it with no negligence [from its side].

6-1-2-2-ج-4-2. أن لا تتحمل الجهة المنشئة تبعات عدم الحصول على التمويل بشروطه إن تعذَّر عليها ذلك دون تقصير.

6-1-2-2-d. **Management of Reserve Account and Benefiting from It**

6-1-2-2-د. **إدارة الحساب الاحتياطي والانتفاع به:**

6-1-2-2-d-1. The balance of the reserve account is the property of the party [from] whom [the amount] was deducted. It is permitted, with the approval of the certificateholders, to state that what remains of the account balance, which is

6-1-2-2-د-1. رصيد الحساب الاحتياطي ملكٌ لمن اقتُطِع منه، ويجوز بموافقة حملة الصكوك النص على أن ما يبقى من رصيد الحساب مما هو مملوك

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owned by the certificateholders, will be for the originator according to the agreement between the two parties.

6-1-2-2-d-2. It is permitted to credit the balance of the reserve account in a current or an investment account held with the originator or other [party]. It is not permitted to stipulate that [such an amount] will be credited exclusively in a current account, or the like, held with the originator, so that [the originator] has the right to benefit from its use and guaranteeing it. The certificateholders, or the party representing them, shall make the choice, after the issuance [of Sukuk], of the account in which the mentioned balance is credited, provided the originator is not a party to this selection in any capacity. If the balance is credited in an investment account, held with the originator, so it is required that the profit percentage of the account to be at the rate of profit for similar investment accounts held with the originator.

6-2. Securities in Sukuk

6-2-1. Securities of the Originator

6-2-1-1. Securities for Obligations of the Originator

It is permitted for the certificateholders to require the originator to provide Shari'ah compliant securities to secure fulfilment of the financial obligations of the originator that will be owed [by the originator] in accordance with the Shari'ah terms and conditions of Sukuk contracts and documents. See: s. (6-1-1-2) and s. (6-1-2-1).

6-2-1-2. **Securities for the underlying assets and**

لهم يكون للجهة المنشئة حافزا حسب الاتفاق بين الطرفين.

6-1-2-2-د-2. يجوز إيداع رصيد الحساب الاحتياطي في حسابٍ جارٍ أو استثماري لدى الجهة المنشئة أو غيرها. ولا يجوز اشتراط إيداعه حصراً في حساب جار أو ما في حكمه لدى الجهة المنشئة، ليكون من حقها الانتفاع باستخدامه مع ضمانه. ويختار حملة الصكوك أو من يمثلهم، بعد الإصدار، الحسابَ الذي يودع فيه الرصيد المذكور، بشرط أن لا تكون الجهة المنشئة طرفًا في هذا الاختيار بأي صفة كانت. وإذا أُودِع الرصيد في حساب استثماري لدى الجهة المنشئة، فيُشترَط أن تكون نسبة ربح الحساب في معدل نسبة ربح الحسابات الاستثمارية المماثلة لدى الجهة المنشئة.

6-2. الضمانات في الصكوك:

6-2-1. ضمانات الجهة المنشئة:

6-2-1-1. ضمان التزامات الجهة المنشئة:

يجوز لحملة الصكوك مطالبة الجهة المنشئة بتقديم ضمانات مشروعة لتوثيق وفائها بما يثبت في ذمتها من التزامات مالية وفقًا للشروط والأحكام الشرعية لعقود ومستندات الصكوك. وينظر البند (٦-١-١-٢)، والبند (٦-١-٢-١).

6-2-1-2. ضمان موجودات الصكوك أو ربحها:

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profits of Sukuk

6-2-1-2-a. If the originator is a Mudarib, partner or an investment agent, then it is not permitted for the originator to guarantee the principal or profit of Sukuk. Originator's guarantee will be limited to cases of misconduct, negligence, or breach of the terms of the contract. With due compliance with s. (3-1), s. (3-3) and Para. (4) of the Shari'ah Standard No. (56): Liability of the Investment Manager and s. (6-2-2), s. (6-1-1-1-b), and s. (7-3-2-10) of this Standard.

6-2-1-2-أ. لا يجوز للجهة المنشئة أن تَضمن رأس مال الصكوك أو ربحها إن كانت الجهة المنشئة مضاربًا أو شريكًا أو وكيلاً بالاستثمار. ويقتصر ضمانها حينئذ على حالات التَّعدي أو التَّقصير أو مخالفة شروط التَّعاقد. ويراعى ما جاء في -البند (٣-١) و-البند (٣-٣) والفقرة (٤) من المعيار الشرعي رقم (٥٦) بشأن ضمان مدير الاستثمار، والبند (٦-٢-٢) والبند (٦-١-١-١-ب) والبند (٧-٣-٢-١٠) من هذا المعيار.

6-2-1-2-b. It is not permitted for the originator to voluntarily guarantee something whose guarantee is not permitted, by virtue of Shari'ah, if the voluntary [guarantee] was before the occurrence of the total or partial loss of the Sukuk principal amount or its underlying assets. If [the originator], out of its own free will, volunteers [to guarantee] something like that, after the occurrence of the loss, then it may do so. See: s. (3-2) and -(3-4) of Shari'ah Standard No. (56): Liability of the Investment Manager.

6-2-1-2-ب. لا يجوز تطوع الجهة المنشئة بضمان ما لا يجوز اشتراط ضمانه شرعًا إن كان التطوع قبل حصول الخسارة الكلية أو الجزئية لرأس مال الصكوك أو موجوداتها، فإن تطوعت بشيء من ذلك بعد وقوع الخسارة بمحض إرادتها فلها ذلك. وينظر -البند (٣-٢)، و-البند (٣-٤) من المعيار الشرعي رقم (٥٦) بشأن ضمان مدير الاستثمار.

6-2-1-3. Undertaking of the originator to guarantee the debtors:

It is permitted for the originator in Sukuks based on partnership, Mudaraba, Investment Agency, or

6-2-1-3. تعهد الجهة المنشئة بضمان المدينين:

يجوز للجهة المنشئة في صكوك الشركة أو المضاربة أو

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الوكالة بالاستثمار أو الوكالة بالخدمات أن تَضمن المستحَق على المدينين الذين تتعامل معهم لصالح الشركة أو المضاربة أو الوكالة بالاستثمار أو الوكالة بالخدمات، بالضوابط الآتية:

Service Agency to guarantee the amounts due by the debtors with whom the originator deals in favour of the partnership, Mudaraba, Investment Agency, or Service Agency, according to the following rules:

6-2-1-3-أ. أن يكون الضمان بمستند مستقل عن عقد الشركة، أو المضاربة أو الوكالة بالاستثمار أو الوكالة بالخدمات، بحيث لا يكون مشروطًا فيه.

6-2-1-3-a. The guarantee shall be [extended] via a document separate from the contracts of partnership, Mudaraba, Investment Agency or Service Agency, so that it is not contingent upon it.

6-2-1-3-ب. أن يكون توقيع مستند الضمان تاليًا لتوقيع العقد المذكور، بحيث يقوم العقد صحيحًا نافذاً دونه.

6-2-1-3-b. Signing of the guarantee document should be subsequent to the signing of the aforementioned contract, so that the contract remains valid and enforceable without [the guarantee].

6-2-1-3-ج. أن لا يترتب على الإخلال بالتزامات الضمان أو بطلانه الإخلالُ بالتزامات ذلك العقد أو بطلانه، ولا على الإخلال بالتزامات العقد أو بطلانه الإخلال بالتزامات الضمان أو بطلانه.

6-2-1-3-c. Breach of the guarantee obligations or their voidance shall not result in the breach or voidance of the obligations of that contract, nor shall the breach of the contract's obligations or its voidance shall lead to the breach of the guarantee obligations or its voidance.

6-2-1-4. تعهد الجهة المنشئة بضمان التزامات شركة التأمين:

إذا كانت الجهة المنشئة تتولى التأمين على موجودات الصكوك نيابة عن حملتها، وكانت هي التي باعت الموجودات لحملة الصكوك أو كانت مضاربًا أو شريكًا أو وكيلاً بالاستثمار أو مستأجراً أو وكيلاً بالخدمات؛ فلا يجوز أن تتعهد بضمان التعويضات التي تدفعها شركة التأمين إذا لم تكن الجهة المنشئة متعدية أو مقصرة أو

6-2-1-4. Undertaking of the originator to guarantee the obligations of the insurance company:

If the originator undertakes [to secure] the insurance of the underlying assets of Sukuk on behalf of its certificateholders, and it is the one that sold the assets to the certificateholders, or if it was the Mudarib, partner, investment agent, or lessee; then it is not permitted to undertake to guarantee the compensation paid by the insurance company if the originator did not commit misconduct, negligence, or breach of the terms of the contract. It is not permitted to stipulate what it is shall be beyond implementation in order to imposing the liability upon the originator, it includes: the

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مخالفة لشروط التعاقد. ولا يجوز اشتراط ما يتعذر عليها تنفيذه بغرض تحميلها الضمان، ومن ذلك: اشتراط أن تدفع شركة التأمين التعويضات خلال مدَّة وجيزة من تاريخ وقوع التلف لا تقبل شركات التأمين دفع التعويضات خلالها عادة، وأن الإخلال بهذا الشرط يجعل الجهة المنشئة ضامنة لالتزامات شركة التأمين، أو اشتراط صدور حكمٍ باتٍ في مدة محددة بعدم ضمان الجهة المنشئة بسبب تعديها أو تقصيرها أو مخالفتها شروط التعاقد. والواجب أن يكون استصدار مثل هذا الحكم خاضعاً لإجراءات التقاضي المعتادة، خالياً من التقييد بمدَّة. أما إذا كان التأمين المشترط ممكن التنفيذ، واختارت الجهة المنشئة عدم التنفيذ؛ فإنها تكون ضامنة. وينظر -البند (٣-١) والبند (٣-٦) والبند (٤-٣) من المعيار الشرعي رقم (٥٦) بشأن ضمان مدير الاستثمار، والبند (٥-١-٨) من المعيار الشرعي رقم (٩) بشأن الإجارة والإجارة المنتهية بالتمليك، والبند (٨-١-١-٣-د-٢-١-٧) من هذا المعيار.

requirement that the insurance company paying the compensation within a short period from the date of the occurrence of the loss, during which insurance companies usually do not accept processing payment of compensation, and that breach of this condition makes the originator liable for the obligations of the insurance company, or requiring the issuance of a final judgment within a specific period not to guarantee the originator due to its misconduct, negligence, or breach of the terms of the contract. The issuance of such a judgment must be subject to the usual litigation procedures, without any time limitation. But if the stipulated insurance is feasible, and the originator chooses not to implement it; then it will be liable. See: s. (1-3), s. (3-6), and s. (3-4) of Shari'ah Standard No. (56): Liability of the Investment Manager, and s. (5-1-8) of Shari'ah Standard No. (9): Ijarah and Ijarah Muntahia Bittamleek and s. (8-1-1-3-d-2-1-7) of this Standard.

6-2-2. تعهد الطرف الثالث:

يجوز تعهد طرف ثالث، غير الجهة المنشئة أو من ينوب عنها، بجبر الخسارة في رأس مال الصكوك أو النقص في الربح، أو بشراء موجودات الصكوك بمبلغ محدد، ولو كانت الجهة المنشئة أمينة على موجودات الصكوك، وذلك بالشروط الواردة في الفقرة (٤) من المعيار الشرعي رقم

6-2-2. Third party Undertaking

It is permitted for a third party, other than the originator or the party representing it, to carry reparation of loss of Sukuk capital or decrease in the profit, or to purchase the underlying assets of Sukuk for a specified amount, even if the originator is the trustee of the underlying assets of Sukuk, in accordance with the conditions mentioned in Para. 4 of Shari'ah Standard No. (56): Liability of the Investment Manager. It is permitted if the originator is a third party. See: s. (4-3) of Shari'ah

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Standard No. (56): Liability of the Investment Manager. With due compliance with s. (5-2) of Shari'ah Standard No. (23): Agency and the Act of Uncommissioned Agent (Fodooli).

(٥٦) بشأن ضمان مدير الاستثمار. ويجوز ذلك من الجهة المنشئة إن كانت طرفًا ثالثًا. وينظر -البند (٤-٣) من المعيار الشرعي رقم (٥٦) بشأن ضمان مدير الاستثمار، ويراعى البند (٥-٢) من المعيار الشرعي رقم (٢٣) بشأن الوكالة وتصرف الفضولي.

6-3. Undertaking to Purchase the Underlying Assets of Sukuk

6-3-1. Events of Performance of Undertaking to Purchase the Underlying assets of Sukuk (Binding Promise)

There is no [Shari'ah] objection, if the originator undertakes to purchase the underlying assets of Sukuk, so that the certificateholders, or the party representing them, demand [the originator] to carry out the purchase in specific events as laid down in the undertaking document, including:

6-3-1-1. At the end of the Sukuk term. See: s. (6-3-2-3).

6-3-1-2. Upon the failure of the originator in settling its obligations.

6-3-1-3. Upon breach of the Shari'ah compliant collaterals provided by the originator.

6-3-1-4. Upon occurrence of events affecting the financial solvency of the originator.

6-3-1-5. Upon the fall of the market value of the underlying assets of Sukuk.

6-3-1-6. When the general economic conditions or circumstances change flagrantly as per experts' view.

6-3. التعهد بشراء موجودات الصكوك:

6-3-1. حالات تنفيذ التعهد (الوعد الملزم) بشراء موجودات الصكوك:

لا مانع من أن تتعهد الجهة المنشئة بشراء موجودات الصكوك، بحيث يطالبها حملة الصكوك أو من يمثلهم بتنفيذ الشراء في حالات محددة في مستند التعهد، ومنها:

6-3-1-1. عند نهاية مدة الصكوك. وينظر البند (٦-٣-٢-٣).

6-3-1-2. عند إخفاق الجهة المنشئة في سداد ما عليها من التزامات.

6-3-1-3. عند اختلال الضمانات المشروعة المقدمة من الجهة المنشئة.

6-3-1-4. عند حصول حوادث تؤثر في الملاءة المالية للجهة المنشئة.

6-3-1-5. عند انخفاض القيمة السوقية لموجودات الصكوك.

6-3-1-6. عند تغير الظروف أو الأوضاع الاقتصادية العامة تغيراً فاحشاً بتقرير الخبراء.

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6-3-1-7. Upon a change in the tax requirements, regulatory guidelines, or in the regulations and laws.

6-3-1-7. عند تغير المتطلبات الضريبية أو التعليمات الرقابية أو الأنظمة والقوانين.

6-3-2. Provisions of the Purchase Undertaking:

It is not permitted to [place] the undertaking from the originator to purchase the underlying assets of Sukuk in the core of the contract according to which the underlying assets are sold to the certificateholders, or in the contract under which the originator pays periodic distributions. It is permitted to provide a purchase undertaking in a separate deed from the contract and it shall not form an integral part thereof, subject to the following provisions:

6-3-2-1. It is not permitted that originator's undertaking to purchase the underlying assets of Sukuk may lead to a guarantee that is prohibited by virtue of Shari'ah, so that the originator undertakes to purchase the underlying assets of Sukuks based on Mudaraba, partnership or Investment Agency at a price to be ascertained upon the issuance of Sukuk or before the fulfilment of the condition in which the purchase undertaking is performed. It is permitted that the purchase undertaking may be [performed] on the basis of the net value of the underlying assets, the market value, the fair value, or a price agreed upon when the purchase is carried out. It is also permitted, in the Mudaraba, parntership or Investment Agency Sukuks whose underlying assets are limited to assets leased to a third party as Ijarah Muntahia Bittamleek, for the purchase undertaking to be with the remainder of the rental instalments of all the underlying assets, by assuming that such an amount represents the net value. Refer: s. (2-2-1) and s. (2-2-2) of Shari'ah Standard No. (5): Guarantees, and s. (3-1-6-2) of Shari'ah Standard No. (12): Sharikah (Musharaka) and Modern

6-3-2. أحكام التعهد بالشراء:

لا يجوز تعهد الجهة المنشئة بشراء موجودات الصكوك في صلب العقد الذي تبيع به الموجودات إلى حملة الصكوك أو العقد الذي تدفع الجهة المنشئة بموجبه التوزيعات الدورية. ويجوز التعهد بالشراء بوثيقة مستقلة عن العقد، لا تكون جزءاً لا يتجزأ منه، مع مراعاة الأحكام الآتية:

6-3-2-1. لا يجوز أن يؤدي تعهد الجهة المنشئة بشراء موجودات الصكوك إلى الضمان الممنوع شرعـًا، وذلك بأن تتعهد بشراء موجودات صكوك المضاربة أو الشركة أو الوكالة بالاستثمار بثمن يتحدَّد عند إصدار الصكوك أو قبل تحقق الحالة التي يُنفَّذ عندها التعهد بالشراء، ويجوز أن يكون التعهد بالشراء على أساس صافي قيمة الموجودات أو القيمة السوقية أو متوسطها خلال مدة محددة أو القيمة العادلة أو بثمن يتفق عليه عند تنفيذ الشراء. كما يجوز في صكوك المضاربة أو الشركة أو الوكالة بالاستثمار التي تقتصر موجوداتها على موجودات مؤجرة للغير إجارة منتهية بالتمليك، أن يكون التعهد بالشراء بباقي أقساط الأجرة لجميع الموجودات، باعتبارها

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Companies, and s. (3-5-1) of Shari'ah Standard No. (56): Liability of the Investment Manager.

تمثل صافي قيمتها. وينظر البند (٢-٢-١) والبند (٢-٢-٢) من المعيار الشرعي رقم (٥) بشأن الضمانات، و البند (٣-١-٦-٢) من المعيار الشرعي رقم (١٢) بشأن الشركة (المشاركة) والشركات الحديثة، و البند (٣-٥-١) من المعيار الشرعي رقم (٥٦) بشأن ضمان مدير الاستثمار.

6-3-2-2. It is permitted for the originator-lessee in the Ijarah Sukuk, to undertake to purchase the underlying assets of Sukuk, at or before the Sukuk maturity date, for a specified price or for a price calculated based on a specific benchmark.

6-3-2-2. يجوز أن تتعهد الجهة المنشئة المستأجرة في صكوك الإجارة بشراء موجودات الصكوك، عند انتهاء أجل الصكوك أو قبله، بثمن محدَّد أو بثمن يحسب وفقاً لمؤشر معين.

6-3-2-3. It is not permitted that originator's undertaking to purchase the underlying assets of Sukuk shall lead to 'Inah sale or to a form of repurchase that is prohibited by virtue of Shari'ah, according to what is stated in Shari'ah Standard No. (58): Repurchase, and s. (3-3) of Shari'ah Standard No. (49): Promise and Bilateral Promise.

6-3-2-3. لا يجوز أن يؤدي تعهد الجهة المنشئة بشراء موجودات الصكوك إلى بيع العينة أو إلى صورة ممنوعة من صور إعادة الشراء، وفقاً للوارد في المعيار الشرعي رقم (٥٨) بشأن إعادة الشراء، والبند (٣-٣) من المعيار الشرعي رقم (٤٩) بشأن الوعد والمواعدة.

6-3-2-4. It is not permitted that originator's undertaking to purchase the underlying assets of Sukuk shall lead to obligating [the originator] to pay the price stated in the purchase undertaking (i.e., the Exercise Price) without concluding the purchase contract, even if that is stated in the undertaking document, and this includes:

6-3-2-4. لا يجوز أن يؤدي تعهد الجهة المنشئة بشراء موجودات الصكوك إلى إلزامها بدفع الثَّمن الوارد في التَّعهد بالشِّراء (سعر التنفيذ – Exercise Price) دون إبرام عقد الشراء ولو كان ذلك منصوصاً عليه في مستند التعهد، ومن ذلك:

6-3-2-4-a. If the purchase could not be carried out

6-3-2-4-أ. إذا تعذَّر تنفيذ الشِّراء لأي سبب كان، كتغيُّر

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for any reason, including change in regulations and laws or revocation of originator's license; and it was a seller of the underlying assets (such as benefits linked to licensing) to the certificateholders and an agent on their behalf with regards to the services, whether what is paid is referred as price or compensation.

الأنظمة والقوانين أو سحب التَّرخيص من الجهة المنشئة؛ إن كانت بائعاً للموجودات (كالمنافع القائمة بالتَّرخيص) لحملة الصُّكوك ووكيلاً عنهم بالخدمات، سواء سمي ما يدفع ثمناً أو تعويضاً.

6-3-2-4-b. If it is proved that the underlying assets, that [the originator] has sold to the certificateholders are owed to a third party. With due compliance with the provisions for the entitlement of a third party to the underlying assets, as given in the s. (5-2-7).

6-3-2-4-ب. إذا ثبت أن الموجودات التي باعتها إلى حملة الصُّكوك مستحقة للغير. وتراعى أحكام استحقاق الموجودات للغير الواردة في البند (٥-٢-٧).

6-3-3. Exercising the Purchase Undertaking:

6-3-3. تنفيذ التعهد بالشراء:

6-3-3-1. Upon exercising the purchase undertaking, it is required to execute a sale contract of the underlying assets of Sukuk [to sell] by the certificateholders to the originator with an offer and an acceptance duly in place. It is not permitted to conclude the sale automatically without exchanging the offer and acceptance. See: s. (6-3-2-4) of this Standard and s. (3-8) of Shari'ah Standard No. (49): Promise and Bilateral Promise.

6-3-3-1. يجب عند تنفيذ التعهد بالشراء إبرام عقد لبيع موجودات الصُّكوك من حمَلة الصُّكوك إلى الجهة المنشئة، بإيجاب وقبول في حينه، ولا يجوز أن يقع البيع تلقائياً دون تبادل إيجاب وقبول. وينظر البند (٦-٣-٢-٤) من هذا المعيار، والبند (٣-٨) من المعيار الشرعي رقم (٤٩) بشأن الوعد والمواعدة.

6-3-3-2. Upon performing the Purchase Undertaking, it is required that the underlying assets of Sukuk, which are undertaken to be purchased, are in their condition when the undertaking was provided, other than what occurs due to usual usage. If the underlying assets were damaged or defected with a flagrant defect (ʻayb fāḥish), it is not permitted to oblige the Originator to perform the undertaking.

6-3-3-2. يجب عند تنفيذ التعهد بالشراء أن تكون الموجودات المتعهَّد بشرائها بحالتها التي كانت عليها عند صدور التعهد، باستثناء ما يحدث بسبب الاستخدام المعتاد، فإن كانت تالفة أو معيبة عيباً فاحشاً، لم يجز إلزام الجهة المنشئة بتنفيذ التعهد.

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6-3-3-3. Upon exercising the Purchase Undertaking, it is required to observe the provisions for disposing of debts or the provisions for currency exchange (*ṣarf*), if the components of the underlying assets of Sukuk so require. See: s. (9-1-2) and s. (9-1-4).

6-3-3-3. يجب عند تنفيذ التعهد بالشراء مراعاة أحكام التصرف في الديون أو أحكام الصرف، إن كانت مكونات موجودات الصُّكوك تتطلب ذلك. وينظر البند (٩-١-٢) والبند (٩-١-٤).

6-3-3-4. It is permitted to oblige the Originator to pay an amount equal to the price, so that the amount remains held as a trust (*amānah*) in the possession of its possessor until the conclusion of the [sale] contract, provided that it is stated that the price is not due to the certificateholders unless the purchase contract is concluded. If that amount is paid and the contract is not concluded, the amount must be returned to the originator, and the underlying assets of the Sukuk remain the property of certificateholders.

6-3-3-4. يجوز إلزام الجهة المنشئة بدفع مبلغ يساوي الثمن على أن يبقى المبلغ أمانة في يد قابضه إلى حين إبرام العقد، بشرط النص على أن الثمن لا يُستحق لحملة الصكوك إلا بإبرام عقد الشراء. فإن تم دفع ذلك المبلغ ولم يُبرم العقد، وجب رد المبلغ إلى الجهة المنشئة، وتبقى موجودات الصُّكوك ملكاً لحمَلتها.

6-3-3-5. If the purchase undertaking was performed and the originator purchased the underlying assets of Sukuk, and then it does not pay the purchase price within the period specified for its payment, it is not permitted to stipulate that the contract that existed between the certificateholders and the originator, such as Ijarah or Investment Agency, is automatically enforced again, unless it is stipulated in the sale that if the originator does not pay the price within the specified period; then that contract is not concluded *ab initio* and the previous contracts remain valid according to their [respective] provisions with the consideration agreed upon in the contract until the originator purchases the underlying assets from the certificateholders pursuant a valid purchase [contract] with the payment of the price. See: s. (6-3-3-6).

6-3-3-5. إذا تم تنفيذ التعهد بالشراء، واشترت الجهة المنشئة موجودات الصكوك، ثم لم تدفع ثمن الشراء في الأجل المحدَّد لدفعه، فلا يجوز النص على أن العقد الذي كان قائماً بين حملة الصكوك والجهة المنشئة، كالإجارة أو الوكالة بالخدمات، يسري تلقائياً من جديد، ما لم يشترط في هذا الشراء على أنه إذا لم تدفع الجهة المنشئة الثمن في الأجل المحدد؛ فإن ذلك العقد غير منعقد من أصله، وتبقى العقود السابقة سارية بأحكامها بالعوض المتفق عليه في العقد إلى أن تشتري الجهة المنشئة الموجودات من حملة الصكوك شراء

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صحيحاً مع دفع الثمن. وينظر ما يأتي في البند (٦-٣-٣-٦).

6-3-3-6. If the originator refrains to perform the purchase undertaking and returns the underlying assets to the certificateholders, then it owes compensation amount for the actual damage. See: s. (5-1-7) of Shari'ah Standard No. (58) Repurchase and s. (5-2-2) and s. (7-3-2-8) of this Standard. However, if it refrained from performing the purchase undertaking and did not return the underlying assets to the certificateholders, then the previous contracts, such as Ijarah or Service Agency, remain valid with the consideration agreed upon in those contracts, as stated in s. (6-3-3-5).

6-3-3-6. إذا امتنعت الجهة المنشئة عن تنفيذ التعهد بالشراء وأعادت الموجودات إلى حملة الصكوك، فعليها التعويض عن الضرر الفعلي. وينظر البند (٥-١-٧) من المعيار الشرعي رقم (٥٨) بشأن إعادة الشراء، والبند (٥-٢-٢) والبند (٧-٣-٢-٨) من هذا المعيار. أما إذا امتنعت عن تنفيذ التعهد بالشراء ولم ترد الموجودات إلى حملة الصكوك فإن العقود السابقة مثل الإجارة أو الوكالة بالخدمات تبقى قائمة بالعوض المتفق عليه في تلك العقود. وينظر البند (٦-٣-٣-٥).

6-3-3-7. If it is not possible to perform the purchase undertaking for a matter beyond the ability of the originator, then it is not permitted that the amount of the price, at which the purchase undertaking is [technically] exercised, to be recognized as a debt owed by [the originator], nor any compensation is charged to the originator. Unless, it is stipulated in the purchase undertaking that if [the undertaking] cannot be performed for legal or procedural reasons after the offer being issued by the certificateholders, and the originator continues to retain possession of the underlying assets of Sukuk, then this is deemed, after the lapse of a specified period, as an acceptance in-action by the originator to purchase those assets at the price stipulated in the purchase undertaking. See: s. (6-3-2-4).

6-3-3-7. إذا تعذر تنفيذ التعهد بالشراء لأمر خارج عن قدرة الجهة المنشئة، فلا يجوز أن يثبت مبلغ الثمن الذي يُنفَّذ به التعهد بالشراء ديناً في ذمتها، ولا يجوز تحميلها بشيء من التعويض، إلا أن ينص في التعهد بالشراء على أنه إذا تعذر تنفيذه لأسباب قانونية أو إجرائية بعد صدور الإيجاب من حملة الصكوك واستمرت الجهة المنشئة محتفظة بحيازة موجودات الصكوك، فإن ذلك يعد بعد مضي مدة محددة قبولاً عملياً منها بشراء تلك الموجودات بالثمن المنصوص عليه في التعهد بالشراء. وينظر البند

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(٦-٣-٢-٤).

6-3-4. Undertaking by the originator to substitute the Underlying Assets

It is permitted for the originator to undertake to substitute the underlying assets of Sukuk with its [own] assets, in cases specified in the issuance documents, under the following conditions:

6-3-4-1. That this does not lead to imposing the liability (*taḥmīl al-ḍamān*) upon [the originator] in a way that is prohibited by virtue of Shari'ah. If the originator sells the underlying assets to the certificateholders, the substitution is required to be based on the market value of old assets, its net value, its fair value, or as agreed upon at the time of substitution. See: s. (5-3) and s. (3-6) and s. (4-3) of Shari'ah Standard No. (56) Liability of the Investment Manager.

6-3-4-2. Execution of the substitution will be carried through an offer and acceptance [made] at that time between the certificateholders (or the party representing them) and the originator; so that the originator does not conclude the contract on behalf of both the sides of the contract (*tawalī ṭarafī al-ʿaqd*) or contracts that are necessary for execution of substitution.

6-3-4-3. The rent for the old property suspends in the period during which that property may no longer be rented, and the leasing of the new property is delayed, and that is in Ijarah Sukuk.

6-3-4. تعهد الجهة المنشئة باستبدال موجودات الصكوك:

يجوز أن تتعهد الجهة المنشئة بأن تُبدل موجودات الصكوك بموجودات من عندها، في أحوال محددة في وثائق الإصدار، وذلك بالشروط الآتية:

6-3-4-1. أن لا يؤدي ذلك إلى تحميلها بضمان ممنوع شرعًا. فإذا باعت الجهة المنشئة الموجودات لحملة الصكوك وجب أن يكون الاستبدال على أساس القيمة السوقية للموجودات القديمة أو على أساس صافي قيمتها أو قيمتها العادلة أو بما يتفق عليه عند الاستبدال. وينظر البند (٣-٥) والبند (٣-٦) والبند (٤-٣) من المعيار الشرعي رقم (٥٦) بشأن ضمان مدير الاستثمار.

6-3-4-2. أن يقع تنفيذ الاستبدال بإيجاب وقبول في حينه بين حملة الصُّكوك (أو من يمثلهم) والجهة المنشئة؛ بحيث لا تتولى الجهة المنشئة طرفي العقد أو العقود اللازمة لتنفيذ الاستبدال.

6-3-4-3. أن تتوقف أجرة العين القديمة في الفترة التي قد لا تبقى فيها تلك العين مؤجرة ويتأخر تأجير العين الجديدة، وذلك في صكوك الإجارة.

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7. Issuance of Sukuk Issuance:

7-1. The concept of Sukuk Issuance:

It is listing [of Sukuk] for public or private subscription in accordance with its base prospectus. The subscription shall be in common shares of equal value in the capital [of Sukuk], which represents the proceeds of the issuance, for the purpose of investing [the proceeds] in accordance with the terms and conditions of the Sukuk contracts and documents. If the issuance of Sukuk is [carried by] way of securitization, then subscription to Sukuk is subscribing to common shares of equal value in an already-existing underlying assets, which are the subject-matter of securitization. See: s. (2-2).

7-2. General Rules for Sukuk Issuance:

7-2-1. It is required that the purpose of the issuance of Sukuk is acceptable by virtue of Shari'ah. It is not permitted to issue Sukuk to finance interest-based transactions or [carrying out] prohibited investments, such as buying conventional bonds and the like.

7-2-2. It is required that Sukuk are issued using financing modes, contracts and document that are acceptable by virtue of Shari'ah and what is in accordance with the characteristics of Sukuk that distinguish them from the conventional bonds. It is not permitted to violate Shari'ah rulings and rules, even to attract conventional investors, to secure a credit rating for Sukuk, to improve its credit rating, or to meet the requirements for listing it in the bond markets or global financial markets. See: Para. 3, s. (9-3) and s. (13-1-1-1).

7. إصدار الصكوك:

7-1. مفهوم إصدار الصكوك:

هو طرحها للاكتتاب العام أو الخاص وفقـًا لنشرة إصدارها. ويكون الاكتتاب بحصص شائعة متساوية في رأس مال الصكوك الذي يمثل حصيلة الإصدار، بغرض استثماره وفقـًا لشروط وأحكام عقود ومستندات الصكوك. وإذا كان إصدار الصكوك بطريق التصكيك، فإن الاكتتاب فيها اكتتابٌ في حصص شائعة متساوية في موجودات قائمة فعلاً، هي الموجودات محل التصكيك. وينظر البند (٢-٢).

7-2. ضوابط عامة لإصدار الصكوك:

7-2-1. يجب أن يكون الغرض من إصدار الصكوك مقبولاً شرعـًا، فلا يجوز إصدار صكوك لتمويل عمليات ربوية أو استثماراتٍ محرَّمة كشراء سندات تقليدية ونحوها.

7-2-2. يجب أن تصدر الصكوك باستخدام صيغة وعقود ومستنداتٍ مقبولة شرعـًا، وبما يتَّفق مع خصائص الصكوك المميزة لها عن السندات التقليدية، ولا يجوز مخالفة الأحكام والضوابط الشرعية ولو لجذب مستثمرين تقليديين أو للحصول على تصنيفٍ ائتمانيٍّ للصكوك أو لرفع درجة تصنيفها الائتماني أو لتلبية متطلبات إدراجها في أسواق السندات أو الأسواق المالية العالمية. وينظر الفقرة (٣) والبند (٩-٣) والبند (١٣-١-١-١).

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7-2-3. It is not permitted to state that if any of the Sukuk contracts turns out to be void, vitiated (*fāsid*) or unenforceable then it shall continue producing its effect on absolute basis, and none of these effects shall be accepted only that goes in line with the rulings and principles of Shari'ah regarding vitiated contracts related to the price, rent, distribution of profit, or other rights or obligations. See: s. (5-2-3-3).

7-2-3. لا يجوز النص على أنه إن ظهر أن أيّ عقد من عقود الصكوك باطل أو فاسد أو غير نافذ؛ فإنه يبقى قائمـًا منتجـًا لآثاره مطلقـًا، ولا يقر من الآثار في هذه الأحوال إلا ما وافق أحكام ومبادئ الشريعة الإسلامية بشأن العقود الفاسدة المتعلقة بالثمن، أو الأجرة، أو تقسيم الربح، أو غيرها من الحقوق أو الالتزامات. وينظر البند (٥-٢-٣-٣).

7-2-4. It is required that the contracts and documents concluded with the parties related to Sukuk issuance (whether the arranger, the dealer or a party carrying any of its activities) are acceptable by virtue of Shari'ah, whatever their duties may be, and to state in [the contracts] their commitment in performing their duties to the rulings and principles of Shari'ah. This applies to those who contract with [such party] to carry out these tasks or some of them (if they are authorized to do so).

7-2-4. يجب أن تكون العقود والمستندات التي تُبرم مع أي طرف ذي صلة بإصدار الصكوك – سواء أكان منظمـًا أم مسوقـًا أم منفذاً لأي من أعمالها – مقبولةً شرعـًا، أيـًا كانت مهماته، مع النَّص فيها على التزامه في أدائه لمهماته بأحكام ومبادئ الشريعة الإسلامية. وينطبق ذلك على من يتعاقد معه للقيام بتلك المهمات أو ببعضها مما هو مأذون له بالتعاقد مع الغير فيه.

7-2-5. It is required that financing mode of Sukuk, its operations, calculation of its profits or losses, and everything related to it remain in accordance with the rulings and principles of Shari'ah until the redemption or cancelation of Sukuk. And if any of the terms or provisions of its contracts and documents are modified, then it is required that the modification must be acceptable by virtue of Shari'ah. See: s. (7-3-2-5) and s. (13-1-1-1).

7-2-5. يجب أن تبقى صيغة الصكوك وعملياتها وحساب أرباحها أو خسائرها وكل ما يتَّصل بها متفقـًا مع أحكام ومبادئ الشريعة الإسلامية إلى حين استرداد أو إطفاء الصكوك. وإذا تم تعديل أيٍّ من شروط أو أحكام عقودها ومستنداتها، فيجب أن يكون التَّعديل مقبولاً شرعـًا. وينظر البند (٧-٣-٢-١٥)، والبند (١٣-١-١-١).

7-2-6. It is not permitted to combine Sukuk

7-2-6. لا يجوز الجمع بين عقود إصدار الصكوك جمعـًا

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issuance contracts in a manner that is not acceptable by virtue of Shari'ah. See: Shari'ah Standard No. (25): Combination of Contracts. It is required for each contract of the approved financing mode applied for the issuance of Sukuk to fulfil its (respective) requirements as determined by Shari'ah, as if it were concluded on its own.

غير مقبولٍ شرعـًا. وينظر المعيار الشرعي رقم (٢٥) بشأن الجمع بين العقود. والواجب أن يحقِّق كل عقدٍ من عقود الصيغة المستخدمة لإصدار الصكوك مقتضاه المقرَّر له شرعـًا، كما لو كان معقوداً بمفرده.

7-2-7. When structuring Sukuk, Shari'ah provisions must be determined according to the outcome and effects of Sukuk's contractual mechanics, taken together, without being limited to the effects of individual (partial) disposals and contracts, in isolation from other contracts and accompanying documents. It is not permitted for its contractual mechanics to lead into an exchange of spot cash for a more deferred cash than for a deferred one, or to negate the certificateholders to bear any of the risks of the underlying assets of Sukuk owned by them.

7-2-7. يجب عند هيكلة الصكوك أن تقرر الأحكام الشرعية وفقـًا لمآل وآثار منظومتها العقدية، مجتمعة، دون الاقتصار على آثار التصرفات والعقود الفردية (الجزئية) بمعزلٍ عن غيرها من العقود والمستندات المصاحبة لها. فلا يجوز أن تؤول منظومتها العقدية إلى تبادل نقد عاجل بنقد آجل أكثر منه مقابل الأجل، أو إلى نفي تحمل حملة الصكوك شيئًا من مخاطر موجودات الصكوك المملوكة لهم.

7-2-8. There is no [Shari'ah] objection to the relationship between the certificateholders and the originator being a direct relationship, or an indirect relationship through establishing a legal entity that represents them in contracting with the originator, such as a special purpose vehicle. See: s. (10-2).

7-2-8. لا مانع من أن تكون العلاقة بين حملة الصكوك والجهة المنشئة علاقة مباشرة، أو علاقة غير مباشرة من خلال إنشاء كيان قانوني يمثلهم في التعاقد مع الجهة المنشئة، كالمنشأة ذات الغرض الخاص. وينظر البند (١٠-٢).

7-2-9. There is no [Shari'ah] objection if a conventional financial institution is the originator in a Sukuk issuance, provided it uses the proceeds of Sukuk issuance in accordance with Shari'ah rules, and that the Sukuk has a Shari'ah Board that monitors its compliance with those rules from the Sukuk issuance until the redemption or cancelation of its

7-2-9. لا مانع شرعًا من أن تكون الجهة المنشئة في إصدار الصكوك مؤسسة مالية تقليدية وذلك بشرط أن تستخدم حصيلة إصدار الصكوك وفقًا للضوابط الشرعية، وأن يكون للصكوك هيئة شرعية تراقب التزامها بتلك الضوابط من إصدار الصكوك إلى

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حين استردادها أو إطفائها. ويراعى الوارد في البند (٨-٣-١-٢-ج) والبند (٨-٣-٢-٢-ب) والبند (١٣-١). كما أنه لا مانع شرعًا من أن تتولى أو تشارك مؤسسة مالية تقليدية في تنظيم أو تسويق إصدارات الصكوك، بشرط أن لا يؤثر ذلك في التزام الصكوك بالضوابط الشرعية بوجه من الوجوه، وأن يكون عقد أو مستند تكليفها بذلك مقبولاً شرعـًا. وينظر البند (٧-٢-٤).

certificates. With due compliance with s. (8-3-1-2-c), s. (8-3-2-2-b) and s. (13-1). There is also no [Shari'ah] objection if a conventional financial institution handles or participates in arranging or marketing the issuances of Sukuk, provided that this does not affect Sukuk's compliance with Shari'ah rules in any way, and that the contract or document entrusting it with that is acceptable by virtue of Shari'ah. See: s. (7-2-4).

7-2-10. يجوز أن تتقاضى الجهة المنظمة لإصدار الصكوك أجرًا على التنظيم وإعداد العقود والمستندات تتحمله الجهة المنشئة أو حملة الصكوك بحسب الاتفاق.

7-2-10. It is permitted for the arranger to charge a fee for arranging Sukuk issuance and preparing contracts and documents, and [such a fee] is borne by the originator or the certificateholders, according to the agreement.

7-2-11. يجوز أن يجعل الدين في ذمة الجهة المنشئة الناشئ عن الصكوك مقابلاً لاكتتاب حملة الصكوك في صكوك أخرى تصدرها الجهة المنشئة، إن تم ذلك باتفاقٍ بينهم وبين الجهة المنشئة عند الاكتتاب في الصكوك الجديدة، وذلك بشرط أن لا تكون الصكوك الجديدة من صكوك المشاركات أو الوكالة بالاستثمار أو السلم، وأن تكون موجودات الصكوك الجديدة مما يقبل مبادلته بالدين دون التقيد بأحكام التصرف في الديون، وإلا وجب التقيد بها، ويراعى الوارد في المعيار الشرعي رقم (٥٩) بشأن بيع الدين، وينظر البند (٣-١-٢-٤) من المعيار

7-2-11. It is permitted to use the debt, owed by the originator resulting from Sukuk, as a consideration for the certificateholders' subscription to other Sukuk issued by the originator, if this is done by agreement between [the certificateholders] and the originator at the time of subscribing to the new Sukuk, provided that the new Sukuk are not based on partnerships, Investment Agency or Salam, and that the underlying assets of the new Sukuk are acceptable to be exchanged for debt without being bound by the provisions of debt disposal, otherwise it is required to comply with provisions of Shari'ah Standard No. (59): Sale of Debt. See: s. (3-1-2-4) of Shari'ah Standard No. (12): Sharikah (Musharaka) and Modern Companies, and s. (7-1) of Shari'ah Standard No. (13): Mudaraba.

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الشرعي رقم (١٢) بشأن الشركة (المشاركة) والشركات الحديثة، والبند (٧-١) من المعيار الشرعي رقم (١٣) بشأن المضاربة.

7-3. Base Prospectus:

7-3-1. Base Prospectus: is a document that includes the details of Sukuk offered for subscription, the terms and conditions of the issuance, and all the information and data that the subscribers need in order to make their decision to subscription based on full information. It represents the invitation that the issuer sends to the subscribers, and the subscription is based on it. Subscription to Sukuk represents the offer, while acceptance is the approval of the originator, and the approval may be with a smaller number of Sukuk subscribed for if the subscription exceeds the size of the issue, and this is known as allotment.

7-3-2. Among the most important things that the base prospectus should include are the following:

7-3-2-1. The size of the issuance, the size of the program if the issuance is within a Sukuk program that includes repeated issuances, and the issuance period (if Sukuk has a specified period).

7-3-2-2. Originator's purpose of Sukuk issuance, with a clear explanation of the Shari'ah compliant financing mode used in issuing the Sukuk.

7-3. نشرة الإصدار:

7-3-1. نشرة الإصدار: مستند يشتمل على تفاصيل الصكوك المطروحة للاكتتاب وشروط وأحكام الإصدار وجميع المعلومات والبيانات التي يحتاج إليها المكتتبون ليكون قرارهم بالاكتتاب فيها عن معرفة تامة. وهي تمثل الدعوة التي يوجهها المصدِر إلى المكتتبين، ويتم الاكتتاب استناداً إليها. ويمثل الاكتتاب في الصكوك الايجاب، أما القبول فهو موافقة الجهة المنشئة، وقد تكون الموافقة بعددٍ أقل من الصكوك المكتتب فيها إن كان الاكتتاب يفوق حجم الإصدار، ويُعرف هذا بالتَّخصيص.

7-3-2. من أهم ما يلزم أن تشتمل عليه نشرة الإصدار ما يأتي:

7-3-2-1. حجم الإصدار، وحجم البرنامج إن كان الإصدار ضمن برنامج للصكوك يشتمل على إصدارات متكرِّرة، ومدَّة الإصدار (إن كان للصكوك مدَّة محدَّدة).

7-3-2-2. غرض الجهة المنشئة من إصدار الصكوك، مع شرح واضح للصِّيغة الشرعية المستخدمة في

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إصدار الصكوك.

7-3-2-3. بيانٌ كافٍ للعقود والمستندات الخاصة بالصكوك، مع ذكر أهم شروطها وأحكامها وآثارها، ولا يجوز أن تشتمل النشرة على أي نصٍّ يخالف شروط هذه العقود والمستندات أو أحكامَها أو آثارها أو مقتضياتها.

7-3-2-3. A sufficient statement of the contracts and documents related to Sukuk, with a reference of their most important terms, conditions and effects. It is not permitted to have the base prospectus include any text that contradicts the terms, provisions, effects or requirements of these contracts and documents.

7-3-2-4. البيانات الكافية عن أطراف الإصدار والمشاركين فيه وصفاتهم التعاقدية وحقوقهم وواجباتهم، وذلك مثل: الجهة المنشئة، والمصدر، وأمين الإصدار، والمنظمين للإصدار، و وكلاء أو وسطاء الاكتتاب، ووكيل الحسابات، ووكيل الدفع، وأمين السجلات، ومتعهد التغطية، وغيرهم من الأطراف أو المشاركين الآخرين إن وجدوا.

7-3-2-4. Adequate information about the issuance parties and participants, their contractual capacities, rights and duties, such as: the originator, the issuer, the trustee, the arrangers, the subscription agents or brokers, the accounts agent, the payment agent, the registrar, the underwriter, and other parties or other participants, if any.

7-3-2-5. طريقة وشروط توزيع العوائد أو الأرباح المتوقعة للصكوك وتواريخها، واستحقاق الحوافز(إن وجدت)، وتحمل نفقات وخسائر موجودات الصكوك، مع النص على مشاركة حملة الصكوك في الغُنم، وتحملهم الغرم بنسب حصصهم في موجودات الصكوك وفقاً للضوابط الشرعية للصيغة المستخدمة في الصكوك والشروط والأحكام الشرعية لعقودها ومستنداتها. وينظر البند (١١-٢-١) والبند (١١-٢-٤).

7-3-2-5. Statement of the method and conditions for distributing the expected returns or profits of Sukuk and their dates, entitlement to the incentives, if any, bearing the expenses and losses of the underlying assets of Sukuk, with a statement that the certificateholders will participate in the profits, and bear the risk in proportion to their shares in the underlying assets of Sukuk in accordance with the Shari'ah rules of the financing mode used in the Sukuk and the Shari'ah terms and conditions for their contracts and documents. See: s. (11-2-1) and s. (11-2-4).

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7-3-2-6. The method of filling the shortfall in the reserve account, if any, and other matters related to the rules of this account. See: s. (6-1-2-2-a-2).

7-3-2-7. Disclosure of the underlying assets of Sukuk or their specifications and related contracts, in a way that achieves full knowledge of [the underlying assets]. Hence, it is neither permitted to state that the underlying assets of Sukuk, that are sold by the originator to certificateholders of Sukuk, have not been determined or their nature known, nor [the underlying assets] have not been subjected to the study and due diligence, or that the originator is the one that identifies them without the intervention of the certificateholders or the party representing them, unless and until the applied financing mode allows [the originator] to do so, as the case with Mudaraba. Also, it is not permitted to state that the terms of the contracts, which govern the ownership held by the originator of the underlying assets or those [contracts] that are based on [such assets], shall be unknown.

7-3-2-8. Stating that the ownership of the underlying assets of Sukuk is transferred to the certificateholders by virtue of Shari'ah and law, taking into account what is stated in s. (5-2-5). It is not permitted to state that the certificateholders collectively be prevented from selling their underlying assets of Sukuk, if the originator fails to perform its undertaking to purchase the underlying asset. See: s. (5-2-2).

7-3-2-9. Stating in the section of the "Risk Factors of

7-3-2-6. طريقة سد العجز في الحساب الاحتياطي إن وجد، وغيرها مما يتصل بضوابط هذا الحساب. وينظر البند (٦-١-٢-٢-أ-٢).

7-3-2-7. الإفصاح عن موجودات الصكوك أو مواصفاتها وما يتَّصل بها من عقود، بما يحقِّق العلم التام بها. فلا يجوز النص على أنَّ موجودات الصكوك التي تبيعها الجهة المنشئة إلى حملتها لم يتم تحديدها أو معرفة طبيعتها أو أنها لم تخضع للدراسة والفحص الفني الواجب (Due Diligence) أو أن الجهة المنشئة هي التي تستأثر بتحديدها بعد الإصدار دون تدخل من حملة الصكوك أو من يمثِّلهم، إلا أن تكون الصيغة المستخدمة تخولها ذلك شرعًا كما في المضاربة. كما لا يجوز النَّص على أن شروط العقود التي تحكم تملُّك الجهة المنشئة للموجودات أو تلك التي تقوم عليها، غير معروفة.

7-3-2-8. النص على أنَّ ملكية موجودات الصكوك تنتقل شرعًا وقانونًا لحملة الصكوك. مع مراعاة ما ورد في البند (٥-٢-٥). ولا يجوز النص على منع حملة الصكوك مجتمعين من بيع موجوداتها إن نكلت الجهة المنشئة عن تنفيذ تعهدها بشرائها. وينظر البند (٥-٢-٢).

7-3-2-9. النص في بند بيان عناصر المخاطر الخاصة

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بالصكوك على مخاطر ملكية موجودات الصكوك وعوائدها أو أرباحها التي يتحملها حملة الصكوك، وفقًا للشروط والأحكام الشرعية لعقودها ومستنداتها. وينظر البند (٦-١-١-١).

the Sukuk" about the ownership risks of the underlying assets of Sukuk and their returns or profits that will be borne by the Certificateholders, in accordance with the Shari'ah terms and conditions of Sukuk contracts and documents. See: s. (6-1-1-1).

7-3-2-10. النص على أنَّ الجهة المنشئة لا تضمن القيمة الاسمية للصكوك في غير حالات التعدي أو التقصير أو مخالفة الشروط، ولا قدراً معينًا من العائد أو الربح، ولا ينطبق هذا على ما يثبت دينًا في ذمتها بموجب العقد شرعًا، مثل: الثمن في البيع أو الأجرة المستحقة في الإجارة. وينظر البند (٦-٢-١-٢-أ).

7-3-2-10. Stipulating that the originator guarantees neither the face value of Sukuk (except in cases of misconduct, negligence, or breach of conditions), nor a specific amount of return or profit, and this does not apply to what is recognised as an owed (outstanding) debt (*dayn fī dhimma*) pursuant to a Shari'ah compliant contract, such as the price amount in the sale [contract] or the rent due in the Ijarah. See: s. (6-2-1-2-a).

7-3-2-11. الضوابط الشرعية لتداول الصكوك واستردادها وإطفائها بحسب صيغة الصكوك وطبيعة موجوداتها. مع بيان طريقة استرداد وإطفاء الصكوك، وما إذا كان لحملة الصكوك أو الجهة المنشئة القيام بذلك مبكِّراً قبل انتهاء مدَّة الصكوك وطريقته، وما إذا كانت الصكوك قابلةً للتحويل إلى أسهم وطريقة تنفيذ ذلك مع بيان طريقة تحديد سعر التحويل. وينظر البند (٨-٢-١) والفقرة (٩).

7-3-2-11. Shari'ah rules for Sukuk trading, redemption, and cancelation according to financing mode of the Sukuk and the nature of its underlying assets. Along with the presenting the method of redemption and cancelation of the Sukuk and whether the certificateholders or the originator may do so early before the maturity of the Sukuk term and the method thereof, and whether the Sukuk are convertible into shares and the method of implementing [and carrying out] that with presenting the method for determining the conversion price. See: s. (8-2-1) and Para. 9.

7-3-2-12. الشروط التي يتم على أساسها إدراج الصكوك في الأسواق المالية، وتأتي في العادة تحت عنوان (الشروط النهائية –Final Terms)،

7-3-2-12. The conditions on the basis of which the Sukuk are listed in the financial markets, and they usually come under the heading (Final Terms), and in these conditions they must be in line with a Shari'ah

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compliant financing mode used in issuing the Sukuk and the Shari'ah terms and conditions for their contracts and documents. It is not permitted to state that the principal amount of Sukuk will be redeemed in all the cases, refer s. (9-3-2).

ويجب في هذه الشروط أن تكون متفقةً مع الصيغة الشرعية المستخدمة في إصدار الصكوك والشروط والأحكام الشرعية لعقودها ومستنداتها، ولا يجوز أن يذكر أن رأس مال الصكوك يسترد في جميع الأحوال. وينظر البند (٩-٣-٢).

7-3-2-13. A detailed Shari'ah pronouncement (Fatwa) issued by the Shari'ah Board of the Sukuk that states about reviewing and endorsing the financing mode applied in the issuance of Sukuk and all its contracts and documents. See: s. (13-1-2-1).

7-3-2-13. فتوى شرعية مفصلة صادرة عن الهيئة الشرعية للصكوك تنص على مراجعة واعتماد الصيغة المستخدمة في إصدار الصكوك وجميع عقودها ومستنداتها. وينظر البند (١٣-١-٢-١).

7-3-2-14. Stating that all the parties to the issuance of [Sukuk] and certificateholders accept the Shari'ah nature of Sukuk, in all its stages, in accordance with its financing mode and the Shari'ah terms and conditions of its contracts and documents, in light of the Fatwa issued by the Shari'ah Board of Sukuk, with the invalidity of any of them challenging the Sukuk's violation of the rulings and principles of Shari'ah upon issuance, and it is not permitted to stipulate that their acceptance of that is restricted to the extent permitted by the Law.

7-3-2-14. النص على أن جميع أطراف الإصدار وحاملي الصكوك يقبلون الطَّبيعة الشَّرعية للصكوك، في جميع مراحلها، وفقاً لصيغتها وللشروط والأحكام الشرعية لعقودها ومستنداتها، في ضوء الفتوى الصادرة عن الهيئة الشرعية للصكوك، مع بطلان دفع أي منهم بمخالفة الصكوك عند الإصدار لأحكام ومبادئ الشريعة الإسلامية، ولا يجوز النص على أن قبولهم لذلك مقيد بالحد الذي يسمح به القانون.

7-3-2-15. Stating that any amendment to the terms or conditions of Sukuk contracts and documents, or any of the terms or conditions of issuance in general, are required to be acceptable to Shari'ah.

7-3-2-15. النَّص على أن أي تعديل لشروط أو أحكام عقود ومستندات الصُّكوك، أو أي من شروط أو أحكام الإصدار بوجه عام، يجب أن يكون

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مقبولاً شرعـًا. وينظر البند (٧-٢-٥) والبند (١٣-١-١-١).

See: s. (7-2-5) and s. (13-1-1-1).

7-3-2-16. بيان موعد الاكتتاب في الصكوك ومدته، وآلية التخصيص والمدد الزمنية المتعلقة به، إذا لم يكن ذلك مبينـًا في موضع آخر.

7-3-2-16. Stating the date and the duration of the subscription to Sukuk, the allotment mechanism and related time periods, if this is not indicated elsewhere.

7-3-2-17. ما تطلب القوانين أو التعليمات الرقابية أو الأسواق المالية التي تُدرج الصكوك فيها اشتمال نشرة الإصدار عليه، بشرط ألا يخالف أحكام ومبادئ الشريعة الإسلامية.

7-3-2-17. What is required by the laws, regulatory guidelines or financial markets, in which Sukuk are listed, to be included in the base prospectus provided [such inclusion] does not contravene the rulings and principles of Shari'ah.

7-4. التعهد بتغطية الاكتتاب:

يجوز أن تتعهد جهة بشراء ما لم يكتتب فيه من الصكوك، ويكون التعهد مبنيـًا على وعد ملزم من طرف واحد، ويكون الشراء بالقيمة المعروضة، ومن دون مقابل على التعهد، مع مراعاة البند (٦-٧-١ من المعيار الشرعي رقم (٥) بشأن الضمانات، والبند (٤-١-٢-٤) من المعيار الشرعي رقم (١٢) بشأن الشركة (المشاركة) والشركات الحديثة.

7-4. Underwriting the subscription:

It is permitted for an institution to undertake to purchase the certificates of Sukuk that have not been subscribed for, and the undertaking is based on an unilateral binding promise, and the purchase is at the offered value, with no consideration for [extending] the undertaking, taking into account s. (6-7-1) of Shari'ah Standard No. (5):Guarantees, and s. (4-1-2-4) of Shari'ah Standard No. (12): Sharikah (Musharaka) and Modern Companies.

8. أنواع الصكوك:

8-1. الصكوك باعتبار العقد الذي تقوم صيغتها عليه نوعان: صكوك مفردة وصكوك مركبة.

8. 8. Types of Sukuk:

8-1. Sukuks, given the contract on which their structure is based, are of two types: plain vanilla Sukuks and composite Sukuk.

8-1-1. الصكوك المفردة:

وهي الصكوك التي تقوم العلاقة فيها بين حمَلة الصُّكوك

8-1-1. Plain Vanilla Sukuks:

These are the Sukuk in which the relationship between the certificateholders and the originator is based on a single contract, on the basis of which

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والجهة المنشئة على عقدٍ واحدٍ تُدفَع التوزيعات الدورية على أساسه، وهي ثلاثة أنواع:

8-1-1-1. صكوك المعاوضات:

8-1-1-1-أ. يقصد بصكوك المعاوضات الصكوك التي تقوم العلاقة فيها بين حملة الصكوك والجهة المنشئة على عقد من عقود المعاوضة، مثل: المرابحة أو الإجارة أو الاستصناع أو غيرها، ومن أهم خصائصها ما يأتي:

8-1-1-1-أ-1. أن بيع موجوداتها للجهة المنشئة ينشئ علاقة مداينة يكون فيها حملة الصكوك دائنين والجهة المنشئة مدينة، وفي حال تأجيرها لها فإن علاقة المداينة تنشأ بانتفاعها بها أو بتمكينها من هذا الانتفاع. وينظر البند (٥-٢-٢) من المعيار الشرعي رقم (٩) بشأن الإجارة والإجارة المنتهية بالتمليك.

8-1-1-1-أ-2. أن الدين الناشئ عن هذه العلاقة يثبت في ذمة الجهة المنشئة، ولحملة الصكوك مطالبتها بتقديم ضمانات للوفاء به.

8-1-1-1-أ-3. أنَّ مخاطر الائتمان لا تنشأ بمجرَّد الاكتتاب فيها وإنما تنشأ بعد ثبوت الدين في ذمة الجهة المنشئة.

8-1-1-1-أ-4. أنَّ عائدها الناتج عن الدين الثابت في ذمة

periodic distributions are paid, and they are of three types:

8-1-1-1. Commutative Contracts Sukuks (*Muʿāwaḍāt*):

8-1-1-1-a. The Commutative Contracts Sukuk means the Sukuk in which the relationship between the certificateholders and the originator is based on one of the commutative contracts, such as: Murabaha, Ijarah, Istisna', or others, and among its most important characteristics are the following:

8-1-1-1-a-1. The sale of its underlying assets to the originator shall establish a relationship of indebtedness in which the certificateholders are the creditors and the originator is the debtor. If [the underlying subject] is leased to [the originator], the relationship of indebtedness will establish by originator's usage of [the underlying subject] or by enabling (*tamkīn*) [the originator] to benefit from [the underlying subject]. See: s. (2-2-5) of Shari'ah Standard No. (9): Ijarah and Ijarah Muntahia Bittamleek.

8-1-1-1-a-2. The debt arising from this relationship is recognised as liability upon the originator, and the certificateholders can claim securities for settling [this debt].

8-1-1-1-a-3. The credit risk does not arise by simply subscribing to [the certificates], rather it arises after the establishment of the debt owed by the originator.

8-1-1-1-a-4. Return of [commutative contract Sukuks] resulting from the debt, which is recognised as liability of the originator,

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is not affected by the factors of market fluctuations. See: s. (11-2-8-b).

الجهة المنشئة لا يتأثر بعوامل تقلبات السوق. وينظر البند (١١-٢-٨-٢).

8-1-1-1-b. **Types of Commutative Sukuks**

There are many types of commutative Sukuks, the most important of which are:

8-1-1-1-b-1. **Murabaha Sukuk:**

It is the Sukuk in which the proceeds of subscription are used to buy a commodity, [on behalf of] the certificateholders, and then sell it on Murabaha basis. The certificateholders are the buyers of the commodity and [then] sellers of [the same] on Murabaha basis, and the originator is the purchaser from [the certificateholders]. The certificateholders of Sukuk own the commodity after purchasing it and before selling it. [The certificateholders] own the price of selling [the underlying asset] after the sale.

8-1-1-1-b-2. **Salam Sukuk**

It is the Sukuk in which the proceeds of subscription are used to purchase a specified-cum-unidentified Salam commodity, on behalf of the certificateholders, and then selling it after taking its possession. The certificateholders are the purchasers of the commodity on Salam basis, and the originator is the seller of the Salam commodity. The certificateholders of Sukuk own the Salam commodity after purchasing it. [The certificateholders] own the price of selling [the underlying asset] after the sale.

8-1-1-1-b-3. **Istisna' Sukuk**

It is the Sukuk in which the proceeds of subscription are used to purchase a specified-cum-unidentified Istisna' commodity, on behalf of the certificateholders, and then selling it after taking its possession. The certificateholders are Mustasni' (the buyers), and the originator is Sani', manufacturer, (the seller) of the Istisna'

8-1-1-1-ب. **أنواع صكوك المعاوضات:**

صكوك المعاوضات أنواعٌ متعددة، أهمها:

8-1-1-1-ب-1. **صكوك المرابحة:**

هي الصكوك التي تستخدم فيها حصيلة الاكتتاب لشراء حملة الصكوك سلعة ثم بيعها بالمرابحة، ويكون حملة الصكوك مشترين للسلعة وبائعين لها بالمرابحة، وتكون الجهة المنشئة مشترية منهم، ويملك حملة الصكوك السلعة بعد شرائها وقبل بيعها، وثمن بيعها بعد البيع.

8-1-1-1-ب-2. **صكوك السلم:**

هي الصكوك التي تستخدم فيها حصيلة الاكتتاب لشراء حملة الصكوك سلعة السلم الموصوفة في الذمة، ثم بيعها بعد قبضها، ويكون حملة الصكوك مشترين لها بالسلم، وتكون الجهة المنشئة بائعة لسلعة السلم، ويملك حملة الصكوك سلعة السلم بعد شرائها، وثمن البيع بعد البيع.

8-1-1-1-ب-3. **صكوك الاستصناع:**

هي الصكوك التي تستخدم فيها حصيلة الاكتتاب لشراء حملة الصكوك سلعة الاستصناع الموصوفة في الذمة، ثم بيعها بعد قبضها، ويكون حملة الصكوك مستصنعين

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commodity. The certificateholders of Sukuk own the Istisna commodity after purchasing it. [The certificateholders] own the price of selling [the underlying asset] after the sale.

(مشترين)، وتكون الجهة المنشئة صانعة (بائعة) لسلعة الاستصناع، ويملك حملة الصكوك سلعة الاستصناع بعد شرائها، وثمن البيع بعد البيع.

8-1-1-1-b-4. **Ijarah Sukuk:**

Ijarah Sukuk are of several types, the most important of which are:

8.1.1.1.b.4.1. **Sukuk of acquiring and leasing a specific (identified) asset:**

It is the Sukuk in which the proceeds of subscription are used to buy and lease a specific (identified) and existing asset, by the certificateholders. The certificateholders are the buyers and then lessors of that asset, and the originator could be the seller of the asset, and [then] its lessee. The certificateholders own the asset, after purchasing it, and [own] its owed rent after leasing it.

8-1-1-1-ب-4. **صكوك الإجارة:**

صكوك الإجارة أنواع متعددة، أهمها:

8-1-1-1-ب-4-1. صكوك تملك عينٍ معينة ثم تأجيرها:

هي الصكوك التي تستخدم فيها حصيلة الاكتتاب في شراء حملة الصكوك عيناً موجودة معينة ثم تأجيرها، ويكون حملة الصكوك مشترين ثم مؤجرين لتلك العين، وقد تكون الجهة المنشئة هي البائعة للعين والمستأجرة لها. ويملك حملة الصكوك العين بعد شرائها، وأجرتها المستحقة بعد تأجيرها.

8.1.1.1.b.4.2. **Sukuk of acquiring and leasing a specified-cum-unidentified asset:**

It is the Sukuk in which the proceeds of subscription are used by the certificateholders to buy a specified-cum-unidentified asset for the purpose of leasing, and then leasing it out. The certificateholders are the buyers and lessors of a Forward Ijarah[1], and the originator may be the seller of the asset, and it may be the lessee in a Forward Ijarah. The certificateholders own the specified-cum-unidentified asset after purchasing it and [own] the due rent after the leasing.

8-1-1-1-ب-4-2. صكوك تملك عين موصوفة في الذمة وتأجيرها:

هي الصكوك التي تستخدم فيها حصيلة الاكتتاب لشراء حملة الصكوك عيناً موصوفة في الذمة وبغرض التأجير، ويكون حملة الصكوك مشترين ومؤجرين إجارة موصوفة في الذمة، وقد تكون الجهة المنشئة هي البائعة والمستأجرة إجارة موصوفة في الذمة. ويملك حملة الصكوك العين الموصوفة في الذمة بعد شرائها، مع الأجرة المستحقة بعد التأجير.

(1) Translation Note: Ijarah Musufa Bi Dhimma is Ijarah of specified-cum-unidentified asset, which is often called in the banking industry as Forward Ijarah. Hence, any reference to this type of Ijarah will use the common terminology to ensure clarity.

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8.1.1.1.ب.4.3. **Sukuk of hiring and leasing a specific (identified) asset:**

They are the Sukuk in which the proceeds of subscription are used to hire a specific and an existing asset, by the certificateholders, and then leasing it. The certificateholders are the lessees of the asset and then its lessors. The originator could be the lessor of the property, and [then] its lessee. The certificateholders own the usufruct after hiring [the asset] and [own] the owed rent after the leasing [the asset].

8-1-1-1-ب-4-3. **صكوك استئجار عين معينة ثم تأجيرها:**

هي الصكوك التي تستخدم فيها حصيلة الاكتتاب لاستئجار حملة الصكوك عيناً موجودة معينة ثم تأجيرها، ويكون حملة الصكوك مستأجرين للعين ثم مؤجرين لها، وقد تكون الجهة المنشئة هي المؤجرة للعين أو المستأجرة لها. ويملك حملة الصكوك منفعةَ العين بعد استئجارها، والأجرة المستحقة بعد تأجيرها.

