



This IIFM-BAFT Master Unfunded Participation Agreement for Trade Finance Transactions (the "MUPA") has been developed by the IIFM and BAFT to facilitate Shari'ah compliant unfunded participation transaction between Islamic financial institutions. IIFM and BAFT encourage the use of the MUPA by all industry stakeholders and interested parties and its use shall not be restricted to IIFM and BAFT members only. This MUPA is accompanied by an explanatory memorandum which covers structure explanation, procedures and operational guidance to be implemented by potential users.

In The Name Of Allah, The Most Beneficent, The Most Merciful

**IIFM-BAFT MASTER UNFUNDED PARTICIPATION AGREEMENT
FOR TRADE FINANCE TRANSACTIONS**

اتفاقية مشاركة رئيسة غير مُمَوَلة لمعاملات التمويل التجاري

Dated []

Between

Party A [INSERT NAME]

And

Party B [INSERT NAME]

Disclaimer

It is to be noted that this IIFM-BAFT Master Unfunded Participation Agreement for Trade Finance Transactions (the "MUPA") has been developed to document only unfunded participation. In compliance with Shari'ah parameters and for greater clarity purposes, IIFM and BAFT have developed a separate master funded participation agreement for trade finance transactions (the "MFPA") to document a funded participation and IIFM and BAFT encourage that the MFPA will be used for a funded participation.

This MUPA has been approved by the IIFM Shari'ah Board and any potential user who proposes to adopt it, without any fundamental amendments, can obtain on request the IIFM Shari'ah Board Approval Pronouncement. Potential users are requested to register their interest with IIFM in order to complete the IIFM required procedures with regard to obtaining the IIFM Shari'ah Board Approval Pronouncement. The IIFM Shari'ah Board Approval Pronouncement is in relation to the MUPA only and shall not cover any transactions entered into under or in connection with the MUPA.

The MUPA should not be used for transactions entered into for the purposes of speculation, and should not be amended to provide for the charging or payment of interest (whether called interest or an alternative name representing interest).

IIFM and BAFT jointly or severally are not responsible for the use of the MUPA or for any damages or losses resulting from the use of the MUPA or any transactions entered into under or in connection with the MUPA. All potential users of the MUPA are urged to undertake their own evaluation of the MUPA to ensure that it is appropriate for use by them in their particular circumstances or in a particular transaction and to ensure that their interests will be protected by its use. Thus, potential users of the MUPA agree that it is the responsibility of such users to ensure that the terms, provisions and conditions of the MUPA are appropriate and protect the users' interests in all respects, and to modify any such terms, provisions and conditions as appropriate in the relevant circumstances.

The attention of users of this MUPA is drawn to the footnotes to this MUPA which provide explanatory information but do not constitute a part of the MUPA.

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THIS IIFM-BAFT MASTER UNFUNDED PARTICIPATION AGREEMENT FOR TRADE FINANCE TRANSACTIONS¹ (the "**Agreement**") is dated [●] and made between:

- (1) [Party A] a bank incorporated in [●], [Head Office][Registered Office] at [●]; and
- (2) [Party B] a bank incorporated in [●], [Head Office][Registered Office] at [●]²,

each a "**Party**" and together the "**Parties**".

WHEREAS:

- (A) The Parties wish, from time to time and in accordance with *Wakalah* (agency) arrangement, to enter into trade participation transactions on an unfunded basis.
- (B) If one Party offers to the other Party a participation on an unfunded basis in accordance with Clause 3.1 (*Offer*) and the other Party accepts such Offer in accordance with Clause 3.2 (*Acceptance*), the provisions of this Agreement shall apply to such participation (an "**Unfunded Participation**").
- (C) The Party offering the Unfunded Participation will be called the "**Grantor**" and the Party taking the Unfunded Participation will be called the "**Participant**"³.
- (D) In relation to an Unfunded Participation, since an LC or LG is to be issued only in the name of the Grantor, the Grantor shall enter into an agency agreement with the Participant and the other participating banks (if any) whereby the Participant and the other participating banks (if any) will appoint the Grantor as their collective agent (*Wakil*) to issue the LC or LG in the name of the Grantor under such Unfunded Participation. In this regard, the LC or LG shall be issued by the Grantor on its own behalf for its own share in the LC or LG and on behalf of the Participant and the other participating banks (if any) as an agent for their respective share in the LC or LG. The Grantor will accept such appointment to act as an agent (*Wakil*) of the Participant and the other participating banks (if any) in accordance with the terms of this Agreement.
- (E) The agency agreement to be entered into between the Grantor and the Participant shall be substantially in the form set out in the Appendix (*Form of Agency Agreement*) to this Agreement and shall be executed prior to the issuance of an LC or LG by the Grantor in order to facilitate sharing with the Participant the participation service fee (if any) to be paid by the Obligors to the Grantor in a *Shari'ah* compliant manner.
- (F) The Participant's share in the participation service fee (if any) shall be the relevant Participation Percentage set out in the Offer and shall be for (i) services rendered by the Participant to the Grantor in connection with the Participated Transaction and such services

¹ General *Shari'ah* rulings on risk participation arrangement: As per the *Shari'ah* it is allowed for two or more parties to jointly guarantee any *Shari'ah* compliant obligation through a *Shari'ah* compliant mechanism. Therefore, it is permissible for an Islamic bank to share part of its risk exposure under an LC or LG etc., with Islamic or conventional banks, taking into consideration the following:

(1) Risk participation agreement must not create any *Shari'ah* repugnant obligation on any party, such as entitlement of penalty interest in case of delay by the customer in funding any claim under LG or LC.

² If a bank is contracting with a branch, the need for "multibranch" provisions be considered on an incremental basis and parent company guarantees sought as necessary.

³ The participant can play the role of a third party guarantor (*Kafil*) to the debtor (Obligor). (See AAOIFI *Shari'ah* Standard No. (5) "Guarantees"). It is not permissible to combine agency and personal guarantees in one contract at the same time (i.e. the same party acting in the capacity of an agent on one hand and acting as a guarantor on the other hand), because such a combination conflicts with the nature of these contracts. In addition, a guarantee given by a party acting as an agent in respect of an investment turns the transaction into an interest-based loan, since the capital of the investment is guaranteed in addition to the proceeds of the investment, (i.e. as though the investment agent had taken a loan and repaid it with an additional sum which is tantamount to *riba*). But if a guarantee is not stipulated in the agency contract and the agent voluntarily provides a guarantee to his clients independently of the agency contract, the agent becomes a guarantor in a different capacity from that of agent. In this case, such an agent will remain liable as guarantor even if he is discharged from acting as agent.

include examining any relevant documents related to the Participated Transaction and advising the Grantor of any discrepancies in the Transaction Documentation provided that any services rendered by the Participant shall be directly or indirectly for the benefit of the parties involved in the Participated Transaction including the Obligors and/or (ii) preparation or issuance of any documents, reports or feasibility studies by the Participant related to or in connection with the Obligors and/or the Participated Transaction and the parties involved in the Participated Transaction including the Obligors may receive a copy of such documents, reports or studies upon request.

IT IS AGREED as follows:

1. **DEFINITIONS AND CONSTRUCTION**

1.1 **Definitions**

For the purpose of this Agreement and any Participation Agreement, the following words and expressions shall have the following meanings:

"Acceptance" means acceptance by the Participant of an Offer in accordance with Clause 3.2 (*Acceptance*) and substantially in the form set out in Schedule 1 (*Form of Offer and Acceptance*).

"Beneficiary" means the person entitled to payment from the Grantor under a Participated Transaction.

"Binding Amendment and Re-organisation" means in respect of each Participated Transaction:

- (a) any amendment or waiver of any term of the Transaction Documentation applicable to such Participated Transaction or any re-organisation of the obligations of an Obligor under any such Transaction Documentation in each case made in accordance with the terms of such Transaction Documentation; or
- (b) any re-organisation of the credit facility granted to an Obligor under the Transaction Documentation applicable to such Participated Transaction,

in each case in compliance with the principles and rules of *Shari'ah*.

"Business Day" means, in respect of each Participated Transaction, a day (other than a [Friday]⁴, Saturday, [Sunday]⁵ or a public holiday) on which the head office of the Participant and the Grantor are open for general business [and, for the purposes of payments only, any day on which banks are open for general business in New York/London]⁶.

"Clause" means any clause of this Agreement.

"Default" means:

- (a) any non-receipt of monies due to the Grantor by the Obligors at the Due Date under a Participated Transaction; and/or

⁴ To be mutually agreed by the Parties.

⁵ To be mutually agreed by the Parties.

⁶ To be mutually agreed by the Parties.

- (b) the Grantor receiving monies from the Obligors under a Participated Transaction which the Grantor is subsequently required to return to an Obligor or any third party by operation of mandatory rules of law⁷.

"Defaulted Amount" means:

- (a) a sum due to the Grantor by the Obligors under a Participated Transaction which has not been received by the Grantor; and/or
- (b) a sum received by the Grantor from the Obligors under a Participated Transaction which the Grantor is subsequently required to return to an Obligor or any third party by operation of mandatory rules of law⁸.

"DOCDEX" means Documentary Credit Dispute Resolution Expertise which is administered by the ICC International Centre for Expertise (a unit within the Secretariat of the ICC International Court of Arbitration) for settling letter of credit disputes.

"Due Date" means the date on which a payment to the Grantor by the Obligors is due under a Participated Transaction.

"FATCA"⁹ means:

- (a) sections 1471 to 1474 of the US Internal Revenue Code of 1986 (the "Code") or any associated regulations;
- (b) any treaty, law, regulation of any other jurisdiction, or relating to an intergovernmental agreement between the US and any other jurisdiction, which (in either case) facilitates the implementation of any law or regulation referred to in paragraph (a) above; or
- (c) any agreement pursuant to the implementation of any treaty, law or regulation referred to in paragraphs (a) or (b) above with the US Internal Revenue Service, the US government or any governmental or taxation authority in any other jurisdiction.

"FATCA Exempt Party" means a Party that is entitled to receive payments free from any FATCA Deduction.

"FATCA Deduction" means a deduction or withholding required by FATCA from a payment under the Participated Transaction.

"ISP"¹⁰ means International Standby Practices, ICC Publication No 590 and any subsequent revisions thereof.

⁷ This refers to a situation where the Grantor received money from an Obligor pursuant to the terms of a Participated Transaction but the Grantor needs to return that money to that Obligor or a third party (e.g., an administrator or liquidator of that Obligor) in compliance with the Grantor's obligations under any applicable laws, rules or regulations. This may happen when an Obligor made a payment to the Grantor when the Obligor was technically insolvent or was not legally permissible to make such payment for any other reason.

⁸ As explained in footnote 7 above.

⁹ The Foreign Account Tax Compliance Act (FATCA) is a 2010 United States federal law to enforce the requirement for United States persons including those living outside the U.S. to file yearly reports on their non-U.S. financial accounts to the Financial Crimes Enforcement Network (FINCEN). It requires all non-U.S. (foreign) financial institutions (FFIs) to search their records for indicia indicating U.S. person-status and to report the assets and identities of such persons to the U.S. Department of the Treasury.

¹⁰ ISP refers to an international set of rules governing the rights and obligations of parties under standby letters of credit produced by the International Chamber of Commerce ("ICC"). The current version is ISP98, ICC Publication No 590.

"**Letter of Credit**"¹¹ or "**LC**" means a commitment by the Grantor, on behalf of the Obligors, to pay a Beneficiary (i.e., goods supplier) a specified amount of money under specified conditions such as on shipment of certain *Shari'ah* compliant specified goods.

"**Letter of Guarantee**" or "**LG**" means, under the *Kafalah* arrangement, the Grantor's guarantee to the payment obligations of the Obligors.

"**LC at sight**" or "**Sight documentary credit**" means immediate payment to the Beneficiary upon presentation to the Grantor of the specified documents.

"**LC at deferred payment**" means payment to be made at the end of the stipulated period.

"**LC issued against 100% cash margin**" means the Obligors (applicant) open an LC against the Obligors' own funds covering 100% of the value of the LC.

"**LC covered partially**" means the Obligors (applicant) open an LC against the Obligors' own funds covering less than 100% of the value of the LC. For greater clarity, the Obligors cover a certain percentage of the LC value from the Obligors' own funds.

