

# Partnership Agreement



**DARUL IFTAA MAHMUDIYYAH**  
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## **PARTNERSHIP CONTRACT**

THIS PARTNERSHIP AGREEMENT is made this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_, by and between the following individuals:

Party 1:

Name: \_\_\_\_\_

Address: \_\_\_\_\_

City/State/code: \_\_\_\_\_

Phone: \_\_\_\_\_

Party 2:

Name: \_\_\_\_\_

Address: \_\_\_\_\_

City/State/code: \_\_\_\_\_

Phone: \_\_\_\_\_

1. **Nature of Business.** The partners listed above hereby agree that they shall be considered partners in business for the following purpose:

\_\_\_\_\_  
\_\_\_\_\_

2. **Name.** The partnership shall be conducted under the name of \_\_\_\_\_ and shall maintain offices at (STREET ADDRESS),(CITY,STATE,CODE).

3. **Day-To-Day Operation.** The partners shall provide their full-time services and efforts on behalf of the partnership. Each partner shall have equal rights to manage and control the partnership and its business. Should there be differences between the partners concerning ordinary business matters, a decision shall be made by a

unanimous vote. It is understood that the partners may elect one of the partners to conduct the day-to-day business of the partnership.

4. **Capital Contribution.** The capital contribution of each partner to the partnership shall consist of the following properties, services, or cash which each partner agrees to contribute:

Name Of Partner	Capital Contribution	Agreed-Upon Cash	% Share

5. **Profit and Loss.** The profit sharing ratio may either be proportionate to the capital contribution or based on a ratio percentage which is agreed upon by all the partners, irrespective of their capital contribution, and the loss should be shared according to the proportion of the capital contribution.
6. **Withdrawal/Death of partner.** In the event that a partner withdraws or retires from the partnership for any reason, including death, the remaining partners may continue to operate the partnership using the same name. A withdrawing partner shall be obliged to give \_\_\_\_ days prior notice of his intention to withdraw or retire.
7. **Term/Termination.** The term of this Agreement shall be for a period of \_\_\_\_ years, unless the partners mutually agree in writing to a shorter period. Should the partnership be terminated by unanimous vote, the assets and cash of the partnership shall be used to pay all creditors, with the remaining amount to be distributed to the partners according to their proportionate share.

8. **Disputes.** Any dispute arising from or in connection with this contract shall be finally resolved in accordance with the standard conditions of Mediation/Arbitration of the Darul Iftaa \_\_\_\_\_ by an arbitrator appointed by the Darul Iftaa.

WHEREFORE, we, the undersigned, agree to this partnership agreement, by signing two copies (one for each partner).

**PARTNER 1**

**PARTNER 2**

\_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Date of signature)

\_\_\_\_\_  
(Date of signature)

# MUSHAARAKAH CONTRACT

## SECTION ONE: DEFINITION

Mushaarakah is a word of Arabic origin which literally means sharing. In the context of business and trade it means a joint enterprise in which all the partners share the profit or loss of the joint venture<sup>1</sup>.

Mushaarakah is a term frequently referred to in the context of Islamic modes of financing. The implication of this term is more limited than the term Shirkat which is more commonly used in Islamic jurisprudence. For the purpose of clarifying the basic concepts, it will be pertinent at the outset to explain the meaning of each term, in order to distinguish one from the other<sup>2</sup>.

Shirkah means sharing and in the terminology of Islamic jurisprudence, it has been divided into two kinds:

1. Shirkat-al-Milk: a joint ownership of two or more persons in a particular property<sup>3</sup>.
2. Shirkat –al-Aqd: a partnership effected by mutual contract<sup>4</sup>.

Shirkat –al-Aqd is further divided into three kinds<sup>5</sup>:

<sup>1</sup> فتاوى الشامى ج 4 ص 299 ايج ايم سعيد ( عِبَارَةٌ عَنْ عَقْدِ بَيْنِ الْمُتَشَارِكِينَ فِي الْأَصْلِ وَالرَّيْحِ )

<sup>2</sup> Introduction to Islamic finance, pg 19

<sup>3</sup> ( وَهِيَ ضَرْبَانِ : شَرِكَةٌ مِلْكٍ ، وَهِيَ أَنْ يَمْلِكَ مُتَعَدَّدٌ ) ائْتَانِ فَأَكْثَرُ ( عَيْنًا ) أَوْ حِفْظًا كَتُّوبِ هَبَّةِ الرَّيْحِ فِي دَارِهِمَا فَإِنَّهُمَا شَرِيكَانِ فِي الْحِفْظِ فَهُسْتَابِيٌّ ( أَوْ دَيْنًا ) عَلَى مَا هُوَ الْحَقُّ ( بِإِزْثٍ أَوْ بَيْعٍ أَوْ غَيْرِهِمَا ) فتاوى الشامى ج 4 ص 299 ايج ايم سعيد

<sup>4</sup> فتاوى الشامى ج 4 ص 305 ايج ايم سعيد وَشَرِكَةٌ عَقْدٍ أَيْ وَاقِعَةٌ بِسَبَبِ الْعَقْدِ قَابِلَةٌ لِلْوَكَالَةِ

<sup>5</sup> فشركة العقود أنواع ثلاثة شركة بالاموال وشركة بالاعمال وتسمى شركة الابدان وشركة الصانع وشركة بالتقبل وشركة بالوجوه (أما) الاول وهو الشركة بالاموال فهو أن يشترك اثنان في رأس مال فيقولان اشتركتنا فيه على أن نشترى ونبيع معا أو شتى أو أطلقا على أن ما رزق الله عزوجل من ربح فهو بيننا على شرط كذا أو يقول أحدهما ذلك ويقول الآخر نعم(وأما) الشركة بالاعمال فهو أن يشتركا على عمل من الخياطة أو القصارة أو غيرها فيقولوا اشتركتنا على أن نعمل فيه على أن ما رزق الله عزوجل من أجرة فيه بيننا على شرط كذا (وأما) الشركة بالوجوه فهو أن يشتركا وليس لهما مال لكن لهما وجاهة عند الناس فيقولوا اشتركتنا على أن نشترى بالنسيئة ونبيع بالنقد على أن ما رزق الله سبحانه وتعالى من ربح فهو بيننا على شرط كذا وسمى هذا النوع شركة الوجوه - بدائع الصنائع ج 7 ص 498 – 500 دار الكتب العلمية

- a. Shirkat-al-Amwal: all the partners invest some capital into a commercial enterprise.
- b. Shirkat-al-A'mal: all the partners jointly undertake to render some services for their customers and the fee charged therefore is distributed amongst them at a pre-agreed ratio.
- c. Shirkat-al-Wujooh: the partners have no investment at all. Instead, they purchase the commodities on a deferred price and sell them at spot. The profit so earned is distributed between them at a pre-agreed ratio.

