

Foreword by AAOIFI Secretary General

Praise be to Allah, Lord of the Worlds, and Allah's blessings and peace be upon the noblest of Messengers, Prophet Muhammad, and upon his household and the companions, and those who follow their example with good conduct until the Day of Judgment.

It is of Allah's Grace that He bestowed on us the great religion of Islam, and made us the best Ummah raised up for mankind, one that is graced with the noblest of Prophets and Heavenly Books and religious codes. This comprehensive religious code encompassed and ordained all things beneficial to humankind in this life and in the Hereafter, and prohibited and banned all evils and vices, as made clear in the Noble Qur'an:

{“...Today, I have perfected your religion for you, and completed My favour upon you, and have granted Islam as a religion for you...”}.⁽¹⁾

One of the basic pillars of Islamic Faith is the belief in, and perseverance towards, the preservation of the well-being of people, and solid establishment of markets, trade, finances, and to distance all of which from prohibitions sanctioned in the Qur'an and the Sunnah; namely, Riba, Gharar, gambling, illegal appropriation of peoples' wealth, etc. This is also embodied in the keenness to observe prohibitions in the area of financial transactions and contracts, especially when it comes to honoring obligations, honesty and straightforwardness, mutual consent of contracting parties, and so on.

Based on this set of norms and values, the Islamic finance industry was established and has attained its current paramount status, as manifested in its growth at a pace greater than that of all other financial sectors. By so doing, it will hopefully be a boon for all peoples and nations of the world.

The cornerstone of the Islamic finance industry is, and will always be, the adherence to, and compliance with, the rules and principles of Shari'ah,

(1) [Al-Ma'idah (The Table): 3]

Foreword by Shari'ah Board's Chairman

outstanding accomplishment and for its unwavering efforts to support and facilitate the errand of the Board as it saved no means to arrange the Board's meetings, to iron out all obstacles and difficulties, and to follow up on the Board's resolutions and communicate them to all parties concerned. I do supplicate to Allah to amply reward all those who sincerely contributed towards this work, and I pray that Allah accept it and extend its benefits to people everywhere.

And praise be to Allah, first and foremost,

Muhammad Taqi Usmani

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.

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

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 insurgency.⁽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.

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) Wahabiah 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].

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).

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 Salam (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 come 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.

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].

- 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].

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.

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 one's 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

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 Dhimma (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 *"Tlam 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 from 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].

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

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 immovable 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'âlim Al-Sunan Li Al-Khattabi", [3: 136].

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).

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.



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.

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.

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

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.

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

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.

rent. Waqf can take place in this manner when the owner of the property does not deprive the lessee the right of subleasing.

4. Condition in Waqf

4/1 Conditions pertaining to the Waqf contract

4/1/1 The Waqif has the right to make his Waqf subject to all conditions which do not contradict with Shari'ah, and his conditions shall be as enforceable as Shari'ah conditions. The conditions of every Waqif must be understood with due consideration to the prevailing norms in his environment. Such conditions may include, for example, designating a certain superintendent for the Waqf and specifying his remuneration package. The designated superintendent could be an individual, a group of people, or an institution.

4/1/2 Regarding the form of the Waqf, the Waqif can make a condition that his debts should be settled from the Waqf income; after his death, or he may stipulate a condition that the income of his Waqf should go to him first as long as he is alive, then to his family, and finally to charitable purposes. Another condition of the Waqif could be that the Waqf income has to be spent first on any member of his family who becomes poor, and then on charity purposes.

4/1/3 A condition stipulated by the Waqif is invalid when it comprises an impermissible element, or when it violates the Shari'ah rulings on Waqf or cause harm to the Waqf property. In such cases the condition should be rejected and the Waqf shall remain valid. Examples of invalid conditions include: absolute forbiddance of *Istibdal* (exchange) of the Waqf, or forbiddance of the dismissal of the Waqf superintendent for any reason.

A condition stipulated by the Waqif also becomes invalid when it tends to hinder the interests of the Waqf, or jeopardize the process of benefiting from it. The example of this is a condition which requires starting - at all times - with distribution of the

Waqf income among the beneficiaries, even if the Waqf is in need of maintenance or renovation.

4/1/4 When the Waqif stipulates a condition that the Waqf should be benefited from through residence, the Waqf can be benefited from either in that manner, or through leasing, and vice versa.

5. Supervision and Management of Waqf

5/1 Controls on supervision and management of Waqf

Supervision and management of Waqf should observe the Shari'ah rulings on Waqf, then the conditions of the Waqif which do not contradict with Shari'ah or hinder the interests of the Waqf as perceived by the judiciary.

5/2 Tasks of the Waqf superintendent

The Waqf Superintendent should perform the following tasks, among others:

5/2/1 Management, maintenance and development of the Waqf.

5/2/2 Leasing of the assets or usufructs of the Waqf (through operating-lease contracts), and leasing of the Waqf lands.

5/2/3 Development of the Waqf properties either directly in Shari'ah-sanctioned methods of investment, or through Islamic financial institutions.