"**LC fully uncovered**" means the Obligors (applicant) open an LC with nil cover. For greater clarity, the Obligors do not deposit any of their own funds towards the issue of the LC and the Grantor issues the LC covering 100% of the value of the LC against a credit facility extended by it to the Obligors.

"**Obligors**" means the persons to whom the Grantor has recourse in respect of a Participated Transaction, as specified in the relevant Offer.

"**Offer**" means an offer made by the Grantor to the Participant in accordance with Clause 3.1 (*Offer*) and substantially in the form set out in Schedule 1 (*Form of Offer and Acceptance*).

"**Participated Transaction**" means the Transaction in which the Participant accepted a participation in accordance with Clause 3.2 (*Acceptance*).

"**Participation Agreement**" means the agreement between the Grantor and the Participant on the terms of the Offer, Acceptance and this Agreement (together with any amendments which the Grantor and the Participant may agree in writing from time to time) in respect of a Participated Transaction.

"**Participation Amount**" means, in relation to a Participated Transaction, the aggregate principal liability assumed by the Participant in respect of such Participated Transaction as specified in the relevant Participation Agreement (but, for the avoidance of doubt, not including any costs or expenses for which the Participant is expressly liable under the terms of this Agreement).

"**Participation Percentage**" means, in respect of a Participated Transaction, the proportion that the Participation Amount bears to the Transaction Amount (expressed as a percentage figure).

"**Participation Portion**" means, in relation to a Participated Transaction, the amount equal to the Participation Percentage of the Defaulted Amount.

"**Party**" means a party to this Agreement.

¹¹ As this is a framework master agreement only for the organization and arrangement of the relationship with regard to trade participation terms and conditions between the Grantor (principal bank/institution) and the Participant (participating bank/institution), the details and conditions of these matters (i.e. LC/LG, LC at sight, LC at deferred payment, LC issued against 100 % cash margin, LC covered partially and LC fully uncovered) shall be included in the Transaction Documentation to be entered into between the Grantor (principal bank/institution) and the applicant (Obligors).

"**Relevant Currency**" means the currency in which the relevant Transaction is denominated, as specified in the relevant Offer.

"**Relevant Dispute**" has the meaning given to it in paragraph (c) of Clause 12 (*Documentary Discrepancies*).

"**Retention Share**" means the percentage of the Transaction Amount of the Participated Transaction retained by the Grantor at its own risk¹².

"**Termination Date**" means, in relation to a Participated Transaction, the earlier to occur of:

- (a) 30 calendar days following the final Due Date;
- (b) the date the relevant Unfunded Participation is terminated in accordance with its terms; or
- (c) the date on which the Grantor's liability (both current and contingent) under that Participated Transaction is reduced to zero.

"**Transaction**" means any of the transactions specified in Clause 2 (*Transactions*) which has been granted to the Obligors pursuant to the Transaction Documentation.

"**Transaction Amount**" means in relation to a Participated Transaction, the aggregate principal amount of the Grantor's exposure to the Obligors, as specified in the relevant Participation Agreement.

"**Transaction Documentation**" means the *Shari'ah* compliant transaction documentation which set out the material terms of the relevant Transaction between the Grantor and the Obligors, together with all schedules and appendices thereto, any amendments or variations thereto and all related guarantee and security documentation.

"**UCP600**¹³" means the Uniform Customs and Practice for Documentary Credits, ICC Publication No. 600.

"**Unfunded Participation**" means a participation on an unfunded basis.

"**Zakah**" means an annual alms payment which must be paid by Muslims (individuals or corporations) in accordance with the principles and rules of *Shari'ah* as interpreted by the relevant *Shari'ah* Supervisory Board and the laws of relevant jurisdiction.

1.2 Construction

In this Agreement:

- (a) Unless the context otherwise requires:
 - (i) use of the singular shall include the plural and vice versa;
 - (ii) a "**person**" includes any gender, any individual, firm, company, corporation, government, state or agency of a state or any association, trust, joint venture, consortium, partnership or other entity (whether or not having separate legal personality);

¹² The retention share refers to the agreed percentage of the Grantor's exposure to the Obligors that will be retained by the Grantor notwithstanding any participation agreement which the Grantor may enter into with any other participant.

¹³ The Uniform Customs and Practice for Documentary Credits (UCP) is a set of rules on the issuance and use of letters of credit produced by the International Chamber of Commerce ("ICC").

- (iii) a "**Party**" or any other person includes its successors in title, permitted assigns and permitted transferees;
 - (iv) an "**Obligor**" shall be construed so as to include its successors in title, permitted assigns and permitted transferees;
 - (v) a "**law**" includes any law (including common or customary law), statute, constitution, decree, judgment, treaty, regulation, directive, by-law, order or any other legislative measure of any governmental, intergovernmental or supranational body, agency, department or regulatory, self-regulatory or other authority or organisation and, for the avoidance of doubt, reference to "**law**" does not include reference to principles and rules of *Shari'ah*;
 - (vi) a reference to this Agreement or any other agreement or instrument is a reference to this Agreement or other agreement or instrument as from time to time amended, restated, novated, or replaced, however fundamentally;
 - (vii) references to Clauses and Schedules are to clauses of, and schedules to, this Agreement;
 - (viii) a reference to any time, day of the week, date or Business Day shall be based on the Gregorian calendar;
 - (ix) a time of day is a reference to [●]¹⁴ time unless otherwise specified; and
 - (x) a provision of law is a reference to that provision as amended or re-enacted.
- (b) Clause and Schedule headings are included for convenience only and shall not affect the interpretation of this Agreement.

1.3 **A single agreement**

Each Participated Transaction is entered into in reliance on the fact that this Agreement, the Offer and the Acceptance applicable to such Participated Transaction form a single agreement between the Parties, and the Parties would not otherwise enter into any Participated Transaction.

1.4 **Third party rights**

Unless expressly provided to the contrary in this Agreement, a person who is not a Party has no rights to enforce or to enjoy the benefit of any term of any Participation Agreement or this Agreement [including for the avoidance of doubt under the Contracts (Rights of Third Parties) Act 1999]¹⁵.

¹⁴ To be mutually agreed by the Parties.

¹⁵ Only to be included where English law is the governing law of this Agreement.

2. TRANSACTIONS¹⁶

- (a) The Grantor may from time to time desire to offer and the Participant may desire to accept and adopt Unfunded Participations in relation to any trade finance transactions which are to be entered into between the Grantor and the Obligor in compliance with the principles and rules of *Shari'ah* including¹⁷:
- (i) Letters of Credit issued or confirmed by the Grantor, drafts accepted and deferred payment or negotiation obligations incurred by the Grantor under Letters of Credit (excluding any discounting arrangement);
 - (ii) confirmations or guarantees¹⁸ of Letters of Credit given at the request of the Beneficiary;
 - (iii) irrevocable reimbursement undertakings, letters of indemnity, Letter of Guarantees or similar instruments issued by the Grantor;
 - (iv) advance payment guarantees issued by the Grantor;
 - (v) performance and bid bonds issued by the Grantor; and
 - (vi) any other type of *Shari'ah* compliant trade financing obligation acceptable in *Shari'ah*.

¹⁶ See the AAOIFI *Shari'ah* Standard No. (14) Documentary Credit: (1) A Documentary credit is a written undertaking by a bank (known as the issuer) given to the seller (the beneficiary) as per the buyer's (applicant's or orderer's) instruction or is issued by the bank for its own use, undertaking to pay up to a specified amount (in cash or through acceptance or discounting of a bill of exchange), within a certain period of time, on condition that the seller present documents for the goods conforming to the instructions (it is an undertaking by a bank to pay subject to conformity of the documents to the contractual instructions). (2) Use of cheques or promissory notes: There is no *Shari'ah* objection to obtaining cheques or promissory notes from the debtor (unless not allowed by law) as a means to force the debtor to make timely payment of installments in cash, whereby if the debtor pays on time such cheques or promissory notes shall be returned to him, and in the event of default on payment they may be produced for recovery. The party providing these cheques or promissory notes as security is entitled to obtain an undertaking from the institution that they will be used only for timely recovery of its due debts without any addition. (3) It is permissible to subscribe to an Islamic insurance coverage as security for debt obligations and it is not permissible that debts are insured on a conventional insurance basis (4) Types & classifications: Types of documentary credit and classifications: (a) Syndicated credit (partnership credit), which describes the state of participation by more than one bank due to the huge amount of credit granted with each bank providing a letter of guarantee, to the extent of its participation, to the leading bank. (b) Standby credit (guarantee credit). This credit resembles letters of guarantee with a clause that payment is conditional upon beneficiary's (in this case the contractor's) failure to perform. (5) *Shari'ah* ruling on documentary credit: Dealing in documentary credit includes agency for providing procedural services, the most important of which is the examination of documents, and the provision of institutional guarantee to the importer. As both agency and guarantee contracts are permissible, documentary credit becomes permissible subject to the conditions stipulated in the AAOIFI *Shari'ah* Standard No. (14). (6) Opening of all types of documentary credit, its issuance and confirmation, on the basis of the client's order or for the institution itself, are permitted for an institution. (7) The issuance of a credit facility should not involve *riba* bearing profits or become a means for such profits. All transactions and procedures must be in accordance with the provisions and principles of *Shari'ah*.

¹⁷ See the AAOIFI *Shari'ah* Standard No. (14) "Documentary Credit": Guarantees in documentary credits: (1) It is permissible for the institution to secure the obligations arising out of documentary credit, or to provide documentary credit as security for payment in favour of institutions and banks dealing with it. The institution may act as an intermediary for facilitating documentary credit using other permissible and acceptable forms of guarantee. It is, therefore permissible to use a number of means as a cover for documentary credit including cash, freezing of permissible accounts and negotiable instruments valid according to the *Shari'ah*, certificates of shares in real estate and withholding the documents of the credit that stand for the goods. (2) The cover of a documentary credit may be also one of the following: a transferable letter of credit; a back-to-back letter of credit; a letter of guarantee issued by a bank of the beneficiary against the advance payment in case of advanced payment credits; a letter of guarantee issued by a bank participating in the issuance or confirmation of the credit; relinquishment receivables and commercial papers, such as bill of exchange and promissory notes. (3) It is not permissible for the institution to accept the following types of guarantees: interest-based bonds, shares of companies that deal in prohibited activities, and interest-based receivable. It is also not permissible for the institution to provide any of these guarantees as security for its obligation to other institutions or banks or to act as an intermediary to facilitate such guarantees. (4) It is permissible for the institution and the applicant for documentary credit to agree on investing the cash cover of the credit in accordance with Mudaraba partnership.

¹⁸ See AAOIFI *Shari'ah* Standard No. (5) "Letters of Guarantee": (1) It is not permissible to take remuneration for issuing a letter of guarantee, whether is with cover or without cover,, if the remuneration is intended as consideration for the guarantee per se, since the amount guaranteed and the duration of the guarantee are usually taken into consideration in computing remuneration. (2) Asking an applicant for a letter of guarantee to bear administrative expenses incurred in issuing a letter of guarantee of either type (i.e. preliminary or final) is permissible in *Shari'ah*, provided the remuneration for such expenses do not exceed the commission that others would charge for such services. Where full or partial cover is provided, it is permissible, in estimating the expenses for issuing a letter of guarantee, to take into account anything that will reflect the actual service to be rendered in providing a cover for the transaction. (3) It is not permitted for the institution to issue a letter of guarantee in favour of an applicant who will use it to acquire an interest-based loan or to conclude a prohibited transaction.

- (b) A Participated Transaction shall be executed after the exchange of an Offer and an Acceptance between the Grantor and the Participant in relation to such Participated Transaction.

3. OFFER AND ACCEPTANCE

3.1 Offer

- (a) If the Grantor wishes to offer the Participant a participation in a Transaction it shall send to the Participant a duly completed Offer in accordance with Clause 18 (*Communication*).
- (b) If the Participant so requests, the Grantor will use reasonable endeavours to promptly provide to the Participant a copy of the Transaction Documentation within a reasonable timeframe prior to the expiry date set out in the Offer.