All these modes of partnership are termed as Shirkah in the terminology of Islamic jurisprudence. However, the term Musharakah is more relevant to us in respect to the contract.

Musharakah is a contract between the partners to contribute capital to an enterprise or a venture, whether existing or new, or to an owner of real estate or moveable asset, either on a temporary or permanent basis. Profits generated by that venture or real estate or assets are shared in accordance with the terms of the Musharakah agreement, while losses are distributed in proportion to each partner's share of capital.<sup>6</sup>

## **SECTION TWO: BASIS OF MUSHARAHAH CONTRACT**

The basis of the Musharakah contract is the Qur'an, Sunnah of the Prophet Muhammad *Sallallahu Alaibi Wasallam* and the consensus of the Muslim jurists.

### **THE QUR'AN:**

Almighty Allah *Tabaarak Wa Ta'ala* gives us the case of the disputing partners which was arbitrated by Dawood *Alayhis Salaam*. One partner very eloquently presented his case and said, 'This is my Muslim brother. He has 99 ewes (female sheep) and I only have one ewe. 'He says I must give him my one ewe he is eloquent in his speech.'

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<sup>6</sup> فتاوى الشامى ج 4 ص 305 ايح ايم سعيد مَطْلَبُ : اِشْتِرَاؤُ الرِّبْحِ مُتَّفَاوِنًا صَحِيحٌ ، بِخِلَافِ اِشْتِرَاؤِ الْحُسْرَانِ

Dawood *Alayhis Salaam* replied, ‘your brother has oppressed you by asking you to add your one ewe to his flock of ewe.’

Upon this, Allah *Ta’ala* said,

‘*And verily many partners oppress one another, but those who have Imaan and do righteous deeds.*’ (Al Qur’an, 38: 23-24)<sup>7</sup>

#### **THE SUNNAH:**

Hazrath Abu Hurayrah *Radiallahu Anhu* said that: The Prophet *Sallallahu Alaibi Wasallam* said: Allah said: I am the third [partner] of the two partners as long as they do not deceive each other. When one of them deceive the other, I depart from them”. (Sunan Abu Dawood)<sup>8</sup>

#### **THE CONSENSUS OF THE MUSLIM JURISTS:**

1. This type of partnership has been practised throughout the history of the Muslims without any objection from the jurists.
2. Imam Ibn al-Munzir *Rahmatullahi Alaibi* states in his book *Al-Ijma*: “And they (Muslim jurists) agree on the validity of a partnership where each partner contributes capital in Dinar or Dirham, and join the two capitals to form a single property which is indistinguishable. They will sell and buy what they see as beneficial for the business and the surplus will be distributed between them whilst the shortfall will be borne

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إِذْ دَخَلُوا عَلَى دَاوُودَ فَفَرِعَ مِنْهُمْ قَالُوا لَا نَخْفُ خَصْمَانَ بَعَى بَعْضُنَا عَلَى بَعْضٍ فَاحْكُم بَيْنَنَا بِالْحَقِّ وَلَا تُشْطِطْ وَاهْدِنَا إِلَى سَوَاءِ الصِّرَاطِ (22) إِنَّ هَذَا أَخِي لَهُ تِسْعٌ وَتِسْعُونَ نَعَجَةً وَإِي نَعَجَةٌ وَاحِدَةٌ فَقَالَ أَكْفُلْنِيهَا وَعَزَّنِي فِي الْخِطَابِ ( 23 ) قَالَ لَقَدْ ظَلَمَكَ بِسُؤَالِ نَعَجَتِكَ إِلَى نِعَاجِهِ وَإِنَّ كَثِيرًا مِّنَ الْخُلَطَاءِ لِيَبْغِيَ بَعْضُهُمْ عَلَى بَعْضٍ إِلَّا الَّذِينَ آمَنُوا وَعَمِلُوا الصَّالِحَاتِ وَقَلِيلٌ مَا هُمْ وَظَنَّ دَاوُودُ أَنَّمَا فَتَنَّاهُ فَاسْتَغْفَرَ رَبَّهُ وَخَرَّ رَاكِعًا وَأَنَابَ (24) سورة ص

<sup>8</sup> باب في الشركة 3383 حدثنا محمد بن سليمان المصيصي ، ثنا محمد بن الزرقان ، عن أبي حيان التيمي ، عن أبيه ، عن أبي هريرة ، رفعه ، قال : (إن الله يقول : أنا ثالث الشريكين ، ما لم يخن أحدهما صاحبه ، فإذا خانه خرجت من بينهما) سنن أبي داود ج 3 ص 247 دارالفكر.



together by them, and when they do carry out (as prescribed), the partnership is valid.”<sup>9</sup>

### **SECTION THREE: FEATURES OF A MUSHAARAKAH CONTRACT**

1. A valid Mushaarakah contract shall be concluded by an offer and acceptance between the partners.<sup>10</sup>
2. Each party in a Mushaarakah contract shall conduct the contract personally or through an agent.
3. In jurisprudence the jurists commonly discuss the *Ahliyyah* (eligibility) to carry out any particular act. There are four pre-requisite for one to be considered eligible: a) Muslim b) Free c) Sane d) Adult

In *Shirkat*, the only condition of qualification is to be sane. That means an insane person cannot be made a partner. Being a Muslim is not necessary. To be a free person is also not necessary. A slave who is granted permission from his master may be a partner. To be an adult is also not necessary. A minor who has reached an understandable age may be a partner on an issue that is of benefit to him/her, if there is a possibility of a loss, for example, in buying, selling, hiring, etc. then the minor requires the consent of his/her guardian to effect such a deal.<sup>11</sup>

