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PARTNERSHIP ON THE PRECIPICE: DEFAULT IN DIMINISHING MUSHARAKAH

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ABSTRACT

This article critically examines the legal architecture of the Diminishing Musharakah (DM), widely regarded as the most prominent Shariah-compliant alternative to the conventional interest-based mortgage, with particular attention to the legal consequences of customer default. The DM is structured as a compound arrangement consisting of three distinct but interrelated contracts: a shirkat al-milk establishing joint ownership between the bank and the customer, an ijarah under which the customer leases the bank's ownership share, and a series of sale transactions executed through a unilateral purchase undertaking that progressively transfers full ownership to the customer. While this structure is widely praised for embodying the Islamic principles of asset-backing, risk-sharing, and equitable participation in profit and loss, the article argues that significant jurisprudential tensions arise at the moment of default.

Standard-form DM agreements typically authorize the bank to initiate a forced sale of the jointly owned property in order to recover its investment, a mechanism that appears to conflict with the classical rules of fiqh governing co-ownership, which generally prohibit one partner from compelling the sale of jointly held property without the other partner's consent or judicial authorization. The article therefore evaluates the principal doctrinal justification advanced by contemporary Shariah supervisory boards: that the customer's agreement to the default clause at the inception of the contract constitutes valid prior consent to the sale. Through a doctrinal analysis of classical Islamic partnership law and modern Islamic finance practice, the article concludes that while the prior consent argument offers partial justification for the default mechanism, it remains jurisprudentially incomplete, particularly in relation to informed consent, the absence of judicial oversight, and the asymmetrical allocation of remedial authority within the contractual framework.

Introduction

The Rise of a Global Industry: Islamic Finance in the Modern Era

The past four decades have witnessed the remarkable transformation of Islamic finance from a theoretical concept confined to academic circles and pious aspirations into a systematic, multi-trillion-dollar global industry. The industry has grown from a niche experiment in faith-based financial intermediation into a multi-jurisdictional system commanding assets in excess of USD 4 trillion as of 2023.[1197] Operating parallel to the conventional financial system, it has established a significant presence not only in Muslim-majority nations from Malaysia to the Gulf but also as a formally recognized and regulated sector in Western financial hubs such as London, Luxembourg, and Hong Kong.[1198]

[1197] Islamic Financial Services Board (IFSB), Islamic Financial Services Industry Stability Report 2023 (Kuala Lumpur: IFSB, 2023), pp. 7–9. The IFSB reports compound annual growth rates of approximately 8–10% over the preceding decade, with Islamic banking assets constituting the dominant sector at roughly 72% of total industry assets.

[1198] See generally Rodney Wilson, 'The Development of Islamic Finance in the GCC' (2009) 2 Kuwait Programme on Development, Governance and Globalisation Working Paper Series 1; Michael McMillen, 'Islamic Capital

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This growth is driven by a substantial and diverse global Muslim population seeking financial services that align with their religious beliefs, alongside a growing interest from non-Muslim investors attracted by the ethical and asset-backed nature of its products. This rapid growth has also generated an extensive body of scholarship examining the legal and jurisprudential foundations of Islamic financial transactions, particularly the ways in which classical Islamic commercial law has been adapted to address modern financial needs.

At its core, Islamic finance is distinguished not merely by the prohibition of interest, but by a comprehensive ethical framework governing all economic activity. Its foundational principles mandate that all transactions must be rooted in tangible assets, prohibit excessive uncertainty and speculation, and emphasize risk-sharing between parties. The Shariah does not view money as a commodity in itself, but as a medium of exchange and a store of value. Therefore, money must be deployed in productive, real-economic activity to generate a legitimate return.

As the renowned scholar and a key architect of modern Islamic finance, Sheikh Yusuf Al-Qaradawi, articulated in his seminal work, The Lawful and the Prohibited in Islam, the prohibition of riba is designed to prevent the rich from exploiting the needy and to foster a spirit of cooperation and mutual responsibility. The goal, he argues, is a system based on justice, fairness, and the prevention of exploitation.

Islamic finance resists reduction to a simple definitional formula, for it is simultaneously a legal system, an ethical framework, and an economic paradigm rooted in the normative architecture of the Shariah. Its foundational contours are, however, consistently articulated by leading religious scholars.

Sheikh Taqi Usmani, widely regarded as the most authoritative contemporary jurist in the field, defines Islamic finance as a system of financial arrangements that must, in their substance and structure, conform to the injunctions of *fiqh al-mu'amalat* (the jurisprudence of commercial transactions), prohibiting *riba* (usury or interest), *gharar* (excessive uncertainty), and *maysir* (speculation), while affirmatively requiring that transactions be anchored in real economic activity, genuine risk-sharing, and the equitable distribution of benefit and burden.[1199]

Sheikh Mustafa al-Zarqa, the Syrian-Jordanian jurist whose foundational scholarship undergirds modern Islamic contract law, situated the the prohibition of *riba* within a broader normative framework of *'adl* (justice) in exchange. He held that any financial arrangement that delivers guaranteed, predetermined return to capital, divorced from the contingencies of actual economic performance, constitutes an exploitation of the borrower's need and an unjust enrichment of the lender inconsistent with the Quranic injunction to abstain from *zulm* (oppression).[1200]

The International Islamic Fiqh Academy, operating under the auspices of the Organisation of Islamic Cooperation, has further codified this understanding through successive resolutions affirming that legitimate Islamic financial contracts must be characterised by genuine asset-backing, real transfer of risk, and the avoidance of any contractual structure that functionally replicates interest-bearing debt under an Islamic terminological facade.[1201]

The Accounting and Auditing Organisation for Islamic Financial Institutions, the principal

Markets: Developments and Issues' (2008) 1 Capital Markets Law Journal 136.

[1199] Muhammad Taqi Usmani, An Introduction to Islamic Finance (The Hague: Kluwer Law International, 2002), pp. 9–14. Usmani elaborates: '[T]he basic philosophy of Islamic finance revolves around the concept that money has no intrinsic utility. It is only a medium of exchange. Therefore, it cannot be sold at a profit. Profit is generated through trade, investment in assets, and sharing of risk.'

