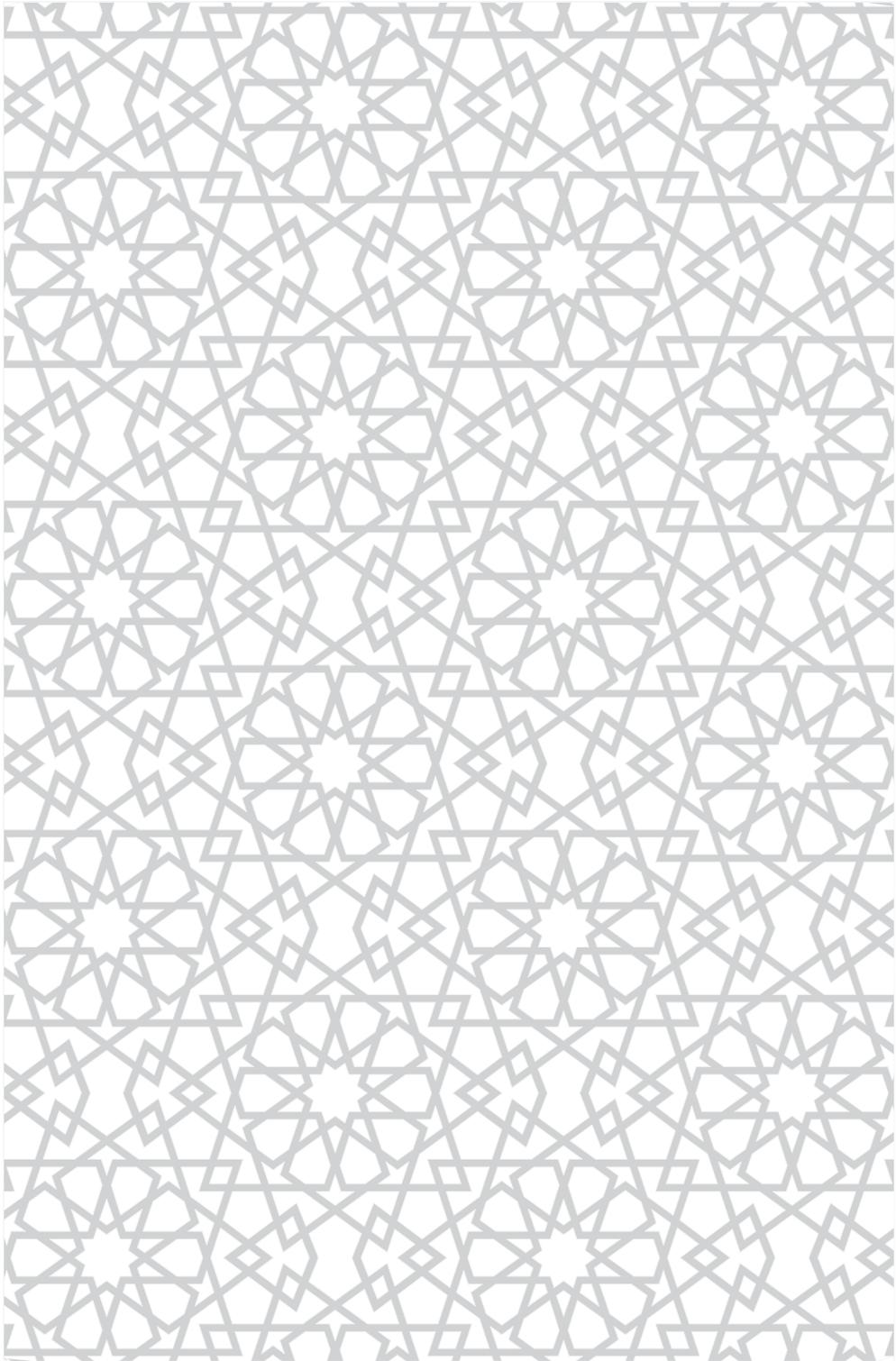


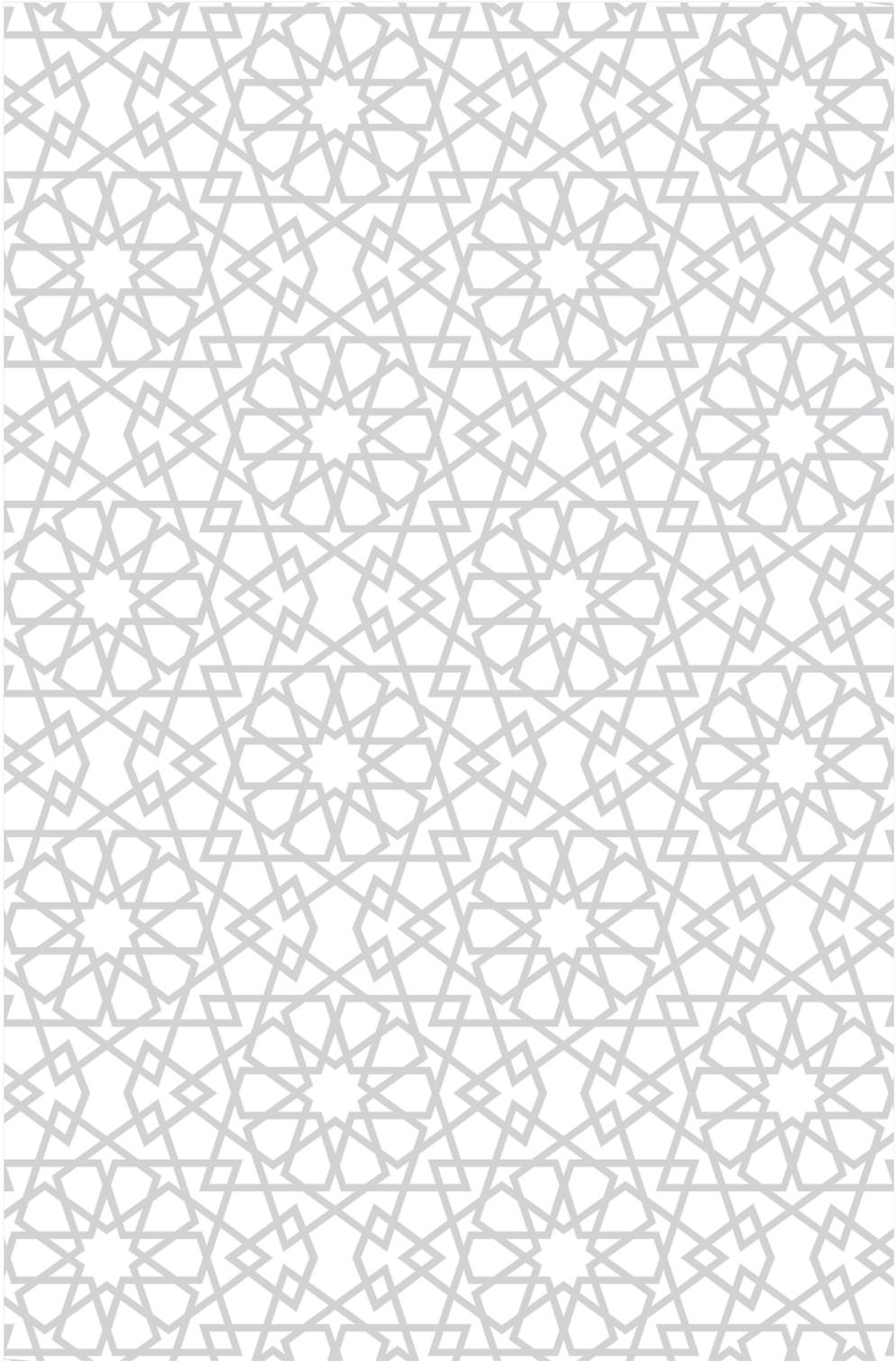
Shari'ah Standard No. (53)

'Arboun (Earnest Money)



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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 explain the Shari'ah rules relating to the payment of 'Arboun (Earnest Money) in sale contracts and its application in the activities of Institutions.⁽¹⁾

(1) The word (Institution/Institutions) is used here to refer, in short, to Islamic financial institutions including Islamic Banks.

Statement of the Standard

1. Scope of the Standard

This Standard covers the definition of 'Arboun (Earnest Money), the rules applicable to it and its applications in the activities of institutions in commutative financial transactions that do not require spot delivery of countervalues. It does not cover payments made prior to contract such as refundable security deposits, commissions or advance payments made subsequent to contracts that are not subject to options.

2. Definition of 'Arboun (Earnest Money)

2/1 Earnest money is paid by the buyer to the seller⁽²⁾ at the time of contract on the basis that the buyer has the option to revoke the contract during an agreed period of time. If he confirms the contract, the earnest money is credited towards the price. If he does not confirm the contract or fails to pay the remaining price during the stipulated time, the seller is entitled to forfeit 'Arboun (Earnest Money).

2/2 An agreement to execute a contract in the future (an agreement to sell) is a promise and not a contract. If money is paid with the promise, it is not considered to be earnest money ('Arboun).

2/3 'Arboun (Earnest Money) can be paid in cash, in kind and with a usufruct.

