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TKBB

Participation Finance Standards No: 7

MUSHARAKAH STANDARD

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Content of the Standard

This standard contains the jurisprudential provisions that should be observed in transactions based on the musharakah (capital partnership/profit-loss partnership) contract applied in participation banking and the justifications of these provisions. Diminishing musharakah (musharakah al-mutanaqisah), which has some particular provisions, is not addressed in this standard.

PROVISIONS

I. Musharakah Contract

Definition
Article 1- Musharakah is a type of partnership established between two or more persons, in which all parties contribute capital and share the profit and bear the loss.

II. General Provisions on Musharakah

Establishment of the Contract
Article 2- The musharakah contract is established by the declaration of will of the parties. The subject and purpose of the contract cannot be contrary to the principles and standards of participation finance

Nature of the Relationship between the Partners
Article 3- The relationship between the partners in the musharakah contract is subject to the provisions of proxy.

Parties to the Agreement
Article 4- The parties to the musharakah may be natural persons or legal entities.

Duration of the Contract
Article 5- A musharakah contract may be established for a definite period of time, or it may be concluded without mentioning a definite period of time.

Binding Nature of the Terms of the Contract
Article 6- Provided that it is in accordance with the structure of the musharakah agreement, any mutually agreed terms and conditions that are not contrary to the principles and standards of participation finance are binding for the parties.

Decisions of the Partnership
Article 7- It is essential that decisions are taken by unanimous vote of all shareholders. However, it may be agreed at the establishment of the agreement or later on that decisions may be taken by a majority of votes. The majority is determined according to the number of partners.

III. Provisions on Musharakah Capital

Determination of Capital as Money
Article 8- In a musharakah partnership, it is essential that the capital shall be money, which is determined in terms of type and amount. It may also be agreed by the parties that an asset or value other than money shall be capital after its monetisation at the market price or after the collection of a receivable.

Consistence of Capital in Different Currencies
Article 9- In the event that the capital consists of different currencies, one of these currencies shall be selected by the parties and the foundation capital and the

participation shares of the parties in the capital shall be determined based on the exchange rates on the day the funds are deposited into the partnership account.

Participation Share Rates
Article 10- It is not required that the partners participation shares in the capital to be equal.

Payment of Participation Share
Article 11- The partners shall pay the agreed participation shares in accordance with the terms of the agreement before the company starts its operations.

Adjustment of Participation Share Rates
Article 12- The participation share rates of the partners in the capital may be increased or decreased. In this case, profit sharing ratios may be re-determined. However, loss-sharing ratios cannot be different from the participation share rates in the capital.

Transfer of Participation Share
Article 13- Each partner may transfer some or all of their participation share in the capital to other partners or to third parties. The consent of all partners is required for the transfer to third parties.

Risk on Capital
Article 14- The risk on the capital belongs to all partners. The capital contributed by the partners cannot be guaranteed in terms of loss by any partner or the manager, if any.

IV. Provisions on Profit and Loss in Musharakah

Determination of Profit Sharing Ratios at Establishment
Article 15- The profit sharing ratio is explicitly determined by the agreement of all partners at the time of the establishment of the musharakah contract. This sharing ratio may be proportional to the participation shares of the partners or it may be a different ratio.

Adjustment of Profit Sharing Ratios
Article 16- The profit sharing ratios determined in the agreement may be rearranged with the mutual consent of the parties as long as the partnership agreement remains in effect.

Prohibition of Profit Guarantee and Right to Share in Profit
Article 17- No profit guarantee may be given in favour of any partner and no partner may be deprived of any profit share.

Excess over Expected Profit
Article 18- In a musharakah, it may be agreed that any profit exceeding a certain expected amount, the profit above this amount shall belong to one or more of the partners or to the employees of the company.

Participation in Loss
Article 19- The partners shall participate in the losses in proportion to their shares in the capital. The contrary cannot be agreed upon.

Manager's Responsibility
Article 20- The managing partner or the manager appointed from outside, if any, is liable to compensate the damages incurred due to his behaviour contrary to the contract or his fault. Any condition stipulating that the manager will be liable for damages in the absence of any breach of contract or fault of the manager is invalid.

Advance Payment
Article 21- It may be agreed that payments may be made to the partners in the form of advances.