8.1.1.1.ب.4.4. **Sukuks of hiring and leasing a specified-cum-unidentified asset:**

They are the Sukuk in which the proceeds of subscription are used to hire, by the certificateholders, a specified-cum-unidentified asset, for the purpose of leasing. The certificateholders are the lessees and the lessor of the asset, and the originator could be the leaser and lessee of the asset. The certificateholders own the usufruct of the specified-cum-unidentified asset and own the due rent after the leasing.

8-1-1-1-ب-4-4. **صكوك استئجار عين موصوفة في الذِّمة وتأجيرها:**

هي الصكوك التي تستخدم فيها حصيلة الاكتتاب لاستئجار حملة الصكوك عيناً موصوفةً في الذمة بغرض التأجير، ويكون حملة الصكوك مستأجرين ومؤجرين، وقد تكون الجهة المنشئة هي المؤجرة أو المستأجرة إجارة موصوفة في الذمة. ويملك حملة الصكوك منفعة العين الموصوفة في الذمة بعد استئجارها، مع الأجرة المستحقة بعد التأجير.

8.1.1.1.ب.4.5. **Sukuk of acquiring and selling specific (identified) services [rendered by] a party:**

These are the Sukuk in which the proceeds of subscription are used by the certificateholders to acquire and [on-]sell a specific (identified) service [rendered by] a party. The certificateholders are the acquirer of the service, and it is most likely that the originator is the seller of the service, the Service Agent to sell [the service] on behalf of the certificateholders. The certificateholders own the

8-1-1-1-ب-4-5. **صكوك تملك خدمات جهة معينة ثم بيعها:**

هي الصكوك التي تستخدم فيها حصيلة الاكتتاب لشراء حملة الصكوك خدمة من جهة معينة ثم بيعها، ويكون حملة الصكوك مشترين للخدمة، والغالب أن تكون الجهة المنشئة هي البائعة للخدمة ووكيلة خدمات لبيعها لصالح حملة

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specific service [rendered by] a specific party after purchasing [the service] and own the selling price of the service to a third party after selling it.

الصكوك. ويملك حملة الصكوك خدمة الجهة المعينة بعد شرائها، وثمن بيع الخدمة للغير بعد بيعها.

8.1.1.1.b.4.6. **Sukuk of acquiring and selling specified-cum-unidentified services of an entity:**

They are the Sukuk in which the proceeds of subscription are used by the certificateholders to purchase specified-cum-unidentified services offered by an entity for the purpose of sale. The certificateholders are buyers of the service, and the originator is usually the seller of the service, and often the originator is the seller of service and an agent to sell the service on behalf of the certificateholders. The certificateholders own the specified-cum-unidentified service after the purchase and [own] the price of selling [the service] to a third party after selling it.

8-1-1-1-ب-4-6. **صكوك تملك خدمات جهة موصوفة في الذمة وبيعها:**

هي الصكوك التي تستخدم فيها حصيلة الاكتتاب لشراء حملة الصكوك خدمة جهة موصوفة في الذمة بغرض البيع، ويكون حملة الصكوك مشترين للخدمة، والغالب أن تكون الجهة المنشئة بائعة للخدمة ووكيلة خدمات لبيع الخدمة لصالح حملة الصكوك. ويملك حملة الصكوك خدمة الجهة الموصوفة في الذمة بعد شرائها، وثمن البيع للغير بعد البيع.

8.1.1.1.b.4.7. **Sukuk of acquiring and selling or leasing the moral rights:**

They are the Sukuk in which the proceeds of subscription are used by the certificateholders to purchase moral rights, and the certificateholders are the buyers of the moral rights and [then] sellers or lessors of [such rights], and it is most likely that the originator is a seller of the rights, and it may also be a buyer or a hirer of it. The certificateholders own the moral right after purchasing it, and own its sale price after concluding the sale, or the owed rent of leasing [the moral right].

8-1-1-1-ب-4-7. **صكوك تملك حقوق معنوية وبيعها أو تأجيرها:**

هي الصكوك التي تستخدم فيها حصيلة الاكتتاب في شراء حملة الصكوك حقوقًا معنوية، ويكون حملة الصكوك مشترين للحقوق المعنوية وبائعين أو مؤجرين لها، والغالب أن تكون الجهة المنشئة بائعة لها، كما قد تكون مشترية أو مستأجرة لها. ويملك حملة الصكوك الحق المعنوي بعد شرائه، وثمن بيعه بعد البيع أو أجرة تأجيره المستحقة بعد التأجير.

8-1-1-1-c. **General provisions of the commutative contract Sukuks:**

8-1-1-1-ج. **أحكام عامة لصكوك المعاوضات:**

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8-1-1-1-ج-1. تكون صكوك المعاوضات محددة المدة دومـًا، ولا يجوز الاتفاق على أن تكون مستمرة لا تنتهي عند مدة محددة. وينظر البند (٨-٣-١-١-أ) والبند (٨-٣-٢-١-أ).

8-1-1-1-c-1. The commutative contract Sukuks are always for a specified term. It is not permitted to have an agreement to have them perpetual that do not end at a specified period. See: s. (8-2-1-1-a) and s. (8-2-1-2).

8-1-1-1-ج-2. يجوز اشتراط ملاءة الجهة المنشئة عند الاكتتاب في هذه الصكوك، وذلك للتأكد من قدرتها الائتمانية على الوفاء بالتزاماتها. ويجوز النظر إلى هذه الملاءة في التصنيف الائتماني للصكوك.

8-1-1-1-c-2. It is permitted to stipulate solvency of the originator at the time of subscribing to such Sukuks, in order to ensure [originator's] creditworthiness to fulfil its obligations. It is permitted that this solvency can be seen in the credit rating of the Sukuk.

8-1-1-1-ج-3. يجوز أن يشترط حملة الصكوك على الجهة المنشئة تقديم ضمانات مشروعة لسداد الدين الذي يثبت في ذمتها؛ كالثمن في صكوك المرابحة والأجرة في صكوك الإجارة والمسلم فيه في صكوك السلم.

8-1-1-1-c-3. It is permitted for certificateholders to stipulate upon the originator to provide Shari'ah compliant securities to settle the outstanding debt that it owes, such as the price in the Murabaha Sukuk, the rent in the Ijarah Sukuk, and the subject of Salam (*Muslam fīh)* in the Salam Sukuk.

8-1-1-1-ج-4. لا يجوز ربط استحقاق حملة الصكوك الدفعات الدورية بوفاء عملاء الجهة المنشئة (المشترية أو المستأجرة من حملة الصكوك) بما هو مستحق لها في ذممهم.

8-1-1-1-c-4. It is not permitted that the entitlement of the certificateholders to periodic payments to be linked to the settlement of the clients of the originator (i.e., the purchaser or the lessee of the certificateholders) of what is due to it by the client.

8-1-1-1-ج-5. لا ينظر في مشروعية المصْدَر الذي تَدفع منه الجهة المنشئة الدفعات الدورية؛ لأنها دينٌ ثابتٌ في ذمتها لا شأن لحملة الصكوك بمصدر الوفاء به، ما لم يَتعيَّن مَصدَر التوزيعات الدورية المحرَّم ويكون معلومًا

8-1-1-1-c-5. The [Shari'ah] legitimacy of the source from which the originator pays periodic payments is not taken into consideration, because [periodic payments] are a debt recognised as liability [on the originator], and the certificateholders have no concern of the source of the debt settlement, unless a prohibited source of periodic

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distributions is identified, and it becomes known to the certificateholders.

لحملة الصكوك.

8-1-1-1-c-6. It is not permitted to stipulate those periodic payments be postponed or suspended automatically due to a change in the financial condition of originator (the debtor), other than its bankruptcy.

8-1-1-1-ج-6. لا يجوز اشتراط تأجيل الدفعات الدورية أو إيقافها تلقائيًا بسبب تغير الأوضاع المالية للجهة المنشئة (المدينة) غير حال إفلاسها.

8-1-1-1-c-7. Commutative Contract Sukuk are classified as a debt instrument for the certificateholders after the recognition of the consideration (the price or the rent) as a debt owed by the buyer or the lessee.

8-1-1-1-ج-7. تُصنف صكوك المعاوضات على أنها أداة دَين لحملة الصكوك بعد ثبوت العوض (ثمنًا أو أجرةً) دينًا في ذمة المشتري أو المستأجر.

8-1-1-1-c-8. It is not permitted for the originator to reschedule the Sukuk debt by issuing new commutative contract Sukuk with the existing certificateholders to pay off [the existing certificates] and accordingly cancel them, so that the new issuance will result in a larger debt owed by the originator. With due compliance with s. (4-1-3) of Shari'ah Standard No. (59): Sale of Debt.

8-1-1-1-ج-8. لا يجوز للجهة المنشئة إعادة جدولة دين الصكوك بإصدار صكوك معاوضة جديدة مع حملة الصكوك القائمة لسداد دينها فيها وإطفائها، بحيث يترتب على الإصدار الجديد دين أكبر في ذمة الجهة المنشئة. ويراعى (٤-١-٣) من المعيار الشرعي رقم (٥٩) بشأن بيع الدين.

8-1-1-1-d. **Special Provisions of types of Commutative contract Sukuk:**

Commutative Sukuks are subject to special provisions for each type, according to the contract between the certificateholders and the originator, as follows:

8-1-1-1-د. **أحكام خاصة بأنواع صكوك المعاوضات:**

تخضع صكوك المعاوضات لأحكام خاصة بكل نوعٍ منها بحسب العقد بين حملة الصكوك والجهة المنشئة، وفق ما يأتي:

8-1-1-1-d-1. **Provisions of Murabaha Sukuk:**

8-1-1-1-د-1. **الأحكام الخاصة بصكوك المرابحة:**

8.1.1.1.d.1.1. It is required that Murabaha Sukuk adhere to the Shari'ah rules given in Shari'ah Standard No. (8): Murabaha.

8-1-1-1-د-1-1. يجب التقيد في صكوك المرابحة بالضوابط

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الشرعية الواردة في المعيار الشرعي رقم (٨) بشأن المرابحة. وفي حال التورق يجب التقيد بالضوابط الشرعية الواردة في المعيار الشرعي رقم (٣٠) بشأن التورق.

In the case of Tawarruq, it is required that Shari'ah rules mentioned in Shari'ah Standard No. (30): Tawarruq are complied with.

8-1-1-1-د-1-2. لا يجوز إصدار صكوك المرابحة إن كانت تؤدي إلى العينة المحرمة شرعًا. وينظر البند (٣-٥) من المعيار الشرعي رقم (٥٨) بشأن إعادة الشراء.

8.1.1.1.d.1.2. It is not permitted to issue Murabaha Sukuk if it leads to 'Inah, that is prohibited as per Shari'ah. See: s. (3-5) of Shari'ah Standard No. (58) Repurchase.

8-1-1-1-د-1-3. إذا وجدت حاجة ظاهرة لتوكيل الجهة المنشئة بشراء الموجودات نيابة عن حملة الصكوك، لتشتريها منهم بالمرابحة، فليس لها أن تتولى البيع لنفسها، ومن ذلك أن تكون هي المديرة للمصدر فتتولى طرفي عقد البيع بالمرابحة. وينظر البند (٣-١-٣)، والبند (٣-١-٤) والبند (٣-١-٥) من المعيار الشرعي رقم (٨) بشأن المرابحة، والبند (٦-١-٣) من المعيار الشرعي رقم (٢٣) بشأن الوكالة وتصرف الفضولي، والبند (١٠-٥) من هذا المعيار.

8.1.1.1.d.1.3. If there is an apparent need (*ḥāja ẓāhira*) to authorize the originator to purchase the underlying assets [of Sukuk] on behalf of the certificateholders, so that [originator] purchases [the underlying assets] from [the certificateholders] on Murabaha basis, then the originator cannot undertake the sale to itself, this includes [a scenario where] the originator is the arranger so it can conclude the sale contract for both sides of the contract (*tawalī ṭarafī al-'aqd*) in the Murabaha. See: s. (3-1-3), s. (3-1-4) and s. (3-1-5) of Shari'ah Standard No. (8): Murabaha, s. (6-1-3) of Shari'ah Standard No. (23): Agency and the Act of Uncommissioned Agent (Fodooli), and s. (10-5) of this Standard.

8-1-1-1-د-1-4. يجوز أن يكون المبيع في صكوك المرابحة أسهمًا أو صكوكًا مما يجوز تداوله بالنقود دون التقيد بضوابط تداول الديون أو أحكام الصرف، كما يمكن أن تكون حقوقًا

8.1.1.1.d.1.4. It is permitted that the subject of sale in the Murabaha Sukuk to be shares or Sukuks that are permitted to be traded for cash with no need to comply with rules of debt trading or provisions of currency exchange (*ṣarf*), and it can also be moral rights.

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معنوية. وينظر البند (٥-١-٣).

See: s. (5-1-3).

8-1-1-1-د-1-5. لا يجوز أن يكون المبيع في صكوك المرابحة أصولًا موصوفة في الذمة.

8.1.1.1.d.1.5. It is not permitted that the subject of sale in the Murabaha Sukuk to be specified-cum-unidentified assets.

8-1-1-1-د-1-6. لا يجوز النص على نفي مسؤولية حملة الصكوك عن النقص في كمية المبيع بالمرابحة، أو الاختلاف في نوعه أو غيره، ويجوز أن يقتصر ذلك على اشتراط البراءة من العيوب. وينظر البند (٤-٩) من المعيار الشرعي رقم (٨) بشأن المرابحة.

8.1.1.1.d.1.6. It is not permitted to state no-responsibility of the certificateholders for a decrease in the quantity of the subject of Murabaha sale, or for the difference in its type or otherwise. It is permitted that no-responsibility is limited to absolution from defect [(sale on as-is basis)]. See: s. (4-9) of Shari'ah Standard No. (8): Murabaha.

8-1-1-1-د-1-7. تتحمل الجهة المنشئة مخاطر الموجودات المبيعة لها من حين تملكها وقبضها لها، فلا يجوز النص على أنها تتحملها قبل ذلك كأن ينص على أنها تتحمل المخاطر من وقت تملك حملة الصكوك لها، أو على أنها ملزمة بشرائها مطلقًا بالحال التي انتقلت بها الملكية إلى حملة الصكوك ولو لم تثبت هذه الملكية أو ثبتت وكانت ملكيةً معيبة.

8.1.1.1.d.1.7. The originator bears the risks of the underlying assets sold to it from the time it acquires them and takes possession of them. Hence, it is not permitted to stipulate that [the originator] bears [the risks] prior to that [point], such as stipulating that [the originator] bears the risks from the time the certificateholders acquired [the underlying assets], or that it is under an absolute obligation to buy [the underlying assets] in the same status as the ownership is transferred to the certificateholders, even if this ownership is not recognized, or it was recognized but was defective ownership (*mulkiyyah muʿība*).

8-1-1-1-د-1-8. يتحمل حملة الصكوك الضرائب وجميع النفقات المتعلقة بتملك الموجودات قبل بيعها مرابحةً إلى الجهة المنشئة، ولهم أن يضيفوها إلى التكلفة الأصلية عند إبرام المرابحة. وينظر البند (٤-٣) من المعيار

8.1.1.1.d.1.8. The certificateholders bear taxes and all the expenses related to acquiring the assets before selling them on Murabaha basis to the originator, and they may add them to the original cost at the time of concluding the Murabaha. See: s. (3-4) of Shari'ah Standard No. (8): Murabaha.

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الشرعي رقم (٨) بشأن المرابحة.

8.1.1.1.د.1.9. يجوز لحملة الصكوك اشتراط أن يكون المبيع مرابحةً مما لا تفرض عليه ضرائب، فإن خالف المصدِر (أو من ينوب عنه) هذا الشرطَ كان ضامنًا لما يتحملونه من ضرائب، وهذا بشرط أن تكون هناك موجودات معفاة من الضرائب مما يمكن شراؤه وبيعه بالمرابحة، وإلا كان للمصدِر (أو من ينوب عنه) عدم الشِّراء وعدم تنفيذ المرابحة، دون تبعةٍ على أيٍّ منهما.

8.1.1.1.د.1.9. It is permitted for the certificateholders to stipulate that the subject of Murabaha sale shall be a thing upon which no taxes are imposed. If the issuer (or the party representing it) breaches this condition, then it will be liable of the taxes borne by [the certificateholders], and this is provided that there are underlying assets that are tax exempted and can purchased and sold on Murabaha. Otherwise, the issuer (or the party representing it) cannot carry the purchase and conclude Murabaha without subjecting itself to such condition.

8.1.1.1.د.1.10. يجوز أن يُشترط على الجهة المنشئة دفع الضرائب التي تُفرض على أقساط المرابحة بحيث تَدفع مبلغ القسط تامًا.

8.1.1.1.د.1.10. It is permitted to stipulate that the originator shall pay the taxes imposed on Murabaha instalments so that the instalment amount is paid in full [with no deduction].

8.1.1.1.د.1.11. لا يجوز في صكوك المرابحة الإطفاء المبكر بإلارادة المنفردة لحملة الصكوك، كما لا يجوز ذلك للجهة المنشئة إن كان يلزم حملة الصكوك بالتنازل عن شيء من المتبقي من الثمن، فإن وقع التنازل من حملة الصكوك برضاهم عند الإطفاء المبكر من الجهة المنشئة، فلا بأس بذلك.

8.1.1.1.د.1.11. It is not permitted for the originator to carry early cancelation based on its unilateral decision [with no consent of] the certificateholders. Also, [early cancelation] is not permitted for the originator if it obliges the certificateholders to waive a part of the outstanding price. In case, waiver from the certificateholders was carried at the time of early cancelation with the consent of the certificateholders then there is no [Shari'ah] issue.

8.1.1.1.د.1.12. لا يجوز في صكوك المرابحة الاتفاق أو التفاهم مقدمًا على تكرار المرابحة في المدد المحددة للتوزيعات الدورية (وهي

8.1.1.1.د.1.12. It is not permitted in Murabaha Sukuk to have an agreement or an understanding in advance to repeat the Murabaha at the periods specified for periodic distributions (i.e., the financing mode of "Revolving Murabaha") except with

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صيغة المرابحة الدوارة "Revolving Murabaha") إلا بالضوابط الواردة في البند (٤-١-٣-٤) من المعيار الشرعي رقم (٥٩) بشأن بيع الدين.

the rules given in s. (4-1-3-4) of Shari'ah Standard No. (59): Sale of Debt.

8-1-1-1-د-2. **الأحكام الخاصة بصكوك السلم:**

8-1-1-1-d-2. **Provisions of Salam Sukuk:**

8-1-1-1-د-2-1. يجب التقيد في صكوك السلم بالضوابط الشرعية الواردة في المعيار الشرعي رقم (١٠) بشأن السلم والسلم الموازي.

8.1.1.1.d.2.1. It is required that the Salam Sukuk adhere to the Shari'ah rules given in Shari'ah Standard No. (10): Salam and Parallel Salam.

8-1-1-1-د-2-2. لا مانع من توكيل حملة صكوك السلم الجهة المنشئة ببيع موجودات السلم بعد تسلمهم لها حقيقةً أو حكمًا، وتوزيع ثمن البيع على حملة الصكوك بحسب نسبة ملكيتهم لموجودات السلم، على ألا يشترط هذا التوكيل في عقد السلم.

8.1.1.1.d.2.2. There is no [Shari'ah] objection in delegating the originator by the certificateholders to sell the underlying assets of Salam [Sukuk] after [the certificateholders] have taken delivery of [the underlying assets] either actually or constructively and distributing the sale price to the certificateholders according to the percentage of their ownership of the underlying assets of Salam Sukuk, provided that this agency is not conditioned in the Salam contract.

8-1-1-1-د-2-3. يجوز أن تعد الجهة المنشئة وعداً ملزماً منفصلًا عن عقد التوكيل بشراء سلعة السلم ولو بثمن محدد إن لم تجد مشترياً لها بموجب التوكيل، فإن كان الشراء بأكثر من رأس مال السلم فيجب أن يكون الثمن حالًا دفعًا للعينة، والواجب أن لا تتولى الجهة المنشئة طرفي العقد عند شرائها سلعة السلم، كما يشترط توافر الضوابط

8.1.1.1.d.2.3. It is permitted for the originator to extend a binding promise, separate from the contract of agency, to purchase the Salam commodity, even for a specified purchase price, if [the originator] does not find a buyer for [the Salam commodity] pursuant to the agency [to buy]. If the purchase was for more than the Salam capital, then it is required that the price is [paid] on spot to avoid 'Inah. It is a requirement that at the time of purchasing the Salam commodity by the originator, it does not conclude the contract on

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الواردة في البند (٣-٥) من المعيار الشرعي رقم (٥٨) بشأن إعادة الشراء، وينظر البند (٦-١-٢) من المعيار الشرعي رقم (٢٣) بشأن الوكالة وتصرف الفضولي. فإن نكلت الجهة المنشئة عن تنفيذ الوعد، فإنها تتحمل التعويض عن الضرر الفعلي، الذي يقدر بما نقص من ثمن بيع سلعة السلم للغير عن رأس مال السلم.

behalf of both sides of the contract (*tawalī ṭarafī al-ʿaqd*). Also, it is required to fulfil the rules given in s. (3-5) of Shari'ah Standard No. 58: Repurchase and see s. (6-1-2) of Shari'ah Standard No. (23): Agency and the Act of Uncommissioned Agent (Fodooli). If the originator repudiates to perform the promise, it shall bear the compensation for the actual damage, which is estimated by the shortfall in the Salam capital after [receiving] the selling price of the Salam commodity to a third party.

8-1-1-1-د-2-4. يجوز اشتراط تقديم ضمان لحملة الصكوك من قبل الجهة المنشئة لشراء حملة الصكوك سلعة السلم على حساب الجهة المنشئة من طرف ثالث في حال عدم وفائها بالتزامها بتسليمها في الأجل المحدد.

8.1.1.1.d.2.4. It is permitted to stipulate that a guarantee be provided by the originator to the certificateholders to purchase the Salam commodity, at the expense of the originator, for the certificateholders from a third party, in case [the third party] does not fulfil its obligation to deliver [the Salam commodity] at the specified time.

8-1-1-1-د-3. **الأحكام الخاصة بصكوك الاستصناع:**

8-1-1-1-d-3. **Provisions of Istisna' Sukuk:**

8-1-1-1-د-3-1. يجب التقيد في صكوك الاستصناع بالضوابط الشرعية الواردة في المعيار الشرعي رقم (١١) بشأن الاستصناع والاستصناع الموازي.

8.1.1.1.d.3.1. It is required that the Istisna' Sukuk adhere to the Shari'ah rules given in Shari'ah Standard No. (11): Istisna' and Parallel Istisna'.

8-1-1-1-د-3-2. لا يشترط في صكوك الاستصناع تسليم حصيلة الاكتتاب إلى الجهة المنشئة في يوم إبرام عقد الاستصناع. وينظر البند (٣-٢-٢) من المعيار الشرعي رقم (١١) بشأن

8.1.1.1.d.3.2. Istisna' Sukuk does not require delivery of the proceeds of subscription to the originator on the day of concluding the Istisna' contract. See: s. (3-2-2) of Shari'ah Standard No. (11): Istisna' and Parallel Istisna'.

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الاستصناع والاستصناع الموازي.

8.1.1.1.د.3.3. يجوز الاتفاق على تسليم الجهة المنشئة موجودات صكوك الاستصناع على دفعات متفق على كمياتها وآجالها ولو دون تعجيل ثمن الاستصناع. ولا مانع من اختلاف كميات الدفعات أو آجالها بما يتفق مع التوزيعات الدورية على حملة الصكوك. وينظر البند (٣-٢-٢) من المعيار الشرعي رقم (١١) بشأن الاستصناع والاستصناع الموازي.

8.1.1.1.d.3.3. It is permitted to agree to hand over the underlying assets of the Istisna' Sukuk to the originator in instalments agreed upon in terms of quantities and dates of delivery, even without advancing (*taʿjīl*) the Istisna' price. There is no [Shari'ah] objection to have difference in amounts of payments or their deadlines to be in line with the periodic distributions to the certificateholders. See: s. (3-2-2) of Shari'ah Standard No. (11): Istsinsa and Parallel Istisna.

8.1.1.1.د.3.4. لا مانع من توكيل حملة صكوك الاستصناع الجهة المنشئة ببيع المصنوع بعد تسلمهم له حقيقةً أو حكمًا، وتوزيع ثمن البيع على حملة الصكوك بحسب نسبة ملكيتهم في المصنوع، على ألا يشترط هذا التوكيل في عقد الاستصناع. وينظر البند (٦-٨) من المعيار الشرعي رقم (١١) بشأن الاستصناع والاستصناع الموازي.

8.1.1.1.d.3.4. There is no [Shari'ah] objection if the certificateholders of Istisna' Sukuk appoint the originator as their agent to sell the manufactured item, after taking its delivery, [either] actually or constructively, by [the certificateholders], and to distribute the sale price among the certificateholders according to the proportion of their ownership in the manufactured item, provided that this agency is not required in the Istisna' contract. See: s. (6-8) of Shari'ah Standard No. (11): Istisna' and Parallel Istisna'.

8.1.1.1.د.3.5. يجوز أن تعد الجهة المنشئة حملة الصكوك وعداً ملزماً منفصلًا عن عقد التوكيل بشراء المصنوع ولو بثمن محدد إن لم تجد مشترياً له بموجب التوكيل، فإن كان الشراء بأكثر من ثمن الاستصناع

8.1.1.1.d.3.5. It is permitted for the originator to extend to the certificateholders a binding promise, separate from the agency contract, to purchase the manufactured item, even for a specified price, if it does not find a buyer for the manufactured item pursuant to the agency [arrangement]. It is required that

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فيجب أن يكون الثمن حالًا دفعًا للعينة. والواجب أن لا تتولى الجهة المنشئة طرفي العقد عند شرائها المصنوع. وينظر البند (٢-٢-٤) من المعيار الشرعي رقم (١١) بشأن الاستصناع والاستصناع الموازي، والبند (٣-٥) من المعيار الشرعي رقم (٥٨) بشأن إعادة الشراء، والبند (٦-١-٢) من المعيار الشرعي رقم (٢٣) بشأن الوكالة وتصرف الفضولي. فإن نكلت الجهة المنشئة عن تنفيذ الوعد، فإنها تتحمل التعويض عن الضرر الفعلي، الذي يقدر بما نقص من ثمن بيع المصنوع للغير عن ثمن الاستصناع.

the price is paid on spot to avoid 'Inah. Also, it is a requirement that the originator does not conclude the contract on behalf of both sides of the contract (*tawali ṭarafī al 'aqd*) when it purchases the manufactured product. See: s. (2-2-4) of Shari'ah Standard No. (11): Istisna' and Parallel Istisna', s. (3-5) of Shari'ah Standard No. (58) Repurchase, and s. (6-1-2) of Shari'ah Standard No. (23): Agency and the Act of Uncommissioned Agent (Fodooli). If the originator fails to carry out the agency or fails to perform the promise, it shall bear compensation for the actual damage, which is estimated by what is less than the price of selling the manufactured to a third party from the price of Istisna'.

8-1-1-1-د-3-6. يجوز اشتراط تقديم ضمان لحملة الصكوك من قبل الجهة المنشئة لشراء حملة الصكوك المصنوع على حساب الجهة المنشئة من طرف ثالث في حال عدم وفائها بالتزامها بتسليم المصنوع في الأجل المحدد.

8.1.1.1.d.3.6. It is permitted to stipulate that a guarantee be provided to the certificateholders by the originator to purchase the certificateholders manufactured at the expense of the originator from a third party in the event that it fails to fulfil its obligation to deliver the manufactured product within the specified period.

8-1-1-1-د-3-7. يجوز إصدار صكوك استصناع لتمويل مشروع للجهة المنشئة يحتاج إلى بناء أو صنعة بحيث يكون حملة الصكوك هم الصانع، ويتم الاتفاق مع الجهة المنشئة على أن ثمن الاستصناع هو انتفاع حملة

8.1.1.1.d.3.7. It is permitted to issue Istisna' Sukuk to finance a project for the originator that needs construction or workmanship (*ṣun'a*), so that the certificateholders are the manufacturer, and it is agreed with the originator that the price of Istisna' is the benefit derived by the certificateholders' from the

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الصكوك بالمصنوع مدةً محددة بعد اكتماله وتسليمه لها. ويكون لحملة الصكوك عوائد استغلال المنفعة خلال مدة الانتفاع، ولو بالتأجير للجهة المنشئة. وتنتهي الصكوك بانتهاء مدة الانتفاع، وتَسترد الجهة المنشئة المشروع سواءٌ حصَّلَ حملة الصكوك رأس مالهم مع الربح المتوقع أو لا. وينظر البند (٣-٢-١) من المعيار الشرعي رقم (١١) بشأن الاستصناع والاستصناع الموازي.

manufactured item for a specified period after its completion and delivery to [the certificateholders]. The certificateholders shall have the proceeds of exploiting the benefit during the usufruct period, even by leasing it to the originator. The Sukuk mature at the expiry of the usufruct period, and the originator will recover the project whether or not the certificateholders collected their capital along with the expected profit. See: s. (3-2-1) of Shari'ah Standard No. (11) Istisna' and Parallel Istisna'.

8-1-1-1-د-4. **الأحكام الخاصة بصكوك الإجارة:**

8-1-1-1-د-4-1. يجب التقيد في صكوك الإجارة بالضوابط الشرعية الواردة في المعيار الشرعي رقم (٩) بشأن الإجارة والإجارة المنتهية بالتمليك، والمعيار الشرعي رقم (٣٤) بشأن إجارة الأشخاص.

8-1-1-1-د-4-2. لا يجوز إصدار صكوك إجارة إن كانت تؤدي إلى العينة المحرمة شرعًا، كأن تؤجر الجهة المنشئة عينـًا مملوكة لها إلى حملة الصكوك بأجرة حالة، ثم تستأجرها منهم بأجرة مؤجلة أكثر. وينظر البند (٣-٤) من المعيار الشرعي رقم (٩) بشأن الإجارة والإجارة المنتهية بالتمليك. ويراعى البند

8-1-1-1-d-4. **Provisions related to Ijarah Sukuks:**

8.1.1.1.d.4.1. It is required that the Ijarah Sukuk adhere to the Shari'ah rules given in Shari'ah Standard No. (9): Ijarah and Ijarah Muntahia Bittamleek and Shari'ah Standard No. (34): Hiring of Persons.

8.1.1.1.d.4.2. It is not permitted to issue Ijarah Sukuk if they lead to 'Inah that is prohibited by Shari'ah, such as the originator leases an asset owned by it to the certificateholders for a spot rent, then hires [the same asset] from [the certificateholders] for a higher deferred rent. See: s. (3-4) of Shari'ah Standard No. (9): Ijarah and Ijarah Muntahia Bittamleek. With due compliance with S. (8-1-1-1-d-5-2) of this Standard.

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(٨-١-١-١-د-٥-٢) من هذا المعيار.

8-1-1-1-د-4-3. لا يجوز إصدار صكوك إجارة يشتري حمَلتها دفعات الأجرة فقط، ولو كانت تسمى في بعض التطبيقات بيع المنافع الاقتصادية (Economic Benefits) للأصول، كما لا يجوز شراء عقد أو عقود الإجارة، حيث ينصرف هذا الشراء إلى شراء دفعات الأجرة، والواجب أن يكون الشراء للعين المؤجرة. وينظر البند (٨-١-١-٣-د-٢-٢-٢).

8.1.1.1.d.4.3. It is not permitted to issue Ijarah Sukuk wherein its certificateholders purchase only the rental payments, even if they are called in some practices as the sale of economic benefits of the assets. Also, it is not permitted to purchase one or many of the Ijarah contracts so that this purchase will be directed to purchase of the rental payments. As a requirement, purchase shall be of the leased asset. See: s. (8-1-1-3-d-2-2-2).

8-1-1-1-د-4-4. لا يجوز جعل أجرة الفترات المستقبلية التي لم تنتفع الجهة المنشئة (المستأجرة) بالأعيان المؤجرة فيها دينًا مستحقًا بمجرد الإخلال بشروط التعاقد مع عدم تمكين الجهة المنشئة من الانتفاع بالأعيان المؤجرة بما يقابل تلك الأجرة، كما لو تم فسخ عقد الإجارة. وينظر البند (٦-٢) من المعيار الشرعي رقم (٩) بشأن الإجارة والإجارة المنتهية بالتمليك.

8.1.1.1.d.4.4. It is not permitted to make the rent for the future periods, that the originator (lessee) has not yet benefited from the leased properties in [those future periods], as a due debt by simply breach the terms of the contract [by the originator], along with not enabling (*tamkīn*) the originator to benefit from the leased assets in lieu of that rent, as if the Ijarah contract had been rescinded. See: s. (6-2) of Shari'ah Standard No. (9): Ijarah and Ijarah Muntahia Bittamleek.

8-1-1-1-د-4-5. لا يجوز النصُّ على أن تلتزم الجهة المنشئة (المستأجرة) بدفع كامل الأجرة دون أن يكون لها الحق في طلب الحط من الأجرة بمقدار ما فات من منفعة، أو الحق في طلب الفسخ، في حال هلاك الأعيان المؤجرة

8.1.1.1.d.4.5. If the leased assets are partially destroyed or the intended usufruct in the contract is instrumentally decreased, as per the assessment of an independent expert body, and the partial loss [of the leased asset] or significant decrease [of the usufruct] is not due to the originator, then it is not permitted

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هلاكًا جزئيًّا أو نقص المنفعة المقصودة بالعقد نقصًا مؤثرًا وفقًا لما تقرره جهة خبرة مستقلة، ولم يكن الهلاك الجزئي أو النقص المؤثر راجعًا إلى الجهة المنشئة. وينظر البند (٥-١-٦) من المعيار الشرعي رقم (٩) بشأن الإجارة والإجارة المنتهية بالتمليك.

to stipulate that the originator shall be under an obligation to pay the full rent without it having the right to request a decrease in the rent to the extent of the lost enjoyment (*fawāt al manfaʿa*) or the right to rescission request. See: s. (5-1-6) of Shari'ah Standard No. (9): Ijarah and Ijarah Muntahia Bittamleek.

8-1-1-1-د-4-6. لا يجوز اشتراط تحمل الجهة المنشئة (المستأجر) تكاليفَ الصيانة الأساسية والتأمينِ على العين المؤجرة، أو أيَّ نفقات هي من تبعات الملك، ولو بِجعل ما يدفع منها جزءًا يضافُ إلى الأجرة الأصلية أو بإضافة عنصر أجرةٍ تكميلية إلى معادلة حساب الأجرة المتغيرة يمثِّلُ ما تكلفته الأعيان المؤجرة للصيانة الأساسية والتأمين والمصروفات الأخرى، في فترة إيجارية، بحيث يضاف مبلغُ هذا العنصر إلى أجرة فترة إيجارية لاحقة تلقائيًّا دون حق الجهة المنشئة في قبول أو رفض إضافته في حينه. وينظر البند (٥-١-٧) والبند (٥-١-٨) من المعيار الشرعي رقم (٩) بشأن الإجارة والإجارة المنتهية بالتمليك، والبند (١١-٢) من المعيار الشرعي رقم (٥٤) بشأن فسخ العقود

8.1.1.1.d.4.6. It is not permitted to stipulate that the originator (the lessee) shall bear the costs of basic maintenance and insurance of the leased asset, or any expenses that are result of the consequences of the ownership (*tabiʿāt al-milk*), even by making whatever part is paid of [these amount] is added to the base rent or by adding a supplementary rent element to the equation of the variable rent calculation that represents what the leased asset costs in terms of basic maintenance, insurance and other expenses, in a rental period, so that the amount of this element is added to the rent of a subsequent rental period automatically without the right of the originator in accepting or rejecting this addition at that time. See: s. (5-1-7) and s. (5-1-8) of Shari'ah Standard No. (9): Ijarah and Ijarah Muntahia Bittamleek, and s. (11-2) of Shari'ah Standard No. (54): Revocation of Contracts of a Cooling-off Option.

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بالشرط.

8-1-1-1-د-4-7. إذا كان القانون يفرض على المستأجر تحمل مصروفات الصيانة الأساسية والتأمين على العين المؤجرة، وتحملتها الجهة المنشئة (المستأجر)؛ فيجب على حملة الصكوك أن يدفعوا للجهة المنشئة ما دفعته.

8.1.1.1.d.4.7. If the law requires the lessee to bear the expenses of basic maintenance and insurance of the leased asset, and the originator (the lessee) borne them; then it is required from the certificateholders to pay the originator what was paid was the originator [of such amount].

8-1-1-1-د-4-8. إذا تم تأميم أو مصادرة موجودات صكوك الإجارة أو الإجبار على بيعها من قبل الدولة، دون أن يكون ذلك بسبب الجهة المنشئة (المستأجر)، فإن حق حملة الصكوك يقتصر على مبلغ التعويض أو ثمن البيع، ولا يجوز النص على تحمل الجهة المنشئة شيئًا من النقص في التعويض أو ثمن البيع عن التوزيعات الدورية ورأس مال الصكوك. فإن وقعت المصادرة لمدَّة مؤقتة، ولم تكن بسبب الجهة المنشئة، فإنَّ أجرة مدةِ عدم انتفاعها بالموجودات بسبب المصادرة تسقط عنها.

8.1.1.1.d.4.8. If the underlying assets of the Ijarah Sukuk were nationalized, confiscated or forced to be sold by the state, without this being due to the originator (the lessee), then the right of the certificateholders is limited to the amount of compensation or the sale price, and it is not permitted to stipulate that the originator will bear any shortfall in the periodic distributions and capital of the Sukuk [after receiving] the compensation or the sale price. If the confiscation occurred for a temporary period, and was not due to the originator, then the rent for the period of non-enjoyment of the underlying assets, as a reason of the confiscation, shall be forfeited.

8-1-1-1-د-5. **الأحكام الخاصة بصكوك تملُّك عينٍ معينة وتأجيرِها:**

8-1-1-1-د-5-1. يجوز إصدار صكوك لشراء عينٍ معينةٍ غير مؤجرة بغرض تأجيرها إجارةً تشغيلية أو

8-1-1-1-d-5. **Provisions of Sukuk based on Acquiring and Leasing a specific asset:**

8.1.1.1.d.5.1. It is permitted to issue Sukuk to purchase a specific (identified) asset, that has not been leased, for

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منتهية بالتمليك، فإن كانت العين مؤجرة لغير الجهة المنشئة وقت الشراء؛ فيشترط لتأجيرها لها أن يتمَّ فسخ الإجارة القائمة قبل التأجير من حملة الصكوك، أو أن يتم التأجير بإجارة مضافة إلى ما بعد انتهاء الإجارة القائمة على العين.

the purpose of leasing it on the basis of operating lease or Ijarah Muntahia Bittamleek. If the asset was leased to a party other than the originator at the time of purchase; so, in order to lease [the asset] to [the originator], it is required that the existing lease is terminated before leasing [the asset] by the certificateholders [to the originator], or that the leasing will be carried through an Ijarah effective after the end of the existing lease of the asset (*ijāra muḍāfa*).

8-1-1-1-د-5-2. إذا تمَّ شراء العين المعينة من الجهة المنشئة والتأجير لها فتنطبق عليها الضوابط الواردة في البند (٣-٢) والبند (٨-٥) من المعيار الشرعي رقم (٩) بشأن الإجارة والإجارة المنتهية بالتمليك، والبند (٣-٥) والبند (٥-٢) من المعيار الشرعي رقم (٥٨) بشأن إعادة الشراء، والبند (٨-١-١-١-د-٤-٢) من هذا المعيار. ولا مانع من أن يسبق التأجيرَ وعدٌ ملزمٌ مستقل من الجهة المنشئة باستئجار العين من حملة الصكوك، على أن لا يخل النكول عن هذا الوعد بعقد بيع العين لحملة الصكوك.

8.1.1.1.d.5.2. If a specific (identified) asset is purchased from the originator and leased to it, then the rules mentioned in s. (3-2) and s. (8-5) of Shari'ah Standard No. (9): Ijarah and Ijarah Muntahia Bittamleek, s. (3-5) and s. (5-2) of Shari'ah Standard No. (58): Repurchase shall apply. See: s. (5-2) of Shari'ah Standard No. (58): Repurchase, and s. (8-1-1-1-d-4-2) of this Standard. There is no [Shari'ah] objection if the lease being preceded by an independent binding promise from the originator to hire the asset from the certificateholders, provided that the repudiation of this promise will not breach the sale contract of the asset by the certificateholders.

8-1-1-1-د-5-3. لا مانع من تعدد إصدارات صكوك تملك عين معينة وتأجيرها، ترد على عين واحدة، وذلك بشراء حملة الصكوك جزءاً مشاعاً معلوم النسبة من العين في كل إصدارٍ

8.1.1.1.d.5.3. There is no [Shari'ah] objection to multiple issuances of Sukuks based on acquiring and leasing of specific assets that transact upon a single asset via purchasing the certificateholders a known percentage of a common part of

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the asset in each issuance and [then] leasing it. The originator may sell the remaining common part to the certificateholders of the existing issuance or to the certificateholders of a new issuance. It is not required that the rent and the periodic distributions to be equal in the multiple issuances. It is required in all of this that the aggregate value of all the issuances should not exceed the market value of the asset. See: s. (5-1-5) of this Standard.

وتأجيره. وللجهة المنشئة أن تبيع الجزء المشاع المتبقي لحملة صكوك الإصدار القائم أو لحملة صكوك إصدار جديد. ولا يشترط أن تتساوى الأجرة والتوزيعات الدورية في الإصدارات المتعددة. ويشترط في كل هذا أن لا تتجاوز القيمةُ الكليةُ لمجموع الإصدارات القيمةَ السوقيةَ للعين. وينظر البند (٥-١-٥) من هذا المعيار.

8.1.1.1.d.5.4. It is permitted for the originator to participate with the certificateholders in owning a specific asset, whether leased or not, and [then] leasing it. If the originator hires the portion of the certificateholders via Ijarah Muntahia Bittamleek, since participation is based on joint ownership (*shirkat al-milk*), so it is permitted [for the originator] to extend a binding promise to buy [the share of the certificateholders] at a specified price. Also, it permitted if hiring [of the portion] is preceded by a binding promise from [the originator] to hire the portion of the certificateholders even at a specified rent. See: s. (8-1-1-2-d-1-4) of this Standard, and s. (5-1-2) of Shari'ah Standard No. (9): Ijarah and Ijarah Muntahia Bittamleek.

8-1-1-1-د-5-4. يجوز للجهة المنشئة أن تشترك مع حملة الصكوك في تملك عين معينة، مؤجرة كانت أو غير مؤجرة، وتأجيرِها. فإن استأجرت الجهة المنشئة حصة حملة الصكوك إجارةً منتهية بالتمليك، فيجوز لها في حال كون هذا الاشتراك شركة ملك أن تَعِدَ وعدًا ملزمًا بشرائها بثمن محدد، كما يجوز أن يسبق استئجارها وعدٌ ملزمٌ منها باستئجار حصة حملة الصكوك ولو بأجرة محددة، وينظر البند (٨-١-١-٢-د-١-٤) من هذا المعيار، والبند (٥-١-٢) من المعيار الشرعي رقم (٩) بشأن الإجارة والإجارة المنتهية بالتمليك.

8.1.1.1.d.5.5. If there is a diminishing partnership between the certificateholders and the originator on a specific

8-1-1-1-د-5-5. إذا كان بين حملة الصكوك والجهة المنشئة مشاركة متناقصة على عينٍ معيَّنة، فإنه

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يجوز أن تبيع الجهة المنشئة حملةَ الصكوك ما تملَّكته وقبضته من حصَّتهم من خلال التَّناقص، وتستأجر ما باعته إجارة منتهية بالتَّمليك، بشرط انتفاء العينة. ويراعى البند (٨-١-١-١-د-٥-٤) من هذا المعيار، وينظر البند (٣-٥) من المعيار الشرعي رقم (٥٨) بشأن إعادة الشراء.

property, then it is permitted for the originator to sell to the certificateholders what it owned and received from their share through the diminishing [ownership], and [the originator] can hire what it sold based on Ijarah Muntahia Bittamleek provided 'Inah is ruled out. With due compliance with s. (8-1-1-1-d-5-4) of this Standard. See: s. (3-5) of Shari'ah Standard No. (58): Repurchase.

8-1-1-1-د-5-6. تنتهي إجارة العين المعينة بهلاكها هلاكًا كليًا؛ ولا يجوز الاتفاق على استمرار الجهة المنشئة (المستأجر) في دفع الأجرة بعد الهلاك، ويقتصر حق حملة الصكوك على مطالبة شركة التأمين بمزايا أو تعويضات التأمين على العين إن كانت مؤمنًا عليها أو مطالبةِ الجهةِ المنشئة بمثل أو قيمة العين إن كان التَّلف يرجع إليها. ولا يجوز تعليق انتهاء الإجارة وتوقف الأجرة على عدم توفير الجهة المنشئة عينًا مماثلة يشتريها حملة الصكوك وتنشأ عليها إجارةٌ جديدةٌ إلى نهاية مدَّة الصكوك. ولا مانع من الاتفاق على استمرار الجهة المنشئة بدفع ما يساوي مبلغ الأجرة بعد الهلاك مدةً محددة للتثبت من كون الهلاك كليًا، فإن ثبت كان على حملة الصكوك ردُّ

8.1.1.1.d.5.6. The Ijarah of a specific asset will terminate upon its total loss; It is not permitted to have an agreement that the originator (the lessee) will continue to pay the rent after the loss, [rather] the right of the certificateholders is limited to claiming the insurance benefits or compensations from the insurance company regarding the asset if it was insured, or to claim from the originator a similar asset or its value if the damage is due to the originator. It is not permitted to suspend the termination of Ijarah, and the cessation of the rent be made dependent on the failure of the originator to provide a similar asset to be purchased by the certificateholders and upon which a new lease shall be created until the end of the Sukuk term. There is no [Shari'ah] objection to have an agreement on the originator's continuance of paying an amount equal to the amount of the rent after the loss for a specified period to establish that the loss is total. If it was recognised, then the certificateholders will return what

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was paid by the originator at the time of loss. In case a new Ijarah was concluded on another asset then an agreement can be made to treat this amount as a rent. See: s. (7-1-6), s. (7-1-3) and s. (7-2-4) of Shari'ah Standard No. (9): Ijarah and Ijarah Muntahia Bittamleek.

ما دفعته الجهة المنشئة من وقت الهلاك، وإذا تم إبرام إجارة جديدة على عين أخرى فيمكن الاتفاق على عدِّ هذا المبلغ من أجرتها. وينظر البند (٥-١-٦)، والبند (٧-١-٣)، والبند (٧-٢-٤) من المعيار الشرعي رقم (٩) بشأن الإجارة والإجارة المنتهية بالتمليك.

8-1-1-1-d-6. **Provisions of Sukuk based on acquiring and leasing a specified-cum-unidentified asset:**

8.1.1.1.d.6.1. It is permitted to have the issuance of Sukuk based on a specified-cum-unidentified asset, for the purpose of leasing on the basis of Forward Ijarah for an asset that conforms the specification, whether through an operating lease or Ijarah Muntahia Bittamleek. It is permitted for the originator, if it is the lessee, to commit itself to a parallel contract for leasing a specified-cum-unidentified asset with similar specifications to another party, so it receives the asset from the certificateholders and delivers it to the lessee from it.

8.1.1.1.d.6.2. If the specified-cum-unidentified asset was purchased from the originator via a contract Salam or Istisna' and then leased to [the originator], then rules mentioned in s. (3-2) and s. (8-5) of Shari'ah Standard No. (9): Ijarah and Ijarah Muntahia Bittamleek, and s. (3-5) of Shari'ah Standard No. (58): Repurchase will apply. See: s. (5-2)

8-1-1-1-د-6. **الأحكام الخاصة بصكوك تملك عين موصوفة في الذِّمة وتأجيرها:**

8-1-1-1-د-6-1. يجوز إصدار صكوك لشراء عينٍ موصوفةٍ في الذمة، وذلك بغرض التأجير إجارة موصوفة في الذمة لعين مطابقة في مواصفاتها، سواء بإجارة تشغيلية أو منتهية بالتمليك. ويجوز للجهة المنشئة إذا كانت هي المستأجرة أن تلتزم بعقد مواز لإجارة موصوفة في الذمة لتأجير عين بمواصفات مماثلة لطرفٍ آخر فتتسلم العين من حملة الصكوك وتسلمها للمستأجر منها.

8-1-1-1-د-6-2. إذا تمَّ شراء العين الموصوفة في الذمة من الجهة المنشئة بسلم أو استصناع والتأجير لها فتنطبق عليها الضوابط الواردة في البند (٣-٢) والبند (٨-٥) من المعيار الشرعي رقم (٩) بشأن الإجارة والإجارة المنتهية

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بالتمليك، والبند (٣-٥) من المعيار الشرعي رقم (٥٨) بشأن إعادة الشراء. وينظر البند (٥-٢) من المعيار الشرعي رقم (٥٨) بشأن إعادة الشراء. ولا مانع من أن يسبق التأجير وعدٌ ملزمٌ مستقل من الجهة المنشئة باستئجار العين الموصوفة في الذمة من حملة الصكوك على أن لا يخل النكول عن هذا الوعد بعقد بيع العين لحملة الصكوك.

of Shari'ah Standard No. (58) Repurchase. There is no [Shari'ah] objection if the lease being preceded by an independent binding promise from the originator to lease a specified-cum-unidentified asset from the certificateholders, provided that the repudiation of this promise does not breach the sale contract of the asset to the certificateholder.

8-1-1-1-ذ-6-3. لا مانع من تعدد إصدارات صكوك تملك عين موصوفة في الذمة وذلك بغرض التأجير إجارة موصوفة في الذمة لعين مطابقة في مواصفاتها، وذلك بشراء وتأجير حملة الصكوك جزءاً مشاعاً معلوم النسبة من عين موصوفة في الذمة في كل إصدارٍ. وللجهة المنشئة أن تبيع الجزء المشاع المتبقي لحملة صكوك الإصدار القائم أو لحملة صكوك إصدار جديد. ولا يشترط أن تتساوى الأجرة والتوزيعات الدورية في الإصدارات المتعددة. ويشترط في كل هذا أن لا تتجاوز القيمة الكلية لمجموع الإصدارات القيمة السوقية للعين. وينظر البند (٥-١-٥) من هذا المعيار.

8.1.1.1.d.6.3. There is no [Shari'ah] objection to multiple issuances of Sukuk based on acquiring specified-cum-unidentified assets for the purpose of leasing via Forward Ijarah for an asset that complies with the specification, and this will be carried via purchasing and leasing a known percentage of a common part of the asset in each issuance by the certificateholders. The originator may sell the remaining common part to the certificateholders of the existing issuance or to the certificateholders of a new issuance. It is not required that the rent and the periodic distributions to be equal in the multiple issuances. It is required in all of this that the aggregate value of all the issuances should not exceed the market value of the asset. See: s. (5-1-5) of this Standard.

8-1-1-1-ذ-6-4. يجوز للجهة المنشئة أن تشترك مع حملة

8.1.1.1.d.6.4. It is permitted for the originator to

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participate with the certificateholders in acquiring and leasing a specified-cum-unidentified asset, for the purpose of leasing. If the originator hires the portion of the certificateholders via Ijarah Muntahia Bittamleek, then that would be permitted for [the originator] if the subscription was based on joint ownership wherein a binding promise is extending to purchase [the portion of the certificateholders] for a specified price. Also, it is permitted to precede hiring of [the portion] a binding promise [from the originator] to hire the portion of the certificateholders, even for a specified rent. See: s. (8-1-1-2-d-1-4) of this Standard and s. (5-1-2) of Shari'ah Standard No. (9): Ijarah and Ijarah Muntahia Bittamleek.

الصكوك في تملك عين موصوفة في الذمة بغرض التأجير. فإن استأجرت الجهة المنشئة حصة حملة الصكوك إجارةً منتهية بالتمليك، فيجوز لها في حال كون هذا الاشتراك شركة ملك أن تَعِد وعداً ملزماً بشرائها بثمنٍ محدد، كما يجوز أن يسبق استئجارها وعدٌ ملزمٌ منها باستئجار حصة حملة الصكوك ولو بأجرة محددة. وينظر البند (٨-١-١-٢-د-١-٤) من هذا المعيار، والبند (٥-١-٢) من المعيار الشرعي رقم (٩) بشأن الإجارة والإجارة المنتهية بالتمليك.

8.1.1.1.d.6.5. To cover the periodic distributions, there is no [Shari'ah] objection to have an agreement with the originator (the lessee) to pay under-account rent before handing over of the specified-cum-unidentified asset, and this rent is entitled only by enabling (*tamkīn*) the originator to benefit from the leased asset in exchange for the rent paid in advance. If the Ijarah did not take effect or is terminated after it was effective, the certificateholders are required to return what they have received to the originator, entirely or partially as the case may be. If this rent is distributed over the entire rental period, and it is calculated on a variable basis, then it is required that the first rental period is excluded from its rent to be part of

8-1-1-1-د-6-5. لا مانع من الاتفاق مع الجهة المنشئة (المستأجرة) على دفع أجرة مقدَّمة على الحساب قبل تسليم العين الموصوفة في الذمة لتغطية التوزيعات الدَّورية، ولا تُستحق هذه الأجرة إلا بتمكين الجهة المنشئة من الانتفاع بالعين المؤجرة بما يقابل الأجرة المقدَّمة المدفوعة، وإذا لم تسرِ الإجارة أو فسخت بعد سريانها، وجب على حملة الصكوك رد ما تسلمته إلى الجهة المنشئة، كله أو بعضه بحسب الحال. وإذا كانت هذه الأجرة موزَّعة على جميع مدَّة الإجارة، وكانت تُحسب على

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أساس متغيِّر، فيجب أن تستثنى الفترة الإيجارية الأولى من أن تكون تلك الأجرة جزءاً من أجرتها، لمنع أن تكون أجرة الفترة الإيجارية الأولى متغيِّرة. وينظر البند (٥-٢-٢) والبند (٥-٢-٣) من المعيار الشرعي رقم (٩) بشأن المعيار الشرعي بشأن الإجارة والإجارة المنتهية بالتمليك.

that [rent], to prevent the rent for the first rental period from being variable. See: s. (5-2-2) and s. (5-2-3) of Shari'ah Standard No. (9): Ijarah and Ijarah Muntahia Bittamleek.

8.1.1.1.د.6.6. يجوز إصدار صكوك لاستصناع بقعة معينة من أرض؛ كما لو كانت بقعة تردم في البحر ليكون براً، ويجوز إجارة ذلك المستصنع في الذمة.

8.1.1.1.d.6.6. It is permitted to issue Istisna Sukuk over a specific plot of land; such as, a portion of the sea is to turn it into a land via reclamation, and it is permitted to hire that contractor through a Forward Ijarah.

8.1.1.1.د.6.7. لا تنتهي إجارة العين الموصوفة في الذمة باختلال المواصفات المتفق عليها للعين عند تسليمها أو بهلاكها بعد التسليم هلاكًا كليًّا، وعلى حملة الصكوك إصلاحها أو توفير عين بديلة بالمواصفات نفسها مع سقوط أجرة الفترة الواقعة بين تأخر التسليم أو الهلاك وبين الإصلاح أو توفير العين البديلة. وإذا تعذر إصلاح العين أو تعذر توفير عين بديلة أو اتفق الطرفان على عدم توفيرها؛ فإن الإجارة تنتهي من حين تعذر تسليم العين لاختلال المواصفات المتَّفق عليها أو من حين هلاك العين. وينظر البند (٧-١-٦) من المعيار الشرعي

8.1.1.1.d.6.7. Ijarah of specified-cum-unidentified asset does not terminate by non-conformity with the agreed upon specifications of the asset at time of delivery, or by its total loss after the delivery. The certificateholders are supposed to carry repair of [the asset] or provide an alternative asset with the same specifications, with the loss of the rent for the period between the delay in the delivery or the loss and between the repair or the provision of the replacement of the asset. If the repair of the asset is not possible, then the Ijarah will terminate from the time of incapability to deliver the asset due to non-conformity with the agreed upon specifications or from the time of loss of the asset. See: s. (7-1-6) of Shari'ah Standard No. (9): Ijarah and Ijarah Muntahia Bittamleek. The lessee has the right

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رقم (٩) بشأن الإجارة والإجارة المنتهية بالتمليك. وللمستأجر أن يقبل تسلم العين مع اختلال المواصفات المتفق عليها، سواء أكان ذلك بالأجرة المتَّفق عليها أم بأقل منها.

to accept delivery of the asset [despite] non-conformity with the agreed upon specifications, whether at the agreed-upon rent or less.

8-1-1-1-د-7. **الأحكام الخاصة بصكوك استئجار عين معينة وتأجيرها:**

8-1-1-1-d-7. **Provisions of Sukuk based on hiring and leasing specific asset:**

8-1-1-1-د-7-1. يجوز إصدار صكوك لاستئجار عين معينة مدَّةً محددةً وذلك بغرض تأجيرها بأجرة أعلى لغير مؤجرها. وينظر البند (٣-٣) من المعيار الشرعي رقم (٩) بشأن الإجارة والإجارة المنتهية بالتمليك. وإذا كانت العين مؤجرة للمدة المحدَّدة نفسها أو أكثر منها، فيشترط فسخ الإجارة القائمة قبل استئجار حملة الصكوك للعين، وإذا كانت العين مؤجرة لأقل من المدَّة المحدَّدة فيمكن أن يتم استئجارها إجارة مضافة للمستقبل لمدة تبدأ من تاريخ انتهاء الإجارة القائمة على العين.

8.1.1.1.d.7.1. It is permitted to issue Sukuk to hire a specific asset for a specified period, with the purpose of leasing it for a higher rent to a party other than its lessor. See: s. (3-3) of Shari'ah Standard No. (9): Ijarah and Ijarah Muntahia Bittamleek. If the asset is leased for the same specified period or beyond that, then it is required to terminate the existing Ijarah before the certificateholders hire the asset. If the asset is leased for a period shorter then the specified period then it can be hired based on Ijarah effective from future (*ijarah muḍāfa lil mustaqbal*) for a period starting from end of the existing Ijarah of the asset.

8-1-1-1-د-7-2. إن كان استئجار حملة الصكوك عيناً معينة من الجهة المنشئة لمدة طويلة بما يجعل هذا الاستئجار في حكم البيع عرفاً بسبب طول المدة ولتحمل المستأجر أعباء

8.1.1.1.d.7.2. If the certificateholders hire a specific asset from the originator for a long period, which makes this hire deemed to be a sale as per customs because of the long period and for the lessee's bearing the burdens of ownership (*'abā' al milk*), then it is permitted for the

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الملك، فيجوز لحملة الصكوك تأجير تلك العين إلى الجهة المنشئة نفسها لمدة أقل مسموح بها قانونًا للإجارة ولو كانت الأجرة مؤجلة وأكثر من مقابل الاستئجار الأول، ولا يدخل ذلك في العينة الممنوعة شرعًا.

certificateholders to lease that asset to the originator itself for a period shorter than what is permitted by virtue of the law even if the rent is deferred and more than the consideration for the first hire, and this shall not be a form of 'Inah that is prohibited as per Shari'ah.

8-1-1-1-د-7-3. يجوز إصدار صكوك لاستئجار عين معينة تنتج ما يتجدد بعد الاستهلاك؛ وذلك بغرض بيع ما تنتجه بعد استخراجه أو توليده، أو بغرض تأجير العين لطرف ثالث مدَّة استئجار حملة الصُّكوك لها أو أقل منها. كأن يستأجر حملة الصكوك بئر نفط أو بئر غاز طبيعي أو محطة توليد طاقة كهربائية، مدَّة محدَّدة، ليبيعوا ما يستخرج من نفط أو غاز أو يتولد من كهرباء أو ليؤجروا البئر أو المحطة لطرف ثالث.

8.1.1.1.d.7.3. It is permitted to issue Sukuk based on hiring a specific (identified) asset that produces a renewable [output] after consumption; this is for the purpose of selling what it produces after its extraction or generation, or for the purpose of leasing the asset to a third party during the period of hiring by the certificateholders for the same period or short than that. For example, certificateholders can hire an oil well, a natural gas well, or a station of electric power generation plant, for a specific period, in order to sell what is extracted from oil or gas, or generated electricity, or to lease the well or station to a third party.

8-1-1-1-د-8. **الأحكام الخاصة بصكوك استئجار عين موصوفة في الذمة وتأجيرها:**

8-1-1-1-d-8. **Provisions of Sukuk based on hiring and leasing a specified-cum-unidentified asset:**

8-1-1-1-د-8-1. يجوز إصدار صكوك لاستئجار عين موصوفة في الذمة وذلك بغرض التأجير إجارة موصوفة في الذمة لعين مطابقة في مواصفاتها، بأجرة أعلى لغير المؤجر الأول. وإذا كانت العين التي ستخصَّص

8.1.1.1.d.8.1. It is permitted to issue Sukuks based on hiring a specified-cum-unidentified asset, with the purpose of leasing on the basis of Forward Ijarah for an asset that conforms the specifications of specified-cum-unidentified asset for a higher rent to a party other than the first lessor. If the asset that will be allocated to drive the

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enjoyment (*istīfā al-manfʿa*) of a specified-cum-unidentified usufruct, which is leased for the same period specified for the certificateholders or longer than that, then it is not required to terminate that lease when the certificateholders hire the asset. However, the termination is required upon the allocation of the asset to drive the enjoyment of its usufruct. If the asset is leased for [a period shorter] than the period specified for the certificateholders, there is no [Shari'ah] objection to allocate the asset to drive the enjoyment, if the certificateholders hired [the asset] for a period starting from the date of the end of the existing lease of the asset.

لاستيفاء المنفعة الموصوفة في الذمة مؤجرة للمدَّة المحدَّدة لحملة الصكوك نفسها أو أكثر منها، فلا يُشترط فسخ تلك الإجارة عند استئجار حملة الصكوك العين، ولكن يجب الفسخ عند تخصيص العين لاستيفاء منفعتها. وإذا كانت العين مؤجرة لأقل من المدَّة المحدَّدة لحملة الصكوك، فلا مانع من تخصيصها لاستيفاء المنفعة إن كان استئجار حملة الصُّكوك لها لمدة تبدأ من تاريخ انتهاء الإجارة القائمة على العين.

8.1.1.1.d.8.2. The leased asset in these Sukuk shall remain specified-cum-unidentified, even if the entity providing the usufruct has appropriated (identified) the usufruct, if the asset from which the usufruct is derived is one of the fungible assets owned by that entity and has not been identified by itself.

8-1-1-1-د-8-2. تبقى العين المؤجرة في هذه الصكوك موصوفة في الذمة وإن عُيِّنت الجهة المقدمة للمنفعة، إن كانت العين التي تستوفى منها المنفعة من الأعيان المثلية المملوكة لتلك الجهة ولم تُعيَّن بذاتها.

8-1-1-2. Musharaka (Partnerships) Sukuks:

8-1-1-2. صكوك المشاركات:

8-1-1-2-a. By Musharaka Sukuks means the Sukuks in which the relationship between the certificateholders and the originator is based on one of the contracts of partnership (Musharaka), which is the partnership contract or the Mudaraba contract, and among its most important characteristics are the following:

8-1-1-2-أ. يقصد بصكوك المشاركات: الصكوك التي تقوم العلاقة فيها بين حملة الصكوك والجهة المنشئة على عقد من عقود المشاركات، وهي عقد الشركة أو عقد المضاربة، ومن أهم خصائصها ما يأتي:

8-1-1-2-a-1. Each certificate represents a common share in the underlying assets, subject of

8-1-1-2-أ-1. أن كل صك منها يمثل حصة شائعة في

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Musharaka, that is owned by the certificateholders.

موجودات محل المشاركة المملوكة لحملة الصكوك.

8-1-1-2-a-2. Handing over [partnership] capital to the originator establishes a fiduciary relationship between [the originator] and the certificateholders, so it does not entail that the capital is an indisputable obligation owed by the originator.

8-1-1-2-أ-2. أنَّ تسليم رأس مالها للجهة المنشئة ينشئ علاقة أمانةٍ بينها وبين حملة الصكوك، فلا يترتب عليها أن يكون رأس المال التزامًا حتمًا في ذمة الجهة المنشئة.

8-1-1-2-a-3. [Partnership] capital and profits are not guaranteed by the originator, and the originator does not guarantee the capital to the extent that [the originator] does not recognized it as a debt owed by it except in the event of misconduct, negligence, or breach of conditions.

8-1-1-2-أ-3. أنَّ رأس مالها وأرباحها غير مضمونين من الجهة المنشئة، ولا تضمن الجهة المنشئة رأس المال بحيث يثبت دينًا في ذمتها إلا في حال التعدي أو التقصير أو مخالفة الشروط.

8-1-1-2-a-4. [Partnership] is exposed to investment risks arising from the feasibility of the participation activity and its ability to achieve expected returns, and [the partnership] is exposed to credit risks of the financees if the originator uses the capital of the Sukuk to finance in any of the modes of commutative [contracts].

8-1-1-2-أ-4. أنها معرضة لمخاطر الاستثمار الناشئة عن جدوى نشاط المشاركة وقدرته على تحقيق العوائد المتوقعة، وتكون معرضة لمخاطر ائتمان المتمولين حال استخدام الجهة المنشئة رأس مال الصكوك في تمويلهم بصيغة من صيغ المعاوضات.

8-1-1-2-a-5. Profits [of partnership] are not determined by a lump sum or a percentage of a known amount, and they are only expected.

8-1-1-2-أ-5. أنَّ أرباحها لا تتحدد بمبلغ مقطوع أو بنسبةٍ من مبلغ معلوم، ولا تكون إلا متوقعة.

8-1-1-2-b. **Types of Partnerships Sukuks:**

8-1-1-2-ب. **أنواع صكوك المشاركات:**

Partnership Sukuks are of two types:

صكوك المشاركات على نوعين:

8-1-1-2-b-1. Partnership Sukuk, which are of two types:

8-1-1-2-ب-1. صكوك الشركة، وهي على نوعين:

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8.1.1.2.b.1.1. **Joint Enterprise (*Sharikat al-ʿAqd*) Sukuk:**

It is the Sukuk that is issued to provide financing to the originator by participating in an investment activity. The issuer of these Sukuk shall be a partner on behalf of the certificateholders; and the originator is a managing partner. The certificateholders and the originator own the assets of the activity jointly (*shuyūʿ*), to the extent of their share in the capital of the partnership. The certificateholders share with the originator in the realized profits according to what they agreed upon, and the loss between them is equal to the share of each party in the capital of the partnership.