3.2 Acceptance

- (a) If the Participant agrees to the terms of the Offer and intends to enter into an Unfunded Participation pursuant to the terms of the Offer, the Participant will deliver to the Grantor its Acceptance prior to the expiry date set out in the Offer.
- (b) Any purported modifications to the terms of the Offer by the Participant shall not constitute an Acceptance unless such modifications to the terms of the Offer are accepted in writing by the Grantor within [two (2)]¹⁹ Business Days of receipt of such modifications (and the expiry date set out in the Offer shall be disregarded in this respect). If the Grantor has not expressly accepted the suggested modifications within such period, the Offer shall become void and no Participation Agreement will be concluded.
- (c) If the Participant has not accepted an Offer before the expiry date set out in the Offer, the Offer shall lapse and no purported Acceptance by the Participant of such Offer after such date will be effective.
- (d) The Participant is under no obligation to accept any Offer.

3.3 Conflict of Terms

In the event of discrepancy or inconsistency between the agreed terms of the Offer and Acceptance and the terms of this Agreement, the terms of the Offer and Acceptance will prevail.

3.4 Participation Agreement²⁰

- (a) Subject to paragraph (c) of Clause 3.2 (*Acceptance*) above, upon the delivery of an Offer by the Grantor to the Participant and an Acceptance of such Offer by the Participant in accordance with Clause 18 (*Communication*), a Participation Agreement shall be concluded between the Grantor and the Participant upon the terms of the relevant Offer and Acceptance and incorporating all of the terms and conditions of this Agreement.

¹⁹ To be mutually agreed by the Parties.

²⁰ Each institution in the participation arrangement must adhere to the rulings that govern the handling of guarantee in *Shari'ah*. (See AAOIFI *Shari'ah* Standard No. (5) as reference).

- (b) Upon conclusion of a Participation Agreement, the terms of the Offer (together with such amendments as may have been agreed in writing by each Party) shall, together with the terms of this Agreement, constitute the Participation Agreement.

4. PARTICIPATION AND FUNDING

- (a) Following a Default, the Participant, as guarantor (*Kafil*) to the Obligor²¹, irrevocably and unconditionally undertakes to pay to the Grantor within [four (4)] Business Days of the Grantor's first written demand (as specified in paragraph (b) below), an amount equal to the relevant Participation Portion.
- (b) Without prejudice to clause 5(f) below, each demand for payment to be delivered by the Grantor to the Participant under paragraph (a) above must be in the form specified in Schedule 2 (*Form of Demand for Payment*) hereto, within thirty (30) calendar days of the relevant Default.
- (c) The Grantor shall not make any demand for payment under this Clause 4 after the Termination Date (other than as referred to in Clause 8.4 (*Refund*)).
- (d) Payment by the Participant of the Participation Portion shall be in the Relevant Currency.
- (e) In the event that the Transaction Amount under a Participated Transaction is reduced, the Participation Amount in respect of such Participated Transaction shall decrease by the Participation Percentage of such reduction and the Grantor shall promptly inform the Participant of any such reduction.
- (f) Following the Grantor's demand for payment under paragraph (b) above, at the Participant's request the Grantor will use its best efforts to promptly provide to the Participant certified copies of the Transaction Documentation (other than those (if any) already supplied by the Grantor to the Participant) and any relevant demand for payment served by the Grantor upon an Obligor. For the avoidance of doubt, failure

²¹ See AAOIFI *Shari'ah* Standard No. (5) "Guarantees":

(1) It is not permissible to combine agency and personal guarantees in one contract at the same time (i.e. the same party acting in the capacity of an agent on one hand and acting as a guarantor on the other hand), because such a combination conflicts with the nature of these contracts. In addition, a guarantee given by a party acting as an agent in respect of an investment turns the transaction into an interest-based loan, since the capital of the investment is guaranteed in addition to the proceeds of the investment, (i.e. as though the investment agent had taken a loan and repaid it with an additional sum which is tantamount to *riba*). But if a guarantee is not stipulated in the agency contract and the agent voluntarily provides a guarantee to his clients independently of the agency contract, the agent becomes a guarantor in a different capacity from that of agent. In this case, such an agent will remain liable as guarantor even if he is discharged from acting as agent.

(2) Personal guarantees are divided into two types. One type is a guarantee where the guarantor has a right of recourse to the debtor, and this guarantee is offered at the request or with the consent of the debtor. The other type is a non-recourse guarantee, which is offered voluntarily by a third party without the debtor's request or consent (voluntary guarantee).

(3) An institution is not entitled to guarantee financial commitments without a right of recourse to the debtor, i.e. to be a non-recourse guarantor, unless the institution is already authorized by its shareholders and investors to make donations or to perform acts of benevolence.

(4) It is permissible to fix the duration of a personal guarantee. It is also permissible to set a ceiling on the amount to be guaranteed and it is permissible that such a guarantee be made contingent upon a future event, for example, by fixing a future date at which liability will commence and, in this case, the guarantor may validly withdraw the guarantee, by notifying the creditor, before the prospective obligation to be guaranteed arises.

(5) The creditor is entitled to claim the amount of his debt from either the debtor or the guarantor and he has the choice of claiming his right from either of them. However, the guarantor is entitled to arrange the order of liability, for example, by stipulating (at the conclusion of the contract of guarantee) that the creditor shall first claim payment from the principal debtor and that the creditor is entitled to recourse to the guarantor for payment only if the principal debtor refuses to fulfill his obligation.

(6) A valid guarantee may be given for debts, the exact amount of which is unknown. Similarly, a valid guarantee may be given for a debt that will arise in the future. However, it is permissible for the guarantor to withdraw such a guarantee before a future debt is actually created, after notifying the person having interest in the guarantee.

(7) It is permissible for a personal guarantee contract to be designated in a separate contract. It can also be concluded together with, or before, or after, the conclusion of the contract of a credit transaction.

(8) It is not permissible to take any remuneration whatsoever for providing a personal guarantee per se, or to pay commission for obtaining such a guarantee. The guarantor is, however, entitled to claim any expenses actually incurred during the period of a personal guarantee, and the institution is not obliged to inquire as to how the guarantee produced has been obtained by the customer.

(9) There is no objection in *Shari'ah* to include a number of guarantees in one contract, such as incorporating a personal guarantee together with a pledge of security in the same contract.

by the Grantor to provide such documentation will not affect the Participant's obligations under the relevant Participation Agreement.

5. DEFAULT UNDER THE PARTICIPATED TRANSACTION²²

- (a) Subject to the other provisions of this Clause 5, the Grantor may take or refrain from taking any steps the Grantor sees fit (acting reasonably and relying on such professional opinions as the Grantor thinks appropriate) in recovering all sums due to the Grantor from the Obligors under a Participated Transaction.
- (b) Following a Default and provided that the Participant is in compliance with its payment obligations under this Agreement, prior to taking or refraining from taking any steps contemplated by paragraph (a) above the Grantor shall consult in good faith with the Participant for a reasonable period and shall use all reasonable endeavours to reach agreement with the Participant as to what steps (if any) to take or refrain from taking to obtain payment or reimbursement of a Defaulted Amount from the Obligors under the Participated Transaction. The obligation of the Grantor to consult with the Participant under this paragraph shall not apply if the Grantor, acting reasonably, determines that its interests or the interests of the Participant under the Participated Transaction would be prejudiced or adversely affected by the time taken to conduct such consultation. In such case, the Grantor shall advise the Participant of any action it has taken as soon as is reasonably practicable.
- (c) Except in the case where the Grantor's actions constitute gross negligence, wilful misconduct or fraud, the Participant agrees, as guarantor (*Kafil*) to the Obligor, to reimburse the Grantor on demand for the relevant Participation Percentage of all documented expenses (including all legal expenses) reasonably and properly incurred, direct costs, losses and claims (excluding any opportunity costs, funding costs, any payment in the nature of interest or other indirect costs incurred by the Grantor) reasonably incurred in connection with the exercise or enforcement of any rights in connection with a Participated Transaction which have not been reimbursed by the Obligors.
- (d) If agreement cannot be reached as to what steps (if any) are to be taken or refrained from being taken following a Default in accordance with paragraph (b) above, the Grantor will, if so requested by the Participant and provided that the Participant has complied with its payment obligations under this Agreement, use reasonable endeavours to assign to the Participant at the [Participant's / Grantor's]²³ cost, the Participation Percentage of:
 - (i) the Grantor's claims, titles, rights and interests against the Obligors in respect of the relevant Defaulted Amount under the relevant Participated Transaction to the extent that the same is capable of assignment; or (at the Participant's option)

²² In case of default by the Obligor, (1) If a Grantor (Islamic bank) issues a guarantee to a beneficiary at the request of an Obligor (customer), either in the form of a letter of guarantee or a letter of credit, and if such guarantee is called by the beneficiary in accordance with the terms set out therein, then it shall be mandatory on the Grantor to pay the guarantee amount covered by the respective guarantee to the beneficiary. (2) Generally, guarantees issued by the Grantor at the request of the Obligor (customer) provide the Grantor with the ability to have a right of recourse against Obligor in the event of such guarantee being called by the beneficiary. Such a right of recourse creates a debt relationship between the Grantor and the Obligor, whereby the Obligor is considered to be under a debt obligation for the guarantee amount to the Grantor. From a *Shari'ah* perspective it is not allowed for the Grantor to charge the Obligor any extra amount for allowing additional time to pay the guarantee amount. Such prohibition is because the extra amount is in the nature of interest, which is strictly prohibited in *Shari'ah*. (3) As per the *Shari'ah*, the Grantor (a bank) cannot convert a unfunded facility such as a guarantee into a funded facility, since the same is tantamount to extending an interest-bearing loan, it is however possible to structure a *Shari'ah* compliant solution between the Grantor (who is acting on its own behalf and on behalf of the Participant(s)) and the Obligor whereby the Grantor can provide the Obligor (customer) with a separate *Shari'ah* compliant contingent financing facility such as Murabahah, Salam etc., with which the Obligor will be able to generate cash proceeds and will be able to settle its liability under guarantee. The liability created on the Obligor under such a facility shall be standalone and shall be paid by the Obligor as per an agreed payment plan.

²³ To be mutually agreed by the Parties.

- (ii) the Grantor's claims, titles, rights and interests related to the Participated Transaction (with the exception of any security), to the extent that the same is capable of assignment.
- (e) [If agreement cannot be reached as to what steps (if any) are to be taken or refrained from being taken following a Default in accordance with paragraph (b) above and the Participant has not exercised its rights under paragraph (d) above, the Grantor may assign to the Participant at the Grantor's cost, the Participation Percentage of:
 - (i) the Grantor's claims, titles, rights and interests against the Obligors in respect of the relevant Defaulted Amount under the relevant Participated Transaction to the extent that the same is capable of assignment; or (at the Grantor's option)
 - (ii) the Grantor's claims, titles, rights and interests related to the Participated Transaction (with the exception of any security), to the extent that the same is capable of assignment.]²⁴
- (f) If [neither] the Participant [does not] [nor the Grantor] opt for assignment under paragraph (d) [or paragraph (e) above (as applicable)] or the Grantor is unable to effect the assignment in accordance with paragraph (d) [or paragraph (e) above (as applicable)], the Grantor shall administer and continue to collect at the expense of the Participant the portion of reimbursement that corresponds with the Participation Percentage of the Defaulted Amount, at all times acting as the Grantor sees fit (subject to the requirements of paragraph (b) of Clause 16 (*Additional Duties of the Grantor*)).
- (g) In any case and if for any reason the Participant receives direct payment from any Obligor in relation to the Participated Transaction, the Participant shall be entitled to retain the Participation Percentage thereof and shall pay to the Grantor the balance of such amount within [five]²⁵ Business Days after such receipt.
- (h) This Clause 5 shall not apply to any Relevant Dispute. Relevant Disputes shall instead be administered in accordance with Clause 12 (*Documentary Discrepancies*).

6. COMMISSION, FEES AND RECOVERIES²⁶

6.1 Payment of Commission and Fees

- (a) Subject to paragraph (d) below and the Participant complying with its payment obligations under this Agreement, the Grantor undertakes to pay to the Participant commission and fees as determined and agreed between the Grantor and the

²⁴ The Parties to agree on a case-by-case basis whether this provision should be included.

²⁵ To be mutually agreed by the Parties.