V. Provisions on the Management of the Musharakah

Management of the Partnership
Article 22- Management may be carried out by one, several or all of the partners, or persons other than the partners may be appointed as managers.

Managing Partner's Remuneration
Article 23- In the event that the management of the company is undertaken by one of the partners, with the consent of all shareholders, the share of this shareholder in the profit may be increased and a certain remuneration may be allocated to him.

Expenses
Article 24- Expenses related to the operation of the partnership capital shall be met from the assets of the partnership. A condition stipulating that such expenses shall be borne by one or more of the partners may not be agreed.

VI. Provisions Regarding Guarantees in Musharakah

Warranty Prohibition and Guarantee
Article 25- The participation shares of the partners in the capital of the partnership cannot be guaranteed by the partnership against the losses to be incurred or no collateral can be given for this purpose. However, in order to ensure the indemnification of the damages caused by the partners due to fault or breach of the terms of the contract and to be used exclusively in these cases, a guarantee may be taken from them.

VII. Provisions on the Termination of the Musharakah

Termination of Partnership by Itself
Article 26- Musharakah partnership shall automatically terminate in the event of loss or destruction of the entire capital, realisation of a condition precedent in the agreement, expiry of a certain period of time if the agreement stipulates a certain period of time, realisation or impossibility of realisation of the purpose of the partnership, loss of legal personality of the legal entity partner or partners, leaving only one partner.

Effects of Death and Loss of Legal Capacity on the Partnership

Article 27- In the event of the death or loss of capacity of one of the partners, the partnership shall continue if the heirs of the deceased partner or the legal representative to be appointed to the partner who has lost his capacity to act so request and the other partners accept. In the event that the heirs or the legal representative does not wish or the partners do not accept, the two-partner partnership shall be terminated; the multi-partner partnership shall continue with the remaining partners.

Termination of Partnership with Termination Notice

Article 28- In a two-partner musharakah, each of the partners may terminate the musharakah at any time. The partner who terminates the contract is obliged to compensate the actual damages incurred by the other partners due to the termination. In the event that one of the partners is at fault or has clearly violated the contract, the partner who terminates the contract on these grounds is not obliged to compensate the damages. The right to claim the damages incurred is reserved. In a musharakah where the number of partners is more than two, the termination notice of one partner does not terminate the partnership.

Liquidation

Article 29- The liquidation of the partnership may be by way of real liquidation to be carried out by sharing the cash assets, actual sale of the assets in kind or judicial liquidation to be carried out by determining and sharing their fair market value.

JUSTIFICATIONS

I. The Musharakah Contract and the Justifications for its Definition

In the dictionary, the word musharakah, which means partnership, participation, or sharing, is generally used in classical fiqh literature with its literal meaning and does not denote a specific type of partnership. Contemporary Islamic jurists use musharakah in participatory finance transactions, particularly to refer to a type of contractual company known as a "capital company (shirkah al-Amwâl)," specifically the inân type, and sometimes describe it as a "profit-loss partnership."

II. Justifications of the General Provisions on Musharakah

Musharakah is a partnership agreement in which capitals are combined for commercial purposes. Through this agreement, each partner obtains the authority to act and conduct legal transactions on behalf of the others, and the rights, obligations, and liabilities arising from these transactions are also established by this agreement. As a general rule, a person cannot possess another's property, grant rights over it, or impose obligations on it without their consent. The Qur'an states, "O you who believe! Do not consume one another's wealth unjustly, but only through trade by mutual consent" (Nisā, 4/29), clearly indicating that the legitimacy of acquiring rights over or disposing of another's property depends on obtaining their consent. Therefore, Islamic jurists have considered consent as the fundamental criterion for the validity of legal transactions. Consent is an internal, hidden state that cannot be known or affect legal relations unless expressed. The concrete indicator of consent is the parties' declaration of their agreement to the legal transaction. Since a declaration, absent any vitiating factors, is the most tangible evidence of consent, it has been universally accepted by Islamic jurists as the foundational element of legal transactions. In unilateral legal transactions, a single person's declaration of intent is sufficient, whereas in bilateral or multilateral transactions, all parties must express mutually consistent declarations of intent. This principle is articulated in the Mecelle as follows: "The basis of a contract of partnership consists of offer and acceptance, express and implied" (Article 1330).

