

NOTE ON THE MINIMUM TERMS AND CONDITIONS FOR MUDARABA CONTRACTS

The following terms and conditions should, as a minimum and as relevant from case to case, be dealt with in Mudaraba contracts where the bank acts as Mudarib:

- details of the parties to the contract, as well as a description of the objects and purposes (whether general or specific) of the particular contract;
- information on the limits/restrictions on investments to be made by the bank under the contract (whether general or specific), as well as a reference to any discretion in this context which the bank has under the contract;
- details of how and by whom the contract assets will be managed and invested, as well as disclosure of any investment policies behind the contract (if applicable). Reference should also be made to any delegation powers of the bank in relation to such management and investment;
- a description of how the contract is to be evidenced (e.g. by certificates) should be given;
- reference of the governing law of the contract (i.e. Shari'a Law, as interpreted by the relevant Supervisory Board) should be made. [In this context, banks should note that their Supervisory Board must both review and approve the contents of, and investments proposed for, standard-form Mudaraba contracts before they are used by the bank to enter into contractual relationships with investment account holders];
- the term/period of the contract, as well as the start and termination dates thereof, should be stated;
- specific reference to the segregation (or otherwise) of the contract assets from the bank's assets and from the claims of the bank's own creditors should be made (if applicable). In addition, it should be clearly stated whether the assets of one Mudaraba contract are to be co-mingled with the assets of other contracts;
- information should be provided on whether transfer or waiver of rights and obligations under the contract (as well as title certificates where relevant) is permitted and, if so, how;
- details of the liability of the bank for breach of contract and negligence, and whether or not a guarantee from a third party exists for that liability, should be given;
- information on minimum subscription levels and currency restrictions should be included;
- reference to the liability of investment account holders being limited to their contributions under the contract should be made. Furthermore, the contract should make it clear (in a prominent position and manner in the contract itself) that the contractual risk including the currency risk, is totally on the investment account holder at all times;

- full information should be included about the deduction from profits of the bank's fees and any other relevant items. In addition, details of any unused reserves and their ultimate treatment/use by the bank should be clearly stated;
- information should be provided about the valuation of the contract assets, how often and by whom (if applicable);
- reference should be made to withdrawal/redemption (including early withdrawal/redemption) by the investment account holder and the effects thereof on his contractual rights and on the contract assets;
- the bank's share of profits as Mudarib;
- details of how any investment account holder's complaints are to be handled should be provided. Furthermore, provision for dispute resolutions and jurisdiction for litigation should be made;
- information should be included on the manner and timing of notices from the bank to the investment account holder and vice versa, as well as statements of account for the contract assets, which may be required from time to time;
- provision should be made for a Power of Attorney to be given to the bank by the investment account holder where necessary. In addition, where lien and set-off rights are to be given in favour of the bank, these should be expressly provided for;
- provision should be made for amending the terms and conditions of the contract, as well as the early termination of the relationship between the investment account holder and the bank; and
- both the investment account holder and the bank should sign the contract. Furthermore, the investment account holder should confirm in writing his agreement to the terms and conditions of the contract, as well as confirming his understanding thereof.

Finally, banks should ensure that the terms and conditions of contracts are clear, concise and unambiguous, and are not intentionally misleading in any way which would confuse an investment account holder or result in his entering into a relationship the impact of which he does not appreciate. Due prominence should be given to the fact that, in contracts such as these, the entire contractual risk is on the investment account holder except in the case of the bank's negligence. The extent of such risk (i.e. low, medium or high) should be explained to the investment account holder, and a reference to such risk should be made on the face of the contract.