[1200] Mustafa Ahmad al-Zarqa, Al-Madkhal al-Fiqhi al-'Amm [General Juristic Introduction] (Damascus: Dar al-Fikr, 1967), vol. 1, pp. 451–460. See also Mohammad Nejatullah Siddiqi, Riba, Bank Interest and the Rationale of Its Prohibition (Jeddah: Islamic Development Bank, 2004), pp. 1–22.

[1201] IIFA Resolution No. 10 (Second Session, 1985) on Ribawi Transactions; IIFA Resolution No. 86 (Ninth Session, 1996) on Financial Instruments. The Academy's resolutions carry persuasive authority across jurisdictions and are routinely cited by national Shariah supervisory boards as foundational jurisprudential precedent.

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standard-setting body for the industry, synthesises these scholarly positions in its Shariah Standards. It defines an Islamic financial institution as one whose objectives, principles, and operations are governed by the Shariah, and whose transactions are structured to ensure that return is generated only through the assumption of genuine commercial risk, through partnership, trade, leasing, or manufacture, rather than through the mere passage of time and the deployment of capital.[1202]

Dr. Hussein Hamed Hassan, longtime Chairman of the AAOIFI Shariah Board, has described this requirement as the doctrine of al-ghunm bil-ghurm, that entitlement to profit is legally conditioned upon exposure to corresponding loss, a principle that he regards as the normative bedrock upon which all legitimate Islamic financial structures must be erected.[1203]

The structural consequences of this doctrinal framework are far-reaching and practically significant. Conventional banking generates return through the extension of interest-bearing credit: the lender advances capital, retains legal title to collateral, bears no equity risk in the borrower's enterprise, and is entitled to a fixed, time-indexed return regardless of the borrower's commercial outcome. Islamic finance, by contrast, demands that the financial institution participate, in some juridically cognisable measure, in the fortunes of the underlying transaction. This requirement is not merely terminological. It demands a fundamental restructuring of the legal relationships among institution, customer, and asset; of the allocation of risk and reward; and of the remedial architecture available upon default. It is within this structural reorientation that the musharakah mutanaqisah, the Diminishing Musharakah, finds its raison d'être.

This philosophy is codified in the standards of the Accounting and Auditing Organization for Islamic Financial Institutions, the industry's leading international standard-setter. AAOIFI defines Islamic finance as a set of financial practices that comply with Shariah rules, whose core objective is the realization of maqasid al-Shariah, the higher objectives of Islamic law, primarily the protection of wealth and the achievement of socio-economic justice. The paradigm shifts from a creditor-debtor relationship, laden with guaranteed returns for the lender, to a partnership-based model where profit and loss are shared according to pre-agreed ratios. It is this promise of partnership, fairness, and shared risk that forms the ethical bedrock of the industry and its appeal to millions.

The Challenge of Home Ownership: Inventing the "Fair" Solution

One of the most significant practical challenges for Islamic finance has been the creation of a Shariah-compliant alternative to the conventional interest-based mortgage. The mortgage, a cornerstone of modern personal finance, is fundamentally built on riba: the lender provides money today in exchange for a guaranteed return of principal plus interest over time, with no sharing of risk beyond the collateral. For the observant Muslim, this transaction is strictly forbidden.

It was in response to this pressing need that the contract of Musharakah Mutanaqisah rose to prominence. Often referred to as a Diminishing Musharakah, this product has been widely championed by Islamic banks and their Shariah boards as the most equitable and Shariah-authentic method for home financing. Its structure is ingenious: instead of a loan, it creates a genuine, albeit temporary, partnership. The bank and the customer jointly purchase the property, becoming co-owners. The customer then lives in the property and pays rent to the bank for the use of the bank's share of the ownership. Periodically, the customer purchases additional units of

[1202] AAOIFI, Shariah Standards for Islamic Financial Institutions (Manama: AAOIFI, 2017), Preface and Standard No. 1 (Trading in Currencies), pp. 1–5; Standard No. 12 (Sharikah (Musharakah) and Modern Corporations), pp. 215–255.

[1203] Hussein Hamed Hassan, 'An Introduction to the Profit Motive and the Prohibition of Interest in Islamic Law' in Rifaat Ahmed Abdel Karim and Simon Archer (eds), Islamic Finance: Innovation and Growth (London: Euromoney Books and AAOIFI, 2002), pp. 40–53.

ownership from the bank. Over time, the customer's share increases while the bank's diminishes, until the customer becomes the sole proprietor.

This model was celebrated for its fidelity to Islamic principles. It avoids interest by replacing it with a legitimate rental relationship and a series of sale transactions. Crucially, it embodies the risk-sharing ethos central to the Islamic economic vision. As Dr. Muhammad Umer Chapra, the renowned Islamic economist, has consistently argued, the shift from debt-based to equity-based financing is essential for promoting greater stability and justice in the financial system. He posits that partnerships like Musharakah force financiers to be more prudent in their lending and to share in the fate of the venture, thereby creating a more balanced and less fragile system. The DM contract, in its ideal form, appears to be a practical embodiment of this vision, a fair partnership for a fundamental human need.

Diminishing Musharakah emerged in the latter decades of the twentieth century as the Islamic finance industry's most ambitious attempt to provide Muslims with access to residential property financing without recourse to the interest-bearing mortgage, the contractual instrument that has historically functioned as the gateway to homeownership across most of the industrialised world. The conventional mortgage is, from the perspective of fiqh al-mu'amalat, doctrinally inadmissible: it generates return through predetermined interest, collateralises the family home against a debt rather than against an equity stake, and imposes upon the borrower the full burden of asset depreciation while reserving for the lender a guaranteed, risk-free return. These structural features collectively engage the prohibition of riba and have been condemned as such by virtually every Shariah supervisory body of consequence.[1204]

The DM contract was designed to supplant the conventional mortgage by recasting the home purchase transaction as an equity partnership, a shirkah, between the financial institution and the customer. It is governed by the classical rules of fiqh al-sharika and progressively restructured, through a series of periodic unit acquisitions by the customer, into sole ownership. In its canonical form, the DM instrument is a compound structure comprising three conceptually distinct but operationally integrated contracts: a shirkah al-milk establishing joint title to the property; an ijarah by which the institution leases its proportionate share to the customer in exchange for periodic rental payments; and a series of binding unilateral undertakings by which the customer commits to purchasing the institution's units progressively over the financing term, thereby incrementally extinguishing the partnership and vesting full ownership in themselves.[1205]

The appeal of this structure to Muslim consumers, and to the Shariah supervisory bodies that have endorsed it, rests upon a compelling normative claim: that the DM represents not merely a technically compliant alternative to the conventional mortgage, but a genuinely more equitable arrangement. The claim has several distinct dimensions.