In a musharakah, since each partner's profit- or loss-generating activities affect the profit or loss of the other partners, the relationship between partners is based on the principle of agency (wakalah).

The term "person" refers to entities capable of holding rights and incurring obligations. Legal persons, like natural persons with legal capacity, can engage in legal transactions, acquire rights, and undertake obligations. Therefore, legal persons, just like natural persons, can be parties to a musharakah agreement. Funds, pools, and similar asset collectives recognized by relevant legislation as having limited legal personality for specific transactions can also be parties to such agreements.

A musharakah agreement may be established for a specified duration. Unless the partners decide otherwise, the agreement terminates upon the expiration of the specified term. A musharakah agreement can also be formed without specifying a duration. In such cases, any partner may request to withdraw from the partnership at any time.

According to Islamic law, since a partnership contract is non-binding (ghayr lâzım), partners have the right to terminate the agreement whenever they wish.

In commercial and financial transactions, as long as they do not contradict the principles and standards of Islamic finance, the parties may include any mutually agreed-upon terms in the musharakah agreement. This is because the principle of contractual freedom in Islamic law allows the parties to determine the subject, content, and conditions of the contract based on their mutual consent and free will. Therefore, as long as they do not violate Islamic finance principles and standards, the partners are obligated to adhere to the conditions they have mutually agreed upon in the contract. This is supported by the prophetic sayings: "Muslims are bound by the conditions they set among themselves" (Bukhârî, "Ijâra," 14) and "A settlement is permissible among Muslims, except one that makes lawful what is forbidden or forbids what is lawful" (Abû Dâwûd, "Aqdiya," 12; Ibn Mâja, "Ahkâm," 24), which indicate the obligation to comply with agreed-upon conditions in such cases.

It is a requirement of the partnership that any decision affecting the property rights of each partner must be taken unanimously. In addition to this basic principle, there is no obstacle to taking decisions by majority vote, since the musharakah includes an authorisation for each partner to represent the others and accordingly allows each partner to make transactions that give rise to rights and obligations on behalf of the partnership. At this point, if all of the shareholders consent to the adoption of such resolutions by majority vote, the unanimity requirement is eliminated.

III. Justifications of the Provisions on Musharakah Capital

In order to clearly determine the proportions of the capital contributed by the partners and the profit or loss that may occur in the future, it is essential that the capital be money, which is determined in terms of type and amount. As a matter of fact, in the fiqh literature, the capitalisation of an asset or value other than money in such capital partnerships is not considered permissible since it would lead to uncertainty in the shares in the partnership and in the determination of the profit later on (al-Sarahsī, *al-Mabsūt*, Beirut, 1993, XI, 159, 160; al-Qāsānī, *al-Bada'i al-sanāi*', Beirut, 1986, VI, 59). On the other hand, when an asset other than money is intended to be capitalised, its monetary value must be clearly revealed through the sale of this asset. Likewise, if the capital of one of the partners is money and the other is a non-monetary asset or value, such a partnership will not be valid since there will be uncertainty in the shares of the partners in the capital. The issue of collecting the receivables and capitalising them is also subject to the above conditions.

In the case of establishing a partnership in different currencies, the participation shares on the partnership capital are determined in one of these currencies and the partners become shareholders on the establishment capital. In the event that the partners put in different currencies, in order to determine their shares in the company capital and taking into consideration that serious fluctuations in exchange rate differences that may occur in the future may cause losses and conflicts between the parties, it has been adopted as a rule that the parties designate a currency and their shares in the capital are determined based on the value of these currencies on the day they are put into the partnership

account. As a result of this determination, the goods to be purchased by using the partnership capital will not be purchased from the money owned separately by the partners, but from the money mixed as the capital of the partnership; profit and loss will be shared accordingly.

The equality of the partners' shares in the capital is a condition of the mufāwada partnership, which is one of the establishment types of contractual companies. Mushārakah, on the other hand, is a capital partnership established in the inān type (shirkah al-amwal) in which the partners are not guarantors of each other, but only agents. It is not necessary for the capital of the partners to be equal in inān type partnerships (al-Qāsānī, *Bedā'u's-sanā'i*', VI, 62; Ibn Rushd*, Bidāyah al-mujtahid*, Cairo, 2004, IV, 36; Mecelle, art. 1365).