8-1-1-2-ب-1-1. **صكوك شركة العقد:**

هي الصكوك التي يتم إصدارها لتمويل الجهة المنشئة بالمشاركة في نشاط استثماري. ويكون المصدر لتلك الصكوك شريكًا نيابة عن حملة الصكوك؛ والجهة المنشئة شريكًا مديراً. ويملك حملة الصكوك والجهة المنشئة موجودات النشاط على الشيوع، وذلك بقدر حصة كل منهما في رأس مال الشركة. ويشترك حملة الصكوك مع الجهة المنشئة في الأرباح المحققة بحسب ما اتفقا عليه، وتكون الخسارة بينهما بقدر حصة كل طرف في رأس مال الشركة.

8.1.1.2.b.1.2. **Joint Ownership (*Shirkat al-Milk*) Sukuk:**

They are the Sukuk that are issued to own an asset, for example, a joint partnership with the originator, without the originator being an agent in disposing of the certificateholders except with their permission, so the certificateholders buy a common share of the asset, and the originator buys the other share, or the certificateholders buy a share of the asset owned by the originator, and the issuer of these Sukuk is a joint-owner on behalf of the certificateholders, and the originator is a co-owner who is not an agent to dispose of without [partner's] permission, and if the asset is leased, the certificateholders share with the originator the rent that is equal to [their respective] shares in the purchase price of the asset, and the loss borne by them, is equal to [their respective] shares in the purchase price as well. The Sukuk do not deviate from being joint ownership Sukuk with one of the two partners authorizing the other based on Service Agency, and then what is stated in s. (3-4) of Shari'ah Standard No. (56): Liability of the Investment Manager shall apply. With due compliance with (5-2) of Shari'ah Standard No. (23):

8-1-1-2-ب-1-2. **صكوك شركة الملك:**

هي الصكوك التي يتم إصدارها لتملك عين –مثلاً– مشاركة مع الجهة المنشئة على سبيل الشيوع، دون أن تكون الجهة المنشئة وكيلة في التصرف عن حملة الصكوك إلا بإذنهم وقت التصرف، فيشتري حملة الصكوك حصة شائعة من العين، وتشتري الجهة المنشئة الحصة الأخرى، أو يشتري حملة الصكوك حصة من عين تملكها الجهة المنشئة، ويكون المصدر لتلك الصكوك شريك ملك نيابة عن حملة الصكوك، والجهة المنشئة شريك ملك غير وكيل بالتصرف إلا بالإذن، وإذا أجرت العين فيشترك حملة الصكوك مع الجهة المنشئة في الأجرة بقدر الحصص في ثمن شراء العين، وتكون الخسارة بينهما بقدر الحصص في ثمن الشراء أيضـاً. ولا تخرج الصكوك عن كونها صكوك شركة ملك بتوكيل

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أحد الشريكين الآخر وكالة خدمات محددة، وفقا لما ورد في البند (٤-٣) من المعيار الشرعي رقم (٥٦) بشأن ضمان مدير الاستثمار. ويراعى البند (٥-٢) من المعيار الشرعي رقم (٢٣) بشأن الوكالة وتصرف الفضولي، والبند (٨-١-١-٢-د-١-٣) من هذا المعيار.

Agency and the Act of Uncommissioned Agent (Fodooli) and s. (8-1-1-2-d-1-3) of this Standard.

8-1-1-2-ب-2. **صكوك المضاربة:**

هي الصكوك التي يتم إصدارها لتمويل الجهة المنشئة بالمضاربة في نشاط استثماري. ويكون المصدر لتلك الصكوك رب مال نيابة عن حملة الصكوك؛ والجهة المنشئة مضاربـًا. ويملك حملة الصكوك موجودات النشاط على الشيوع بينهم بغنمها وغرمها، ويشترك حملة الصكوك مع الجهة المنشئة في الأرباح المحققة بحسب ما اتفقا عليه، وتكون الخسارة على حملة الصكوك.

8-1-1-2-b-2. **Mudaraba Sukuk:**

These are the Sukuk that are issued to finance the originator through Mudaraba in an investment activity. The issuer of these Sukuk is a *Rab-al-Mal* on behalf of the certificateholders of Sukuk; and the originator is the Mudarib. The certificateholders own the underlying assets of the activity in common among them, sharing the reward and the liability among them, and the certificateholders share the realized profits with the originator in according to what they agreed upon, and the loss is borne by the certificateholders.

8-1-1-2-ج. **أحكام عامة لصكوك المشاركات:**

8-1-1-2-ج-1. يجب أن يستثمر رأس مال صكوك المشاركات فيما يصلح أن يكون محلًا للاستثمار.

8-1-1-2-ج-2. لا يجوز أن تضمن الجهة المنشئة رأس مال أو أرباح صكوك المشاركات. وينظر البند (٦-٢-١-٢). ويجب أن تكون الأرباح ناتجةً من موجودات الصكوك.

8-1-1-2-ج-3. يجب أن تحدد نسبة تقاسم الربح المتحقق

8-1-1-2-c. **General provisions for Partnerships Sukuks:**

8-1-1-2-c-1. It is required that the capital of Musharaka Sukuk is invested in what is fit to be a subject of investment.

8-1-1-2-c-2. It is not permitted for the originator to guarantee the capital or profits of the Musharaka Sukuk. See: s. (6-2-1-2). It is required that the profits is derived from the underlying assets of Sukuk.

8-1-1-2-c-3. It is required to determine percentage of profit sharing of actual realized profit.

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فعلًا، ولا يجوز أن يحدد الربح بمبلغ أو بنسبة من رأس المال أو بمؤشر، لا في نشرة الإصدار ولا في العقد المنظم للعلاقة بين حملة الصكوك والجهة المنشئة ولا في أي مستند آخر، إلا أن يذكر أنه على سبيل التوقع. وينظر البند (٦-٢-١-٢) والبند (٧-٣-٢-٥) والبند (١١-٢-٤).

It is not permitted that the profit is determined by an amount or a percentage of the capital or by an index, neither in the base prospectus nor in the contract regulating the relationship between the certificateholders and the originator, nor in any other document, except that it is mentioned as a matter of expectation. See: s. (6-2-1-2), s. (7-3-2-5) and s. (11-2-4).

8-1-1-2-ج-4. يجوز أن يشترط حملة الصكوك على الجهة المنشئة تقديم ضمان مشروعٍ لرد رأس مال الصكوك في حال التعدي والتقصير أو مخالفة الشروط، وينظر البند (٢-٢-١) من المعيار الشرعي رقم (٥) بشأن الضمانات، والبند (٣-١-٤-٢) من المعيار الشرعي رقم (١٢) بشأن الشركة (المشاركة) والشركات الحديثة، والبند (٦) من المعيار الشرعي رقم (١٣) بشأن المضاربة.

8-1-1-2-c-4. It is permitted for certificateholders to stipulate upon the originator to provide a Shari'ah compliant securities for repayment of the capital of the Sukuk in the event of misconduct, negligence, or breach of the conditions. See: s. (2-2-1) of Shari'ah Standard No. (5): Guarantees, and s. (3-1-4-2) of Shari'ah Standard No. (12): Sharikah (Musharaka) and Modern Companies, and s. (6) of Shari'ah Standard No. (13): Mudaraba.

8-1-1-2-ج-5. يجوز اشتراط ملاءة الجهة المنشئة بمستوى معين عند الاكتتاب في صكوك المشاركات ومنعها من تصرفات محددة تخل بها، فإن ادعت عند إصدار الصكوك مستوىً معيَّنًا من الملاءة ثم ظهر أنها كانت على خلاف ما ادعته أو فعلت تصرفًا مما مُنعت منه، وقرر حملة الصكوك تصفيتها

8-1-1-2-c-5. It is permitted to stipulate the solvency of the originator to be at a certain level when subscripting to the Musharaka Sukuk and prevent it from specific actions that prejudice [the partnership]. Hence, if [the originator] claimed a certain level of solvency and later it was revealed that [the level of insolvency] was contrary to what it claimed or it committed an act that was prejudice [to the partnership], the certificateholders resolved the dissolution of the Sukuk due to that reason and the capital was

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short; so [the originator] shall be liable for the shortfall [in the capital] and the realized [portion of] profits.

بسبب ذلك، ونَقَصَ رأس المال؛ فإنها تضمن النقص وما تحقق من ربح.

8-1-1-2-c-6. It is permitted that Musharaka Sukuk absolute (unrestricted). Also, it is permitted to have [Musharaka Sukuk] restricted to a specific project or restricted to an investment in the general pool of the originator.

8-1-1-2-ج-6. يجوز أن تكون صكوك المشاركات مطلَقة كما يجوز أن تكون مقيدة بمشروع معيَّن أو مقيدة بالاستثمار في الوعاء العام للجهة المنشئة.

8-1-1-2-c-7. It is permitted to use the capital of Sukuk, which is invested in the general pool of the originator, to honour the obligations of the general pool, provided that this is done after the certificateholders own a share in the general pool in proportion to their capital. See: s. (12-2) of Shari'ah Standard No. (46): Al-Wakala bi Al-Istithmar (Investment Agency), and s. (8-3-1-2-d-4-1). If the investment of the Sukuk capital is restricted to a specific project, then it is not permitted to include it in the general pool. It is not permitted for the originator to use [the capital] to honour the obligations of the general pool or other obligations that [the originator] has other than the obligations of that project.

8-1-1-2-ج-7. يجوز استخدام رأس مال الصكوك المستثمَر في الوعاء العام للجهة المنشئة في الوفاء بما على الوعاء العام من التزامات، بشرط أن يتم ذلك بعد أن يملك حملةُ الصكوك حصةً في الوعاء العام بنسبة رأس مالهم. وينظر البند (١٢-٢) من المعيار الشرعي رقم (٤٦) بشأن الوكالة بالاستثمار، والبند (٨-٣-١-٢-د-٤-١). فإن كان استثمارُ رأس مال الصكوك مقيداً بمشروع معين، فإنه لا يجوز إدخاله في الوعاء العام، ولا يجوز للجهة المنشئة أن تستخدمه في الوفاء بما على الوعاء العام من التزامات أو بما عليها من التزامات أخرى غير التزامات ذلك المشروع.

8-1-1-2-c-8. It is not permitted to link the return of the capital of Musharaka Sukuk or the distribution of its profits to the conditions of originator's investments that are outside the activity in which the capital is invested, including the settlement by the debtors of the

8-1-1-2-ج-8. لا يجوز ربط رد رأس مال صكوك المشاركات ولا ربط توزيع أرباحها بأحوال استثمارات الجهة المنشئة الخارجة عن النشاط الذي يُستثمرُ رأسُ

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المال فيه، ومن ذلك وفاء مديني الجهة المنشئة بالتزاماتهم التي لم تنشأ عن استثمار رأس مال الصكوك.

originator of their obligations that did not arise from the investment of the capital of Sukuk.

8-1-1-2-ج-9. يجوز للجهة المنشئة أن تستخدم الوسائل المشروعة للتحوط من المخاطر المتعلقة برأس المال أو الأرباح بالاتفاق مع حملة الصكوك. فإن استخدمت الجهة المنشئة هذه الوسائل دون اتفاق مع حملة الصكوك ودون أن يجري عرف التعامل بذلك؛ فلا يجوز أن يرتب عليهم أي التزام مالي. ينظر البند (٦-١-٢) من هذا المعيار، وينظر المعيار الشرعي رقم (٤٥) بشأن حماية رأس المال والاستثمارات، والمعيار الشرعي رقم (٥٦) بشأن ضمان مدير الاستثمار.

8-1-1-2-c-9. Pursuant to an agreement with the certificateholders, it is permitted for the originator to use Shari'ah compliant means to hedge risks related to capital or profits. If the originator used these means without an agreement with the certificateholders and there were no customarily practices of dealing with [such means]; then it is not permitted to entail any financial obligation [upon the certificateholders]. See: s. (6-1-2) of this Standard, and Shari'ah Standard No. (45): Protection of Capital and Investments, and Shari'ah Standard No. (56): Liability of the Investment Manager.

8-1-1-2-ج-10. يجوز أن تكون صكوك المشاركات مؤقتةً تنتهي بمدة محددة أو في حالات معينة أو بتصفية نشاطها، ويجوز أن تكون مستمرة باستمرار الجهة المنشئة. وينظر البند (٨-٣-١-٢-د-٣).

8-1-1-2-c-10. It is permitted for partnerships Sukuk to be time-bound that ends with a specified period, occurrence of certain events, or with the dissolution of its activity. It is permitted to have Musharaka Sukuk that are perpetual with continuance of the originator. See: s. (8-3-1-2-d-3).

8-1-1-2-د. **أحكام خاصة بأنواع صكوك المشاركات:**

تخضع صكوك المشاركات لأحكام خاصة بكل نوعٍ منها بحسب العقد بين حملة الصكوك والجهة المنشئة، وفق ما

8-1-1-2-d. **Special Provisions to the types of Partnerships Sukuk:**

Musharaka Sukuk are subject to special provisions for each type, according to the contract between the certificateholders and the originator, as follows:

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يأتي:

8-1-1-2-د-1. الأحكام الخاصة بصكوك الشركة:

8-1-1-2-د-1-1. يجب التقيد في صكوك الشركة بالضوابط الشرعية الواردة في المعيار الشرعي رقم (١٢) بشأن الشركة (المشاركة) والشركات الحديثة.

8-1-1-2-د-1-2. يجوز إصدار صكوك الشركة على أساس المشاركة المتناقصة القائمة على شركة العقد بحيث تتعهد الجهة المنشئة بشراء حصة حملة الصكوك في موجوداتها تدريجيًّا إلى أن تتملكها تملكًا كاملًا، بشرط أن يتم الشراء بالقيمة السوقية أو بالقيمة التي يُتَّفق عليها عند الشراء، ولا يجوز أن يكون بقيمة محدَّدة مقدَّمًا، ومن ذلك أن يكون التعهد بشراء الحصة بالمرابحة، وينظر البند (٥-١) والبند (٥-٧) من المعيار الشرعي رقم (١٢) بشأن الشركة (المشاركة) والشركات الحديثة.

8-1-1-2-د-1-3. لا تخرج الصكوك عن كونها صكوك شركة ملك، في حال كانت كذلك، بتوكيل أحد الشريكين الآخر وكالة خدمات محددة وفقا لما ورد في البند (٤-٣-١) من المعيار الشرعي رقم (٥٦) بشأن ضمان

8-1-1-2-d-1. Special Provisions related to Partnership Sukuks:

8.1.1.2.d.1.1. It is required that Partnership Sukuk adhere to the Shari'ah rules mentioned in Shari'ah Standard No. (12): Sharikah (Musharaka) and Modern Companies.

8.1.1.2.d.1.2. It is permitted to issue Partnership Sukuk on the basis of the Diminishing Partnership, which is based on the joint enterprise partnership, so that the originator undertakes to gradually purchase the share of the certificateholders in the underlying assets [of Sukuk] until it fully owns it, provided that the purchase is made at the market value, or the value agreed upon at the time of purchase, and it is not permitted [for the purchase price] to be at a value determined in advance. This includes an undertaking to purchase the share on Murabaha basis. See: s. (5-1) and s. (5-7) of Shari'ah Standard No. (12): Sharikah (Musharaka) and Modern Companies.

8.1.1.2.d.1.3. The Sukuk do not deviate from being Sukuk of joint ownership, if so, by appointment of one the partners by the other partner as an agent [to perform] specific services, according to what was stated in s. (4-3-1) of Shari'ah Standard No. (56): Liability of the Investment Manager. This does not imply permitting imposition of liability on the agent for damage in

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مدير الاستثمار، ولا يقتضي ذلك جواز تضمينه التلف في غير حال التعدي والتقصير أو مخالفة الشروط وفقاً لما جاء في البند (٥-٢) من المعيار الشرعي رقم (٢٣) بشأن الوكالة وتصرف الفضولي. وينظر البند (٨-١-١-٢-ب-١-٢) من هذا المعيار.

cases other than misconduct, negligence, and breach of conditions, as it was stated in s. (5-2) of Shari'ah Standard No. (23): Agency and the Act of Uncommissioned Agent (Fodooli). See: s. (8-1-1-2-b-1-2) of this Standard.

8-1-1-2-د-1-4. يجوز في صكوك شركة الملك أن يعد أحد الشريكين الآخر وعداً ملزماً بشراء حصته بثمن محدد. وينظر البند (٥-٤-٣) من المعيار الشرعي رقم (٥٨) بشأن إعادة الشراء، والبند (٨-١-١-١-د-٥-٤) من هذا المعيار.

8.1.1.2.d.1.4. In joint ownership Sukuks, it is permitted for a partner to extend to the other partner a binding promise to buy [other partner's] share at a specified price. See: s. (5-4-3) of Shari'ah Standard No. (58): Repurchase and s. (8-1-1-1-d-5-4) of this Standard.

8-1-1-2-د-2. **الأحكام الخاصة بصكوك المضاربة:**

8-1-1-2-د-2-1. يجب التقيد في صكوك المضاربة بالضوابط الشرعية الواردة في المعيار الشرعي رقم (١٣) بشأن المضاربة.

8.1.1.2.d.2.1. It is required that Mudaraba Sukuk adhere to the Shari'ah rules mentioned in Shari'ah Standard No. (13): Mudaraba.

8-1-1-2-د-2-2. إذا خلطت الجهة المنشئة، بصفتها مضاربًا، رأس مال الصكوك بأموالها، بعد الإذن أو التفويض لها بذلك من حملة الصكوك، فإنه تنشأ مشاركة بينها وبين حملة الصكوك من نوع شركة العقد، مع بقاء المضاربة، ويوزَّع الربح المحقَّق تبعاً

8.1.1.2.d.2.2. If the originator, in its capacity as a Mudarib, commingles the capital of Sukuk, after [securing] permission or authorization from the certificateholders to do so, with its own funds then a partnership will arise between it and the certificateholders of the type of joint enterprise (*shirkat al-ʿaqd*), with the continuance of Mudaraba as it was, and the realized profit will be distributed according to this

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commingling (*khalṭ*); the profit is distributed between the two parties to the partnership (Mudaraba funds and funds of the originator so that [each part] takes profit on the funds [shared respectively]), then the profit of the Mudaraba fund is distributed between the certificateholders and the originator. See: s. (8-9) and s. (9-1-6) of Shari'ah Standard No. (13): Mudaraba.

لهذا الخلط؛ فيوزَّع الربح بين طرفي المشاركة (مال المضاربة ومال الجهة المنشئة حيث تأخذ ربح مالها)، ثم يوزَّع ربح مال المضاربة بين حملة الصكوك والجهة المنشئة. وينظر البند (٨-٩) والبند (٩-١-٦) من المعيار الشرعي رقم (١٣) بشأن المضاربة.

8.1.1.2.d.2.3. If the originator undertakes to purchase a share of the underlying assets of the Mudaraba Sukuk after the issuance and before the maturity of the Sukuk term, then a partnership is formed between [the originator] and the certificateholders immediately upon this purchase being [concluded], and the Sukuk capital decreases by the amount of the share that has been purchased. This shall have similar status of commingling the capital of Sukuk with funds of the originator, as given in the above s. (8-1-1-2-d-2-2). See: s. (6-3-2-1) of this Standard, and s. (3-5-1) of Shari'ah Standard No. (56): Liability of the Investment Manager.

8-1-1-2-د-2-3. إذا تعهدت الجهة المنشئة بشراء حصَّة من موجودات صكوك المضاربة بعد الإصدار وقبل انتهاء أجل الصكوك، فإن مشاركةً تنشأ بينها وبين حملة الصكوك بمجرَّد هذا الشراء، وينقص رأس مال الصكوك بمقدار الحصة التي تم شراؤها، ويأخذ ذلك حكم خلط الجهة المنشئة رأس مال الصكوك بأموالها، وفق ما تقدم في البند (٨-١-١-٢-د-٢-٢). وينظر البند (٦-٣-٢-١) من هذا المعيار، والبند (٣-٥-١) من المعيار الشرعي رقم (٥٦) بشأن ضمان مدير الاستثمار.

8-1-1-3. Wakala (Agency) Sukuks:

8-1-1-3-a. Wakala Sukuks means the Sukuks in which the relationship between the certificateholders and the originator is based on an agency contract, and among its most important

8-1-1-3. صكوك الوكالة:

8-1-1-3-أ. يقصد بصكوك الوكالة الصكوك التي تقوم العلاقة فيها بين حملة الصكوك والجهة المنشئة على عقد وكالة، ومن أهم خصائصها

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characteristics are the following:

ما يأتي:

8-1-1-3-a-1. That each certificate represents a common share in the agency's assets or activities.

8-1-1-3-أ-1. أن كل صك منها يمثل حصة شائعة في موجودات أو نشاط الوكالة.

8-1-1-3-a-2. Delivery of the [Wakala] capital or the underlying assets of [Agency Sukuk] to the originator pursuant to the agency contract establishes a fiduciary relationship between [the originator] and the certificateholders, so it does not entail that the capital is an indisputable obligation owed by the originator.

8-1-1-3-أ-2. أنَّ تسليم رأس مالها أو موجوداتها للجهة المنشئة بموجب عقد الوكالة ينشئ علاقة أمانةٍ بينها وبين حملة الصكوك، فلا يُثبت رأس المال أو قيمة الموجودات التزامًا حتمًا في ذمة الجهة المنشئة.

8-1-1-3-a-3. The capital or underlying assets of Wakala Sukuk and its profits or returns are not guaranteed by the originator, and it does not guarantee the capital or the value of the underlying assets to the extent that [the originator] recognizes it as a debt owed by it except in the event of misconduct, negligence, or breach of conditions. See: s. (8-1-1-3-c-2).

8-1-1-3-أ-3. أنَّ رأس مالها أو موجوداتها، وأرباحها أو عوائدها، غير مضمونةٍ من الجهة المنشئة، وهي لا تضمن رأس المال أو قيمة الموجودات بحيث تثبت دينًا في ذمتها إلا في حال التعدي أو التقصير أو مخالفة الشروط. وينظر البند (٨-١-١-٣-ج-٢).

8-1-1-3-a-4. It is exposed to investment risks arising from the feasibility of the agency's activity and its ability or the ability of the underlying assets of agency to achieve profits and expected returns. It is exposed to the credit risk of the financees if the originator uses the agency's capital to finance them in any forms of commutative [contracts], or the risks of payment of consideration for benefiting from assets of agency.

8-1-1-3-أ-4. أنها معرضة لمخاطر الاستثمار الناشئة عن جدوى نشاط الوكالة وقدرته أو قدرة موجودات الوكالة على تحقيق الأرباح والعوائد المتوقعة، وتكون معرضة لمخاطر ائتمان المتمولين حال استخدام الجهة المنشئة رأس مال الوكالة في تمويلهم بصيغة من صيغ المعاوضات، أو مخاطر دفع عوض الانتفاع بموجودات الوكالة.

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8-1-1-3-a-5. Wakala Sukuk's profits and returns are not ascertained as a lump sum or a percentage of a known amount. There is no [Shari'ah] objection of the ascertainment as an expectation with no obligation.

8-1-1-3-أ-5. أنَّ أرباحها وعوائدها لا تتحدد بمبلغ مقطوع أو بنسبةٍ من مبلغ معلوم، ولا مانع من التحديد على سبيل التوقّع دون التزام به.

8-1-1-3-b. **Types of Wakala Sukuk**

Wakala Sukuks are of two types:

8-1-1-3-b-1. **Investment Agency Sukuk:**

It is the Sukuk that is issued to finance the originator through Investment Agency in an investment activity. The issuer of these Sukuk shall be the principal (investor) on behalf of the certificateholders; The originator is an investment agent. The certificateholders own, among them, a common share in the assets of the activity, including profits and liabilities [of the certificateholders], and the certificateholders are [solely] entitled for the realized profits, and the loss is borne by them. The originator shall have a known fee. Usually, the originator has an incentive along with this fee.

8-1-1-3-b-2. **Service Agency Sukuks:**

It is the Sukuk that is issued to finance the purchase of the underlying assets, and the certificateholders delegates the originator to provide services related to those assets, other than investing them. The issuer of these Sukuk shall be the principal (Muwakkil) on behalf of the certificateholders, and the originator shall be the service agent. The certificateholders, among them, own a common share in the underlying assets, along with the profits and liabilities [of the underlying assets]. The certificateholders are [solely] entitled for returns of those underlying assets, and the loss or damage

8-1-1-3-ب. **أنواع صكوك الوكالة:**

صكوك الوكالة على نوعين:

8-1-1-3-ب-1. **صكوك الوكالة بالاستثمار:**

هي الصكوك التي يتم إصدارها لتمويل الجهة المنشئة بالوكالة بالاستثمار في نشاط استثماري. ويكون المصدر لتلك الصكوك أصيلاً (مستثمراً) نيابة عن حملة الصكوك؛ والجهة المنشئة وكيلاً بالاستثمار. ويملك حملة الصكوك موجودات النشاط على الشيوع بينهم بغنمها وغرمها، ويختص حملة الصكوك بالأرباح المحققة، وتكون الخسارة عليهم، ويكون للجهة المنشئة أجر معلوم، وفي الغالب يكون لها حافز مع هذا الأجر.

8-1-1-3-ب-2. **صكوك الوكالة بالخدمات:**

هي الصكوك التي يتم إصدارها لتمويل شراء موجوداتٍ، وتوكيل حملة الصكوك الجهة المنشئة بتقديم خدماتٍ لتلك الموجودات، غير استثمارها. ويكون المصدر لتلك الصكوك أصيلاً (موكلاً) نيابة عن حملة الصكوك، والجهة المنشئة وكيلاً بالخدمات، ويملك حملة الصكوك الموجودات على الشيوع بينهم، بغنمها وغرمها، ويختصون

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shall be borne by [the certificateholders]. The originator shall have a known fee. Usually, the originator has an incentive along with this fee.

بعوائد تلك الموجودات، وتكون الخسارة أو التلف عليهم، ويكون للجهة المنشئة أجرٌ معلوم، وفي الغالب يكون لها حافز مع هذا الأجر.

8.1.1.3.b.2.1. Service Agency **Sukuks** are of two types

8-1-1-3-ب-2-1. وصكوك الوكالة بالخدمات على نوعين:

8.1.1.3.b.2.1.1. Wakala Sukuk for providing services to income-generating assets:

It is the Sukuk that is issued to finance the purchase of income-generating underlying assets by certificateholders from the originator or other party, and to pay price of the underlying assets from the proceeds of subscription, and authorizing the originator by the certificateholders to extend services to those assets, such as collecting returns, renewing the existing contracts or concluding new contracts with its beneficiaries, maintenance, paying taxes, and the like. [The scope of] agency to the originator may include purchasing assets if the purchase is from others. See: s. (4-3-1) of Shari'ah Standard No. (56): Liability of the Investment Manager. In most cases, the originator undertakes to purchase the underlying assets from the certificateholders at the end of the [Sukuk] term. The certificateholders own, in common, the underlying assets and their returns, along with profits and liabilities of the underlying asset, and this is based on the partnership among them, and it is joint enterprise (*shirkat 'aqd*).

8-1-1-3-ب-2-1-1. صكوك التوكيل بتقديم خدمات لموجودات مدرةٍ للدخل:

وهي صكوك يتمُّ إصدارها لتمويل شراء حمَلة الصُّكوك موجوداتٍ تدرُّ دخلاً، من الجهة المنشئة أو غيرها، ودفع ثمنها من حصيلة الاكتتاب، وتوكيل حمَلة الصُّكوك الجهةَ المنشئةَ بتقديم خدمات لتلك الموجودات، من نحو تحصيل العوائد وتجديد العقود القائمة أو إبرام عقود جديدة مع المنتفعين بها والصِّيانة ودفع الضَّرائب، وما شابه ذلك، وقد يشمل التَّوكيل للجهة المنشئة شراء الموجودات إن كان الشراء من غيرها. وينظر البند (٤-٣-١) من المعيار الشَّرعي رقم (٥٦) بشأن ضمان مدير الاستثمار. والغالب أن تتعهد الجهة المنشئة بشراء الموجودات من حمَلة الصُّكوك في نهاية مدَّتها. ويملك حمَلة الصُّكوك الموجودات وعوائدها على الشيوع، بغنمها وغرمها، وذلك على أساس الشركة بينهم، وهي شركة عقد.

8.1.1.3.b.2.1.2. Agency Sukuk to sale of the underlying assets:

They are Sukuk that is issued to finance purchase of the underlying assets for the certificateholders, such as tangible assets, usufructs, or others, and to pay their price from the proceeds of subscription, and the certificateholders deputize the originator to sell a specified quantity of those underlying assets

8-1-1-3-ب-2-1-2. صكوك التوكيل ببيع موجودات:

وهي صكوك يتمُّ إصدارها لتمويل شراء حمَلة الصُّكوك موجودات، كالأعيان أو المنافع أو غيرها، ودفع ثمنها من حصيلة الاكتتاب، وتوكيل حمَلة الصُّكوك الجهةَ المنشئةَ

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بيع كميَّة محدَّدة من تلك الموجودات للغير (مشتري التجزئة أو الجملة) في كلِّ فترة توزيع عوائد. والغالب أن تتعهد الجهة المنشئة بشراء المتبقي من الموجودات من حمَلة الصُّكوك في نهاية مدَّتها. ويملك حمَلة الصُّكوك الموجودات وعوائدها على الشيوع، بغنمها وغرمها، وذلك على أساس الشركة بينهم، وهي شركة عقد.

to third parties (retail or wholesale buyers) in each return distribution period. In most cases, the originator undertakes to purchase the remainder of the underlying assets from the certificateholders at the end of the term of Sukuk. The certificateholders own, in common, the underlying assets and their returns along with the rewards and liability [of the underlying assets], on the basis of the partnership between them, and it's a joint enterprise (*shirkat 'aqd*).

8-1-1-3-ج. **أحكام عامة لصكوك الوكالة:**

8-1-1-3-c. **General provisions for Wakala Sukuk:**

8-1-1-3-ج-1. لا يجوز أن تضمن الجهة المنشئة رأس المال أو قيمة الموجودات في صكوك الوكالة، ومن الضمان التَّعهد ببقاء قيمة الموجودات عند مقدارٍ معيَّن. وينظر البند (٦-٢-١-٢-أ). إلا أن تكون الجهة المنشئة طرفًا ثالثًا في صكوك الوكالة بالخدمات بالضوابط المذكورة في البند (٤-٣-٢) من المعيار الشرعي رقم (٥٦) بشأن ضمان مدير الاستثمار، مع مراعاة البند (٥-٢) من المعيار الشرعي رقم (٢٣) بشأن الوكالة تصرف الفضولي.

8-1-1-3-c-1. It is not permitted for the originator to guarantee the capital or the value of the underlying assets in the Wakala Sukuks, and it is a [form of] guarantee to provide an undertaking of stabilization of the value of the underlying assets at a certain amount, see s. (6-2-1-2-a), except if the originator is a third party in the Service Agency Sukuk as per the rules given in s. (4-3-2) of Shari'ah Standard No. (56): Liability of the Investment Manager, and with due compliance with s. (5-2) of Shari'ah Standard No. (23): Agency and the Act of Uncommissioned Agent (Fodooli).

8-1-1-3-ج-2. لا يجوز أن تضمن الجهة المنشئة أرباح أو عوائد صكوك الوكالة بمبلغ أو بنسبة من رأس المال أو بمؤشر، سواء في نشرة الإصدار أو في العقد المنظم للعلاقة بين حملة الصكوك والجهة المنشئة أو في أي

8-1-1-3-c-2. Neither in the base prospectus nor in the contract regulating the relationship between the certificateholders and the originator or in any other document, it is not permitted for the originator to guarantee the profits or returns of Wakala Sukuk either by an amount, a percentage of the principal amount or an index. It is permitted to mention [the profits or returns] as a matter of

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مستند آخر، ويجوز أن يذكر ذلك على سبيل التوقع، ويجب أن تكون الأرباح أو العوائد ناتجةً من نشاط أو موجودات الصكوك. وينظر البند (٦-٢-١-٢-أ) والبند (٧-٣-٢-٥) والبند (٧-٣-٢-١٢) والبند (٨-١-١-٣-أ-٣) والبند (١١-٢-٤). ويستثنى من ذلك أن تكون الجهة المنشئة طرفًا ثالثًا في صكوك الوكالة بالخدمات، حيث يجوز لها أن تلتزم بجبر النَّقص في الأرباح أو العوائد بالضوابط المذكورة في البند (٤-٣) من المعيار الشرعي رقم (٥٦) بشأن ضمان مدير الاستثمار، وبمراعاة البند (٥-٢) من المعيار الشرعي رقم (٢٣) بشأن الوكالة والتصرف الفضولي.

expectation. It is required that the profits and the returns are generated from the activities or the underlying assets of Sukuk. See: See: s. (6-2-1-2-a), s. (7-3-2-5), s. (7-3-2-11), s. (8-1-1-3-a-3) and s. (11-2-4). An exception [to this provision] is that the originator would be a third party to Service Agency Sukuk, in that case it is permitted [for the originator] to commit to reparation of the shortfall (*jabr al-naqṣ*) in the profits or returns as per the rules given in s. (3-4) of Shari'ah Standard No. (56): Liability of the Investment Manager, and with due compliance with s. (5-2) of Shari'ah Standard No. (23): Agency and the Act of Uncommissioned Agent (Fodooli).

8-1-1-3-ج-3. يجوز أن يشترط حملة الصكوك على الجهة المنشئة تقديم ضمان مشروعٍ لرد رأس مال الصكوك أو بدل موجوداتها في حال التعدي أو التقصير أو مخالفة الشروط، وينظر البند (٢-٢-١) من المعيار الشرعي رقم (٥) بشأن الضمانات، والبند (٣-١-٤-٢) من المعيار الشرعي رقم (١٢) بشأن الشركة (المشاركة) والشركات الحديثة، والبند (٦) من المعيار

8-1-1-3-c-3. It is permitted for certificateholders to stipulate upon the originator to provide a Shari'ah compliant security for repayment of the capital of the Sukuk or substitute its underlying assets in the event of misconduct, negligence, or breach of the conditions. See: s. (2-2-1) of Shari'ah Standard No. (5) Guarantees, and s. (3-1-4-2) of Shari'ah Standard No. (12): Sharikah (Musharaka) and Modern Companies, and s. 6 of Shari'ah Standard No. (13): Mudaraba.

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الشرعي رقم (١٣) بشأن المضاربة.

8-1-1-3-ج-4. يجوز اشتراط ملاءة الجهة المنشئة بمستوى معين عند الاكتتاب في صكوك الوكالة ومنعها من تصرفات محددة تخل بها، فإن ادعت عند إصدار الصكوك بمستوىً معيَّن من الملاءة ثم ظهر أنها كانت على خلاف ما ادعته أو تصرفت تصرفًا ممنوعًا في العقد، وقرر حملة الصكوك تصفيتها بسبب ذلك، ونقص رأس المال؛ فإنها تضمن النقص.

8-1-1-3-c-4. At the time of subscription to Wakala Sukuk and to prevent [the originator] from specific actions that are prejudice [to Wakala Sukuk], it is permitted to stipulate the solvency of the originator at a certain level. Hence, if [the originator] claimed a certain level of solvency and later it was revealed that it was contrary to what it claimed or committed an act that was prohibited in the contract, the certificateholders resolved dissolution of the Sukuk due to that reason and the capital was short; so [the originator] shall guarantee the shortfall [in the capital].

8-1-1-3-ج-5. يجوز للجهة المنشئة أن تستخدم الوسائل المشروعة للتحوط من المخاطر المتعلقة برأس المال أو الموجودات أو العوائد بالاتفاق مع حملة الصكوك. فإن استخدمت الجهة المنشئة هذه الوسائل دون اتفاق مع حملة الصكوك ودون أن يجري عرف التعامل بذلك؛ فلا يجوز أن يرتب عليهم أي التزام مالي. وينظر البند (٦-١-٢) من هذا المعيار، وينظر المعيار الشرعي رقم (٤٥) بشأن حماية رأس المال والاستثمارات، والمعيار الشرعي رقم (٥٦) بشأن ضمان مدير الاستثمار.

8-1-1-3-c-5. It is permitted for the originator to use Shari'ah compliant means to hedge against risks related to the capital, underlying assets or returns, with an agreement with the certificateholders. If the originator used these means without agreement with the certificateholders and with no customary practice of applying them; then it is not permitted to entail any financial obligation upon [the certificateholders]. See: s. (6-1-2) of this Standard, and Shari'ah Standard No. (45): Protection of Capital and Investments, and Shari'ah Standard No. (56): Liability of the Investment Manager.

8-1-1-3-ج-6. يجب أن تكون صكوك الوكالة مؤقتةً تنتهي بمدة محددة أو ببيع موجوداتها، فلا يجوز

8-1-1-3-c-6. Wakala Sukuk are required to be time-bound that end by a specified period or by sale of its underlying assets. It is not

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أن تكون مستمرة باستمرار الجهة المنشئة. وينظر البند (٨-٣-١-٢-ب).

permitted to have Wakala Sukuk that are perpetual with the continuance of the originator. See: s. (8-3-1-2-b).

8-1-1-3-د. **أحكام خاصة بأنواع صكوك الوكالة:**

تخضع صكوك الوكالة لأحكام خاصة بكل نوعٍ منها بحسب العقد بين حملة الصكوك والجهة المنشئة، وفق ما يأتي:

8-1-1-3-d. **Special provisions for types of Wakala Sukuks:**

Wakala Sukuks are subject to special provisions for each type, according to the contract between the certificateholders and the originator, as follows:

8-1-1-3-د-1. **الأحكام الخاصة بصكوك الوكالة بالاستثمار:**

8-1-1-3-d-1. **Special Provisions related to Investment Agency Sukuk:**

8-1-1-3-د-1-1. يجب التقيد في صكوك الوكالة بالاستثمار بالضوابط الشرعية الواردة في المعيار الشرعي رقم (٤٦) بشأن الوكالة بالاستثمار.

8.1.1.3.d.1.1. It is required that the Investment Agency Sukuk must adhere to the Shari'ah guidelines mentioned in Shari'ah Standard No. (46): Al-Wakala bi Al-Istithmar (Investment Agency).

8-1-1-3-د-1-2. يجوز أن تكون صكوك الوكالة بالاستثمار مطلقة، كما يجوز أن تكون مقيدة بمشروع معيَّن، أو مقيدة بالاستثمار في الوعاء العام للجهة المنشئة.

8.1.1.3.d.1.2. It is permitted if Investment Agency Sukuk is unrestricted. Also, it is permitted if it is restricted to a specific project or restricted to investment in the general pool of the originator.

8-1-1-3-د-1-3. يجوز استخدام رأس مال صكوك الوكالة بالاستثمار المستثمر في الوعاء العام للجهة المنشئة في الوفاء بما على الوعاء العام من التزامات، بشرط أن يتم ذلك بعد أن يملك حملة الصكوك حصةً في الوعاء العام بنسبة رأس مالهم. وينظر البند (١٢-٢) من المعيار الشرعي رقم (٤٦) بشأن الوكالة

8.1.1.3.d.1.3. It is permitted to use the capital of Investment Agency Sukuk, that is invested in the general pool of the originator, to meet the obligations of the general pool, provided that this is done after the certificateholders own a share in the general pool in proportion to their capital. See: s. (12-2) of Shari'ah Standard No. (46): Al-Wakala bi Al-Istithmar (Investment Agency). If the investment of the capital of Sukuk is restricted to a

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specific project, then it is not permitted to include it in the general pool, and it is not permitted for the originator to use it to settle the obligations of the general pool or other obligations of [the originator] other than what arises out of the obligations of that project.

بالاستثمار. فإن كان استثمار رأس مال الصكوك مقيداً بمشروع معين، فإنه لا يجوز إدخاله في الوعاء العام، ولا يجوز للجهة المنشئة عندئذ أن تستخدمه في الوفاء بما على الوعاء العام من التزامات أو بما عليها من التزامات أخرى غير التزامات ذلك المشروع.

8.1.1.3.d.1.4. It is not permitted to link returning the capital of Investment Agency Sukuk or the distribution of its profits to the conditions of the originator's investments that are beyond the activity in which the capital was invested. This includes the settlement by originator's debtors of their obligations that did not arise from the investment of the Sukuk capital.

8-1-1-3-د-1-4. لا يجوز ربط رد رأس مال صكوك الوكالة بالاستثمار أو توزيع أرباحها بأحوال استثمارات الجهة المنشئة الخارجة عن النشاط المستثمَر فيه رأس المال، ومن ذلك وفاء مديني الجهة المنشئة بالتزاماتهم التي لم تنشأ عن استثمار رأس مال الصكوك.

8-1-1-3-d-2. **Special Provisions related to Service Agency Sukuk**

8-1-1-3-د-2. **الأحكام الخاصة بصكوك الوكالة بالخدمات:**

8.1.1.3.d.2.1. In general, the following provisions apply to Service Agency Sukuk:

8-1-1-3-د-2-1. تطبق على صكوك الوكالة بالخدمات بوجه عام الأحكام الآتية:

8.1.1.3.d.2.1.1. In Service Agency Sukuk, it is required to adhere to the Shari'ah rules of agency mentioned in Shari'ah Standard No. (23): Agency and the Act of Uncommissioned Agent (Fodooli) and Shari'ah Standard No. (56): Liability of the Investment Manager.

8-1-1-3-د-2-1-1. يجب التَّقيد في صكوك الوكالة بالخدمات بالضَّوابط الشَّرعية للوكالة الواردة في المعيار الشَّرعي رقم (٢٣) بشأن الوكالة وتصرُّف الفضولي، والمعيار الشرعي رقم (٥٦) بشأن

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ضمان مدير الاستثمار.

8-1-1-3-د-2-1-2. يجب أن تقتصر الخدمات التي يقدِّمها الوكيل بالخدمات على الخدمات التي لا تأخذ صفةً استثماريةً، من نحو ما تقدَّم في البند (٨-١-١-٣-ب-٢-١-١).

8.1.1.3.d.2.1.2. It is required that the services provided by the service agent are limited to services that do not carry on the investment nature, as stated in s. (8-1-1-3-b-2-1-1).

8-1-1-3-د-2-1-3. إن نُصَّ على أن الوكيل بالخدمات يدير الموجودات وفق خطَّة استثمارية تتضمن الاستقلال في اتخاذه قرارات استثمارية بشأنها، تقلب فيها الموجودات أو تستبدل مع غيرها أو تباع بغرض التصفية، ولم تكن مجرَّد خطَّة للخدمات التي يقدِّمها، فإنه يصير وكيلاً بالاستثمار تطبق عليه أحكامه. وينظر البند (٤-٣-١) من المعيار الشَّرعي رقم (٥٦) بشأن ضمان مدير الاستثمار.

8.1.1.3.d.2.1.3. If it is stated that the service agent manages the underlying assets according to an investment plan, that features independence in terms of taking investment decisions regarding [the underlying assets] so that the underlying assets can turned around (*taqlīb*), substituted with other assets, or sold for the purpose of dissolution, and [it is] not just a plan for the service, so [the service agent] turns into an investment agent and its [respective] provisions shall apply to it. See: s. (4-3-1) of Shari'ah Standard No. (56): Liability of the Investment Manager.

8-1-1-3-د-2-1-4. يكون وكيل الخدمات طرفًا ثالثًا بالشروط الواردة في البند (٤-٣) من المعيار الشرعي رقم (٥٦) بشأن ضمان مدير الاستثمار، مع مراعاة ما جاء في البند (٥-٢) من المعيار الشرعي رقم (٢٣) بشأن الوكالة وتصرف الفضولي.

8.1.1.3.d.2.1.4. The Service Agent shall be a third party according to the conditions stated in s. (4-3) of Shari'ah Standard No. (56): Liability of the Investment Agent and with due compliance with s. (5-2) of Shari'ah Standard No. (23): Agency and the Act of Uncommissioned Agent (Fodooli).

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8.1.1.3.d.2.1.5. If it is stipulated that the service agent invests whatever surplus liquidity may arise for the benefit of the certificateholders, then [the agent] becomes an investment agent in the amount of the surplus that is actually invested. If [the agent] undertakes to buy the underlying assets of the Sukuk, it is not permitted to have its undertaking to buy the underlying assets of the surplus for a price agreed upon *ab initio* if investment of the surplus was existing at the time of excreting the purchase undertaking. See: s. 5-3 of Sharia Standard No. (45) Protection of Capital and Investments.

8-1-1-3-د-2-1-5. إن نص على أن الوكيل بالخدمات يَستثمر ما قد يطرأ من فائض سيولةٍ لصالح حمَلة الصُّكوك، فإنه ينقلب وكيلاً بالاستثمار في مبلغ الفائض المستثمَر فعلاً، فإن تعهد بشراء موجودات الصُّكوك فلا يجوز أن يكون تعهده بشراء موجودات هذا الفائض بثمنٍ متَّفَقٍ عليه ابتداءً إن كان استثمار الفائض قائمًا وقت تنفيذ التَّعهد بالشِّراء. وينظر البند (٥-٣) من المعيار الشَّرعي رقم (٤٥) بشأن حماية رأس المال والاستثمارات.

8.1.1.3.d.2.1.6. The agent remains a service agent, and does not turn into an investment agent, if its role is confined to inform the certificateholders, at the time of substituting the underlying assets, if the need for the substitution, or informing whoever manages the issuer (representing the certificateholders) of [the need of substitution], so that the certificateholders or the party managing the issuer on their behalf may take the substitution decision, provided that the service agent, in the second case, is not the manager of the issuer.

8-1-1-3-د-2-1-6. يبقى الوكيل وكيلا بالخدمات، ولا ينقلب وكيلا بالاستثمار إذا اقتصرت مهمته في حال استبدال موجودات الصكوك على إعلام حمَلتها بحاجتها إلى الاستبدال، أو إعلام من يدير المصدر الممثِّل لحمَلة الصُّكوك بذلك، ليتَّخذ حملة الصكوك أو يتَّخذ من يدير المصدر بالوكالة عنهم، قرارَ الاستبدال، شريطة أن لا يكون الوكيل بالخدمات في الحال الثانية هو المدير للمصدر.

8.1.1.3.d.2.1.7. It is not permitted to stipulate that

8-1-1-3-د-2-1-7. لا يجوز عند اشتراط قيام الوكيل

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بالخدمات بالتأمين على الموجودات بنحو يتعذر عليه تنفيذه، النَّص على أن الوكيل يدفَع من ماله مبلغ مزايا أو تعويضات التأمين لحمَلة الصكوك، وأن ما تدفعه شركة التأمين بعد ذلك يكون له؛ لما في ذلك من المقامرة، فشركة التأمين قد لا تدفع شيئًا، وقد تدفع كلَّ أو بعض ما دَفَع، فيكون ما يدفعه الوكيل بالخدمات لحمَلة الصُكوك من قبيل معاوضةِ مبلغٍ نقديٍّ حاضرٍ بمبلغٍ نقديٍّ مؤجَّلٍ مجهولِ المقدار. وينظر البند (٦-٢-١-٤).

the service agent will [obtain the insurance] for the underlying asset in a manner that will be difficult to perform it. [It is not permitted] to stipulate that the agent shall pay, out of its own funds, to the certificateholders, the amount of benefits or insurance compensation and whatever amount paid [later on] by the insurance company will be for [the agent], because this would be gambling (*qimār*), since the insurance company may pay nothing or pay full or part of what was [already] paid [by the agent], so whatever paid by the service agent to the certificateholders will be in the form of transacting a spot cash amount against deferred cash amount that is unknown in its value. See: s. (6-2-1-4).

8-1-1-3-د-2-1-8. لا يجوز أن يُشترَط على الوكيل بالخدمات المحافظة على قيمة موجودات الصُّكوك عند قيمةٍ معيَّنة، كالقيمة الاسميَّة. ويجوز أن يُشترَط عليه أن لا يتصرَّف بما يُنقص من قيمة الموجودات تصرفًا غير مأذون له فيه تعاقدًا أو عرفًا، فإن فعل كان ضامنًا للنَّقص.

8.1.1.3.d.2.1.8. It is not permitted for the service agent to provide the services of stabilization of value of the underlying assets of Sukuk at a specific value, such as the face value. It is permitted to stipulate upon [the service agent] that it will not commit any act that will cause decrease in the value of the underlying assets in a manner that [the service agent] is not authorized to do either contractually or customarily. If [the service agent] does so, then it will be liable for the shortfall.

8-1-1-3-د-2-1-9. إذا تعهدت الجهة المنشئة بشراء موجودات الصكوك من حملتها، وكانت هي التي باعتها لهم، فإن هذا يكون من إعادة الشراء، وتنطبق عليه

8.1.1.3.d.2.1.9. If the originator undertakes to purchase the underlying assets of Sukuk from its certificateholders, and it is the party that sold [the underlying assets] to [the certificateholders], then this is a repurchase, and its rules apply to it.

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ضوابطه. وتنظر الفقرة (٣) من المعيار الشرعي رقم (٥٨) بشأن إعادة الشراء.

See: Para. 3 of Shari'ah Standard No. (58): Repurchase.

8-1-1-3-د-2-2. **الأحكام الخاصة لصكوك التوكيل بتقديم خدمات لموجودات مدرةٍ للدخل:**

8.1.1.3.d.2.2. **Special Provisions to Service Agency Sukuk for income-generating assets:**

8-1-1-3-د-2-2-1. يمكن أن تكون الموجودات مفردَةً أو مجموعةً في محفظةٍ، وهي قد تكون أعيانـًا مؤجرة أو قابلة للتأجير أو أسهمـًا أو صكوكـًا أو نحوها، أو مجموعة من هذه كلها، أو منها ومن ديون. فإن كانت الموجودات في محفظةٍ مملوكة للجهة المنشئة واشترى حملة الصكوك حصةً من المحفظة، وتولت الجهة المنشئة تقديم بعض الخدمات لحصة حملة الصكوك، فإنها تأخذ حكم الشريك في شركة العقد في أحكام الضمان والتعهد بالشراء. ومثله ما لو اشتروا من الجهة المنشئة بعض الأسهم التي تملكها في شركة واحتفظت هي بالبعض الآخر. وينظر البند (٥-١-٣).

8.1.1.3.d.2.2.1. The underlying assets can be a single or a group of assets in a portfolio, and they may be tangible leased or leasable assets, shares, Sukuks, etc., or a combination of all of these, or [a combination] of them and debts. If the assets are in a portfolio owned by the originator and the certificateholders has purchased a share of the portfolio, the originator undertakes to provide some services for the share of the certificateholders, then it takes the status of a partner in the joint enterprise (*sharikat al-'aqd*) regarding the provisions of the liability and the purchase undertaking. A similar provision applies, if [the certificateholders] purchased from the originator some of the shares, that are owned by the partnership, the remaining portion. See: s. (5-1-3).

8-1-1-3-د-2-2-2. يجب أن يقع البيع إلى حمَلة الصُّكوك على الموجودات نفسها، وما يتعلَّق بها

8.1.1.3.d.2.2.2. It is required that the sale to the certificateholders takes place on the underlying assets themselves, including the rights and obligations

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associated to them. It is not permitted that [the sale contract] takes place on the contracts of the underlying assets, such as stipulating about selling the Ijarah contracts and not the leased assets, or [selling] only returns [of the leased assets], which is referred as a beneficial interest, an economic benefit or any other term. See: s. (8-1-1-1-d-4-3).

من حقوق والتزامات، ولا يجوز أن يقع على عقود الموجودات، كأن يُنصَّ على بيع عقود الإجارة وليس الأعيان المؤجرة، أو على عوائدها فقط، وهي التي يُعبَّر عنها بالمصلحة النَّفعيَّة (Beneficial Interest) أو بالمنفعة الاقتصادية (Economic Benefit) أو بأي اصطلاح آخر. وينظر البند (٨-١-١-١-د-٤-٣).

8.1.1.3.d.2.2.3. If the underlying assets are assets leased under Ijarah Muntaihia Bittamleek, and the term of the Ijarah, when the certificateholders acquire the asset, is shorter than the Sukuk period; the service agent have the status of the investment agent if [the agent] was the one who will solely take decisions regarding buying new assets, but if the term of the Ijarah is equal to or longer than the term of the Sukuk and the service agent needs to turn around the liquidity that has generated at its side; so it becomes an investment agent in that.

8-1-1-3-د-2-2-3. إن كانت الموجوداتُ أعيانـًا مؤجَرة إجارة منتهية بالتَّمليك، وكانت مدَّة الإجارة عند تملُّك حمَلة الصُّكوك الأعيانَ أقل من مدة الصكوك؛ فإن الوكيل بالخدمات يأخذ حكم الوكيل بالاستثمار إن كان ينفرد بقرار شراء أعيان جديدة. وإذا إذا كانت مدة الإجارة مساويةً أو أطول من مدَّة الصُّكوك واحتاج الوكيل بالخدمات إلى تقليب سيولة طرأت لديه؛ فإنه يصبح في ذلك وكيلاً بالاستثمار.

8.1.1.3.d.2.2.4. If the assets are not legally registered in the name of the originator that leases them, with the law making a requirement to carry registration for the transfer of the title, as if the assets were real estate assets, then it is not

8-1-1-3-د-2-2-4. إن كانت الأعيان غير مسجَّلة قانونـًا باسم الجهة المنشئة المؤجرة لها مع اشتراط القانون التَّسجيل لانتقال الملكيَّة، كما لو كانت أعيانـًا عقارية،

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فلا يجوز حينئذ أن يُشترَط في عقد بيع الجهة المنشئة حمَلةَ الصُّكوك أعيانـًا مؤجَرة أن تكون التزامات المستأجرين لها معتبرة قانونـًا، لأن مثل هذا الشَّرط يخلُّ بعقد البيع من أوَّل إبرامه.

permitted to stipulate in the contract of sale of leased assets by the originator to the certificateholders that obligations of the lessee will be legally established, because such a condition does not non-conform from the very beginning of its conclusion.

8-1-1-3-د-2-2-5. لا يجوز أن يتعهد الوكيل بالخدمات بأن يستبدل موجودات من عنده بموجودات الصُّكوك التالفة أو التي نقصت قيمتها أو التي لم تعد مجديةً اقتصاديـًا لما في ذلك من الضَّمان الممنوع شرعـًا على الوكيل إذا لم يكن طرفـًا ثالثـًا. فإن كان الوكيل ضامنـًا لتلك الموجودات بسبب أن ما طرأ لها يرجع إلى تعديه أو تقصيره أو مخالفته شروط التَّعاقد، فإن لحملة الصكوك أو من يمثلهم إلزامه بتعويضها بموجودات مثلها وقت وقوع الطارئ ولو لم يكن طرفـًا ثالثـًا. ويراعى ما تقدَّم في البند (٨-١-١-٣-د-٢-١-٢).

8.1.1.3.d.2.2.5. It is not permitted for the service agent to undertake to substitute the assets of its own against the underlying assets of Sukuk that are damaged, devalued, or that are no longer useful from economic point of point, because that would be a form of a liability [imposed upon] the agent that is prohibited by the virtue of Shari'ah, unless and until [the agent] was a third party. If the agent is under liability of those assets because what happened to them is due to [service agent's] misconduct, negligence, or breach of the terms of the contract, then the certificateholders, or party representing them, may oblige [the agent] to compensate them with similar assets at the time of the contingency, even if he was not a third party. With due compliance with the preceding s. (8-1-1-3-d-2-1-2) of this Standard.

8-1-1-3-د-2-3. **الأحكام الخاصة لصكوك التوكيل ببيع موجودات:**

8.1.1.3.d.2.3. **Special Provisions to Agency Sukuks for Selling the Underlying Assets:**

8-1-1-3-د-2-3-1. يمكن أن تكون الموجودات أعيانًا، كأن يشتري حملة الصكوك وحداتٍ

8.1.1.3.d.2.3.1. The underlying assets can be tangible assets, such as certificateholders buying real

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عقارية ويوكِّلوا الجهة المنشئة ببيعها في السوق، أو أن تكون خدمات، كأن يشتري حملة الصكوك خدمات النَّقل الجوي ويوكِّلوا الجهة المنشئة ببيعها في صورة تذاكر سفر، أو أن يشتروا خدمات الاتصال ويوكلوا الجهة المنشئة ببيعها لمن يستخدمها في الاتصال الهاتفي، وقد تكون الموجودات أسهمـًا يشتريها حملة الصكوك ويوكلوا الجهة المنشئة ببيعها في السوق.

estate units and authorizing the originator to sell them in the market, or they can be services, such as certificateholders buying air travel services and authorizing the originator to sell them in the form of air tickets, or they can buy telecommunication services and authorizing the originator to sell them to whoever uses them for telephone calls. The underlying assets may be shares that certificateholders buy and authorize the originator to sell in the market.

8-1-1-3-د-2-3-2. يُشترَط في الخدمات (المنافع) التي يشتريها حمَلة الصُّكوك، ما يلي:

8.1.1.3.d.2.3.2. The services (benefits) purchased by certificateholders shall be subject to the following:

8-1-1-3-د-2-3-2-1. أن تكون مباحةً شرعًا. وإذا اشتملت على مكونات محرمة فيجب استثناؤها من الخدمات التي يملكها حملة الصكوك. وينظر البند (٥-١-٢).

8.1.1.3.d.2.3.2.1. It should be Shari'ah compliant. If it contains prohibited components, it is required to exclude them from the services owned by the certificateholders. See: s. (5-1-2).

8-1-1-3-د-2-3-2-2. أن يكون لها مقياسٌ معياريٌّ معتدٌّ به في صناعتها، تُقاس به الكميَّة التي تُباع منها.

8.1.1.3.d.2.3.2.2. It should have a reliable standard in its making, by which the quantity sold is measured.

8-1-1-3-د-2-3-2-3. أن يكون البائع قادراً على تقديم الكميَّة المبيعة من الخدمات.

8.1.1.3.d.2.3.2.3. That the seller has the capability of providing the quantity of services being delivered.

8-1-1-3-د-2-3-2-4. أن تكون الكميَّة المبيعة لحمَلة

8.1.1.3.d.2.3.2.4. The quantity being sold to the

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الصُّكوك لا تُجاوز الكميَّة القصوى وفق الطَّاقة الاستيعابية المحدَّدة للبائع من الجهات المانحة للتَّرخيص.

certificateholders should not exceed the maximum quantity according to the capacity of output of the seller as specified by the licensing authority.

8-1-1-3-د-2-3-3. إن اشتُرِط على الوكيل بيع الأعيان أو الخدمات بثمنٍ محدَّدٍ، فلا يجوز له البيع بأقلَّ منه، فإن باع بالأقلِّ فإنه يضمَن النَّقص على سبيل التَّعويض. ويُنظر البند (٧-٢) من المعيار الشَّرعي رقم (٥٦) بشأن ضمان مدير الاستثمار. ويجوز النَّص على أنه إن باع بأقلَّ من الثَّمن المحدَّد، وكان لديه كميَّة من الأعيان أو الخدمات مملوكة له فوق ما يملكه حمَلة الصُّكوك، فإنه يكون بائعاً عن نفسِه، لا عن حمَلة الصُّكوك.

8.1.1.3.d.2.3.3. If it is stipulated upon the agent to sell the assets or the services at a specified price, then it is not permitted [for the agent] to sell for less than [the specified price]. If [the agent] sells for less, it will be liable [to pay] the shortfall as a compensation. See: s. (7-2) of Shari'ah Standard No. (56): Liability of the Investment Manager. It is permitted to stipulate that if [the agent] sells for less than the specified price, and it has a quantity of assets or services owned by it that exceeds what the certificateholders own, then [the agent] shall be selling on its own behalf, not on behalf of the certificateholders.

8-1-1-3-د-2-3-4. إن اشتُرِط على الوكيل بيع الأعيان أو الخدمات بثمنٍ محدَّدٍ، فيجوز الاتفاق على أن يكون أجره ما يزيد من الثمن الذي يبيع به عن الثَّمن المحدَّد. يُنظر البند (٤-٢-٥) من المعيار الشَّرعي رقم (٢٣) بشأن الوكالة وتصرُّف الفضولي.

8.1.1.3.d.2.3.4. If it is stipulated upon the agent to sell the assets or services at a specified price, then it is permitted to have an agreement that [agent's] fee will be from the price at which the agent will sell exceeding the specified price. See: s. (4-2-5) of Shari'ah Standard No. (23): Agency and the Act of Uncommissioned Agent (Fodooli).

8-1-1-3-د-2-3-5. إن اشتُرِط على الوكيل بيع كميَّة محدَّدة

8.1.1.3.d.2.3.5. If the agent is required to sell a

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specified volume of assets or services in each period of distribution of returns, it is not permitted to sell more than [the specified volume] in one period. If [the agent] violates and sells more, then provisions of the sale by a *negotiorum gestio* (unauthorized agent/Fodooli) shall apply in the excess quantity. Hence, enforceability of the sale depends on the authorization of the certificateholders, or the party representing them. If [the certificateholders] approved the sale, then the agent is supposed to credit the sale price in the Sukuk [income] account or the reserve account, and if it did not [deposit the amount in the [respective account], so it will be liable for the owed price. If [the certificateholders] did not [approve the sale], so the sale of the excess volume will be [considered as] carried by [the agent] on its own behalf. There is no [Shari'ah] objection to stipulate that if the agent sells more than the volume specified for it to sell and holds a quantity of assets or services that exceeds what is held by the certificateholders, then [the agent] has sold on its own behalf. See: s. (8-2) and s. (8-4) of Shari'ah Standard No. (23): Agency and the Act of Uncommissioned Agent (Fodooli).

من الأعيان أو الخدمات في كلِّ فترة توزيع عوائد، فلا يجوز له أن يبيع أكثر منها في الفترة الواحدة. فإن خالف وباع أكثر أخذ أحكام بيع الفضولي في كمية المبيع الزائدة، فيتوقف نفاذ بيعها على إجازة حملة الصكوك أو من يمثلهم، فإن أجازوه فعليه أن يودِع ثمن البيع في حساب الصُّكوك أو حساب الاحتياطي، وإن لم يفعل فإنه يكون ضامنـًا للثمن في ذمَّته، وإن لم يجيزوه كان بيعه للكمية الزائدة عن نفسه. ولا مانع من النَّص على أن الوكيل إذا باع أكثر من الكميَّة المحدَّد له بيعها، وكان لديه كميَّة من الأعيان أو الخدمات مملوكة له فوق ما يملكه حمَلة الصُّكوك، فإنه يكون بائعـًا عن نفسِه. وينظر البند (٨-٢) والبند (٨-٤) من المعيار الشرعي رقم (٢٣) بشأن الوكالة وتصرف الفضولي.

8.1.1.3.d.2.3.6. If the agent, selling assets or services, is a third party, then it is permitted for it to undertake to purchase from certificateholders what it was unable to sell during any period of distribution of returns at the price specified for selling the

8-1-1-3-د-2-3-6. إن كان الوكيل ببيع الأعيان أو الخدمات طرفًا ثالثًا فيجوز له أن يتعهد بالشراء من حملة الصكوك لما لم يتمكَّن من بيعه في أيِّ فترة توزيع عوائد

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بالثَّمن المحدَّد للبيع به. ويراعى في التَّعهد بالشِّراء ما تقدَّم في البند (٦-٣-٢). وينظر البند (٤-٣) من المعيار الشرعي رقم (٥٦) بشأن ضمان مدير الاستثمار.

unsold quantity. Regarding the purchase undertaking, with due compliance with s. (6-3-2). See: s. (4-3) of Sharia Standard (56): Liability of Investment Manager.

8-1-1-3-د-2-3-7. إذا تعهد الوكيل ببيع الأعيان أو الخدمات بشراء المتبقي منها في نهاية الصُّكوك، بكلِّ القيمة الاسمية للصُّكوك، أيًا كانت الكمية المتبقية من الأعيان أو الخدمات، وكان الوكيل طرفًا ثالثًا، فإن هذا التَّعهد يجوز. ويُنظر البند (٤-٣-٢) من المعيار الشَّرعي رقم (٥٦) بشأن ضمان مدير الاستثمار.

8.1.1.3.d.2.3.7. If the agent, being a third party, undertakes to sell the assets or services by purchasing the remainder thereof at the end of the Sukuk [term], for the aggregate face value of the Sukuk, irrespective of the remaining quantity of the assets or services, and the agent is then extending such an undertaking is permitted. See: s. (4-3-2) of Shari'ah Standard No. (56): Liability of the Investment Manager.

8-1-1-4. صكوك الاستثمار الزراعي:

8-1-1-4-أ. يقصد بصكوك الاستثمار الزراعي في هذا المعيار الصكوك التي تقوم العلاقة فيها بين حملة الصكوك والجهة المنشئة على عقد من عقود الاستثمار الزراعي، وهي عقد المساقاة أو المزارعة أو المغارسة، ومن أهم خصائصها ما يأتي:

8-1-1-4-أ-1. أنَّ كل صك منها يمثل حصة شائعة في موجودات أو نشاط الصكوك بحسب

8-1-1-4. Agricultural Investment Sukuks:

8-1-1-4-a. In this Standard, Agricultural Investment Sukuks mean Sukuks where the relationship between the certificateholders and the originator is based on one of the contracts of agricultural investments, which are Musāqa, Muzāraʿa, or Mughārasa, and its most important characteristics are the following:

8-1-1-4-a-1. Each certificate represents a common share in the underlying assets of Sukuk or its activity according to the agricultural contract used in structuring

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the Sukuk.

8-1-1-4-أ-2. أنَّ رأس مالها أو موجوداتها، وعوائدها، غير مضمونةٍ على العامل فيها، وهو لا يضمن رأس المال أو الموجودات بحيث تثبت دينًا في ذمته إلا في حال التعدي أو التقصير أو مخالفة الشروط.

8-1-1-4-a-2. Its capital or underlying assets, and its returns, are not guaranteed to [party acting as] the worker, and the worker does not guarantee the capital or the underlying assets to the extent that it is not recognized as a debt owed by it except in the event of misconduct, negligence, or breach of conditions.

8-1-1-4-أ-3. أنها معرضة لمخاطر الاستثمار الناشئة عن جدوى النشاط الزراعي وقدرته أو قدرة موجودات النشاط على تحقيق العوائد المتوقعة.

8-1-1-4-a-3. It is exposed to investment risks arising from the feasibility of the agricultural activity and its ability or the ability of the assets of the activity to achieve expected returns.

8-1-1-4-أ-4. أنَّ أرباحها وعوائدها لا تكون إلا متوقعة.

8-1-1-4-a-4. Its profits and returns are only expected.

8-1-1-4-ب. **أنواع صكوك الاستثمار الزراعي:**

صكوك الاستثمار الزراعي أنواعٌ متعددة، أهمها:

8-1-1-4-ب-1. **صكوك المساقاة:**

هي الصكوك التي يتم إصدارها لتمويل رعاية شجر، مع الاشتراك في ناتجها. ويكون حملة الصكوك مالكين للشجر، والجهة المنشئة مساقيًا. ويملك حملة الصكوك الموجودات وهي الشجر مع حصة شائعة في الناتج مع الجهة المنشئة حسب ما اتفقا عليه.