²⁶ See the AAOIFI *Shari'ah* Standard No. (14) "Documentary Credit": Commissions and expenses in documentary credit: (1) It is permissible for the institution to charge actual expenses incurred in issuing documentary credit. It is also permissible for the institution to charge a fee for providing the required services, whether such a fee is in the form of a lump sum or a certain percentage of the credit amount, provided that the duration of the credit is not considered in determining the commission. This rule applies to services rendered for both import and export credit, except where the amendment involves a rescheduling for the institution to charge only the actual expenses incurred, in which case it will be a definite sum and not a percentage. (2) The aspect of guarantee per se must not be taken into account when estimating fees for documentary credit. Accordingly, it is not permissible for an institution to charge an amount in addition to the actual expenses incurred if it endorses a credit facility issued by another bank, because endorsing a credit facility is an addition over guarantee. The rule for endorsement applies to participation in the issuance and endorsement of credit as well as issuance of standby credit (guarantee credit), as long as services or obligations are not required. (3) The issuance of a credit facility should not involve *riba* bearing profits or become a means for such profits. (4) It is not permissible to use a combination of contracts in documentary credit as an excuse for involvement in the prohibited transactions, such as taking a commission for providing a guarantee or extending a loan.

The rulings of commission for providing letters of guarantee stated in the AAOIFI *Shari'ah* Standard No. (5) on Guarantees must be complied with when determining commissions for the letters of guarantee that accompany documentary credits, such as letters of guarantee provided in the case of advance payment of a portion of the amount or the shipping guarantee that is issued for releasing the goods before the arrival of documents. The Parties to agree on a case-by-case basis as to which rules should govern commission payments.

Participant and set out in the relevant Offer of the relevant Participated Transaction for the period from the start date of the relevant Participation Agreement until the earlier of (i) the final Due Date, (ii) the date on which the relevant Participation Agreement is terminated or (iii) the date on which the relevant Participated Transaction is terminated, in each case adjusted to reflect the duration and quantum of the Participant's exposure.

- (b) Payments of commission and fees shall be made on:
 - (i) subject to paragraph (c) below, each Due Date; and
 - (ii) the earlier of (A) the date on which the relevant Transaction Documentation is terminated and (B) the date on which the relevant Participated Transaction is terminated.
- (c) Unless otherwise agreed in the relevant Participation Agreement, commission and fees shall only be payable to the Participant on the dates specified in paragraph (b)(i) above following receipt by the Grantor of the corresponding commission and fees payable to the Grantor by the relevant Obligor in respect of the relevant Participated Transaction.
- (d) If so stated in the Offer and subject to the Participant complying with its obligations in respect of the relevant Participated Transaction, the Grantor undertakes, promptly upon receipt by it from the Obligors in respect of the relevant Participated Transaction, to pay to the Participant a participation service fee in the relevant Participation Percentage stated in the Offer for:
 - (i) services rendered by the Participant to the Grantor in connection with the Participated Transaction and such services include examining any relevant documents related to the Participated Transaction and advising the Grantor of any discrepancies in the Transaction Documentation provided that any services rendered by the Participant shall be directly or indirectly for the benefit of the parties involved in the Participated Transaction including the Obligors; and/or
 - (ii) preparation or issuance of any documents, reports or feasibility studies by the Participant related to or in connection with the Obligors and/or the Participated Transaction; and the parties involved in the Participated Transaction including the Obligors may receive a copy of such documents, reports or studies upon request.
- (e) All fees must commensurate with real operative market rates and any fees which are not deemed to be *Shari'ah* compliant (as determined by the *Shari'ah* board/advisor of the Participant) will not be payable to the Participant.
- (f) All commissions and fees payable by the Grantor to the Participant will be generated from the Participated Transaction.

6.2 Recoveries by the Grantor

In respect of each Participated Transaction, subject to compliance by the Participant with its payment obligations under that Participated Transaction, the Grantor shall promptly pay to the Participant the relevant Participation Percentage of all sums recovered (including, without limitation, through payment by or on behalf of an Obligor, an Obligor's receiver, liquidator or other insolvency officer, or through the exercise of any rights of set-off).

6.3 Non-attributable Sums

If any sum which is received or recovered under any Transaction Documentation is not attributable to any particular amount due under that Transaction Documentation, that sum will be applied (after payment of any actual expenses incurred in its collection) by the Grantor towards such obligations of the relevant Obligor as it may determine.

7. LATE PAYMENT AMOUNT

7.1 Late Payment Amount

- (a) If any sum due and payable by a Party (the "**Paying Party**") under any Participated Transaction is not paid to the other Party (the "**Affected Party**") on the due date (the "**Payment Due Date**"), the Paying Party undertakes to pay a late payment amount (the "**Late Payment Amount**") [on request of the Affected Party] on such amount as calculated in accordance with Clause 7.2 (*Calculation of Late Payment Amount*) below.
- (b) For the purposes of Clause 7.2 (*Calculation of Late Payment Amount*) below the unpaid amount due from the Paying Party shall be called the "**Unpaid Sum**".
- (c) The period beginning on the Payment Due Date and ending on the date upon which the obligation of the Paying Party to pay the Unpaid Sum is discharged in full shall be called the "**Applicable Period**".

7.2 Calculation of Late Payment Amount

The Late Payment Amount shall be an amount equal to the Unpaid Sum:

- (a) multiplied by $[\bullet]^{27}$ per cent. ($[\bullet] \%$) per annum; and
- (b) multiplied further by the number of days in such Applicable Period and divided by 360.

7.3 Payment of Late Payment Amount²⁸

The Affected Party may apply any Late Payment Amount so received by it in reimbursement of any actual direct costs (excluding any opportunity costs, funding costs, any payment in the nature of interest or other indirect costs incurred by the Affected Party) incurred by it as a result of the late payment of the Unpaid Sum and the Affected Party shall donate an amount equal to the remainder of the Late Payment Amount so received by it to [[such registered charitable foundations as the Affected Party may select under the supervision of its *Shari'ah* board/advisor] / [such registered charitable foundations that do not violate Islamic principles] / [specify registered charitable foundation]]²⁹. The Paying Party shall be entitled to request the Affected Party to provide the Paying Party with documentation evidencing (a) the calculation of actual costs and (b) any relevant donation.

²⁷ To be mutually agreed by the Parties.

²⁸ Although an Islamic bank cannot convert a non-funded facility such as a guarantee into a funded facility, since the same is tantamount to extending an interest-bearing loan, it is however possible to structure a *Shari'ah* compliant solution whereby the Islamic bank can provide the customer with a separate *Shari'ah* compliant contingent financing facility, with which the customer will be able to generate cash proceeds and will be able to settle its liability under guarantee. The liability created on the Obligor under such a facility shall be standalone and shall be paid by the Obligor as per an agreed payment plan.

²⁹ Which option is relevant to be mutually agreed by the Parties.

8. TAX AND PAYMENTS

8.1 Deduction or withholding

- (a) All payments by the Grantor under this Agreement shall be made net of any deduction or withholding required to be made from such payments by any law or regulation. If any such deduction or withholding is made, the Participant shall bear the risk of such deduction or withholding and shall for the purposes of this Agreement be deemed to have received the amount that it would have received if such deduction or withholding had not been made.
- (b) All payments by the Participant under this Agreement shall be made free and clear of any deduction or withholding unless such deduction or withholding is required to be made by any law, regulation or practice. If any such deduction or withholding is made or is required to be made the Participant shall increase the amount to be paid to the Grantor to ensure that the Grantor receives and retains a sum equal to the sum which it would have received and so retained had no such deduction or withholding been made or required to be made.
- (c) The Grantor and the Participant shall each use their reasonable endeavours to avoid any such deduction or withholding as is referred to in paragraphs (a) and (b) above.
- (d) This Clause 8.1 does not apply to any FATCA Deduction.

8.2 Completing procedural formalities

The Grantor and the Participant shall co-operate in completing any procedural formalities necessary to make a payment without any tax or *Zakah* deduction.

8.3 Account

All payments under this Agreement shall be made in immediately available funds in the Relevant Currency to the credit of the account specified by the Party to whom such payments are due without set-off or counterclaim.

8.4 Refund

If at any time (including after the relevant Termination Date) the Grantor pays an amount to the Participant and (a) the Grantor had not actually received the related amount under the Participated Transaction or (b) the Grantor is required to return such amount to an Obligor or any third party by operation of mandatory rules of law, then the Participant shall, on demand by the Grantor supported by the relevant documentary evidences, refund the same to the Grantor together with the Grantor's actual direct costs (excluding any opportunity costs, funding costs, any payment in the nature of interest or other indirect costs incurred by the Grantor).

8.5 Currency

- (a) If any sum due from either Party under this Agreement to the other or any order or judgment given or made in relation hereto or thereto has to be converted from the currency (the "**first currency**") in which the same is payable hereunder or under such order or judgment into another currency (the "**second currency**") for the purpose of (i) making or filing a claim or proof against the Participant or an Obligor, (ii) obtaining an order or judgment given in any court or other tribunal or (iii) enforcing any order or judgment given or made in relation hereto or thereto, the paying Party shall indemnify and hold harmless the recipient Party from and against any actual loss

suffered as a result of any discrepancy between (A) the rate of exchange used to convert the sum in question from the first currency into the second currency and (B) the rate or rates of exchange at which the receiving Party may in the ordinary course of business purchase the first currency with the second currency upon receipt of a sum paid to it in satisfaction, in whole or in part, of any such order or judgment, claim or proof.

- (b) Payments under each Participated Transaction shall be made in the currency in which the amount is denominated for value on the due date at such times as are customary for settlement of transactions in that currency in the place of payment.

8.6 **Failure to Remit**

The Grantor shall not be:

- (a) responsible for any loss or liability arising out of its failure, or the failure of its relevant branch, owing to causes outside its control (such as, but not limited to, the imposition of foreign exchange restrictions or that a payment from an Obligor was remitted on a day other than a Business Day, or such payment was only capable of verification on a subsequent Business Day), to remit to the Participant any amount due to it under any Participated Transaction; or
- (b) except as otherwise provided in Clause 7 (*Late Payment Amount*), liable to remit to the Participant any amount greater than the relevant Participation Percentage of any amount it receives from any Obligor in respect of any Participated Transaction.

8.7 **FATCA Withholding**

- (a) Each Party may make any FATCA Deduction it is required to make by FATCA, and any payment required in connection with that FATCA Deduction, and neither Party shall be required to increase any payment in respect of which it makes such a FATCA Deduction or otherwise compensate the recipient of the payment for that FATCA Deduction.
- (b) Each Party shall promptly, upon becoming aware that it must make a FATCA Deduction (or that there is any change in the rate or the basis of such FATCA Deduction) notify the other Party.

9. **FRAUD RISK**

[Notwithstanding any other Clause in this Agreement, if it is finally, non-appealably legally determined that the Obligors had no obligation to reimburse the Grantor due to the occurrence of fraud in the underlying transaction or related Transaction Documentation (including, without limitation, any Transaction Documentation examined by the Grantor in accordance with paragraph (a) of Clause 12 (*Documentary Discrepancies*) then:

- (a) the Participant shall not be liable to make payment to the Grantor in respect of such (if it has not already made such payment); and
- (b) the Grantor shall reimburse the Participant any monies paid by the Participant under Clause 4 (*Participation and Funding*) (and which have not otherwise been reimbursed by the Grantor in accordance with the terms of the Participation Agreement) in respect of such, together with such amount from the date such payment was made by the Participant under Clause 4 (*Participation and Funding*), until the date of actual reimbursement, calculated by the Participant to reflect its

actual direct costs (excluding any opportunity costs, funding costs, any payment in the nature of interest or other indirect costs incurred by the Participant).]