It is important that the capital pledged by each shareholder is delivered in advance so that the company can start its activities as soon as possible, so that it does not cause disputes that may arise from the late delivery of the capital, and so that the profit and loss accounting can be kept fairly. As a matter of fact, in Islamic law, it is considered necessary to bring the capital at the latest when the commercial activity is to be started (al-Qāsānī, *Bedā'u's-sanā'i*', VI, 60).

Since it is subject to the provisions of inân-type companies, in musharakah, the participation shares in the capital can be increased, provided that the mutual agreement of the partners is obtained. Many changes and improvements to be made in the conditions of the partnership throughout the musharakah contract can be made with the mutual agreement of the parties, provided that they do not contradict the principles of participation finance. The parties may bring additional capital to the partnership in line with the ordinary course of commercial life. Similarly, it is also possible to reduce the participation shares in the capital with the unanimous vote of all partners. If some of the capital is withdrawn, the musharakah continues on the remaining capital amount. In both cases, the partners have the right to redetermine the profit sharing rate by consensus (al-Sarahsī, *al-Mabsūt*, XI, 157). This is because in musharakah, the parties can determine the profit rates by mutual agreement during the contract, different from their shares in the capital, or they can rearrange them according to the increase or decrease in their shares in the capital. Loss sharing, on the other hand, should be in proportion to the capital in any case, and for this reason, it should be arranged in proportion to the new participation shares in the capital (al-Qāsānī, *Bedā'u's-sanā'i'*, VI, 62). It is narrated from some of the Companions, especially 'Ali, and the scholars of the tabi'in that *"Profit is shared in the proportion that the partners agree upon. The loss is according to the proportion of the capital"* (Ibn Abi Shaybah, *al-Musannaf*, Riyadh, 1409, IV, 267-268; Ibn Hazm*, al-Muhallâ*, Beirut, n.d., VI, 417; Tahānawî*, I'lâ al-Sunan*, Karachi, 1415, XIII, 80).

The share of the partnership may be transferred either to one of the partners or to a third party. In case the share is transferred to a third party, a new person will enter the partnership, and it may be considered important for this new person to be compatible with the other partners and the partnership structure in terms of the culture of doing business together. For this reason, the inclusion of a third party in the partnership is subject to the approval of the other shareholders.

According to Islamic law the legitimacy of profit depends on either capital or labour or the assumption of responsibility for damage (damān). For this reason, in transactions where the responsibility for damage must be assumed, the profit obtained without assuming this responsibility is not legitimate. As a matter of fact, the Prophet (pbuh) said*, "Profit is in return for responsibility"* (Ibn Māja, "Ticārāt", 43) and based on this, the general fiqh rules of *" Disadvantage is an obligation accompanying enjoyment.*" (Mecelle, Art. 87) and *" The burden is in proportion to the benefit and the benefit to the burden.*" (Mecelle, Art. 88) were determined. Therefore, it is not permissible for one of the partners or the manager, if any, to assume all or part of the loss that will occur, since it means guaranteeing the capital for the other partners. This is because it is an unanimous judgement of the jurists that the losses incurred should be covered in proportion to the share of the partners in the capital (Ibn al-Munzir, *Kitab al-Ijma*, Riyadh, 2004, p. 100; Ibn Hazm*, Merâtib al-ijma*, Beirut n.d., p. 91).

IV. Justifications of the Provisions on Profit and Loss in Musharakah

In a musharakah, profit sharing should be determined proportionally, not as a fixed amount. Situations that lead to ambiguity in the profit-sharing ratio render the partnership invalid (fasid). Therefore, conditions that would give rise to such situations cannot be stipulated. Profit-sharing ratios must be established before any profit is realized. This is because both the failure to determine the profit proportionally and determining it after the partnership has commenced and profits have been earned create uncertainties regarding the purpose and operation of the contract, thereby causing the contract to be invalid (fasid) (Mecelle, Article 1336).

Profit-sharing ratios can be based on the amount of capital contributed by the partners. The responsibility of one or more partners to manage the capital does not preclude this (Mecelle, Articles 1349, 1370). As long as it adheres to Islamic law, profit-sharing ratios among partners may be set differently from the proportions of their capital contributions (Mecelle, Article 1349).