8-1-1-4-b. **Types of Agricultural Investment Sukuk:**

There are many types of agricultural investment Sukuk, the most important of which are:

8-1-1-4-b-1. **Musaqah (Plant Servicing) Sukuk:**

It is a Sukuk that is issued to finance tree care, with participation in the output of the tree. The certificateholders are the owners of the trees and the originator is the worker (*musāqī*). The certificateholders own the underlying assets, which are the plants, with a common share in the output with the originator, as agreed upon.

8-1-1-4-ب-2. **صكوك المزارعة:**

هي الصكوك التي يتم إصدارها لتمويل زراعة أرض، مع

8-1-1-4-b-2. **Muzara'a (Sharecropping) Sukuk:**

It is a Sukuk that are issued to finance the cultivation of land, with participation in its output. The certificateholders are the owners of the land or its

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الاشتراك في ناتجها. ويكون حملة الصكوك مالكين للأرض أو لمنفعتها، والجهة المنشئة مزارعًا. ويملك حملة الصكوك الموجودات وهي الأرض أو المنفعة مع حصة شائعة في الناتج مع الجهة المنشئة حسب ما اتفقا عليه.

usufruct, and the originator is a farmer (*muzāriʿ*). The certificateholders own the underlying assets, which are the land or the usufruct, with a common share in the output with the originator, as agreed upon.

8-1-1-4-ب-3. **صكوك المغارسة:**

هي الصكوك التي يتم إصدارها لتمويل غرس شجر. ويكون حملة الصكوك مالكين للأرض والجهة المنشئة مغارسًا. ويشترك حملة الصكوك مع الجهة المنشئة في الغراس أو في الأرض والغراس على الشيوع حسب ما اتفقا عليه.

8-1-1-4-b-3. **Mughrasa Sukuk:**

It is a Sukuk that is issued to finance the planting of trees. The certificateholders are the owners of the land and the originator is the planter. The certificateholders share in common, with the originator, the plants or the land and the plant, according to what they agreed upon.

8-1-2. الصكوك المركبة:

8-1-2-1. وهي الصُّكوك التي تقوم العلاقة فيها بين حمَلة الصُّكوك والجهة المنشئة على أكثر من عقدٍ (صيغةٍ)، يَختلف فيها محلُّ كلِّ عقدٍ عن الآخر، وتَصدر بنشرة إصدار واحدة، وتدفع التوزيعات الدورية على أساس تلك العقود. ومن أمثلتها:

8-1-2-1-أ. الصكوك المركبة من المرابحة والمضاربة، أو الوكالة بالاستثمار، أو الإجارة أو الوكالة بالخدمات، حيث تكون الجهة المنشئة مشتريًا بالمرابحة ومضاربًا أو وكيلاً بالاستثمار أو مستأجراً أو وكيلاً بالخدمات.

8-1-2-1-ب. الصكوك المركبة من الوكالة بالخدمات والمضاربة أو الوكالة بالاستثمار أو الإجارة،

8-1-2. Composite Sukuks

8-1-2-1. These are the Sukuks in which the relationship is established between the certificateholders and the originator on more than one contract (financing mode), in which the subject of each contract differs from the other, it is issued through one base prospectus, and periodic distributions are paid on the basis of those contracts. Examples are:

8-1-2-1-a. Composite Sukuk of Murabaha and Mudaraba, Investment Agency, Ijarah, or Service Agency, where the originator is a Murabaha buyer, a Mudarib, an investment agent, a lessee, or a service agent.

8-1-2-1-b. Composite Sukuk of Service Agency and Mudaraba, or Investment Agency or Ijarah, where the originator is a service agent, Mudarib, investment agent or a lessee.

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حيث تكون الجهة المنشئة وكيلاً بالخدمات ومضاربـًا أو وكيلاً بالاستثمار أو مستأجراً.

8-1-2-1-ج. صكوك الإجارة والوكالة بالخدمات والمرابحة، حيث تكون الجهة المنشئة مستأجراً ووكيلاً بالخدمات ومشتريـًا بالمرابحة.

8-1-2-1-c. Sukuk of Ijarah, Investment Agency and Murabaha, where the originator is a lessee and a service agent and a Murabaha purchaser.

8-1-2-2. خصائص الصُّكوك المركَّبة:

للصُّكوك المركَّبة بحسب طبيعتها خصائص، أهمها:

8-1-2-2-أ. أن التعدد في العقود يكون في العلاقة بين حمَلة الصُّكوك والجهة المنشئة، فإن اقتصرت هذه العلاقة على عقدٍ واحدٍ، ثم استثمَرت الجهة المنشئة حصيلة الصُّكوك بأكثر من عقدٍ أو صيغةٍ مع جهة أخرى، فإن الصُّكوك لا تكون من الصُّكوك المركَّبة. وينظر البند (٤-٢-٧) من المعيار الشرعي رقم (٤٥) بشأن حماية رأس المال والاستثمار.

8-1-2-2-ب. أن العقود المتعددة تجمعها نشرة إصدار الصُّكوك، والدُّخول فيها جميعـًا شرطٌ للإصدار، لا يتم إلا بها، وليس لحمَلة الصُّكوك أو الجهة المنشئة أو لهما معـًا الاقتصار بعد طَرح الصُّكوك للاكتتاب على واحدٍ أو أكثر منها دون بقيَّة العقود.

8-1-2-2. Characteristics of Composite Sukuk:

Composite Sukuk, according to their nature, have characteristics, the most important of which are:

8-1-2-2-a. The multiplicity of contracts is in the relationship between the certificateholders and the originator. If this relationship is limited to one contract, then the originator invests the proceeds of the Sukuk in more than one contract or financing mode with another party, then [such] Sukuk is not a composite Sukuk. See: s. (4-2-7) of Shari'ah Standard No. (45): Protection of Capital and Investments.

8-1-2-2-b. That the multiple contracts are joined by a base prospectus for Sukuk issuance, and entering into all of them is a condition for the issuance, which cannot be fully without it, and after offering the Sukuk for subscription, neither the certificateholders nor the originator, or both of them together, can limit themselves to one or more contract by excluding the rest of the contracts.

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8-1-2-2-c. Breach in one of the multiple contracts (*ikhtilāl al-ʻaqd*) affects the issuance as a whole, and its effect is not limited to the contract in which the breach happened, as the Sukuk cannot continue with one or some of those contracts that are required for the issuance.

8-1-2-2-ج. أن اختلال أحد العقود المتعدِّدة يؤثِّر في الإصدار ككل، ولا يَقتصر أثره على العقد الذي وقَع فيه الاختلال، إذ لا يمكن أن تستمرَّ الصُّكوك بأحد أو بعض تلك العقود المشترَطة للإصدار.

8-1-2-2-d. That the returns of the issuance, or the incentives of the originator, if any, are calculated on the basis of the aggregate output of multiple contracts together, without differentiation, as if the issuance is based on a single contract, and the return or incentive from a contract is not independent of the return or incentive from the other contract or contracts. In addition, the list of final conditions in the base prospectus, on the basis of which the Sukuks are listed in the financial markets, shows the return as a return to [the Sukuk] as a whole, without distinction or [giving] detail as to what is [realized] or is expected from each contract [separately].

8-1-2-2-د. أن عوائد الإصدار، أو حوافز الجهة المنشئة إن وجدت، تُحسَب على أساس إجمالي النَّاتج من العقود المتعدِّدة مجتمعةً، دون تمييز، كما لو أن الإصدار قائم على عقدٍ واحدٍ، ولا يستقلُّ العائد أو الحافز من عقدٍ عن العائد أو الحافز من العقد أو العقود الأخرى. كما أن قائمة الشروط النهائية في نشرة الإصدار، التي يتم إدراج الصُّكوك في الأسواق المالية على أساسها، يَظهر فيها العائد على أنه عائدٌ لها ككل، دون تمييزٍ أو تفصيلٍ لما يكون أو يتوقَّع من كلِّ عقد.

8-1-2-3. The purpose of using Composite Sukuk:

More than one contract is used in a single issuance of Sukuk, by making it a composite Sukuk, to achieve one or more of the following purposes:

8-1-2-3. الغرض من استخدام الصُّكوك المركَّبة:

يُستخدَم أكثر من عقدٍ في الإصدار الواحد للصُّكوك، بجعلها صكوكًا مركَّبةً، لتحقيق واحدٍ أو أكثر من الأغراض الآتية:

8-1-2-3-a. Covering the entire value of the issue by the issuance of Sukuk. If the originator does not have tangible assets or other assets equal to the value of the issue, then such assets are used exclusively to the contract that suits them, and another contract is used to cover the remainder of the value of the issue.

8-1-2-3-أ. تغطية كل قيمة الإصدار، بإصدار الصُّكوك وإن لم يكن لدى الجهة المنشئة أصولٌ عينيَّة أو غيرها مساوية لقيمة الإصدار، فيُقتصَر في هذه الأصول على العقد الذي يناسبها، ويُستخدم

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عقد آخر لتغطية المتبقي من قيمة الإصدار. ومن أمثلة ذلك: صكوك الإجارة والمرابحة، وصكوك الوكالة بالخدمات والمرابحة.

Examples of this are: Ijarah-cum-Murabaha Sukuk, Service Agency-cum-Murabaha Sukuk.

8-1-2-3-ب. تحقيق شرط تداول الصُّكوك دون الحاجة إلى التقيُّد بأحكام تداول الديون النقدية بنقد. ومن أمثلة ذلك: صكوك المضاربة أو الوكالة بالاستثمار مع المرابحة، مع اشتراط توافر النِّسبة المطلوبة من الموجودات العينيَّة لجواز التَّداول المذكور في موجودات المضاربة أو الوكالة بالاستثمار.

8-1-2-3-b. Complying with the condition of negotiability of Sukuk without the need to comply with the provisions of trading cash debts for cash. Examples of this: Mudaraba or Investment Agency Sukuks with Murabaha, with the prerequisite that the tangibility ratio being fulfilled for permitting the aforementioned trading in the assets of Mudaraba or Investment Agency.

8-1-2-3-ج. تضمين الجهة المنشئة رأسَ مال المضاربة أو الوكالة بالاستثمار، أو تضمينها رأس المال مع الربح. ومن أمثلة ذلك: صكوك المرابحة والمضاربة أو الوكالة بالاستثمار، مع جعل ربح المرابحة مساوياً رأسَ مال المضاربة أو الوكالة بالاستثمار وجميعَ ربح الإصدار.

8-1-2-3-c. Imposition of liability (*taḍmīn*) of Mudaraba or Investment Agency capital upon the originator, or imposition of liability of the capital, along with the profit, upon the originator. Examples of this are: Murabaha and Mudaraba Sukuk or Investment Agency, with Murabaha profit being equal to the capital of Mudaraba or Investment Agency and the whole profit of the issuance.

8-1-2-3-د. الجمع بين أكثر من نوع من الموجودات في الحال التي لا تكون فيها الأصول المتوافرة لدى الجهة المنشئة مناسبة بطبيعتها للاقتصار على عقدٍ واحدٍ. ومن أمثلة ذلك: صكوك الإجارة والوكالة بالخدمات، حين تؤجَر بعض الأعيان للجهة المنشئة ولا تكون مؤجرة لغيرها.

8-1-2-3-d. Combining more than one type of the underlying assets in the case that the assets available with the originator are not suitable in nature to be restricted to one contract. Examples of this: Ijarah and Service Agency Sukuk, when some of the assets are leased to the originator and are not leased to others.

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8-1-2-4. Provisions of Composite Sukuks:

8-1-2-4-a. It is required that the combination of multiple contracts in composite Sukuk adhere to the Shari'ah rules mentioned in Shari'ah Standard No. (25): Combination of Contracts.

8-1-2-4-b. It is required that each of the multiple contracts adhere to the provisions of the Sukuk on the basis of which it is issued, as if it was used alone in the issuance.

8-1-2-4-c. It is required that the document of each of the multiple contracts to be completely independent from the other contract or contracts, as if it were a single contract alone.

8-1-2-4-d. It is required that the breach in one of the multiple contracts should not result in breach of the issuance as a whole. When the originator breaches its obligations in any of these contracts, it is not permitted to entitle the certificateholders to rescind the contract or other contracts. The certificateholders and the originator may enter into an agreement that they consider the deferred debts arising from the contract or other contracts as payable immediately on spot.

8-1-2-4-e. It is not permitted that the combination of multiple contracts will prejudice the provisions and effects of any of them. It is required that the provisions of each contract remain, and its effects follow as if it did not have another contract. See: s. (7-2-7). Accordingly, it is not

8-1-2-4. أحكام الصُّكوك المركَّبة:

8-1-2-4-أ. يجب التقيُّد في الجمع بين العقود المتعدِّدة في الصُّكوك المركَّبة بالضَّوابط الشَّرعية الواردة في المعيار الشَّرعي رقم (٢٥) بشأن الجمع بين العقود.

8-1-2-4-ب. يجب التقيُّد في كلِّ عقدٍ من العقود المتعدِّدة بأحكام الصُّكوك التي يتمُّ إصدارها على أساسه، كما لو كان مستخدمًا وحده في الإصدار.

8-1-2-4-ج. يجب أن تكون وثيقة كل عقد من العقود المتعدِّدة مستقلَّة استقلالاً تامًا عن العقد أو العقود الأخرى، كما لو كان عقداً مفرداً وحده.

8-1-2-4-د. يجب أن لا يترتب على اختلال أحد العقود المتعدِّدة اختلال الإصدار ككل. ولا يجوز عند إخلال الجهة المنشئة بالتزاماتها في أيٍّ من تلك العقود أن يخوِّل ذلك حمَلة الصُّكوك فسخ العقد أو العقود الأخرى، ولحملة الصكوك والجهة المنشئة الاتفاق على أن يعدوا الديون المؤجَّلة الناشئة عن العقد أو العقود الأخرى حالةً واجبة السَّداد فوراً.

8-1-2-4-هـ. لا يجوز أن يُخلَّ الجمع بين العقود المتعدِّدة بأحكام وآثار أيِّ عقدٍ منها، فالواجب أن تبقى أحكام كل عقد وتترتب آثاره كما لو لم يكن معه عقدٌ آخر. وينظر البند (٧-٢-٧). وعليه

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لا يجوز أن يؤدي الجمع بين العقود المتعددة إلى تضمين الجهة المنشئة ما لا يجوز أن تضمنه شرعـًا، وذلك مثل:

permitted that the combination of multiple contracts shall lead to the imposition of liability on the originator of what it is not permitted to be held liable by virtue of Shari'ah, such as:

8-1-2-4-هـ-1. أن تكون الجهة المنشئة مضاربـًا ويُجمَع مع المضاربة عقد آخر يؤدي إلى تضمينها رأس مال المضاربة، كلَّه أو بعضَه، أو يؤدي إلى تضمينها رأس المال والرِّبح، كما هو الحال في صكوك المرابحة والمضاربة مع جعل نسبة ربح المرابحة فوق نسبة الربح المتوقَّع للصُّكوك أو جعلِ ربح المرابحة مساويـًا رأس مال المضاربة وجميعَ ربح الإصدار. وينظر البند (٨-٤) من المعيار الشرعي رقم (٥٩) بشأن بيع الدين.

8-1-2-4-e-1. That the originator, being a Mudarib, combines with the Mudaraba another contract that leads to imposition of liability of the Mudaraba capital, in whole or in part, or leads to imposition of liability of the capital and the profit, as is the case in the Murabaha-cum-Mudaraba Sukuk by making the Murabaha profit rate above the expected profit rate of the Sukuk or making the Murabaha profit equal to the Mudaraba capital and the entire profit of the issuance. See: s. (8-4) of Shari'ah Standard No. (59): Sale of Debt.

8-1-2-4-هـ-2. أن تكون الجهة المنشئة وكيلاً بالاستثمار ويُجمَع مع الوكالة بالاستثمار عقد آخر، كما في حال المضاربة في البند (٨-١-٢-٤-هـ-١).

8-1-2-4-e-2. The originator, being an investment agent, combines another contract with Investment Agency, as in the case of Mudaraba in s. (8-1-2-4-e-1).

8-1-2-4-هـ-3. أن تكون الجهة المنشئة مضاربـًا أو وكيلاً بالاستثمار ويُجمَعُ مع المضاربة أو الوكالة بالاستثمار عقد وكالة بالخدمات مع جعل الثَّمن في التّعهد بالشِّراء من الوكيل بالخدمات (أي الجهة المنشئة، وهي المضارب أو الوكيل بالاستثمار) في الحال

8-1-2-4-e-3. The originator, being a Mudarib or an investment agent, combines with the Mudaraba or Investment Agency the contract of Service Agency, so that the price, included in the purchase undertaking from the service agent (i.e., the originator being the Mudarib or investment agent), undertaken by the service agent can be a specified price, which is inclusive of what is equal to the capital of Mudaraba or Investment

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Agency, all or part of it, or all of it with the unpaid profits. It is not permitted to have such a purchase undertaking, even if it is stated that the originator undertakes it in its capacity as a service agent and not in its capacity as a Mudarib or an investment agent.

التي يجوز فيها لوكيل الخدمات أن يتعهد بالشراء بثمن محدد، شاملاً ما يساوي رأس مال المضاربة أو الوكالة بالاستثمار، كلَّه أو بعضَه، أو كله مع ما لم يُدفَع من ربح. ولا يجوز مثلُ هذا التَّعهدِ بالشِّراء وإن تم التَّصريح بأن الجهة المنشئة تتعهد به بصفتها وكيلاً بالخدمات لا بصفتها مضاربـًا أو وكيلاً بالاستثمار.

8-1-2-4-e-4. That the originator, being a lessee, combines another contract with the Ijarah leading to the imposition of leased assets' liability on [the originator], as is the case in Ijarah-cum-Murabaha Sukuk, by making the Murabaha profit inclusive of what is equal to the value of the leased assets. See: s. (7-2-7) of this Standard and s. (8-4) of Shari'ah Standard No. (59): Sale of Debt.

8-1-2-4-هـ-4. أن تكون الجهة المنشئة مستأجرة، ويجمع مع الإجارة عقد آخر يؤدي إلى تضمينها الأعيان المؤجرة، كما هو الحال في صكوك الإجارة والمرابحة مع جعل ربح المرابحة شاملاً ما يساوي قيمة الأعيان المؤجرة. وينظر البند (٧-٢-٧) من هذا المعيار، والبند (٨-٤) من المعيار الشرعي رقم (٥٩) بشأن بيع الدَّين.

8-1-2-4-f. And if the composite Sukuk has an incentive for the originator, then it is required that it should be in a contract in which the incentive is permitted to be stipulated, and not be contingent on the total proceeds of the issuance. It is permitted that in Murabaha-cum-Mudaraba (or Investment Agency) Sukuk, the incentive to be stipulated exclusively in the Mudaraba or Investment Agency [contract], and it is not permitted to stipulate it in the Murabaha [contract]. In Ijarah-cum-Service Agency Sukuk, it is permitted to stipulate the incentive in the Service

8-1-2-4-و. إذا كان في الصُّكوك المركَّبة حافزٌ للجهة المنشئة، فيجب أن يكون في العقد الذي يجوز اشتراطُ الحافز فيه، لا أن يكون مشروطـًا في إجمالي عوائد الإصدار. ففي صكوك المرابحة والمضاربة أو الوكالة بالاستثمار، يجوز أن يُشترَط الحافز في المضاربة أو الوكالة بالاستثمار حصراً، ولا يجوز أن يُشترَط في المرابحة. وفي صكوك الإجارة والوكالة

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بالخدمات، يجوز أن يُشترَط الحافز في الوكالة بالخدمات وحدها دون الإجارة. وينظر البند (٦-١-٢-٢-أ-٣).

Agency alone without Ijarah. See: s. (6-1-2-2-a-3).

8-2. أنواع الصكوك باعتبار آلية الإطفاء:

8-2-1. الصُّكوك القابلة للتَّحويل إلى أسهم:

8-2-1-1. تقوم هذه الصُّكوك على هيكلة تجعلها قابلةً لأن تُحوَّل إلى أسهمٍ من أسهم الجهة المنشئة أو أسهمٍ تملكها هذه الجهة في شركة أخرى، بحيث يملك حمَلة الصُّكوك تلك الأسهم عوضـًا عن الصُّكوك عند تمام التَّحويل بالمبادلة (المعاوضة بالبيع) بين الأسهم والصُّكوك، فتصير موجودات الصُّكوك ملكـًا للجهة المنشئة، وبذلك تنتهي الصُّكوك.

8-2-1-1. These Sukuk are based on a structure that enables it to be converted into shares from the originator's shares or shares owned by this entity in another company, so that the certificateholders own those shares in consideration of the Sukuk upon completion of the conversion by exchange (commutative contract by sale ((*muʿāwaḍa bi al-bayʿ*)) between the shares and Sukuk, so the underlying assets of Sukuk become the property of the originator, and thus the certificates of Sukuk ends.

8-2-1-2. يمكن أن يكون الحقُّ في طلب التَّحويل لحمَلة الصُّكوك، أو للجهة المنشئة، أو لهما معـًا.

8-2-1-2. The right to request a conversion may be held by the certificateholders, or to the originator, or to both of them.

8-2-1-3. يَثبت الحقُّ في طلب التَّحويل بوعدٍ ملزمٍ بمبادلة الصُّكوك بالأسهم عند انتهاء مدَّة الصُّكوك، أو قبل ذلك في وقتٍ محَّددٍ، أو عند وقوع حادثٍ معيَّنٍ، أو إذا بلغ سعر الأسهم مقداراً معيَّنـًا، أو عند طلب الجهة الرقابية، أو غير ذلك، أو مطلقـًا في أي وقتٍ خلال مدَّة الصُّكوك.

8-2-1-3. The right to request a conversion is established by a binding promise from the other party to exchange the Sukuk with shares at the end of the certificates Sukuk term, or before that at a specific time, or upon the occurrence of a specific event, or if the price of the shares hits a certain amount, or at the request of the regulators, or otherwise, or absolutely at any time during the Sukuk term.

8-2-1-4. إذا كان الحقُّ في طلب التَّحويل لحمَلة

8-2-1-4. If the right to request a conversion is held by the certificateholders and the

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originator together, then the trigger for performing the binding promise issued by the other party must be different from the trigger for the binding promise issued in its favour, in order to prevent a bilateral binding agreement (*muwāʿada mulzima*) between the two parties. See: s. (9-4-3) of this Standard and s. (3-7) of Shari'ah Standard No. (49): Unilateral and Bilateral Promise.

الصُّكوك والجهة المنشئة معـًا، فيجب أن يكون مورِد تنفيذ الوعدِ الملزِم الصَّادر من الجهة الأخرى مختلفـًا عن مورِد الوعد الملزِم الصَّادر لصالحها، منعـًا للمواعدة الملزمة للطَّرفين. وينظر البند (٩-٤-٣) من هذا المعيار، والبند (٣-٧) من المعيار الشرعي رقم (٤٩) بشأن الوعد والمواعدة.

8-2-1-5. It is required that the promise is [carried through] a document separate from the contract that establishes the relationship between the certificateholders and the originator, provided that this contract is not breached by breach of the promise or repudiation (*nukūl*) in performing it. See: s. (8-1) of Shari'ah Standard No. (9): Ijarah and Ijarah Muntahia Bittamleek, and s. (5-1) of Shari'ah Standard No. (12): Sharikah (Musharaka) and Modern Companies.

8-2-1-5. يجب أن يكون الوعد بمستندٍ مستقلٍّ عن العقد المنشئ للعلاقة بين حمَلة الصُّكوك والجهة المنشئة، مع عدم اختلال هذا العقد باختلال الوعد أو النُّكول عن تنفيذه. وينظر البند (٨-١) من المعيار الشَّرعي رقم (٩) بشأن الإجارة والإجارة المنتهية بالتَّمليك، والبند (٥-١) من المعيار الشَّرعي رقم (١٢) بشأن الشركة (المشاركة) والشركات الحديثة.

8-2-1-6. The conversion price in the binding promise can be in the form of a number of the certificates of Sukuk in return for each share, provided that this does not lead to a guaranteeing of what is not permitted to be guaranteed by Shari'ah.

8-2-1-6. يمكن أن يكون سعر التَّحويل في الوعد الملزِم في صورة عددٍ من الصُّكوك مقابل كلِّ سهمٍ، بشرط أن لا يؤدي ذلك إلى ضمان ما لا يجوز ضمانه شرعـًا.

8-2-1-7. It is not permitted that the promised conversion to take place automatically, rather it is required to carry offer and acceptance between the certificateholders and the originator. See: s. (3-8) of Shari'ah Standard No. (49): Unilateral and Bilateral Promise. Also, it is not permitted that conversion takes place via transfer by a suspensive contract (*ʿaqd*

8-2-1-7. لا يجوز أن يقع التَّحويل الموعود به تلقائيـًا، وإنما يجب أن يتم بإيجاب وقبول بين حمَلة الصُّكوك والجهة المنشئة. وينظر البند (٣-٨) من المعيار الشَّرعي رقم (٤٩) بشأن الوعد والمواعدة. كما لا يجوز أن يكون التَّحويل

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mu'llaq) or effective from the future (*muḍāf ilā al-mustaqbal*).

8-2-1-8. If the promisor repudiates on its binding promise of conversion, the promissory party has the right to claim compensation for the actual damage resulting from the repudiation, and it is determined if the promisor is the originator by what the certificateholders pay to buy the shares promised to be converted from the market, at the time specified for the performance of the promise, in excess of the actual value of the underlying assets of Sukuk corresponding to each share of them, according to the conversion price in the promise. However, if the promisor is the certificateholders, the actual damage is determined by the decrease in the selling price of the shares by the originator to which the conversion is promised, at the time specified for the performance of the promise, from the actual value of the underlying assets of Sukuk corresponding to each share, according to the conversion price in the promise. See: s. (3-4) of Shari'ah Standard No. (49): Unilateral and Bilateral Promise and s. (5-1-7) of Shari'ah Standard No. (58): Repurchase.

8-2-1-9. It is required that the shares to which the Sukuk are convertible are from what is permitted to be owned by virtue of Shari'ah, as per the conditions mentioned in s. (3-4) of the Shari'ah Standard No. (21): Financial Papers (Shares and Bonds), and that these conditions are met in the shares, whether at the time of issuance of Sukuk or at the time of conversion. And if

بعقدٍ معلَّقٍ أو مضافٍ إلى المستقبل.

8-1-2-8. إذا نكل الواعد عن وعده الملزِم بالتَّحويل، فإن من حقِّ الموعود مطالبته بتعويضه عن الضَّرر الفعلي الناتج عن النُّكول، وهو يتحدَّد إن كان الواعد الجهة المنشئة بما يدفعه حمَلة الصُّكوك لشراء الأسهم الموعود بالتَّحويل إليها من السوق، في الوقت المحدَّد لتنفيذ الوعد، زيادةً عن القيمة الفعلية لموجودات الصُّكوك المقابلة لكلِّ سهمٍ منها، وفق سعر التَّحويل في الوعد. أما إن كان الواعد حمَلة الصُّكوك، فإن الضَّرر الفعلي يتحدَّد بالنُّقصان في ثمن بيع الجهة المنشئة للأسهم الموعود بالتَّحويل إليها، في الوقت المحدَّد لتنفيذ الوعد، عن القيمة الفعلية لموجودات الصُّكوك المقابلة لكلِّ سهم، وفق سعر التّحويل في الوعدِ. وينظر البند (٣-٤) من المعيار الشَّرعي رقم (٤٩) بشأن الوعد والمواعدة، والبند (٥-١-٧) من المعيار الشَّرعي رقم (٥٨) بشأن إعادة الشِّراء.

9-1-2-8. يجب في الأسهم التي تكون الصُّكوك قابلة للتَّحويل إليها مما يجوز تملُّكه شرعـًا، وفق الشروط الواردة في البند (٣-٤) من المعيار الشَّرعي رقم (٢١) بشأن الأوراق الماليَّة

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(الأسهم والسَّندات)، وأن تكون هذه الشروط متوافرة في الأسهم سواء عند إصدار الصُّكوك أو عند التَّحويل. وإذا كان التَّحويل إلى عددٍ من الأسهم يعطي حمَلة الصُّكوك حقَّ التأثير في قرار الشركة بعد تملُّكها، فإن الواجب عليهم التخلص من أي نشاط أو كسب محرم بعد تملكهم لها وتمكنهم من ذلك. وينظر البند (٣-٣) من المعيار الشَّرعي رقم (٢١) بشأن الأوراق المالية (الأسهم والسَّندات)، والبند (٥-١-٤) من هذا المعيار.

the conversion to a number of shares gives the certificateholders the right to influence the decisions of the company after acquiring it, then it is required that the shares, after owning them, should be free from any forbidden activity or earning once [the certificateholders] are enabled to do so. See: s. (3-3) of Shari'ah Standard No. (21): Financial Papers (Shares and Bonds), and s. (5-1-4) of this Standard.

8-2-1-10. لا مانع من أن يكون العائد أو الربح المتوقَّع في الصُّكوك القابلة للتَّحويل إلى أسهم أعلى مما لو كانت صكوكًا عادية غير قابلة للتَّحويل، ولكن لا تجوز المعاوضة على الحقِّ في التَّحويل، كأن يدفع حمَلة الصُّكوك علاوةً عند الإصدار مقابلاً لهذا الحقِّ.

8-2-1-10. There is no [Shari'ah] objection if the expected return or profit in the Sukuk convertible into shares being higher than if they were ordinary non-convertible Sukuk, but it is not permitted to claim a consideration for the right of conversion, such as the certificateholders paying a premium at the time of issuance in lieu of this right.

8-2-1-11. يجب عند التَّحويل أن تكون موجودات الصُّكوك وموجودات الأسهم مما يجوز مبادلتها ببعضها دون التقيُّد بأحكام الصَّرف أو أحكام التصرف في الديون، وإلا وجب التقيُّد بها، بحسب الحال. وينظر المعيار الشرعي رقم (٥٩) بشأن بيع الدين.

8-2-1-11. It is required, at the time of conversion, that the underlying assets of Sukuk and the assets of the shares are the ones that can be exchanged for each other without being bound by the provisions of exchange (*ṣarf*) or the provisions of the disposal of debts, otherwise it is required to adhere to such provisions, as the case may be. See: Shari'ah Standard No. (59): Sale of Debt.

8-2-1-12. إذا كان الحقُّ في التَّحويل يعطي الواعد الحقَّ في دفع ثمن الأسهم أو يعطي الموعود حقَّ

8-2-1-12. If the right to conversion gives the promisor the right to pay the price of the shares or gives the promisee the right to

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طلب هذا الثَّمن، وليس الأسهم الموعود بالتَّحويل إليها، فإن ما يُدفَع عندئذٍ يكون ثمناً لموجودات الصُّكوك، ولا يُعدُّ تحويلاً، وتنطبق على الوعد في هذه الحال أحكام الوعد بشراء أو بيع موجودات الصّكوك، ويكون ما يتم استرداداً أو إطفاءً عادياً. وينظر البند (٦-٣-٢).

demand this price, and not the shares to which the conversion is promised, so what is paid then is the price of the underlying assets of Sukuk and is not considered a conversion. The promise in this case shall be subject to provisions of promise to purchase or sale of the underlying assets, and what is carried will be a standard redemption or cancelation. See: s. (6-3-2).

8-2-2. الصُّكوك غير القابلة للتَّحويل إلى أسهم:

تقوم هذه الصُّكوك على هيكلة لا تجعلها قابلةً لأن تُحوَّل إلى أسهمٍ من أسهم الجهة المنشئة نفسها أو أسهمٍ تملكها هذه الجهة في شركة أخرى، وإنما يتم إطفاؤها بشراء الجهة المنشئة لموجوداتها أو بتصفية الموجودات ببيعها للغير في السوق.

8-2-2. Non-convertible Sukuk into shares:

These Sukuk are not based on a structure that enable them to be converted into shares of the originator's own shares or shares owned by this entity in another company. Rather, they are cancelled by the originator's purchase of the underlying assets of such Sukuk or by winding up of the underlying assets through selling them to a third party in the market.

8-3. أنواع الصكوك باعتبار تعزيزها القاعدة الرأس ماليَّة:

يقصد بصكوك تعزيز القاعدة الرأس مالية، الصكوك التي تصدرها الجهة المنشئة الخاضعة لإشراف الجهات الرقابية لزيادة رأس مالها النِّظامي، بتوفير رأسِ مالٍ إضافيٍّ أو رأسِ مالٍ ثانويٍّ، من حصيلة الاكتتاب فيها. وهي نوعان: صكوك الشِّق الأول من رأس المال وصكوك الشق الثاني من رأس المال.

8-3. Types of Sukuk to raise core equity base:

It refers to Sukuks of raising core equity base. Those Sukuks, issued by the originator, are subject to the supervision of the regulators to increase [the originator's] statutory capital, by providing additional capital or secondary capital, from the proceeds of its subscription [to the Sukuks]. They are of two types: Tier 1 Capital Sukuk and Tier 2 Capital Sukuk.

8-3-1. صكوك الشِّق الأول من رأس المال (Tier 1

8-3-1. Tier 1 Capital Sukuk

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(Capital Sukuk

يتم إصدار هذه الصُّكوك لتوفير رأس مالٍ إضافيٍّ (Additional Capital)، يشكِّل مع رأس المال الأصلي وهو حقوق الملكيَّة (Common Equity) لمساهمي الجهة المنشئة؛ الشِّقَ الأول (Tier-1 Capital) من رأس مال الجهة المنشئة.

It is a Sukuk that is issued to provide additional capital, which, along with the original capital, constitutes the common equity of the shareholders of the originator; The first tier (Tier 1 Capital) from the capital of the originator.

8-3-1-1. الخصائص الرقابية (النظامية) لصكوك الشِّق الأَول من رأس المال:

يلزَم لعدِّ الصُّكوك من الشِّق الأول من رأس المال، أن تتوافر فيها من الناحية الرقابية جملة خصائص، أهمها:

8-3-1-1-أ. أنها مستمرَّة بالنسبة لحملة الصكوك، غير محدَّدة بمدَّة تُطفأ عندها، وليس لهم المطالبة باستردادها (تصفيتها)، فتستمرُّ في الأصل إلى أن تتم تصفية الجهة المنشئة، شأنها في ذلك شأن أسهمها، وللجهة المنشئة إطفاؤها بعد مضي خمس سنوات من إصدارها، أو قبل ذلك في حالات محددة، إن توافرت شروطٌ تُحدِّدها الجهات الرقابية.

8-3-1-1-ب. أنها قادرة على امتصاص خسائر الجهة المنشئة، فتتأخَّر في الاستيفاء عند تصفية الجهة المنشئة للإعسار أو الإفلاس عن التزاماتها العادية، وهي الالتزامات التي تكون للمودعين والدَّائنين العاديين، وعن الالتزامات الأعلى

8-3-1-1. The regulatory characteristics of Tier 1 Capital Sukuk:

In order to count the Sukuk as part of Tier 1 Capital, it is necessary, from the supervisory point of view, to have a number of characteristics, and the most important of which are:

8-3-1-1-a. It is perpetual in nature for the certificateholders, not specified for a period at which it is cancelled, and [the certificateholders] do not have the right to claim its redemption (dissolution), so it continues normally until the dissolution of the originator, as is the case with the shares [of the originator], and the originator has the right to cancel it after five years have surpassed from the issuance [of the certificates], or before that in specific events, if the conditions specified by the regulators are met.

8-3-1-1-b. It is capable of absorbing originator's losses, so it is subordinated to normal and senior obligations of the originator at the time of its dissolution for reasons of originator's insolvency or bankruptcy. The normal obligations are of depositors and unsecured creditors. Senior rank obligations are of the obligations of Tier-2 capital Sukuk. The Sukuk has seniority to the common equity.

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منها رتبة (وهي الالتزامات التي تكون لحمَلة صكوك الشِّق الثاني من رأس المال)، وتتقدَّم على حقوق الملكية.

8-3-1-1-c. It grants the originator the right to cancel the payment of profits to the certificateholders on the dates specified for their distribution, provided that certificateholders are notified and no dividends are distributed to the holders of equity.

8-3-1-1-ج. أنها تمنح الجهة المنشئة حقَّ إلغاء دفعِ أرباحٍ لحمَلة الصكوك في التواريخ المحدَّدة لتوزيعها، بشرط إعلام حملة الصكوك وعدم توزيع أرباحٍ على أصحاب حقوق الملكية.

8-3-1-1-d. That its unpaid profits are not due in any subsequent period, as they are non-cumulative. If [the profits] are not paid, the certificateholders will not have the right to demand payment of [profits], and the originator may use [the unpaid profit] to pay the obligations owed to it.

8-3-1-1-د. أن أرباحها غير المدفوعة لا تستحق في أي فترة لاحقة، فهي غير تراكمية (Non-Cumulative)، فإذا لم تُدفَع فإنه لا يكون لحملة الصُّكوك المطالبة بدفعها لهم، ويكون للجهة المنشئة استخدامها في سداد الالتزامات المستحقَّة عليها.

8-3-1-1-e. It is not guaranteed and not covered by a guarantee from the originator, or from any party related to it.

8-3-1-1-هـ. أنها غير مضمونةٍ وغير مغطَّاة بكفالةٍ من الجهة المنشئة، أو من أي جهةٍ ذات علاقة بها.

8-3-1-1-f. When the originator reaches a point of non-viability or to protect it from reaching this state, [Sukuk] can be written off in whole or in part, or converted into ordinary shares, via a resolution by the regulator.

8-3-1-1-و. أنها يمكن شطبها كليًّا أو جزئيًا، أو تحويلها إلى أسهمٍ عاديَّة، بقرار من الجهة الرقابية عند وصول الجهة المنشئة إلى حال عدم القدرة على الاستمرار (Point of Non-Viability) أو لحمايتها من الوصول إلى هذه الحال.

8-3-1-2. Provisions and rules for Tier-1 Sukuk:

8-3-1-2. أحكام وضوابط صكوك الشِّق الأول من رأس المال:

8-3-1-2-a. It is not permitted to use modes based on commutative [contracts] in issuing

8-3-1-2-أ. لا يجوز استخدام صيغ المعاوضة في إصدار

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صكوك الشِّق الأول من رأس المال، سـواء كانت مفردةً أو مركَّبة مع إحدى صيغ المشـــــاركة، لأن صيغة المعاوضة لا يمكن أن تكون مستمرَّة دون آجالٍ محدَّدةٍ لسداد أقساط مديونيتها، ولأنه لا يجوز للجهة المنشئة أن تقرِّر بإرادتها المنفردة عدمَ دفع قسطٍ من أقساط المديونية في الأجل المحدَّد لدفعه فيفقد حمَلة الصُّكوك حقَّ المطالبة به. وينظر البند (٨-١-١-١-ج-١).

Tier-1 Sukuk, whether plain vanilla or composite with any modes of Musharaka, because commutative financing mode cannot be perpetual with no specified maturities for the settlements of its indebtedness instalments, and because it is not permitted for the originator to decide that by its own will that it will not to pay an instalment of the indebtedness instalments within the specified maturity for its payment, in which case the certificateholders lose their right to claim [the instalment]. See: s. (8-1-1-1-c-1).

8-3-1-2-ب. لا يجوز استخدام صيغة الوكالة بالاستثمار في إصدار صكوك الشق الأول من رأس المال إن كانت بأجر لأنها تأخذ حكم إجارة الأشخاص فتلحق بصيغ المعاوضة. ينظر البند (٤-٢-٢) من المعيار الشَّرعي رقم (٢٣) بشأن الوكالة وتصرُّف الفضولي، والبند (٢) من المعيار الشَّرعي رقم (٣٤) بشأن إجارة الأشخاص. وينظر البند (٨-١-١-٣-ج-٦).

8-3-1-2-b. It is not permitted to use the financing mode of the Investment Agency in issuing Tier-1 Sukuk if it is for a fee, because it takes the status of hiring people, so it is attached to the financing modes based on commutative [contracts]. See: s. (4-2-2) of Shari'ah Standard No. (23): Agency and the Act of Uncommissioned Agent (Fodooli) and s. (2) of Shari'ah Standard No. (34): Hiring of Persons. See: s. (8-1-1-1-c-6).

8-3-1-2-ج. لا يجوز أن تكون الجهة المنشئة في صكوك الشق الأول من رأس المال جهة تقليدية ولو مع استخدام حصيلة الإصدار فيما لديها من موجودات مقبولة شرعـًا؛ لأنها تدعم رأس مال هذه الجهة، وتكون ضامنة للوفاء بالتزاماتها التقليدية الأعلى رتبة من صكوك الشق الأول. وينظر البند (٧-٢-٩).

8-3-1-2-c. It is not permitted for the originator of Tier-1 Sukuk to be a conventional entity, even if the proceeds of the issuance are used in its underlying assets that are acceptable by the virtue of Shari'ah; because [such Sukuk] supports the capital of this entity and is a guarantor for the fulfilment of its conventional liabilities that are senior in rank than Tier-1 Sukuk. See: s. (7-2-9).

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8-3-1-2-د. يجوز إصدار صكوك الشِّق الأول من رأس المال بصيغة المضاربة أو الشركة، وفقًا للأحكام والضوابط الآتية:

8-3-1-2-d. It is permitted to issue Tier-1 Sukuk by applying the financing mode of Mudaraba or partnership, in accordance with the following provisions and rules:

8-3-1-2-د-1. يجب التَّقيد في صكوك الشِّق الأول من رأس المال القائمة على صيغة المضاربة أو صيغة الشركة بأحكام صكوك المشاركات الواردة في البند (٨-١-١-٢).

8-3-1-2-d-1. It is required that Tier-1 Sukuk based on the financing mode of Mudaraba or partnership to adhere to the provisions of the Musharaka Sukuk given in s. (8-1-1-2).

8-3-1-2-د-2. تكون حصيلة الاكتتاب في الصُّكوك في صيغة المضاربة هي رأسُ مال المضاربة، وتكون المضاربة مقيَّدة باستثمار رأس مالها في الوعاء العام للجهة المنشئة في جانب حقوق الملكيَّة، مع إذن حمَلة الصُّكوك للجهة المنشئة بخلط رأس مال المضاربة بأموالها (حقوق الملكيَّة) في وعائها العام. أما في صيغة الشركة فيتكون رأس مال الشركة من حصيلةِ الاكتتاب في الصكوك، وحقوقِ الملكيَّةِ في الوعاء العام للجهة المنشئة بقيمة هذه الحقوق وقت بدء الشركة.

8-3-1-2-d-2. The proceeds of subscription to Sukuk in the financing mode of Mudaraba is the Mudaraba capital, and the Mudaraba is restricted to investing its capital in the general pool of the originator on the side of common equity, with the permission of the certificateholders to the originator to commingle the Mudaraba capital with its funds (common equity) in its general pool. As for the financing mode of partnership, the company's capital consists of the proceeds of subscription to Sukuk, and the equity rights in the general pool of the originator, with the value of these rights at the time of the start of the partnership.

8-3-1-2-د-3. تكون المضاربة أو الشركة مستمرة باستمرار الجهة المنشئة، وتبقى إلى أن تتم تصفية هذه الجهة. وينظر البند (١٠-١-٥) من المعيار الشَّرعي رقم (١٣) بشأن المضاربة.

8-3-1-2-d-3. Mudaraba or partnership are perpetual with the continuance of the originator, and they will remain until the dissolution of this entity. See: s. (10-1-5) of Shari'ah Standard No. (13): Mudaraba.

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8-3-1-2-د-4. تنشأ مشاركة الشِّق الأول من رأس المال في صيغة المضاربة بخلط رأس مال المضاربة بحقوق الملكيَّة بقيمتها، أما في صيغة الشركة فتنشأ المشاركة بإبرام عقد الشركة، وهي في الحالين شركة عقد يصير بها لحمَلة الصُّكوك حصَّةٌ فيما لحقوق الملكيَّة من حقوقٍ وما عليها من التزاماتٍ، بنسبة حصَّتهم في رأس مال المشاركة، بعد أن أصبحوا شركاء مع مساهمي الجهة المنشئة في حقوق الملكيَّة. ينظر البند (٨-٩) من المعيار الشَّرعي رقم (١٣) بشأن المضاربة، والبند (٤-٧) من المعيار الشَّرعي رقم (٤٠) بشأن توزيع الرِّبح في الحسابات الاستثمارية على أساس المضاربة. ويترتب على ذلك:

8-3-1-2-d-4. In the financing mode of Mudaraba, partnership is created with Tier-1 Capital by commingle the Mudaraba capital with the common equity at its value. As for the financing mode of Musharaka, the partnership arises by concluding the contract of partnership, and in both cases, it is a joint enterprise (*sharikat al-ʻaqd*) in which the certificateholders have a share in the rights and obligations of the holders of equity, in proportion to their share in the partnership capital, after they have become partners with the shareholders of the originator in the common equity. See: s. (8-9) of Shari'ah Standard No. (13): Mudaraba, and s. (4-7) of Shari'ah Standard No. (40): Distribution of Profit in Mudaraba-based Investment Accounts. It implies the following:

8-3-1-2-د-4-1. أن الجهة المنشئة ممثِّلةً لمشاركة الشِّق الأول من رأس المال، تُصبح ملتزمةً في أموال هذه المشاركة بالوفاء بما على الجهة المنشئة من التزاماتٍ ناشئة من تمويلاتٍ قائمةٍ أو جديدةٍ. وينظر البند (٨-١-١-٢-ج-٧).

8.3.1.2.d.4.1. The originator, representing the Tier-1 participation, becomes committed as a liability for the funds of this participation to fulfil obligations of the originator arising from the existing or new financing. See: s. (8-1-1-2-c-7).

8-3-1-2-د-4-2. أن هذه المشاركة تُصبح هي المقترِضَةُ لأرصدة الحسابات الجارية، وتصير هذه الأرصدةُ مضمونةً في أموال تلك

8.3.1.2.d.4.2. That this participation becomes the borrower of the balances of the current accounts, and these balances become guaranteed in the funds of that participation.

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8.3.1.2.d.4.3. أن هذه المشاركة ممثلة بالجهة المنشئة تُصبح هي المضارب في حسابات الاستثمار القائمة على المضاربة، وهي الوكيل بالاستثمار في حسابات الاستثمار القائمة على الوكالة بالاستثمار، وإذا لزمها الضَّمان بسبب التَّعدي أو التَّقصير أو مخالفة شروط التَّعاقد فإنها تتحمَّله في أموال تلك المشاركة. ثم يحق لحملة صكوك الشق الأول بصفتهم أرباب مال أن يرجعوا على الجهة المنشئة التي هي المضارب، لأن التعدي أو التقصير قد حدث بسبب يعود إلى المضارب. وينظر البند (٨-٣-١-٣-أ-١).

8.3.1.2.d.4.3. That this participation, represented by the originator, becomes the Mudarib in Mudaraba-based investment accounts, and it is the Investment Agent in the Investment Agency-based accounts, and if [the originator] is subject to a liability due to misconduct, negligence, or breach of the terms of the contract, then [the originator] bears [such liability] from the funds of that partnership. Then the certificateholders of the Tier-1 Sukuk, in their capacity as Rab al-Maal, have the right of recourse to the originator, which is the Mudarib, because misconduct or negligence has occurred due to a reason attributed to Mudarib. See: s. (8-3-1-3-a-1).

8.3.1.2.d.4.4. أن الحصَّة التي كانت للجهةِ المنشئة في رأس مال المشاركة القائمة بالخلط بين أموال الجهة المنشئة وأموال وعاء حسابات المضاربة أو وعاء حسابات الوكالة بالاستثمار، المأذونِ بخلطها بأموال الجهة المنشئة، يضاف إليها مقدار صكوك الشِّق الأول من رأس المال، ويكون المجموع وعاء هذه المشاركة الجديدة، وتُدير الجهة المنشئة هذه المشاركةَ ممثِّلة لمشاركة الشِّق الأول من

8.3.1.2.d.4.4. The share that the originator had in the capital of the existing partnership by commingling the funds of the originator with the funds of the pool of the Mudaraba accounts or the pool of Investment Agency accounts, which are authorized to be commingled with the funds of the originator, to which is added the amount of Tier-1 Sukuk, and the total is the pool of this new partnership, and the originator manages this partnership representing the partnership of Tier-1 of the capital. See: s. (9-1-6-1) of Shari'ah Standard No. (13): Mudaraba, and s. (3-1-2-3) of Shari'ah Standard No. (12): Sharikah (Musharaka) and

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رأس المال. ينظر البند (٩-١-٦-١) من المعيار الشَّرعي رقم (١٣) بشأن المضاربة، والبند (٣-١-٢-٣ من المعيار الشَّرعي رقم (١٢) بشأن الشركة (المشاركة) والشركات الحديثة.

Modern Companies.

8-3-1-2-د-5. لا مانع من الاتفاق في عقد المضاربة أو عقد الشركة على أن للجهة المنشئة اختيارَ عدم توزيع الأرباح المحقَّقة في التَّاريخ المحدَّد للتَّوزيع إن هي قرَّرت عدم توزيع أرباحٍ لأصحاب حقوق الملكيَّة، وهذا بشرط:

8-3-1-2-d-5. There is no [Shari'ah] objection to have an agreement in the Mudaraba contract or the partnership contract pursuant to which the originator has the option of not distributing the realized profits on the date specified for distribution if it decides not to distribute profits to the holders of equity, and this is provided:

8-3-1-2-د-5-1. أن تُضاف هذه الأرباح إلى احتياطي الأرباح الخاصِّ بحمَلة الصُّكوك الذي يُستثمَر رصيده لصالحهم بشروط استثمار حصيلة الاكتتاب في الصكوك.

8.3.1.2.d.5.1. That these profits be added to the profits reserve of the certificateholders whose balance is invested on their behalf according to the terms of investing the proceeds of subscription to the Sukuk.

8-3-1-2-د-5-2. أن يبقى رصيد الاحتياطي ملكاً لحملة الصُّكوك إلى تصفيتها.

8.3.1.2.d.5.2. That the reserve balance remains the property of the certificateholders until the dissolution of the Sukuk.

8-3-1-2-د-5-3. أن يتم الدَّفع لحملة الصُّكوك من رصيد الاحتياطي في أي فترة توزيع أرباحٍ لاحقةٍ إذا لم تحقِّق المضاربة أو الشركة الأرباحَ المتوقَّعة للتَّوزيع.

8.3.1.2.d.5.3. That the certificateholders be paid from the balance of the reserve in any subsequent profit distribution period if Mudaraba or the partnership did not achieve the expected profits for distribution.

8-3-1-2-د-6. لا مانع من الاتفاق على أنه ليس لحمَلة الصُّكوك مطالبة الجهة المنشئة بأن تدفع لهم رصيد الاحتياطيِّ الوارد في البند (٨-

8-3-1-2-d-6. There is no [Shari'ah] objection to have an agreement that the certificateholders have no right to request the originator to pay them the reserve balance, mentioned in s. (8-3-1-

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٣-١-٢-د-٥) إن حقَّقت المضاربة أو الشركة الأرباح المتوقَّعة في التاريخ المحدَّد للتَّوزيع، مع بقاء رصيد الاحتياطي مملوكًا لهم.

2-d-5), if the Mudaraba or the partnership achieves the expected profits on the date specified for the distribution, while the reserve balance remains owned by them.

8-3-1-2-د-7. لا مانع من الاتفاق على أن للجهة المنشئة استخدام رصيد الاحتياطي الوارد في البند (٨-٣-١-٢-د-٥) لسداد ما على مشاركة الشق الأول من رأس المال من التزامات، وأن ما يبقى منه زائداً على الأرباح المتوقَّعة المدفوعة يكون للجهة المنشئة عند تصفية الصُّكوك. ينظر البند (١٢-٤) من المعيار الشَّرعي رقم (٤٦) بشأن الوكالة بالاستثمار.

8-3-1-2-d-7. There is no [Shari'ah] objection to have an agreement that the originator may use the reserve balance, mentioned in s. (8-3-1-2-d-5), to pay off the obligations of Tier-1 participation, and that what remains of it in excess of the expected profits paid will belong to the originator when the Sukuk is dissolved. See: s. (2-4) of Shari'ah Standard No. (46): Al-Wakala bi Al-Istithmar (Investment Agency).

8-3-1-2-د-8. لا مانع من الاتفاق على أن للجهة المنشئة تصفية الصُّكوك بعد مدَّة محدَّدة من تاريخ إصدارها أو في حالات محدَّدة، بشروطٍ متَّفقٍ عليها، منها التأكُّد بالتَّنضيض الحُكميِّ من سلامة رأس مال الصُّكوك فقط أو سلامة رأس مالها مع تحقيق قدرٍ محدَّدٍ من الرِّبح. فإن ظهر بالتَّنضيض الحكمي وجود خسارة أو أن الرِّبح المحدَّد غير متحقِّقٍ، فإن للجهة المنشئة أن تستمر في المضاربة أو الشركة ولا تُصَفي الصُّكوك، أو أن تختار التَّصفية بشرائها

8-3-1-2-d-8. There is no [Shari'ah] objection to have an agreement that the originator may dissolve the Sukuk after a specific period from its date of issuance or in specific cases, with agreed-upon conditions, including making sure through constructive liquidation (*tanḍīḍ ḥukmī*) about securing only the capital of the Sukuk or the securing its capital with the realization of a specific amount of profit. If it appears, via constructive liquidation, that there is a loss or that the specified profit is not realized, then the originator may continue the Mudaraba or the partnership and not to dissolve the Sukuk or opt for dissolution by purchasing the underlying assets of the certificateholders at a specified price agreed upon. It is also permitted for the certificateholders to make a binding promise to the originator, pursuant to a

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موجودات حملة الصكوك بثمن محدد متفق عليه. ويجوز كذلك أن يَعِد حمَلة الصُّكوك الجهة المنشئة وعداً مُلزماً، بمستندٍ مستقلٍّ، ببيعها موجودات الصُّكوك بعد مدَّة محدَّدة من تاريخ إصدارها، أو في حالات محددة، بثمنٍ محدد متفق عليه.

separate document, to sell them the underlying assets of Sukuk after a specified period from the date of issuance of Sukuk, or in specified cases, at a specified price agreed upon.

8-3-1-2-د-9. يجوز أن يَعِد حمَلة الصُّكوك الجهة المنشئةَ وعداً مُلزماً، بمستندٍ مستقلٍّ، بتحويل الصُّكوك إلى أسهمٍ، ببيعهم أسهماً جديدة من أسهمها بالصُّكوك، إن وصلت تلك الجهة إلى حال عدم القدرة على الاستمرار (Point of Non-Viability)، وفقاً للضَّوابط التي تضعها الجهات الرقابية. ويكون التَّحويل بالبيع بأي ثمنٍ عادل يتم الاتفاق عليه في حينه، بشرط أن لا يؤدي تنفيذ التَّحويل إلى ضمان الجهة المنشئة ما لا يجوز لها ضمانه شرعاً. وينظر البند (٨-٢-١-٦) من هذا المعيار. ولا يجوز الاتفاق على إعدام (شطب) الجهة المنشئة للصُّكوك كليًّا أو جزئياً، في تلك الحال، والاستئثار بموجوداتها وضمِّها إلى حقوق الملكيَّة مع سقوط حقِّ حمَلة الصُّكوك في هذه

8-3-1-2-d-9. It is permitted for the certificateholders to extend a binding promise to the originator, pursuant to a separate document, to convert the Sukuk into shares, by selling them new shares from [the originator's] shares against the Sukuk, if that entity reaches a point of non-viability, in accordance with the rules set by the regulators. The conversion via sale will be at any fair price to be agreed upon at the time, provided that carrying conversion does not lead to a guarantee from the originator of what it is not permitted for it to guarantee it according to Shari'ah. See: s. (6-3-1-6) of this Standard. In that event, it is not permitted to have an agreement to write-off the originator of the Sukuk in whole or in part, and to hold its underlying assets exclusively and to include them in the common equity with the forfeiture of the right of the certificateholders in these underlying assets.

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الموجودات.

8-3-1-2-د-10. لا يجوز الاتفاق على تقدُّم أصحاب حسابات الاستثمار في الوعاء العام على حمَلة صكوك الشِّق الأول من رأس المال في استيفاء أرصدتهم عند تصفية الجهة المنشئة، حال الإعسار أو الإفلاس، تقدُّماً مطلَقاً، بأن يتقدموا وإن كانت الخسارة لا ترجع إلى تعدي الجهة المنشئة أو تقصيرها أو مخالفتها لشروط التعاقد، وإنما يجوز الاتفاق على تقدُّمهم في استيفاء حقوقهم الثَّابتة لهم بموجب شروط وأحكام تلك الحسابات التي لا تكون الجهة المنشئة بموجبها ضامنةً للخسارة إلا حال التَّعدي أو التَّقصير أو مخالفة شروط التَّعاقد.

8-3-1-2-d-10. Upon the dissolution of the originator, in the event of insolvency or bankruptcy, it is not permitted to have an agreement to give the investment accountholder in the general pool an absolute priority over the certificateholders of Tier-1 Sukuk in collecting their balances so that [the investment accountholders] are given priority, even if the loss was not due to misconduct, negligence, or breach by the originator of the terms of the contract. However, it is permitted to have an agreement for priority of [the investment accountholders] in claiming their rights established as per the terms and conditions of those account, wherein the originator is not liable for the loss, except in the event of misconduct, negligence, or breach of the terms of the contract.

8-3-1-3. تصفية صكوك الشِّق الأَول من رأس المال (أولوية الاستيفاء) لإعسار أو إفلاس الجهة المنشئة:

8-3-1-3. Dissolution of Tier-1 Sukuk (Priority of Payment) due to the insolvency or bankruptcy of the originator:

8-3-1-3-أ. إذا تقرَّر تصفية الجهة المنشئة، لإعسارها أو إفلاسها، فإنه يُفرَّق في ضـــوابط التَّصفية بين أن تكون الجهة المنشئة مسؤولة عن الخســـارة وبين أن لا تكون مسؤولة عنها.

8-3-1-3-a. If it was decided to go the dissolution of the originator, due to its insolvency or bankruptcy, a distinction is made in the rules of dissolution whether the originator being responsible for the loss and not being responsible for it.

8-3-1-3-أ-1. إذا كانت الخسارة راجعةً إلى تعدي الجهة المنشئة أو تقصيرها أو مخالفتها لشروط

8-3-1-3-a-1. If the loss is due to misconduct, negligence or breach of the terms of the contract, the dissolution shall be according to the following stages and

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التَّعاقد، فإن التَّصفية تكون وفق المراحل والضَّوابط الآتية:

rules:

8-3-1-3-أ-1-1. يُدفَع من الوعاء العام الدَّين المستحقُّ للدَّائنين العاديين، وأرصدة الحسابات الجارية، وأرصدة حسابات الاستثمار بعد أن صارت هذه الأرصدة مضمونةً في أموال مشاركة الشِّق الأول من رأس المال. وإذا لم يكنِ الموجود في الوعاء العامِّ كافيًا لدفع جميع المستحقِّ لهؤلاء فإن الموجود يقسَّم بينهم بالنِّسبة والتَّناسب قسمة غرماء.

8.3.1.3.a.1.1. The debt due to unsecured creditors, the balances of current accounts, and the balances of investment accounts are paid from the general pool after these balances have become secured in the funds of the Tier-1 Capital. And if what is available in the general pool is not sufficient to pay all those to whom the amounts are due, then what is available is divided among them in proportion as division among the creditors (*qismat al-ghuramā'*).

8-3-1-3-أ-1-2. يُدفَع مما بقي في الوعاء العام لحَمَلة صكوك الشِّق الأول من رأس المال ما يُغَطِّي رأس مال الصُّكوك، بعد أن صار مضمونـًا من قبَل الجهة المنشئة في حصَّة أصحاب حقوق الملكية في مشاركة الشِّق الأول من رأس المال.

8.3.1.3.a.1.2. What remains in the general pool for certificateholders of Tier-1 Sukuk is paid to cover the capital of Sukuk, after it has become guaranteed by the originator in the share of the holders of equity in the participation of the Tier-1 of capital.

8-3-1-3-أ-1-3. يُدفَع ما يبقى في الوعاء العام لأصحاب حقوق الملكية أيـًا كان مقداره.

8.3.1.3.a.1.3. What remains in the general pool is paid to the holders of equity, whatever its amount.

8-3-1-3-أ-1-4. إذا لم يمكن الدفع –كليًا أو جزئيًا– للدَّين المستحقِّ للدَّائنين العاديين وأرصدة الحسابات الجارية وأرصدة الحسابات الاستثمارية، أو لرأس مال صكوك الشِّق الأول من رأس المال، بعد الدَّفع للسَّابقين بسبب عدم كفاية الموجود في الوعاء العام

8.3.1.3.a.1.4. If it is not possible to pay, in whole or in part, the debt owed to unsecured creditors, the balances of current accounts and the balances of investment accounts, or the capital of the Tier-1 Sukuk, after paying the previous ones due to the insufficiency of what is [available] in the general pool after the loss, then the provision of limited liability company shall apply

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بعد الخسارة، فإن عدم الدفع في هذه الحال ينطبق عليه حكم الشركة ذات المسؤولية المحدودة. وينظر البند (٤-١-٢-٩) من المعيار الشرعي رقم (١٢) بشأن الشركة (المشاركة) والشركات الحديثة.

on the non-payment in this event. See: s. (4-1-2-9) of Shari'ah Standard No. (12): Sharikah (Musharaka) and Modern Companies.

8-3-1-3-أ-2. إذا لم تكن الخسارة راجعة إلى تعدي الجهة المنشئة أو تقصيرها أو مخالفتها لشروط التَّعاقد، فإن التَّصفية تكون وفق المراحل والضَّوابط الآتية:

8-3-1-3-a-2. If the loss is not due to misconduct, negligence or breach of the terms of the contract, the dissolution shall be according to the following stages and rules:

8-3-1-3-أ-2-1. يُدفَع من الوعاء العام الدَّينُ المستحقُّ للدَّائنين العاديين، وأرصدةُ الحسابات الجارية، وأرصدةُ حسابات الاستثمار بعد أن تُنقَص هذه الأرصدة -أي أرصدة حسابات الاستثمار- بمقدار حصَّتها في خسارة الوعاء العام. وإذا لم يكنِ الموجود في الوعاء العامِّ كافياً لدفع جميع المستحقِّ لهؤلاء فإن الموجود يوزَّع بينهم بالنِّسبة والتَّناسب قسمة غرماء.

8.3.1.3.a.2.1. The Debt owed to unsecured creditors, current account balances, and investment account balances shall be paid from the general pool after decreasing these balances (i.e., investment account balance) by the amount of their share in the loss of the general pool. And if what is available in the general pool is not sufficient to pay all those to whom the amounts are due, then what is available is distributed among them in proportion as per division among the creditors.

8-3-1-3-أ-2-2. يُدفَع مما بقي في الوعاء العام لحَمَلة صكوك الشِّق الأول من رأس المال ما يُغطِّي رأس مال الصُّكوك بعد أن يُنقَص بمقدار حصَّته في خسارة الوعاء العام.

8.3.1.3.a.2.2. What remains in the general pool shall be paid to the certificateholders of Tier-1 Sukuk that covers the capital of the Sukuk after it is reduced by the amount of its share in the loss of the general pool.

8-3-1-3-أ-2-3. يُدفَع ما يبقى في الوعاء العام لأصحاب حقوق الملكية أيـًا كان مقداره.

8.3.1.3.a.2.3. What remains in the general pool is paid to the holders of equity, whatever its amount.

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8.3.1.3.a.2.4. If it is not possible to pay, in whole or in part, the debt owed to unsecured creditors, the balances of current accounts and the balances of investment accounts after reducing them by the amount of their share in the loss, or the capital of Tier-1 Sukuk after reducing it by the amount of their share in the loss, after paying the previous ones due to the insufficiency of the existing [amount] in the general pool after the loss, then the provision of limited liability company shall apply on non-payment in this event. See: s. (4-1-2-9) of Shari'ah Standard No. (12): Sharikah (Musharaka) and Modern Companies.

8-3-1-3-أ-2-4. إذا لم يمكن الدفع -كليًا أو جزئيًا- للدَّين المستحقِّ للدَّائنين العاديين وأرصدة الحسابات الجارية وأرصدة الحسابات الاستثمارية بعد إنقاصها بمقدار حصَّتها في الخسارة، أو لرأس مال صكوك الشِّق الأول من رأس المال بعد إنقاصه بمقدار حصَّته في الخسارة، بعد الدَّفع للسَّابقين بسبب عدم كفاية الموجود في الوعاء العام بعد الخسارة، فإن عدم الدفع في هذه الحال هو حكم الشركة ذات المسؤولية المحدودة. وينظر البند (٤-١-٢-٩) من المعيار الشرعي رقم (١٢) بشأن الشركة (المشاركة) والشركات الحديثة.

8-3-1-4. Dissolution of Tier-1 Sukuk upon the dissolution of the originator at the end of its term:

If the term of the originator ends, and its shareholders decide its dissolution without renewing it, without it being insolvent or bankrupt, then the certificateholders of Tier-1 Sukuk will recover the capital of Sukuk in full, and the realized profit will be paid to them according to their common share in the profit of the Mudaraba or the partnership, up to the amount specified in the contract of Mudaraba or partnership for the expected profit of the certificateholders. Whatever surplus shall be for the holders of equity as an incentive [fee] to performance.

8-3-1-4. تصفية صكوك الشِّق الأول من رأس المال عند تصفية الجهة المنشئة لانتهاء مدَّتها:

إذا انتهت مدَّة الجهة المنشئة، وقرَّر مساهموها تصفيتها وعدم تجديدها، دون أن تكون معسِرةً أو مفلسةً، فإن حمَلة صكوك الشِّق الأول من رأس المال يستردُّون رأس مال الصُّكوك كاملاً، ويُدفَع لهم الرِّبح المحقَّق وفق حصَّتهم الشَّائعة في ربح المضاربة أو الشركة، إلى القدر المحدَّد في عقد المضاربة أو الشركة للرِّبح المتوقَّع لحملة الصكوك، وما زاد فإنه يكون لأصحاب حقوق الملكية حافزاً على الأداء.

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8-3-2. Tier 2 Capital Sukuk:

It is a Sukuk that is issued to provide secondary capital, which alone constitutes Tier-2 capital of the statutory capital of the originator.

8-3-2-1. The regulatory characteristics of Tier 2 Capital Sukuk:

In order to count the Sukuk from the Tier 2 Capital, it is necessary for it to have a number of characteristics, from the supervisory point of view, the most important of which are:

8-3-2-1-a. It is for a fixed period, not perpetual, and are issued for a period of no less than five years.