First, because the institution holds a real ownership interest in the property rather than a secured debt claim against it, the customer is not, in principle, a debtor obligated to service a fixed liability regardless of the asset's market performance. Rather, the customer is a partner, whose payment obligations reflect the progressive acquisition of equity and the fair rental value of the institution's undivided share.[1206]

[1204] See Sheikh Yusuf al-Qaradawi, Al-Halal wal-Haram fil-Islam [The Lawful and Prohibited in Islam] (Cairo: Maktabat Wahba, 1994), pp. 262–270; Usmani, supra note 1, pp. 27–35. Al-Qaradawi, while acknowledging the jurisprudential debate concerning necessity-based permissibility in non-Muslim-majority jurisdictions, affirms the categorical inadmissibility of conventional mortgages as a first-order position.

[1205] The structural mechanics of the DM are elaborated with doctrinal precision in Meera, A.K.M. and Razak, D.A., 'Home Financing through the Musharakah Mutanaqisah Contract: Some Practical Issues' (2009) 16(2) Journal of King Abdulaziz University: Islamic Economics 3. See also AAOIFI Shariah Standard No. 12, paras. 5/3–5/6; Bank Negara Malaysia, Shariah Standard on Musharakah (Kuala Lumpur: BNM, 2019), pp. 32–45.

[1206] This partnership characterisation is emphasised by proponents of the DM as its defining moral and legal virtue. See M.A. Muneeza, 'Musharakah Mutanaqisah Home Financing: Issues and Challenges' (2013) 1 International

Second, the proportional equity accumulation mechanism is presented as intrinsically protective of the customer's patrimony. Unlike the conventional mortgage, under which early repayments are heavily weighted toward interest service, leaving the borrower with minimal equity in the early years of the loan, the DM's unit-purchase structure ensures that each periodic payment makes a direct, proportionate contribution to the customer's ownership stake. Upon any dissolution of the partnership, whether voluntary or compelled, the customer's accumulated equity is, on the theory endorsed by its proponents, fully cognisable and protected as a matter of *milkiyyah* (ownership) under Islamic law.[1207]

Third, and most foundationally from the perspective of classical jurisprudence, the DM's grounding in *fiqh al-sharika* theoretically imports the entire normative architecture of partnership law into the home financing relationship: the principle of *al-ghunm bil-ghurm* (entitlement to profit conditioned upon exposure to loss); the prohibition upon one partner appropriating the other's share without consent or judicial authorisation; the requirement of proportional distribution of both profits and losses; and the procedural safeguards, including the necessity of judicial oversight, that classical jurists developed precisely to protect the weaker partner in a dissolving shirkah. On this reading, the DM is not merely Shariah-compliant; it is Shariah-superior, an instrument that affirmatively realises the ethical objectives of Islamic commercial law rather than simply avoiding its formal prohibitions.[1208]

These normative claims have secured the DM its status as the preferred Islamic home financing instrument across a growing number of jurisdictions, most notably Malaysia, where Bank Negara Malaysia has promulgated comprehensive Shariah standards for its implementation; Pakistan, where the State Bank's Shariah Governance Framework mandates DM as the primary residential finance model; and the Gulf Cooperation Council states, where the product has achieved widespread retail adoption. The Global Islamic Finance Report has documented the DM as among the fastest-growing Islamic retail banking products globally, with outstanding home financing portfolios denominated in DM structures exceeding USD 200 billion in key markets.[1209]

Yet the normative claims upon which the DM's reputation for fairness rests have never been subjected to rigorous jurisprudential scrutiny at precisely the moment when they are most consequential: default. The DM, in its standard commercial form, is not a bare partnership governed solely by classical *fiqh al-sharika*. It is a contractually layered instrument, drafted by financial institutions operating under competitive pressure to protect their capital recovery, and approved by Shariah supervisory boards whose institutional independence from the institutions they certify has been the subject of sustained scholarly concern.[1210] When a DM customer defaults, the contractual mechanisms invoked, forced sale clauses, bank-priority recovery waterfall structures, and extra-judicial liquidation procedures, do not derive from classical fiqh al-sharika. They derive, rather, from the remedial architecture of conventional secured lending, imported into an Islamic contractual framework through doctrinal

Journal of Real Estate Studies 1; Muhammad Ayub, Understanding Islamic Finance (Chichester: John Wiley & Sons, 2007), pp. 321–340.

[1207] Asyraf Wajdi Dusuki, 'Banking for the Poor: The Role of Islamic Banking in Microfinance Initiatives' (2008) 24(1) Humanomics 49, 57–58; Monzer Kahf, 'Islamic Banks: The Rise of a New Power Alliance of Wealth and Shari'a Scholarship' in Clement Henry and Rodney Wilson (eds), The Politics of Islamic Finance (Edinburgh: Edinburgh University Press, 2004), pp. 17–36.

[1208] This normative ambition is articulated most systematically by Sheikh Hussein Hamed Hassan, supra note 8, and by the IIFA in its Resolution No. 136 (Fourteenth Session, 2003) on Musharakah Mutanaqisah, which endorses the DM structure while noting the necessity of ensuring that its contractual documentation faithfully reflects the partnership's bilateral and equitable character.