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<sup>9</sup>وأجمعوا على أن الشركة الصحيحة أن يخرج كل واحد من الشريكين مالا مثل صاحبه دنانير أو دراهم ثم يخلطان ذلك حتى يصير مالا واحدا لا يتميز على أن يبيعا ويشتريا ما رأيا من التجارات على أن ما كان فيه من فضل فلهما وما كان من نقص فعليهما فإذا فعلا ذلك صحت الشركة- الاجاع لابن منذر ج 1 ص 33

<sup>10</sup>وركنها الإيجاب والقبول وهو أن يقول أحدهما : شاركتك في كذا وكذا ويقول الآخر : قبلت ، كذا في الكافي ، ويندب الإشهاد عليها ، كذا في النهر الفائق . فتاوى الهندية ج 2 ص 301 مكتبه رشيديه

<sup>11</sup> ( وَإِمَّا عِنَانٌ ) بِالْكَسْرِ وَتُفْتَحُ ( إِنْ تَضَمَّنَتْ وَكَالَةٌ فَفَطُ ) بَيَانٌ لَشَرْطِهَا ( فَتَصِحُّ مِنْ أَهْلِ التَّوَكُّيلِ ) كَصَبِيٍّ وَمَعْتُوهُ يَعْقِلُ الْبَيْعَ ( وَإِنْ لَمْ يَكُنْ أَهْلًا لِلْكَفَالَةِ ) لِكُونِهَا لَا تَقْتَضِي الْكِفَالَةَ بَلْ الْوَكَالَةَ فَتَاوَى الشَّامِيِّ ج 4 ص 311 ايج ايم سعيد

فتجوز هذه الشركة بين الرجال والنساء والبالغ والصبي المأذون والحرة والعبد المأذون في التجارة والمسلم والكافر ، كذا في فتاوى قاضي خان . فتاوى الهندية ج 2 ص 319 مكتبه رشيديه

4. Mushaarakah is a relationship established by the parties through a mutual contract. Therefore, all the necessary ingredients of a valid contract must be present here. In addition the essential features attributable to a Mushaarakah contract are capital, management, profit sharing, loss sharing and a joint venture.

### **CAPITAL CONTRIBUTION BY ALL PARTNERS**

1. The proportion of profit to be distributed between the partners must be agreed upon at the time of effecting the contract. If no such proportion has been determined, the contract is not valid in Shariah.<sup>12</sup>
2. The ratio of the profit for each partner must be determined in proportion to the actual profit accrued in the business, and not in proportion to the capital invested by the partners. It is not allowed to fix a lump sum amount for any one of the partners, or any rate of profit tied up with one's investment.<sup>13</sup>
3. Monetary assets denominated in different currencies shall be valued according to the current exchange rate at the time of payment. This is to determine the shares and liabilities of each partner.<sup>14</sup>
4. The capital may also be in the form of non monetary assets and shall be valued based on the valuation determined by a third party. This may include authoritative bodies, experts or anybody agreed upon by the contracting parties at the time of concluding of the contract.<sup>15</sup>

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( وأما شرطها ) فأنواع : منها ما يرجع إلى الموكل وهو أن يكون ممن يملك فعل ما وكل به بنفسه ، فلا يصح التوكيل من الجنون

والصبي الذي لا يعقل أصلا ، فتاوى الهندية ج 3 ص 561 مكتبه رشيديه

<sup>12</sup> وأن يكون الربح معلوم القدر ، فإن كان مجهولا تفسد الشركة وأن يكون الربح جزءا شائعا في الجملة لا معينيا فإن عينا عشرة أو

مائة أو نحو ذلك كانت الشركة فاسدة ، كذا في البدائع . فتاوى الهندية ج 2 ص 302 مكتبه رشيديه

<sup>13</sup> وأن يكون الربح جزءا شائعا في الجملة لا معينيا فإن عينا عشرة أو مائة أو نحو ذلك كانت الشركة فاسدة ، كذا في البدائع .

فتاوى الهندية ج 2 ص 302 مكتبه رشيديه

<sup>14</sup> AAOIFI (2008) pg222

<sup>15</sup> Introduction to Islamic finance pg27

5. The ratio of profit of each partner may conform to the ratio of capital invested by him or may differ from the ratio of investment. The ratio of profit doesn't have to be exactly in conformity to the ratio of investment.<sup>16</sup>
6. In case of loss, each partner shall suffer the loss according to the exact ratio of his investment.<sup>17</sup>
7. All forms of debt shall not qualify as Musharakah capital, as they are not assets in possession. Account receivables and payments due from other partners or third parties are considered as debt, thus they should not form part of the Musharakah contract.<sup>18</sup>
8. Additional capital may be injected upon mutual agreement of all the partners. In this regard, the partners may agree to revise the proportion of capital contribution and the profit sharing ratio.
9. Musharakah capital comprising of monetary and non-monetary assets invested by each partner should be mixed, representing the collective rights of each partner.<sup>19</sup>
10. Once contributed as capital, the rights, obligations and liabilities of all assets contributed to the Musharakah venture shall be jointly assumed by all the partners.

ولو كان من أحدهما دراهم ومن الآخر عروض فالحيلة في جوازه أن يبيع صاحب العروض نصف عرضه بنصف دراهم صاحبه ويتقاضى ويخلطاً جميعاً حتى تصير الدراهم بينهما والعروض بينهما ثم يعقدان عليهما عقد الشركة فيجوز بدائع الصنائع ج 7 ص 507 دار الكتب العلمية

<sup>16</sup> (قَوْلُهُ : وَحُكْمُهَا الشَّرْكَةُ فِي الرِّبْحِ ) الْوَأُو لِلْحَالِ ط : أَي فَيَلْزَمُ انْتِفَاءُ حُكْمِهَا لَوْ لَمْ يَرَبِّحْ غَيْرَ الْمُسَمَّى ، وَيُحْمَلُ كَوْنُ الْوَأُو لِلْعَطْفِ عَلَى قَوْلِهِ : وَشَرَطُهَا . مَطْلَبٌ : اشْتِرَاطُ الرِّبْحِ مُتَّفَاوِئًا صَحِيحٌ ، بِخِلَافِ اشْتِرَاطِ الْحُسْرَانِ [ تَنْبِيْهُ ] وَيُنْدَبُ الْإِشْهَادُ عَلَيْهَا فتاوى الشامى ج 4 ص 305 ايج ام سعيد

