

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 party 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 than 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.

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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).