[1209] Cambridge Institute of Islamic Finance, Global Islamic Finance Report 2022 (London: GIFR, 2022), pp. 78–82. Malaysia alone reports Shariah-compliant home financing — predominantly structured as DM — accounting for over 30% of total residential mortgage outstanding by 2022.

[1210] On the governance concerns surrounding Shariah supervisory boards, see Volker Nienhaus, 'Governance of Islamic Banks' in Kabir Hassan and Mervyn Lewis (eds), Handbook of Islamic Banking (Cheltenham: Edward Elgar, 2007), pp. 128–143; Dahlia Ibrahim, 'The Home Financing-Deposit Nexus and Its Shariah Governance Implications' (2016) 33 Journal of Financial Regulation and Compliance 201.

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rationalisations whose adequacy this article systematically interrogates.

Scope and Structure of the Inquiry

This two-part article project undertakes a critical examination of the Diminishing Musharakah contract at the precise moment of its greatest stress: the point of default and forced liquidation. By dividing the inquiry into two distinct but interconnected parts, this collaboration will dissect both the juristic authority for, and the financial consequences of, a unilateral forced sale.

This research article delves into the foundational legal question: can a co-owner unilaterally force the sale of jointly owned property? It will scrutinize the classical fiqh principle that a partner cannot be compelled to sell without consent, and weigh it against the modern contractual argument that the default clause constitutes valid prior consent. This section will explore how Shariah supervisory boards have navigated this tension to grant banks this power.

This article aims to move beyond the idealized marketing of Islamic finance and examine the hard realities embedded in its legal contracts. In doing so, it seeks to contribute to a more honest and rigorous discourse on whether these modern financial instruments truly deliver on the classical Islamic promises of justice, partnership, and fairness.

The Architecture of the Diminishing Musharakah Contract

I. Conceptual Foundation

The Diminishing Musharakah (hereinafter 'DM') is not a single contract. It is a deliberately engineered sequence of three legally distinct but operationally integrated transactions, each drawing its validity from a separate branch of classical *fiqh al-mu'amalat*. Their combination is designed to achieve, over the financing term, the same practical result as a conventional mortgage, but through a framework of co-ownership, leasing, and progressive sale rather than through the extension of interest-bearing credit.[1211]

The simplest way to understand the DM is through contrast with what it replaces. In a conventional mortgage, the bank lends money, takes a charge over the property as security, and charges interest on the outstanding balance. The bank never owns the property; the customer is the sole owner but owes a debt. In a DM, by contrast, the bank and customer **jointly purchase** the property from the outset and are both registered as co-owners on title. The customer does not owe a debt; the customer pays rent for the use of the bank's share and periodically buys that share, unit by unit, until the bank's ownership is extinguished. It is this co-ownership structure that both gives the DM its claim to Islamic authenticity and generates the legal difficulties examined in this article.

The Three Constituent Contracts

The DM is composed of three constituent contracts. Each is independently valid under classical *Shari'ah*; their integration into a single financing instrument has been endorsed by the International Islamic Fiqh Academy and the AAOIFI, subject to the condition that each is executed as a genuinely distinct transaction and not artificially conflated with the others.[1212]

A) Shirkat al-Milk: The Co-Ownership Partnership

The bank and customer jointly acquire the property in agreed proportions. Both are registered as co-owners on title. The customer typically contributes 10-20% of the purchase price; the bank contributes the remainder. This creates a shirkah al-milk (co-ownership partnership) governed by fiqh al-sharika. Their relationship at this stage is governed by the rules of shirkat al-milk, or partnership in ownership, as distinct from shirkat al-aqd,

[1211] Muhammad Taqi Usmani, An Introduction to Islamic Finance (The Hague: Kluwer Law International, 2002), p. 58. Usmani confirms that the arrangement is 'composed of different transactions which come to play their role at different stages.'
[1212] AAOIFI Shariah Standard No. 12 (Sharikah and Modern Corporations), paras. 5/3-5/6 (Manama: AAOIFI, 2017); IIFA Resolution No. 136 (Fourteenth Session, 2003) on Musharakah Mutanaqisah.

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which is a partnership formed by contract for commercial enterprise. In shirkat al-milk, the parties are simply co-owners of a specific asset, and their rights and obligations flow from the fact of co-ownership rather than from any entrepreneurial venture. Neither party holds the property as security for a debt; both hold it as genuine owners, with all the proprietary rights that ownership entails under classical Islamic law.

B) Ijarah: The Lease Agreement

The bank leases its ownership share to the customer under a separate ijarah agreement. The customer occupies the full property and pays rent calculated on the bank's proportionate ownership. As the bank's share diminishes through unit purchases, the rental is reduced correspondingly. The customer pays rent only on what the bank actually owns at any given time, not on the full property value. This rental income is the bank's legitimate return earned through ownership rather than through interest.

C) The Purchase Undertaking: The Diminishing Mechanism

The customer gives the bank a unilateral binding promise (wa'd) to purchase the bank's ownership share progressively, in defined units, at regular intervals. Each unit purchase is a separate bay' (sale) concluded at the time of each transfer. As each unit is transferred, the bank's share is reduced and the customer's increases proportionally. The arrangement continues until the bank's share reaches zero and the customer becomes the sole proprietor.

A Worked Example: The House Financing Illustration

The mechanics of the DM are most readily grasped through a numerical illustration adapted from the canonical exposition provided by Usmani.[1213] The hypothetical property is valued at USD 100,000. The customer contributes USD 20,000 (20%) and the bank USD 80,000 (80%). The bank's share is divided into ten equal units of USD 10,000 each, representing 10% per unit. The customer undertakes to purchase one unit per quarter, completing full acquisition over ten quarters. Prevailing market rent for the full property is assumed at USD 1,000 per month.

[1213] Usmani, supra note 1, pp. 57-59.