Musharakah, being a contract based on cooperation, is established on the basis of mutual consent and agreement between the parties. In this context, profit-sharing ratios exhibit flexibility in accordance with the terms determined by the parties and can be periodically renegotiated. This flexibility enables the fair distribution of profits in line with the dynamic nature of business activities. Indeed, since musharakah is a contract aimed at profit-sharing through capital partnership, it is fundamental for the partners to determine the profit-sharing ratios during the contract. However, there is no jurisprudential obstacle to changing these ratios during the partnership term with the mutual consent and approval of the partners. If one of the parties stipulates conditions regarding the adjustability of these ratios at the time of the contract, it does not harm the profit-sharing nature of this partnership, nor does it lead to any legal disputes between the parties.

The ability to periodically re-determine the profit rate allows for a profit sharing arrangement that is more appropriate to the needs of the partnership and the objectives of the parties. In addition, periodic re-determination of profit ratios supports business continuity and ensures that the relationship between the parties is based on long-term solid foundations.

Stipulating that any partner receives a fixed, non-proportional amount of profit renders the musharakah invalid (fasid). According to the principle of justice, no partner can be deprived of their share of the profit. In commercial activities, just as there is a possibility of earning a profit, there is also the possibility of not earning a profit or incurring a loss. Given these conditions, including a clause in the contract that guarantees a fixed profit to one or more capital contributors contradicts the principle of profit-sharing, which is the essence of musharakah. This is because it is not certain that the fixed amount stipulated in the agreement will be achieved. Therefore, stipulating in the contract that one partner will receive a fixed profit is not in accordance with the essence of musharakah (Mecelle, Article 1337). Furthermore, if a partner demands a fixed profit amount in addition to their capital at the end of the contract, it transforms the musharakah into an interest-bearing transaction. As stated, it cannot be known in advance whether a profit will be realized. Providing a guaranteed payment to one of the contract's parties is not in line with the requirements of the contract. Determining the profit proportionally, however, resolves this issue.

However, stipulating that any profit exceeding a certain amount belongs to one of the partners does not equate to one partner receiving a fixed amount of profit. This is because, in such a case, a fixed profit is not predetermined from the outset. Instead, a transaction is carried out concerning the profit that arises if a profit is realized. This transaction is not contrary to the rules of stipulating conditions in a contract according to Islamic law (Ali el-Hafîf, Ahkâmu'l-muâmelât, Cairo, 1429/2008, 494; Decision No. 123 (13/5) of the Islamic Fiqh Academy). When a fixed fee is stipulated, a partner can claim that amount under all circumstances. However, in the case of profit exceeding a certain amount, if it is stipulated in favor of one or more partners, such a condition takes on the nature of an incentive bonus. This type of profit does not render the profit-sharing arrangement uncertain and, therefore, does not invalidate the partnership. Consequently, this situation is distinct from stipulating a fixed profit in favor of one partner from the beginning. It can also be agreed that the portion of profit exceeding the expected amount belongs to the company's employees as a means of incentivizing and rewarding them.

In musharakah, it is an established rule that participation in losses is based on the partners' shares in the capital. Conditions that result in some partners not bearing any losses or bearing them only up to a certain percentage are contrary to this rule. Such conditions in the partnership contract, aimed at reducing losses below the capital amount, are invalid, and the partners must share the existing losses according to their capital shares.

The requirement to distribute losses according to the capital shares and the impermissibility of stipulating otherwise stem from narrations, as mentioned above, which stipulate that profits should be shared in the agreed-upon ratio among the partners, while losses should be shared according to the capital ratio. On the other hand, if one partner seeks a share in profits without bearing any losses, this amounts to demanding an unearned excess, which causes the contract to deviate from a partnership and resemble an interest-based transaction.

Although it is not permissible to stipulate the bearing of losses as a condition, there is no objection to some partners voluntarily covering part or all of the losses as a form of donation (tabarru), provided it is not stipulated in advance, promised, or established as a customary practice. However, it is not permissible to agree upon this in the contract.

In a musharakah contract, the partner managing the partnership, or any appointed manager, acts as an agent for the other partners in operating the capital, as they manage the partnership's capital with their permission. The agent's responsibility is to exercise due care in preserving and operating the capital, which is held in trust. Therefore, if the manager fails to exercise due care in preserving or operating the partnership's capital or neglects to fulfill obligations arising from the contract, they are deemed at fault and are liable for the resulting losses.