8-3-2-1-b. It is capable of absorbing originator's losses, so it is delayed in payment, at the time of insolvency or bankruptcy of the originator, against unsecured obligations of the originator, which are the obligations to the depositors and unsecured creditors. It has preference over the obligations of the certificateholders of Tier-1 Sukuk and common equity.

8-3-2-1-c. The originator has no right to cancel the payment of profits on the dates specified for their distribution, even if it decided not to distribute profits to the holders of equity.

8-3-2. صكوك الشِّق الثاني من رأس المال (Tier 2 Capital Sukuk):

يتم إصدار هذه الصُّكوك لتوفير رأس مالٍ ثانويٍّ (Secondary Capital)، يشكِّل وحده الشِّق الثاني (Tier-2 Capital) من رأس المال النِّظامي للجهة المنشئة.

8-3-2-1. الخصائص الرقابية (النِّظاميَّة) لصكوك الشِّق الثاني من رأس المال:

يلزَم لعدِّ الصُّكوك من الشِّق الثاني من رأس المال، أن تتوافر فيها من الناحية الرقابية جملة خصائص، أهمها:

8-3-2-1-أ. أنها تكون محدَّدة المدَّة، غيرَ مستمرَّة، يتم إصدارها لمدَّة لا تقلُّ عن خمس سنوات.

8-3-2-1-ب. أنها تكون قادرة على امتصاص خسائر الجهة المنشئة، فتتأخَّر في الاستيفاء عند تصفية الجهة المنشئة للإعسار أو الإفلاس عن التزاماتها العادية، وهي الالتزامات التي تكون للمودعين والدَّائنين العاديين، وتتقدَّم على الالتزامات التي تكون لحمَلة صكوك الشِّق الأول من رأس المال وعلى حقوق الملكية.

8-3-2-1-ج. أنه ليس للجهة المنشئة حق إلغاء دفع الأرباح في التواريخ المحدَّدة لتوزيعها حتى وإن قرَّرت عدم توزيع أرباحٍ على أصحاب حقوق الملكية.

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8-3-2-1-d. It is not guaranteed and is not backed by a guarantee from the originator, or from any of its related entities.

8-3-2-1-e. It can be written off, in whole or in part, or converted into ordinary shares, via a resolution of the supervisory authority when the originator reaches a point of non-viability or to protect it from reaching this state.

8-3-2-1-د. أنها تكون غيرَ مضمونةٍ وغيرَ مغطَّاة بكفالةٍ من الجهة المنشئة، أو من أي جهةٍ متَّصلةٍ بها.

8-3-2-1-هـ. أنها يمكن شطبها كليًّا أو جزئيًا، أو تحويلها إلى أسهمٍ عاديَّة، بقرار من الجهة الرقابية عند وصول الجهة المنشئة إلى حال عدم القدرة على الاستمرار (Point of Non- Viability) أو لحمايتها من الوصول إلى هذه الحال.

8-3-2-2. Provisions and rules for Tier 2 capital Sukuk:

8-3-2-2-a. It is permitted to use the financing modes of partnerships, Wakala (agencies), or commutative contracts to issue Tier-2 Sukuk, whether [the Sukuk is] plain vanilla or composite.

8-3-2-2-b. It is not permitted if the originator of Tier-2 Sukuk is a conventional entity, even if the proceeds of the issuance are used in its underlying assets that are acceptable by the virtue of Shari'ah, because [Sukuk] supports the capital of this entity, and is a guarantor for the fulfilment of its conventional obligations that are senior in rank than Tier-1 Sukuk.

8-3-2-2-c. In the event of issuing Tier-2 Sukuk by applying the financing mode of Mudaraba, partnership, or Investment Agency, the following provisions and rules should be taken into account:

8-3-2-2-c-1. In the financing mode of Mudaraba, the

8-3-2-2. أحكام وضوابط صكوك الشِّق الثاني من رأس المال:

8-3-2-2-أ. يجوز استخدام صيغ المشاركات أو الوكالات أو المعاوضات في إصدار صكوك الشِّق الثاني من رأس المال، سواء كانت مفردة أو مركَّبة.

8-3-2-2-ب. لا يجوز أن تكون الجهة المنشئة في صكوك الشق الثاني من رأس المال جهة تقليدية ولو مع استخدام حصيلة الإصدار فيما لديها من موجودات مقبولة شرعًا؛ لأنها تدعم رأس مال هذه الجهة، وتكون ضامنة للوفاء بالتزاماتها التقليدية الأعلى رتبة من صكوك الشق الثاني. وينظر البند (٧-٢-٩).

8-3-2-2-ج. يراعى في حال إصدار صكوك الشِّق الثاني من رأس المال بصيغة المضاربة أو الشركة أو الوكالة بالاستثمار، الأحكامُ والضوابطُ الآتية:

8-3-2-2-ج-1. تكون حصيلةُ الاكتتاب في الصُّكوك في

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صيغة المضاربة هي رأسَ مال المضاربة، وتكون في صيغة الوكالة بالاستثمار هي مبلغَ الاستثمار، وتكون المضاربة أو الوكالة بالاستثمار مقيَّدةً باستثمار رأس مالها أو مبلغ الاستثمار في الوعاء العام للجهة المنشئة، في جانب موجودات الشِّق الأوَل من رأس المال، مع إذن حمَلة الصُّكوك للجهة المنشئة بخلط رأس مال المضاربة أو مبلغ الاستثمار بموجودات الشِّق الأول من رأس المال في وعائها العام. أما في صيغة الشركة فيتكون رأس مال الشركة من حصيلةِ الاكتتاب في الصكوك وموجودات الشِّق الأول من رأس المال في الوعاء العام للجهة المنشئة، بقيمة هذه الموجودات وقت بدء الشركة.

proceeds of subscription to Sukuk are the capital of Mudaraba. In the financing mode of Investment Agency, [the proceeds] are the amount of investment. The Mudaraba or Investment Agency will be restricted to investing [the Mudaraba] capital or the investment amount in the general pool of the originator in the common equity, with the permission of the certificateholders to the originator to commingle the capital of Mudaraba or the investment amount with the assets of Tier-1 Capital in in its general pool. As for the financing mode of partnership, the capital of partnership comprises of the proceeds of subscription to Sukuk, and the assets of Tier-1 Capital in the general pool of the originator, with the value of these assets at the time of the start of the partnership.

8-3-2-2-ج-2. تنشأ مشاركة الشِّق الثاني من رأس المال في صيغة المضاربة أو صيغة الوكالة بالاستثمار بخلط رأس مال المضاربة أو مبلغ الاستثمار بموجودات الشِّق الأول من رأس المال بقيمتها، وهي تنشأ في صيغة الشركة بإبرام العقد، وهي في جميع هذه الأحوال شركة عقد يصير بها لحمَلة الصُّكوك حصَّةٌ فيما لموجودات الشِّق الأول من رأس المال من حقوق وما عليها

8-3-2-2-c-2. In the financing mode of Mudaraba or Investment Agency, partnership of Tier-2 is created with Tier-1 Capital through commingle the capital of Mudaraba or the investment amount with the assets of Tier-1 Capital [at their respective] value. As for the financing mode of partnership, the partnership arises by concluding the partnership contract, and in both cases, it is a joint enterprise (*sharikat al-ʻaqd*) in which the certificateholders have a share in the rights and obligations of the assets of Tier-1, in proportion to their share in the partnership capital, after they have become partners with the holders of equity and the certificateholders of Tier-

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1 Sukuk (if any), and this shall be partnership of Tier-1 and Tier-2 of capital. It implies the following:

من التزامات، بعد أن أصبحوا شركاء مع مالكي الشِّق الأول من رأس المال ــ وهم أصحاب حقوقِ الملكية وحملةُ صكوك الشِّق الأول من رأس المال (إن وجدوا) ــ بنسبة حصَّتهم في رأس مال المشاركة، وهي مشاركة الشِّق الأول والشِّق الثاني من رأس المال. ويترتب على ذلك:

8.3.2.2.c.2.1. The originator, representing the participation of Tier-1 and Tier-2 (whether the original partnership or the one created in the Mudaraba and Investment Agency) created via commingling, becomes obligated with the funds of this partnership to fulfil the originator's obligations arising from the existing or the new financing.

8-3-2-2-ج-2-1. أن الجهة المنشئة ممثِّلةً لمشاركة الشِّق الأول والشِّق الثاني من رأس المال (سواء المشاركة الأصلية أو تلك التي نشأت بالخلط، في المضاربة أو الوكالة بالاستثمار) تُصبح ملتزمةً في أموال هذه المشاركة بالوفاء بما على الجهة المنشئة من التزامات ناشئة من تمويلات قائمة أو جديدة.

8.3.2.2.c.2.2. That the originator, representing this partnership, becomes the borrower for the balances of the current accounts, and these balances become guaranteed in the funds of that partnership.

8-3-2-2-ج-2-2. أن الجهة المنشئة ممثِّلةً لهذه المشاركة، تُصبح هي المقترِضَةَ لأرصدة الحسابات الجارية، وتصير هذه الأرصدة مضمونةً في أموال تلك المشاركة.

8.3.2.2.c.2.3. That the originator, representing this partnership, becomes the Mudarib in Mudaraba-based investment accounts, and it is the investment agent in the investment accounts based on the Investment Agency, and if it is subject to a liability, due to misconduct, negligence, or breach of the terms

8-3-2-2-ج-2-3. أن الجهة المنشئة ممثِّلةً لهذه المشاركة، تُصبح هي المضاربَ في حسابات الاستثمار القائمة على المضاربة، وهي الوكيل بالاستثمار في حسابات الاستثمار القائمة على الوكالة بالاستثمار، وإذا لزمها

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الضَّمان بسبب التَّعدي أو التَّقصير أو مخالفة شروط التَّعاقد فإنها تتحمَّله في أموال تلك المشاركة.

of the contract, then [the originator] bears [the liability] from the funds of that partnership.

8-3-2-2-ج-2-4. أن حصَّة الجهةِ المنشئة (وحدها أو ممثِّلة للمشاركة في الشِّق الأول من رأس المال حال وجود صكوكٍ من هذا الشِّق) في رأس مال المشاركة القائمة بالخلط بين أموال الجهة المنشئة وأموال وعاء حسابات المضاربة أو وعاء حسابات الوكالة بالاستثمار، المأذون بخلطها بأموالها، تزيد بمقدار رأس مال صكوك الشِّق الثاني من رأس المال، وتُدير الجهة المنشئة هذه المشاركة ممثِّلة لمشاركة الشِّق الثاني والشِّق الأول من رأس المال، وتَضمَن الخسارةَ لوعاء حسابات المضاربة أو وعاء حسابات الوكالة بالاستثمار في أموال هذه المشاركة حال التَّعدي أو التَّقصير أو مخالفة شروط التَّعاقد.

8.3.2.2.c.2.4. The share of the originator (either held solely or in representation of the partnership between Tier-1 Sukuk if Sukuk existed in this tier) in the capital of the existing partnership via commingling the funds of the originator with the funds of the pool of the Mudaraba accounts or the pool of the Investment Agency accounts, which are authorized to be commingled with the funds of the originator, will increase by the value of the capital of Tier-2 Sukuk, and the originator manages this partnership representing the partnership of Tier-1 and Tier-2 of the capital, and will be liable for the loss in the pool of Mudaraba accounts or Investment Agency accounts of the funds of this partnership, in the case of misconduct, negligence or breach of terms and conditions.

8-3-2-2-ج-3. يجوز أن يعِد حمَلة الصُّكوك الجهةَ المنشئة وعداً مُلزمـًا، بمستند مستقل، بتحويل الصُّكوك إلى أسهمٍ، ببيعهم أسهمـًا جديدة من أسهمها بالصُّكوك، إن وصلت تلك الجهة إلى حال عدم القدرة على الاستمرار (Point of Non-

8-3-2-2-c-3. It is permitted for the certificateholders to extend a binding promise to the originator, in a separate document, to convert [the certificates of] Sukuk into shares, by selling to [the certificateholders] new shares held by [the originator's] shares against the Sukuk, if that entity reaches a point of non-viability, in accordance with the rules set by the regulators. The conversion via sale will be at any fair

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Viability)، وفقـًا للضَّوابط التي تضعها الجهات الرقابية. ويكون التَّحويل بالبيع بأي ثمنٍ عادل يتم الاتفاق عليه، بشرط أن لا يؤدي تنفيذ التَّحويل إلى ضمان الجهة المنشئة ما لا يجوز لها ضمانه شرعـًا. وينظر البند (٨-٢-١-٦) من هذا المعيار. ولا يجوز الاتفاق على إعدام (شطب) الجهة المنشئة للصُّكوك كليًّا أو جزئيـًا، في تلك الحال، والاستئثارُ بموجوداتها وضمِّها إلى حقوق الملكيَّة مع سقوط حقِّ حمَلة الصُّكوك في هذه الموجودات.

price to be agreed upon at that time, provided that carrying conversion does not lead to a guarantee from the originator of what is not permitted to be held liable according to Shari'ah. See: s. (8-2-1-6) of this Standard. It is not permitted to have an agreement to write off the originator of the Sukuk in whole or in part, in that event, and to hold its underlying assets exclusively and to include them in the common equity with the forfeiture of the right of the certificateholders in its underlying assets.

8-3-2-2-ج-4. لا يجوز الاتفاق على تقدُّم أصحاب حسابات الاستثمار في الوعاء العام على حمَلة صكوك الشِّق الثاني من رأس المال في استيفاء أرصدتهم عند تصفية الجهة المنشئة، حالَ الإعسار أو الإفلاس، تقدُّمـًا مطلقـًا، بأن يتقدموا وإن كانت الخسارة لا ترجع إلى تعدي الجهة المنشئة أو تقصيرها أو مخالفتها لشروط التعاقد، وإنما يجوز الاتفاق على تقدُّمهم في استيفاء حقوقهم الثابتةِ لهم بموجب شروط وأحكام تلك الحسابات التي لا تكون الجهة المنشئة بموجبها ضامنة للخسارة إلا حال التَّعدي أو التَّقصير أو مخالفة شروط التَّعاقد.

8-3-2-2-c-4. It is not permitted to have an agreement that gives an absolute priority to the investment accountholder in the general pool over the certificateholders of Tier-2 Sukuk in collecting their balances upon the dissolution of the originator, in the event of insolvency or bankruptcy, so that [the investment accountholders] are given priority, even if the loss was not due to misconduct, negligence, or breach by the originator in the terms of the contract. However, it is permitted to have an agreement for giving priority to [the investment accountholders] in claiming their rights that established as per the terms and conditions of those account, wherein the originator is not liable for the loss, except in the event of misconduct, negligence, or breach of the terms of the contract.

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8-3-2-2-ج-5. لا يجوز الاتفاق على تقدُّم حمَلة صكوك الشِّق الثاني من رأس المال على حمَلة صكوك الشِّق الأول من رأس المال (حال وجودها) أو على أصحاب حقوق الملكية، في استيفاء رأس مال صكوكهم عند تصفية الجهة المنشئة للإعسار أو الإفلاس، تقدُّماً مطلقاً، بأن يتقدموا وإن كانت الخسارة لا ترجع إلى تعدي الجهة المنشئة أو تقصيرها أو مخالفتها لشروط التعاقد، وإنما يجوز أن يتقدَّموا في استيفاء حقوقهم الثابتة لهم بموجب شروط وأحكام المضاربة أو الشركة أو الوكالة بالاستثمار التي تقوم الصُّكوك عليها، التي لا تكون الجهة المنشئة بموجبها ضامنةً للخسارة إلا حال التَّعدي أو التَّقصير أو مخالفة شروط التَّعاقد.

8-3-2-2-c-5. It is not permitted to have an agreement that gives an absolute priority to the certificateholders of Tier-2 Sukuk over the certificateholders of Tier-1 Sukuk (if any) in giving the collection of their capital of the [respective] Sukuks upon the dissolution of the originator, in the event of insolvency or bankruptcy, so that [the certificateholders of Tier-2 Sukuk] are given priority, even if the loss was not due to misconduct, negligence, or breach by the originator in the terms of the contract. However, it is permitted to have an agreement for priority of [the certificateholders of Tier-2 Sukuk] in claiming their rights established as per the terms and conditions of Mudaraba, partnership, or Investment Agency, wherein the originator is not liable for the loss, except in the event of misconduct, negligence, or breach to the terms of the contract.

8-3-2-2-د. يراعى في حال إصدار صكوك الشِّق الثاني من رأس المال باستخدام إحدى صيغ المعاوضات أو صيغة الوكالة بالخدمات، الأحكامُ والضوابطُ الآتية :

8-3-2-2-d. In the event of issuing Tier-2 Sukuk by using one of the financing modes of commutative contracts or the financing mode of Service Agency, the following provisions and rules should be taken into account:

8-3-2-2-د-1. أن يتم إصدار الصُّكوك لصالح الجهة المنشئة ممثَّلةً للشِّق الأول من رأس المال، بحيث تكون ملتزمةً بالوفاء بما ينشأ عن الصُّكوك من دَين (التزاماتٍ) في أموال

8-3-2-2-d-1. That the Sukuk issuance will be in favour of the originator representing the Tier-1 Capital, so that it is obliged to settle the debt (the obligations) arising from the Sukuk out of funds of the Tier-1 of its capital, and not with all the assets of its general pool.

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الشِّق الأول من رأس مالها، لا في جميع موجودات وعائها العام.

8-3-2-2-د-2. لا مانع من الاتفاق بين حمَلة الصُّكوك والجهة المنشئة، بمستندٍ مستقلٍّ عن عقد المعاوضة أو الوكالة بالخدمات الذي تقوم الصُّكوك عليه، على أنه عند تصفية الجهة المنشئة للإعسار أو الإفلاس، فإن استيفاء حمَلة الصُّكوك للدَّين الثابت لهم على الجهة المنشئة يتأخَّر عن التزاماتها العادية، وهي الالتزامات التي تكون للمودعين والدَّائنين العاديين، الثابتةُ لهم بموجب شروط وأحكام التَّعاقد معهم، ويكون ذلك من تقديم دَينٍ على دَينٍ بموافقة الدَّائن المتأخِّر.

8-3-2-2-d-2. There is no [Shari'ah] objection to have an agreement between the certificateholders and the originator via a document, separate from the commutative contract or Service Agency contract on which the Sukuk is based, that upon dissolution of the originator, due to insolvency or bankruptcy, the certificateholders' recovery of the debt recognised to them by the originator shall be postponed (delayed) beyond the normal obligations [of the originator], which are the obligations that are due to depositors and unsecured creditors, and recognised for them according to the terms and conditions of the contract with them, and this is [carried] by priority of a debt on a debt with the consent of the delayed creditor.

8-3-2-2-د-3. إذا كان حمَلة الصُّكوك يملكون موجودات عينيَّة، كما لو كانت الصُّكوك تقوم على الإجارة أو الوكالة بالخدمات، فإنه لا مانع من الاتفاق بينهم وبين الجهة المنشئة، بمستندٍ مستقلٍّ عن عقد الإجارة أو الوكالة بالخدمات، على أن تستخدم الجهةُ المنشئةُ الأصول المؤجرة أو أصول الوكالة بالخدمات في الوفاء بالتزاماتها الثابتةِ للمودعين والدَّائنين العاديين إذا لم تكن أموال الشِّق الأول من رأس المال

8-3-2-2-d-3. If the certificateholders own tangible assets, as if the Sukuk were based on Ijarah or Service Agency, then there is no [Shari'ah] objection to have an agreement between [the certificateholders] and the originator, with a document separate from the contract of Ijarah or Service Agency, provided that the originator uses the assets of Ijarah or Service Agency in settling its obligations recognised for the depositors and unsecured creditors, if the funds of Tier-1 Capital were not sufficient to settle them, which is like hypothecation (*al-rahn al-mustaʿār*). By using the assets, the Ijarah or Service Agency ends. This shall apply when it is not possible, due to insolvency or bankruptcy, by the originator to

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perform the binding promise to purchase the underlying assets, otherwise this promise is performed, and the price becomes a debt owed by the originator, and then it will be subject to the agreement mentioned in (s. (8-3-2-2-d-2).

كافية للوفاء بها، وهو بمثابة الرَّهن المستعار. وباستخدام الموجودات تنتهي الإجارة أو الوكالة بالخدمات، وهذا إذا تعذَّر ــ بسبب الإعسار أو الإفلاس ــ تنفيذُ الوعد الملزِم من الجهة المنشئة بشراء الموجودات، وإلا فإن هذا الوعد يُنفَّذ، ويُصبح الثَّمن دينـًا على الجهة المنشئة، ويدخل عندئذٍ في الاتفاق المذكور في البند (٨-٣-٢-٢-د-٢).

8-3-2-2-d-4. It is permitted for the certificateholders to extend a binding promise to the originator to convert the Sukuk into shares, by selling them new shares from [the originator's] shares against the Sukuk, if that entity reaches a point of non-viability, in accordance with the rules set by the regulators. The conversion via sale will be at any price as agreed, even [if agreed] in advance. It is not permitted to have an agreement to write off the originator of the Sukuk in whole or in part, in that event, and to hold its underlying assets exclusively and to include them in the common equity with the forfeiture of the right of the certificateholders in these underlying assets, unless it will be to the extent that the originator fulfils its obligations to depositors and unsecured creditors, this is in accordance with what was mentioned in s. (8-3-2-2-d-2) and s.(8-3-2-2-d-3).

8-3-2-2-د-4. يجوز أن يعِد حمَلة الصُّكوك الجهة المنشئة وعداً مُلزمـًا بتحويل الصُّكوك إلى أسهمٍ ببيعهم أسهمـًا جديدة في المؤسَّسة بالصُّكوك، إن وصلت الجهة المنشئة إلى حال عدم القدرة على الاستمرار (Point of Non-Viability)، وفقـًا للضَّوابط التي تضعها الجهات الرقابية. ويكون التَّحويل بالبيع بأي ثمنٍ يتم الاتفاق عليه، ولو مقدَّمـًا. ولا يجوز الاتفاق على إعدام (شطب) المؤسَّسة للصُّكوك كليَّـًا أو جزئيـًا، في تلك الحال، والاستئثارُ بموجوداتها وضمِّها إلى حقوق الملكيَّة مع سقوط حقِّ حمَلة الصُّكوك في هذه الموجودات، إلا أن يكون ذلك بالقدر الذي تفي به الجهة المنشئة بما عليها من

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التزامات للمودعين والدَّائنين العاديين، ويكون ذلك وفقاً لما تقدَّم في البند (٨-٣-٢-٢-د-٢) والبند (٨-٣-٢-٢-د-٣).

8-3-2-3. تصفية صكوك الشِّق الثاني من رأس المال (أولوية الاستيفاء) لإعسار أو إفلاس المؤسَّسة:

8-3-2-3-أ. إذا كانت صكوك الشِّق الثاني من رأس المال قائمة على صيغةٍ من صيغ المشاركات (المضاربة أو الشركة) أو الوكالة بالاستثمار، وتقرَّر تصفية المؤسَّسة المصدِرة لها، لإعسارها أو إفلاسها، فإنه يُفرَّق في ضوابط التَّصفية بين أن تكون الجهة المنشئة مسؤولة عن الخسارة وبين أن لا تكون مسؤولة عنها.

8-3-2-3-أ-1. إذا كانت الخسارة راجعة إلى تعدي الجهة المنشئة أو تقصيرها أو مخالفتها لشروط التَّعاقد، فإن التَّصفية تكون وفق المراحل والضَّوابط الآتية:

8-3-2-3-أ-1-1. يُدفَع من الوعاء العام الدَّين المستحقَّ للدَّائنين العاديين وأرصدة الحسابات الجارية، وأرصدة حسابات الاستثمار بعد أن صارت هذه الأرصدة مضمونةً في أموال مشاركة الشِّق الثاني والشِّق الأول من رأس

8-3-2-3. Dissolution of Tier-2 Sukuk (priority of payment) due to the insolvency or bankruptcy of the Institution:

8-3-2-3-a. If Tier-2 Sukuk is based on one of the financing modes of partnerships (Mudaraba or partnership) or Investment Agency, and it is decided to go for dissolution of its issuing institution due to its insolvency or bankruptcy, then a distinction is made in the dissolution rules between the originator being responsible for the loss and not being responsible for it.

8-3-2-3-a-1. If the loss is due to misconduct, negligence, or breach of the terms of the contract, the dissolution shall be according to the following stages and rules:

8.3.2.3.a.1.1. The debt owed to unsecured creditors, the balances of current accounts, and the balances of investment accounts are settled from the general pool after these balances have become secured in the funds of the Tier-2 and Tier-1 of capital. And if what is available in the general pool is not sufficient to pay all those to whom the amounts

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	are due, then what is available is divided among them in proportion as an allocation among the creditors (*qismat al-ghuramā'*).	المال. وإذا لم يكنِ الموجود في الوعاء العامِّ كافيًا لدفع المستحقِّ لجميع هؤلاء كاملاً، فإن الموجود يقسم بينهم بالنِّسبة والتَّناسب، قسمة غرماء.
8.3.2.3.a.1.2.	What remains in the general pool shall be paid to the certificateholders of Tier-2 Sukuk that covers the capital of Sukuk after it has become guaranteed by the originator in the funds of Tier-1 Capital.	8-3-2-3-أ-1-2. يُدفَع مما يبقي في الوعاء العام لحَمَلة صكوك الشِّق الثاني من رأس المال ما يغطي رأس مال الصُّكوك بعد أن صار مضمونـًا من قبل الجهة المنشئة في أموال الشِّق الأول من رأس المال.
8.3.2.3.a.1.3.	What remains in the general pool shall be paid to the certificateholders of Tier-1 Sukuk (if any) that covers the capital of the Sukuk after it has become guaranteed from the originator in the share of holders of equity in participating in Tier-1 Capital.	8-3-2-3-أ-1-3. يُدفَع مما يبقى في الوعاء العام لحمَلة صكوك الشِّق الأول من رأس المال (حال وجودها) ما يغطي رأس مال الصُّكوك بعد أن صار مضمونـًا من قبل الجهة المنشئة في حصَّة أصحاب حقوق الملكية في مشاركة الشِّق الأول من رأس المال.
8.3.2.3.a.1.4.	What remains in the general pool is paid to the holders of equity, whatever its amount.	8-3-2-3-أ-1-4. يُدفَع ما يبقى في الوعاء العام لأصحاب حقوق الملكية أيـًا كان مقداره.
8.3.2.3.a.1.5.	After the occurrence of the loss, if [the amount] available in the general pool, is not sufficient to pay the whole debt owed to unsecured creditors, the balances of current accounts and the balances of investment accounts, or [the amount] available was not sufficient to pay the capital of Tier-2 Sukuk after paying the previous parties, or [the amount] available was not sufficient to pay the capital of Tier-1 Sukuk after paying the	8-3-2-3-أ-1-5. إذا لم يكن الموجود في الوعاء العام بعد الخسارة كافيـًا لدفع كلِّ الدَّين المستحقِّ للدَّائنين العاديين وأرصدة الحسابات الجارية وأرصدة الحسابات الاستثمارية، أو لم يكن الموجود كافيـًا لدفع رأس مال صكوك الشِّق الثاني من رأس المال بعد الدَّفع للسَّابقين، أو لم يكن الموجود كافيـًا

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previous parties, then non-payment in this case shall be subject to the provision of limited liability company. See: s. (4-1-2-9) of Shari'ah Standard No. (12): Sharikah (Musharaka) and Modern Companies.

لدفع رأس مال صكوك الشِّق الأول من رأس المال بعد الدَّفع لجميع السَّابقين، فإن عدم الدفع في هذه الحال هو حكم الشركة ذات المسؤولية المحدودة. وينظر البند (٤-١-٢-٩) من المعيار الشرعي رقم (١٢) بشأن الشركة (المشاركة) والشركات الحديثة.

8-3-2-3-a-2. If the loss is not due to originator's misconduct, negligence, or breach of the terms of the contract, the dissolution shall be according to the following stages and rules:

8-3-2-3-أ-2. إذا لم تكن الخسارة راجعة إلى تعدي الجهة المنشئة أو تقصيرها أو مخالفتها لشروط التَّعاقد، فإن التَّصفية تكون وفق المراحل وبالضَّوابط الآتية:

8.3.2.3.a.2.1. The debt owed to unsecured creditors, current account balances, and investment account balances shall be paid from the general pool after decreasing these balances by the amount of their share in the loss of the general pool. And if what is available in the general pool is not sufficient to pay all those to whom the amounts are due, then what is available is distributed among them on proportion basis as per division among the creditors (*qismat al-ghuramā'*)

8-3-2-3-أ-2-1. يُدفَع من الوعاء العام الدَّينُ المستحقَّ للدَّائنين العاديين، وأرصدةُ الحسابات الجارية، وأرصدةُ حسابات الاستثمار بعد أن تُنقَص هذه الأرصدة بمقدار حصَّتها في خسارة الوعاء العام. وإذا لم يكنِ الموجود في الوعاء العامِّ كافياً لدفع المستحقِّ لجميع هؤلاء كاملاً، فإن الموجود يقسم بينهم بالنِّسبة والتَّناسب، قسمة غرماء.

8.3.2.3.a.2.2. What remains in the general pool shall be paid to the certificateholders of Tier-2 Sukuk that covers the capital of the Sukuk after it is reduced by the amount of its share in the loss of the general pool.

8-3-2-3-أ-2-2. يُدفَع مما يبقى في الوعاء العام لحَمَلة صكوك الشِّق الثاني من رأس المال ما يغطي رأس مال الصُّكوك بعد أن يُنقَص بمقدار حصَّته في خسارة الوعاء العام.

8.3.2.3.a.2.3. What remains in the general pool is

8-3-2-3-أ-2-3. يُدفَع مما يبقي في الوعاء العام لحَمَلة

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صكوك الشِّق الأول من رأس المال ما يغطي رأس مال الصُّكوك بعد أن يُنقَص بمقدار حصَّته في خسارة الوعاء العام.

paid to the certificateholders of Tier-1 Sukuk to cover the capital of the Sukuk after it decreases by the amount of its share in the loss of the general pool.

8-3-2-3-أ-2-4. يُدفَع ما يبقى في الوعاء العام لأصحاب حقوق الملكية أيًا كان مقداره.

8.3.2.3.a.2.4. What remains in the general pool is paid to the holders of equity, whatever its amount.

8-3-2-3-أ-2-5. إذا لم يكن الموجود في الوعاء العام بعد الخسارة كافيًا لدفع كلِّ الدَّين المستحقِّ للدَّائنين العاديين وأرصدة الحسابات الجارية وأرصدة الحسابات الاستثمارية بعد إنقاصها بمقدار حصَّتها في الخسارة، أو لم يكن الموجود كافيًا بعد الدَّفع للسَّابقين لدفع رأس مال صكوك الشِّق الثاني بعد إنقاصه بمقدار حصَّته في الخسارة، أو لم يكن الموجود كافيًا بعد الدَّفع لجميع السَّابقين لدفع رأس مال صكوك الشِّق الأول من رأس المال بعد إنقاصه بمقدار حصَّته في الخسارة، فإن عدم الدفع في هذه الحال هو حكم الشركة ذات المسؤولية المحدودة. وينظر البند (٤-١-٢-٩) من المعيار الشرعي رقم (١٢) بشأن الشركة (المشاركة) والشركات الحديثة.

8.3.2.3.a.2.5. If [the amount] available in the general pool after the loss is not sufficient to pay all the debt due to unsecured creditors and the balances of current accounts and balances of investment accounts after decreasing them by the amount of their share in the loss, or if [the amount] is not sufficient, after paying the previous parties, to pay the capital of Tier-2 Sukuk after reducing it by the amount of its share in the loss, or if [the amount] is not sufficient after paying all the previous parties to pay the capital of Tier-1 Sukuk after decreasing [the capital] by the amount of its share of the loss, then non-payment in this case shall be subject to the provision of limited liability company. See: s. (4-1-2-9) of Shari'ah Standard No. (12): Sharikah (Musharaka) and Modern Companies.

8-3-2-3-ب. إذا كانت صكوك الشِّق الثاني من رأس المال قائمة على صيغةٍ من صيغ المعاوضات أو

8-3-2-3-b. If Tier-2 Sukuk is based on a financing mode of commutation contract or Service Agency, and it was resolved to

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الوكالة بالخدمات، وتقرَّر تصفية الجهة المنشئة، لإعسارها أو إفلاسها، فإن التَّصفية تكون وفق المراحل وبالضَّوابط الآتية:

go for dissolution of the originator, due to its insolvency or bankruptcy, then the liquidation shall be according to the following stages and rules:

8-3-2-3-ب-1. يُدفَع من الوعاء العام الدَّين المستحقَّ للدَّائنين العاديين، وأرصدة الحسابات الجارية، والمستحقُّ لأصحاب حسابات الاستثمار بموجب شروط وأحكام التَّعاقد معهم. ويمكن أن تستخدم الأصول المملوكة لحمَلة صكوك الشِّق الثاني من رأس المال، من نحو الأصول المؤجرة أو موجودات الوكالة بالخدمات، في الدَّفع، إن وجِد اتفاقٌ على ذلك، وفق ما تقدَّم في البند (٨-٣-٢-٢-د-٢)، والبند (٨-٣-٢-٢-د-٣).

8-3-2-3-b-1. The debt owed to unsecured creditors, current account balances, and owed to investment account holders under the terms and conditions of the contract with them shall be paid out of the general pool. The assets owned by the certificateholders of Tier-2 Sukuk, such as leased assets or assets of Service Agency, can be used for settlement, if there is an agreement on that, according to the preceding s. (8-3-2-2-d-2), and s. (8-3-2-2-d-3).

8-3-2-3-ب-2. يتم إرجاع الأصول المملوكة لحمَلة صكوك الشِّق الثاني من رأس المال، من نحو الأصول المؤجرة أو موجودات الوكالة بالخدمات، أو إرجاع الباقي منها إن احتاجت الجهة المنشئة إليها في الدَّفع، وفقاً لما تقدَّم في البند (٨-٣-٢-٣-ب-١).

8-3-2-3-b-2. The assets held by the certificateholders of Tier-2 Sukuk, such as leased assets or assets of Service Agency, are returned or return the remainder of them if the originator needs them for payment, according to the preceding s. (8-3-2-3-b-1).

8-3-2-3-ب-3. يُدفَع مما يبقى في الوعاء العام لحَمَلة صكوك الشِّق الثاني من رأس المال ما يغطي الدَّين الذي لهم على الجهة المنشئة،

8-3-2-3-b-3. What remains in the general pool for the certificateholders of Tier-2 Sukuk is paid to cover the debt they owe to the originator, and [the originator] is committed to settle it from the funds of

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the Tier-1 Capital.

وهي ملتزمةٌ بالوفاء به من أموال الشِّق الأول من رأس المال.

8-3-2-3-b-4. What remains in the general pool for the certificateholders of Tier-1 Sukuk (if any) shall be paid to cover the amount recognised for them according to the terms and conditions of the contract of Mudaraba or partnership on which the Sukuk is based.

8-3-2-3-ب-4. يُدفَع مما يبقى في الوعاء العام لحمَلة صكوك الشِّق الأول من رأس المال (حال وجودها) ما يغطي القدر الثابت لهم بموجب شروط وأحكام عقد المضاربة أو الشركة الذي تقوم الصُّكوك عليه.

8-3-2-3-b-5. Whatever amount remains in the general pool shall be paid to the holders of equity.

8-3-2-3-ب-5. يُدفَع ما يبقى في الوعاء العام لأصحاب حقوق الملكية أيـًا كان مقداره.

8-3-2-3-b-6. If [the amount] that remains in the general pool, after the loss, is not sufficient to pay all the debt owed to unsecured creditors and current account balances and owed to investment account holders, or if [the amount] is not sufficient to pay the entire debt owed to the certificateholders of Tier-2 Sukuk after paying the previous ones, or if [the amount] is not sufficient to pay the due to the certificateholders of Tier-1 Sukuk after paying all the previous parties, then provision of limited liability company shall apply on non-payment in this case. See: s. (4-1-2-9) of Shari'ah Standard No. (12): Sharikah (Musharaka) and Modern Companies.

8-3-2-3-ب-6. إذا لم يكن الموجود في الوعاء العام بعد الخسارة كافيـًا لدفع كلِّ الدَّين المستحقِّ للدَّائنين العاديين وأرصدةِ الحسابات الجارية والمستحقِّ لأصحاب الحسابات الاستثمارية، أو لم يكن الموجود كافيـًا لدفع كلِّ الدَّين المستحَقِّ لحمَلة صكوك الشِّق الثاني من رأس المال بعد الدَّفع للسَّابقين، أو لم يكن الموجود كافيـًا لدفع المستحَقِّ لحمَلة صكوك الشِّق الأول من رأس المال بعد الدَّفع لجميع السَّابقين، فإن عدم الدفع في هذه الحال هو حكم الشركة ذات المسؤولية المحدودة. وينظر البند (٤-١-٢-٩) من المعيار الشرعي رقم (١٢) بشأن الشركة (المشاركة) والشركات الحديثة.

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8-3-2-4. Dissolution of Tier-2 Sukuk upon the dissolution of the originator at the end of its term:

Without being insolvent or bankrupt, if the term of the originator matures and its shareholders decide its dissolution and not to renew it, the certificateholders of Tier-2 Sukuk will recover the capital of Sukuk in full, and will be paid to realized profit according to their common share in the profit of Mudaraba, partnership or the entire realized profit of Investment Agency will be paid up to the amount specified in the contract of partnership, Mudaraba or Investment Agency for the expected profit of the certificateholders. Whatever surplus is for the owners of Tier-1 Capital as an incentive [fee]. If Tier-2 Sukuk is based on a financing mode of the commutative contract or Service Agency, then its certificateholders, in the financing mode of commutative contract, will recover the debt of Sukuk, being recognised for them and owed by the originator, in full, with the recovery of whatever underlying assets they may hold, such as leased assets, and in the form of Service Agency, they will recover the underlying assets owned by them. After that, the certificateholders of Tier-1 Sukuk will recover the capital of Sukuk in full, and the realized profit will be paid to them according to their common share in the profit of Mudaraba or partnership, up to the amount specified in the Mudaraba or partnership contract [respectively] for the expected profit of the certificateholders, and whatever exceeds [that] will be an incentive [fee] for the holders of equity.

8-3-2-4. تصفية صكوك الشِّق الثاني من رأس المال عند تصفية الجهة المنشئة لانتهاء مدَّتها:

إذا انتهت مدَّة الجهة المنشئة، وقرَّر مساهموها تصفيتها وعدم تجديدها، دون أن تكون معسرةً أو مفلسةً، فإن حمَلة صكوك الشِّق الثاني يَستردون رأس مال الصُّكوك كاملاً إن كانت قائمة على المضاربة أو الشركة أو الوكالة بالاستثمار، ويُدفَع لهم الرِّبح المحقَّق وفقـًا لحصَّتهم الشائعة في ربح الشركة أو ربح المضاربة، أو يدفعَ لهم جميع الرِّبح المحقَّق في الوكالة بالاستثمار، وذلك إلى القدر المحدَّد في عقد المضاربة أو الشركة أو الوكالة بالاستثمار للرِّبح المتوقَّع لحملة الصكوك، وما زاد فإنه يكون لمالكي الشِّق الأول من رأس المال، حافزاً. وإذا كانت صكوك الشِّق الثاني من رأس المال قائمةً على صيغة معاوضة أو صيغة الوكالة بالخدمات، فإن حمَلتها في صيغة المعاوضة يستوفون دَين الصُّكوك الثابت لهم على الجهة المنشئة كاملاً مع استرجاع ما قد يكون لهم من أصولٍ مملوكةٍ من نحو الأصول المؤجرة، وفي صيغة الوكالة بالخدمات يسترجعون الموجودات المملوكة لهم. وبعد ذلك يَسترد حمَلة صكوك الشِّق الأول من رأس المال رأس مال الصُّكوك كاملاً، ويُدفَع لهم الرِّبح المحقَّق وفقـًا لحصَّتهم الشائعة في ربح المضاربة أو الشركة، إلى القدر المحدَّد في عقد المضاربة أو الشركة للرِّبح المتوقَّع لحملة الصكوك، وما زاد فإنه يكون لأصحاب حقوق الملكية، حافزاً.

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8-3-3. Stages of calculating and distributing the profit of the general pool for the originator of Tier-1 Sukuk and Tier-2 Sukuk based on Partnership, Mudaraba, or Investment Agency,

with regard to these Sukuk:

8-3-3-1. First: The realized profit is distributed between the Mudaraba pool or the Investment Agency pool and participation of Tier-2 and Tier-1 Capital, in proportion to the share of each of them in the existing partnership capital based on commingling.

8-3-3-2. Second: The profit related to the participation of Tier-2 and Tier-1 Capital is distributed between its two parties, i.e., between Tier-2 Sukuk and the participation of Tier-1 Capital, in proportion to the share of each of them in the capital of the partnership (based on joint enterprise (*sharikat al-ʿaqd*) or by way of commingling) if Tier-2 Sukuk is based on Mudaraba or Investment Agency.

8-3-3-3. Third: The distribution of profits of Tier-2 Sukuk is sourced from the capital, according to the following scenarios:

8-3-3-3-a. If the Sukuk are based on partnership, then the profit is distributed among its certificateholders, up to the percentage specified for their expected profit for them, and what exceeds given to the originator, representing Tier-1 Capital,

8-3-3. مراحل حساب وتوزيع ربح الوعاء العام للجهة المنشئة لصكوك الشِّق الأول، وصكوك الشِّق الثاني من رأس المال القائمة على الشركة أو المضاربة أو الوكالة بالاستثمار،

فيما يخصُّ هذه الصُّكوك:

8-3-3-1. أولاً: يتم توزيع الرِّبح المحقَّق بين وعاء المضاربة أو وعاء الوكالة بالاستثمار ومشاركة الشِّق الثاني والشِّق الأول من رأس المال، بنسبة حصةٍ كلٍّ منهما في رأس مال المشاركة القائمة بينهما بالخلط.

8-3-3-2. ثانيـاً: يتم توزيع الرِّبح الخاصِّ بمشاركة الشِّق الثاني والشِّق الأول من رأس المال، بين طرفيها، أي بين صكوك الشِّق الثاني من رأس المال ومشاركة الشِّق الأول من رأس المال، بنسبة حصَّة كلٍّ منهما في رأس مال المشاركة (القائمة بالعقد أو بالخلط) إن كانت صكوك الشِّق الثاني من رأس المال قائمة على المضاربة أو الوكالة بالاستثمار.

8-3-3-3. ثالثـاً: يتم توزيع الرِّبح الخاصِّ بصكوك الشِّق الثاني من رأس المال، وفق الأحوال الآتية:

8-3-3-3-أ. إن كانت الصُّكوك قائمة على الشركة، فإن الربح يوزَّع بين حملتها، إلى النّسبة المحدَّدة للرِّبح المتوقَّع لهم، وما زاد فإنه يكون للجهة

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المنشئة ممثِّلة للشِّق الأول من رأس المال حافزاً، أو أنه يودَع في احتياطي الأرباح الخاصِّ بحمَلة صكوك الشِّق الثاني من رأس المال، حسب الاتفاق.

as an incentive [fee], or it is deposited in the profits reserve of the certificateholders of Tier-2 Sukuk, according to the agreement.

8-3-3-3-ب. إن كانت الصكوك قائمة على المضاربة، فإنه يتم توزيع الرِّبح الخاصِّ بصكوك الشِّق الثاني من رأس المال، بين حمَلة صكوك الشِّق الثاني من رأس المال (أرباب المال) والجهة المنشئة ممثلةً لمشاركة الشِّق الأول من رأس المال (المضارب)، بالنِّسب الشائعة المتَّفق عليها لتوزيع ربح المضاربة، ويكون لحمَلة صكوك الشِّق الثاني من رأس المال حصَّتهم من الرِّبح إلى النّسبة المحدَّدة للرِّبح المتوقَّع لهم، وما زاد فإنه يكون للجهة المنشئة ممثِّلةً للشِّق الأول من رأس المال، حافزاً، أو أنه يودَع في احتياطي الأرباح الخاصِّ بحمَلة صكوك الشِّق الثاني من رأس المال، حسب الاتفاق.

8-3-3-3-b. If the Sukuk is based on Mudaraba, then the profit is of Tier-2 Sukuk is distributed between the certificateholders of the Tier-2 Sukuk (Rab al-Maal) and the originator, representing the participation of Tier-1 Capital (Mudarib), as a common ratios agreed upon for the distribution of the Mudaraba profit, and the certificateholders of Tier-2 Sukuk have their share of the profit to the specified percentage of the expected profit. What exceeds is given to the originator, representing Tier-1 Capital, as an incentive [fee], or it is deposited in the income reserve account held for the certificateholders of Tier-2 Sukuk, as per the agreement.

8-3-3-3-ج. إن كانت الصكوك قائمة على الوكالة بالاستثمار، فإن الرِّبح الخاصَّ بصكوك الشِّق الثاني من رأس المال يُدفع كله إلى حمَلة هذه الصُّكوك (الموكِّلين بالاستثمار) إلى النّسبة المحدَّدة للرِّبح المتوقَّع لهم، وما زاد فإنه يكون للجهة المنشئة (الوكيل بالاستثمار) ممثِّلةً للشِّق الأول من رأس المال، حافزاً، أو

8-3-3-3-c. If the Sukuk is based on Investment Agency, then the profit of Tier-2 Sukuk is paid entirely to the certificateholders of this Sukuk (the Muwakkil of Investment) up to the specified percentage of their expected profit for [the certificateholders], and what exceeds is given to the originator (the Investment Agent), representing the Tier-1 Capital, as an incentive [fee], or it is deposited in the income reserve account held for the certificateholders of Tier-2 Sukuk, according to the agreement.

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أنه يودَع في احتياطي الأرباح الخاصِّ بحمَلة صكوك الشِّق الثاني من رأس المال، حسب الاتفاق.

8-3-3-4. رابعًا: يتم توزيع حصَّة الرِّبح الخاصَّة بمشاركة الشِّق الأول من رأس المال، بين طرفيها، وهما صكوك الشِّق الأول من رأس المال وحقوق الملكية، بنسبة حصَّة كلٍّ منهما في رأس مال المشاركة (القائمة بالعقد أو بالخلط).

8-3-3-4. Fourth: The profit share of partnership of Tier-1 Capital is distributed between its two parties, which are Tier-1 Sukuk and common equity rights, in proportion to the share of each of them in the capital of the partnership (based on joint enterprise (*sharikat al-ʿaqd*) or commingling).

8-3-3-5. خامسًا: يتمُّ توزيع حصَّة الرِّبح الخاصَّة بصكوك الشِّق الأول من رأس المال، وفق الأحوال الآتية:

8-3-3-5. Fifth: Distribution of tge profit share of Tier 1 Sukuk is sourced from the capital, according to the following conditions:

8-3-3-5-أ. إذا كانت الصكوك قائمة على الشركة بالعقد، فإن الربح يكون لحملة الصُّكوك إلى النّسبة المحدَّدة للرِّبح المتوقَّع لهم، وما زاد فإنه يكون للجهة المنشئة، أي أصحاب حقوق الملكية، حافزاً، أو أنه يودَع في احتياطي الأرباح الخاصِّ بحمَلة الصُّكوك، حسب الاتفاق. وهو يودَع في هذا الاحتياطي إن قرَّرت الجهة المنشئة عدم توزيع ربحٍ على أصحاب حقوق الملكية.

8-3-3-5-a. If the Sukuk is based on joint enterprise (*sharkiat al-ʿaqd*), then the profit belongs to the certificateholders up to the specified percentage of their expected profit, and what exceeds is given to the originator, i.e., the holders of equity, as an incentive [fee], or it is deposited in the profits (income) reserve held for the certificateholders, as per to the agreement. It is deposited in this reserve if the originator decides not to distribute the profit to the holders of equity.

8-3-3-5-ب. إذا كانت الصكوك قائمة على المضاربة، فإن الربح يوزع بين حمَلة هذه الصُّكوك (أرباب المال) والجهة المنشئة (المضارب)، بالنِّسب

8-3-3-5-b. If the Sukuk is based on Mudaraba the profit is distributed between the certificateholders of this Sukuk (Rab al-Maal) and the originator (Mudarib),

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الشائعة المتَّفق عليها لتوزيع ربح المضاربة، إلى النّسبة المحدَّدة للرِّبح المتوقَّع لهم، وما زاد فإنه يكون للجهة المنشئة، أي أصحاب حقوق الملكية، حافزاً، أو أنه يودَع في احتياطي الأرباح الخاصِّ بحمَلة الصُّكوك، حسب الاتفاق. وهو يودَع في هذا الاحتياطي إن قرَّرت الجهة المنشئة عدم توزيع ربحٍ على أصحاب حقوق الملكية.

according to the common ratios agreed upon for the distribution of the profit of Mudaraba, up to the specified percentage of their expected profit, and what exceeds is given to the originator, i.e. the holders of equity, as an incentive [fee], or it is credited to profits (income) reserve account of the certificateholders, as per to the agreement. It is deposited in this reserve if the originator decides not to distribute the profit to the holders of equity.

9. تداول الصكوك واستردادها وإطفاؤها:

يُقصد بتداول الصُّكوك، بيعها لغير الجهة المنشئة في المرحلة التالية للاكتتاب فيها عند الإصدار.

9-1. الأحكام العامَّة للتَّداول:

9-1-1. يخضع تداول الصُّكوك لشروط تداول ما تمثِّله من موجودات.

9-1-2. لا يجوز تداول الصُّكوك بعد الاكتتاب فيها وموجوداتُها ما تزال نقوداً، وكذلك إن تمحَّضت موجوداتها نقوداً في أي مرحلة من المراحل، إلا بمراعاة أحكام الصَّرف، ومن ذلك تداول الصكوك بعد الاكتتاب والتخصيص وقبل الشروع في استثمار رأس مالها فعلاً.

9-1-3. إن تم إيداع حصيلة الإصدار بعد الاكتتاب في حسابات استثمارية لدى بنوك إسلامية، تُستثمَر في

9. Trading, Redemption and Cancellation of Sukuk:

Trading of Sukuk means selling [its certificates] to a party than the originator in the subsequent stage of subscribing to Sukuk upon issuance.

9-1. General Provisions of Trading [the certificates of] Sukuk:

9-1-1. Trading of Sukuk is subject to the conditions of trading (negotiability) of the underlying assets they represent.

9-1-2. Trading of the certificates of Sukuk is not permitted after subscribing to them when the [underlying assets] are still cash, and also if its underlying assets comprise entirely of cash at any of the stages, except by complying the provisions of currency exchanging (*ṣarf*), including trading of Sukuk after the subscription and allotment and before actually commencing the investment of its capital.

9-1-3. If the proceeds of the issuance are deposited after the subscription in the investment accounts held with Islamic banks, which are invested in their general pools in which the assets are turned around

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(*taqlīb*), and whose assets include tangible assets, usufructs, or rights, or a commingled set of them or some of them, then the underlying assets of Sukuk shall not deemed in totality as cash, and its trading is permitted at any price without complying with the provisions of currency exchange (*ṣarf*).

أوعيتها العامَّة التي تُقلَّب فيها الأموال، وتَشتمل في جملة موجوداتها على أعيانٍ أو منافع أو حقوق، أو خلطة منها أو من بعضها، فإن موجودات الصكوك لا تُعَدُّ نقوداً محضَة، ويجوز تداولها بأي سعر دون التقيُّد بأحكام الصَّرف.

9-1-4. Trading of Sukuk is not permitted if its underlying assets are in totality debts, even if debts arising from commentative contracts, such as Murabaha, unless and until the provisions of sale of debt are complied with. See: s. (5) of Shari'ah Standard No. (59): Sale of Debt.

9-1-4. لا يجوز تداول الصُّكوك إن تمحَّضت موجوداتها ديونـًا، وإن كانت ديونـًا ناشئة من معاوضات مثل المرابحات، إلا بمراعاة أحكام تداول الديون. وينظر البند (٥) من المعيار الشرعي رقم (٥٩) بشأن بيع الدين.

9-1-5. If the certificates of Sukuk are among those that are not permitted to be traded except by observing the provisions of currency exchange (*ṣarf*) or observing the provisions of sale of debt, then it is not permitted to list [such certificates] in the financial markets, even If it is stated that their trading should be carried only by complying to [those respective provisions]. See: s. (9-3-1).

9-1-5. إذا كانت الصُّكوك مما لا يجوز تداولها إلا بمراعاة أحكام الصَّرف أو بمراعاة أحكام تداول الديون، فإنه لا يجوز إدراجها في الأسواق الماليَّة، ولو مع التَّصريح بأن تداولها لا يكون إلا بمراعاة ذلك. وينظر البند (٩-٣-١).

9-1-6. If the underlying assets of Sukuk are the assets being an existing entity, on which Sukuk was issued, or on a common share thereof, and the entity has on-going activities in which assets are turned around (*taqlīb*), and its activities include dealing with tangible asset, usufruct, or rights, or all or some of them, and debts or cash are generated from this dealing, then it is permitted to trade in [the certificates of] Sukuk at any price, without the need to comply with the provisions of sale of debt or currency exchange provisions (*ṣarf*), unless the assets of the entity turn in totality into debts, cash, or both of them together. See: s. (8-1) of Shari'ah Standard

9-1-6. إذا كانت موجودات الصُّكوك موجودات كيانٍ قائم، جرى إصدار الصُّكوك عليه أو على حصَّة شائعة منه، والكيان له أنشطة مستمرة تُقلَّب فيها الأموال، ويَدخل في أنشطته التَّعاملُ بالأعيان أو المنافع أو الحقوق أو بها جميعـًا أو ببعضها، وتتوَّلد من هذا التَّعامل ديون أو تنتج عنه نقود، فإنه يجوز تداول الصُّكوك بأي سعرٍ، دون مراعاة أحكام تداول الديون أو أحكام الصَّرف، ما لم

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No. (59): Sale of Debt.

تتمحَّض موجودات الكيان ديونـًا أو نقوداً أو منهما معـًا. وينظر البند (٨-١) من المعيار الشرعي رقم (٥٩) بشأن بيع الدَّين.

9-1-7. If the underlying assets of the Sukuk include debts or cash, along with tangible assets, usufructs or rights, which the originator has segregated (*ifrāz*) among its assets in a legally recognized entity with which the commingling is established by virtue of Shari'ah, such as a special purpose vehicle, or an investment portfolio licensed by the competent authorities, with assets being turned around (*taqlīb*), as described in s. (9-1-6), then for the permissibility of trading Sukuk at any price, without the requirement to comply with the provisions of sale of debt or currency exchange (*ṣarf*), it is required that the amount of debts or cash or both at the time of issuance of Sukuk is less than 50% of the value of the entity's assets. And if this percentage drops due to a supervening matter after the Sukuk issuance, then the provision of trading shall not be different if the percentage is not less than 33% of the value of the underlying assets. If [the percentage] goes below that, it is required to inform the certificateholders of Sukuk that [their certificates] are no longer tradable (negotiable). If such certificates are listed on a financial market, it is required to delist them. See: s. (8-2) of Shari'ah Standard No. (59): Sale of Debt.

9-1-7. إذا كانت موجودات الصُّكوك تشتمل على ديونٍ أو نقودٍ، معها أعيان أو منافع أو حقوق، أفرزَتها الجهة المنشئة من جملة موجوداتها في كيانٍ قانوني معتبَر تتحقَّق به الخلطة شرعـًا، مثل منشأة ذات غرض خاص، أو محفظة استثمارية مرخَّصة من جهات مختصَّة، دون أن يكون شأن تلك الموجودات التَّقليبَ بشكل مستمر على ما هو موضح في البند (٩-١-٦)، فإنه يشترَط لجواز تداول الصُّكوك بأي سعر، دون التقيُّد بأحكام تداول الديون أو أحكام الصَّرف، أن يكون مقدار الديون أو النقود أو هما معـًا عند إصدار الصُّكوك أقل من ٥٠٪ من قيمة موجودات الكيان. وإذا نزلت هذه النِّسبة لأمر طارئ بعد إصدار الصُّكوك، فلا يختلف حكم التداول إن لم تقلَّ النِّسبة عن ٣٣٪ من قيمة الموجودات، فإن قلَّت عن ذلك وجب إعلام حمَلة الصُّكوك بأنها لم تَعد قابلة للتداول، وإذا كانت مدرجة في سوق ماليَّة فالواجب سحبها من الإدراج. وينظر البند (٨-٢) من المعيار الشرعي رقم (٥٩) بشأن بيع الدَّين.

9-1-8. If the underlying assets of Sukuk include shares of companies or other Sukuk, which are permitted to be held and traded at any

9-1-8. إذا كان من موجودات الصُّكوك أسهمُ شركات أو صكوك أخرى، مما يجوز تملُّكه وتداوله بأي سعر

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وضمت إليها ديونٌ بنحو ما تقدم في البند (٩-١-٦)، فإن هذه الأسهم أو الصكوك وإن جاز تداولها بنفسها بأي سعر لا تُعدُّ بكاملها أعيانًا عند حساب نسبة الأعيان في موجودات الصُّكوك، وإنما الواجب الاقتصار فيها على نسبة الأعيان (وما في حُكمها) في موجودات الشركة أو موجودات تلك الصكوك.

price, and debts were added to them, as given in the preceding s. (9-1-6), then these shares or Sukuk, despite being allowed to be traded themselves at any price, as a whole are not considered to be tangible asset while calculating the percentage of tangible assets in the underlying assets of Sukuk, rather it is required to confine to the tangibility ratio (and [the ratio (the like) assets) in the assets of the company or the underlying assets of those Sukuk.

9-1-9. لا يجوز إصدار صكوك على الديون بحيث يضم إليها أعيان أو ما في حكمها لمجرد تبرير التداول دون إفرازها في كيان قانوني معتبر تتحقق به الخلطة شرعًا. وينظر البند (٨-٢) والبند (٨-٣) من المعيار الشرعي رقم (٥٩) بشأن بيع الدين[1].

9-1-9. It is not permitted to issue certificates of Sukuk based on debts in which tangible assets, or the like, are included merely to justify trading without segregating [the underlying assets] into a legally valid entity wherein commingling is materialized by virtue of Shari'ah. See: s. (8-2) and s. (8-3) of Shari'ah Standard No. (59): Sale of Debt[2].

9-1-10. إذا كانت الصُّكوك مما يجوز تداوله بأي سعرٍ، فإنه لا مانع عند بيعها من الاتفاق على أن يُحسَب في ثمن بيعها (أو يُضاف إليه) ما يُغطي ربح المدَّة التي مرَّت من تاريخ آخِر توزيعٍ للأرباح، ولو كان الرِّبح متوقَّعًا.

9-1-10. If the certificates of Sukuk are among those that are permitted to be traded at any price, then, at the time of selling them, there is no [Shari'ah] objection to have an agreement to include (or to add) in calculating their the selling price what covers the profit for the period that has surpassed since the last date of distribution of profits, even if the profit is expected.

9-1-11. يجوز تداول الصكوك بأي طريقة متعارف عليها مقبولة شرعًا.

9-1-11. It is permitted to trade [the certificates of] Sukuk in any way recognized and acceptable by virtue of Shari'ah.

9-1-12. إذا اختل شرط من شروط تداول الصُّكوك بأي سعر بعد الاكتتاب فيها، فلا مانع من الاحتفاظ بها

9-1-12. If one of the conditions for trading of certificates of Sukuk at any price is breached after subscription to them, there is no [Shari'ah] objection to hold [the

(1) يتطلع المجلس الشرعي من الحاضرين الشرعيين والفنيين إبداء رأيهم في إبقاء أسهم الشركات.

2 The Shari'ah Board is looking for the Sharia and technical attendees to express their opinion on keeping the companies' shares.

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إلى الإطفاء، على أن يكون الإطفاء بالضَّوابط الشَّرعية.

9-1-13. إذا تم رهن الصكوك، أيًّا كان نوعها، توثيقًا لدينٍ، فيجب التقيد بالأحكام الشرعية للتداول عند التنفيذ عليها استيفاءً للدين. ينظر البند (٣-٤) والبند (٤-١) من المعيار الشرعي رقم (٣٩) بشأن الرهن وتطبيقاته المعاصرة.

certificates] until the cancellation, provided that cancellation is carried in accordance with the Shari'ah rules.

9-1-13. If Sukuk, whatever type, are pledged to secure a debt (*tawthīq dayn*), then Shari'ah provisions of trading must be adhered to at the time of enforcement [of pledge] (*tanfīdh al-rahn*) for the discharge of debt (*istīfā' al-dayn*). See: s. (3-4) and s. (4-1) of Shari'ah Standard No. (39): Pledge and Its Contemporary Applications.

9-2. الأحكام الخاصَّة للتَّداول (بحسب صيغة الصُّكوك):

9-2-1. يجوز تداول صكوك المضاربة أو الشركة أو الوكالة بالاستثمار، بأي سعر، إن كان نشاطها تملُّكَ كيانٍ قائمٍ أو حصَّة شائعة منه، من نحو الكيان المبيَّن في البند (٩-١-٦)، وذلك بعد تحقُّق التملُّك وعدم تمحُّض الكيان في الديون أو النُّقود أو فيهما معًا.

9-2-2. يجوز تداول صكوك المضاربة أو الشركة أو الوكالة بالاستثمار، بأي سعر، إن كان نشاطها تملُّكَ الكيان المذكور في البند (٩-١-٧) أو تملُّكَ حصَّة شائعة منه، وذلك بعد تحقُّق التَّملُّك وتوافر الضوابط الواردة في البند (٨-٢) من المعيار الشَّرعي رقم (٥٩) بشأن بيع الدَّين.

9-2-3. يجوز تداول صكوك المضاربة أو الشركة أو الوكالة بالاستثمار، بأي سعرٍ، بعد مباشرة النَّشاط

9-2. Special provisions for trading (as per the financing mode of Sukuk):

9-2-1. Trading the certificates of Sukuk, that are based on Mudaraba, partnership or Investment Agency is permitted at any price, if the underlying activity [of the Sukuk] is the acquisition of an existing entity, or a common share in it, such as the entity given in s. (9-1-6), and that's after the acquisition has been materialized and the entity does not represent in totality debts, cash or both.

9-2-2. Trading the certificates of Sukuk that are based on Mudaraba, partnership or Investment Agency is permitted at any price, if the underlying activity [of Sukuk] is the acquisition of the entity, as referred in s. (9-1-7), or the acquisition of a common share in it, after materializing [their] acquisition has and the rules provided in s. (8-2) of Shari'ah Standard No. (59): Sale of Debt are fulfilled.

9-2-3. Trading the certificates of Sukuks that are based on Modaraba, partnership or Investment Agency is permitted at any price, after the commencement of the

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investment activity, if this activity is trading in tangible assets, usufructs or rights, or in all or some of them with turning them over (*taqlīb*) even if the trading [of the assets] generates debts or cash, unless the underlying assets do not represent in totality debts, cash or debts and cash together, then it is required to comply with the provisions of currency exchange (*ṣarf*) or the provisions of disposal of debts, as the case may be.

الاستثماري، إن كان هذا النَّشاطُ متاجرةً في الأعيان أو المنافع أو الحقوق، أو فيها جميعـًا أو في بعضها مع تقليبها، وإن تولَّدت عن المتاجرة ديون أو نقود، ما لم تتمحَّض الموجودات ديونـًا أو نقوداً أو ديونًا ونقودًا معـًا، فيلزم عندئذٍ مراعاة أحكام الصَّرف أو أحكام التصرف في الديون، بحسب الحال.

9-2-4. Trading the certificates of Sukuks based on Mudaraba, partnership, Investment Agency, whose capital investment is restricted to using one of the indebtedness contracts, such as Murabaha, Istisna' or Salam, will be subjected to the provision of trading of Sukuk based on the debt contract in which the investment is restricted.

9-2-4. يأخذ تداول صكوك المضاربة أو الشركة أو الوكالة بالاستثمار، التي يُقيَّد استثمار رأس مالها باستخدام عقدٍ من عقود المداينات، كالمرابحة أو الاستصناع أو السَّلم، حكمَ تداول الصُّكوك القائمة على عقدِ المداينة الذي قُيِّد الاستثمار به.

9-2-5. Trading the certificates of Murabaha Sukuk is not permitted after selling the Murabaha commodity except by complying to the provisions of disposal of debts or the provisions of currency exchange (*ṣarf*), as the case may be. However, trading is permitted after purchasing the commodity and receiving it actually or constructively and prior to selling [the commodity] to the buyer.

9-2-5. لا يجوز تداول صكوك المرابحة بعد بيع سلعة المرابحة إلا بمراعاة أحكام التصرف في الدَّيون أو أحكام الصَّرف، بحسب الحال، أما بعد شراء السلعة وتسلمها حقيقة أو حكمًا وقبل بيعها للمشتري فيجوز التداول حينئذ.

9-2-6. Trading the certificates of Salam Sukuk is not permitted during the tenure of Salam before receiving the Salam commodity, or after selling the Salam commodity and handing it over to its purchaser pursuant to a parallel Salam contract with [the Salam seller] , or after selling the commodity to those who buy it from [the Salam buyer] pursuant to a sale contract [of specific commodity], except by complying with the provisions of disposal of debts or the provisions of currency exchange (*ṣarf*), as

9-2-6. لا يجوز تداول صكوك السلم في مدَّة السَّلم قبل تسلُّم سلعة السَّلم، أو بعد بيع سلعة السَّلم وتسليمها لمشتريها منهم بموجب عقد سلَمٍ موازٍ معه، أو بعد بيع السِّلعة لمن يشتريها منهم بعقد بيعٍ معيَّنٍ إلا بمراعاة أحكام التصرف في الديون أو أحكام الصَّرف، بحسب الحال، أما بعد تسلُّم

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حمَلة الصُّكوك سلعة السَّلم حقيقةً أو حُكمـًا فيجوز التداول حينئذٍ.

9-2-7. لا يجوز تداول صكوك الاستصناع إن اقتصر ملكُ حمَلة الصُّكوك على موصوف في الذِّمة بموجب الاستصناع، أو تمَّ تسليم سلعة الاستصناع التي تسلموها لمن استصنع معهم سلعة مماثلة بعقد استصناع موازٍ، أو تم بيع سلعة الاستصناع التي تسلموها بعقد بيع معيَّن، إلا بمراعاة أحكام التصرف في الديون أو أحكام الصرف، بحسب الحال. ويجوز التداول بأي سعر لصكوك الاستصناع في الحالتين الآتيتين:

9-2-7-1. أن يكون التداول بعد تسلم حملة الصكوك سلعة الاستصناع، كلها أو أكثرها، بحسب القيمة، وهي ما تزال في ملكهم.