[If it is determined that any Obligors had no obligation to reimburse the Grantor due to the occurrence of fraud in the underlying transaction or related Transaction Documentation (including, without limitation, any Transaction Documentation examined in accordance with paragraph (a) of Clause 12 (*Documentary Discrepancies*)) then the Participant shall continue to be liable for the relevant Participation Portion notwithstanding that that Obligor had no such obligation, provided that the provisions of paragraph (c) of Clause 12 (*Documentary Discrepancies*) shall continue to apply in respect of the examination of documents.]³⁰

10. INFORMATION

10.1 General

- (a) The Grantor shall, within a reasonable timeframe, notify the Participant of (i) any dispute under the Participated Transaction, which in the reasonable opinion of the Grantor has had or may have a material adverse effect on the likelihood of the Obligors paying any amounts due under the relevant Participated Transaction; and (ii) any Default.
- (b) The Grantor shall:
 - (i) within a reasonable timeframe, notify the Participant of the expiry, fulfilment or non-fulfilment of each material liability or obligation relating to the Participated Transaction; and
 - (ii) in respect of each Participated Transaction, to the extent that it is lawfully able to do so without breaching any duty of confidentiality or other obligation owed to any person, promptly provide the Participant with copies of all communications and documents it receives under any Transaction Documentation applicable to such Participated Transaction.
- (c) Any failure by the Grantor to comply with the terms of this Clause 10 will not affect the Participant's obligations under the relevant Participation Agreement.

10.2 FATCA Information

- (a) Subject to paragraph (d) below, each Party shall, within ten (10) Business Days of a reasonable request by the other Party:
 - (i) confirm to that other Party whether it is:
 - (A) a FATCA Exempt Party; or
 - (B) not a FATCA Exempt Party;
 - (ii) supply to that other Party such forms, documentation and other information relating to its status under FATCA as that other Party reasonably requests for the purposes of that other Party's compliance with FATCA; and
 - (iii) supply to that other Party such forms, documentation and other information relating to its status as that other Party reasonably requests for the purposes of that other Party's compliance with any other law, regulation, or exchange of information regime.

³⁰ Parties to agree appropriate option (i.e. whether Participant participates in the risk of fraud).

- (b) Subject to paragraph (d) below, the Grantor shall use its reasonable endeavours to obtain, and provide to the Participant, such forms, documentation and other information relating to an Obligor's status under FATCA as the Participant reasonably requests.
- (c) If a Party confirms to the other Party pursuant to paragraph (a)(i) above that it is a FATCA Exempt Party and it subsequently becomes aware that it is not, or has ceased to be, a FATCA Exempt Party, that Party shall notify that other Party reasonably promptly.
- (d) Paragraphs (a) and (b) above shall not oblige a Party to do anything which would or might in its reasonable opinion constitute a breach of:
 - (i) any law or regulation;
 - (ii) any fiduciary duty;
 - (iii) any duty of confidentiality; or
 - (iv) the Transaction Documentation.
- (e) If a Party fails to confirm whether it is (and/or remains) a FATCA Exempt Party or to supply forms, documentation or other information requested in accordance with paragraph (a)(i) or (a)(ii) above, (including, for the avoidance of doubt, where paragraph (d) above applies), then such Party shall be treated for the purposes of the Participated Transaction as if it is not a FATCA Exempt Party.

11. VARIATION OF TRANSACTION

- (a) The Grantor shall not without the prior written consent of the Participant (without prejudice to the rights of the Participant under Clause 5 (*Default Under The Participated Transaction*)), take such action that would result in:
 - (i) any extension of the date for payment by an Obligor in respect of any Participated Transaction;
 - (ii) any reduction in the liability of any Obligor or in the release of any security in respect of any Participated Transaction;
 - (iii) any material change in the goods or change of country of any named port(s) in respect of any Participated Transaction;
 - (iv) any change in the currency in respect of any Participated Transaction; or
 - (v) any reduction of any amount in respect of commission or fee related to a Participated Transaction, which would affect the amount of commission or fee due to the Participant from the Grantor.
- (b) The Grantor may without the prior consent of the Participant (without prejudice to the rights of the Participant under Clause 5 (*Default Under The Participated Transaction*)), take such action that would result in:
 - (i) any increase in the Transaction Amount; or
 - (ii) any extension in the date of validity or extension of the expiry date (but not an extension of the date for payment by an Obligor in respect of any Participated Transaction),

provided that (A) such action does not affect the rights or obligations of the Participant under the Participation Agreement; and (B) the Participation Amount in respect of the relevant Participation Agreement shall not change and the Participant shall have no liability in respect of any payment made or liability incurred by the Grantor after the original date of validity or expiry date.

- (c) In cases where the Participant does not agree to any such action where its consent is required, the Grantor shall have the option immediately to terminate the Participation Agreement by giving written notice to the Participant. All commission and fee payable to the Participant under the Participation Agreement shall be calculated on a pro rata basis and the principal amount (if any) paid by the Participant to the Grantor shall be reimbursed.

12. DOCUMENTARY DISCREPANCIES

- (a) The examination of any documents submitted by an Obligor or a Beneficiary in respect of a Participated Transaction is the full responsibility of the Grantor.
- (b) In respect of Participated Transactions the Grantor shall exercise such care and attention in relation to the presentation and form of documents with respect to a Participated Transaction as would a bank acting in accordance with UCP600 or ISP (if applicable and in compliance with the principles and rules of *Shari'ah*) or otherwise as is in accordance with established market practice in the relevant financial centre for Transactions of a similar nature.
- (c) If a dispute arises between an Obligor and the Grantor under a Participated Transaction as to whether documents examined by the Grantor complied with the documentary requirements of that Participated Transaction and the Grantor is of the reasonable opinion that the Obligor is unjustified in its refusal to pay to the Grantor any sums paid by the Grantor to the Obligor or a third party beneficiary (a "**Relevant Dispute**"), the Grantor shall (without prejudice to its obligations under paragraph (b) of Clause 16 (*Additional Duties of the Grantor*)) use its reasonable endeavours to obtain a final non-appealable legally binding decision, whether obtained in a court of competent jurisdiction, through arbitration or DOCDEX³¹ decision (a "**Relevant Decision**") as soon as is reasonably possible.
- (d) Should a Relevant Decision not be in favour of the Grantor, the Grantor shall reimburse to the Participant the relevant Participation Portion together with the Participant's actual direct costs (excluding any opportunity costs, funding costs, any payment in the nature of interest or other indirect costs incurred by the Participant). Such reimbursement obligation will continue notwithstanding the expiry or assignment of the relevant Participation Agreement or Participated Transaction.
- (e) Where a Relevant Decision holds that the Obligor should reimburse the Grantor, the Participant shall promptly pay to the Grantor an amount equal to its Participation Percentage of the costs reasonably incurred by the Grantor in relation to obtaining the Relevant Decision (including without limitation all associated legal fees and costs reasonably and properly incurred) ("**Relevant Costs**"). The Grantor shall enclose with any such claim a certificate setting out in reasonable detail the calculation of amounts demanded thereunder. In all other cases, all Relevant Costs incurred by the Grantor shall be exclusively borne by the Grantor and the Participant shall have no liability in respect of the same.

³¹ ICC's Documentary Instruments Dispute Resolution Expertise (DOCDEX) provide parties with a specific resolution procedure that leads to an independent, impartial and prompt expert decision settling disputes involving trade finance-related instruments.

- (f) Save as expressly set out in this Clause 12, the existence of a Relevant Dispute will not affect the rights and obligations of each Party under Clause 4 (*Participation and Funding*) in respect of the relevant Participated Transaction.
- (g) If the Grantor does not use reasonable endeavours to obtain a Relevant Decision as soon as is reasonably possible following the commencement of a Relevant Dispute, the Participant may exercise its rights under paragraph (d) of Clause 5 (*Default under the Participated Transaction*). For the avoidance of doubt, the Grantor's obligation to reimburse the Participant in accordance with paragraph (d) above will survive any termination or expiry of the Participated Transaction, Participation Agreement, this Agreement or any assignment made in accordance with paragraph (d) [or (e)] of Clause 5 (*Default under the Participated Transaction*).

13. **BINDING AMENDMENT AND RE-ORGANISATION**³²

- (a) Subject to paragraph (g) below, it is the intent that the Participant will bear the risk of any Binding Amendment and Re-organisation in relation to its Participation Percentage of the relevant Participated Transaction.
- (b) The Grantor shall not be obliged to make payment to the Participant under a Participation Agreement in respect of:
 - (i) any sum which is paid into a blocked account or is paid in non-transferable and/or non-convertible currency until that impediment is removed; or
 - (ii) any financial or other *Shari'ah* compliant instrument issued to the Grantor in either case paid or issued in satisfaction or purported satisfaction of the obligation of an Obligor to make any payment with respect to a Participated Transaction unless and until such instrument is, in compliance with the principles and rules of *Shari'ah*, disposed of, redeemed or otherwise realised for cash and where the proceeds of realisation are themselves not subject to this paragraph (b).
- (c) The Grantor will endeavour (at the expense of the Participant) to assign to the Participant the pro rata benefit of any sum referred to in paragraph (b)(i) above to the extent that the Grantor is able to do so and to the extent that the same is, in the Grantor's reasonable opinion, attributable to the Participant's interest in relation to the relevant Participated Transaction.
- (d) The Grantor may, in connection with any Binding Amendment and Re-organisation, apply for or accept any note or other *Shari'ah* compliant instrument issued or proposed to be issued by the relevant Obligor or any other person in respect of any Participated Transaction or any part thereof, or any commission or fee payable in respect of any Participated Transaction or any part thereof.
- (e) [The Grantor may participate in any agreement in connection with a Binding Amendment and Re-organisation and which relates to any principal or profit on or commission or fees in respect of any Participated Transaction. If the Grantor does so, the Grantor shall not be obliged to account to the Participant in respect of that principal, profit, commission or fees. However, the Grantor will endeavour to give the Participant the benefit of the agreement on the same terms as this Agreement to the extent that payments received and applied by the Grantor under the agreement are

³² As per the AAOIFI *Shari'ah* Standard No. (8) "Murabahah" (5/7), it is not permissible to extend the date of payment of the debt in exchange for an additional payment in case of rescheduling, irrespectively of whether the debtor is solvent or insolvent.

in the Grantor's reasonable opinion attributable to the Participant's interest in the relevant Participated Transaction.]³³

- (f) [If, in connection with any Binding Amendment and Re-organisation, the Grantor agrees to increase its exposure, the Grantor shall not be obliged to account to the Participant under this Agreement until that increased exposure has been paid and satisfied unless the Participant agrees to modify this Agreement in form and substance reasonably satisfactory to the Grantor to the effect that the Participant participates in the increased exposure on the terms of this Agreement. The provisions of this paragraph (f) shall only apply if the Grantor has first offered the Participant the opportunity to modify this Agreement in form and substance reasonably satisfactory to the Grantor to the effect that the Participant participates in the increased exposure on the terms of this Agreement and the Participant has either refused to so participate or fails to accept the Grantor's offer within [five] Business Days of such offer being made.]³⁴

[The Grantor may join any Binding Amendment and Re-organisation which affects the Grantor's payment claim against an Obligor arising from any Participated Transaction without the Participant's prior consent and shall notify the Participant thereof. The Participant shall then, upon the Grantor's first demand, adapt the Participant's undertaking or perform its duties and enjoy its rights under the relevant Participation Agreement irrespective thereof.]³⁵

- (g) Notwithstanding any other provision of this Agreement, the Participant shall have no obligation to participate in any such increased exposure whether in connection with any Binding Amendment and Re-organisation or otherwise.

14. CONFIDENTIALITY

- (a) Subject to paragraph (b) below and unless otherwise agreed in writing by the Parties: (i) the Participant shall not without prior written consent of the Grantor, disclose the Participated Transaction (unless the Participated Transaction is expressly undertaken on a "disclosed" basis) or any offered Unfunded Participation or any other information relating thereto or to the Participated Transaction to any Obligor or to any third party; and (ii) the Grantor and the Participant agree that they will treat this Agreement and any information supplied in connection herewith as being confidential (but, for the avoidance of doubt, each Party is permitted to disclose such information to its affiliates, directors, officers, employees and professional advisers who have a need to know the information and who are made aware of the obligations of confidentiality under this Clause 14). The duty of confidentiality arising from this Agreement continues to apply in full even after the relevant Participation Agreement has been terminated [but will expire two years following such termination]³⁶.
- (b) The provisions of paragraph (a) above do not apply to any information which:
- (i) is or comes into the public domain otherwise than by breach of this Agreement;
 - (ii) is required to be disclosed in compliance with any applicable law, rule, regulation or order from a court of competent jurisdiction;

³³ Parties to consider whether this clause should be included.

³⁴ Parties to consider whether this clause should be included.

³⁵ Parties to decide whether to use this wording.

³⁶ Parties to agree on a case-by-case basis whether this wording should be included.