Imposing conditions that hold the manager solely responsible for covering losses, even if no fault is found, is invalid as it leads to unjust enrichment, and in such cases, the loss must be distributed according to the capital contribution. Islamic law prohibits abusing authority and rights to cause harm to others and, when such a situation arises, provides measures and precautions to address the damages and grievances suffered by others. The principle in Article 20 of the Mecelle, "Harm shall be eliminated," is aimed at this legal objective. In line with this principle, the relevant partner or manager is directly responsible for losses arising from transactions such as donations, waiving receivables, or acquittance, which constitute gratuitous enrichment and put the capital at risk. The burden of proof regarding whether the musharakah manager complied with the contract terms and whether they were at fault can be determined by the parties in the contract.

The final profit-loss calculation is made upon the liquidation of the partnership. However, in cases where the contract is established for a long term, making advance payments to meet the partners' needs does not conflict with the provisions of musharakah. In this case, the advance received is considered akin to a qard (loan) contract and is deducted from the partner's profit or capital, depending on whether a profit or loss is determined in interim calculations or the final liquidation. Decisions regarding such advance payments to partners are evaluated under Article 7 of this Standard, whether they require unanimous or majority consent.

V. Reasons for the Provisions on the Management of the Musharakah

The management of the partnership is a right held by all partners who have a share in the capital. Therefore, each partner can actively participate in the company's management if they wish. However, there is no fiqh-related objection to the partners delegating the management of the partnership to one or more among themselves through a contract or a decision, or appointing a third party outside the partners as a manager.

In musharakah, the default is that management is undertaken by all partners. However, one or a few partners may assume management with the consent of the others. In this case, they carry out activities on their own behalf as principals and on behalf of their partners as agents. The managing partner may fulfill their agency responsibilities without any compensation, or, according to the majority of Islamic jurists, they may do so for an additional profit share determined with the consent of the parties (Zayla'i, Tabyin al-

Haqa'iq, Cairo, 1314, III, 318; Ruhaybani, Matalib Uli'n-Nuha fi Sharh Ghayat al-Muntaha, n.p., 1994, III, 498).

The majority of Islamic jurists do not consider it permissible for the managing partner to receive a fixed fee for management duties beyond the options mentioned above. This is because such a practice contradicts the essence of the mushārakah contract, which is based on the principle of profit-and-loss sharing. In this case, the managing partner simultaneously assumes the roles of both employer and employee, leading to unfair outcomes for the other partner(s) in situations where no profit is generated or the profit is less than the fixed fee set for the managing partner. However, in cases where the company's operations require outsourcing services or hiring paid staff, it is permissible, with the consent of the other partners, for one of the partners to dedicate their efforts to these tasks and receive a fixed remuneration in return.

On the other hand, according to the Zahiris and some Hanbalis (Ibn Hazm, al-Muhallā, Beirut, 1984, VI, 415; Buhūtī, Sharh Muntaha al-Irādāt, Beirut, 1993, II, 213), it is permissible for one of the partners who undertakes management to receive a fixed fee or salary. In this case, the parties enter into a new contract separate from the mushārakah agreement, whereby the managing partner is entitled to a share of the profit arising from the capital and, additionally, to a fixed fee for the managerial duties performed under this new contract. Otherwise, an unfair situation would arise for the managing partner, as their efforts would go uncompensated in cases where the company incurs losses or does not generate sufficient profit. It is generally accepted that both of these views can be considered viable options.

The acceptance of the managing partner's entitlement to a fixed fee for managerial duties as a second option in the standard is based on several justifications. Here, the fee received by the managing partner is not a profit derived from their capital but an income arising from their managerial activities. On the other hand, it is contrary to the ordinary course of life for the managing partner to settle for only the fixed fee, exhibit poor management, and risk losing their own capital invested in the company. At this point, criticisms raised by those holding the opposing view—such as the claim that the profit from the mushārakah would be distributed in favor of a single person, that a managing partner receiving a fixed fee or salary would not exert sufficient effort to ensure the company's profitability, that other partners would be unable to gain any profit if the company's profit remains very low, and that the resulting situation would be incompatible with the principle of partnership—are open to debate.