<sup>17</sup> فتاوى الشامى ج 4 ص 305 ايج ام سعيد مَطْلَبٌ : اشْتِرَاطُ الرِّبْحِ مُتَّفَاوِئًا صَحِيحٌ ، بِخِلَافِ اشْتِرَاطِ الْحُسْرَانِ

<sup>18</sup> AAOIFI (2008) pg222

<sup>19</sup> الشركة تنبى عن الاختلاط فمسلم لكن على اختلاط رأسى المال أو على اختلاط الربح فهذا مما لا يتعرض له لفظ الشركة فيجوز أن يكون تسميته شركة لا اختلاط الربح لا اختلاط رأس المال واختلاط الربح يوجدان اشترى كل واحد منهما بمال نفسه على حدة لان الزيادة وهى الربح تحدث على الشركة (وأما) ما هلك من أحد المالين قبل الخلط فانما كان من نصيب صاحبه خاصة لان الشركة لا تتم الا بالشراء فما هلك قبله هلك قبل تمام الشركة فلا تعتبر حتى لو هلك عد الشراء باحدهما كان الهالك من المالين جميعاً لانه هلك بعد تمام العقد بدائع الصنائع ج 7 ص 510-509 دار الكتب العلمية

11. The capital invested by any of the partners shall not be guaranteed because all the partners in a Musharakah contract maintain the assets on a trust basis. Therefore, no party is liable except in the case of misconduct or negligence.<sup>20</sup>
12. Any loss of capital in the course of the venture shall be recognized as capital impairment.<sup>21</sup>
13. Upon termination of the partnership, capital impairment loss shall be borne by the partners proportionate to capital contribution.
14. All the partners act as an agent of each other and shall be liable for misconduct or negligence to the partnership.<sup>22</sup>
15. New partners may enter the Musharakah during the tenure of the existing contract subject to the agreement of existing partners.

## MANAGEMENT OF MUSHARAKAH VENTURE

A Musharakah venture may be managed in the following manner:

- A. Management by all the partners.
- B. Management by certain partners or a single partner.
- C. Management by a third party.

1. In principle, each partner has the discretion to transact in person or by appointing someone in the following transactions : spot or deferred sales, taking possession or custody of the partnership receivables, making payments or deposits and receiving or providing a pledge on behalf of the partnership, asking for payment of debts, cancellation of contracts, rejecting defective goods, renting assets of the partnership and doing what is customary in the interest of trading, unless all or most of the partners have not consented to a certain action. A partner cannot act against the

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<sup>20</sup>فتاوى الشامى ج 4 ص 320 ايج ايم سعيد ( وَ يُضْمَنُ بِالتَّعَدِّي ) وَ هَذَا حُكْمُ الْأَمَانَاتِ

<sup>21</sup>فما كان من ربح فهو بينهما على قدر رؤوس أموالهما، وما كان من ضبيعة أو تبعة فكذلك، ولا خلاف أن اشتراط الوضعية

بخلاف قدر رأس المال باطل، واشتراط الربح متفاوتا عندنا صحيح فتاوى الشامى ج 4 ص 305

<sup>22</sup> فتاوى الشامى ج 4 ص 311 ايج ايم سعيد ( وَإِمَّا عِنَانٌ ) بِالْكَسْرِ وَتُفْتَحُ ( إِنْ تَضَمَّنْتَ وَكَالَهُ فَقَطْ )

interest of the partnership or perform such actions that will damage the partnership, such as giving out grants or loans, unless all the partners have consented to such an action.<sup>23</sup>

2. If all the partners agree to work for the joint venture, each one of them shall be treated as an agent of the other in all matters related to business. Any work done by one of them in the normal course of business shall be deemed to be authorized by all the partners, unless a specific work has not been consented by the partners.<sup>24</sup>
3. It is permissible for the partners to agree that the management of the partnership will be restricted to certain partners or to a single partner. In this case the sleeping partners shall be entitled to the profit only to the extent of their investment, and the ratio of profit allocated to them should not exceed the ratio of their investment.<sup>25</sup>