- (iii) is required or requested to be disclosed to any public authority or governmental body or regulatory body having jurisdiction over the conduct of (as applicable) the Grantor's or Participant's business and/or affairs;
- (iv) is disclosed by any Party to its legal advisers or auditors (but in that capacity only) provided that such persons are bound by professional obligations of confidentiality; and
- (v) is disclosed to any potential assignee, transferee or sub-participant provided that the Party intending to disclose any such information to any person shall only disclose such information to the extent necessary for the relevant person to decide whether or not to enter into the assignment, transfer or sub-participation and otherwise to effect the assignment, transfer or sub-participation and upon the terms that all information so disclosed shall be kept confidential by that recipient.

15. ASSIGNMENT AND TRANSFER

- (a) Subject to compliance with the principles and rules of *Shari'ah* and in a remote possibility of an assignment or transfer, a Party may assign or transfer any of its rights or obligations under this Agreement or under any Participation Agreement.
- (b) Unless expressly stated to the contrary in the Participation Agreement, the Participant may enter into sub-participations with third parties in respect of Participation Agreements without the consent of, and without giving notice to, the Grantor provided that any sub-participation shall be in compliance with the principles and rules of *Shari'ah*.
- (c) The Grantor may not enter into any transaction that purports to pledge, exchange or otherwise dispose of the Grantor's claims, titles, rights or interests in the portion of the Participated Transaction subject to the relevant Participation Agreement without the prior written consent of the Participant.

16. ADDITIONAL DUTIES OF THE GRANTOR

- (a) The Grantor may enter into other participations with third parties in respect of Participated Transactions provided that the Grantor retains the Retention Share stipulated in the relevant Offer (if any). If no Retention Share is stipulated in the relevant Offer, then the Grantor shall not be obliged to retain any Retention Share in that Participated Transaction.
- (b) The Grantor shall administer the Participated Transaction with the same degree of care which the Grantor normally exercises in administering Transactions in which no participation has been granted even in the case the Grantor holds no Retention Share in the Participated Transaction.

17. REPRESENTATIONS AND WARRANTIES

- (a) Without prejudice to the Grantor's duties under Clause 12 (*Documentary Discrepancies*), the Grantor does not make any representation or warranty and does not assume any responsibility (other than in the case of the Grantor's gross negligence, wilful misconduct or fraud) with respect to the due execution, legality, validity, adequacy or enforceability of the relevant Transaction or of any document related thereto.
- (b) Each Party represents and warrants to the other that:

- (i) it will at all times make its own independent investigation and assessment of the financial condition, creditworthiness, status and affairs of the Obligors and of other relevant factors for the assessment of the credit risk and that it has not relied on the other Party for the making of such assessment; and
 - (ii) this Agreement and any Participation Agreement concluded hereunder constitute and will constitute its legally valid and binding obligations enforceable in accordance with their respective terms.
- (c) The representations and warranties set out in paragraph (a) and (b) above shall be deemed repeated as at the date each Participation Agreement is concluded.
- (d) In respect of each Participated Transaction, the Grantor represents and warrants to the Participant that, to the best of its knowledge as at the date the relevant Participation Agreement begins, it will own beneficially the obligations under the Transaction in which the Participated Transaction is granted free from any lien, security interest or other encumbrance, any purchase or option agreement or arrangement, or any agreement to create or effect any of the same.
- (e) In respect of each Participated Transaction, the Participant represents and warrants to the Grantor that it has undertaken its own assessment of the Participated Transaction (including as to its type and nature) and has received sufficient information from the Grantor in order to undertake such assessment.
- (f) [To the best of the Grantor's knowledge and belief, neither the Grantor, nor any party to an offered Transaction or Participated Transaction, nor the country of origin or despatch of any goods relating to an offered Transaction or Participated Transaction is subject to trade sanctions or other financial or export or import restrictions imposed by the United Nations, the European Union, HM Treasury, the United States of America or any other international body or jurisdiction to which the Grantor is subject.]³⁷
- (g) In so far as a Party wishes or is required for any reason to enter into only transactions which comply or are consistent with the principles and rules of *Shari'ah*, that Party has made its own investigation into and satisfied itself as to the *Shari'ah* compliance with this Agreement and the Participated Transactions contemplated thereunder, and all necessary action to confirm that this Agreement and the transactions contemplated thereunder are *Shari'ah* compliant has been taken (including obtaining of a *Shari'ah* approval where required) and that Party will not claim any dispute on the grounds of *Shari'ah* compliance of this Agreement or of the transaction contemplated thereunder.

18. COMMUNICATION

- (a) The Parties agree that the Grantor may send information related to a Transaction via e-mail prior to sending the final Offer to the Participant. The Participant is entitled to assume that all the information received by the Grantor via e-mail is from an authorised individual. However, regarding the conclusion of a Participated Transaction, Clause 3 (*Offer and Acceptance*) shall apply.
- (b) The Parties confirm that they are aware of the fact that information by way of electronic exchange is transmitted unencrypted over a publicly accessible network, and each acknowledges all associated risks.

³⁷ Parties to agree on a case-by-case basis whether this provision should be included.

- (c) Except as otherwise provided herein, notices under this Agreement shall be in writing and must be sent by courier, prepaid registered mail, signed facsimile or by authenticated SWIFT message to the address specified by the Parties below. Each Party shall provide written notice to the other Party of a change of address, which shall become effective five calendar days after such notice is received.

Notice details for the Grantor:

[Address]

Attention: [●]

Telephone: [●]

Fax: [●]

E-mail: [●]

Swift: [●]

Notice details for the Participant:

[Address]

Attention: [●]

Telephone: [●]

Fax: [●]

E-mail: [●]

Swift: [●]

- (d) Unless the contrary shall be proved, each such notice shall be deemed to have been given or made and delivered, if by letter or signed facsimile message upon receipt by the addressee, if by delivery when delivered at the relevant address with acknowledgement of receipt or if by authenticated SWIFT message when transmitted. However, a notice given in accordance with this Clause that is received on a non-Business Day or after business hours in the place of receipt will only be deemed to be given on the next Business Day in that place.
- (e) [Where an Offer has been sent by the Grantor to the Participant by facsimile, the Grantor agrees to promptly provide the Participant with a hard copy of the original Offer.]³⁸
- (f) [Where an Acceptance has been sent by the Participant to the Grantor by facsimile, the Participant agrees to promptly provide the Grantor with a hard copy of the original Acceptance.]³⁹

³⁸ To be included if required by the Parties.

³⁹ To be included if required by the Parties.

19. **TERMINATION**

Each Party may terminate⁴⁰ this Agreement by giving [●]⁴¹ calendar days' notice in writing to the other Party. Notwithstanding any such termination: (a) this Agreement shall continue to govern any Participation Agreement concluded before the termination of the Agreement, and (b) such termination will be without prejudice to any rights or obligations accrued prior to the date such termination takes effect.

20. **INDEMNITY**

Each Party (the "**Indemnifying Party**") shall, forthwith on demand, indemnify the other Party (the "**Indemnified Party**") against any direct cost (excluding any opportunity costs, funding costs, any payment in the nature of interest or other indirect costs incurred by the Indemnified Party), loss or liability which the Indemnified Party reasonably incurs as a consequence of any breach by the Indemnifying Party of its obligations or representations under any Participated Transaction except to the extent such cost, loss or liability are found in a final non-appealable judgment by a court of competent jurisdiction to have resulted from the Indemnified Party's gross negligence, fraud or willful misconduct.

21. **MISCELLANEOUS**

- (a) The relationship between the Participant and the Grantor is that of a principal (*Muwakkil*) and an agent (*Wakil*) with the right of the Participant (as principal (*Muwakkil*)) to receive amounts from the Grantor (as agent (*Wakil*)) restricted to the relevant Participation Percentage of any amount received and applied by the Grantor from any Obligor and the Participant's rights against the Grantor under this Agreement.
- (b) Other than those expressly specified or set out in this Agreement, this Agreement shall not constitute any other kind of agency, fiduciary or trust relationship between the Grantor and the Participant and the Grantor shall not have any other duties or responsibilities.
- (c) If, at any time, any provision of this Agreement is or becomes invalid, illegal or unenforceable in any respect, the validity, legality or enforceable character of the remaining provisions will not in any way be affected or impaired.
- (d) This Agreement and any Participation Agreement thereunder represents the entire agreement between the Parties with respect to its subject matter and supersedes all prior agreements or communications pertaining thereto. [This Agreement shall not affect any participation concluded between the Parties before the date of this Agreement in respect of any Transaction.]⁴²
- (e) Subject to Clause 1.4 (*Third party rights*), this Agreement may be rescinded or varied at any time by the Parties without the consent of any third party.
- (f) No amendment or waiver of any provision of this Agreement or of any Participation Agreement shall be effective unless made in writing by both Parties. Any amendment or waiver shall be effective only in the specific instance and for the specific purpose for which given.

⁴⁰ AAOIFI *Shari'ah* Standard No. (23) "Agency and the Act of an Uncommissioned Agent (Fodooli)", Clause 4/3 "Binding agency" states that "Agency is, basically, not binding, because each of the two parties has the right to revoke the contract without denying its effects that may continue after revocation. However, agency becomes binding ... 4/3/2 when agency is a paid agency." Therefore, in the case of a paid agency arrangement between the Participant (as principal (*Muwakkil*)) and the Grantor (as agent (*Wakil*)), the Parties may not terminate this Agreement and any Participation Agreement entered into hereunder without mutual consent or agreement of both Parties.

⁴¹ To be mutually agreed by the Parties.

⁴² Parties to consider whether this wording should be included.

- (g) This Agreement does not contain any obligation for and commitment of either Party to issue an Offer or an Acceptance or to agree to an Acceptance towards the other Party.
- (h) Save as expressly set out in this Agreement, any Unfunded Participation is made without recourse to the Grantor. The Grantor shall not have any liability or obligation to the Participant relating to the Participated Transaction or a Participation Agreement whether entered into on a disclosed or undisclosed basis⁴³, except as specifically set out in this Agreement.
- (i) Nothing in this Agreement shall oblige the Grantor to carry out any "know your customer" or other checks in relation to any person on behalf of the Participant and the Participant confirms to the Grantor that it is solely responsible for any such checks it is required to carry out and that it shall not rely on any statement in relation to such checks made by the Grantor. The Grantor shall, at the request of the Participant, provide all relevant documents to carry out any "know your customer" or other checks in relation to any person by or on behalf of the Participant.
- (j) This Agreement and any Participation Agreement may be executed in counterparts, both of which taken together shall constitute one and the same Agreement or Participation Agreement.

22. SET-OFF AND COUNTERCLAIM

22.1 No set-off and counterclaim

Subject to Clause 22.2 (*Permitted set-off*), all payments by a Party under each Participated Transaction shall be made without set-off or counterclaim.

22.2 Permitted set-off

Either Party may (but is not obliged to) set off any amount due and payable by the other Party under any Participated Transaction against any such amounts due and payable by it to the other Party under that Participated Transaction. The Party exercising its rights under this Clause 22.2 may effect such currency exchanges as it considers necessary to implement the set off.

23. NO WAIVER OF RIGHTS

No failure or delay by any Party in exercising any right, power or privilege hereunder shall operate as a waiver nor shall any single or partial exercise thereof preclude any other further exercise thereof, or the exercise of any other right, power or privilege, and any waiver of any breach of this Agreement or any Participation Agreement shall be without prejudice to any rights of such Party in connection with any other or further breach.

24. NO VIOLATION OF SHARI'AH

The terms and conditions in this Agreement shall govern the Participated Transactions as follows:

- (a) The subject matter of the Participated Transactions should be *Shari'ah* compliant and will exclude all non-*Shari'ah* compliant conventional transactions and non-*Shari'ah* compliant assets, trade, including but not limited to armaments, pornographic material, intoxicant drugs such as alcohol, heroin, marijuana and tobacco;

⁴³ Regardless whether an Unfunded Participation is entered into on a disclosed or undisclosed basis, the Participant, as sub-participant, will bear the credit risk of the Obligors and will have recourse to the Obligors.