3. Permissibility of Earnest Money

3/1 It is permissible to pay 'Arboun (Earnest Money) in commutative contracts that do not require spot payment of one or both counter-values whether the sale item is identified or is sold by description

(2) What applies to the buyer also applies to the lessee and the purchaser in an Istisna'a contract, and what applies to the seller also applies to the lessor and the seller in an istisna'a contract, etc.

for future delivery (*Ijarah Mawsufah Fi al-Dhimmah*), such as sales, Istisna'a contracts, leases of identified assets and of assets leased by description for a future date.

3/2 Payment of 'Arboun (Earnest Money) is not permissible in Salam and currency exchange contracts.

4. Option Period Arising from 'Arboun (Earnest Money) Payment

The option period arising from the payment of 'Arboun (Earnest Money) must be specified either by express stipulation of the parties, or by custom if there is an existing custom that specifies the option period.

5. Lapsing of the Option Arising from 'Arboun (Earnest Money) Payment

5/1 The buyer loses his right to revoke the contract if he informs the seller that he has confirmed the contract or disposes the sold item in a manner that indicates confirmation. The contract may stipulate conduct that indicates lapsing of the option and confirmation of the contract in order to avoid dispute. [see Shari'ah Standard No. (52) on Options to Reconsider]

5/2 If the option period expires without the buyer paying the remaining price to the seller and without the seller having agreed an extension, the contract is considered revoked and the buyer is not entitled to recover the 'Arboun (Earnest Money).

6. Ownership and Liability for the Sold Item During the Option Period

Prior to delivery, the seller is liable for any loss to the sale item. If it is destroyed or damaged before delivery to the buyer or delivery is not possible, the contract is void and the earnest money must be returned to the buyer. After delivery, the buyer is liable for the sale item. If it is destroyed or damaged after delivery to the buyer, the buyer's option is canceled and he is required to pay the balance (unpaid part of the price) to the seller.

7. Delivery of the Sale Item During the Option Period

The buyer may take delivery of the sale item during the option period, which does not on its own indicate confirmation of the contract unless the buyer's conduct indicates that he has accepted the sale item.

8. Increase in the Sold Item During the Option Period

- 8/1 Increase that is physically connected to the original is considered part of the original.
- 8/2 In principle, any growth in (increase to, and/or yield of) the sale item that is physically separate from it, which occurs during the option period whether prior to delivery or after delivery is considered part of the sale item. It is permissible for the party who is liable for the sale item to stipulate that any increase that is physically separate should belong to him, even if ultimate ownership of the sale item is not vested in him.

9. Disposal of the Sale Item Under 'Arboun (Earnest Money) Arrangement

- 9/1 If the sold item is identified, the seller is not entitled to dispose of it. If the seller does dispose of it by sale or lease or otherwise, his actions are subject to the rules relating to uncommissioned (Fodooli) disposals. If the buyer ratifies the seller's actions, he loses his option and is liable for the remainder of the price to the first seller. The first seller's disposal becomes binding and the first buyer is entitled to receive the sale price. If the first buyer does not ratify the seller's actions, the second disposal is void. [see Shari'ah Standard No. (23) on Agency and Acts of Uncommissioned Agent (Fodooli)]
- 9/2 If the sale is related to an identified item, the seller cannot deliver a different item even with same specifications, except with the consent of the buyer, in which case what the buyer has paid remains 'Arboun (Earnest Money).
- 9/3 If the buyer stipulates that he will offer the sale item to his clients during the option period and the seller accepts this, the buyer's right to revoke the contract remains valid during the option period, even after offering the item to his clients. The conclusion of a sale to one of his clients is deemed to be confirmation of the contract.
- 9/4 It is not permissible to negotiate/trade options arising from payments of 'Arboun (Earnest Money). [see Shari'ah Standard No. (20) on Sale of Commodities in Organized Markets]

10. Stipulating Refund of Earnest Money in the Contract

It is permissible for the buyer to stipulate a condition in the contract providing for a refund of earnest money in specific situations, such as the buyer's failure to obtain licenses from the relevant authorities.

11. Date of Issuance of the Standard

The Shari'ah Board issued this standard on 15 Muharram 1435 A.H., corresponding to 8 November 2014 A.D.

Adoption of the Standard

The Shari'ah Board adopted the standard on 'Arboun (Earnest Money) in its meeting No. (39) held in the Kingdom of Bahrain on 13-15 Muharram 1435 A.H., corresponding to 6-8 November 2014 A.D.

Appendix (A)

Brief History of the Preparation of the Standard

On 19 Rabi' I, 1433 A.H., corresponding to 12 March 2012 A.D., the Secretariat of AAOIFI decided to commission a Shari'ah consultant to prepare a juristic study on 'Arboun (Earnest Money).