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Period	Bank Ownership	Customer Ownership	Unit Price Paid	Monthly Rent	Legal Effect
Inception	80% (8 units)	20% (2 units)	USD 20,000 (deposit)	USD 800/mo	Shirkah al-Milk created; Ijarah executed
Yr 1 Q1	70% (7 units)	30% (3 units)	USD 10,000	USD 700/mo	1st unit transferred; rent reduced
Yr 1 Q2	60% (6 units)	40% (4 units)	USD 10,000	USD 600/mo	2nd unit transferred; rent reduced
Yr 1 Q3	50% (5 units)	50% (5 units)	USD 10,000	USD 500/mo	3rd unit transferred; equal co-ownership
Yr 1 Q4	40% (4 units)	60% (6 units)	USD 10,000	USD 400/mo	4th unit transferred
Final Qtr	0%	100%	USD 10,000 (final)	USD 0	Shirkah dissolved; sole ownership vested

Three features of this progression are legally significant and recur throughout this article. First, the customer's ownership share is **vested and unconditional** from the moment each unit is purchased, constituting *milkiyyah* (ownership) in the full classical sense. Second, the bank's rental entitlement is strictly **proportional to its current ownership share** and has no independent existence apart from that ownership. Third, upon dissolution of the partnership at any point, the proceeds of sale fall to be distributed between bank and customer in exact proportion to their respective ownership shares. It is the third feature that becomes acutely contested in the default scenario and to which this article is primarily devoted.

The Tension Inherent in the Compound Structure

By layering three contracts onto a single financing relationship, the DM creates a structure in which three distinct bodies of classical law operate simultaneously: the law of co-ownership (*shirkah al-milk*), the law of lease (*fiqh al-ijarah*), and the law of sale (*fiqh al-bay'*). Each generates its own rights and obligations, and they do not always point in the same direction upon default. The bank, as co-owner, wishes to realise its investment by selling the property; the customer, also a co-owner, holds vested ownership rights that classical *fiqh al-sharika* protects against unilateral disposition by the other partner. The question of which body of law prevails, and under what conditions, is the central jurisprudential problem this article addresses.[1214]

The Classical Fiqh Position: The Sanctity of Co-Owner Consent

I. A. The Nature of Shirkat al-Milk

The DM's co-ownership structure is an instance of *shirkat al-milk*: joint ownership of a specific asset (*'ayn*) by two or more persons, each holding a proportionate undivided share. It is

[1214] Al-Kasani, Bada'i' al-Sana'i' fi Tartib al-Shara'i' (Beirut: Dar al-Kutub al-'Ilmiyyah, 2003), vol. 7, pp. 115-118.

distinguished from *shirkat al-'aqd* (contractual commercial partnership) in that it does not require a shared commercial enterprise; it arises wherever two or more persons hold title to the same asset.[1215]

The defining characteristic of *shirkat al-milk* is that each co-owner's interest pervades every part of the asset in the relevant proportion. No part is exclusively attributable to any one co-owner. Al-Kasani articulates in the *Bada'i' al-Sana'i'* that this undivided character means neither co-owner may deal with any specific part of the asset as if it were exclusively their own without the other's consent.[6] Each co-owner may freely dispose of their **share** (*hissa*) including by sale, gift, or bequest — but may not compel any action with respect to the **corpus** of the asset without the other's agreement. This distinction between share and corpus is the conceptual key to understanding why unilateral forced sale is prohibited in classical *fiqh*.

Ownership as a Bundle of Rights: The Classical Incidents of Milkiyyah

The concept of *milkiyyah* in classical Islamic jurisprudence is not a monolithic entitlement but a structured bundle of legally cognisable rights, each independently protected. A unilateral forced sale does not merely affect one of them; it extinguishes or impairs each simultaneously.

[1215] Al-Kasani, supra note 6, vol. 7, pp. 120-124. Al-Kasani's case is particularly instructive because it arises in the context of shirkah al-milk arising from inheritance, which is the same category of co-ownership as the DM. The ruling is therefore directly applicable rather than merely analogous.

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Right Comprised in Milkiyyah	Classical Fiqh Authority	Effect of Unilateral Forced Sale
Haqq al-Tasarruf (Right of Disposition)	Al-Kasani: the owner alone determines the modality and timing of disposition of their property.	Forced sale transfers the co-owner's share to a third party without their consent, directly extinguishing this right.
Haqq al-Intifa' (Right of Use and Enjoyment)	Al-Nawawi: ownership includes the right to derive benefit from the asset for so long as one chooses.	Sale terminates the customer's right to occupy the property, even where the customer holds a continuing rental entitlement under the Ijarah.
Haqq al-Hifz (Right of Retention)	Ibn Qudama: a co-owner cannot be deprived of specific property through another's unilateral act; only a court acting on grounds of necessity may override this right.	This is the right most directly violated by unilateral bank-initiated sale: the customer is stripped of an asset they have a vested right to retain.
Haqq al-Nima' (Right to Accretion and Appreciation)	Al-Sarakhsi: any increase in the value of jointly owned property accrues proportionally to all co-owners.	Distressed sale at below-market value destroys the customer's proportionate share of appreciation, transferring that value to the purchaser without compensation.

Table 2: The Incidents of Milkiyyah and the Effect of Unilateral Forced Sale upon Each

A concrete illustration from the classical texts makes these abstract principles tangible. Al-Kasani poses the following case in the *Bada'i' al-Sana'i*: two persons jointly inherit a house. One wishes to sell; the other refuses, wishing to retain the property for residential use. Al-Kasani rules unambiguously that the co-owner who wishes to sell has no power to compel either a sale or a partition that would disadvantage the other.[7] His rationale is precise: the retaining co-owner's *haqq al-hifz* (right of retention) is a complete proprietary right, and no person has authority to extinguish another's complete proprietary right without either that person's

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consent or a judicial order predicated on grounds of necessity. A preference for liquidation, however commercially reasonable, does not constitute necessity.

Ibn Qudama in *al-Mughni* provides a further illustration that speaks directly to the DM context: where one partner in a joint property arrangement has expended more capital than the other and wishes to recover it, that financial motivation, however legitimate in its origin does not override the other partner's right to retain the specific asset.[1216] The correct remedy is judicial partition, not unilateral sale. Ibn Qudama's ruling is significant because the DM bank is in precisely this position: it wishes to recover capital invested in a jointly owned property, and the customer is the co-owner who wishes to retain it. Classical *fiqh* is explicit that the bank's financial interest, however legitimate, does not by itself entitle it to compel a sale.