<sup>23</sup> (وَلِكُلِّ مِنْ شَرِيكِي الْعِنَانِ وَالْمُفَاوِضَةِ أَنْ يَسْتَأْجِرَ) مَنْ يَتَّجِرَ لَهُ أَوْ يَحْفَظُ الْمَالَ (وَيُبْضِعُ) أَي يَدْفَعُ الْمَالَ بِضَاعَةً، بِأَنْ يَشْتَرِطَ الرَّبْحَ لِرَبِّ الْمَالِ (وَيُودِعُ) وَيُعِيرُ (وَيُضَارِبُ) لِأَنَّهَا دُونَ الشَّرِكَةِ فَتَضَمَّنَتْهَا (وَيُوكِّلُ) أَجْنَبِيًّا بِنَيْحٍ وَشَرَاءٍ، وَلَوْ نَهَاةَ الْمُفَاوِضِ الْأَخْرَ صَحَّ نَهْيُهُ بِحَرْ (وَيَبِيعُ) بِمَا عَزَّ وَهَانَ خُلَاصَةً (بِنَقْدٍ وَنَسِيئَةٍ) بَرَّازِيَّةً (وَيُسَافِرُ) بِالْمَالِ لَهُ جَمَلٌ أَوْ لَا هُوَ الصَّحِيحُ، خِلَافًا لِلْأَشْبَاهِ. (قَوْلُهُ وَلَوْ نَهَاةَ الْمُفَاوِضِ الْأَخْرَ) التَّقْيِيدُ بِالْمُفَاوِضِ وَبِكَوْنِ النَّهْيِ عَنِ التَّوَكُّلِ اتِّفَاقِيًّا لِمَا مَرَّ أَنَّ كُلَّ مَا كَانَ لِأَحَدِهِمَا فِعْلُهُ يَصِحُّ نَهْيُ الْأَخْرَ عَنْهُ ط. (لَا) يَمْلِكُ الشَّرِيكُ (الشَّرِكَةَ) إِلَّا بِإِذْنِ شَرِيكِهِ جَوْهَرَةً (و) لَا (الرَّهْنُ) إِلَّا بِإِذْنِهِ أَوْ يَكُونُ هُوَ الْعَاقِدَ فِي مُوجِبِ الدَّيْنِ وَحِينَئِذٍ فَيَصِحُّ إِفْرَازُهُ (بِالرَّهْنِ وَالْإِزْتِمَانِ) سِرَاجٌ (و) لَا (الْكِتَابَةَ) وَالْإِذْنَ بِالتَّجَارَةِ (وَتَرْوِيحِ الْأُمَةِ) وَهَذَا كَلُّهُ (لَوْ عِنَانًا) (وَلَا يَجُوزُ هُكْمًا) فِي عِنَانٍ وَمُفَاوِضَةٍ (تَرْوِيحِ الْعَبْدِ وَلَا الْإِعْتِاقِ) وَلَوْ عَلَى مَالٍ (و) لَا (الْهَيْبَةَ) أَي لِثَوْبٍ وَنَحْوِهِ فَلَمْ يَجُزْ فِي حِصَّةِ شَرِيكِهِ، وَجَازَ فِي نَحْوِ حَلْمٍ وَخُبْزٍ وَفَاقِيهِ (و) لَا (الْفَرَضُ) إِلَّا بِإِذْنِ شَرِيكِهِ إِذْنَا صَرِيحًا فِيهِ سِرَاجٌ (وَكَذَا كُلُّ مَا كَانَ إِتِلَافًا لِلْمَالِ أَوْ) كَانَ (تَمْلِيكًا) لِلْمَالِ (بِعَيْرِ عَوْضٍ) - لِأَنَّ الشَّرِكَةَ وُضِعَتْ لِلِاسْتِزْتِاحِ وَتَوَابِعِهِ، وَمَا لَيْسَ كَذَلِكَ لَا يَنْتَظِمُهُ عَقْدُهَا. فتاوى الشامى ج 4 ص 316 - 318 ايج ام سعيد

<sup>24</sup> (قَوْلُهُ وَلَوْ نَهَاةَ الْمُفَاوِضِ الْأَخْرَ) التَّقْيِيدُ بِالْمُفَاوِضِ وَبِكَوْنِ النَّهْيِ عَنِ التَّوَكُّلِ اتِّفَاقِيًّا لِمَا مَرَّ أَنَّ كُلَّ مَا كَانَ لِأَحَدِهِمَا فِعْلُهُ يَصِحُّ نَهْيُ الْأَخْرَ عَنْهُ ط فتاوى الشامى ج 4 ص 316 ايج ام سعيد

<sup>25</sup>قوله: (ومع التفاضل في المال دون الربح) أي بأن يكون لاحدهما ألف وللآخر ألفان مثلا واشترطا التساوي في الربح، وقوله عكسه أي بأن يتساوى المالاان ويتفاضلا في الربح، لكن هذا مقيد بأن يشترط الاكثر للعامل منهما أو لاكثرهما عملا، أما لو شرطاه للقاعد أو لاقتهما عملا، فلا يجوز كما في البحر عن الزيلعي والكمال. قلت: والظاهر أن هذا محمول على ما إذا كان العمل مشروطا على أحدهما. وفي النهر: اعلم أنهما إذا شرط العمل عليهما إن تساويا مالا وتفاوتا ربحا جاز عند علمائنا الثلاثة خلافا لزر، والربح بينهما على ما شرطوا وإن عمل أحدهما فقط: وإن شرطاه على أحدهما، فإن شرط الربح بينهما بقدر رأس

4. It is not permitted to specify a fixed remuneration for a partner who contributes in managing the joint venture or provides some form of services, such as accounting. However, it is permissible to give him a greater share of profit than he would have received solely on the basis of his share in the partnership capital.<sup>26</sup>
5. It is permissible that one of the partners be appointed to provide services that are mentioned in the above clause, provided that the appointment is based on an independent contract from the partnership contract. This is because he may be dismissed as a manager at any point of times. As a result the Musharakah contract will not be subject to any amendment. In this case, the appointed partner may earn a specific remuneration.<sup>27</sup>
6. It is permissible for the partners to appoint a manager other than one of the partners based on a relevant contract such as Wakalah (agent), Ijarah (employer) or Mudaarabah contract.

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ماهما جاز، ويكون مال الذي لا عمل له بضاعة عند العامل له ربحه وعليه وضيعته، وإن شرطاً الربح للعامل أكثر من رأس ماله جاز أيضاً على الشرط ويكون مال الدافع عند العامل مضاربة، ولو شرطاً الربح للدافع أكثر من رأس ماله لا يصح الشرط ويكون مال الدافع عند العامل بضاعة لكل واحد منهما ربح ماله والوضيعة بينهما على قدر رأس مالهما أبداً. هذا حاصل ما في العناية اه. ما في النهر. قلت: وحاصل ذلك كله أنه إذا تفاضلاً في الربح، فإن شرطاً العمل عليهما سوية جاز: ولو تبرع أحدهما بالعمل وكذا لو شرطاً العمل على أحدهما وكان الربح للعامل بقدر رأس ماله أو أكثر ولو كان الأكثر لغير العامل أو لاقلهما عملاً لا يصح، وله ربح ماله فقط فتاوى الشامى ج 4 ص 312 ايح ايم سعيد

<sup>26</sup>في المنتقى اشتركا يعمالان على أن لأحدهما أجر كل شهر عشرة دراهم ليس من مال الشركة فالشركة جائزة والشرط باطل كذا في المحيط . فتاوى الهندية ج 2 ص 350

(ومع التفاضل في المال دون الربح) أي بأن يكون لأحدهما ألف وللآخر ألفان مثلاً واشترطاً التساوي في الربح، وقوله عكسه أي بأن يتساوى المالان ويتفاضلاً في الربح، لكن هذا مقيد بأن يشترط الأكثر للعامل منهما أو لأكثرهما عملاً، أما لو شرطاه للقاعد أو لاقلهما عملاً، فلا يجوز كما في البحر عن الزيلعي والكمال. فتاوى الشامى ج 4 ص 312 ايح ايم سعيد