9-2-7-2. أن يكون التداول بعد تملك حملة الصكوك عقاراً معينًا وتسلمه، وكان محل الصكوك خاصًا بذلك العقار، من نحو بناء عقار بعقد استصناع على أرضٍ معيَّنة، وكانت قيمة الجزء المستصنع أقل من نصف قيمة المجموع.

9-2-8. يجوز التداول بأي سعر لصكوك تملُّك عينٍ معيَّنة وتأجيرها، من وقت تملُّك حمَلة الصُّكوك للعين، وتسلُّمهم لها حقيقة أو حُكمـًا، ويستمر هذا الحكم ما دامت العين مملوكة لهم، وإن أُجرت،

the case may be. However, the trading is permitted after receipt of the Salam commodity, whether actually or constructively, by the certificateholders.

9-2-7. Trading the certificates of Istisna' Sukuk is not permitted if the title of the certificateholders is limited to a specified-cum-unidentified [asset] pursuant to Istisna', or if the Istisna' commodity, which [the certificateholders] received, was delivered to those who made [a request to make on order] a similar commodity for them under a parallel Istisna' contract, or if the Istisna' commodity that they have taken its delivery was on-sold pursuant to sale of specific (identified) contract, unless by complying with the provisions of debt disposal or the provisions of currency exchange (*ṣarf*), as the case may be. It is permitted to trade certificates of Istisna' Sukuk at any price in the following two cases:

9-2-7-1. That the trading takes place after the certificateholders receive the entire or most of the Istisna' commodity according to the [its] value, and it is still held under their ownership.

9-2-7-2. That the trading takes place after the certificateholders own a specific (identified) real estate and taken its delivery, and the subject of Sukuk is precise to that real estate, such as building a real estate with an Istisna' contract on a specific land, and the value of the manufactured part is less than half of the value of the total.

9-2-8. Trading of certificates of Sukuk, that are based on acquiring and leasing a specific (identified) asset, is permitted at any price from the time the certificateholders acquire the property and have taken its delivery either actually or constructively. This provision shall apply till the asset is held [by the certificateholders], even if it

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was leased, and whatever was its rent.

ومهما كانت أجرتها.

9-2-9. Trading the certificates of Sukuk, based on acquiring and leasing specified-cum-unidentified asset, is not permitted if the ownership of the certificateholders was limited to the asset before taking its delivery, or the asset they have taken its delivery was sold via a sale contract of specific (identified) [asset], unless by complying with the provisions of disposing of debts or the provisions of currency exchange [*ṣarf*], as the case may be. Trading the certificates of Sukuk, based on acquiring and leasing a specified-cum-unidentified asset, is permitted at any price in the following two cases:

9-2-9. لا يجوز تداول صكوك تملك عين موصوفة في الذمة وتأجيرها إن اقتصر ملكُ حمَلة الصُّكوك على العين قبل تسلمها، أو تم بيع العين التي تسلموها بعقد بيع معيَّن، إلا بمراعاة أحكام التصرف في الديون أو أحكام الصرف، بحسب الحال. ويجوز التداول بأي سعر لصكوك تملك عين موصوفة في الذمة وتأجيرها في الحالتين الآتيتين:

9-2-9-1. That the trading takes place after the certificateholders of Sukuk of specified-cum-unidentified asset have received whole or most of [the underlying asset], according to [its] value, and it is still held by [the certificateholders].

9-2-9-1. أن يكون التداول بعد تسلم حملة الصكوك العين الموصوفة في الذمة، كلها أو أكثرها، بحسب القيمة، وهي ما تزال في ملكهم.

9-2-9-2. That the trading takes place after the certificateholders own a specific real estate and receive it, and the subject matter of the Sukuk is precise to that real estate, such as constructing a specified-cum-unidentified building for the purpose of leasing, and the value of the specified-cum-unidentified part is less than half the value of the total.

9-2-9-2. أن يكون التداول بعد تملك حملة الصكوك عقارًا معيَّنًا وتسلمه، وكان محل الصكوك خاصًا بذلك العقار، مثل إقامة بناء موصوف في الذمة على أرضٍ معيَّنة لتأجيره، وكانت قيمة الجزء الموصوف في الذمة أقل من نصف قيمة المجموع.

9-2-10. Trading the certificates of Sukuk, based on hiring and a leasing a specific (identified) asset, is permitted at any price after the certificateholders have hired the asset and have taken its delivery actually or constructively. If the certificateholders leased the asset for the entire, or most, period of their lease, then it is not permitted to trade the certificates of Sukuk. However, if the certificateholders leased less than half of the [asset], or they leased

9-2-10. يجوز التداول بأي سعر لصكوك استئجار عينٍ معيَّنة ثم تأجيرها، بعد استئجار حمَلة الصُّكوك للعين، وتسلُّمها حقيقة أو حُكمـًا. فإن أجر حمَلة الصُّكوك العين، لكامل مدَّة استئجارهم لها أو أكثرها، لم يجز تداول الصُّكوك. أما إن أجر حمَلة

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الصُّكوك أقل من نصف العين أو أجروها لأقلَّ من نصف مدَّة استئجارهم لها، واحتفظوا بملك منفعة العين للمدَّة المتبقية، جاز عندئذٍ تداول الصُّكوك بأي سعر.

it for less than half of the period they hired [the asset] for, and they held the usufruct of the asset for the remaining period, then it is permitted to trade the certificates of Sukuk at any price.

9-2-11. لا يجوز تداول صكوك استئجار عينٍ موصوفة في الذِّمة وتأجيرها، قبل تسلُّم العين، إلا بمراعاة أحكام التصرف في الديون. فإن تسلَّم حمَلة الصُّكوك العين، جاز عندئذٍ تداول الصُّكوك بأي سعر، ما لم يتم تأجيرها لكامل مدَّة استئجار حملة الصُّكوك لها. فإن أجر حمَلة الصُّكوك أقل من نصف العين أو أجروها لأقلَّ من نصف مدَّة استئجارهم لها، واحتفظوا بملك منفعة العين للمدَّة المتبقية، جاز عندئذٍ تداول الصُّكوك بأي سعر.

9-2-11. Trading the certificates of Sukuk, based on hiring and leasing a specified-cum-unidentified asset, is not permitted before taking delivery of the asset, except by complying to the provisions of the disposal of debts. If the certificateholders received the asset, then it is permitted to trade the certificates of Sukuk at any price, unless [the asset] is leased for the entire period of the certificateholders' hiring of it. If the certificateholders leased less than half of the asset, or they leased it for less than half of the period they hired it, and they held the usufruct of the asset for the remaining period, then it is permitted to trade the certificates of Sukuk at any price.

9-2-12. يجوز تداول صكوك تملُّك خدمات جهة معيَّنة وبيعُها، بأي سعر، من وقت تملُّك حمَلة الصُّكوك للخدمات، وتسلُّمهم لها حُكمـًا بإتاحة الانتفاع بها لهم وتمكينهم من التصرف بها، ويَستمر هذا الحكم ما دام أكثر موجودات الصكوك من الخدمات، فإن كان نصف موجودات الصكوك أو أكثرها نقداً لم يجز تداول الصُّكوك إلا بمراعاة أحكام الصَّرف، وإن كان نصف موجودات الصكوك أو أكثرها دينـًا، لم يجز تداول الصُّكوك إلا بمراعاة أحكام التصرف في الديون. ويراعى ما

9-2-12. Trading the certificates of Sukuk, based on acquiring and selling the services of a specific (identified) provider, is permitted at any price from the time the certificateholders acquire the services, and they take their delivery constructively by allowing them to enjoy the [the service] and enabling (*tamkīn*) them to dispose of [the service], and this provision applies as long as most of the underlying assets of Sukuk consist of services. Hence, if half or most of the underlying assets of Sukuk is cash, so it is not permitted to trade the certificates of Sukuk, unless complying with the provisions of currency exchange (*ṣarf*). However, if half or most of the underlying assets of Sukuk are in debt, it is not permitted to trade the certificates of Sukuk except by complying to the provisions of

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disposal of debts. Taking into account what is stated in s. (8-2) of Shari'ah Standard No. (59): Sale of Debt.

جاء في البند (٨-٢) من المعيار الشرعي رقم (٥٩) بشأن بيع الدين.

9-2-13. Trading the certificates of Sukuk, based on acquiring and selling specified-cum-unidentified services offered by an entity, is not permitted without complying with provisions of disposal of debts. If the identification (*ta'yyin*) of the party that will provide the services was made and [the service] being received by the certificateholders constructively through allowing them to enjoy the [the service] (*al-intif'ā*) and enabling [*tamkīn*] them to dispose of [the service], in that case it is permitted to trade the certificates of Sukuk at any price provided most of the underlying assets of Sukuk are services. If half or most of the underlying assets of Sukuk are in cash, so trading the certificates of Sukuk is not permitted without complying with provisions of currency exchange (*ṣarf*). Taking into account with s. (8-2) of Shari'ah Standard No. (59): Sale of Debt.

9-2-13.لا يجوز تداول صكوك تملُّك خدمات جهة موصوفة في الذِّمة وبيعُها، قبل تعيين من يقدم الخدمات، إلا بمراعاة أحكام التصرف في الديون. فإن تم تعيين من يقدم الخدمات، وتسلَّمها منه حمَلة الصُّكوك حُكمًا بإتاحة الانتفاع بها لهم وتمكينهم من التصرف بها، جاز عندئذٍ تداول الصُّكوك بأي سعر ما دام أن أكثر موجودات الصكوك من الخدمات، فإن كان نصف موجودات الصكوك أو أكثرها نقداً لم يجز تداول الصُّكوك إلا بمراعاة أحكام الصَّرف، وإن كان نصف موجودات الصكوك أو أكثرها دينًا، لم يجز تداول الصُّكوك إلا بمراعاة أحكام التصرف في الديون. ويراعى ما جاء البند (٨-٢) من المعيار الشرعي رقم (٥٩) بشأن بيع الدين.

9-2-14. Trading the certificates of Sukuk, based on acquiring and leasing the moral, is permitted at any price from the time the certificateholders acquire the rights, and they receive them constructively by taking hold of documents that represent them which enables enjoying and disposing [of the moral rights]. This provision shall continue as long as most of the underlying assets of Sukuk are rights. If half or most of the assets of the Sukuk are in cash, it is not permitted to trade the certificates of Sukuk without complying with the provisions of currency exchange (*ṣarf*), and if half or most of the assets of the Sukuk are in debt, it is

9-2-14.يجوز تداول صكوك تملُّك الحقوق المعنوية وتأجيرها، بأي سعر، من وقت تملُّك حمَلة الصُّكوك للحقوق، وتسلُّمهم لها حُكمًا بتسلُّم ما يمثِّلها من مستندات تمكِّن من الانتفاع والتصرف بها، ويَستمر هذا الحكمُ ما دام أن أكثر موجودات الصكوك من الحقوق، فإن كان نصف موجودات الصكوك أو أكثرها نقداً لم يجز تداول الصُّكوك إلا بمراعاة أحكام الصَّرف، وإن كان نصف

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موجودات الصكوك أو أكثرها دينـًا، لم يجز تداول الصُّكوك إلا بمراعاة أحكام التصرف في الديون. ويراعى ما جاء البند (٨-٢) من المعيار الشرعي رقم (٥٩) بشأن بيع الدين.

not permitted to trade the certificates of Sukuk without complying with the provisions of disposal of debts. Taking into account s. (8-2) of Shari'ah Standard No. (59): Sale of Debt.

9-2-15. يجوز تداول صكوك تملُّك منفعة عين معيَّنة تتجدَّد منفعتها بالاستهلاك وبيعُها، بأي سعر، من وقت تملُّك المنفعة، وتسلُّمها بتسلُّم العين التي تستوفى المنفعة منها، ويستمر هذا الحكم ما دام أن أكثر موجودات الصكوك من منافع تلك العين، فإن كان نصف موجودات الصكوك أو أكثرها نقداً لم يجز تداول الصُّكوك إلا بمراعاة أحكام الصَّرف، وإن كان نصف موجودات الصكوك أو أكثرها دينـًا، لم يجز تداول الصُّكوك إلا بمراعاة أحكام التصرف في الديون. ويراعى ما جاء البند (٨-٢) من المعيار الشرعي رقم (٥٩) بشأن بيع الدين.

9-2-15. It is permitted to trade at any price the certificates of Sukuk, based on acquiring and selling a specific (identified) asset whose benefit is renewed by consumption from the time the usufruct is acquired, and delivered by delivery of the asset from which the benefit is derived, and this provision continues as long as most of the underlying assets of the Sukuk are from the usufructs of that asset. If half or most of the underlying assets are in cash, it is not permitted to trade certificates of Sukuk without complying with provisions of currency exchange (*ṣarf*). Whereas, if half or most of the underlying assets of Sukuk are in debt, it is not permitted to trade the certificates of Sukuk without complying with the provisions of deposal of debts. Taking into account s. (8-2) of Shari'ah Standard No. (59): Sale of Debt.

9-2-16. يجوز تداول صكوك الوكالة بالخدمات لموجودات مدرَّة للدَّخل، بأي سعر، من وقت تملُّك حمَلة الصُّكوك للموجودات، وتسلُّمِها بحسب طبيعتها. سواء أكانت الموجودات أعيانـًا وما في حكمها، أم كانت أسهمـًا أو صكوكـًا مما يجوز تداوله بأي سعر، أم كانت كيانـًا قائمـًا أو حصة شائعة منه من نحو الكيان المبيَّن في البند (٩-١-٦) ما دام أن موجوداتِه لم تتمحض ديونـًا

9-2-16. Trading the certificates of Service Agency Sukuk, based on income-generating underlying assets, is permitted at any price from the time the certificateholders acquire the underlying assets, and taking their delivery according to their respective nature. Whether the assets are tangible assets (and the like), or they are shares or Sukuk that are permitted to be traded at any price, or they are an existing entity or a common share of it, like the entity shown in s. (9-1-6), as long as assets of the entity are not in totality debts, cash or both, or it was an entity or a common share of it, like the entity referred in s. (9-1-7) and taking into

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أو نقوداً أو منهما معـًا، أم كانت كيانـًا أو حصة شائعة منه من نحو الكيان المبيَّن في البند (٩-١-٧) وتوافرت الضوابط الواردة في البند (٨-٢) من المعيار الشرعي رقم (٥٩) بشأن بيع الدَّين. ويَستمر هذا الحكمُ ما دامت الموجودات مملوكة لهم.

account rules given in s. (8-2) of Shari'ah Standard No. (59): Sale of Debt. This provision continues as long as the underlying assets are owned by [the certificateholders].

9-2-17. يجوز تداول صكوك الوكالة بالخدمات ببيع موجودات، بأي سعر، من وقت تملُّك حمَلة الصُّكوك للموجودات، وتسلُّمها بحسب طبيعتها، سواء أكانت أعيانـًا أم منافع أم حقوقـًا، ويستمرُّ هذا الحكم وإن تناقصت الموجودات بالبيع المتكرِّر، وإن نتجت نقودٌ أو ديونٌ من بيعها، لأنها تابعة للباقي منها، ما لم تتمحَّض موجودات الصُّكوك نقوداً أو ديونـًا أو نقوداً وديونـًا، حيث يلزم عندئذٍ مراعاة أحكام التصرف في النقود أو أحكام التصرف في الديون، بحسب الحال.

9-2-17. Trading the certificates of Service Agency Sukuk, based on selling assets, is permitted from the time the certificateholders acquire the assets and taken their delivery according to their [respective] nature, whether they are assets, usufructs, or rights. This provision shall continue even if the underlying assets diminished due to frequent sale, even if cash and debts generated from selling [the underlying assets] because [sale proceeds] are ancillary to the remainder, unless and until underlying asset did not become in totality cash, debts, or cash and debt, wherein provisions of disposal of currency exchange (ṣarf) or disposal of debts, as the case may be.

9-2-18. يجوز تداول صكوك المزارعة والمساقاة، بأي سعر، إن كان حاملو صكوك المزارعة مالكين للأرض أو لمنفعتها، أو كان حاملو صكوك المساقاة مالكين للشجر، وذلك من وقت تملُّكهم لها.

9-2-18. Trading the certificates of Muzara'a Sukuk and Musaqat Sukuk, is permitted at any price if the certificateholders of Musaqah Sukuk own the land or its usufruct, or the certificateholders of the Musaqat Sukuk own the plants, from the time they own them.

9-2-19. يجوز تداول صكوك المغارسة، بأي سعر، ما دام أن حاملي الصُّكوك مالكين للأرض، وذلك من وقت تملُّكهم لها.

9-2-19. Trading the certificates of Mughrasa Sukuk is permitted at any price, as long as the certificateholders own the land, and that is from the time they acquired [the land].

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9-2-20. Trading Composite Sukuk is permitted at any price if the tangible assets, usufruct or rights in its underlying assets are more than half of the assets. The percentage is calculated by value, with due compliance with s. (8-4) of Shari'ah Standard No. (59): Sale of Debt.

9-2-20.يجوز تداول الصُّكوك المركَّبة، بأي سعر، إن كانت الأعيان أو المنافع أو الحقوق في موجوداتها أكثر من نصف الموجودات، وتُحسب النسبة بالقيمة، ويراعى الوارد في البند (٨-٤) من المعيار الشرعي رقم (٥٩) بشأن بيع الدَّين.

9-3. Listing of Sukuk in the Financial Markets:

9-3. إدراج الصكوك في الأسواق المالية:

9-3-1. In order to list the Sukuk in the financial markets, it is required that they belong to a category which permitted to be traded by virtue of Shari'ah without being bound by the provisions of currency exchange (ṣarf) or the provisions of selling debts. See: s. (9-1-5).

9-3-1. يُشترَط لإدراج الصُّكوك في الأسواق الماليَّة أن تكون مما يجوز تداوله شرعـًا دون التقيُّد بأحكام الصَّرف أو أحكام تداول الديون. وينظر البند (٩-١-٥).

9-3-2. It is required that listing of Sukuk in the financial markets should be without prejudice to the Shari'ah rulings specific to these Sukuk and the financing modes used in them. See: s. (7-2-2) and s. (7-3-2-12).

9-3-2. يجب أن يكون إدراج الصكوك في الأسواق المالية غير مخل بالأحكام الشرعية الخاصة بتلك الصكوك والصيغ المستخدمة فيها. وينظر البند (٧-٢-٢) والبند (٧-٣-٢-١٢).

9-3-3. If the underlying assets of Sukuk devolve into a state whereby it is not permitted to trade them for cash without complying with the provisions of currency exchange (*ṣarf*) or disposal of debts, then it is required to delist the certificates of Sukuk. See: s. (5-1-3) of this Standard and s. (8-2-3) of Shari'ah Standard No. (59): Sale of Debt.

9-3-3. إذا آلت موجودات الصكوك إلى حال لا يجوز معها تداولها بالنقود دون مراعاة أحكام الصرف أو التصرف في الديون، فيجب عندئذ سحب الصكوك من الإدراج. وينظر البند (٥-١-٣) من هذا المعيار والبند (٨-٢-٣) من المعيار الشرعي رقم (٥٩) بشأن بيع الدين.

9-3-4. There is no [Shari'ah] objection in listing Sukuk certificates, which are non-negotiable for cash, at the financial markets if the purpose of listing is to boost confidence in the Sukuk among the investors, and to gain reputation by listing them in those markets, without trading

9-3-4. لا مانع من إدراج الصكوك غير القابلة للتداول بالنقود في الأسواق المالية إن كان الغرض من الإدراج توفير الثقة بالصكوك لدى المستثمرين، وكسب السمعة بإدراجها في تلك الأسواق، دون

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them through the market, and this is on the condition that it is stipulated in the listing documents that they are not traded against cash.

تداولها من خلال السوق، وهذا بشرط النص في وثائق إدراجها على أنها لا تتداول بالنقود.

9-3-5. There is no [Shari'ah] objection in paying fees to the financial markets for the listing service, whether they are paid by the certificateholders or the originator.

9-3-5. لا مانع من دفع رسومٍ للأسواق المالية مقابل خدمة الإدراج، سواء دفعها حملة الصكوك أو الجهة المنشئة.

9-3-6. It is required that the Shari'ah Board of Sukuk should approve the procedures and documents for listing, to ensure that they comply with the Shari'ah terms and conditions of Sukuk, and that they do not include what is prohibited by Shari'ah. See: s. (13-1-1-1).

9-3-6. يجب أن تعتمد الهيئة الشَّرعية للصُّكوك إجراءات ومستندات الإدراج، للتأكد من توافقها مع الشروط والأحكام الشرعية للصكوك، وعدم اشتمالها على ما هو محرَّم شرعـًا. وينظر البند (١٣-١-١-١).

9-4. Redemption and Cancelation of Sukuk:

9-4. استرداد وإطفاء الصكوك:

9-4-1. The redemption will be carried by the originator through purchasing some of the certificates of issuance of Sukuk at the request [of the originator] or by its certificateholders. Whereas the cancelation is carried by the originator purchasing all the certificates of issuance of Sukuk or dissolution of all its underlying assets by selling them to a third party.

9-4-1. الاسترداد يتم بشراء الجهة المنشئة بعض صكوك الإصدار بطلبٍ منها أو من حملتها، أما الإطفاء فيتم بشراء الجهة المنشئة جميعَ صكوك الإصدار أو تصفية جميع موجوداتها ببيعها للغير.

9-4-2. It is required that the redemption or the cancelation [of the certificates] is carried for a cash price, [which implies] the certificates of Sukuk should be negotiable (tradable) without being bound by the provisions of currency exchange (*ṣarf*) or the provisions of disposal of debts, otherwise they must be comply to them, as the case may be. See: s. (9-1) and s. (9-2)

9-4-2. يجب في الاسترداد أو الإطفاء بثمن نقدي، أن تكون الصكوك قابلة للتداول دون التقيد بأحكام الصرف أو أحكام التصرف في الديون، وإلا وجب التقيد بها بحسب الحال. وينظر البند (٩-١) والبند (٩-٢).

9-4-3. It is permitted for the originator to extend to the certificateholders a binding promise to buy [the certificates of Sukuk] from them, either all [the certificates] (the case

9-4-3. يجوز أن تعد الجهةُ المنشئةُ حملةَ الصكوكِ وعدًا ملزمًا بشرائها منهم، كلها (إطفائها) أو بعضها

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(استردادها)، في حالات تحدد في وثيقة الوعد، كما يجوز أن يعد حملة الصكوك الجهة المنشئة وعدًا ملزمًا ببيع الصكوك لها في حالات تحدد في وثيقة الوعد وتكون مغايرة لحالات تنفيذ الوعد الصادر من الجهة المنشئة. وينظر البند (٨-٢-١-٤).

of cancelation) or some of them (the case of redemption), in cases as specified in the promise deed. Also, it is permitted for the certificateholders to extend to the originator a binding promise to sell to it the certificates of Sukuk in different events, as specified in the promise deed which shall be different from the trigger event of exercising the promise made by the originator. See: s. (8-2-1-4).

9-4-4. يجوز أن يكون الوعد الملزم الصادر من حملة الصكوك بالبيع بأي ثمنٍ ولو كان محددًا، أمَّا الوعد المُلزم الصادر من الجهة المنشئة بالشراء فتراعى فيه الضوابط الواردة في البند (٦-٣-٢-١) والبند (٦-٣-٢-٢) والبند (٨-١-١-٣-د-٢-٣-٦) والبند (٨-١-١-٣-د-٢-٣-٧).

9-4-4. It is permitted for the binding promise, issued by the certificateholders, for sale at any price, even if [the price] was specified. As for the binding promise issued by the originator to purchase, with due compliance with the rules mentioned in s. (6-3-2-1), s. (6-3-2-2), s. (8-1-1-3-d-2-3-6) and s. (8-1-1-3-d-2-3-7).

9-4-5. لا يجوز منع حملة الصكوك مجتمعين من بيع موجوداتها لطرفٍ غير الجهة المنشئة في حال نكول الجهة المنشئة عن تنفيذ وعدها الملزم بالشراء. وينظر البند (٥-٢-٢) والبند (٧-٣-٢-٨).

9-4-5. It is not permitted to prevent the certificateholders collectively from selling their Sukuk's underlying assets to a party other than the originator in the event that the originator repudiates to perform its binding promise to purchase. See: s. (5-2-2) and s. (7-3-2-8).

9-4-6. إذا انتهت مدة الصكوك القائمة على الشركة أو المضاربة أو الوكالة بالاستثمار دون أن تشتريها الجهة المنشئة، فيجب أن تبيع موجوداتها للغير تصفيةً لها، وتُدفع حصيلة البيع لحملة الصكوك بنسبة حصصهم فيها، فإن امتنعت الجهة المنشئة عن بيعها فلحملة الصكوك الحق في بيعها.

9-4-6. If the term of Sukuk, based on the partnership, Mudaraba, or Investment Agency, expires without [the underlying assets] being purchased by the originator, then it is required that [originator] sells its underlying assets to a third party as a dissolution, and the sale proceeds shall be paid to the certificateholders in proportion to their shares in [the proceeds]. If the originator refrained from selling [the underlying assets], the certificateholders have the right to sell them.

9-4-7. إذا كانت صيغة الصكوك تقوم على مشاركة حملة

9-4-7. If the financing mode of Sukuk is based on the participation of certificateholders with other depositors in the general pool of the

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originator, it is not permitted for Sukuk to have financial characteristics that lead to giving [the Sukuk] priority in recovering the capital upon dissolution and cancelation of Sukuk, in way that results in cessation of the partnership in the losses. See: s. (4-1-2-14) of Shari'ah Standard No. (12): Sharikah (Musharaka) and Modern Companies and s. (8-3-1-3) and s. (8-3-2-3) of this Standard.

الصكوك غيرهم من المودعين في الوعاء العام للجهة المنشئة فلا يجوز أن يكون للصكوك خصائص مالية تؤدي إلى إعطائها الأولوية في استرداد رأس المال عند التصفية وإطفاء الصكوك، بما يقطع الشركة في الخسارة. ينظر البند (٤-١-٢-١٤) من المعيار الشرعي رقم (١٢) بشأن الشركة (المشاركة) والشركات الحديثة. وينظر البند (٨-٣-١-٣) والبند (٨-٣-٢-٣) من هذا المعيار.

10. Provisions of the Special Purpose Vehicle (SPV) in Sukuk:

10-1. The special purpose vehicle (SPV) is a legal entity that is incorporated for the purpose of issuing [the certificates] of Sukuk, and it is usually the issuer of [the certificates] and represents the certificateholders of the Sukuk with their authorization.

10-2. For the issuance of Sukuk, presence of the special purpose vehicle (SPV) within the Sukuk structure is not necessary, as the relationship can be direct between the certificateholders and the originator. See: s. (7-2-8).

10-3. It is required that the Articles of Association for the Special Purpose Vehicle (SPV) is acceptable by virtue of Shari'ah. See: s. (13-1-1-1).

10-4. It is required that whichever party manages the special purpose vehicle must abide by the rulings and principles of Shari'ah in its management work.

10-5. If the originator is the manager of the special purpose vehicle, then it is required that it does not carry the contract on behalf of both

10. أحكام المنشأة ذات الغرض الخاص في الصكوك:

10-1. المنشأة ذات الغرض الخاص كيانٌ قانوني يتم تأسيسه لغرض إصدار الصكوك، وتكون في العادة هي المصدر للصكوك والممثلة لحملتها بتفويضٍ منهم.

10-2. لا يلزم لإصدار الصكوك شرعًا وجود المنشأة ذات الغرض الخاص ضمن هيكلة الصكوك، إذ يمكن أن تكون العلاقة مباشرة بين حملة الصكوك والجهة المنشئة. وينظر البند (٧-٢-٨).

10-3. يجب أن يكون عقد تأسيس المنشأة ذات الغرض الخاص مقبولاً شرعـًا. وينظر البند (١٣-١-١-١).

10-4. يجب أن يلتزم من يدير المنشأة ذات الغرض الخاص بأحكام ومبادئ الشريعة الإسلامية في أعمال إدارتها.

10-5. إذا كانت الجهة المنشئة هي المدير للمنشأة ذات

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الغرض الخاص، فالواجب أن لا تتولى طرفي العقد عند إبرام العقود مع نفسها نيابة عن حملة الصكوك. وينظر البند (٦-١-٣) من المعيار الشرعي رقم (٢٣) بشأن الوكالة وتصرف الفضولي، والبند (٣-١-٣) والبند (٣-١-٤) والبند (٣-١-٥) من المعيار الشرعي رقم (٨) بشأن المرابحة، والبند (٨-١-١-١-د-١-٣) من هذا المعيار.

sides of contracts by concluding the contracts with itself on behalf of the certificateholders. See: s. (6-1-3) of Shari'ah Standard No. (23): Agency and the Act of Uncommissioned Agent (Fodooli), and s. (3-1-3) and s. (3-1-4) and s. (3-1-5) of Shari'ah Standard No. (8): Murabaha, and s. (8-1-1-1-d-3-1) of this Standard.

10-6. الأصل أن تكون المنشأة ذات الغرض الخاص مملوكةً لغير الجهة المنشئة، فإن كانت مملوكةً لها لم يكن حينئذ فرق بينها وبين الجهة المنشئة في العلاقات والأحكام الشرعية. وينظر البند (٤-١-١) من المعيار الشرعي رقم (٥٦) بشأن ضمان مدير الاستثمار.

10-6. As a basic norm, the special purpose vehicle should be owned by a party other than the originator. If it was owned by [the originator], then there is no difference between the special purpose vehicle and the originator in terms of relationships and Shari'ah provisions. See: s. (4-1-1) of Shari'ah Standard No. (56) Liability of the Investment Manager.

10-7. يجب أن تكون ملكية حملة الصكوك لموجودات الصكوك -المسجلة باسم المنشأة ذات الغرض الخاص الممثلة لحملة الصكوك- ملكية مقبولة شرعًا وقانونًا، سواءٌ كان ذلك لحصيلة الاكتتاب في الصُّكوك أو لما يتملكونه من موجودات باستخدام حصيلة الاكتتاب أو لما ينتج من نشاط الصُّكوك، ويلزم توثيق ذلك في وثائق الصكوك تصريحاً أو تضميناً بما يفيد علم حملة الصكوك أو من يمثلهم به. وينظر البند (٥-٢-١) والبند (٥-٢-٢) والبند (٥-٢-٣).

10-7. It is required that the ownership held by the certificateholders of the underlying assets of Sukuk, registered in the name of the special purpose vehicle representing the certificateholders, is acceptable by virtue of law and Shari'ah, whether that is the proceeds of subscription to Sukuk, the underlying assets that will be owned by [the certificateholders] using the proceeds of subscription, or which is the outcome of the Sukuk activity. It is necessary to record that in the documentation of Sukuk either explicitly or implicitly in a way that result in making the certificateholders of Sukuk, or the party representing them, informed. See: s. (5-2-1), s. (5-2-2) and s. (5-2-3).

10-8. في حال إعلان المنشأة ذات الغرض الخاص العهدة (Trust) على موجودات الصُّكوك المملوكة لحملتها

10-8. In the event that the special purpose vehicle declares a trust over the underlying assets of Sukuk owned by its certificateholders and is

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legally registered in its name, then it is required that this should not affect the certificateholders' ownership of those underlying assets in terms of them bearing the risks and their right to dispose of [the underlying assets]. See: s. (5-2-2) and s. (5-2-6).

مع تسجيلها قانونـًا باسمها، فإن الواجب أن لا يؤثر ذلك على ملكية حملة الصُّكوك لتلك الموجودات من حيث تحملهم لمخاطرها وحقهم في التصرف بها. وينظر البند (٥-٢-٢) والبند (٥-٢-٦).

10-9. It is not permitted to use a special purpose vehicle to prevent the certificateholders from assuming the legal obligations and Shari'ah burdens of ownership of its underlying assets.

10-9. لا يجوز استخدام المنشأة ذات الغرض الخاص لمنع تحمل حملة الصكوك الالتزامات والأعباء الشرعية لملكية موجوداتها.

10-10. If the financing mode of the Sukuk requires that the special purpose vehicle, which is the issuer of the certificates of Sukuk, to purchase another special purpose vehicle whose assets include real estate (and the like) and debts, then the purchased special purpose vehicle, along with its assets, shall constitute the underlying assets of Sukuk. With due compliance with s. (9-1-7) of this Standard, and s. (8-2-2) of Shari'ah Standard No. (59): Sale of Debt.

10-10. إذا اقتضت صيغة الصُّكوك شراء المنشأة ذات الغرض الخاص، التي هي المصدِر للصُّكوك، منشأةً أخرى ذات غرض خاص تشتمل موجوداتها على أعيان (وما في حكمها) وديون، فإن المنشأة ذات الغرض الخاص المشتراة تكون بموجوداتها هي موجودات الصُّكوك أو من جملة موجوداتها. ويراعى ما ورد في البند (٩-١-٧) من هذا المعيار، والبند (٨-٢-٢) من المعيار الشرعي رقم (٥٩) بشأن بيع الدَّين.

10-11. It is required to prepare an annual balance sheet for the special purpose vehicle at least on annual basis, through which it is brought to the knowledge whether profit was achieved, or loss was incurred, and [this balance sheet] should be approved by the Shari'ah Board of Sukuk and should be made public to the certificateholders. See: s. (13-1-1-4).

10-11. يجب أن تعدَّ ميزانية دورية سنوية -في الحد الأدنى- للمنشأة ذات الغرض الخاص، يُعرَف بها ما تحقَّق من ربحٍ أو حصل من خسارة، تعتمدها الهيئة الشَّرعية للصُّكوك، وتعلن لحملة الصكوك. وينظر البند (١٣-١-١-٤).

11. Expenses, Profits and Losses on Sukuk:

11. النفقات والأرباح والخسائر في الصكوك:

11-1. Expenses (Costs and Taxes):

11-1. النفقات (والمصروفات والضرائب):

11-1-1. When charging expenses, costs, taxes and other financial burdens, the provisions

11-1-1. يراعى في تحميل النفقات والمصروفات

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relating to the financing mode, according to the [respective] Shari'ah standard for that financing mode (if any), on which the Sukuk are based should be complied with.

والضرائب وغيرها من الأعباء المالية الأحكام الخاصة بالصيغة التي تقوم الصكوك عليها وفقًا للوارد في المعيار الشرعي الخاص بتلك الصيغة (إن وجد).

11-1-2. Expenses, costs, taxes and other financial burdens related to the ownership of the underlying assets of Sukuk are borne by their certificateholders [of Sukuk] to the extent of their share therein. It is not permitted to require the originator to bear them. It is permitted to stipulate upon the originator that the expenses and costs, related to the enjoyment of the underlying assets, shall be borne by [the originator] if is the beneficiary thereof.

11-1-2.تكون النفقات والمصروفات والضرائب وغيرها من الأعباء المالية المتعلقة بملكية موجودات الصكوك على حملتها بقدر حصتهم فيها، ولا يجوز اشتراطها على الجهة المنشئة. أما النفقات والمصروفات المتعلقة بالانتفاع بالموجودات، فيجوز أن تشترط على الجهة المنشئة في حصة حملة الصكوك في الموجودات إن كانت هي المنتفعة بها.

11-1-3. The certificateholders bear the currency exchange differences related to the capital of Sukuk or their returns or other financial rights and burdens related to the ownership of their underlying assets of Sukuk, and it is not permitted to stipulate them upon the originator unless it is related to the funds that stand due to the certificateholders, such as Murabaha instalments, if the originator is the buyer, or rent payments, if it is the lessee. See: s. (6-1-1-4).

11-1-3.يتحمل حملة الصكوك فروق صرف العملة الخاصة برأس مال الصكوك أو عوائدها أو غيرها من الحقوق والأعباء المالية المتصلة بملكية موجودات الصكوك الخاصة بهم، ولا يجوز اشتراطها على الجهة المنشئة إلا إذا كانت متعلقة بما ثبت في ذمتها من أموال لحملة الصكوك، كأقساط المرابحة إذا كانت الجهة المنشئة هي المشترية أو دفعات الأجرة إن كانت هي المستأجرة، وينظر البند (٦-١-١-٤).

11-1-4. There is no [Shari'ah] objection to add a specified percentage to the face value of the Sukuk upon the subscription [of the certificates] to cover the expenses of issuance, to be paid by the

11-1-4.لا مانع شرعـًا من إضافة نسبة محدَّدة إلى القيمة الاسمية للصكوك عند الاكتتاب لتغطية مصروفات الإصدار، يدفعها حملة الصكوك إلى

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الجهة المنشئة، وذلك بشرط أن تكون هذه النسبة مقدَّرة تقديراً مناسبًا.

certificateholders to the originator, provided that this percentage is appropriately estimated.

11-2.الأرباح والخسائر:

11-2-1.تطبق الضوابط الشرعية للربح والخسارة وفقًا للصيغة التي يتم إصدار الصكوك على أساسها، الواردة في المعيار الشرعي لتلك الصيغة (إن وجد)، وما ورد في المعيار الشَّرعي رقم (٤٠) بشأن توزيع الرِّبح في الحسابات الاستثمارية على أساس المضاربة، والمعيار الشَّرعي رقم (٤٥) بشأن حماية رأس المال والاستثمارات، والمعيار الشَّرعي رقم (٤٧) بشأن ضوابط حساب ربح المعاملات. وينظر البند (٧-٣-٢-٥) من هذا المعيار.

11-2-2.يجوز أن تتَّفق نسبة حصَّة كلِّ صكٍّ في الرِّبح مع نسبة حصَّته في رأس مال الإصدار، ويجوز أن تختلف عنها بالضابط الوارد في البند (٣-١-٥-٣) والبند (٣-١-٥-٤) والبند (٥-٥) من المعيار الشَّرعي رقم (١٢) بشأن الشركة (المشاركة) والشركات الحديثة، أما الخسارة فلا يجوز أن تختلف نسبة تحمُّلها عن نسبة الحصَّة في رأس المال.

11-2-3.يجب النص في نشرة الإصدار وشروطه وأحكامه، على أن الأرباح تُدفع من عوائد موجودات

11-2. Profits and losses:

11-2-1. Shari'ah rules for profit and loss are applied in accordance with the financing mode on the basis of which the Sukuk is issued, as given in the particular Shari'ah standard for that financing mode (if any), and what was stated in Shari'ah Standard No. (40): Distribution of Profit in Mudaraba-based Investment Accounts, and Shari'ah Standard No. (45): Protection of Capital and Investments, and Shari'ah Standard No. (47) Rules for Calculating Profit in the Financial Transactions. See: s. (7-3-2-5) of this Standard.

11-2-2. It is permitted that the percentage of share in the profit for each certificate of Sukuk to be in line with the percentage of its share in the capital of issuance. It is permitted if [the percentage of profit] is different from [percentage of capital contribution] in accordance with the rule mentioned in s. (3-1-5-3) and s. (3-1-5-4) and s. (5-5) of the Shari'ah Standard No. (12): Sharikah (Musharaka) and Modern Companies. As far as the loss, it is not permitted that the percentage of its bearing differs from the percentage of the share in the capital.

11-2-3. It is required that the base prospectus and its terms and conditions should stipulate that profits are paid from the returns of the underlying assets of the Sukuk that [will be]

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الصُّكوك المستحقَّة وفقًا لشروط وأحكام العقود الخاصَّة بها، ولا يجوز الفصل بين أرباح الصُّكوك وعوائد موجوداتها، ومن ذلك أن تَلتزم الجهة المنشئة بالأرباح التزامًا مباشراً، مستقلاً عن عوائد تلك الموجودات وأحوالها من الاستحقاق والتَّحصيل أو عدمه، ويراعي ما يأتي في البند (١١-٢-٨).

due in accordance with the terms and conditions of their contracts. It is not permitted to separate the profits of the Sukuk from the returns of its underlying assets, such as that the originator cannot under a direct obligation of the profits that is independent of the returns of those underlying assets and their conditions of entitlement and collection or not. With due compliance with the following in s. (11-2-8).

11-2-4. يجب النَّص في نشرة الإصدار، وشروطه وأحكامه، والشُّروط التي يتم إدراج الصُّكوك على أساسها في الأسواق المالية، على أن ربح الصُّكوك متوقَّع، وليس مضمونًا. وينظر البند (٧-٣-٢-٥) والبند (٧-٣-٢-٩).

11-2-4. It is required to state in the base prospectus, in its terms and conditions, and in the conditions on the basis of which Sukuk are listed in the financial markets, that the Sukuk profit is expected, not guaranteed. See: s. (7-3-2-5) and s. (7-3-2-9).

11-2-5. إذا لم يتم دفع المقدار المتحقِّق من الرِّبح أو العائد في التاريخ المحدد للتوزيعات الدورية، وتقرَّر إيداع الرِّبح أو العائد في حساب الصُّكوك أو حساب الاحتياطي، وكان ذلك وفقًا للشروط المتفق عليها، فإنه لا مانع من أن يزاد المقدار الموزَّع من الرِّبح أو العائد في التاريخ اللاحق للتَّوزيع، إن كانت الزِّيادة تُدفَع من حساب الصُّكوك أو حساب الاحتياطي، ولا يجوز أن تُلزَم الجهة المنشئة بدفع الزِّيادة من عندها. وينظر البند (٦-١-٢-٢).

11-2-5. If the realized amount of profit or return is not paid on the date specified for periodic distributions, and it is decided to deposit the profit or return in the Sukuk account or reserve account, and that is in accordance with the conditions agreed upon, then there is no [Shari'ah] objection in increasing the distributed amount of profit or return on the following date of distribution, if the increase is paid from the Sukuk [income] account or the reserve account. It is not permitted that the originator be obligated to pay the increase from its own. See: s. (6-1-2-2).

11-2-6. يبدأ حساب أرباح أو عوائد الصُّكوك المتحققة من موجوداتها من تاريخ توقيع عقودها ومستنداتها،

11-2-6. The calculation of profits or returns of Sukuk realized from their underlying assets commences from the date of signing their

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contracts and documents, after the issuance. If the signing of contracts and documents is delayed, the period between the date of issuance of the Sukuk and the date of signing of the contracts and documents shall have no profit calculation. It is not permitted to oblige the originator to pay profits or returns for that period that do not result from the underlying assets of Sukuk in accordance with the terms and conditions of its contracts after their signing. See: s. (6-1-2-2-c-2).

بعد الإصدار. وإذا تأخّر توقيع العقود والمستندات، فإن الفترة بين تاريخ إصدار الصُّكوك وتاريخ توقيع العقود والمستندات تكون دون احتساب أرباح. ولا يجوز أن تُلزَم الجهة المنشئة بدفع أرباح أو عوائد عن تلك الفترة لا تكون ناتجة من موجودات الصُّكوك وفقاً لشروط وأحكام عقودها بعد توقيعها. وينظر البند (٦-١-٢-٢-ج-٢).

11-2-7. In Sukuk based on partnership, Mudaraba, or Investment Agency, the underlying assets of the Sukuk should be subject to *de facto* or constructive liquidation (*tanḍīḍ*) in order to know the amount of distributable realized profit. If the profit is distributed without this liquidation, then it is paid under account, and is subject to settlement (increase or decrease) at the time of liquidation. See: s. (8-8) of Shari'ah Standard No. (13): Mudaraba.

11-2-7. يَلزم في الصُّكوك القائمة على الشركة أو المضاربة أو الوكالة بالاستثمار، تنضيض موجودات الصُّكوك حقيقةً أو حُكمَاً، لمعرفة مقدار الرِّبح المتحقِّق القابل للتّوزيع. فإن تمَّ توزيع ربحٍ دون هذا التَّنضيض، فإنه يكون مدفوعاً تحت الحساب، ويخضَع للتَّسوية (زيادةً أو نقصاً) عند التّنضيض. ويُنظر البند (٨-٨) من المعيار الشَّرعي رقم (١٣) بشأن المضاربة.

11-2-8. It should be complied that the periodic distributions, in the base prospectus, of the Sukuk profits are in line with the dividends of the underlying assets of Sukuk or the payments due under the existing contract between the issuer, representing the certificateholders, and the originator. It is permitted that the distributions may differ from each other according to the following two cases:

11-2-8. يراعى أن تتَّفق التَّوزيعات الدَّورية لأرباح الصُّكوك في نشرة الإصدار مع توزيعات أرباح موجودات الصُّكوك أو الدفعات المستحقَّة بموجب العقد القائم بين المصدِر ممثلاً لحمَلة الصُّكوك والجهة المنشئة. ويجوز أن تختلف التَّوزيعات عن بعضها وفق الحالتين الآتيتين:

11-2-8-1. That the date of the periodic distributions of Sukuk profits be later than the date of the dividends of its underlying assets or

11-2-8-1. أن يتأخَّر تاريخ التَّوزيعات الدَّورية لأرباح الصُّكوك عن تاريخ توزيعات أرباح موجوداتها

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the date of payments due under the contract between the issuer, representing the certificateholders, and the originator, provided that the dividends of the assets or the received payments are deposited in the Sukuk [income] account or the reserve account. As for the advancement of the date of the periodic distributions of the Sukuk profits over the aforementioned dates, it is not permitted if the payment is not recorded as being from the available balance in the Sukuk [income] account or the reserve account, because non-restriction obliges the originator to lend to the certificateholders. The originator may volunteer the payment at the time, and the payment shall be an absolute donation or will be an under-account payment that is settled from the instalments to be paid or from other [resources] that are owned by the certificateholders. See: s. (6-1-2-2-c-1).

أو تاريخ استحقاق الدفعات بموجب العقد القائم بين المصدِر ممثلاً لحمَلة الصُّكوك والجهة المنشئة، بشرط أن يودَع ما يوزَّع من أرباح الموجودات أو ما يُدفع من دفعات في حساب الصُّكوك أو حساب الاحتياطي. أما تقدُّم تاريخ التَّوزيعات الدَّورية لأرباح الصُّكوك على التَّواريخ المذكورة فلا يجوز إذا لم يقيَّد الدَّفع بأن يكون من الرَّصيد المتوافر في حساب الصُّكوك أو حساب الاحتياطي، لما في عدم التَّقييد من إلزام الجهة المنشئة بإقراض حمَلة الصُّكوك. وللجهة المنشئة أن تتطوَّع بالدَّفع في حينه، ويكون الدَّفع تبرُّعًا مطلَقًا أو دفعًا تحت الحساب تتم تسويته من الأقساط التي تُدفع أو من غيرها مما هو مملوك لحمَلة الصُّكوك. وينظر البند (٦-١-٢-٢-ج-١).

11-2-8-2. The method of calculating the periodic distributions of Sukuk profits differs from the method of calculating the dividends of the underlying assets of Sukuk or calculating the payments due under the existing contract between the issuer, representing the certificateholders, and the originator, such as calculating the periodic distributions of Sukuk profits according to a variable index whereas the dividends of underlying assets of Sukuk or the calculation of the said payments is not subject to change according to the same index, and this is provided that the excess amounts of the periodic distributions of the Sukuk profits are paid from the balance of the Sukuk [income] account or

.2-8-2-11 أن تختلف طريقة حساب التَّوزيعات الدّورية لأرباح الصُّكوك عن طريقة حساب توزيعات أرباح موجودات الصُّكوك أو حساب الدفعات المستحقَّة بموجب العقد القائم بين المصدِر ممثِّلاً لحمَلة الصُّكوك، والجهة المنشئة، كأن تُحسَب التَّوزيعات الدَّورية لأرباح الصُّكوك وفقًا لمؤشِّر متغيِّر ولا تكون توزيعات أرباح موجودات الصُّكوك أو لا يكون حساب الدفعات المذكورة خاضعًا للتَّغير وفقًا

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للمؤشِّر نفسه، وهذا بشرط أن يُدفَع الزائد من مبالغ التّوزيعات الدَّورية لأرباح الصُّكوك من رصيد حساب الصُّكوك أو حساب الاحتياطي المتجمِّع من إيرادات موجوداتها، وأن يُودَع الفرق، إذا كانت التوزيعات الدورية أقل، في حساب الصكوك أو حساب الاحتياطي. وينظر البند (٦-١-٢-٢).

the reserve account accumulated from the revenues of its assets, and that the difference, if the periodic distributions are less, is deposited in the Sukuk [income] account or the reserve account. See: s. (6-1-2-2). See: s. (6-1-2-2).

11-2-9. لا مانع من تقسيم صكوك الإصدار الواحد إلى فئات بحيث يكون لكل فئة حصّة (نسبة) مختلفة عن غيرها من إجمالي أرباح موجودات الصُّكوك، أو أن تختلف تواريخ التَّوزيعات الدَّورية لأرباح كل فئة، أو أن تختلف مدَّة صكوك كلِّ فئة عن الفئات الأخرى وتختلف حصة كل فئة من الربح تبعًا لذلك، بشرط أن لا يَقطَع ذلك المشاركة في الرِّبح المتحقِّق بين جميع الفئات، وبشرط أن لا يَدفع حمَلة صكوك الفئة ذات حصَّة الرِّبح الأعلى عوضـًا لذلك، كأن يدفعوا علاوة إصدار أو ثمنـًا لشراء الصُّكوك أعلى من الفئات الأقل منهم في حصَّة الرِّبح. وينظر البند (٥-١) من المعيار الشرعي رقم (٤٠) بشأن توزيع الربح في الحسابات الاستثمارية على أساس المضاربة.

11-2-9. There is no [Shari'ah] objection of dividing the certificates of Sukuk of one issue into categories so that each category has a different share (percentage) from the total profits of the underlying assets of Sukuk, or the dates of the periodic distributions of the profits of each category differ, or the duration of the Sukuk of each category differs from other categories and the share of each category of profit varies accordingly, provided that this does not cease the participation in the profit realized between all categories, and provided that the certificateholders of the Sukuk of the higher profit share category do not pay a consideration for that, such as they pay an issuance premium or a higher price for purchasing Sukuk than the categories lower than them in terms of profit share. See: s. (5-1) of Shari'ah Standard No. (40): Distribution of Profit in Mudaraba-based Investment Account.

12. إفلاس إصدارات الصكوك:

12-1. تنطبق على إفلاس الجهة المنشئة الأحكام الواردة في

12. Bankruptcy of Sukuk Issuances:

12-1. The provisions contained in Shari'ah Standard No. (43): Insolvency shall apply to

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المعيار الشرعي رقم (٤٣) بشأن الإفلاس.

12-2. يكون حملة الصكوك أحق بالموجودات المملوكة لهم فلا يشترك فيها غيرهم من غرماء الجهة المنشئة سواء وجدت الموجودات بأعيانها أو كانت حصصاً في موجودات مضاربة أو مشاركة أو وكالة بالاستثمار ولو كانت تلك الموجودات مسجلة داخل ميزانية الجهة المنشئة، ما لم يكن حملة الصكوك مشاركين للجهة المنشئة في تحمل التزاماتها كما في صكوك الشق الأول من رأس المال، فيتحملون من تلك الالتزامات بقدر حصتهم. وينظر البند (٨-٣-٤) والبند (٩-٢) من المعيار الشرعي رقم (٤٣) بشأن الإفلاس، والبند (٥-٢-٥-٣) والبند (٨-٣-٢-٢-د-٣) والبند (٨-٣-٢-٣-ب-١) من هذا المعيار.

12-3. إذا كان لدى الجهة المنشئة حسابات للصكوك سواء أكانت حسابات جارية أم استثمارية فإن لها في الإفلاس حكم الحسابات الجارية والأوعية الاستثمارية. وينظر البند (٩-١-١) والبند (٩-٢) من المعيار الشرعي رقم (٤٣) بشأن الإفلاس.

12-4. لا يجوز عدُّ الثمن الوارد في التعهد بالشراء ديناً على الجهة المنشئة قبل تنفيذ الشراء. وينظر البند (٦-٣-٢-٤) والبند (٦-٣-٣-٧) من هذا المعيار، والبند (٥-٣) من المعيار الشرعي رقم (٤٣) بشأن الإفلاس.

the bankruptcy of the originator.

12-2. The certificateholders have more right to the underlying assets held by them, so other creditors of the originator do not participate in [underlying assets], whether the assets exist as specific (identified) tangible assets, or they are shares in the underlying assets of Mudaraba, partnership, or an Investment Agency, even if those assets are recorded on the balance sheet of the originator, unless the certificateholders are partners with the originator in assuming its obligations, as in the Tier-1 Sukuk, so they bear from the obligations to the extent of their share. See: s. (8-3-4) and s. (9-2) of Shari'ah Standard No. (43) Insolvency, s. (5-2-5-3) and s. (8-3-2-2-d-3) and s. (8-3-2-3-b-1) of this Standard.

12-3. If the originator has accounts for the Sukuk, whether they are current or investment accounts, then in bankruptcy [such accounts] has the same status as the current accounts and pools of investment. See: s. (9-1-1) and s. (9-2) of Shari'ah Standard No. (43) Insolvency.

12-4. It is not permitted that the price, mentioned in the purchase undertaking, to be recognized as a debt owed by the originator before the purchase is concluded. See: s. (6-3-2-4), s. (6-3-3-7) of this Standard and s. (5-3) of Shari'ah Standard No. (43) Insolvency.

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13. Shari'ah Governance of Sukuk:

13-1. The Shari'ah Board of Sukuk:

It is required that each issuance [of Sukuk] to have a Shari'ah Board, and the member of the [Shari'ah] Board should fulfil the conditions stipulated in s. (5) of Shari'ah Standard No. (29): Stipulations and Ethics of Fatwa in the Institutional Framework.

13-1-1. Duties, powers and responsibilities of the Shari'ah Board of Sukuk:

13-1-1-1. Endorsement of the Shari'ah Board of the structure of the issuance of Sukuk, all its contracts and documents, and any amendments thereto, whether they were necessary for the issuance of Sukuk, the establishment of a special purpose vehicle, the implementation of Sukuk activities, or entering into contracts with parties to organize and market the issuance of Sukuk, whatever their tasks, along with granting approvals on the procedures and documents for listing the certificates of Sukuk in the financial markets.

13-1-1-2. Endorsing the conformity of the existing underlying assets for the issuance of Sukuk on them from a Shari'ah point of view and making sure that their sources of income for the certificateholders are permissible by virtue of Shari'ah.

13-1-1-3. If [the certificates] Sukuk are in the form of a program that includes repeated issuances, then the Shari'ah Board of Sukuk should make sure that the

13. الحوكمة الشرعية للصكوك:

13-1. الهيئة الشرعية للصكوك:

يجب أن يكون لكل إصدار هيئة شرعية، ويجب أن تتوافر في عضو الهيئة الشروط الواردة في البند (٥) من المعيار الشرعي رقم (٢٩) بشأن ضوابط الفتوى وأخلاقياتها في إطار المؤسسات.

13-1-1. مهمات الهيئة الشرعية للصكوك وصلاحياتها ومسؤولياتها:

13-1-1-1. اعتماد الهيئة الشرعية للصكوك هيكلة الإصدار وجميع عقوده ومستنداته، وأي تعديلات عليها، سواء ما كان منها لازماً لإصدار الصكوك أو لتأسيس المنشأة ذات الغرض الخاص أو لتنفيذ أنشطة الصكوك أو للتَّعاقد مع أطراف تنظيم وتسويق إصدار الصُّكوك أياً كانت مهماتهم مع اعتماد إجراءات ومستندات إدراج الصكوك في الأسواق المالية.

13-1-1-2. اعتماد صلاحية الموجودات القائمة لإصدار الصكوك عليها من الناحية الشرعية، والتأكد من أن مصادر دخلها لحملة الصكوك مباحة شرعاً.

13-1-1-3. إذا كانت الصكوك في صورة برنامج يشتمل على إصدارات متكرِّرة، فإن على الهيئة

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الشرعية للصكوك أن تتأكد أن وثائق الإصدارات المتكررة مطابقة لما سبق اعتماده، وإلا وجب اعتماد كل إصدار أصالة.

documentation of the repeated issuances is in conformity with what was previously approved, otherwise it is required to get each issuance approved afresh.

13-1-1-4. اعتماد الأسس الشرعية لحساب عوائد الصكوك، وطريقة تحميل النفقات والمصروفات، وحساب الأرباح وطريقة توزيعها، وما يلزم تجنيبه من دخل محرَّم إن وجد. ومراجعة القوائم المالية والإيضاحات للمنشأة ذات الغرض الخاص بشكل دوري لا يقل عن مرة في كل سنة مالية. وينظر البند (١٠-١١).

13-1-1-4. Adopting the Shari'ah bases for calculating the returns of Sukuk, the method of calculating expenses and costs, calculating the profits and the method of their distribution, and what must be forfeited of prohibited income, if any. Reviewing the financial statements and annexures of the special purpose vehicle, at least once in every financial year. See: s. (10-11).

13-1-1-5. اعتماد خطةً للتدقيق الشرعي الدوري على الإصدار.

13-1-1-5. Approving a plan for periodic Shari'ah audit of the issuance.

13-1-1-6. إصدار تقرير شرعي سنوي بخلاصة رأيها بالتزام الإصدار بالفتوى التي أصدرتها وبما اعتمدته، في ضوء تقارير التدقيق الشرعي الدوري، ويكون متاحاً لحملة الصكوك.

13-1-1-6. Issuance of an annual Shari'ah report with a summary of [Shari'ah Board's] opinion regarding the issuance's compliance with the Fatwa it issued and with what it adopted, in light of the periodic Shari'ah audit reports, and it shall be made public to certificateholders.

13-1-1-7. اعتماد تنفيذ إجراءات استرداد الصكوك أو إطفائها، وتوزيع ما ينتج عن أي منهما.

13-1-1-7. Approving the implementation of procedures for redemption or cancelation of the certificates of Sukuk and distributing what results from either of them.

13-1-1-8. للهيئة الشرعية للصكوك الاطلاع على كل ما تراه ضرورياً لقيامها بمهماتها من سجلات ومستندات أو بيانات، أيًّا كانت، سواءً لدى الجهة المنشئة أو لدى أي طرفٍ من أطراف

13-1-1-8. The Shari'ah Board of Sukuk has access to all that it deems necessary to carry out its tasks, such as records, documents or data, whatever they may be, whether with the originator or with any of the parties of the issuance.

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الإصدار.

13-1-1-9. View the credit rating scorning, the legal opinion document, and other documents that help it verify that the documentation of Sukuk do not contain Shari'ah breach, and figure out the core base of the Sukuk from the credit and legal point of view, and [the Shari'ah Board] may request a meeting with the credit rating agency or the legal body of the Sukuk, to discuss with them, if it deems a need for that.

13-1-1-9. الاطلاع على شهادة التصنيف الائتماني، ووثيقة الرأي القانوني ونحوها من المستندات التي تمكنها من التحقق بأن وثائق الصكوك لا تشتمل على مخالفة شرعية، والوقوف على حقيقة الصكوك من الناحية الائتمانية والقانونية، ولها أن تطلب الاجتماع بوكالة التصنيف الائتماني أو بالجهة القانونية للصكوك، لمناقشتهم، إن رأت حاجة لذلك.

13-1-2. Fatwa Document of the Shari'ah Board of Sukuk:

13-1-2-1. It is required that the Shari'ah Board of Sukuk to issue a detailed Shari'ah Fatwa document, at the time of the issuance of Sukuk, approving the issuance. It is required that the Fatwa document to be one of the legal documents for the issuance, and an integral part of it, with the obligation to stipulate in all contracts and documents for issuance, whatever they are, that their terms and conditions are interpreted in the light of what is stated in the Shari'ah Fatwa, and that the will of the parties to Sukuk is interpreted in light of it as well. See: s. (7-3-2-13).

13-1-2. وثيقة فتوى الهيئة الشرعية للصكوك:

13-1-2-1. يجب على الهيئة الشرعية للصكوك أن تصدر وثيقة فتوى شرعية مفصلة عند إصدار الصكوك، باعتماد الإصدار، ويجب أن تكون وثيقة الفتوى من المستندات القانونية للإصدار، وجزءاً لا يتجزأ منها، مع وجوب النص في جميع عقود ومستندات الإصدار، أياً كانت، على أن شروطها وأحكامها تفسر في ضوء الوارد في الفتوى الشرعية، وأن إرادة أطراف الصكوك تفسر في ضوئها أيضاً. وينظر البند (٧-٣-٢-١٣).

13-1-2-2. It is required that the Fatwa document is a part of the base prospectus of Sukuk, with the originator providing a separate copy of it to the certificateholders. See: s. (7-3-2-13) of this Standard.

13-1-2-2. يجب أن تكون وثيقة الفتوى جزءاً من نشرة إصدار الصكوك، مع إتاحة الجهة المنشئة نسخة مستقلة منها لحملة الصكوك. وينظر

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البند (٧-٣-٢-١٣).

13-1-2-3. The Shari'ah Fatwa document must include the following:

13-1-2-3-a. Statement of the general structure of the Sukuk and their Shari'ah characterization.

13-1-2-3-b. A statement of the Sukuk contracts and their documents.

13-1-2-3-c. A summary of the Shari'ah rules for Sukuk and their trading rules.

13-1-2-3-d. A summary of the opinion of the Shari'ah Board regarding the ruling on the issuance and approving the Sukuk structure, contracts, and documents.

13-1-2-4. If the Fatwa was issued by the majority [of Shari'ah Board members], the non-approving [member] has no right to sign it, and it is stated in the Fatwa that it was issued by the majority.

13-1-2-3. يجب أن تشتمل وثيقة الفتوى الشرعية على ما يأتي:

13-1-2-3-أ. بيان الهيكلة العامة للصكوك وتكييفها الشرعي.

13-1-2-3-ب. بيان عقود الصكوك ومستنداتها.

13-1-2-3-ج. خلاصة الضوابط الشرعية للصكوك وضوابط تداولها.

13-1-2-3-د. خلاصة رأي الهيئة الشرعية في حكم الإصدار واعتماد هيكلة الصكوك وعقودها ومستنداتها.

13-1-2-4. إذا صدرت الفتوى بالأغلبية فليس للمخالف أن يوقع عليها، ويُصرَّح في الفتوى بأنها صدرت بالأغلبية.

13-2. Shari'ah Audit of Sukuk:

13-2-1. It is required that the issuance is subject to Shari'ah audit in the light of the Shari'ah Board's Fatwa issued endorsing it.

13-2-2. The scope of the Shari'ah audit includes all that is included in the tasks of the Shari'ah Board for issuance in the light of what it has decided in this regard.

13-2-3. The periodic Shari'ah audit report shall be submitted to the Shari'ah Board of Sukuk.

13-2.التدقيق الشرعي للصكوك:

13-2-1. يجب التدقيق الشرعي على الإصدار في ضوء فتوى الهيئة الشرعية الصادرة باعتماده.

13-2-2.يشمل نطاق التدقيق الشرعي جميع ما يدخل في مهمات الهيئة الشرعية للإصدار في ضوء ما قررته بشأنها.

13-2-3.يُرفع تقرير التدقيق الشرعي الدوري إلى الهيئة الشرعية للصكوك.

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14. The Governing Law of Sukuk:

14-1. As a basic norm, the Islamic Shari'ah should be the governing law of the Sukuk, and from that, the arbitration is based on a law derived from the Islamic Shari'ah or Shari'ah standards, issued by the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI).

14-2. If the basic norm stated in the preceding section is not possible, then resort to arbitration subject to the rulings and principles of Shari'ah.

14-3. If what was mentioned in the preceding two sections is not possible, the following is required to comply with:

14-3-1. A statement in the contract that the governing law is applied in a manner that does not contradict the rulings and principles of Shari'ah, as determined by the Shari'ah standards issued by the Accounting and Auditing Organization for Islamic Financial Institutions, and that the terms of the contract are interpreted accordingly.

14-3-2. A declaration in the Sukuk documentation in the terms of the obligations of both parties, other than the clause of the governing law, that this is what the parties to the contract have committed themselves to.

14-3-3. It is a requirement to stipulate that the parties will not claim or accept the interest amount as a result of judicial [award].

14. القانون الحاكم للصكوك:

14-1. الأصل أن تكون الشريعة الإسلامية هي القانون الحاكم للصكوك، ومن ذلك أن يكون التحاكم لقانون مستمد من الشريعة الإسلامية أو للمعايير الشرعية الصادرة عن هيئة المحاسبة والمراجعة للمؤسسات المالية الإسلامية.

14-2. إذا تعذر الاصل المنصوص عليه في البند (السابق فيجب اللجوء إلى التحكيم الخاضع لأحكام ومبادئ الشريعة الإسلامية.

14-3. إذا تعذر ما ذُكر في البندين السابقين، فيجب مراعاة ما يأتي:

14-3-1. التصريح في وثائق الصكوك أن القانون الحاكم يطبق بما لا يتعارض مع أحكام ومبادئ الشريعة الإسلامية حسبما قررته المعايير الشرعية الصادرة عن هيئة المحاسبة والمراجعة للمؤسسات المالية الإسلامية، وأن تفسر بنود العقد وفقاً لها.

14-3-2. التصريح في وثائق الصكوك في بنود التزامات الطرفين، غير بند القانون الحاكم، بأن هذا ما التزمت به أطراف التعاقد.

14-3-3. وجوب النص على أن الأطراف لن يطالبوا بالفوائد ولن يقبلوا أن يُحكم بها.

DRAFT of AAOIFI Shari'ah Standard No. (62): Sukuk is issued in Arabic. In case of any difference between the Arabic text and its English translation, the Arabic text shall prevail.
DRAFT Release Date: 6th November 2023.

Shari'ah Standard No. (21)

Financial Paper
(Shares and Bonds)

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

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

Preface

This Standard aims to elaborate the rules for the shares of corporations just as it seeks to explain the rules for interest-bearing bonds.

Statement of the Standard

1. Scope of the Standard

This Standard covers shares with respect to their issuance and flotation including investment, trading, renting, loaning, pledging and Salam in them, along with the rule for concluding futures, options and swapping contracts on the basis of shares.

The Standard also covers issuance of and trading in interest-bearing bonds. The Standard does not cover investment Sukuk for which there is a separate specific standard.

2. Rules for Issuance of Shares

2/1 The issuance of shares is permissible if the objectives for which the corporation was established are permissible according to the Shari'ah, thus, the objectives of its formation should not be transactions that are prohibited, like the manufacturing of liquor, trading in swine or transactions in Riba. If the objectives of the corporation are impermissible, the formation of the corporation is permissible too, and consequentially so is the issuance of shares that constitute such a corporation.