The Foundational Rule and the Requirement of Judicial Oversight

From the foregoing analysis of *milkiyyah*, the classical jurists derived a foundational rule stated uniformly across all four Sunni schools: **no co-owner may compel the other to participate in the sale of the jointly owned asset without that co-owner's consent or a judicial order.** Al-Sarakhsi articulates the rationale in *al-Mabsut*: the co-owner who wishes to retain the property has a legitimate interest legally equal in weight to the one who wishes to sell. Neither may impose their preference upon the other by unilateral action; the proper forum is the court, which alone may adjudicate between competing legitimate interests.[1217]

Ibn Qudama states the consequence with precision: a co-owner who unilaterally sells the entire jointly owned property commits *ta'addi* (transgression) upon the other's proprietary rights. The transaction, insofar as it purports to pass the non-consenting co-owner's share to the purchaser, is *batil* (void) as a matter of classical *fiqh*; the non-consenting co-owner retains their share as against the world, including the ostensible purchaser.[1218]

The Role of the Judiciary: Hukm al-Qadi as the Legitimate Override Mechanism

Classical Islamic jurisprudence recognises that the rule of co-owner consent cannot be applied in a manner that perpetuates injustice. A co-owner who exploits their veto right to obstruct a dissolution that is genuinely necessary, or whose continued co-ownership imposes demonstrable harm on the other, cannot invoke *milkiyyah* as a vehicle for *zulm* (oppression). To address this tension, the classical jurists invested the *qadi* (judge) with authority to override a non-consenting co-owner's objection by judicial decree (*hukm al-qadi*) in defined and limited circumstances.

[1216] Ibn Qudama, Al-Mughni (Riyadh: Maktabat al-Riyadh al-Hadithah, 1981), vol. 5, pp. 5-10.
[1217] Al-Sarakhsi, Al-Mabsut (Beirut: Dar al-Ma'rifah, 1993), vol. 15, pp. 67-72.
[1218] Ibn Qudama, supra note 8, vol. 5, pp. 1-12. See also al-Nawawi, Rawdat al-Talibin (Beirut: al-Maktab al-Islami, 1991), vol. 4, pp. 97-105.

School	General Position	Conditions for Judicial Override
Hanafi	Permits compelled partition in kind; judicial order required for sale	Partition in kind (*qismat al-ifraz*) must be physically feasible without material damage (*darar*) to either share. Where indivisible, the court may order sale only as a last resort. A co-owner cannot unilaterally compel sale.[1219]
Maliki	Permits judicial compulsion where continuance causes demonstrable harm	Court must be satisfied that: (i) harm is genuine and present; (ii) no remedy short of dissolution exists; and (iii) the non-consenting partner's interest is not disproportionately prejudiced.[1220]
Shafi'i	Permits compelled partition; prohibits unilateral forced sale	Sale against a co-owner's will absent judicial authority constitutes *ta'addi* (transgression) and is void (*batil*). Court may substitute sale for partition only where partition harms both parties.[1221]
Hanbali	Strictest protection of co-owner consent; narrowest grounds for compulsion	Compelled sale requires judicial order and proof of necessity or harm. Unilateral forced sale violates *haqq al-milkiyyah* and constitutes *zulm* (oppression).[1222]

1219 Majallat al-Ahkam al-'Adliyyah, Arts. 1067-1075; al-Kasani, Bada'i' al-Sana'i', vol. 7
1220 Ibn Rushd, Bidayat al-Mujtahid, vol. 2; al-Mudawwana al-Kubra
1221 Al-Nawawi, Rawdat al-Talibin, vol. 4; al-Shirazi, al-Muhadhdhab
1222 Ibn Qudama, al-Mughni, vol. 5; al-Buhuti, Kashshaf al-Qina'

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Table 3: Conditions for Judicial Override of Co-Owner Consent Across the Four Sunni Schools

The four cumulative conditions for *hukm al-qadi* are: genuine and present harm (*darar haqiqi*), absence of a less intrusive remedy, proportional protection of the responding party's interest, and procedural regularity under judicial supervision. The *qadi*'s role is substantive, not merely procedural: the court assesses whether the conditions for compelled dissolution are met and supervises the realisation process in the interests of both parties. A contractual clause that substitutes the bank's own judgment of default for the court's independent assessment eliminates this substantive protection entirely.[1223]

Standard-form DM default clauses are in structural tension with all four conditions. They substitute contractual self-help for judicial oversight; they move immediately to sale without requiring the bank to demonstrate that other remedies are inadequate; and they frequently distribute proceeds under a bank-priority structure that does not reflect the proportional ownership model that *fiqh al-sharika* demands. It is this structural tension between the classical doctrinal baseline and the contractual reality of the DM, that the remainder of this article examines.

The Contract as Prior Consent: The Principal Justificatory Argument

Having established the classical doctrinal baseline in Section II, this section examines the central argument deployed by contemporary Islamic finance jurists and *Shari'ah* supervisory boards to justify the forced sale default clause in DM agreements. The argument, in its most developed form, is this: the classical rule requiring co-owner consent before a forced sale is not violated by the DM default clause because the customer's signature on the DM agreement itself constitutes valid prior consent to the sale, conditionally operative upon the customer's own default. The forced sale does not proceed without consent; it proceeds pursuant to consent that was given at the inception of the contract and that crystallises upon the occurrence of a condition that the customer had the power to prevent.

I. The Architecture of the Prior Consent Argument

The prior consent argument draws upon two distinct but related doctrinal tools from the classical law of contract: the principle of *al-shurut fil-'uqud* (permissible conditions in contracts) and the mechanism of *khiyar al-shart* (the option condition). Together, these tools are invoked to recharacterise the default clause from a unilateral bank right to an agreed contractual mechanism that both parties freely accepted at the outset.