Furthermore, the objection that if a fixed fee is given to the managing partner, the roles of worker and employer would converge in the same person does not have a strong basis. Indeed, partners can always be parties to rights and obligations arising from different contracts related to the acquisition of goods and services. For instance, according to the Hanafi, Maliki, and in one narration, the Hanbali schools, it is permissible in a mudâraba partnership for one of the parties to purchase the partnership's assets. In such a case, it is not assumed that each partner is both a buyer and a seller; rather, it is stated that each partner is considered a third party in relation to the partnership's assets (Kāsānī, Badāʾiʻu's-sanāʾiʻ, VI, 101; Ibn Qudāma, al-Mughnī, Riyadh, 1417/1997, VII, 168).

Therefore, there is no obstacle in musharakah to the partners entering into a separate contract to which they are parties.

It cannot be assumed that the managing partner, due to the regular fee they receive, is gradually and indirectly recovering their capital in the partnership, nor can it be said that they will eventually hold a share without cost or that they will not bear losses proportionate to their capital in the event of a loss. This is because the profit and loss arising from the managing partner's capital in the partnership are a result of the musharakah contract, whereas their undertaking of the management duties, which are to be performed by the other partner(s), and receiving a fee for this is the result of a separate and independent contract. Therefore, the rights and responsibilities arising from these two contracts are independent of each other.

The expenses incurred in a musharakah are mandatory financial obligations arising from the commercial activities of the individuals and must be covered. For this reason, the financial expenses should be met from the partnership's assets, and each partner must bear financial responsibility proportionate to their contribution share.

VI. Justifications of the Provisions on the Guarantees Related to Musharakah

In a musharakah, a demand to guarantee the partnership capital is incompatible with the principle of partnership. This is because an individual must bear potential losses in proportion to their share of the partnership capital. This is a natural consequence of the rights and obligations arising from the partnership. However, a guarantee may be demanded from the partners, and if applicable, from the managing partner, for the compensation of losses resulting from intentional acts, negligence, or actions contrary to the terms of the contract.

VII. Reasons for the Provisions on the Termination of the Musharakah

For the continuation of a musharakah partnership, certain fundamental conditions must be met. The violation of these conditions or the occurrence of specific circumstances may lead to the termination of the partnership. For instance, the complete loss of capital eliminates the raison d'être of the partnership, making it impossible for the musharakah partnership to continue.

In partnerships consisting of two individuals, the death of one partner, in classical literature, generally terminates the musharakah. However, considering contemporary needs and the necessity to ensure the continuity of companies, it has been accepted that death does not directly dissolve the partnership agreement. In such cases, it is foreseen that the partnership may continue if the heirs of the deceased and the remaining partner reach an agreement. For the same reasons, in partnerships involving three or more individuals, only the partnership of the deceased individual terminates. Nevertheless, the heirs of the deceased may continue in the partnership if they consent and the other partners also agree.

Since the musharakah can be established with a specified duration, the musharakah partnership terminates when the duration specified in the contract expires. Similarly, if

the musharakah is subject to a terminating condition, the contract ends upon the realization of that condition.

Musharakah is a non-binding contract that grants the parties the right to terminate the agreement whenever they wish. However, this does not permit the arbitrary or harmful exercise of the right to termination. If the contract is terminated at a time unsuitable for the nature of the undertaking, the party initiating the termination is obligated to compensate the other party for any actual losses incurred. Article 19 of the Mecelle, with the principle of "There is no harm, nor reciprocating harm," stipulates that harmful actions and wrongful acts are prohibited, and legal rights and powers cannot be exercised without limits. Accordingly, in a musharakah contract, the parties cannot use their right to termination in a manner that causes harm to their partners. The requirement to remedy any actual losses arising from termination is also a consequence of the Mecelle's rule stated in Article 20, "Harm shall be removed."

The liquidation of a partnership can be carried out through actual or constructive liquidation methods. Actual liquidation, also known in the literature as true monetization, involves converting the partnership's tangible assets into cash by selling them. The cash obtained through this method is distributed among the partners. On the other hand, in the method known as constructive liquidation or constructive monetization, the current value of the company's existing assets is determined without physically selling them, and their monetary equivalents are calculated based on these values and shared among the partners.