<sup>27</sup> Aaoifi 2008 pg 206

**Note:** If the management is carried out as a Mudaarabah contract then the manager will be entitled to a share in the profit, if any, and deserves no further remuneration for management services.<sup>28</sup>

7. The managing partner(s) as an agent shall be liable for any loss caused by his negligence or misconduct or breach of the management contract.<sup>29</sup>

## **DETERMINATION OF PROFIT AND LOSS**

1. The profit shall be calculated after deducting the costs, expenses and taxes attributable to the Mushaarakah venture.<sup>30</sup>
2. In the event of a Mushaarakah being specified for a particular project or activity, only expenses related to that project may be deductible.<sup>31</sup>
3. The profit sharing ratio may either be proportionate to the capital contribution or be based on a ratio/percentage which is agreed upon by all partners irrespective of their capital contribution.<sup>32</sup>
4. It is not permissible to include a condition in a Mushaarakah contract that stipulates a pre-determined fixed amount of profit for one partner.<sup>33</sup>
5. It is permissible to agree that if the profit realised is above a certain amount, the profit in excess of such an amount belongs to a particular partner. The parties may

<sup>28</sup> (وَلِكُلِّ مِنْ شَرِيكِي الْعِنَانِ وَالْمُفَاوِضَةِ أَنْ يَسْتَأْجِرَ) مَنْ يَتَّجِرُ لَهُ أَوْ يَحْفَظُ الْمَالَ (وَيُبْضِعُ) أَي يَدْفَعُ الْمَالَ بِضَاعَةً ، بِأَنْ يَشْتَرِي الرِّبْحَ لِزَبِّ الْمَالِ (وَيُودِعُ) وَيُعِيرُ (وَيُضَارِبُ) لِأَنَّهَا دُونَ الشَّرِكَةِ فَتَضَمَّنَتْهَا (وَيُوكَلُّ) أَجْنَبِيًّا بِيْنَعٍ وَشَرَاءٍ ، وَلَوْ نَهَاةُ الْمُفَاوِضِ الْأَخْرُ صَحَّ نَهْيُهُ بِحُجْرِ فُتَاوَى الشَّامِيِّ ج 4 ص 316 ايج ام سعيد

<sup>29</sup> (وَيُضَمَّنُ بِالتَّعَدِّي) وَهَذَا حُكْمُ الْأَمَانَاتِ فُتَاوَى الشَّامِيِّ ج 4 ص 320 ايج ام سعيد

<sup>30</sup> Aaoifi 2008 pg 207

<sup>31</sup> Introduction to Islamic finance pg 46 47

<sup>32</sup> فُتَاوَى الشَّامِيِّ ج 4 ص 305 ايج ام سعيد مَطْلَبٌ : اشْتِرَاطُ الرِّبْحِ مُتَّفَاوِتًا صَحِيحٌ ، بِخِلَافِ اشْتِرَاطِ الْحُسْرَانِ

وَأَنْ يَكُونَ الرِّبْحُ جِزَاءَ شَائِعَةٍ فِي الْجُمْلَةِ لَا مَعِينًا فَإِنْ عِينَا عَشْرَةٌ أَوْ مِائَةٌ أَوْ نَحْوَ ذَلِكَ كَانَتِ الشَّرِكَةُ فَاسِدَةً ، كَذَا فِي الْبَدَائِعِ . فُتَاوَى

الْهِنْدِيَّةِ ج 2 ص 302 مَكْتَبُهُ رَشِيدِيَّةِ <sup>33</sup>



also agree that if the profit is not over the certain amount or is below the certain amount, the distribution will be in accordance with their agreement.<sup>34</sup>

6. Partner(s) in a Musharakah shall not fully or partially guarantee the principal and profit of another partner(s).<sup>35</sup>
7. It is permissible to agree on setting aside a proportion of the profit to a charitable donation due to any source of income accrued from a Shariah prohibited activities.<sup>36</sup>
8. In case of loss, if any, the loss shall be shared in proportion to the capital contribution of each partner.<sup>37</sup>

### **PARTNERSHIP VENTURE:**

1. Business ventures of Musharakah shall be Shariah compliant and may be conducted in various sectors such as trading, plantation, construction, manufacturing, investment and services.
2. Any fund accrued from Shariah prohibited activities of a Musharakah venture due to circumstances may be distributed to charity.

### **TERMINATION AND DISSOLUTION OF THE MUSHARAKAH AGREEMENT:**

1. Partners may mutually agree to terminate the contract at any time unless stated otherwise in the Musharakah agreement.<sup>38</sup>

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<sup>34</sup> (قَوْلُهُ : وَالرَّيْحُ عَلَى مَا شَرَطَا ) أَي مِنْ كَوْنِهِ بِقَدْرِ رَأْسِ الْمَالِ أَوْ لَا لِكَيْتَهُ مَحْمُولٌ عَلَى مَا عَلِمْتَهُ مِنَ التَّفْصِيلِ الْمَارِّ ، وَأَعَادَهُ مَعَ قَوْلِهِ مَعَ التَّفَاصِيلِ فِي الْمَالِ دُونَ الرَّيْحِ لِلتَّصْرِيحِ بِأَنَّ هَذَا الشَّرْطَ صَحِيحٌ فَافْتَمُّ ، نَعَمْ ذِكْرُهُ بَيْنَ الْمُتَعَاظِفَاتِ غَيْرُ مُنَاسِبٍ ، وَقِيْدَ بِالرَّيْحِ ؛ لِأَنَّ الْوَضِيْعَةَ عَلَى قَدْرِ الْمَالِ وَإِنْ شَرَطَا غَيْرَ ذَلِكَ كَمَا فِي الْمُتَلَقَى وَعَبَّرَهُ فِتَاوَى الشَّامِيِّ ج 4 ص 313 اِيح ايم سعيد Aaoifi 2008 pg 208

<sup>35</sup> فِتَاوَى الشَّامِيِّ ج 4 ص 320 اِيح ايم سعيد ( وَوُضِعَ بِاللَّتَعَدِّيِّ ) وَهَذَا حُكْمُ الْأَمَانَاتِ