Al-Shurut Fil-'Uqud: Permissible Conditions in Contracts

The doctrine of *al-shurut fil-'uqud* is grounded in the well-established *hadith*: '*al-muslimun 'ala shuruthihim illa shartan ahalla haraman aw harrama halalan*' - Muslims are bound by their conditions, except a condition that permits the prohibited or prohibits the permitted.[1224] On the basis of this authority, the Hanafi and Hanbali schools in particular developed a permissive doctrine of contractual conditions: parties to a *shirkah* may stipulate conditions that alter the default rules of partnership law, provided those conditions do not violate a categorical textual prohibition (*nass*), corrupt the essential purpose (*maqsad*) of the contract, or impose *zulm* upon either party.[1225]

Applied to the DM default clause, the argument runs as follows: the customer who signs a DM agreement containing a forced sale provision has stipulated as a condition of the contract that upon their own default, the bank is authorised to initiate the sale of the jointly

[1223] Mohammad Hashim Kamali, Principles of Islamic Jurisprudence, 3rd edn (Cambridge: Islamic Texts Society, 2003), pp. 293-298.

[1224] Reported by Abu Dawud, Sunan Abu Dawud, Kitab al-Aqdhiya, hadith no. 3594; al-Tirmidhi, Sunan al-Tirmidhi, Kitab al-Ahkam, hadith no. 1352. The hadith is regarded as foundational to the classical law of contractual conditions across all four schools.

[1225] Al-Kasani, supra note 6, vol. 5, pp. 232-244; Ibn Qudama, supra note 8, vol. 4, pp. 161-175 (Hanbali position on stipulated conditions in sale and partnership contracts).

owned property. This condition was agreed at arm's length at the inception of the partnership. It is not a condition imposed unilaterally by the bank after the partnership commenced; it is a condition to which both parties subscribed as the foundational terms of their relationship. The customer's *rida'* (consent) is therefore present not at the time of the sale, but at the time of the contract, in anticipation of the contingency that the default clause addresses.[1226]

The Khiyar al-Shart Analogy

The analogy to *khiyar al-shart* (the option condition) provides the most sophisticated version of the prior consent argument. *Khiyar al-shart* is a classical mechanism by which the parties to a contract agree, at the time of contracting, that one or both of them shall have the right to rescind or confirm the contract upon the occurrence of a defined condition within a specified period. The mechanism is recognised and extensively discussed in all four schools, with the Hanafi school permitting the option period to extend up to three days, and the Maliki and Hanbali schools permitting longer periods by agreement.[1227]

The *Shari'ah* supervisory boards that have approved DM default clauses draw an analogy between the default clause and *khiyar al-shart* in the following manner. Just as *khiyar al-shart* allows parties to agree in advance that a specific course of action will be available to one of them upon the occurrence of a condition, the DM default clause allows the bank to agree with the customer, in advance, that the bank will be entitled to initiate the sale of the property upon the occurrence of the defined condition of customer default. The customer's agreement to this mechanism at the outset of the contract is argued to supply the element of consent that classical *fiqh* requires. The consent is prospective and conditional rather than contemporaneous and unconditional, but it is consent nonetheless.[1228]

A further dimension of the *khiyar al-shart* analogy is that the customer's control over whether the condition is triggered reinforces the voluntariness of the consent given. Unlike a condition whose occurrence is beyond the contracting parties' control, default is entirely within the customer's power to prevent. The customer who performs their contractual obligations need never face the default clause. On this analysis, the forced sale is not an imposition visited upon the customer by the bank; it is the contractually agreed consequence of the customer's own election not to perform.

The Wa'd Mechanism as an Additional Justificatory Layer

A second justificatory mechanism employed by *Shari'ah* supervisory boards is the structural disaggregation of the default clause from the *shirkah* contract itself. On this analysis, the customer's agreement to liquidation upon default is not a condition stipulated within the *shirkah* (which might be subject to the classical rules on permissible conditions in partnership agreements) but a separate unilateral *wa'd* (binding promise) given by the customer independently of the main contract. This structural separation is designed to insulate the *shirkah* from the contaminating effect of a potentially objectionable condition, while still giving the bank a legally enforceable right to initiate sale upon default.[1229]

The practical effect of framing the default authorisation as a *wa'd* rather than a *shart* is significant. A *wa'd* given by the customer to consent to sale upon default is presented as a

[1226] This argument is articulated by Sheikh Hussein Hamed Hassan, 'An Introduction to the Profit Motive and the Prohibition of Interest in Islamic Law' in Rifaat Ahmed Abdel Karim and Simon Archer (eds), Islamic Finance: Innovation and Growth (London: Euromoney Books and AAOIFI, 2002), pp. 47-50.

[1227] Usmani, supra note 1, pp. 83-88; al-Kasani, supra note 6, vol. 5, pp. 268-285; Ibn Qudama, supra note 8, vol. 3, pp. 456-472. See also Mohammad Hashim Kamali, 'Islamic Commercial Law: An Analysis of Options' (1997) 3 American Journal of Islamic Social Sciences 17, 22-28.

[1228] See AAOIFI Shariah Standard No. 12, para. 5/6, which endorses the use of conditions in musharakah agreements that provide exit mechanisms for the institutional partner, subject to the general requirement that such conditions not involve zulm or gharar.

[1229] The International Islamic Fiqh Academy addressed the binding force of unilateral promises in Resolution No. 40-41 (Fifth Session, 1988), holding that a unilateral promise (wa'd) is binding in conscience (diyanatan) and, in certain circumstances involving the promisee's reliance, legally enforceable (qada'an). This resolution is the primary authority for the binding character of the wa'd in DM structures.

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voluntary commitment undertaken for the bank's benefit and reliance, giving rise to a legal obligation that the customer cannot subsequently resile from without cause. The bank's reliance on this promise — specifically, its decision to advance USD 80,000 into a co-ownership structure rather than demand conventional security — is the consideration that makes the *wa'd* binding. On this analysis, the customer who subsequently objects to the forced sale is not exercising a legitimate proprietary right; they are attempting to resile from a binding promise given in circumstances of full commercial disclosure.