5/2/4 Increasing the Waqf money by investing it through Mudarabah and other similar forms.

5/2/5 Changing the operational form of the Waqf assets with the aim of maximizing the benefit that results to the Waqf and its beneficiaries. This may include, for instance, converting a residential building into a commercial building, or constructing buildings for rent on an agricultural land, provided that this would satisfy the demand of the people, generate more income for the Waqf and is done with the permission of the concerned authorities.

Appendix (B)

The Shari'ah Basis for the Standard

- The basis for considering Waqf (in principle) as a permissible and commendable practice (Mandub) is the Quranic Verses which instruct people to do good and spend on charitable causes, and also the Hadith (Prophetic tradition) which indicates: *"When a person dies his rightful deeds will stop except in three respects: An ongoing charity "Sadaqah Jariyah..."*. Waqf is considered to be the ongoing charity referred to in the Hadith, because the beneficiary does not own the Waqf asset, and accordingly, cannot dispose of it.

Moreover, there is the Hadith about the piece of land in Khybar which Umar donated as Waqf, when the Prophet (peace be upon him) advised him to do so.

Again, permissibility of Waqf is supported by the practice of the Sahabah (Prophet's Companions) like Uthman and Abu Talhah, in addition to Ijma' (consensus of Fuqaha). Waqf for charitable purposes can also be justified through Qiyas (analogical deduction) in comparison to Waqf for mosques.

Enforceability of the Waqf when it is indicated by a donor in his will, stems from the fact that according to Shari'ah a will should be executed, and its alteration or cancelation is strictly prohibited.

- Family Waqf (*Waqf ahli* or *Dhurri*) is permissible on the basis of the Hadith about Umar's Waqf, and because family Waqf is, in fact, a charitable Waqf since it will finally become so.
- Acceptance of the Waqf is not a condition for its validity when the beneficiary is not specified, because acceptance cannot be expected in this case. In case of a specific beneficiary, acceptance can be obtained from him even if implicitly when he keeps silent. The ruling that when the beneficiary rejects the Waqf his rights in the Waqf shall be dropped, whereas the Waqf should still remain valid, is based on the viewpoint of

Appendix (C)

Definitions

Waqf

Making a property invulnerable to any disposition, and donating its income for charitable causes. The term Waqf is also used to describe the property donated in this manner.

Waqf Ahli (Family Waqf)

The income of the donated assets or usufructs goes in this case to the Waqif himself, his children, a certain number of people, or a specific entity, for a specific period.

Waqf Khayri (Charitable Waqf)

The income of the donated assets or usufructs goes to charitable purposes without specifying a certain entity or a specific group of people as beneficiaries. The Waqf could be eternal or temporary.

Waqf Assets

The property used for generating income, while it cannot be disposed of.

Hikr or Tahkir

A lease contract according to which the Waqf land is kept in the hands of the tenant to build on it or cultivate it as long as he pays the normal rent for such property. *Hikr* or *Tahkir* can also take place through utilization of the Waqf land by leasing it for a specific purpose without specifying the period, and thus, the tenant obtains the right to stay, subject to a valid contract. A third form of *Hikr* or *Tahkir* can take place implicitly when the land is leased for a specific period, and then the tenant build on it or cultivate it after obtaining the permission for that. In this latter case, when the lease period expires, and the tenant wishes to stay and pay the rent equivalent to that of similar property, he can be allowed to do so, in order not to cause harm to

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.

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].

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 indispensable 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).

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).

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.

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

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].

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 Musaqaat works.
- The basis for the prohibition of sub-contracting in Musaqaat 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 Musaqaat 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 Musaqaat 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 Musaqaat is a contract that becomes binding upon commencement of work, so that

(6) Related by Muslim, Chapter on Musaqaat for part of the fruits and plants. Also, related by Abu Dawud, Chapter on Musaqaat.

- 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 Musaqa

- 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].



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Islamic Financial Services in SABB Bank

Banks have become very important for all people and businesses all over the world. They are the backbone of any financial or economic system at both the local and international levels. Due to their importance, banks are highly regulated by most countries. This is because the country's economy depends totally on the activities of its banks. The stronger and more effective the banks are, the more likely it is that the economic and financial systems may be more stable and effective. All this explains why the countries normally pay much attention to monitoring and regulating systems for their banks and financial institutions as a means to maintain and increase the efficiency of their banking and financial operations.

The increasing number of economic and financial activities and transactions in the world in general and in the Islamic community in particular highlights the need for more Islamic banking services. This is why the Islamic banks, in a highly competing market, do their best to provide their customers with high-quality Islamic banking services that help them manage their financial transactions in a Shariah-compliant way.

The Saudi British Bank (SABB) is one of the banks that offer such Islamic banking services. In 2001, the Bank opened a new section, Amanah, to provide services and products compatible with Shariah standards under the supervision of an independent Shariah Committee. In 2012, the name of this section has been changed to "Islamic Financial Services".