<sup>36</sup> Aaoifi 2008 pg 209

<sup>37</sup> فما كان من ربح فهو بينهما على قدر رؤوس أموالهما، وما كان من ضبيعة أو تبعة فكذلك، ولا خلاف أن اشتراط الوضبيعة

بخلاف قدر رأس المال باطل، واشتراط الربح متفاوتا عندنا صحيح فتاوى الشامى ج4 ص 305

<sup>38</sup> وأما صفة عقد الشركة فهي انها عقد جائز غير لازم حتى ينفرد كل واحد منهما بالفسخ الا أن من شرط جواز الفسخ أن يكون بحضرة صاحبه أي بعلمه حتى لو فسخ بمحضر من صاحبه جاز الفسخ وكذا لو كان صاحبه غائبا وعلم بالفسخ وان كان غائبا ولم يبلغه الفسخ لم يجوز

الفسخ ولم يفسخ العقد بدائع الصنائع ج 7 ص 540 دار الكتب العلمية



2. Upon termination of the Musharakah agreement, if the assets of the Musharakah are in cash form, all of them will be distributed pro rata between the partners. If the assets are not liquidated, the partners may agree either on the liquidation of the assets, or on their distribution between the partners as they are. If there is a dispute between the partners in this matter i.e. one partner seeks liquidation while the other wants distribution of the non-liquid assets themselves, distribution is preferable. However, if the assets are such that they cannot be separated or partitioned, such as machinery, then they shall be sold and the sale-proceeds shall be distributed.<sup>39</sup>

**Note:** The question arises whether the partners can agree, whilst entering into the contract of Musharakah, on a condition that the liquidation or distribution of the business shall not be affected unless all the partners, or the majority of them want to do so, and that a single partner who wants to come out of the partnership shall be compelled to sell his share to the other partners and shall not force them on liquidation or distribution.

Most of the traditional books of Islamic Fiqh seem to be silent on this question. However, it appears that there is no bar from the Shariah point of view if the partners agree to such a condition right at the beginning of the Musharakah.<sup>40</sup>

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<sup>39</sup> إن كان رأس مال الشركة دراهم أو دنانير انفسخت الشركة ، ولو كان عروضاً وقت الفسخ ذكر الطحاوي أنها لا تنفسخ ، كذا في الخلاصة .

وبعض المشايخ قالوا تنفسخ الشركة ، وإن كان المال عروضاً وهو المختار ، كذا في فتح القدير فتاوى الهندية ج 2 ص 335 مكتبه رشيديه

Introduction to Islamic finance pg 28

<sup>40</sup> Introduction to Islamic finance pg 29

طَلَبَ فِي تَوْقِيتِ الشَّرِكَةِ رَوَايَتَانِ ثُمَّ إِذَا وَقَّتَهَا فَهَلْ تَتَوَقَّفُ بِالْوَقْتِ حَتَّى لَا تَبْقَى بَعْدَ مُضِيِّهِ ؟ فِيهِ رَوَايَتَانِ كَمَا فِي تَوْقِيتِ الْوَكَالَةِ ، وَتَمَامُهُ فِي الْبَحْرِ عَنِ الْمُحِيطِ وَلَمْ يَذْكَرْ تَرْجِيحًا ، وَجُزْمَ فِي الْحَانِيَّةِ بِأَنَّهَا تَتَوَقَّفُ حَيْثُ قَالَ : وَالتَّوْقِيتُ لَيْسَ بِشَرْطٍ لِصِحَّةِ هَذِهِ الشَّرِكَةِ وَالْمُضَارَبَةِ ، وَإِنْ وَقَّتْنَا لِذَلِكَ وَقْتًا بِأَنْ قَالَ مَا اشْتَرَيْتَ الْيَوْمَ فَهُوَ بَيْنَنَا صَحَّ التَّوْقِيتُ ، فَمَا اشْتَرَاهُ بَعْدَ الْيَوْمِ يَكُونُ لِلْمُشْتَرِي خَاصَّةً ، وَكَذَا لَوْ وَقَّتَ الْمُضَارَبَةُ ؛ لِأَنَّهَا وَالشَّرِكَةُ تَوْكِيلٌ وَالْوَكَالَةُ مِمَّا يَتَوَقَّفُ . ١ هـ .

لَكِنْ سَيَذْكَرُ الشَّارِحُ فِي كِتَابِ الْوَكَالَةِ عَنِ الْبَرَازِيَّةِ الْوَكِيلُ إِلَى عَشْرَةِ أَيَّامٍ وَكَيْلٌ فِي الْعَشْرَةِ وَبَعْدَهَا فِي الْأَصَحِّ تَأْمَلْ . فتاوى الشامى ج 4 ص 312 ايج ام سعيد

3. A Musharakah contract shall be terminated either upon expiration of a specified tenure of the contract, even though the venture is still in progress unless the partners mutually agree to extend the partnership.<sup>41</sup>
4. The partnership shall be terminated upon completion of a business venture.<sup>42</sup>
5. Subject to terms and conditions, the Musharakah contract may be terminated if a considerable portion of the capital is impaired.<sup>43</sup>
6. If any one of the partners die during the course of Musharakah, the contract of Musharakah with him stands terminated. The heirs do not inherit any right of partnership. Their rights are only related to the share of their inheritance in the assets of the partnership enterprise. They have no rights to future profits of the business. If they wish to continue, then they will have to make a new contract to join the Musharakah venture.<sup>44</sup>
7. If any one of the partners become insane or otherwise becomes incapable of effecting commercial transaction, the Musharakah contract stands terminated.<sup>45</sup>