- (b) The participation of the Participant should not be used to facilitate non-*Shari'ah* compliant funding or discounting of the Participated Transaction. In the event that the Grantor provides interest-based financing to the Obligor, importer or exporter upon the termination, expiry or liquidation of services relating to the Participation, the rights and obligations arising out of such interest-based financing shall not apply to the Participant; and
- (c) Where the Participated Transaction is confirmation of a letter of credit, the Grantor shall not have any direct relationship (as an issuer) to the applicant of the letter of credit in the context of that particular letter of credit.

25. APPLICABLE LAW AND DISPUTE RESOLUTION

25.1 Governing Law

This Agreement, each Participation Agreement and any non-contractual obligations arising out of or in connection with any of them shall be governed by and construed in accordance with [English law] [to the extent [English law] does not conflict with the principles and rules of *Shari'ah* and in the case of any conflict, the principles and rules of *Shari'ah* shall prevail.

25.2 Jurisdiction

[Subject to Clause 25.4 (*Arbitration*):]⁴⁴

- (a) [Each Party agrees that the courts of [England and Wales] have exclusive jurisdiction to settle any disputes in connection with this Agreement and/or any Participation Agreement and accordingly submits to the jurisdiction of the courts of [England and Wales].]⁴⁵
- (b) Each Party:
 - (i) waives objection to the courts of [England and Wales] on grounds of inconvenient forum or otherwise as regards proceedings in connection with this Agreement and/or any Participation Agreement; and
 - (ii) agrees that a judgment or order of a court of [England and Wales] in connection with this Agreement and/or any Participation Agreement is conclusive and binding on it and may be enforced against it in the courts of any other jurisdiction.

25.3 Service of Process⁴⁶

⁴⁷[Without prejudice to any other mode of service allowed under any relevant law:

- (a) the Grantor irrevocably appoints [●] as its agent for service of process in relation to any proceedings before the courts of England and Wales in connection with this Agreement and any Participation Agreement;
- (b) the Participant irrevocably appoints [●] as its agent for service of process in relation to any proceedings before the courts of England and Wales in connection with this Agreement and any Participation Agreement;

⁴⁴ This wording should be included if the parties choose to retain clause 25.4 (*Arbitration*).

⁴⁵ Parties to consider whether this clause should be included.

⁴⁶ Please note that a process agent appointment is required where the relevant Party does not have a registered place of business in England or Wales (if governed under English law).

⁴⁷ To be used for either/neither/both party/ies as necessary.

- (c) the Grantor agrees that failure by a process agent to notify the Grantor of the process will not invalidate the proceedings concerned; and
- (d) the Participant agrees that failure by a process agent to notify the Participant of the process will not invalidate the proceedings concerned.]

25.4 [Arbitration

- (a) A Party may by notice in writing to the other Party at the address given for the sending of notices under this Agreement pursuant to Clause 18 (*Communication*) require that any dispute in connection with this Agreement and/or any Participation Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the arbitration rules of [the London Court of International Arbitration / the Dubai International Islamic Centre for Reconciliation and Arbitration]⁴⁸, which rules are deemed to be incorporated by reference into this Clause.
- (b) The number of arbitrators shall be [one/three], the seat, or legal place of arbitration shall be [●] and the language to be used in the arbitral proceedings shall be [●].
- (c) The arbitral award shall be final, binding and capable of being enforced as if it had been issued by a court of competent jurisdiction and the Parties hereby waive any right to refer any question of law and any right of appeal on the law and/or merits to any court.
- (d) The arbitration and all matters related thereto, including any awards, shall be confidential, unless otherwise agreed in writing by both Parties or to the extent disclosure is required under any applicable law.]

25.5 Waiver of Payment of Interest⁴⁹

The Parties to this Agreement recognise and agree that the payment of interest is repugnant to the principle and rules of *Shari'ah* and accordingly, to the extent that any legal system would (but for the provisions of this Clause) impose (whether by contract or by statute) any obligation to pay interest, the Parties hereto hereby irrevocably and unconditionally expressly waive and reject any entitlement to recover interest from each other. Nothing in this Agreement shall oblige either Party to pay interest or to receive any interest on any amount payable in violation of the *Shari'ah* principles or to do anything that is unacceptable under the principles and rules of *Shari'ah*. Each Participated Transaction entered into by the Parties pursuant to this Agreement shall be fully *Shari'ah* compliant.

This Agreement has been entered into on the date stated at the beginning of this Agreement.

⁴⁸ The Parties may choose any other arbitration body including the DIFC-LCIA Arbitration Court, the International Chamber of Commerce Arbitration Rules, the Bahrain Chamber for Dispute Resolution Arbitration Rules or the Dubai International Arbitration Centre Rules.

⁴⁹ It is a requirement to explicitly state that a provision stipulating interest will not be acted upon, and also for trading activities that contravene the provisions of the *Shari'ah*.

SCHEDULE 1
FORM OF OFFER AND ACCEPTANCE

OFFER

From: [Grantor]

To: [Participant]

Date: [Date]

**IIFM-BAFT Master Unfunded Participation Agreement for Trade Finance Transactions dated
[Date] (the "Agreement")**

Pursuant to the terms of the Agreement, the Grantor hereby offers to the Participant an Unfunded Participation in the following Transaction.

Type of Transaction: [insert detailed description of transaction]

Type of Unfunded Participation: [disclosed/undisclosed]⁵⁰

[LC number: [•]]

Grantor's reference no.: [•]

Obligor(s): [name, city, country]

Obligor(s)'s reference no.: [•]

Relevant Currency and Transaction Amount: [currency and amount]

Participation Amount: [currency and amount]

Participation Percentage: [percentage]

Exporter: [name, city, country]

Importer: [name, city, country]

Goods: [description of goods]

Shipment: from [country] to [country]

Start date of Transaction: [date]

Start date of Participation Agreement: [date]

Validity date of Transaction: [date]

Payment terms of Transaction: [•]

Latest date for shipment in Transaction: [Date]

Latest possible Due Date of Transaction: [Date]

⁵⁰ Regardless whether an Unfunded Participation is entered into on a disclosed or undisclosed basis or with or without the consent of the Obligors, it is the intention of the parties that the Participant, as sub-participant, will bear the credit risk of the Obligors and will have recourse to the Obligors.

Applicable rules (if any): [e.g. UCP600, ISP98 etc]

Special conditions or comments (if any): [more detailed information about the Transaction if necessary]

Your commission for above Unfunded Participation: [[● % p.a.] or [LIBOR⁵¹ plus [●]% margin p.a.], calculated on the basis of a year of 360 days and actual number of days elapsed] in accordance with the Transaction Documentation

Your participation service fee for above Unfunded Participation (for (a) services (which are directly or indirectly for the benefit of the parties involved in the Participated Transaction including the Obligors) rendered by you in connection with the Transaction and/or (b) preparation or issuance of any documents, reports or feasibility studies by you related to or in connection with the Obligors and/or the Transaction the parties involved in the Participated Transaction including the Obligors may receive a copy of such documents, reports or studies upon request): [●]/[Nil]

Retention Share: [●]%

Transaction Documentation provided: [Yes][No]

[We are prepared to act as your non-paid⁵² agent (*Wakil*) in relation to your Unfunded Participation to the abovementioned Transaction.] / [We are prepared to act as your paid⁵³ agent (*Wakil*) in relation to your Unfunded Participation to the abovementioned Transaction. In consideration of us acting as your paid agent (*Wakil*), you agree to pay us a one-time fee of [currency●] [100] payable on the start date of the Participation Agreement.]⁵⁴

Please let us know at your earliest convenience - but in no case later than close of business on [Date●] when this Offer will expire - whether you accept this Offer of Unfunded Participation. Your acceptance shall be given to us by delivering to us a duly signed Acceptance in accordance with Clause 18 (*Communication*) of the Agreement.

All provisions of the Agreement including Clause 25 (*Applicable Law and Dispute Resolution*) are applicable to this Offer.

For and on behalf of
[Name of the Grantor]

Name: _____

Title: _____

⁵¹ See AAOIFI *Shari'ah* Standard No. (27) "Indices": 5. Permissible Methods of Using Indices. 5/2 It is permissible to use indices as a benchmark for comparison of funds and investment bonds, or for correlating the remuneration of the manager or the bonus of the agent to the investment, or the bonus of the Mudarib to the results of the Mudarabah. 5/3 It is permissible to use an index like LIBOR, or certain share/commodity price index, as a basis for determining the profit of a Murabahah pledge, provided that the contract is to be concluded on a specific profit that does not vary with further changes in the index.

⁵² A non-paid agency can be terminated at anytime by a Party by giving a notice to the other Party.

⁵³ AAOIFI *Shari'ah* Standard No. (23) "Agency and the Act of an Uncommissioned Agent (Fodooli)", Clause 4/3 "Binding agency" states that "Agency is, basically, not binding, because each of the two parties has the right to revoke the contract without denying its effects that may continue after revocation. However, agency becomes binding ... 4/3/2 when agency is a paid agency." Therefore, the Parties may not terminate a paid agency without mutual consent or agreement of both Parties.

⁵⁴ Which option is relevant to be mutually agreed by the Parties.

ACCEPTANCE

From: [Participant]

To: [Grantor]

Date: [Date]

IIFM-BAFT Master Unfunded Participation Agreement for Trade Finance Transactions dated [Date] (the "Agreement")

We refer to the Agreement and your Offer dated [●]. This is an Acceptance. Terms defined in the Agreement have the same meaning in this Acceptance unless given a different meaning in this Acceptance.

Pursuant to the terms of the Agreement and the Offer, we hereby inform you that we will be pleased to participate on the terms of your Offer as outlined.

[We hereby confirm your appointment as our non-paid⁵⁵ agent (*Wakil*) in relation to our Unfunded Participation to the Transaction.] / [We hereby confirm your appointment as our paid⁵⁶ agent (*Wakil*) in relation to our Unfunded Participation to the Transaction. In consideration of you acting as our paid agent (*Wakil*), we agree to pay you a one-time fee of [currency●] [100] payable on the start date of the Participation Agreement.]⁵⁷

Kindly remit any sums due to us in relation to this Participation Agreement to:

Participant's account no.: _____
[account no.]

Participant's correspondent bank: _____
[Name, City, Country, Swift Code]

Participant's reference no.: _____
[reference no.]

All provisions of the Agreement including Clause 25 (*Applicable Law and Dispute Resolution*) are applicable to this Acceptance.

For and on behalf of
[Name of the Participant]

Name: _____

Title: _____

⁵⁵ A non-paid agency can be terminated at anytime by a Party by giving a notice to the other Party.

⁵⁶ AAOIFI *Shari'ah* Standard No. (23) "Agency and the Act of an Uncommissioned Agent (Fodooli)", Clause 4/3 "Binding agency" states that "Agency is, basically, not binding, because each of the two parties has the right to revoke the contract without denying its effects that may continue after revocation. However, agency becomes binding ... 4/3/2 when agency is a paid agency." Therefore, the Parties may not terminate a paid agency without mutual consent or agreement of both Parties.

⁵⁷ Which option is relevant to be mutually agreed by the Parties.

SCHEDULE 2

FORM OF DEMAND FOR PAYMENT

Pursuant to the terms of our IIFM-BAFT Master Unfunded Participation Agreement for Trade Finance Transactions, dated [Date] (the "**Agreement**"), our Offer dated [Date] and your Acceptance dated [Date], we hereby inform you that a Default has occurred under the following Transaction:

Type of Transaction:	[Description]
Type of Participation:	Unfunded [disclosed/undisclosed]
Grantor's Reference No.:	[...]
Participant's Reference No.:	[...]
Obligors:	[Name, City, Country]
Defaulted Amount:	[Currency and Amount]

We confirm that:

- (i) the Defaulted Amount has been claimed from the Obligors;
- (ii) payment is due and has not reached us as of today; [and]
- (iii) we have acted in all respects with the Participation Agreement applicable to the Transaction.[;and]
- (iv) [payment has been made under the Transaction]

[Please note: statements (i), (ii) and (iii) above must not be amended when making a demand]

[A copy of the claim sent to the relevant Obligor along with copy of payment message or payment instrument is enclosed with this request for payment].

We kindly ask you, as guarantor (*Kafil*) to the Obligor⁵⁸, to remit the amount of [Currency and Amount] within [four] Business Days to our account:

Account No.:	[...]
With Bank:	[Name, City, Country, Swift Code]
Our Reference No.:	[...]