2/2 It is permissible to add a determined percentage to the value of the share at the time of subscription to cover the expenses of issuance as long as this percentage is fixed and determined to be a reasonable amount. [see item 4/1/2/2 of Shari'ah Standard No. (12) on Sharikah (Musharakah) and Modern Corporations]

2/3 It is permissible to issue new shares for increasing the capital of a corporation if such shares are issued at a price that is equivalent to the value of the old shares, which is worked out through expert valuation of the assets of the corporation or on the basis of the market-value whether this is at a premium or at a discount with respect to the price of the issue. [see item 4/1/2/3 of Shari'ah Standard No. (12) on Sharikah (Musharakah) and Modern Corporations]

2/4 It is permissible to underwrite the issue when this is done without compensation in lieu of underwriting. This is an agreement, at the time of the formation of the corporation, with someone who undertakes to purchase the entire issue of shares, or a part thereof. It is an undertaking from the person bound to subscribe at the nominal value to all that remains and has not been subscribed to by another. It is permissible to acquire compensation for work, like the preparation of feasibility studies or the marketing of shares, irrespective of the work being undertaken by the underwriter or someone if such compensation is not in lieu of a guarantee. [see item 4/1/2/4 of Shari'ah Standard No. (12) on Sharikah (Musharakah) and Modern Corporations]

2/5 It is permissible to split the value of the share into instalments at the time of subscription so that one instalment is paid and the remaining instalments are deferred. The subscriber will be considered a participant to the extent of what he has paid up and will be bound to pay his additional capital in the company, and this on the condition that the instalments apply to all the shares and that the liability of corporation remains restricted to the value of the shares subscribed to. [see item 4/1/2/5 of Shari'ah Standard No. (12) on Sharikah (Musharakah) and Modern Corporations]

2/6 It is not permissible to issue preference shares that have special financial features leading to the granting of priority to these shares at the time of liquidation or the distribution of profits. It is permitted to grant certain shares features related to procedural or administration matters, in addition to the rights attached to ordinary shares, like voting rights. [see item 4/1/2/14 of Shari'ah Standard No. (12) on Sharikah (Musharakah) and Modern Corporations]

2/7 It is not permissible to issue *Tamattu'* shares. These are shares that grant the participant compensation in lieu of his shares, whose value is redeemed during the existence of the company, and he is granted *Tamattu'* shares that grant him rights that are available for shares based on capital, except the right to profits and the distribution of assets at the time of winding up, insofar as the *Tamattu'* shares

are entitled to profit lesser than that given to the owner of shares based on capital, just as the owner of *Tamattu'* shares does not have a share in the assets of the company at the time of winding up until the owners of shares based on capital have been granted the value of their shares. [see item 4/1/2/15 of Shari'ah Standard No. (12) on Sharikah (Musharakah) and Modern Corporations]

2/8 The share certificate – or what stands in its place – is a document that is deemed evidence of ownership of the shareholder for his undivided share in the assets of the company. It is permitted that this document be in the name of the owner, to his order, or for the bearer.

3. Rules for Dealing in Shares

3/1 A share represents an undivided share in the capital of a corporation, just as it represents an undivided share in its assets and the rights associated with it upon conversion of the capital into tangible things, benefits, debts and so on. The subject-matter of the contract at the time of trading of shares is this undivided share.(1)

3/2 It is permissible to buy and sell shares of corporations, on a spot or deferred basis in which delay is permissible, if the activity of the corporation is permissible irrespective of its being an investment (that is, the share is acquired with the aim of profiting from it) or dealing in it (that is, with the intention of benefiting from the difference in prices).

3/3 Participation or trading in shares for purposes of conversion

Participation or trading is permitted for purposes of conversion for one who has the ability to effect conversion by adopting a resolution for

(1) See the Shari'ah basis for the standard, item (18), for the permissibility of trading in shares of corporations whose assets represent tangible things and profits along with debts and cash that are in excess of the tangible assets and profits with the stipulation that such tangible and cash assets should not be less than one-third. The reason is that the debts and cash can be properly considered as secondary to them. (This explanatory note is intended to complete the text of the Standard for implementing subsequent amending procedures, God willing).

conversion in accordance with the Shari'ah at the first general meeting or by striving for conversion in line with item 3/4/6. [see Shari'ah Standard No. (6) on Conversion of a Conventional Bank into an Islamic Bank]

3/4 Participation or trading (for investment and trading) in the shares of corporations whose primary activity is permissible, but they make deposits or borrow on the basis of interest

The fundamental rule is that of prohibition of acquiring shares of and transactions (investment and trading) in the shares of corporations that sometimes undertake transactions in Riba and other prohibited things even when their primary activity is permissible, but from this rule subscription and transactions (investment or trading) are exempted with the following conditions:

3/4/1 That the corporation does not state in its memorandum of association that one of its objectives is to deal in interest, or in prohibited goods or materials like pork (swine) and the like.

3/4/2 That the collective amount raised as loan on interest – whether long-term or short-term debt – does not exceed 30% of the market capitalization of the corporation, knowingly that raising loans on interest is prohibited whatsoever the amount is.

3/4/3 That the total amount of interest-taking deposits, whether short-, medium- or long-term, shall not exceed 30% of the market capitalization of total equity, knowingly that interest-taking deposits are prohibited whatsoever the collective amount is.

3/4/4 That the amount of income generated from prohibited component does not exceed 5% of the total income of the corporation irrespective of the income being generated by undertaking a prohibited activity, by ownership of a prohibited asset or in some other way. If a source of income is not properly disclosed then more effort is to be exerted for identification thereof giving due care and caution in this respect.

3/4/5 For the determination of these percentages, recourse is to be had to the last budget or verified financial position.

3/4/6 It is obligatory to eliminate prohibited income specific to the share that is mixed up with the earnings of the corporations, and this in accordance with the following:

3/4/6/1 The elimination of prohibited income is obligatory on one who is the owner of the share, whether an investor or a trader, at the end of the financial period, even if the payment is due at the time of issuance of the final financial statements whether quarterly, annual or for other period. Accordingly, elimination is not obligatory for one who sells the shares before the end of the financial period.

3/4/6/2 The subject-matter of elimination is the prohibited income specific to the share whether or not the profits have been distributed and whether or not the corporation has declared a profit or suffered a loss.

3/4/6/3 Elimination is not obligatory for the intermediary, agent or manager out of part of their commission or wages, because this is their right in lieu of the work they have undertaken.

3/4/6/4 The figure, whose elimination is obligatory on the person dealing in shares, is arrived at by dividing the total prohibited income of the corporation whose shares are traded by the number of shares of the corporation, thus, the figure specific to each share is obtained. Thereafter the result is multiplied by the number of shares owned by the dealer – individual, institution, fund or another – and the result is what is to be eliminated as an obligation.

3/4/6/5 It is not permissible to utilise the prohibited component in any way whatsoever nor is any legal fiction to be

created to do so even if this is through the payment of taxes.

3/4/6/6 The responsibility for elimination of the prohibited component of the income, for the benefit of all, falls upon the institution in case it is trading for itself or in case it is managing the operations. In the case of intermediation, however, it is bound to inform the person dealing in them of the mechanism for the elimination of the prohibited component so that he can undertake it himself. The institution may offer these services, with or without a charge, for those dealers who desire them.

3/4/7 The institution will apply the above rules whether it does so directly or through another and whether it is trading for itself or for another by way of intermediation or management of wealth, like funds, or is doing so as the agent of another.

3/4/8 It is necessary to observe these rules throughout the period of participation or trading. If the rules cannot be applied, it is obligatory to give up such investment.

3/5 It is not permissible to purchase shares by raising interest-bearing loans through a broker or another (margin sales), just as it is not permitted to mortgage the shares for such a loan. [see item 4/1/2/6 of Shari'ah Standard No. (12) on Sharikah (Musharakah) and Modern Corporations]

3/6 It is not permissible to sell shares that the seller does not own (short sale), and the promise of a broker to lend these at the time of delivery is of no consequence. [see item 4/1/2/7 of Shari'ah Standard No. (12) on Sharikah (Musharakah) and Modern Corporations]

3/7 It is permissible to the buyer of a share to undertake transactions in it by way of sale to another and the like after the completion of the formalities of the sale and the transfer of liability to him even though the final settlement in his favour has not been made.

3/8 To secure lawful interests, it is permissible to specialised official agencies to organize trading in some shares so that it cannot be undertaken except through specialised brokers or those licensed to undertake the activity. [see item 4/1/2/8 of Shari'ah Standard No. (12) on Sharikah (Musharakah) and Modern Corporations]

3/9 It is not permissible to lend shares of corporations.

3/10 It is permissible to mortgage shares that are lawful according to the Shari'ah, and in this respect there is no difference whether the assets of the corporation are cash, tangible assets or debts or they are a combination of cash, tangible assets and debts and irrespective of one type being predominant in them. This is to be done in conformity with the conditions for selling shares at the time of liquidation.

3/11 The contract of Salam is not permissible in shares.

3/12 It is not permissible to conclude futures contracts for shares. [see item 5/1 of Shari'ah Standard No. (20) on the Sale of Commodities in Organized Markets]

3/13 It is not permissible to conclude contracts of options for shares. [see item 5/2 of Shari'ah Standard No. (20) on the Sale of Commodities in Organized Markets]

3/14 It is not permitted to conclude swap contracts with respect to shares and their returns.

3/15 It is not permissible to rent shares, whether this is for pledging them or for the purpose of selling the rented shares, and returning shares similar to them, as is done in the stock-markets, or for acquiring their profits or for showing a stronger financial position of the hirer or for another reason.

3/16 It is permitted to lend shares by way of I'arah for the purpose of pledging them or for the purpose of granting their profit to the borrower as is done in stock markets. The borrower does not have the right to sell the shares except for the execution of the terms of the mortgage.

3/17 It is not permissible to undertake trading in the shares of a corporation, when the assets of the corporation are cash exclusively, whether this is during the period of subscription or after that, prior to the commencement of the business of the company or at the time of liquidation, except at their nominal value and with the condition of delivery of possession.

3/18 It is not permissible to undertake trading in the shares of a corporation if the entire assets of the corporation are composed of debts, unless the rules for dealing in debts are observed.

3/19 If the assets of a corporation are composed of tangible assets, benefits, cash and debts, the rule for trading in the shares of such a corporation will differ according to the primary asset, which conforms to the objective of the corporation and its usual activity. If its purpose and activity pertain to trading in tangible assets, benefits and rights, trading in its shares is permissible without taking into account the rules of *Sarf* or transactions in debts, with the condition that the total market value of assets, benefits and rights should not be less than 30% of the total assets value of the corporation including all assets, benefits, rights and cash liquidity (the corporation's debts, current accounts with others, and bonds it holds which constitute debts) irrespective of their size as in such a case these are secondary. If, however, the objective of the corporation and its usual activity is dealing in gold, silver or currencies (*Sirafah*), it is obligatory to undertake trading in its shares in the light of the rules of *Sarf*.

3/20 It is stipulated for the implementation of what is laid down in paragraph 3/18 that it shall not be adopted as a means for bargains in debts and trading in them by merging parts of tangible assets and benefits with the debts as a legal device for transaction in debts.

4. Rules for Issuance of Bonds

The issuance of all kinds of bonds is prohibited when these bonds include stipulations for the return of the amount of loan and excess in any form, whether such excess is paid at the time of the satisfaction of the principal amount of loan, is paid in monthly or yearly instalments or in another

manner and whether this excess represents a percentage of the value of the bond, as in the case with most types of bonds, or a part of it, as is the case with zero-coupon bonds. Likewise, prize bonds are also prohibited. This applies irrespective of the bonds being private, public or governmental.

5. The Rule for Trading in Bonds

Trading in bonds, both sale and purchase, is prohibited and so is their pledging and endorsement and so on.

6. Shari'ah Substitute for Bonds

The Shari'ah substitute for bonds are investment Sukuk. [see Shari'ah Standard No. (17) on Investment Sukuk]

7. Date of Issuance of the Standard

This Standard was issued on 30 Rabi' I, 1425 A.H., corresponding to 20 May 2004 A.D.

Adoption of the Standard

The Shari'ah standard on Financial Paper (Shares and Bonds) was adopted by the Shari'ah Board in its meeting No. (12) held at Al-Madinah Al-Munawwarah from 26-30 Rabi' I, 1425 A.H., corresponding to 15-20 May 2004 A.D.

Appendix (A)
Brief History of the Preparation of the Standard

The Shari'ah Board in its meeting No. (7) held at Makkah Al-Mukarramah from 9-13 Ramadan 1422 A.H., corresponding to 24-28 November 2001 A.D., decided to issue the Shari'ah standard on financial paper (Shares and Bonds).

On 25 Rajab 1423 A.H., corresponding to 2 October 2002 A.D., the Shari'ah Standards Committee decided to commission a Shari'ah consultant for the preparation of an exposure draft on the Shari'ah Standard on Financial Paper (Shares and Bonds).

In meeting No. (6) of the Shari'ah Standards Committee (2) held from 14-15 Muharram 1424 A.H., corresponding to 17-18 March 2003 A.D., in the Kingdom of Bahrain, the Committee discussed the Shari'ah standard and required the consultant to incorporate necessary amendments in the light of the discussion and observations of the members.

In meeting No. (7) of the Shari'ah Standards Committee (1) held from 14-15 Safar 1424 A.H., corresponding to 16-17 April 2003 A.D., in the Kingdom of Bahrain, the Committee discussed the exposure draft of the Shari'ah Standard on Financial Paper (Shares and Bonds) and made necessary amendments, just as the Committee discussed the exposure draft of the Standard in its meeting held from 25-26 Rabi' II, 1424 A.H., corresponding to 25-26 June 2003 A.D., and made necessary amendments in the light of the discussion and observations of the members.

In its meeting No. (9) held from 23-24 Jumada I, 1424 A.H., corresponding to 23-24 July 2003 A.D., at Amman, the Hashimite Kingdom of Jordan, the Committee discussed the exposure draft of the Standard and made necessary amendments in the light of the discussion and observations of the members.

The revised exposure draft of the Shari'ah standard was presented to the Shari'ah Board in its meeting No. (11) held in Makkah Al-Mukarramah from 2-8 Ramadan 1424 A.H., corresponding to 27 October - 2 November 2003 A.D. The Shari'ah Board made further amendments to the exposure draft of the standard, and decided that it be sent to specialists and interested parties in order to obtain their comments in preparation for the discussion of the standard in a public hearing.

A public hearing was held in the Kingdom of Bahrain on 29 Dhul-Qa'dah 1424 A.H., corresponding to 21 January 2004 A.D. The public hearing was attended by more than 50 participants representing central banks, institutions, accounting firms, Shari'ah scholars, academics and others interested in the field. The members of the Shari'ah Standards Committees (1) and (2), responded to the written comments that were sent prior to the public hearing as well as to the oral comments that were expressed in the public hearing.

The Shari'ah Standards Committees (1) and (2) in a joint meeting in the Kingdom of Bahrain on 30 Dhul-Qa'dah 1424 A.H., corresponding to 22 January 2004 A.D., discussed the comments that were made during the public hearing as well as the observations received in writing. The Committees made amendments that were deemed suitable.

The amended exposure draft was presented to the Drafting Committee in its meeting held in the Kingdom of Bahrain on 25 Safar 1425 A.H., corresponding to 15 April 2004 A.D.

The Shari'ah Board in its meeting No. (12) held at Al-Madinah Al-Munawwarah during the period 26-30 Rabi' I, 1425 A.H., corresponding to 15-20 May 2004 A.D., discussed the amendments suggested by the Shari'ah Standards Committee and the Drafting Committee, and incorporated the amendments deemed suitable. The Shari'ah Board unanimously adopted some of the items of the standard and some items were adopted by the majority vote of the members of the Shari'ah Board, as recorded in the minutes of the meetings of the Shari'ah Board.

Appendix (B)
The Shari'ah Basis for the Standard

Issuance of Shares

- The basis for the permissibility of the issuance of shares, when the objectives for which the corporation has been established are permissible, is the basis for the permissibility of the corporation (Sharikat al-Musahamah), which is the generality of the evidences conveying the obligation of abiding by contracts and conditions, the generality of the evidences conveying the permissibility of partnership, and the generality of the evidences conveying the permissibility of 'Inan, Mudarabah, Musaqat and Muzara'ah. 'Inan is the basis for the permissibility of participation by two or more persons with their wealth and labour, just as Mudarabah, Musaqat and Muzara'ah are the basis for the permissibility of participation with wealth from one side and labour from the other side whether the subject-matter of the contract is cash, as in the case of Mudarabah, or is tangible assets that are developed with work on these assets, as in the case of Musaqat and Muzara'ah. The evidences for all these forms are well known.
- The basis for the permissibility of underwriting the issue without compensation is that it is an undertaking that does not have a counter-value, which is the taking of compensation for it. In this regard a resolution of the International Islamic Fiqh Academy has been issued.[2]
- The basis for the impermissibility of the issuance of preference shares, that is, in other than the prescribed manner, is that this leads to the severance of participation in profit and the imposition of injustice on the other shareholders.[3]
- The basis for the impermissibility of issuing *Tamattu'* shares is that the owners of these shares claim their rights to profit and their redemption is

(2) International Islamic Fiqh Academy Resolution No. 63 (1/7) on Financial Markets.
(3) International Islamic Fiqh Academy Resolution No. 63 (1/7) on Financial Markets.

only in form as they continue to be owners of these share and are entitled to rights at the time of liquidation.

- The basis for the permissibility of share being in a person's name, at his order, or for bearer is that the Lawgiver wishes to establish rights through writing and other forms, but He has not determined a particular form for this. If -in the case of corporations- this takes place through the issuance of shares on which names of the shareholders are written then this is valid. Likewise, if this is undertaken by recording the names of the shareholders in special registers, or indexes, or in any other way, or even if the names are not recorded at all -neither on the certificates nor elsewhere- then this is permissible.

Trading in Shares

- The basis for the permissibility of the sale and purchase of shares of corporations, when the activity of the corporation is permissible, is that the shares are owned by the shareholder, and he has the right to undertake transactions in them as he desires whether this is by way of sale, gift or another way, especially when each one of the shareholders has been granted permission to undertake such transactions through their participation in the memorandum of the corporation and by subscribing to it.
- The basis for the permissibility of participation by one who has the ability to convert or makes an effort to convert insofar as that is a means to alter the rejected and belongs to the category of *al-Amr Bil-Ma'ruf Wa al-Nahy 'An al-Munkar* (enjoining good and forbidding evil), which is an act approved by acknowledged evidences. In this regard a jurstic opinion (Fatwa) has been issued by the Third Seminar on Financial Markets.[4]
- The basis for exempting trading in the shares of these corporations, whose primary activity is permissible, however, they deposit amounts and borrow on the basis of interest, is the application of the rule of removal of hardship and acknowledging of general need, widespread practice, the acknowledged principles of surplus, shortage and predominance,[5]as well

(4) Held in the Kingdom of Bahrain during Jumada I, 1412 A.H., corresponding to November 1991 A.D.

(5) *"Al-Furuq"* by Al-Qarafi [4: 104]; *"Al-Muwafaqat"* [1: 37]; *"Ahkam Al-Qur`an"* by Ibn Al-Arabi [4: 1804]; and *"Qawa'id Al-Ahkam Fi Masalih Al-Anam"* [1: 18, 41-45].

as the permissibility of dealing with one the major part of whose wealth is permissible,[6]along with reliance upon the issue of separation of bargains according to some Jurists.[7] This is upheld by most fatwa issuing organisations as well as the Shari'ah Supervisory Boards of Islamic banks.[8]

- The basis of the impermissibility of buying shares by raising interest-bearing loans from the broker or someone else, is the indulgence in interest and securing this through mortgage, and these are activities prohibited by the Texts along with a curse for those who charge Riba, pay it, write it down and witness it.
- The basis for the impermissibility of the sale of shares that the seller does not own is that this leads to the sale of something that is not within the liability of the seller nor in his ownership, and this is prohibited according to the Shari'ah.
- The basis for the permissibility of undertaking transactions in shares even though the final registration formalities have not been completed is the transfer of the liability for loss (*Daman*) to the buyer. This is attained through constructive possession that is granted through the transacting in what he has purchased.
- The basis for the impermissibility of lending the shares of corporations is that the share at the time of repayment-in consideration of what it represents-does not represent the same thing that it did at the time of lending due to the constant change in the assets of the corporation.
- The basis for the permissibility of mortgaging the shares of corporations is the established principle that a thing can be mortgaged if its sale is permissible. As the sale of shares is permitted, mortgaging them is also permitted. The reason is that the purpose of a mortgage is the securing of a loan and recovering it through the sale price of the asset mortgaged in case recovery is not possible from the debtor. This is what is achieved through the mortgaging of shares and is, therefore, permitted.

(6) *"Bada`i' Al-Sana`i'"* [4: 104]; *"Al-Ashbah Wa Al-Naza`ir* by Ibn Nujaym (pp. 112-114); *"Al-Bayan Wa Al-Tahsil"* [18: 194-95]; and *"Al-Manthur Fi Al-Qawa'id"* [2: 335].

(7) *"Fath al-Qadir* [6: 89-90]; *"'Iqd Al-Jawahir Al-Thaminah"* [3: 439]; *"Al-Sharh Al-Kabir Ma'a Al-Dusuqi* [3: 15]; *"Al-Rawdah"* [3: 420-25]; and *"Majmu' Al-Fatawa"* [29: 48].

(8) Among these is Al Rajhi Organization in its resolution No. 48, 23/8/1422 A.H.

- The basis for the impermissibility of Salam in shares is that the subject-matter of Salam is a debt and not an ascertained thing, while in shares of corporations nothing works except ascertainment. This is done by mentioning the name of the corporation whose shares are desired through Salam thereby rendering the shares an ascertained thing and not a liability for a debt. Shares cannot, therefore, essentially be the subject-matter of the contract of Salam. Further, Salam in shares implies the sale of ascertained things that are not owned and this is not permitted. In addition to this, the constant availability of specified shares in the market and the ability of the buyer to deliver them at the end of the period is something that cannot be guaranteed.
- The impermissibility of concluding futures contracts for shares is that these contracts imply the stipulation of delay in the delivery of an ascertained sold commodity, that is, shares, and this prohibited and not permitted. Likewise, the delay in the price and the priced commodity, for this is the sale of a debt for a debt, which is prohibited by agreement. Further, the seller -mostly- does not own the shares for which the futures contract has been concluded and is, therefore, selling something that is owned by another. This is something over which there is no disagreement among the scholars as to its impermissibility. It is also included primarily in the meaning of the Shari'ah Texts established By Prophet Muhammad (peace be upon him) that convey the prohibition of the sale of something that one does not possess. Again, most of the futures contracts are completed through a cash settlement between the parties, and this is brazen gambling if this is stipulated within the contract. If it is not stipulated in the contract, it is still one type of gambling. Thereafter, the purpose of contracts is the delivery of possession, while in futures contracts delivery of possession is not the primary purpose of the contracting parties. These contracts, thus, create an obligation for, and engage the liability of, each party for a debt that is of no benefit, except by way of Mukhatarah and for waiting for a loss that will inevitably be incurred by one party.
- The basis for the impermissibility of concluding options contracts for shares is the right of option- which is the subject-matter of options

contracts transacted in financial markets- is not included in rights that can be sold. The reason is that this right is not established at all for the seller as it is created through the contract and after its creation it is not related to wealth rather it is related to an abstract thing, that is, sale and purchase. If established rights cannot be sold when these do not relate to wealth, like the right of pre-emption, the right to custody of children, the right of Qisas, then, rights -like the right of option- cannot be permitted in the first instance. Added to this is the fact that dealing in options contracts is based on Gharar, and Gharar is prohibited, just like dealing in options contracts is based upon gambling and games of chance, equally for the buyer and the seller of a right to an option, and this occurs in cases that terminate in a cash settlement between the two parties. The contract for an option falls under the sale by a person of something that he does not own when he writes an option to buy, for he does not own the shares or commodities that he undertakes to sell; and the sale of what one does not own is prohibited according to the Shari'ah.

- The basis for the impermissibility of concluding swap contracts for the dividends of shares is that these contracts include Riba in both its forms if the contracts involve the same currency, or *Riba al-Nasi`h* alone if it involves two different currencies; the sale of a debt for a debt as it is a contract in which both counter-values are deferred; Gharar due to the uncertainty about the amount of the cash at the time of the contract; gambling, as the purpose of these contracts is the acquisition of the difference between the two average returns on the shares and it is not the delivery of possession, which is the purpose of contracts, thus, one of the parties gains and the other inevitably loses, and this is truly gambling. Each one of these prohibitions alone is sufficient to prohibit this type of contracts, then what about all of them collectively?
- The basis for the permissibility of trading in shares or corporations, which include cash assets and debts, without regard for the rules of Sarf and dealing in debts, even when such debts are more than one-half, is that in such circumstances such assets are deemed secondary, and in secondary things matters that are not normally overlooked otherwise are overlooked. If, however, the tangible assets and benefits are less than a third, it is not

permitted to deal in the shares, except by observing the rules of *Sarf* or transactions in debts, because in such a case the assets and benefits are meagre and here debts and cash cannot be deemed secondary to them, and they are the primary objective of the contract, thus, those conditions are to be stipulated for them that would be applied to them if they were desired separately.

- The basis for the permissibility of trading in shares of corporations whose assets include debts and cash, when the objective and activity of the corporation is dealing in things and benefits, without regard for the percentage of debts and cash, is as follows:

  1. The Hadith of Ibn Umar (may Allah be pleased with him) stating: "... *When a person buys a slave, who has wealth, then the wealth is for the seller, unless the buyer stipulates this too.*"(9)The Hadith is explicit on the permissibility of the sale without regard for the genus of the price. The general meaning of the Arabic term "*Mal*" in the Hadith includes all his wealth whether this is cash, debts or goods and whether this is less or more. It indicates that debts or cash, less or more, in comparison with the price of the slave are not taken into account in the Hukm, because they are in this case secondary and are not the primary purpose of the contract.

     Imam Malik relates this Hadith in Al-Muwatta` and then says: "The matter is settled unanimously in our view that if the buyer stipulates the wealth of the slave then it belongs to him, whether this is cash or debt or goods, known or unknown. This applies even if the wealth owned by the slave is more than that with which he is purchased, and irrespective of whether the price is cash debts or goods."(10)

  2. The Hadith of Ibn Umar (may Allah be pleased with him) stating: "*When a person buys a palm-grove after pollination, then the fruit is*

(9) Agreed upon by both Al-Bukhari and Muslim. The text of this Hadith belongs to Al-Bukhari: "*Sahih Al-Bukhari*", "*Kitab Al-Musaqat*", chapter: When the person has a right of way or right to water in an orchard or palm-grove (No. 2250); and "*Sahih Muslim*", "*Kitab Al-Buyu'*", chapter: When a person sells palm-grove with fruit (No. 1543).

(10) See "*Al-Muwatta'*".

for the seller, unless the buyer stipulates this too."[11]The Hadith conveys the permissibility of an absolute stipulation on the part of the buyer for the fruit whether or not the fruit has begun to ripen despite the prohibition of the sale of fruit before it has begun to ripen, as is found in the Hadith of Jabir (may Allah be pleased with him)saying: "The Messenger of Allah (peace be upon him) forbade the sale of fruit before it has begun to ripen."[12]As the fruit was secondary to the primary subject-matter, which was the palm-grove, it was overlooked when it would not be if it was the only subject-matter of the contract.

3. Among the established principles of Fiqh according to the scholars is that the secondary is subservient. One who examines the various issues flowing from this principle, and the cases structured upon the principle, will find that these principles as a group convey the meaning that the secondary thing will take the rule of the primary and will not be assigned a separate rule; it will come to be owned along with the ownership of the primary, and something that will not be overlooked separately will be overlooked when the thing is secondary.

   Among the cases derived from the rules are the following:

   a) The subservience of what has not begun to ripen to what has begun to ripen even when what is ripening is very little. It is stated in *"Kashshaf Al-Qina'"* as follows: "The ripening of some of the fruit of a tree in a garden is its ripening, that is, of the tree as well as the ripening of all that falls in this category in a single garden. … It becomes valid with what has begun to ripen as it is subsidiary to it."[13]

   b) The sale of a house, whose roof is painted with gold, for gold, or is painted with silver for silver; the sale of a sword ornamented with gold for gold; the sale of milk for milk; or a thing made of wool for wool and so on.

(11) Agreed upon by both Al-Bukhari and Muslim. The text of this Hadith belongs to Al-Bukhari: *"Sahih Al-Bukhari"*, *"Kitab Al-Musaqat"*, chapter: When the person has a right of way or right to water in an orchard or palm-grove (No. 2250); and *"Sahih Muslim"*, *"Kitab Al-Buyu'"*, chapter: When a person sells palm-grove with fruit (No. 1543).

(12) Agreed upon by both Al-Bukhari and Muslim.

(13) *"Kashshaf Al-Qina'"* [3: 287]; see also *"Al-Mughni"* [6: 156].

Issuance of Bonds

- The basis for the impermissibility of issuing interest-bearing bonds is that they represent, in their customary nature, a loan and the meaning of a loan is applied to them in their nature according to the Shari'ah. As each loan that yields a benefit is Riba, and the issuance of bonds is based upon loans with interest, their issuance is prohibited according to the Shari'ah.

Dealing in (Negotiation of) Bonds

- The basis for the impermissibility of dealing in bonds is what has been settled with respect to their issuance due to their being based on Riba. The reason is that the word negotiation includes the meaning of continuity and the transfer of the bond from one hand to another bearing interest benefits. This means that the buyer of a bond continues to be a creditor of the issuing corporation and demands Riba for his debt. This is impermissible according to the Shari'ah, and all dealing leading to this is impermissible.

Appendix (C)
Definitions

Share

It is the share of a shareholder in the assets of the corporation and is represented by a certificate that can be negotiated. The term share is also applied to the certificate that represents such share.

Preference Shares

These are shares whose bearer is accorded priority over the holder of the ordinary share in the distribution of dividends and in claiming his share in the assets of the corporation at the time of liquidation.

Tamattu' Shares

These are shares whose holder is granted compensation for his shares that are offered for redemption during the existence of the corporation, and in exchange for this he is granted Tamattu' shares that grant him the rights that belong to the holder of shares based upon capital, except in dividends and the distribution of assets a the time of its winding up, insofar as the owner of the Tamattu' shares is given a share in the profits less than that given to the shares based upon capital, just as the owner of the Tamattu' shares does not get a share in the assets of the corporation at the time of winding up until the owners of shares based on capital are granted the value of their shares.

Futures Contract

It is a contract for a specified thing, or one described as deferred liability, for a deferred prince.

Option Contract

It is a contract for compensation for an abstract right granting the owner the right to sell a specified thing, or to buy it for a specified price, during

a determined period, or at a fixed date, either directly or through an organisation that guarantees the rights of the two parties.

Swap Contract

It is an agreement between two parties to exchange at a subsequent date the average return on a specified share, or a group of share for the average return on a share or for another financial asset.

Bond

It is a financial paper issued by trading establishments and governments in order to raise long-term loans (wealth) in lieu of interest that is paid to the bearer of the bond after periods. They are sometimes issued at a discount with respect to their face value.

Shari'ah Standard No. (27)

Indices

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

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

Preface

The purpose of this standard is to present basic information about Indices with special emphasis on their nature, functions, Shari'ah status of their various applications, and to what extent Islamic financial institutions (Institution/Institutions)[1] may apply them.

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

Statement of the Standard

1. Scope of the Standard

This Standard covers definition of Indices, methods of their calculation, their main types, their various forms of applications, and the Shari'ah status of each of these forms. The Standard also sets out the Shari'ah rulings that govern Indices.

2. Definition and Main Applications of the Index

1/2 An Index is a statistically computed figure based on a selected package of financial papers or commodities dealt in organized or non-organized financial markets, or in both. Each paper/commodity is given a specific weight, according to its market value, and the total value is divided by a constant figure. Among the best-known indices at present are the Consumer Price Index, and the Dow Jones and FTSE indices in the financial markets.

2/2 An Index that is well designed to measure the market situation, indicates the general economic situation of the country, and may help in forecasting its future developments before any change takes place and, thus, facilitates investment decisions. An index may also provide a signal to investors about the future movement of the prices of financial papers, or demonstrate a certain downward or upward trend of such prices. Due to the inconsistency that might occur between one index and another, indices are used besides other analytical methods, as well as the experience and knowledge about the market situations and the predominant models of transactions.

2/3 The upward and downward movements of an index reveal the directions of the market, and hence the market is denoted as a rising or a declining market.

3. Bases of Calculation and Characteristics of Indices

3/1 Calculation of indices is a process that depends on several aspects including past and current price forecasts, market projections, time intervals, upper and lower limits of dealing prices, and display charts.

3/2 Indices differ from each other in several aspects such as the components of the index or the type of data it attempts to summarize, the weight it assigns to each component, and the method of calculation thereof. There are, however, some common characteristics among all well-known indices in the capital and commodity markets, regardless of the data that each index attempts to analyze. Most important among these characteristics are accuracy, objectivity and transparency.

Accuracy refers to proper specification of the components of the index, sources of its data input, time of obtaining the data, method of calculating the weights, and basis of rounding off the numbers.

Objectivity entails presentation of the detailed calculations of the index to leave no room for difference of opinion with regard to determination of the value of the index on a specific date or at a specific place.

Transparency entails pre-specification of the time, place, and method of announcing the readings of the index so that the process does not involve *Jahalah* (ignorance or uncertainty).

3/3 There are some general principles that govern almost all indices, such as:

3/3/1 The absolute value of the index has no implication when presented as a single figure. The value of the index, at a given point of time, becomes meaningful only when compared to the past and future values of the index. Only then, the trend and percentage of change may be observed. For instance, an increase of 9 points in the value of the index may represent 2% of its previous value.

3/3/2 The values of the index at different periods may be multiplied or divided by any constant figure (i.e., increasing or decreasing

the figures of the index by the same percentage like division of shares), without affecting the accuracy of its implications. That is to say, the implications of the index are confined to what it represents of the average upwards and downwards changes in the weights of its components from time to time.

4. Types of Indices

Indices are classified according to different considerations:

4/1 With regard to their general or specific nature, indices may be classified into the following categories:

- General Indices that measure the market situation in general.
- Sectoral Indices that measure the market situation of a certain sector or industry, such as the transport sector.

4/2 Indices that precede price movements may be classified, with regard to central and area fluctuations, into the following categories:

- Centered Oscillating Indices, which measure price changes during a specific period in the past, and indicate probable future events.
- Ranged Oscillating Indices (band) that fluctuate between two areas, like overbuying or overselling.

5. Permissible Methods of Using Indices

5/1 It is permissible in Shari'ah to use indices to discern the magnitude of change in a certain market, or to judge the performance of specialized managers by comparing the returns they achieve to the indices. Indices may be used to form up an idea about a portfolio or to estimate its systematic risks instead of monitoring the performance and risks of each financial paper independently. Moreover, Indices may also be used for forecasting the future situation of the market and discovering the pattern of changes that the market may undergo. Therefore, using indices for guidance in operations that relate to real transactions is permissible in Shari'ah.

5/2 It is permissible to use indices as a benchmark for comparison of funds and investment bonds, or for correlating the remuneration of

the manager or the bonus of the agent to the investment, or the bonus of the Mudarib to the results of the Mudarabah.

5/3 It is permissible to use an index like LIBOR, or a certain share/ commodity price index, as a basis for determining the profit of a Murabahah pledge, provided that the contract is to be concluded on a specific profit that does not vary with further changes in the index. [see Shari'ah Standard No. (8) on Murabahah – Item 4/6]

5/4 It is permissible to use the index to determine the portion of the variable *Ujrah* (rent) that represents the return. [see Shari'ah Standard No. (9) on Ijarah and Ijarah Muntahia Bittamleek – para 5/2/3]

5/5 It is permissible that work rules, regulations and the arrangements, pertaining to money-based employment contracts, stipulate a provision on wage indexation.Wage indexation here refers to periodical adjustment of wages according to changes in the price level, as determined by the concerned bodies. However, in case of accumulation of unpaid wage that takes the form of debt, Shari'ah rulings on debts should be observed.

5/6 It is permissible to link the deals to be undertaken by the Mudarib or the agent to a specific index, so that he can dispose of the commodity at the market price when the index reaches a certain reading, or purchase a certain amount of the commodity at a specific reading of the index.

5/7 It is permissible to connect the fulfillment of a binding pledge on the part of a buyer or a seller to the rate of increase or decrease of a specific index in comparison to the price of the commodity at a particular date, so that any further increase may be added to the price of the commodity.

5/8 It is permissible to link the amount of a donation to a charitable body, in case of delayed settlement, with a particular index, at one end.

6. Impermissible Methods of Using Indices

6/1 Shari'ah prohibits trading in indices or taking advantage of their changes in the financial markets, through payment or receipt of

money on the mere occurrence of certain readings of the index, and without selling or buying the real assets which the index represents or any other assets. Such dealing is prohibited even if it is practiced for the sake of hedging against potential risk.

6/2 It is prohibited in Shari'ah to conclude option contracts on indices. [see Shari'ah Standard No. (20) on Sale of Commodities in Organized Markets – item 5/2]

6/3 It is also prohibited in Shari'ah to conclude contracts on the Index Contracts' Multiplier.

6/4 It is also prohibited in Shari'ah to link a contract that should not be suspended, like selling, to a specific index.

6/5 It is prohibited in Shari'ah to connect the amount of a cash debt, at the time of lending, to the price index.

7. Development of an Islamic Index

The following points should be observed while developing an Islamic Index:

7/1 Adherence to Shari'ah precepts, in addition to the technical controls relating to the components of the index, and its applications.

7/2 There should be a Shari'ah Supervisory Board for the Index, to ensure observation of the Shari'ah precepts in the components and applications of the index, and to conduct periodical review and reporting relating thereto.

8. Date of Issuance of the Standard

This Standard was issued on 12 Jumada I, 1427 A.H., corresponding to 3–9 June 2006 A.D.

Adoption of the Standard

The Shari'ah standard on Indices was adopted by the Shari'ah Board in its meeting No. (16) held in Al-Madinah Al-Munawwarah on 7–12 Jumada I, 1427 A.H., corresponding to 3–9 June 2006 A.D.

Appendix (A)
Brief History of the Preparation of the Standard

The Shari'ah board decided in its meeting No. (8) held on 28 Safar – 4 Rabi' I, 1423 A.H., corresponding to 11-16 May 2002 A.D., in Makkah Al-Mukarramah, to issue a Shari'ah Standard on Indices.

On 12 Jumada I, 1424 A.H., corresponding to 12 July 2003 A.D., the Shari'ah Standards Committee decided to commission a Shari'ah consultant to prepare a draft Standard on Indices.

The Committee (2) discussed the draft Standard in its meeting No. (15) held in Manama, Kingdom of Bahrain, on 8 Jumada I, 1426 A.H., corresponding to 15 June 2005 A.D., and made necessary changes thereto in the light of the discussions and comments of its members.

The Committee (2) once again discussed the draft Standard in its meeting No. (16) held in Manama, Kingdom of Bahrain, on 4–5 Sha'ban 1426 A.H., corresponding to 8-9 September 2005 A.D., and incorporated necessary changes therein in the light of the discussions and observations of the meeting.

The revised draft of the Standard was submitted to the Shari'ah Board in its meeting No. (15) held in Makkah Al-Mukarramah on 22–26 Sha'ban 1426 A.H., corresponding to 26-30 September 2005 A.D. The Shari'ah Board decided to send the draft Standard to specialized experts for review and comments before discussing it in a public hearing.

AAOIFI held a public hearing in the Kingdom of Bahrain, on 1 Safar 1427 A.H., corresponding to 1 March 2006 A.D. More than 30 participants representing central banks, Institutions, accounting firms, Shari'ah scholars, academics and other interested parties attended the public hearing. Several

observations were made in the session to which members of the Shari'ah Standards Committees (1) and (2) duly responded.

The draft Standard was presented to the Drafting Committee in a meeting held in Kingdom of Bahrain on 1 Safar 1427 A.H., corresponding to 1 March 2006 A.D., and several amendments were proposed in the meeting.

The Shari'ah Board discussed in its meeting No. (16) held in Al-Madinah Al-Munawwarah, on 7-12 Jumada I, 1427 A.H., corresponding to 3-9 June 2006 A.D., the amendments proposed by the Drafting Committee and accepted some of them. The Shari'ah Board then approved the Standard, unanimously for some of its clauses and by majority for others, as indicated in the minutes of the Board's meetings.

Appendix (B)
The Shari'ah Basis for the Standard

- Developing indices is permissible in Shari'ah because they constitute a method of forecasting and a means of observing the state of circumstances (inferences). Resorting to inferences is a well-recognized practice in judicature and financial transactions. Ibn Al-Qayyim in his book on Judicial Methods presented a number of proofs on permissibility of using inferences.
- Permissibility of using indices to forecast the market situation is derived from acceptability of using inferences for judgment. As indicated above, Shari'ah does not object to using inferences to make current or future judgment based on past events, or to initiate practical actions in the light of probable developments.
- Selling or buying indices is prohibited because it is nothing more than payment or receipt of money for the mere existence of a certain reading or figure. Such an act constitutes a form of gambling and an illegal act of gaining money. Hence, prohibition of selling or buying indices has been well emphasized by the Resolution of the International Islamic Fiqh Academy which states that it is not permissible to sell or buy an index, because this constitutes pure gambling. It is an act of selling an imaginary object that never exists.[2]
- Prohibition of concluding option contracts that are based on indices, or on the index contracts' multiplier, rests on the same reasons for prohibition of trading in indices, in addition to prohibition of dealing in options themselves. Such transactions obviously deal with wills and intentions rather than with real commodities. Moreover, prohibition of dealing in options has been clearly stated in a resolution issued by the International Islamic Fiqh Academy.[3]

(2) Resolution No. 63 (1/7), Resolution of the Islamic Fiqh Academy (P. 127).
(3) Resolution No. 63 (1/7), Resolution of the Islamic Fiqh Academy (P. 127).

- The justification for periodical adjustment of wages subject to changes in the level of prices is to pursue application of a fair wage policy, and protect the money income of the employees against deterioration of purchasing power due to inflation. It is permissible to provide for such a condition in the contract because conditions between contracting parties are permissible in principle, unless they lead to reversing what has been permitted or prohibited by Shari'ah.

Appendix (C)
Definitions

Index Multiplier

A specific ratio added to the difference in the price of the index on expiry of the date of the transaction.

Centered Oscillating Indices

These are the indices that fluctuate around a given center or point. They measure price change in a past period, and are used for forecasting probable future events. Such indices precede market movements and measure the rate of price change during the period under study.

Ranged Oscillating Indices

These are indices that fluctuate between two specific ranges, such as the limit of overbuying and the limit of overselling.

Benchmark

It refers to any index that represents the performance of a whole industry or a particular activity. It can be used as a standard for measuring the performance of investment funds and investment units, or used as an indicator for fixing remuneration for management or bonus for the investment agent or the Mudarib.

Hedging

It is a method for mitigating investment risks (such as market risks) by using financial instruments available in the market to curb down the risks that may arise from severe price changes.

Divider

It is the total price of the two shares, divided by the average price before division.

Index Contracts' Multiplier

It is a decimal or simple number, multiplied by the nominal value of a contract that has been connected to the performance of a certain index, to calculate the value of the contract based on the performance of that index.

Shari'ah Standard No. (16)

Commercial Papers

(Revised Standard)

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

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

Preface

The purpose of this standard is to elaborate the rules pertaining to commercial paper, the types permitted and those not permitted, the rules for dealing in commercial paper, its collection, discounting, possession and the acceptance of the obligation to pay, as well as the elaboration of the Shari'ah regulations for Islamic financial Institutions (Institution/Institutions)[1] for dealing in commercial paper.

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

Statement of the Standard

1. Scope of the Standard

This standard covers commercial papers to which the Geneva Uniform Convention on the Law of Commercial Papers,[2] confined itself. These are bill of exchange, promissory note and cheque. This standard covers dealings in such commercial papers insofar as they conform to the rules and principles of the Shari'ah. The standard does not cover anything that may possess the attributes of commercial paper other than the three types named above.

2. Definition and Shari'ah Characterisation of Commercial Papers

2/1 Bill of exchange: A written, signed, and unconditional order from a person to another person to pay a certain sum of money at sight or at a particular or determinable date to a third person or to the order of that third person or to the bearer of that order.

2/2 Promissory note: A certificate whereby by the issuer (a debtor) promises to pay a certain amount of money at sight or at a particular or determinable date to another person (a beneficiary/creditor). In Shari'ah characterisation, it is considered a certificate of debt.

2/3 Cheque: A certificate that is issued to a particular person, containing an order issued by a person (the drawer) to another person (the drawee) to pay a certain sum of money to a third person (the beneficiary) at sight. In Shari'ah characterisation, it is considered a restricted Hawalah if the drawer is a debtor to the drawee. Otherwise, it is considered an unrestricted Hawalah with respect to the drawer.

(2) Issued on 1349/1350 A.H., corresponding to 1930/1931 A.D., and adopted by a large number of countries.

3. Rules for Dealing in Commercial Papers

3/1 It is permissible to undertake transactions in commercial paper of the three types (bill of exchange, promissory note and cheque) on the condition that it does not amount to the contravention of the Shari'ah, like Riba or delay that is legally prohibited in accordance with the details provided in the following paragraphs.

3/2 It is not permissible to use a bill of exchange or promissory note in transactions that require possession (of the counter-values), like deeming the two types of commercial paper as counter-values in the contract of *Sarf* (currency exchange) or as the counter-value for the capital (*Ras al-Mal*) in the contract of Salam.

3/3 It is permitted to use a cheque in the following types of transactions and situations:

a) A cheque, where the owner has a balance, when drawn by the client against the bank or by the bank against another bank or against itself or against one of its branches.

b) A cheque, where the owner has no balance, when drawn by the client against a bank or is drawn by the bank against another bank or against itself or against one of its branches (the so-called overdraft). From Shari'ah perspective, it is a loan (Qard) which is permissible if it is void of Riba.

c) A crossed cheque that binds the payee bank to fulfil its conditions.

d) An account payee cheque that binds payee bank to fulfil its conditions by crediting the amount of the cheque to the beneficiary's account.

e) Travellers' cheques. It is permissible for the institution issuing it to take commission in lieu of intermediation in such issuance or at the time of its payment provided this does not include Riba.

4. Endorsement

All forms of endorsements are binding with respect to their legal effects provided that the endorsements fulfil the legal conditions and regulations determined for them.

5. Collection of the Amount of Commercial Papers

The collection of the amount of commercial papers is considered an agency with the client appointing the institution as an agent to collect the value of the paper on his behalf. The institution is entitled to commission that is agreed upon between the client and the institution. In the absence of an agreement between them, the practice prevalent among institutions is to be acted upon.

6. Discounting of Commercial Papers

6/1 It is not permissible to discount commercial papers, but it is permitted to pay an amount that is less than the value of the paper to the first beneficiary prior to the date of maturity.

6/2 It is not permissible to sell commercial paper that has not become due for an amount similar to its value (*Riba al-Nasi`ah*) nor for an amount that is more than its value (*Riba al-Nasi`ah* plus *Riba al-Fadl*).

6/3 It is permissible to the beneficiary to treat commercial paper that is not yet due as price for ascertained goods or usufruct, but not those that are sold by description as a liability with the condition of actual or legal delivery of goods or usufructuary asset (commodity-based discounting of debts).

6/4 The holder of commercial paper is permitted to purchase goods to be delivered later (on the date of maturity of the paper), and after the debt is established as a liability. The holder of the paper transfers the claim of his creditor to his debtor through this paper. In such a case, the transaction amounts to Hawalah.

7. Taking Possession of Commercial Papers

7/1 The receipt of a cheque requiring prompt payment, if it is a banker's cheque or a certified cheque or one that is legally deemed a certified cheques whereby a certain amount is mandatorily maintained in the drawer's account, being drawn among banks or among banks and their branches, constitutes constructive possession of the amount written on it, and it is on this basis that it is permissible to use the

cheque in transactions that stipulate possession such as the exchange of currencies, the purchase of gold or silver with the cheque as well as treating the cheque as capital (*Ras al-Mal*) of Salam.

7/2 The receipt of a cheque that is to be paid promptly, if it is not a banker's cheque or a certified cheque or one that is legally deemed a certified cheque, cannot be considered constructive possession of its amount, and in such a case, it is not permitted to use it for transactions for which possession is stipulated.

7/3 It is permitted to use cheques of bank transfers for transactions when the amount intended to be transferred is in the same currency in which payment is to be made, however, where the currency is different from that in which payment is to be made, it is necessary to first apply the process of conversion between the two currencies, deeming constructive possession to be sufficient, and then undertake the transfer. It is a form combining currency exchange (*Sarf*) and Hawalah.

8. Acceptance for Payment of the Value of Commercial Papers

8/1 Acceptance for paying the value of commercial paper on the part of the drawee is considered an undertaking and an obligation to pay the debt represented by the commercial paper to the holder on the date of maturity. This undertaking and obligation must be fulfilled according to the Shari'ah.

8/2 All parties whose signatures appear on the commercial paper including the drawer, the endorser and the guarantor are jointly responsible to pay to the holder the value of the paper in accordance with rules of liability, thus, the holder is entitled to have recourse to them severally or jointly after the refusal of the drawer (or the issuer in case of a promissory note) to pay.

8/3 Tangible security stipulated by the holder of commercial paper to ensure the securing of his right will be deemed a Mortgage (Rahn) and will be governed by the rules of Mortgage (Rahn).

9. Date of Issuance of the Standard

This Shari'ah Standard was issued on 7 Rabi' I, 1424 A.H., corresponding to 8 May 2003 A.D.

Adoption of the Standard

The Shari'ah Standard on Commercial Papers was adopted by the Shari'ah Board in its meeting No. (10) held during the period of 2-7 Rabi' I, 1424 A.H., corresponding to 3-8 May 2003 A.D.

Appendix (A)
Brief History of the Preparation of the Standard

In its meeting No. (7) held in Makkah Al-Mukarramah during the period of 9-13 Ramadan 1422 A.H., corresponding to 24-28 November 2001 A.D., the Shari'ah Board decided to issue the Shari'ah standard for Commercial Papers and to appoint a Shari'ah consultant for the preparation of the exposure draft of the Shari'ah standard for commercial papers.

On Saturday 14 Shawwal 1422 A.H., corresponding to 29 December 2001 A.D., a Shari'ah consultant was commissioned to prepare a juristic study and an exposure draft on the Shari'ah standards for commercial papers.

In its meeting held in the Kingdom of Bahrain on 4-5 Safar 1423 A.H., corresponding to 17-18 April 2002 A.D., the Shari'ah Standard Committee discussed the exposure draft of the Shari'ah standard on commercial papers and asked the consultant to make necessary amendments to reflect the comments and observations made by the members of the Committee. The Committee discussed the exposure draft of the standard in its meeting held in the Kingdom of Bahrain on 6-7 Rabi' II, 1423 A.H., corresponding to 17-18 June 2002 A.D., and introduced necessary amendments as per observations and comments of the members.

The exposure draft of the standard was also discussed by the Committee in its meeting held in Amman, the Hashemite Kingdom of Jordan on 17 Rabi' II, 1423 A.H., corresponding to 28 June 2002 A.D., and further amendments were incorporated in the standard.

The revised exposure draft of the Shari'ah standard was presented to the Shari'ah Board in its 9th meeting held in Makkah Al-Mukarramah during the period of 11-16 Ramadan 1423 A.H., corresponding to 16-21 November 2002 AD. The Shari'ah Board made further amendments to the

exposure draft of the standard and decided that it be sent to specialists and interested parties in order to obtain their comments in preparation for its discussion in a listenig session.

A public hearing was held in Bahrain on 18 Dhul-Hajjah 1423 A.H., corresponding to 19 February 2003 A.D. The public hearing was attended by more than thirty participants representing central banks, institutions, accounting firms, Shari'ah scholars, academics and others interested in the field. The members of the Shari'ah Standards Committees (1) and (2) responded to the written comments that were sent prior to the public hearing as well as to the oral comments that were expressed in the public hearing.

The Shari'ah Standards Committees (1) and (2) held a joint meeting on 2 Muharram 1424 A.H., corresponding to 5 March 2003 A.D., to discuss the comments made during the public hearing as well as comments received in writing. The two Committees made the amendments considered necessary.

The Shari'ah Board in its meeting No. (10) held in Al-Madinah Al-Munawwarah during the period of 2-7 Rabi' I, 1424 A.H., corresponding to 3-8 May 2003 A.D., discussed the amendments made by the Shari'ah Standards Committee and made amendments considered suitable. The Shari'ah Board unanimously adopted some of the items, while other items were adopted by a predominant majority vote, as recorded in the minutes of the meetings of the Shari'ah Board.

The Shari'ah Standards Review Committee reviewed the standard in its meeting held on Rabi' II, 1433 A.H., corresponding to March 2012 A.D., in the State of Qatar, and proposed after deliberation a set of amendments (additions, deletions, and rephrasing) as deemed necessary, and then submitted the proposed amendments to the Shari'ah Board for approval as it deemed necessary.

In its meeting No. (41) held in Al-Madinah Al-Munwwarah, Kingdom of Saudi Arabia during the period of 27-29 Sha'ban 1436 A.H., corresponding to 14-16 June 2015 A.D., the Shari'ah Board discussed the proposed amendments submitted by the Shari'ah Standards Review Committee. After deliberation, the Shari'ah Board approved necessary amendments, and the standard was adopted in its current amended version.

Appendix (B)
The Shari'ah Basis for the Standard

Dealings in Commercial Papers

- The basis for the permissibility of dealing in a bill of exchange is that it is in the meaning of Hawalah or Qard (loan) contract, which are agreed upon by Ijma' (consensus of Fuqaha), or in the meaning of *Suftajah* (demand note), which is valid according to the preponderant opinion. The evidence for this is the report from a number of Companions (may Allah be pleased with them) who dealt in these instruments. It is reported from Abdullah Ibn Abbas (may Allah be pleased with him) that he used to take silver from traders at Mecca and write down a demand note for them to be paid at Kufa. It is related from Abdullah Ibn Al-Zubayr that he used to take dirhams from traders at Mecca and then write a note drawn upon his brother Mus'ab in Iraq. When Ibn Abbas was asked about this, he saw no harm in the transaction.(3) Al-Muwaffaq Ibn Qudamah,(4) may Allah confer mercy upon him, has related from Ali (may Allah be pleased with him) that he was asked about a similar transaction and he saw no harm in it. Further, in the *Suftajah* is the interest of both the lender and the borrower without harm being caused to either one of them. The lender is secure against the danger of the highway in transporting his dirhams to the destined town, while the borrower benefits from the loan and is also secure against the dangers of the highway being under an obligation to pay in the said town. The Shari'ah does not lay down a prohibition for interests that do no invoke harm.

(3) This has been related by Al-Bayhaqi in *"Al-Sunan Al-Kubra"* [5: 352]; and see Muhammad Nasir Al-Albani, *"Irwa` Al-Ghalil Fi Takhrij Ahadith Manar Al-Sabil"* [5: 328].
(4) *"Al-Mughni"* [6: 436].

- Shaykh Al-Islam Ibn Taymiyyah[5] (may Allah confer mercy upon him) has said: "The correct view is that of permissibility, because both the lender and the borrower benefit from such raising of a loan, and the Shari'ah does not proscribe what benefits them and is in their interest; it proscribes what is harmful for them." In addition to this, there is no text that prohibits a *Suftajah* nor is such meaning implied by the texts. It is, therefore, necessary to maintain its permissibility, especially when there is a general need for it.[6]
- The basis for the permissibility of a promissory note is that it is considered a document acknowledging a debt, and Allah, the Al-Mighty, has commanded the securing of debts, as He, the Al-Mighty, says: ***{"O you who believe! When you contract a debt for a fixed period, write it down. Let a scribe write it down in justice between you..."}***[7]
- The permissibility of a cheque drawn by the client upon a bank, with which he has a balance is that it is in the nature of Hawalah. The *Muhil* (transferor) is the accountholder, the *Muhal* is the beneficiary and the *Muhal Alayh* (transferee) is the drawee bank.
- The permissibility of a cheque drawn by the client upon a bank with which he does not have a balance is that it is Hawalah. This view is held by those who do not stipulate for the permissibility of Hawalah that the transferee be indebted to the *Muhal* (transferor) with Hawalah (transfer) being valid for a person who does not owe a prior debt. Some jurists call this absolute Hawalah or Hawalah upon one with no liability. The second view is that it is an agency for borrowing, and both are (independently) valid. This rule, however, is contingent upon the cheque no invoking Riba by way of an overdraft, for banks usually do not lend without interest. Banks will not accept cheques drawn upon them by clients with no balance except by charging Riba-bearing profits that are due from the client along with the value of the cheque. Consequently, if the cheque drawn by the client upon the bank, where he does not

(5) *"Majmu' Al-Fatawa"* [29: 531].
(6) See: *"Al-Mughni"* [6: 437]; *"Majmu' Al-Fatawa"* [20: 515] and [29: 531]; and Ibn Qayyim Al-Jawziyyah, *"Tahdhib Sunan Abu Dawud"* [5: 152].
(7) [Al-Baqarah (The Cow): 282].

have a balance, includes Riba-bearing profits it is prohibited; it is not permissible to write such a cheque nor to undertake transactions in it.

- The basis for the permissibility of dealing in crossed and account payee cheques, and the obligation of the payee bank to abide by the conditions stipulated by the accountholder for the two types of cheque, is the generality of the Hadith stating: *"Muslims abide by the conditions they stipulate"*.(8) The reason is that such a condition promotes the inherent interest of the contract. Further, the primary principle for conditions and contracts is that of permissibility.

Endorsement

The basis for the permissibility of endorsement is that it does not go beyond the meaning of either Hawalah (transfer) or Wakalah (agency), and both are permissible.

Discounting of Commercial Papers

- The basis for not permitting discounting of commercial paper is that in reality the discounting of commercial paper amounts to a loan with interest. What affirms this is that the interest charged through discounting varies according to the value of the commercial paper and its date of maturity, and loan with interest is prohibited by agreement.
- The permissibility of paying less than the value of the paper, when the transaction is between the holder and the first beneficiary, is that it belongs to the category of the issue known as "negotiating a deferred debt for part of it paid promptly." This is what is known as *Da' Wa Ta'ajjal* (reduce the amount for hastening payment), and according to one opinion it is permissible to undertake such a transaction. The evidence that supports permissibility is the Hadith of Ibn Abbas (may Allah be pleased with him), stating: *"When the Prophet (peace be upon him) decided to expell Banu Al-Nadir, they said, 'O Messenger of Allah,*

(8) This Hadith has been related by a number of reporters of Hadith. See: *"Sunan Al-Tirmidhi"* [4: 584]; Al-Hakim, *"Al-Mustadrak"* [4: 101]; and *"SunanAl-Daraqutni"* [3: 27]. The Hadith has been narrated by Amr Ibn Awf and is connected to the Prophet (peace be upon him). It has a number of different Isnad (chains of transmission) to the Prophet. This is why Al-Bukhari related it in his *"Sahih"* [4: 451] as a *Mu'allaq* (Suspended) Hadith. Muhammad Nasir Al-Albani has investigated the chains of transmission of this Hadith *"Irwa` Al-Ghalil"* [5: 142-146] and concluded that the Hadith is generally authentic in view of the number of its Isnads.

you have ordered our expulsion when we have against people debt claims that are not yet due.' The Prophet (peace be upon him) said, 'Reduce the amounts to hasten payments'."[9] Ibn Abbas (may Allah be pleased with him), was asked about the issue of a person who has a deferred claim against another, and he says to the debtor, "Hasten the payment and I will reduce the amount for you", so Ibn Abbas responded saying, "There is no harm in it". Ibn Abbas (may Allah be pleased with him), was the narrator of the previous Hadith. Further, this issue is the opposite of the issue of Riba. That is, Riba involves an excess in both the period and the amount, which is entirely harmful for the debtor, whereas this issue involves the absolving of the liability of the debtor with respect to the debt with a benefit coming to the creditor through prompt payment. Each one of them benefits without being subjected to harm. This is different from Riba, the prohibition of which is agreed upon and that causes injury to the debtor. The benefit in Riba is exclusively for the creditor (owner of capital). Thus, this case differs from Riba in both form and meaning. The reason is that the excess in Riba as a counter-value for the period leads to a grave hardship, for a single dirham is doubled and multiplied keeping the Dhimmah (liability) engaged without any corresponding benefit. In the case of reduction of the amount and hastening of payment, the liability of the debtor is removed and the prompt payment benefits the creditor. The Law-giver encourages the discharging of debt liabilities. The debtor has been called a person imprisoned by difficulties, and thus in the discharging his liability is a release from these shackles. This is different from his remaining patiently burdened with an excess.[10]

(9) This Hadith has been related by a number of Hadith reporters. See: Al-Tahawi, *"Sharh Mushkil Al-Athar"* [11: 56]; Al-Bayhaqi, *"Al-Sunan Al-Kubra"* [6: 28]; *"Sunan Al-Daraqutni"* [3: 46]; and Al-Hakim, *"Al-Mustadrak"* [2: 52]. Ibn Al-Qayyim said in *"Ighathat Al-Lahfan"* [2: 11]: This Hadith has been related as per relation conditions of *"Al-Sunan Al-Kubra"*. Al-Bayhaqi has classified the Hadith as weak but the men in the chain of transmission of the Hadith are trustworthy. However, the Hadith has been classified as weak due to Muslim Ibn Khalid who is a narrator in the chain of transmission of the Hadith. Nevertheless, he is a trustworthy and reliable jurist as Imam Shafi'i has related Hadiths through him and regard his view as authoritative.

(10) "*Ighathat Al-Lahfan*" [2: 11]; and "I'lam Al-Muwaqqi'in" [3: 313].

- The basis for treating commercial paper as a price for ascertained goods is that it amounts to the sale of a debt, to a person other than the one who owes it, for ascertained goods. This is permitted according to the Maliki school if it takes place after possession so that it does not turn into the delaying of the two counter-values. A resolution pertaining to this has been issued by the Islamic Fiqh Academy of the Organization of Islamic Conference.[11]

Taking Possession of Commercial Papers

- The basis for considering a cheque, whether certified or one of the same type, as possession of the amount mentioned in it, is that a cheque is secured by a large number of guarantees that make the possessor the owner of its contents. The beneficiary in this case is able to undertake transactions in it by selling, buying or by making a gift. Further, there is a strong protection provided by state governments to support confidence in cheques. In addition to this, relying upon a cheque means the existence of sufficient funds to cover its amount with the certifier undertaking to retain the funds until the end of the period fixed for payment. It is for this reason that people in general prefer certified cheques over cash for large transactions.
- The basis for not considering an uncertified cheque, or one that is similar to it as far as the possession of its amount is concerned, is the probability that there is no balance to cover it or there is an insufficient balance. The basis for possession is customary practice, and a resolution has been passed by the Islamic Fiqh Academy deeming the receipt of a certified cheque as possession.
- The basis for the permissibility of dealing in cheques for bank transfers, when the intention is to transfer the same currency in which payment is to be made, is that it belongs to the category of *Suftajah*, which is permissible according to one out of two opinions of the jurists.

Payment Guarantees for the Value of Commercial Paper

- The basis for considering a guarantee for acceptance as an undertaking and an obligation on the part of the drawee to pay to the legal holder, on

(11) In its 16th session held in Mecca on 21-26 Shawwal 1422 A.H.

the date of maturity, the amount of debt stated on the bill of exchange, is that this undertaking and obligation is to be fulfilled according to the Shari'ah. This requirement is due to the generality of the words of Allah, the Exalted, saying: ***{"O you who believe! Fulfil (your) obligations"},***[12] as well as due to the generality of the saying of the Prophet (peace be upon him): *"Muslims abide by the conditions they stipulate"*.[13]

- The conditions a person stipulates for himself, and by which he is bound, are included in this meaning. There is also the Hadith of Jabir Ibn Abdullah (may Allah be pleased with him), who said: "The Messenger of Allah (peace be upon him) did not pray over (the funeral of) a person who died while owing a debt. A dead person was brought to him (for prayers) and he said, *'Does he owe a debt?'* The people replied, 'Yes, he owes two dinars.' At this Abu Qatadah Al-Ansari said, 'The two dinars are on me, O Messenger of Allah.' The Messenger of Allah (peace be upon him) then offered the funeral prayers for him".[14] In this Hadith, we notice that Abu Qatadah Al-Ansari (may Allah be pleased with him) offers an undertaking and accepts the obligation to pay the debt owed by the deceased, and this is accepted by the Prophet (peace be upon him). In fact, this undertaking and obligation given by Abu Qatadah were deemed sufficient to absolve the deceased from all liability for the debt. In some different texts of the Hadith, it has been reported that after the statement of Abu Qatadah (The two dinars are on me), "The Prophet (peace be upon him) said, *'The right of the creditor is due and the deceased is absolved of it.'* Abu Qatadah responded in the affirmative, so the Prophet (peace be upon him) prayed over him'".[15] The removal of all liability for the debt from the deceased was due to the undertaking and obligation given by Abu Qatadah (may Allah be pleased with him), to pay the debt due form this person and because of which he became indebted to the extent

(12) [Al-Ma`idah (The Table): 1].
(13) The source of the Hadith is stated earlier.
(14) This text of the Hadith has been related by Abu Dawud in his *"Sunan"* [9: 193]. However, the Hadith has origin in the two authentic books of Hadith. See: *"Sahih Al-Bukhari"* [2: 467]; and *"Sahih Muslim"* [3: 1237] (H: 1619).
(15) This narration has been related by Imam Ahmad in his *"Musnad"* [3: 330].

of two dinars. Al-Muwaffaq Ibn Qudamah (may Allah confer mercy upon him) said: "The words of the Prophet (peace be upon him): *'The deceased is absolved of it'* mean that 'you have now become subject to the claim for two dinars.' This is by way of emphasis for establishing the claim against him as well as the obligation to pay".[16]

- The basis for permitting the holder of commercial paper to have recourse to all persons who have signed the paper is that by doing so they bind themselves to the extent of the value of the paper in case of non-payment. The Ulama arrived at a consensus on the permissibility of guarantees on the whole.
- The basis for the permissibility of guarantees through tangible assets is that these are treated as Rahn (mortgage) and are governed by the same rules that apply to Rahn. The Ulema arrived at a consensus for the permissibility of Rahn (Mortgage).

(16) *"Al-Mughni"* [7: 85].

Appendix (C)
Definitions

Commercial Papers

Tradable certificates that represent pecuniary rights payable at sight or after a short period. Customary practice regards them as instruments of payment and they act as substitutes for cash in transactions.

Bill of Exchange

A certificate issued in a particular legal form. It consists of an order from a person (known as the drawer) to another person (known as the drawee) to pay a certain sum of money at sight, or at a particular or determinable date, to a third person (called the beneficiary).