<sup>41</sup>طَلَبَ فِي تَوْقِيتِ الشَّرِكَةِ رَوَايَتَانِ ثُمَّ إِذَا وَقَّتَهَا فَهَلْ تَتَوَقَّفُ بِالْوَقْتِ حَتَّى لَا تَبْقَى بَعْدَ مُضِيِّهِ ؟ فِيهِ رَوَايَتَانِ كَمَا فِي تَوْقِيتِ الْوَكَالَةِ ، وَتَمَامُهُ فِي الْبَحْرِ عَنِ الْمُحِيطِ وَلَمْ يَذْكَرْ تَرْجِيحًا ، وَحُرْمَ فِي الْحَايَةِ بِأَنَّهَا تَتَوَقَّفُ حَيْثُ قَالَ : وَالتَّوْقِيتُ لَيْسَ بِشَرْطٍ لِصِحَّةِ هَذِهِ الشَّرِكَةِ وَالْمُضَارَبَةِ ، وَإِنْ وَقَّتَا لِذَلِكَ وَقَّتَا بِأَنْ قَالَ مَا اشْتَرَيْتَ الْيَوْمَ فَهُوَ بَيْنَنَا صَحَّ التَّوْقِيتُ ، فَمَا اشْتَرَاهُ بَعْدَ الْيَوْمِ يَكُونُ لِلْمُشْتَرِي خَاصَّةً ، وَكَذَا لَوْ وَقَّتَ الْمُضَارَبَةُ ؛ لِأَنَّهَا وَالشَّرِكَةُ تَوْكِيلٌ وَالْوَكَالَةُ بِمَا يَتَوَقَّفُ . ا هـ . لَكِنْ سَيَذْكَرُ الشَّارِحُ فِي كِتَابِ الْوَكَالَةِ عَنِ الْبَرَايَةِ الْوَكِيلُ إِلَى عَشْرَةِ أَيَّامٍ وَكَيْلٌ فِي الْعَشْرَةِ وَبَعْدَهَا فِي الْأَصَحِّ تَأْمَلُ . فتاوى الشامى ج 4 ص 312 ايچ ايم سعيد

<sup>42</sup> Aaoifi 2008 pg 209

<sup>43</sup>حدثنا سليمان بن داود المهري ، أخبرنا ابن وهب ، أخبرني سليمان بن بلال ، ح وثنا أحمد بن عبد الواحد الدمشقي ، ثنا مروان يعني ابن محمد ثنا سليمان بن بلال أو عبد العزيز بن محمد ، شك الشيخ ، عن كثير بن زيد ، عن الوليد بن رباح ، عن أبي هريرة ، قال : قال رسول الله صلى الله عليه وسلم : (الصلح جائز بين المسلمين) زاد أحمد : (إلا صلحا أحل حراما أو حرم حلالا) وزاد سليمان بن داود : وقال رسول الله صلى الله عليه وسلم : (المسلمون على شروطهم) . سنن أبي داود ج 3 ص 333 دار الفكر

فتاوى الشامى ج 4 ص 327 ايچ ايم سعيد <sup>44</sup>( وَتَبْطُلُ الشَّرِكَةُ ) أَي شَرِكَةُ الْعَقْدِ ( بِمَوْتِ أَحَدِهِمَا ) عَلِمَ الْآخِرُ أَوْ لَا لِأَنَّهُ عَزَلَ حُكْمِي

<sup>45</sup>(ومنها) جنونه جنونا مطبقا لان به يخرج الوكيل عن الولة وجميع ما يخرج به الوكيل عن الوكالة يبطل به عقد الشركة لان الشركة تتضمن الوكالة على نحو ما فصلنا في كتاب الوكالة بدائع الصنائع ج 7 ص 541 دار الكتب العلمية

8. In case there are more than three members in the Mushaarakah agreement and one of them dies or becomes insane, the agreement will remain intact in respect to the rest of the members.<sup>46</sup>
9. Upon the termination of the Mushaarakah contract, the Mushaarakah assets shall be subjected to the liquidation process.<sup>47</sup>
10. Mushaarakah assets may be liquidated through actual liquidation in which the assets are disposed to the markets or third parties. The proceeds of the disposal shall then be measured against the capital to recover the capital and to distribute the profit or to record a loss accordingly.<sup>48</sup>
11. In the case of an actual liquidation, the assets shall be sold at market value and the proceeds of the sale shall be used as follows:
  - i. Payments of liquidation expenses.
  - ii. Payment of financial liabilities that are owed to the partnership.
  - iii. Distribution of the remaining assets, if any, among the partners in proportion to the profit ratio agreed upon.<sup>49</sup>
12. A constructive liquidation of the partnership assets may be effected where the partners agree to dissolve the existing partnership and initiate a new partnership by investing the initial assets as capital in kind.<sup>50</sup>
13. If a constructive liquidation has to take place, all the debts and liabilities have to be paid out then only can a new partnership be initiated.

#### **AMENDMENT AND VARIATION OF MUSHAARAKAH AGREEMENT:**

1. Any amendment or alteration to the Mushaarakah agreement may take effect at any time through the tenure of the contract on all the terms provided such amendments and variations are mutually agreed upon by the partners.

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ولو كان الشركاء ثلاثة مات واحد منهم حتى انفسخت الشركة في حقه لا تنفسخ في حق الباقين ، كذا في المحيط فتاوى الهندية ج 2 ص 335 مكتبه رشيديه

<sup>46</sup> Aaoifi 2008 pg 209

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

2. Any amendment to the loss sharing ratio which differs from the capital contribution ratio is not permissible.<sup>51</sup>

**We advise one to put a Mediation/ Arbitration clause such as:**

Any dispute arising from or in connection with this contract shall be finally resolved in accordance with the standard conditions of Mediation/Arbitration of the Darul Iftaa Mahmudiyyah Sherwood, Durban, by an arbitrator appointed by the Darul Iftaa or any other competent Darul Iftaa.

**NOTE:** The above-mentioned are broad rules regarding a partnership agreement. If any individual wishes to add any specific condition, he may do so and attach it to this document. The conditions must not conflict with the integrals of Shariah. As such we advise that the contract be sent to a Mufti or an Alim for revision and verification so that all the conditions come in conformity with the dictates of Shariah.

**Live like brothers and Deal like strangers**

**Remember to reduce all your dealings in writing**

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<sup>51</sup>فما كان من ربح فهو بينهما على قدر رؤوس أموالهما، وما كان من وضعية أو تبعة فكذلك، ولا خلاف أن اشتراط الوضعية بخلاف قدر رأس المال باطل، واشتراط الربح متفاوتا عندنا صحيح فتاوى الشامى ج4 ص 305