In its meeting No. (35) held in Al-Madinah Al-Munawwarah on 22-23 Shawwal 1434 A.H., corresponding to 29-30 September 2013 A.D., the Shari'ah Board discussed the exposure draft of the standard and introduced the changes it deemed suitable.

In its meeting No. (37) held in the Kingdom of Bahrain on 19-21 Jumada I, 1435 A.H., corresponding to 20-22 March 2013 A.D., the Shari'ah Board continued its discussions on the exposure draft of the standard, and introduced the changes it deemed suitable.

In its meeting No. (38) held in the Kingdom of Bahrain on 28 Sha'ban – 1 Ramadan 1435 A.H., corresponding to 26-28 June 2014 A.D., the Shari'ah Board continued its discussions on the exposure draft of the standard, and introduced the changes it deemed suitable.

The Secretariat of AAOIFI held a public hearing in the Kingdom of Saudi Arabia (Riyadh) on 28 Dhul-Hajjah 1435 A.H., corresponding to 22 October 2014 A.D. The public hearing was attended by representatives of central banks, institutions, auditing firms, Shari'ah scholars, academics and others interested in this field. The members of the Shari'ah Board and the Shari'ah Standards Committee responded to a number of observations raised by the participants.

In its meeting No. (39) held in the Kingdom of Bahrain on 13-15 Muharram 1435 A.H., corresponding to 6-8 November 2014 A.D., the Shari'ah Board discussed the changes proposed at the public hearing and introduced the changes it deemed suitable to the exposure draft of the standard, and adopted the standard.

Appendix (B)

The Shari'ah Basis for the Standard

- The basis for permissibility of 'Arboun (Earnest Money) is a narration that Nafi' Ibn Abdul-Harith purchased a building in Mecca to be used as a prison from Safwan Ibn Umayyah, provided that if Umar (may Allah be pleased with him) approves the sale, then the sale is considered to be effected by him (Umar) and on his behalf (Umar's), and if not, then Safwan shall be paid 400 dinars.

Also, there is a narration that Ibn Sirin said: "A man said to a lessor of ride camels: prepare your camels, so that if I did not leave with you on so and so day, you get 100 dirhams. Then he did not leave with him". And Shurayh said: "He who voluntarily makes it incumbent upon himself to do something (with a condition and without coercion), then he shall have to honor the condition". Hence, 'Arboun is similar, where a buyer pays part of the price and says: "If I did not confirm the sale, the 'Arboun is yours to keep". Payment of the 'Arboun either at time of contract or later at the time of relinquishing it is valid.

- The basis for impermissibility of 'Arboun in *Sarf* and Salam contracts is that 'Arboun is embedded with a cooling-off option (*Khiyar al-Shart*), which according to the majority of Fuqaha (of the Four Schools of Fiqh) is impermissible in *Sarf* contracts (currency exchange transactions). This rule was deduced from the Hadith: "*Gold for gold, silver for silver... like for like, equal for equal, and hand to hand. If these types differ, then sell them as you find proper, provided it is hand to hand*".

Ibn Umar (may Allah be pleased with both of them) is reported to have said: "O, Messenger of Allah, hold on that I may ask you a question: I sell camels in Baqi', so that I sell for dinars and receive dirhams, and I sell for dirhams and receive dinars. I take so and so of this and pay so and so of that? Then the Prophet (peace be upon him) said: "*No harm that you apply*

the market rate unless you (you and the counterparty) leave the transaction session without settlement of dues". Therefore, this was an evidence on the requirement to take possession of both countervalues (Qabd) at the contracting session (*Majlis al-'Aqd*).

'Arboun is also impermissible in Salam contract, because in Salam, payment of the price (capital of Salam) shall be settled at the contracting session. The Prophet (peace be upon him) said: "*Whoever pays money in advance for dates (to be delivered later) should pay it for a known specified weight and measure (of the dates)....*". This implies that unless the price is paid in full before the two parties leave the contracting session, the transaction is not deemed to be Salam (or Salam).

- The basis for determination of a specific term for 'Arboun is to avoid Gharar that may result from an unknown term (Jahalah that involves 'Arboun term).
- The basis for the seller being liable for the object of sale before delivery and for the buyer being liable for it after delivery is the Shari'ah maxim: "Ownership (title) shall be established upon the conclusion of the contract, while liability is contingent upon delivery (Qabd)".
- The basis for attributing growth connected to the original is that it represents an integral part of it.
- The basis for attributing growth and yields, separate from the object of sale, to the object of sale is the saying of the Prophet (peace be upon him): "*Al-Kharaj Bi al-Daman*" (i.e., entitlement to revenue is based on bearing liability for the revenue-generating asset).