Promissory Note

A certificate whereby the issuer promises to pay a certain sum of money at a particular or determinable date, or at sight, to another person (called the beneficiary).

Cheque

A certificate that is issued in a particular form containing an order issued by a person (known as the payer) to another person (known as the payee) to pay a certain sum of money to a third person (known as the beneficiary) when the cheque is presented.

Crossed Cheque

A cheque written in the form of an ordinary cheque except that it is distinguished by two parallel lines on the face of the cheque. The crossing places an obligation upon the payee bank not to pay the value of the cheque to a person other than a client of the payee bank or to another bank.

Certified Cheque

A cheque written in the form of an ordinary cheque and distinguished by the word "certified" or "accepted" or whatever gives this meaning, on the face of the cheque along with the date and the address of the payee bank with the signatures of the certifying official whereby the payee bank certifies the authenticity of the signature of the payer and the existence of sufficient funds in his account for payment of the value of the cheque to the beneficiary.

Banker's Cheque (Bank Draft)

A cheque issued by the payee bank (to its client) guaranteeing payment of the value of the cheque to a third party.

Account Payee Cheque

A cheque written in the form of an ordinary cheque to which the issuer adds a statement indicating that its value should not be paid in cash, but upon conditions stated, like a statement written on the face of the cheque saying "Account Payee" or any other statement bearing the same meaning.

Travellers' Cheque

Cheques drawn in varying values by institutions upon their foreign branches or correspondent institutions in the interest of a traveller who will receive their value by merely presenting them for payment to a party that will accept them.

Cheques for Bank Transfers

A cheque written by an institution, upon the request of a person, who intends to remit his cash through the institution, by way of cheques, to another location, so that he, his agent, or any other person may receive it.

Endorsement

A legal act by means of which ownership in the commercial paper is transferred from one person (known as endorser) to another person (known as the endorsee), or it has the effect, through a statement, of creating an agency for collection or a mortgage.

Discounting of Commercial Papers

A process by means of which the holder of commercial paper, through an endorsement, transfers ownership in it to a third party prior to the date of maturity with the institution discounting the value by a determined amount in lieu of early payment.

Acceptance to Pay

The undertaking by the drawee to pay the value of the bill of exchange to the lawful holder at the date of its maturity.

Guarantee or Guarantor

The bank as guarantor provides a guarantee to the holder for paying the value of the commercial paper by way of a guarantor along with other signatories if the primary debtor refuses to pay.

Tangible Guarantees

These are guarantees stipulated by the holder of commercial paper through the creation of a mortgage on real estate, or a mortgage of movables, like commercial paper or negotiable instruments that the debtor endorses over to the holder by way of mortgage or goods that the debtor delivers to the holder as a security for payment.

Shari'ah Standard No. (26)

Islamic Insurance

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

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

Preface

The purpose of this standard is to present the Shari'ah rules that govern Islamic Insurance, as well as the characteristics, basic aspects, principles and types of Islamic Insurance. The standard also aims to indicate the controls that Islamic financial Institutions (Institution/Institutions)[1] should observe in this connection.

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

Statement of the Standard

1. Scope of the Standard

This Standard covers Islamic Insurance in terms of its definition, Shari'ah status, characteristics, principles, basic elements, types, and how it differs from Conventional Insurance. The Standard also sets out the controls to be observed by the Islamic financial Institutions offering products based on Islamic insurance. However, it does not cover social insurance schemes arranged by the state.

2. Definition of Islamic Insurance in Contrast with Conventional Insurance

Islamic Insurance is a process of agreement among a group of persons to handle the injuries resulting from specific risks to which all of them are vulnerable. A process, thus initiated, involves payment of contributions as donations, and leads to the establishment of an insurance fund that enjoys the status of a legal entity and has independent financial liability. The resources of this fund are used to indemnify any participant who encounters injury, subject to a specific set of rules and a given process of documentation. The fund is managed by either a selected group of policyholders, or a joint stock company that manages the insurance operations and invests the assets of the fund, against a specific fee.

As for Conventional Insurance, it is a Mu'awadah (mutual compensation) contract that seeks to make profit out of the insurance operation itself, and, hence, is subject to Shari'ah rulings on financial dealings that involve Gharar (uncertainty). Consequently, conventional insurance is banned by Shari'ah.

3. Status of Islamic Insurance According to Fiqh (Islamic Jurisprudence)

Islamic insurance is based on the commitment of the participants to make donations for the sake of their own interest. The participants,

therefore, protect their group by payment of contributions that constitute the resources of the insurance fund, and assign the management of that fund to a committee of policyholders, or to a joint stock company that possesses the license of practicing insurance business. In the latter case, the company assumes this job on the basis of a remunerated Wakalah (Agency) contract. In addition to managing the insurance operations, the committee of policyholders or the company also assumes the responsibility of investing the assets of the fund through Mudarabah or investment agency.

3/1 The managing company is entitled to its own capital and returns on capital, the agency fee, and its specific share of the profits earned by investing the insurance assets through Mudarabah or investment agency. The company also bears all the expenses of its operations including those relating to its tasks for investing the insurance assets.

3/2 The policyholders fund is entitled to the contributions and the returns thereon, the provisions and reserves relating to insurance business, and the insurance surplus. The fund bears all direct expenses pertaining to management of insurance operations.

4. Contractual Relationships in Islamic Insurance

There are three contractual relationships in Islamic insurance, including:

4/1 The Musharakah (partnership) among the participants, which leads to the establishment of a company that has articles of association and all other documents. The relationship between the participants may be confined to a Musharakah contract if a company manages the fund. [see Shari'ah Standard No. (12), on Sharikah (Musharakah) and Modern Corporations]

4/2 The relationship between the company and the policyholders' fund which is a Wakalah relationship in regard to management, and a Mudarabah or investment agency relationship in regard to the investment of the fund's assets.

4/3 The relationship between the policy holders and the fund which takes the form of donation commitment at the stage of making

contributions, and indemnification commitment at the stage of providing compensation for injury as per regulations and underlying constituent documents.

5. Principles and Shari'ah Bases of Islamic Insurance

Islamic insurance is based on the following principles and rules of Shari'ah, which shall be explicitly mentioned in the articles of association or the rules or the documents of the corporation:

5/1 Donation commitment, as it should be stipulated that the participant donates his contribution and the returns thereon to the insurance account for payment of indemnity, and may undertake to bear any deficit that may occur, as per regulations.

5/2 The company that arranges the insurance deal should maintain two separate accounts: one for its own rights and liabilities, and the other for the rights and liabilities of the policyholders.

5/3 The company should assume the role of the agent in managing the insurance account, and the role of the Mudarib or agent in investing the insurance assets.

5/4 The insurance account is entitled to the insurance assets and their returns on investment, and should bear the liabilities relating to these assets.

5/5 The adopted rules may comprise disposal of the surplus in a way that serves the cause of common interest of the participants, such as accumulation of reserves, reduction of the contribution, charitable donations and partial/full distribution of the surplus among the participants. The managing company is not entitled to any share of the surplus.

5/6 When the company is liquidated, all provisions and accumulated reserves pertaining to insurance should be spent on charitable purposes.

5/7 Preference should be given to policyholders to participate in management of the insurance operations through appropriate legal arrangements that enable them to exercise their control rights and protect

their interest. Such arrangements could include, among others, representation of policyholders in the Board of Directors.

5/8 Company shall adhere to the rules and principles of Islamic Shari'ah in all its activities and investments, especially in refraining from provision of insurance coverage for Shari'ah-banned items, activities or purposes.

5/9 A Shari'ah Supervisory Board shall be formulated for issuance of Fatawa (plural: Fatwa, i. e. juristic opinion) that are binding to the company, and establishment of an internal unit for Shari'ah monitoring and auditing.

6. Types of Islamic Insurance

6/1 Property Insurance: which entails indemnification for actual injury, and comprises insurance against fire, car accidents, airplane accidents, liability, breach of trust, etc. [See Shari'ah Standard No. (5) on Guarantees – item 6/4]

6/2 Person Insurance: which includes insurance against the risk of disability and death, and is sometimes known as *Takaful* (mutual support). It corresponds to conventional life insurance.

6/2/1 Insurance against the risk of disability or death takes place as follows:

6/2/1/1 Submission of a request for participation indicating all personal affairs and characteristics, that need to be known for offering the insurance coverage to the insured, along with the particulars of the entitlements and obligations of the insured.

6/2/1/2 Specification of the contribution amount.

6/2/1/3 Specification of the benefits payable to the beneficiary as per agreement.

6/2/1/4 In case of death, the *Takaful* entitlements should be distributed among the deserving persons, parties or purposes as indicated in the documents, and accord-

ing to the regulatory rules issued by the Shari'ah Supervisory Board. In case the deceased was entitled to some investment balances, then the same should be distributed among the inheritors according to the Islamic rules of inheritance.

6/2/1/5 In case of insurance against death, it should be stipulated in the insurance policy that the insured (the beneficiary) or his inheritor should not be entitled to any compensation when the death is caused by a murder wherein the said beneficiary or inheritor is involved.

7. Participation in Islamic Insurance

7/1 Non-Muslims may participate with Muslims in the various types of Islamic insurance.

7/2 The contribution may be determined according to the actuarial principles based on statistical techniques. In this regard, due consideration should be given to whether the risk involved is fixed or variable, and to the contribution/risk tradeoff besides determination of the type and period of the risk coverage, and specification of the insurance amount.

7/3 The risk that constitutes the subject matter of insurance should be one that could probably occur. It should not be something that relates to the absolute will of the participant, and should not encounter any Shari'ah prohibition.

8. Commitments of the Participant in Islamic Insurance

The participant (insurance seeker) should observe the following commitments:

8/1 Submission of the required information about the risks to be insured against, and informing the company of any new circumstances that may increase these risks after concluding the contract. If it is proved that the participant had committed fraud or deceit, or submitted false information, he is then subject to partial or full deprivation

from indemnity. In case of unintentional misrepresentation by the participant, the indemnity shall become proportionate to the accurate information he presented.

8/2 Payment of contribution on time as per agreement. If the participant refrains from or delays payment of his contribution, the company has the right to terminate the contract or pursue legal enforcement of payment.

8/3 Informing the company, in its capacity as an agent of the policyholders' fund, of occurrence of the risk insured. Notification should be made during the period stipulated in the insurance policy, or within reasonable time if such period is not provided for in the policy. If the participant fails to make such notification, the company has the right to claim indemnity from him for the actual loss incurred by the insurance account due to such breach of commitment.

9. Conditions in Islamic Insurance Policies

9/1 There is no Shari'ah restriction on providing for special conditions in the insurance policy. Special conditions may relate to periods of insurance, denial of indemnity in specific cases as when the participant fails to notify the company about occurrence of risk on time, or charging the participant with a specific portion of the indemnity. A condition thus stipulated in the insurance policy remains binding as long as it does not contradict with the rules of Shari'ah or the prerequisites of the contract.

9/2 It is permissible to stipulate in the insurance policy special cases that lead to deprivation from indemnity provided that justice, preservation of rights, and avoidance of abusive conditions are well observed.

10. Commitments and Jurisdictions of the Joint Stock Company

10/1 The Company shall assume the various tasks of managing the insurance operations including; preparation of insurance policies, collection of contributions, payment of indemnities, and all other technical tasks. The Company performs such tasks against a specific fee, which should be stated in the agreement in order to obtain the participant's approval thereon by signing the contract.

10/2 The Company is entrusted with the duty of achieving common interest while undertaking the management of the insurance operations. However, it should not guarantee the insurance assets except in case of misconduct, negligence or breach of contractual obligations.

10/3 The Company shall bear its pre-operating expenses as well as all other expenses that relate to conducting its own business or the investment of its own funds.

10/4 The statutory reserve of the Joint Stock Company is deducted from its share capital and becomes part of its shareholders equity, a case that also holds true for all other capital-related deductions. No deduction shall be made from the policyholders fund or profits for the benefit of the shareholders of the Joint Stock Company.

10/5 For the sake of serving the policyholders' interest, it is permissible to deduct part of their funds or profits to be used as reserves or allocations pertaining to the insurance fund. Such deductions, however, should by no means belong to the shareholders of the Joint Stock Company. The accumulated balance of the insurance account shall be spent on charity purposes in case of liquidation.

10/6 The Company claims indemnity from the party who causes the injury, whether through breach of contractual commitment or any similar misbehavior. In this case, the Company represents the participants in disposing of all the tasks that relate to the case, such as filing of lawsuits, realization of the consequent rights, and depositing the proceeds in the insurance account.

10/7 When the Company invests the policyholders' funds through Mudarabah, it should bear the expenses that are normally borne by the Mudarib [see Shari'ah Standard No. (13) on Mudarabah]. However, if the Company invests such funds through investment agency, the deal shall be subject to Shari'ah rulings on remunerated agency.

10/8 When the insurance assets along with indemnities received from re-insurance companies fall short of covering indemnity commitments, the Company may cover the deficit from project financing or *Qard Hasan* (interest-free or benevolent loan) debited to the account of the insurance fund. In this regard, the deficits resulting from commitments of the current year may be covered from the surpluses of the succeeding years. The Company may also claim settlement of the deficit from policyholders if they undertake to do so in the insurance policy.

10/9 The insurance account shall bear all the expenses and fees that relate to insurance activities.

10/10 There is no Shari'ah restriction on reconciling between the Company and the party who causes the injury, if such reconciliation is in the interest of the participants, and conforms to the relevant Shari'ah rulings.

11. Indemnity

11/1 The participant shall receive either the loss, he incurred because of the injury, or the insurance amount; whichever is less, and as per regulations.

11/2 The participant should not receive both the indemnity and the compensation from other parties for injury caused to him.

11/3 In Property Insurance, indemnity should be confined to what has been provided for in the regulations, and may comprise subsidiary losses that can be appropriately estimated according to the actual injury.

12. Insurance Surplus

12/1 The insurance surplus is part of the assets of the insurance account and should be disposed of according to what has been stated in item 5/5 of this Standard.

12/2 Distribution of the surplus or part thereof among the policyholders should be in one of the following forms, provided that the selected form is explicitly mentioned in the regulations:

12/2/1 Distribution of the surplus among the policyholders in proportion to their respective contributions, and regardless of whether the policyholder has received indemnity during the financial period or not.

12/2/2 Distribution of the surplus among the policyholders who have not received indemnity during the financial period.

12/2/3 Distribution of the surplus among policyholders after deducting the amounts of indemnity they receive during the same financial period.

12/2/4 Distribution through any other method approved by the Shari'ah Supervisory Board.

13. Expiry of Insurance Policy

The insurance policy expires in any of the following cases:

13/1 At the end of the period agreed upon in the insurance policy. In case of property insurance, it is permissible to stipulate that the contract is automatically renewable unless the participant informs the company, within a specific period before expiry of the contract, of his desire to cease contract's renewal.

13/2 Termination of the policy by the company or the participant, if the policy provides for the right of termination to each of the parties to contract.

13/3 Complete damage of the insured property (in case of property insurance), without nullifying the entitlement of the participant to the indemnity, subject to the contract's conditions.

13/4 Death of the insured person in case of persons' (life) insurance, without nullifying the entitlement of the beneficiary to the insurance benefits, subject to the contract's conditions.

14. Date of Issuance of the Standard

This Standard was issued on 23 Rabi' I, 1426 A.H., corresponding to 2 May 2005 A.D.

Adoption of the Standard

The Shari'ah standard on Islamic Insurance was adopted by the Shari'ah Board in its meeting No. (16) held in Al-Madinah Al-Munawwarah on 7-12 Jumada I, 1427 A.H., corresponding to 3-9 June 2006 A.D.

Appendix (A)
Brief History of the Preparation of the Standard

The Shari'ah Board decided in its meeting No. (8) held on 28 Safar – 4 Rabi' I, 1423 A.H., corresponding to 11-16 May 2002 A.D., in Makkah Al-Mukarramah to issue a Shari'ah Standard on Islamic Insurance.

On 12 Jumada I, 1424 A.H., 12 July 2003 A.D., the Shari'ah Standards Committee decided to commission a Shari'ah consultant to prepare a draft standard on Islamic Insurance.

In its meeting No. (10) held on 23–24 Jumada II, 1424 A.H., corresponding to 23–24 July 2003 A.D., in Amman, the Hashemite Kingdom of Jordan, the Shari'ah Standards Committee (1) discussed the Shari'ah study and advised the consultant to incorporate the necessary changes, in the light of the discussions and observations of its members.

The Shari'ah Standards Committee (1) once again discussed the draft of the Standard in its meeting No. (11) held on 25–26 Safar 1425 A.H., corresponding to 15-6 April 2004 A.D., in the Kingdom of Bahrain and incorporated further changes in it. The committee also requested the consultant to review the document on the light of the discussions and incorporate necessary changes.

A third round of discussions on and amendments in the draft of the Standard also took place in meeting No. (12) of the Shari'ah Standards Committee (1) held on 28 Rabi' II, 1425 A.H., corresponding to 16 June 2004 A.D. in Dubai, United Arab Emirates.

The revised version of the Standard was then submitted to the Shari'ah Board in its meeting No. (13) held in Makkah Al-Mukarramah on 26 Sha'ban – 1 Ramadan 1425 A.H., corresponding to 10–15 October 2004 A.D. and further changes were incorporated in the document.

In its meeting No. (14) held in Dubai, United Arab Emirates on 21–24 Rabi' I, 1426 A.H., corresponding to 30 April – 2 May 2005 A.D., the Shari'ah Board discussed the draft of the Standard and decided, in the light of the discussions and comments of the members, to transfer it to the Shari'ah Standards Committee (1) for thorough study.

The Shari'ah Standards Committee (1) studied the draft of the Standard in its meeting No. (17) held in Kingdom of Bahrain on 4–5 Sha'ban 1426 A.H., corresponding to 8–9 September 2005 A.D.

The revised draft of the Standard was again submitted to the Shari'ah Board in its meeting No. (15) held in Makkah Al-Mukarramah, on 22–26 Sha'ban 1426 A.H., corresponding to 26–30 September 2005 A.D. The Board decided to send the document to concerned experts for review and comments before discussing it in a public hearing.

AAOIFI held a public hearing in the Kingdom of Bahrain on 1 Safar 1427 A.H., corresponding to 1 March 2006 A.D. More than 30 participants representing central banks, Institutions, accounting firms, Shari'ah scholars, academics and other interested parties attended the session. Several comments and observations were posed, to which the members of the Shari'ah Standards Committees (1) and (2) duly responded.

In its meeting held in the Kingdom of Bahrain on 1 Safar 1427 A.H., corresponding to 1 March 2006 A.D., the Drafting Committee discussed the comments and observations made in the public hearing and made the changes that it deemed necessary.

In its meeting No. (16) held in Al-Madinah Al-Munawwarah on 7–12 Jumada I, 1427 A.H., corresponding to 3–9 June 2006 A.D., the Shari'ah Board discussed the amendments proposed by the Drafting Committee, incorporated some changes in the document and approved the Standard (unanimously for some clauses and with the majority for others), as indicated in the minutes of the Board's meetings.

Appendix (B)
The Shari'ah Basis for the Standard

- Commercial Insurance is prohibited because it involves Gharar (uncertainty). In this regard Muslim, *Ashab Al-Sunan* (compilers of the books of Sunan) and others quoted Abu Hurayrah as having said: *"The Prophet peace be upon him prohibited sales which involve Gharar"*.[2]
- The Fuqaha define Gharar in several ways, which -in brief- indicate that it is a process that has unknown/unrevealed consequences and outcomes.[3]
- Some contemporary scholars believe that Gharar is similar to betting and gambling.[4]
- Resolutions of Fiqh forums on insurance include the resolution of the Islamic Fiqh Academy in its first session held in 1398 A.H., which endorsed a preceding resolution on the subject issued by the Council of Eminent Shari'ah Scholars of the Kingdom of Saudi Arabia in its session No. (10) held in Riyadh on 4 April 1397 A.H. A third resolution on the subject was issued by the International Islamic Fiqh Academy - Resolution No. 9 (9/2).
- Permissibility of cooperative/mutual/social insurance stems from the fact that it is based on cooperation and donation, rather than on Mu'awadah (exchange contract). It is well known among the Fuqaha (Maliki School)

(2) *"Sahih Muslim"*, *Kitab: Al-Buyu'* [3: 1153]; *"Sunan Abu Dawud"* [2: 228] (H: 3367); *"Sunan Al Nasa`i"* [2: 217]; *"Sunan Ibn Majah"* [2: 739]; *"Sunan Al-Tirmidhi"* [3: 532]; *"Sunan Al-Darimi"* [2: 167]; *"Al-Muwatta`"* [2: 664]; *"Musnad Al-Imam Ahmad"* [1: 203] and [2: 367 and 439]; *"Sunan Al-Bayhaqi"* [5: 226]; and *"Musannaf Ibn Abu Shaybah"* [8: 194], Section (2).

(3) See: *"Sharh Al-'Inayah Ma'a Fath Al-Qadir"* [5: 192]; *"Tabyin Al-Haqa`iq"* [4: 46]; *"Al-Taj Wa Al-Iklil"* [4: 362]; *"Fath Al-'Aziz Bi-Hamish Al-Majmu'"* [8: 127]; *"Matalib Uli Al-Nuha"* [3: 25]; *"Al-Qawa'id Al-Nuraniyyah"* (P. 116); *"Nazariyyat Al-'Aqd"* (P. 224). See: *"Al-Gharar Wa Atharahu Fi Al-'Uqud"* by Al-Siddiq Al-Amin Al-Darir (published by Saleh Kamil Center for University Thesis), (P. 54).

(4) See: Husayn Hamid, *"Al-Gharar"* (P. 72).

that Gharar has no impact on donation contracts. This viewpoint is well supported by a number of Quranic verses and sayings of the Prophet (peace be upon him) which instruct Muslims to promote cooperation.

- Consequently, several resolutions were issued by Fiqh forums regarding permissibility of cooperative insurance. Such resolutions include, the resolution of the Islamic Research Academy of Al-Azhar Al-Sharif, the resolution of the Islamic Fiqh Academy of the World Muslim League referred to earlier, and the resolution of the International Islamic Fiqh Academy, which states that: "The contract that respects the origins of Islamic dealings is the cooperative insurance Contract which is based on donation and cooperation…". The fact that cooperative insurance is permissible, also does not seem to have encountered any dispute among contemporary Muslim Fuqaha.[5]
- Permissibility of cooperative insurance and non-permissibility of commercial insurance is in fact due to the following differences:

  a) The conventional insurance contract is a financial Mu'awadah (exchange contract) that aims at making profit out of the insurance operations. Therefore, its permissibility should be judged in the light of the Shari'ah rulings on financial transactions. Consequently, such rulings prohibit the conventional insurance contract, which involves Gharar.

  b) In the Islamic insurance contract, the company assumes the role of the agent of the insurance account, whereas in the commercial insurance contract the company is an original party that signs the contract in its own name.

  c) The company in commercial insurance owns the premiums against its commitment to pay the insurance amount; whereas in Islamic insurance, it is the insurance account rather than the company that owns the contributions.

  d) In Islamic insurance the residual premiums and the returns on them, that remain after deduction of expenses and indemnity amounts,

(5) Fatawa of the Shari'ah Advisory Board of Al Rajhi Banking & Investment Company, Fatwa No. (40).

become the property of the policyholders account, and constitute a surplus, which can be distributed among the policyholders. This cannot be imagined in commercial insurance where the company owns and receives the premiums as soon as it signs the contract. In commercial insurance, the premiums constitute part of the revenue and profits of the company.

e) In Islamic insurance, the returns on investment of the premium assets belong to the policyholders account, after deduction of the Mudarib share for the company, whereas such returns belong to the company in commercial insurance.

f) Islamic insurance aims at achieving cooperation among the members of the society, rather than generating profits from the insurance operations, whereas commercial insurance is profit-oriented.

g) The company in Islamic insurance earns profits through investment of its own funds and its share in Mudarabah, as it assumes the role of the Mudarib and the insurance account assumes the role of the Rab al-Mal (owner of the capital).

h) In Islamic insurance, the insurer and the participant are in fact the same person although they differ in recognition, whereas the insurer and the participant are totally different in commercial insurance.

i) The company in Islamic insurance adheres to the rules of Islamic Shari'ah and the Fatawa of its Shari'ah Supervisory Board, while in commercial insurance there are no such commitments.

j) In Islamic insurance, the allocations from the insurance account, which remain there until the time of liquidation of the company, are spent on charity purposes, and do not go to shareholders, whereas in commercial insurance such amounts go to shareholders.

- The Shari'ah ruling that the Islamic insurance contract is an act of donation that both parties are bound to honor, is measured by analogy to what is known in Fiqh as *Nihd*,[6] or donation pledge. It has been narrated that

(6) Al-Bukhari in his *"Sahih"* [15: 128] commented on *Nihd* or *Nahd* where he said (….since Muslims did not see any harm in *Nihd*, in which the members of =

Ali and Ibn Mas'ud said: "A gift, if specifically defined, is binding, whether received or not." It has also been narrated that Abu Bakr and Umar indicated that a gift does not become binding before receipt.[7] Malik however reconciled the two viewpoints by indicating that Ali, Ibn Mas'ud and the others seem to have focused on the fact that the contract as such is binding, while Abu Bakr and Umar seem to have focused on the fact that the receipt of the gift is a prerequisite of finalizing the contract. The latter viewpoint was justified by the desire to leave no room for an excuse that Umar explicitly mentioned.[8] The obligatory nature of the donation contract can also be derived from the saying of the Prophet (peace be upon him) that: *"A person who withdraws his gift is like a dog that withholds its vomit"*.[9]

- The basis of the Shari'ah ruling that the company should not guarantee the insurance assets is that the company is an agent, and the Fuqaha unanimously agree that an agent should not guarantee the property except against misconduct, negligence or breach of the contract.
- The justification for stating the nine principles of Islamic insurance in the articles of association of the company is the need to preserve the element of donation in the contract and emphasize it as a basic aspect of the company, and hence preserve the cooperative nature and permissibility of the insurance operation. Otherwise, the insurance operation becomes a Mu'awadah transaction, and therefore subject to impact of Gharar as mentioned earlier. In other words, emphasis on the nine principles is because they constitute the fundamental differences between Islamic insurance and commercial insurance. Several Fatawa were issued to

= of the group consume different amounts of the food to which they have equally contributed) and he narrated some sayings of the Prophet (peace be upon him) that support this practice. In *"Fath Al-Bari"* [5: 129], Ibn Hajar indicated that *Nihd* was an ancient practice of Muslim travelers who used to contribute equally to the stock of food they need during their journey, and leave each of them free to consume the portion of the food he needs. At the end of the journey, they distribute the food leftover among themselves, unless they decide to keep it for another journey. This is quite similar to the treatment of the surplus in Islamic Insurance.

(7) See: *"Al-Muwatta`"* [2: 468]; and *"Nasb Al-Rayah"* [4: 122].

(8) *"Bidayat Al-Mujtahid"* [2: 534].

(9) *"Sahih Al-Bukhari"* [5: 190]; and *"Sahih Muslim"* (H: 1622].

demonstrate these differences including, Fatwa No. (12/11) issued by the 12th Seminar on Islamic Economics of the Al Baraka Group, Fatwa No. (42/3) issued by the Shari'ah Supervisory Board of the Al Rajhi Company, Fatwa of the Shari'ah Board of Faisal Islamic Bank and Fatwa of the Islamic insurance Company of Jordan.(10)

- The general framework of the contract and the nature of its conditions have been set up along the lines of binding contracts in Islamic jurisprudence, and the peculiar characteristics of the insurance contracts as far as the insured is concerned.
- The ruling that the insurer and the insured must fulfill their commitments is based on the Shari'ah prerequisite of honoring contracts. Since the insurance contract is a binding contract, all its conditions should be honored unless they violate the rules of Islamic Shari'ah. Such reasoning is well supported by various Quranic Verses and sayings of the Prophet (peace be upon him) that explicitly instruct Muslims to honor their contracts and conditions. In this regard, Allah, the Almighty, says: ***{"O You who believe! Fulfill (all) obligations..."}.***(11) The Prophet (peace be upon him) also says *"Muslims are at their conditions"*.(12)
- The company could manage the insurance account against fee or free of charge because the relationship here is viewed as agency, which the Fuqaha unanimously approve, with or without remuneration. The Fatawa in this regard comprise those of the 12th Seminar on Islamic Economics of the Al Baraka Group (Fatwa No. (12/11), the resolution of the Islamic Fiqh Academy of the Muslim World League – Makkah Al-Mukarramah (Fatwa No. 961), and Fatwa No. (51) of the Council of Eminent Scholars of Saudi Arabia.
- The basis of assigning the investment of the assets of the insurance fund to the company is the Mudarabah contract, which the Fuqaha unanimously declare as permissible. Arrangement of investment in this manner entails

(10) See: *"Fatawa Al-Ta`min"*, Dallah Al Baraka Group, Dr. Abdul-Sattar Abu Ghuddah and Dr. Izzul-Din Khoja (eds.), (pp. 99-108).

(11) [Al-Ma`idah (The Table): 1].

(12) Related by Al-Bukhari in his *"Sahih"* [4: 451]; and Al-Tirmidhi with *"Tuhfat Al-Ahwazi"* [4: 584]. Al-Tirmidhi deemed it a good, authentic Hadith.

specification of a profit share for each party, and entitlement of the insurance fund to its respective share. The relevant Fatawa in this regard include the Fatwa of the Shari'ah Supervisory Board of Faisal Islamic Bank,[13] Fatwa No. (12/11) of the 12th Seminar on Islamic Economics of the Al Baraka Group and the Shari'ah Standard No. (13): Mudarabah.

- The emphasis on honoring commitments in general – including commitment of the company to furnish *Qard Hasan* to the insurance account – is based on the Shari'ah requirement of honoring pledges that are binding to either of the two parties. This viewpoint to which some leading Fuqaha subscribe is well supported by Qur`an, Sunnah and reported Muslim practice, such as the divine Quranic instruction: ***{"...Fulfill (all) obligations..."}*** has been taken by the Fuqaha to comprise any Shari'ah-accepted commitment of the Muslim. There are also several sayings of the Prophet (peace be upon him) which indicate that Muslims are bound to honor their contracts, covenants and pledges.[14] Several resolutions of Shari'ah forums and Shari'ah Boards were also issued in this connection including, resolution No. 40 – 41 (2–5/3) of the International Islamic Fiqh Academy[15] and the Fatwa of the Shari'ah Supervisory Board of the Islamic Insurance Company of Jordan.[16]
- The ruling that responsibility of providing the evidence lies with the participant depends on the general rules in the Qur`an, the Sunnah and the opinion of the Ulema that evidence should be established by the claimant. This has been indicated in several Fatawa including Fatwa No. (14/6) of the United Shari'ah Board of Al Baraka Group.
- Permissibility of the two types of Islamic insurance (mentioned in this Standard) rests on the various evidences of permissibility of Islamic insurance in general, as discussed earlier, and are supported by various Fatawa of Shari'ah Boards. Such Fatawa include Fatwa No. 2/9 of the 2nd Al Baraka Seminar on Islamic Economics, Fatwa No. 10/3/5 of the 10th Al Baraka seminar on Islamic Economics, and other Fatwa issued by the Shari'ah

(13) See: Chapters on Mudarabah in books of various schools of Fiqh, and the term "Mudarabah" in the Kuwaiti Encyclopedia.

(14) See: *"Mabda` Al-Rida Fi Al-'Uqud: Dirasah Muqaranh"* (Principle of Consent in Contracts: A Comparative Study) and its references.

(15) See: Magazine of the International Islamic Fiqh Academy, Issue No. (5), (2/754– 965).

(16) *"Fatawa Al-Ta`min"*, (P. 106).

Supervisory Boards of Dubai Islamic Bank, Kuwait Finance House, Qatar Islamic Bank and the Islamic Insurance Company – Jordan.[17]

- The rulings relating to the contract as such are based on the general principles of contracts in Islamic Shari'ah, which emphasize avoidance of fraud and deceit and the need to observe the time limits indicated in the contracts. Shari'ah rulings on compensation have also been resorted to in this connection, in addition to the Fatawa and resolutions issued by various forums such as the Islamic Fiqh Academy of the Muslim World League, the Supreme Council of Ulema of Saudi Arabia and the Shari'ah boards of Islamic banks and Islamic insurance companies.[18]
- The jurisdictions of the company are determined on the basis of its articles of association, the various documents that govern the contractual relationship, the general principles of contracts and conditions, insurance conventions, and some Fatawa of Shari'ah boards.
- The rules that regulate the relationship between the company and the policyholders are based on the articles of association, which consider this relationship as an agency contract (remunerated or free of charge) for the management of the insurance operations, and Mudarabah for the investment of the insurance assets.
- Indemnity is based on the general Shari'ah directives emphasizing the principle that "one should neither tolerate harm nor cause it to others"[19] as well as the general principles and rules of Fiqh that advocate fair, and at the same time, non-obsessive indemnification for injury. Furthermore, inferences on indemnity could also be drawn from the cooperative nature of this donation-oriented contract, in addition to some Fatawa such as Fatwa No. (3) of the 10th Al Baraka Seminar on Islamic Economics, and the various Fatawa of the Shari'ah boards of Islamic banks and Islamic insurance companies.[20]

(17) *"Fatawa Al-Ta`min"* (pp. 193–206).
(18) ibid.
(19) This Hadith has been related by Malik in *"Al-Muwatta`"*, *"Kitab Al-Aqdiyah"*; Ahmad in *"Musnad Al-Imam Ahmad"* [1: 313] and [5: 527]; and Ibn Majah in his *"Al-Hashiyah"* [2: 782].
(20) *"Fatawa Al-Ta`min"*, (P. 153).

- Treatment of the insurance surplus is based on the cooperative nature of the contract and the practice of the *Sahabah* [companions of the Prophet (peace be upon him)] with regard to *Nihd*, as reported by Bukhari.[21]
- Possibility of contract termination stems from the fact that the insurance contract is a time-specific contract, and therefore it expires at the end of its stipulated period just like Ijarah (hiring). The insurance contract also expires on the damage of the insured property (or death of the insured), as there will be no object of commitment.

(21) Al-Bukhari in his *"Sahih"* [15: 128] commented on *Nihd* or *Nahd* where he said (….since Muslims did not see any harm in *Nihd*, in which the members of the group consume different amounts of the food to which they have equally contributed) and he narrated some sayings of the Prophet (peace be upon him) that support this practice. In *"Fath Al-Bari"* [5: 129], Ibn Hajar indicated that *Nihd* was an ancient practice of Muslim travelers who used to contribute equally to the stock of food they need during their journey, and leave each of them free to consume the portion of the food he needs. At the end of the journey, they distribute the food leftover among themselves, unless they decide to keep it for another journey. This is quite similar to the treatment of the surplus in Islamic Insurance.

Appendix (C)
Definitions

Premium

It is the amount of the contribution, which the participant donates, along with its related profits, for the benefit of the insurance scheme.

Insurance Amount

It is the amount paid by the company out of the insurance account at the occurrence of the risk insured against.

Risk Insured Against

It is the probable, legally acceptable, accident.

Commercial Insurance

It is a contract between an insured party and a technical insuring body, stipulating that the former pays the latter a specific number of financial installments or a lump sum amount, against the commitment of the latter to bear a risk that can be insured against, through payment of an estimated financial indemnity to the insured or the beneficiary, on the occurrence of the risk. [Clause No. (747) of the Egyptian law, Clause No. (773) of the Kuwaiti Law and Clause No. (983) of the Iraqi Law].

Cooperative Insurance

A collective insurance contract is a contract whereby each participant undertakes to pay a specific amount of money as donation to indemnify any member of the group who encounters the risk insured against.

Islamic Insurance

It is a kind of cooperative insurance, which covers all types of risks, under the management of a specialized company that adheres to the rules and principles of Shari'ah. In this sense, Islamic insurance differs from coopera-

tive insurance as the latter only covers a specific group of beneficiaries who might encounter risks, for instance, merchants, sailors and the like while Islamic insurance is available to the general public. Islamic insurance also differs from cooperative Insurance with regard to adherence to the rules and principles of Islamic Shari'ah as well as in some technical aspects pertaining to premiums. In cooperative insurance, premiums may be variable at the beginning; whereas in organized Islamic insurance, premiums are specific due to use of precise statistical studies.

Mutual Insurance, the Alternate to Life Insurance

It is the insurance that covers the risks of death, inability, injury or illness, for the individual or the group, through payment of the insurance amount to the participant or the beneficiary, as per the agreement.

Surplus

The Surplus comprises of residual premiums of the participants (the insured) in addition to the reserves and profits, after deducting all expenses and indemnity amounts (paid or payable during the same year). The residual amount, thus computed, is considered as surplus, rather than profit.

Gharar

It is what one cannot predict its unrevealed/unknown consequences. Something that may occur/materialize or may not[22].

Participant

The Participant is a person who accepts the cooperative insurance scheme, signs the insurance policy and undertakes to observe its consequent commitments. It may be referred as the insured, the insured for and the policyholder.

Insurance Account

It is the account established by the company by virtue of its articles of association, to accommodate the premiums of the participants and the returns thereon as well as the reserves. Such account has an independent

(22) See: *"Al-Gharar Wa Atharahu Fi Al-'Uqud"* (P. 53).

financial liability towards its own claims and commitments, though it is represented by the company for its all affairs. This account is also known as the insurance fund, the policyholders account or the portfolio of the participants group.

Shari'ah Standard No. (41)

Islamic Reinsurance

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

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

Preface

This Standard aims to illustrate the rules and principles of Shari'ah that govern Islamic reinsurance and indicate the controls which Islamic insurance and reinsurance companies as well as Islamic financial institutions (Institution/Institutions)[1] should observe in dealing with traditional insurance and reinsurance companies. The overall objective of the standard is to facilitate transference of risks and increasing of insurance capacity.

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

Statement of the Standard

1. Scope of the Standard

This Standard covers Islamic reinsurance and participation with traditional insurance or reinsurance companies. The Standard does not cover Islamic insurance which has already been covered in a separate standard.

2. Definition of Reinsurance

2/1 Islamic Reinsurance refers to the agreement among insurance companies, on behalf of the insurance funds under their management, to devise a mechanism for the avoidance of part of the risks which the insurance funds may encounter. On the basis of such agreement a reinsurance fund which has a distinct legal personality and independent financial liability is formed up through making contributions out of the insurance funds paid by the insurance clients on the basis of donation. The reinsurance fund, thus formed, assumes the task of covering part of the risks encountered by the insurance funds.

2/2 Reinsurance, as described above, constitutes the Islamic alternative for the reinsurance provided by traditional reinsurance companies, which is based on exchange of the reinsurance premiums and compensation, rather than on donation commitments.

3. Shari'ah Status of Reinsurance

3/1 Shari'ah status of Islamic reinsurance:

3/1/1 It is permissible to reinsure with Islamic reinsurance companies.

3/2 Shari'ah status of reinsurance with traditional reinsurance companies:

It is impermissible for Islamic insurance companies to reinsure with traditional reinsurance companies, except when such reinsurance is sought as a transitional arrangement stemming from public need which amounts to necessity.

4. Key Methods of Reinsurance

With regard to the scope of commitment of the reinsurer, reinsurance can take place through one of the following two forms:

4/1 Selective reinsurance: In this case the insurance company presents the individual risk which constitutes the subject matter of reinsurance to the reinsurer along with a summary of all the information related to it, so that the reinsurer can study the information and decide whether to accept the risk or not. The reinsurance company (insurer) becomes committed to what it accepts.

4/2 Comprehensive reinsurance (reinsurance agreement): In this case the reinsurance company assumes the commitment to accept all the risks which fall within the scope of the agreement signed with the insurance company.

5. Key Forms of Reinsurance Requests

5/1 Risk sharing reinsurance: The insurance company in this case seeks reinsurance for a percentage of the insurance policies it issues (50% or 25%), whether such coverage is within or in excess of its own insurance capacity.

5/2 Excess risk reinsurance (beyond risk tolerance): The insurance company keeps all the insurance policies which it can easily tolerate their risks and seeks reinsurance for those which involve risks that it cannot tolerate.

5/3 Loss reinsurance: According to this type of reinsurance the reinsurance company assumes the responsibility of bearing the losses beyond the specific limit agreed upon. This form of reinsurance is widely used in the insurances which involve big amounts. The insurance company bears, for instance, the first 20 thousand dollars of compensation for the accident, while the reinsurance company bears the rest.

6. Controls on Reinsurance with Traditional Reinsurance Companies

In reinsuring with traditional reinsurance companies, Islamic insurance companies should observe the following controls:

6/1 Islamic insurance companies should reinsure first with Islamic reinsurance companies, to the largest possible extent.

6/2 Islamic insurance companies should not keep any cash reserves for ongoing risks, that belong to traditional reinsurance companies and on which interest has to be paid. Nevertheless, an agreement can be reached between the Islamic insurance company and the traditional reinsurance company in order to specify a certain portion of the premiums payable to the traditional reinsurance company to be retained by the Islamic insurance company. The Islamic insurance company can invest retained funds through Mudarabah or investment agency, where the Islamic insurance company assumes the role of the Mudarib and the traditional reinsurance company assumes the role of Rab al-Mal. When profit is distributed as per the ratios agreed upon, the share of the traditional reinsurance company is to be added to its account with the Islamic insurance company, whereas the share of the profit earned by the Islamic insurance company for performing the investment as an independent personality is to be added to the account of the participants.

6/3 The periods of the reinsurance agreements sought by Islamic insurance companies from traditional reinsurance companies should be commensurate to the actual need.

6/4 Before signing agreements with traditional reinsurance companies, Islamic insurance companies should seek the approval of their Shari'ah Supervisory Boards.

6/5 Islamic insurance companies should stick to the minimum size of reinsurance with traditional reinsurance companies, and Shari'ah Boards should undertake follow-up in this connection.

7. Shari'ah Status of Compensations and Commissions Presented to Islamic Insurance Companies by Traditional Reinsurance Companies

7/1 It is permissible for Islamic insurance companies to receive the amounts of the insurance coverage from traditional reinsurance companies.

7/2 It is impermissible for an Islamic insurance company to receive reinsurance commission from a traditional reinsurance company. Nevertheless, the Islamic insurance company has the right to seek premium discounts from the traditional reinsurance company.

7/3 Islamic insurance companies should not accept any redistributions of insurance surplus forwarded by traditional reinsurance companies. Nonetheless, Islamic insurance companies can request premium discounts from traditional reinsurance companies.

8. Shari'ah Controls on Practicing Islamic Reinsurance by Islamic Reinsurance Companies

8/1 Islamic reinsurance companies should observe the Shari'ah controls on the activities of Islamic insurance companies indicted in Shari'ah Standard No. (26) on Islamic Insurance, with due consideration to the fact that the participants in this case are the insurance companies.

8/2 Formation of a Shari'ah Supervisory Board to supervise the process of establishing the Islamic reinsurance company, verify its contracts and documents, overview its applications and submit Shari'ah reports on its activities.

8/3 It is permissible for the Islamic reinsurance company to provide reinsurance services to traditional insurance companies, subject to the following conditions:

1. The contract to be used should be the Islamic reinsurance contract.
2. There should be no linkage.
3. Reinsurance should not involve a Shari'ah prohibited object.

9. Financial Gains Received from Islamic Reinsurance Companies

All financial gains which Islamic insurance companies receive from Islamic reinsurance companies are considered as lawful gains and should be credited to the account of policyholders (the participant companies of the reinsurance scheme), as part of revenues.

10. Date of Issuance of the Standard

This Standard was issued on 2 Dhul-Qa'dah 1430 A.H., corresponding to 21 October 2009 A.D.

Adoption of the Standard

The Shari'ah Board adopted the draft of the Standard on Islamic Reinsurance in its 25th meeting held during the period of 2-4 Dhul-Qa'dah 1430 A.H., corresponding to 21-23 October 2009 A.D.

Appendix (A)
Brief History of the Preparation of the Standard

In its meeting No. (16) held in Al-Madinah Al-Munawarah, during the period of 7-12 Jumada I, 1427 A.H., corresponding to 3-8 June 2006 A.D, the Shari'ah Board decided to issue a Shari'ah Standard on Islamic Reinsurance.

On 12 Rajab 1427 A.H., corresponding to 6 August 2005 A.D., the General Secretariat decided to commission a Shari'ah consultant to prepare a juristic study on Islamic Reinsurance and Participation with Traditional Companies.

In a joint meeting held in the Kingdom of Bahrain, on 18 Safar 1428 A.H., corresponding to 8 March 2007 A.D., the Shari'ah Standards Committees (1) and (2) discussed the study, approved it and required the consultant to prepare the exposure draft of the Standard.

In a further joint meeting held in Manama, the Kingdom of Bahrain, on 15 Jumada I, 1428 A.H., corresponding to 31 May 2007 A.D., the Shari'ah Standards Committees (1) and (2) discussed the draft of the Standard and necessary amendments were made in the light of the discussions and observations of the meeting.

In its meeting No. (19) held in Makkah Al-Mukarramah, during the period of 26-30 Sha'ban 1428 A.H., corresponding to 8-12 September 2007 A.D., the Shari'ah Board discussed the draft of the Standard and made the amendments which it deemed necessary.

The General Secretariat held a public hearing in the Kingdom of Bahrain, on 8 Jumada II, 1429 A.H., corresponding to 12 June 2008 A.D. The public hearing was attended by more than thirty participants

representing central banks, institutions, accounting firms, Shari'ah scholars, academics and others interested in this field. The members of the Shari'ah Standards Committees (1) and (2) duly responded to several comments and observations that were made in the public hearing.

In its meeting No. (25) held in the Kingdom of Bahrain, during the period of 2-4 Dhul-Qa'dah 1430 A.H., corresponding to 21-23 October 2009 A.D., the Shari'ah Board discussed the draft of the Standard, incorporated the necessary amendments that it deemed appropriate, and adopted the Standard.

Appendix (B)
The Shari'ah Basis for the Standard

- Impermissibility of commercial reinsurance is based on the fact that the idea of commercial reinsurance depends on the idea of commercial insurance and involves Shari'ah-prohibited Gharar. As related by Muslim, Ashab al-Sunan and others, quoting Abu Hurayrah, the Prophet (peace be upon him) prohibited *Bay' al-Gharar*[2] (aleatory sale). Gharar, as defined by several Fiqh scholars, indicates uncertainty about the outcomes, or the consequences, or end result of something.[3] According to some contemporary Fiqh scholars Gharar is similar to or part of betting or gambling.[4] A number of resolutions on prohibition of Gharar have also been issued by Islamic Fiqh Academies including the Resolution of the Islamic Fiqh Academy -Makkah Al-Mukarramah in its 1398 A.H. Session, endorsing the Resolution of the Supreme Council of the Ulema of the Kingdom of Saudi Arabia in its 10th Session held in Riyadh on 4 Rabi' II, 1397 A.H., and Resolution No. (9) 9/1 of the International Islamic Fiqh Academy.
- Permissibility of cooperative insurance stems from the fact that cooperative insurance companies are based on cooperation and donation rather than on exchange-based dealings. It is a well-known as Fiqh axiom that Gharar does not affect donation-based contracts. Permissibility of cooperative insurance can also be derived from several Verses of the Glorious Qur`an

(2) *"Sahih Muslim"*, *Kitab Al-Buyu'* [3: 115]; *"Sunan Abu Dawud"* [2: 22]), (H: 3376); *"Sunan Al-Nasa`i"* [2: 21]; *"Sunan Ibn Majah"* [2: 73]; *"Sunan Al-Tirmizi"* [3: 532]; *"Sunan Al-Darami"* [2: 16]); *"Al-Muwatta`"* [2: 66]); *"Musnad Ahmad"* [1: 201, 2: 367 and 397]; *"Sunan Al-Bayhaqi"* [5: 22]; and *"Musnnaf Ibn Abu Shaybah"* [8: 19], Part 2.

(3) See: *"Sharh Al-'Inayah Ma'a Fath Al-Qadir"* [5: 192]; *"Tabyin Al-Haqa`iq"* [4: 46]; *"Al-Taj Wa Al-Iklil"* [4: 36]; *"Fath Al-'Aziz Bi Hamish Al-Majmu'"* [8: 127]; *"Matalib Uli Al-Nuha"* [3: 25]; *"Al-Qawa'id Al-Nuraniyyah"*, (P. 166); and *"Nazariyyat Al-'Aqd"*, (P. 224). See also Sheikh Siddiq Al-Darir: His valuable book on *"Al-Gharar Wa Atharuhu Fi Al-Uqud"*, Salih Kamil Lil-Rasa`il Al-Jami'iyyah, (P. 54).

(4) See: Dr. Hussein Hamid: *"Al-Gharar"*, (P. 72).

and Prophetic Hadiths which instruct people to cooperate. In this regard, a number of resolutions have been issued by the Islamic Research Academy of Al-Azhar in addition to the Resolution of the Islamic Fiqh Academy -Makkah Al-Mukarramah and Resolution No. (9) 9/1 of the International Islamic Fiqh Academy which states: "Indeed, the contract which respects the origins of Islamic dealings is the cooperative insurance contract which is based on donation and cooperation…" Moreover, permissibility of cooperative insurance contract has never encountered dispute from any contemporary Fiqh scholar.[5]

In addition to what has been stated above, the underlying reasons for permissibility of solidarity reinsurance and impermissibility of commercial reinsurance can be summarized in the following essential differences between the two systems:

a) The commercial reinsurance company is an exchange-based financial contract which aims to make profit out of the reinsurance itself, and therefore should become subject to the rulings on exchange-based financial contracts which can be affected by Gharar. In the contrary, in solidarity reinsurance the contract is based on donation and cooperation and thus cannot be affected by Gharar when the contract involves it.

b) The company in the Islamic reinsurance contract is an agent of the reinsurance account, whereas in commercial reinsurance the company is a principal party who signs the contract in his own name.

c) The company in commercial reinsurance owns the reinsurance premiums against commitment to pay the reinsurance amount, while in Islamic reinsurance the company does not own the contributions, which are owned by the reinsurance account.

d) In Islamic reinsurance the remaining part of the contributions and the returns on it -after expenses and compensations- go to the account of the policyholders (such amounts represent the surplus distributed among participants), whereas this cannot be imagined in commercial

(5) A Fatwa issued by the Shari'ah Board of the Al Rajhi Banking Company for Investment, Fatwa No. (40).

reinsurance, because the contributions are owned by the company by virtue of the contract and through actual possession. The contributions in the case of commercial reinsurance are even considered as revenue and profit.

e) In Islamic reinsurance the returns earned from investment of the principal amount of the contributions go to the account of the policyholder after deduction of the Mudarib's share by the company, whereas in commercial reinsurance such returns go to the company.

f) Islamic reinsurance aims to achieve cooperation among the participating companies rather than profit, whereas commercial reinsurance aims to achieve profit from the reinsurance process itself.

g) In Islamic reinsurance the company makes profits by investment of its funds in addition to its share in the Mudarabah, as it assumes the role of the Mudarib and the reinsurance account assumes the role of Rab al-Mal.

h) In Islamic reinsurance companies the participant and the reinsurance client are in fact the same person even if legally considered as separate personalities, while in commercial reinsurance companies they are completely different.

i) An Islamic reinsurance company observes the rules of the Islamic Shari'ah and the Fatwas issued by its Shari'ah Supervisory Board, whereas the case is not so for commercial reinsurance companies.

j) When the allocations deducted from the solidarity reinsurance fund remain unpaid until the time of liquidation they are spent on charitable purposes and are not given to the participants, whereas in commercial reinsurance companies such funds go to participants.

- The Islamic reinsurance contract is considered as a binding donation contract, because it is analogous to Munahadah (contribution of travelers to a pool of food victuals) or to pledge of donation. Both of the Islamic Fiqh Academy of the Muslim World League and the International Islamic Fiqh Academy stipulated in their resolutions referred to earlier that Islamic reinsurance is based on donation.

The fact that the Islamic reinsurance contract is binding can also be derived from what has been emphasized by Imam Malik about donation. According to Imam Malik a gift in general becomes valid before possession, and this was also said to have been the viewpoint of Ali and Ibn Masood. The Hanbali scholars hold that a gift is binding even if it is not possessed, except in things that are measured in terms of volume and weight.[6] Ibn Rushd (the grandson) said: "Scholars were in disagreement regarding possession…Malik said: "The contract is valid on acceptance, and possession of the gift should be enforced quite like the case in sale…"[7]

Ali and Ibn Mas'ud are reported to have said: *"Gift is permissible if it is known, whether it is possessed or not"*. It is also reported that Abu Bakar and Omar considered the gift to be binding only when it is possessed.[8] Therefore, Malik seems to have taken all these viewpoints into consideration. He derived from the viewpoint of Ali, Ibn Masood and the others that the contract as such is binding, whereas he took the viewpoint of Abu Bakar and Omar to mean that possession is a necessary condition for completion of the contract so as to leave no room for the Dhari'ah (excuse) mentioned by Umar.[9]

The fact that a pledge of donation is binding can also be derived from the Hadith of the Prophet (peace be upon him) who said: *"The person who retreats from a gift that he offers is like the dog which licks up its vomit"*.[10]

- The ruling that the company, which assumes the role of the agent in Islamic reinsurance, should not guarantee is based on the unanimous agreement among Fiqh scholars that an agent should not guarantee except in case of transgression, negligence or breach of the contract.
- The necessity of mentioning the nine principles of Islamic reinsurance in the articles of association of the company stems from the need for reinforcing the donative nature of the contract and laying the Shari'ah foundation

(6) *"Bidayat Al-Mujtahid"* [2: 53]); *"Al-Mughni"* by Ibn Qudamah [5: 64]). See also: *"Bada`i' Al-Sana`i'"* [8: 3960]; and *"Al-Ghayah Al-Quswa"* [2: 655].
(7) *"Bidayat Al-Mujtahid"* [2: 534].
(8) See: *"Al-Muwatta'"* [2: 46]; and *"Nasb Al-Rayah"* [4: 12].
(9) "Bidayat Al-Mujtahid" [2/53]).
(10) *"Sahih Al-Bukhari"* [5: 19]; and *"Sahih Muslim"* (H: 1622).

for this important aspect of the company. In the absence of emphasis on these principles which distinguish Islamic reinsurance from commercial reinsurance, Islamic reinsurance may become an exchange-based reinsurance contract, and hence becomes vulnerable to nullification by Gharar, as has been indicated earlier. For illustration of these distinguishing principles of Islamic reinsurance, several Fatwas have been issued including: Fatwa No. (12/11) issued by the 12th Al Baraka Seminar on Islamic Economics, and Fatwa No. (42/3) issued by the Shari'ah Supervisory Board of Al Rajhi Company, as well as the Fatwas of the Shari'ah Supervisory Board of Faisal Islamic Bank, Islamic Insurance company –Jordan-(11) and Islamic Insurance Company of Qatar.

- The basic elements and conditions of the Islamic reinsurance contract are derived from its nature as a contract which is binding to the two parties in addition to the special nature of the insurance contract with regard to the subject matter of insurance.
- The reinsurer and the client should honor their commitments because the reinsurance contract is binding to both parties. According to Shari'ah, the two parties should honor what they agree upon as long as it does not contradict with the rules and principles of Islamic Shari'ah. This can be derived from the Quranic Verses and Hadiths which instruct people to observe commitments and conditions they agree upon, including the Verse: ***{"O you who believe! Fulfill (your) obligations"}***(12) and the Hadith of the Prophet (peace be upon him) who said: *"Muslims are at their conditions"*.(13)
- The basis of the ruling that the reinsurance company may assume the responsibility of managing the reinsurance account against a fee or free of charge is the nature of the agency (Wakalah) contract which Fiqh scholars unanimously declare as permissible with or without remuneration. This point of view is supported by the 12th Al Baraka Seminar on Islamic

(11) See: *"Fatawa Al-Ta`min"*, Dallah Al Baraka Group, reviewed by Dr. Abd Al-Sattar Abu Guddah and Dr. Ezz Al-Din Mohammad Khojah, (pp. 99-108).

(12) [Al-Ma`dah (The table):1].

(13) Related by Al-Bukhari with dogmatizing comments from his side: *"Fath Al-Bari"* [4: 251]; *"Al-Tirmidhi"* - with *"Tuhfat Al-Ahwazi"* [4: 584] and he said a good and authentic Hadith.

Economics (Fatwa No. 12/11), the Islamic Fiqh Academy of the Muslim World League (Fatwa No. 961) and the Supreme Council of Ulama of the Kingdom of Saudi Arabia (Fatwa No. 51).

- Permissibility for the company to invest the funds of the reinsurance account is based on the Mudarabah contract which Fiqh scholars unanimously declare as permissible. Such contract entails prior specification of profit sharing ratios so that the reinsurance account can get its share of the profit as indicated by a number of Fatwas including: Fatwa of the Shari'ah Supervisory Board of Faisal Islamic Bank,(14) Fatwa No. 12/11 of the 12th Seminar of Al Baraka and Shari'ah Standard No. (13) on Mudarabah.
- Necessity of observing conditions in general, including commitment of the company to present Qard Hasan (benevolent loan) to the reinsurance account, is based on the commitment to honor pledges that are binding to only one party of the contract. Honoring such pledges is emphasized by a number of distinguished Fiqh scholars, and is well supported by Shari'ah Texts and Traditions. One of these texts is the Verse: ***{"O you who believe! Fulfill (your) obligations"}***, which is taken to mean any Shari'ah-acceptable commitment. Several Hadiths have also indicated enforceability of honoring contracts, pledges and promises.(15) In this respect also Fiqh Academies and Shari'ah Supervisory Boards have issued resolutions including: Resolution No. (40-41) 2-3/5(16) of the International Islamic Fiqh Academy, and the Fatwa of the Shari'ah Supervisory Board of the Islamic Insurance Company –Jordan.(17)
- The ruling that the participant should bear the burden of proving, is based on application of the general rules of evidence which state that evidence is to be provided by the alleger. This rule is supported by explicit indications from the Qur`an and the Sunnah and the viewpoints of knowledgeable Fiqh scholars. A Fatwa in this regard has also been issued by the consolidated Shari'ah Supervisory Board of Al Baraka (Fatwa No. 14/6).

(14) See: The Book titled *"Al-Mudarabah Fi Kutub Al-Madhahib Al-Fiqhiyyah"*; and *"Al-Mawsu'ah Al-Kuwaytiyyah"*, the term Mudarabah.

(15) For more details see: *"Mabda` Al-Rida Fi Al-'Uqud"*, a comparative study [2: 1161] and its reliable references.

(16) See the Journal of the Academy, No. (5) 2/754-965.

(17) *"Fatawa Al-Ta`min"*, (P. 106).

- The basis of permissibility of the two types of reinsurance is the various evidences of permissibility of insurance and the Fatwas issued by the 2nd Seminar of Al Baraka (Fatwa No. 2/9), the 10th Seminar of Al Baraka (Fatwa No. 10/3/5), and the Fatwas of the Shari'ah Supervisory Boards of Dubai Islamic Bank, Faisal Islamic Bank, Kuwait Finance House, Qatar Islamic Bank and the Islamic Insurance Company.(18)
- The basis of the rulings relating to the Islamic insurance and reinsurance contract is the general principles of contracts in the Islamic Shari'ah such as forbiddance of cheating and fraud, and necessity of commitment to the time specified for implementation of contracts. In addition to these general principles, the insurance and reinsurance contracts are also based on specific rulings pertaining to insurance coverage indicated by the Resolutions and Fatwas issued by the Islamic Fiqh Academy of the Muslim World League, the Supreme Council of Ulema and the Shari'ah Supervisory Boards of Islamic banks and Islamic insurance companies.(19)
- The jurisdictions of the company are based on its articles of association, the documents which regulate the contract, the general principles of contracts and conditions, insurance practices and the Fatwas issued by Shari'ah Supervisory Boards.(20)
- The rulings that relate to regulation of the relationship between the company and the policyholders are based on the articles of association of the company which specify whether the contract is a fee-based agency or not, in addition to the Mudarabah contract regarding the reinsurance fund.
- The reinsurance coverage is based on the general texts affirming the Hadith which states: *"No harm and no reciprocal harm"*(21) and the general rules and principles of Islamic Fiqh which stipulate that coverage should be for the actual harms and not at all for making a wealth out of it. The reinsurance coverage is also governed by the donative nature of the Islamic reinsurance contract and the Fatwas issued by competent bodies such as

(18) *"Fatawa Al-Ta`min"*, (pp. 193 -206).
(19) Ibid.
(20) Ibid.
(21) This is a Hadith narrated by Malik in *"Al-Muwatta`"*, *Kitab Al-Aqdiyah*, (P. 464); *"Musnad Ahmad"* [1: 313 and 5: 527]; and Ibn Majah in his *"Hashiyah"* [2: 784].

Fatwa No. (3) of the 10th Seminar of Al Baraka and the Fatwas issued by the Shari'ah Supervisory Boards of Islamic banks and insurance companies.[22]

- The reinsurance surplus is based on the nature of the donation-based contract and what has been reported by Al-Bukhari about the practice of the Sahabah (companions of the Prophet, peace be upon him) in the case of Munahadah.[23]
- Permissibility of reinsurance with traditional reinsurance companies is based on the practical necessity arising from lack for Islamic reinsurance coverage and the dire public need which ranks up as necessity. Shari'ah recognition for necessity and dire public need is supported by a number of Texts in the Qur`an and the Sunnah. In this respect also a Fatwa has been issued by Faisal Islamic Bank of Sudan (Fatwa No. 5/3).

(22) *"Fatawa Al-Ta`min"*, (P. 153).

(23) Al-Bukhari stated in his *"Sahih"* with *"Fath Al-Bari"* [5: 12]), *Bab Al-Sharikah Fi Al-Ta'am Wa Al-Nihd Wa Al-'Urud* …because Muslims did not see any harm in Nihd, of which each of them used to eat a part, and he mentioned some Hadiths indicating what he had stated. In his Book *"Fath Al-Bari"* [5: 129], Ibn Hajar said: "Nihd is a practice in which all the people in companionship (on travel) provide the food. Each of them contributes the same quantity, yet some may consume more than others, even though, the remaining food is shared among them if they do not decide to keep it for another journey". This is exactly the reinsurance surplus, or quite similar to it.

Appendix (C)
Definitions

Reinsurance

The reinsurance contract is a contract according to which the insurance company transfers part of the risks of its insurance commitments to the reinsurance company. The insurance company, therefore, undertakes to pay to the reinsurance company part of the insurance premium paid by the participants, against commitment of the reinsurance company to bear part of the claims as per an agreement between the two parties. Islamic reinsurance has the distinctive characteristic of being based on the same principles of solidarity insurance, as indicated in Shari'ah Standard No. (26) on Islamic Insurance.

Special Need

Something that concerns a certain group of people, or the employees of a certain profession, as for instance the need for insurance for the employees in trade and industry sectors.

Public Need

Something that does not concern a certain group of people, or a certain country. Public need is the need that concerns everybody such as the need for Istisna'a.

Reinsurance Commission

A percentage amount of the contributions payable to the reinsurance company, paid to the Islamic insurance company for the efforts it exerts in mobilizing the reinsured insurance contracts.

Reinsurance Profit Commission

A percentage amount of the realized increase of revenues over expenses in the reinsurance agreement, paid to the Islamic insurance company as

a bonus for its excellent performance in managing the insurance operations in general, and the reinsured risks in particular.

Risk-Sharing Reinsurance

The process of sharing the insured risk between the Islamic insurance company and other insurance companies, either due to lack of sufficient insurance capacity for such risk, or because of regulatory requirements of risk sharing with regard to the magnitude of the risk in question.

Financial Gains of Islamic Insurance Companies from Traditional Reinsurance Companies

Reinsurance agreements between traditional reinsurance companies and Islamic insurance companies lead to the following financial gains to Islamic insurance companies:

- **Compensations for harms**; the reinsurance company bears a percentage of the risk cover -when the harm materializes- commensurate to the percentage of its share from insurance contributions.
- **Reinsurance commission**; which is a percentage amount of the contributions payable to the reinsurance company, paid to the Islamic insurance company for the efforts it exerts in mobilizing the reinsured insurance contracts.
- **Reinsurance profit commission**; which refers to a percentage amount of the realized increase of revenues (reinsurance contributions) over expenses in the reinsurance agreement (coverage), paid to the Islamic insurance company as a bonus for its excellent performance in managing the insurance operations in general and the reinsured risks in particular, and providing the best services to its customers. Such amount is paid in the form of an agreed upon percentage of the profits of the reinsurance company, as per the reinsurance agreement signed between the two companies. When the reinsurance company earns profits from the reinsurance contracts signed between the two companies, the reinsurance company pays the part of the profits agreed upon to the insurance company.

Appendix (D)
A Model Reinsurance Agreement Issued by Islamic Insurance Company – Jordan

1. The insurance company agrees with the reinsurance company on signing annual agreements with the aim of transferring part of the risk borne by the insurance company, to the reinsurance company.
2. The insurance company assumes beforehand commitment to transfer to the reinsurer the agreed upon part of the reinsured risk, and the reinsurer offers his acceptance. According to the conditions of the reinsurance agreements, the commitment of the reinsurer becomes valid since the time of signing the original insurance contract with the insurance client.
3. The insurance company assumes the commitment to pay the reinsurance contribution against the commitment of the reinsurer to pay its share of the claims, in addition to the commissions agreed upon for the contracts within the signed agreements. It can also be stipulated in the agreement that the insurance company shall obtain a share in the profits achieved by the reinsurer under the signed agreements.
4. The insurance company retains a percentage of the reinsurance contributions (40%) for fire agreements, general accidents and marine and health insurance, as a guarantee for honoring commitments from the side of the reinsurer. The amount thus retained is to be released after one year within the reinsurance agreement. During the period of its retention, the amount is to be invested with the Islamic Bank of Jordan through Shari'ah-acceptable modes of investment, and the reinsurer be given the part of the return agreed upon.
5. The return thus obtained by the reinsurer becomes part of his accounts, and is deductable from the commissions to be received from him, on the

basis of the fact that such amount is part of the cost of the reinsurance operation.

6. The reinsurer assumes the commitment to pay commission to the insurance company. Such commission is determined as a certain percentage of the reinsurance contributions. This amount does not represent a commission in the strict sense of the word. It is rather a contribution from the part of the reinsurer in the direct expenses borne by the insurance company, and which relate to the reinsured risks.
7. Such commissions enter into the accounts of policyholders as part of revenues in the account of the cooperative insurance fund.
8. The reinsurance agreement normally stipulates the right of the insurance company to obtain a specific percentage of the net profits achieved by the reinsurer under the reinsurance agreement.
9. Reinsurance profit commission is calculated at the end of the agreement period, and enters into the accounts of the policyholders as part of revenues.