Capitalised terms not otherwise defined in this notice shall have the meaning set out in the Agreement, unless the context otherwise requires. All provisions of the Agreement, including Clause 25 (*Applicable Law and Dispute Resolution*) are applicable to this demand.

[Name of the Grantor] [Grantor's signatures].

⁵⁸ See AAOIFI *Shari'ah* Standard No. (5) "Guarantees": Personal guarantees are divided into two types. One type is a guarantee where the guarantor has a right of recourse to the debtor, and this guarantee is offered at the request or with the consent of the debtor. The other type is a non-recourse guarantee, which is offered voluntarily by a third party without the debtor's request or consent (voluntary guarantee). To avoid turning a transaction into an interest-based loan, it is not permissible to combine agency and personal guarantees in one contract at the same time (i.e. the same party acting in the capacity of an agent on one hand and acting as a guarantor on the other hand), but if a guarantee is not stipulated in the agency contract and the agent voluntarily provides a guarantee to his clients independently of the agency contract, the agent becomes a guarantor in a different capacity from that of agent. In this case, such an agent will remain liable as guarantor even if he is discharged from acting as agent.

APPENDIX

FORM OF AGENCY AGREEMENT

[NOTE: This is a form of the agency agreement to be entered between the Grantor and the Participant and this form is therefore not part of the MUPA but is set out herein for the purpose of information only]

THIS AGENCY (WAKALAH) AGREEMENT (the "**Agency Agreement**") is dated [●] and made between:

- (1) [INSERT NAME OF PARTICIPANT] a bank incorporated in [●], [Head Office][Registered Office] at [●]of [●] (the "**Principal**"); and
- (2) [INSERT NAME OF GRANTOR] a bank incorporated in [●], [Head Office][Registered Office] at [●]; (the "**Agent/Grantor**"),

each a "Party" and together the "Parties".

Background

- (A) The Parties have entered into an IIFM-BAFT master unfunded participation agreement for trade finance transactions dated [●] (the "**Master Unfunded Participation Agreement**").
- (B) Pursuant to the terms of the Master Unfunded Participation Agreement, the Parties have agreed, from time to time, to enter into trade participation transactions on an unfunded basis ("**Unfunded Participation**") in accordance with agency (*Wakalah*) arrangement.
- (C) Pursuant to the terms of this Agency Agreement, the Principal has agreed to appoint the Agent/Grantor, and the Agent/Grantor has agreed to act, as the Principal's agent in relation to the Principal's participation of any Unfunded Participation.

IT IS AGREED as follows:

1. **DEFINITIONS AND CONSTRUCTION**

Terms defined in the Master Unfunded Participation Agreement have the same meaning in this Agency Agreement unless given a different meaning in this Agency Agreement or the context requires otherwise.

2. **AGENCY**

2.1 **Appointment**

- (a) The Principal hereby appoints the Agent/Grantor as its agent:
 - (i) in relation to the Principal's participation of any Unfunded Participation in accordance with the terms of the Master Unfunded Participation Agreement; and
 - (ii) to issue any LC or LG on its behalf and for its share in the LC or LG relating to an Unfunded Participation.
- (b) The Agent/Grantor agrees to act as paid or non-paid agent for and on behalf of the Participant in this respect.

3. **MISCELLANEOUS**

3.1 **[Third Party Rights**

Unless expressly provided to the contrary in this Agency Agreement, a person who is not a Party has no rights to enforce or to enjoy the benefit of any term of this Agency Agreement [including for the avoidance of doubt under the Contracts (Rights of Third Parties) Act 1999]⁵⁹.

3.2 **Partial Invalidity**

If, at any time, any provision of this Agency Agreement is or becomes illegal, invalid or unenforceable in any respect under any law of any jurisdiction, neither the legality, validity or enforceability of the remaining provisions nor the legality, validity or enforceability of such provision under the law of any other jurisdiction will in any way be affected or impaired.

3.3 **Termination**

This Agency Agreement shall terminate [upon [●]/on [●]]⁶⁰ and without prejudice to this, either Party may terminate this Agency Agreement by giving the other at least [1]⁶¹ month prior written notice.

3.4 **Entire Agreement**

This Agency Agreement constitutes the entire agreement and understanding of the Parties with respect to its subject matter. Each of the Parties acknowledges that in entering into this Agency Agreement it has not relied on any oral or written representation, warranty or other assurance (except as provided for or referred to in this Agency Agreement) and waives all rights and remedies which might otherwise be available to it in respect thereof, except that nothing in this Agency Agreement will limit or exclude any liability of a party for fraud.

3.5 **Remedies and Waivers**

No failure to exercise, nor any delay in exercising, on the part of any Party, any right or remedy under this Agency Agreement shall operate as a waiver, nor shall any single or partial exercise of any right or remedy prevent any further or other exercise or the exercise of any other right or remedy. The rights and remedies provided in this Agency Agreement are cumulative and not exclusive of any rights or remedies provided by law.

3.6 **Amendments**

Any amendment to any of the terms or conditions of this Agency Agreement shall be in writing and signed by both Parties.

3.7 **Counterparts**

This Agency Agreement may be executed in any number of counterparts, and this has the same effect as if the signatures on the counterparts were on a single copy of this Agency Agreement.

⁵⁹ Only to be included where English law is the governing law of this Agency Agreement.

⁶⁰ To be agreed commercially on a client specific basis.

⁶¹ To be agreed commercially on a client specific basis.

3.8 Notices

(a) Communications in writing

Any communication to be made under or in connection with this Agency Agreement shall be made in writing and, unless otherwise stated, may be made by fax, e-mail or letter.

(b) Addresses

The address, e-mail and fax number (and the department or officer, if any, for whose attention the communication is to be made) of each Party for any communication or document to be made or delivered under or in connection with this Agency Agreement is that identified with its name below or any substitute address, e-mail or fax number or department or officer as the Party may notify to the other by not less than five (5) Business Days' notice.

Principal:

Address: [●]

Fax: [●]

E-mail: [●]

Attention: [●]

Agent/Grantor:

Address: [●]

Fax: [●]

E-mail: [●]

Attention: [●]

(c) Delivery

Any communication or document made or delivered by one person to another under or in connection with this Agency Agreement will only be effective:

(i) if by way of fax, when received in legible form [provided that such communication is made from the fax number specified in Clause 3.8(b) above of the relevant Party or, if made from a different fax number, upon receipt of an e-mail confirmation from the Party delivering such communication to the other Party that such communication has been sent by fax]; or

(ii) if by way of letter, when it has been left at the relevant address provided such delivery was by way of an internationally reputable courier company which retains proof of delivery,

and, if a particular department or officer is specified as part of its address details provided under Clause 3.8 (*Notices*), if addressed to that department or officer.

3.9 **Reliance on Communication**

A Party (the "Receiving Party") is authorised to act without further enquiry upon any instruction or communication received by fax or telephone which it reasonably believes in good faith to be an instruction or communication given or made by the other Party (the "Delivering Party") or any person authorised by the Delivering Party to give instructions or make other communications by fax or telephone on its behalf and is entitled to treat any such instruction or communication as fully authorised by and binding upon the Delivering Party. The Delivering Party shall indemnify the Receiving Party and its officers, directors, employees, representatives and agents from and against any cost, claim, loss expense (including legal fees) or liability together with any value added tax thereon which any of them may reasonably incur or sustain by reason of having acted upon any such instruction or communication.

4. **Applicable Law and Dispute Resolution**

4.1 **Governing Law**

This Agency Agreement and any non-contractual obligations arising out of or in connection with it shall be governed by and construed in accordance with [English law] [to the extent [English law] does not conflict with the principles and rules of *Shari'ah* and in the case of any conflict, the principles and rules of *Shari'ah* shall prevail.

4.2 **Jurisdiction**

[Subject to Clause 4.4 (*Arbitration*):]⁶²

- (a) [Each Party agrees that the courts of [England and Wales] have exclusive jurisdiction to settle any disputes in connection with this Agency Agreement and accordingly submits to the jurisdiction of the courts of [England and Wales].]⁶³
- (b) Each Party:
 - (i) waives objection to the courts of [England and Wales] on grounds of inconvenient forum or otherwise as regards proceedings in connection with this Agency Agreement; and
 - (ii) agrees that a judgment or order of a court of [England and Wales] in connection with this Agency Agreement is conclusive and binding on it and may be enforced against it in the courts of any other jurisdiction.

4.3 **Service of Process**⁶⁴

⁶⁵[Without prejudice to any other mode of service allowed under any relevant law:

- (a) the Principal irrevocably appoints [●] as its agent for service of process in relation to any proceedings before the courts of England and Wales in connection with this Agency Agreement;
- (b) the Agent/Grantor irrevocably appoints [●] as its agent for service of process in relation to any proceedings before the courts of England and Wales in connection with this Agency Agreement;

⁶² This wording should be included if the parties choose to retain clause 4.4 (*Arbitration*).

⁶³ Parties to consider whether this clause should be included.

⁶⁴ Please note that a process agent appointment is required where the relevant Party does not have a registered place of business in England or Wales (if governed under English law).

⁶⁵ To be used for either/neither/both party/ies as necessary.

- (c) the Principal agrees that failure by a process agent to notify the Principal of the process will not invalidate the proceedings concerned; and
- (d) the Agent/Grantor agrees that failure by a process agent to notify the Agent/Grantor of the process will not invalidate the proceedings concerned.]

4.4 [Arbitration

- (a) A Party may by notice in writing to the other Party at the address given for the sending of notices under this Agency Agreement pursuant to Clause 3.8 (*Notices*) require that any dispute in connection with this Agency Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the arbitration rules of [the London Court of International Arbitration / the Dubai International Islamic Centre for Reconciliation and Arbitration]⁶⁶, which rules are deemed to be incorporated by reference into this Clause.
- (b) The number of arbitrators shall be [one/three], the seat, or legal place of arbitration shall be [●] and the language to be used in the arbitral proceedings shall be [●].
- (c) The arbitral award shall be final, binding and capable of being enforced as if it had been issued by a court of competent jurisdiction and the Parties hereby waive any right to refer any question of law and any right of appeal on the law and/or merits to any court.
- (d) The arbitration and all matters related thereto, including any awards, shall be confidential, unless otherwise agreed in writing by both Parties or to the extent disclosure is required under any applicable law.]

4.5 Waiver of Payment of Interest

The Parties to this Agency Agreement recognise and agree that the payment of interest is repugnant to the principles and rules of *Shari'ah* and accordingly, to the extent that any legal system would (but for the provisions of this Clause) impose (whether by contract or by statute) any obligation to pay interest, the Parties hereto hereby irrevocably and unconditionally expressly waive and reject any entitlement to recover interest from each other. Nothing in this Agency Agreement shall oblige either Party to pay interest or to receive any interest on any amount payable in violation of the *Shari'ah* principles or to do anything that is unacceptable under the principles and rules of *Shari'ah*. Each Unfunded Participation entered into by the Parties pursuant to this Agency Agreement shall be fully *Shari'ah* compliant.

This Agency Agreement has been entered into on the date stated at the beginning of this Agency Agreement.

For and on behalf of

[Principal]

For and on behalf of

[Agent/Grantor]

⁶⁶ The Parties may choose any other arbitration body including the DIFC-LCIA Arbitration Court, the International Chamber of Commerce Arbitration Rules, the Bahrain Chamber for Dispute Resolution Arbitration Rules or the Dubai International Arbitration Centre Rules.

Name: _____

Name: _____

Title: _____

Title: _____

Name: _____

Name: _____

Title: _____

Title: _____

SIGNATURE PAGES

PARTY A

SIGNED for and on behalf of)
[●]) _____

Name: _____

Title: _____

Address: [●]

Fax No.: [●]

Attention: [●]

in the presence of:

Signature of Witness _____

Name of witness _____

Address _____

Occupation _____

Signature of Witness _____

Name of witness _____

Address _____

Occupation _____

PARTY B

SIGNED for and on behalf of
[●]

)
) _____

Name: _____

Title: _____

Address: [●]

Fax No.: [●]

Attention: [●]

in the presence of:

Signature of Witness _____

Name of witness _____

Address _____

Occupation _____

Signature of Witness _____

Name of witness _____

Address _____

Occupation _____