Is It a Violation? Weighing the Competing Arguments

Having set out the classical doctrinal baseline in Section II and the principal justificatory arguments in Section III, this section undertakes the analytical task that the preceding sections have prepared: a rigorous evaluation of whether the DM default clause, in its standard commercial form, constitutes a violation of the classical rules of *shirkat al-milk* or whether the prior consent argument provides an adequate jurisprudential justification. The analysis proceeds by examining the strongest version of each position before offering a critical assessment.

I. Arguments That the Default Clause Constitutes a Violation

A) Consent is not informed as to manner and timing

The customer consented to a forced sale in the abstract at the time of signing but had no means of knowing the specific conditions under which that sale would be conducted: the state of the property market, the method of realisation (private treaty, auction, or distressed disposal), the identity of the buyer, or the price that would be achieved. Classical consent (rida') requires knowledge ('ilm) of the subject matter of what is consented to. Prospective consent to an indefinitely described future act does not satisfy this requirement.

B) The bypassing of the judicial safeguard is substantive, not procedural

The requirement for hukm al-qadi is not a mere procedural step. It is a substantive guarantee that an independent authority will assess whether the conditions for dissolution are met, that sale is appropriate rather than partition, and that the non-consenting co-owner's interests are protected throughout the process. A contractual clause that bypasses this mechanism eliminates the substantive protection, not merely the procedure.

C) The wa'd cannot override milkiyyah

A unilateral promise (wa'd) is a personal obligation (iltizam); it is not itself a disposition of property. A customer who promises to consent to a sale upon default has made a personal commitment but has not thereby transferred any element of their milkiyyah. The bank cannot enforce the wa'd by independently selling the property; it can only seek judicial enforcement of the promise, which returns the analysis to the requirement for judicial oversight.

D) The khiyar al-shart analogy is structurally imperfect

Khiyar al-shart is a right to rescind or confirm an existing contract within a defined short period. It is not a mechanism for authorising one party to compel the other's participation in a new transaction i.e. the sale of their property potentially years after contracting and under entirely different market conditions. The DM default clause is a remedial mechanism of indefinite temporal scope, not a short-term option to rescind a sale contract.

E) A distressed sale is not equivalent to a consensual sale

Even if the customer consented at inception to the principle of a forced sale upon default, consent to the principle does not extend to every manifestation of it. A sale conducted in a depressed market, through an auction that may attract only distressed-asset buyers at significant discounts to market value, is materially different from the arm's-length

market sale that a co-owner would consent to voluntarily. Consent to the former cannot be inferred from consent to the latter.

Arguments That the Default Clause Does Not Constitute a Violation

A) Default is a material breach that triggers pre-agreed remedies

In classical Islamic contract law, a material breach of a bilateral obligation entitles the non-defaulting party to remedies that would not otherwise be available. The customer's failure to pay rent or to purchase units as undertaken is not a neutral event; it is a breach of the specific obligations that the entire DM structure was premised upon. It is commercially reasonable and jurisprudentially coherent that such a breach should trigger the contractual remedy agreed at the outset, including the bank's right to initiate dissolution.

B) Commercial partnerships routinely provide for default-triggered liquidation

In the classical law of shirkat al-'aqd (commercial partnership), it is recognised that the partnership may be dissolved upon the breach of essential obligations by one partner. The DM is a financing instrument as well as a co-ownership arrangement, and the customer's payment obligations are the essential commercial quid pro quo for the bank's participation. Treating a payment default as a dissolution trigger is consistent with the commercial logic of partnership law.

C) The customer had the power to avoid the consequence

Unlike a force majeure event or an unforeseen change in circumstances, a payment default is entirely within the customer's control to prevent. The customer who performs their obligations such as paying rent, purchasing units on schedule will never face the default clause. The consequence is therefore not imposed upon the customer by the bank; it is the agreed result of the customer's own non-performance. The prior consent given at inception is not vitiated by subsequent hardship if that hardship was foreseeable.

D) The wa'd is binding and the bank relied upon it

The IIFA recognised in Resolution No. 40-41 that a wa'd is binding where the promisee has relied upon it to their detriment. The bank's decision to invest USD 80,000 in a co-ownership structure, rather than requiring a conventional mortgage charge, was made in reliance upon the customer's wa'd to consent to sale upon default. Permitting the customer to resile from this promise would allow them to benefit from the bank's reliance while escaping the reciprocal obligation upon which that reliance was conditioned.

E) The shurut doctrine provides ample basis for the condition

The Hanafi and Hanbali positions on al-shurut fil-'uqud are permissive: parties to a shirkah may stipulate conditions that modify default rules of partnership law, provided those conditions do not violate a categorical prohibition or constitute zulm. A condition that provides a remedy for the bank's proportionate share upon the customer's material breach does not obviously satisfy the threshold for zulm, and the supervisory boards that have approved such conditions have not acted without doctrinal foundation.

Critical Assessment: Why the Prior Consent Argument Is Necessary but Insufficient

The prior consent argument is not without doctrinal merit. The *al-shurut fil-'uqud* doctrine does permit parties to a *shirkah* to modify default rules by agreement; the *khiyar al-shart* analogy, while structurally imperfect, reflects a genuine classical recognition that prospective conditional consent is legally cognisable; and the binding force of the *wa'd* upon the customer is well-established in contemporary Islamic finance jurisprudence. A *Shari'ah* supervisory board that approves a DM default clause on

these grounds is not acting in ignorance of the classical tradition.

Nevertheless, the prior consent argument, taken alone, is insufficient to discharge the full jurisprudential burden that the default clause must satisfy. Three specific inadequacies are identified.

Step 1: The Inadequacy of Generic Prospective Consent

Classical rida' (consent) operates in relation to a specific transaction, not in relation to an open-ended class of future transactions whose material terms are unknown at the time of consent. The customer who signs a DM agreement containing a default clause consents to the principle of forced sale upon default; they do not thereby consent to any particular forced sale, conducted at any particular time, by any particular method, at any particular price. The absence of these specifics from the consent given at inception means that the consent is necessarily generic rather than particularised. The classical law of bay' requires that the subject matter of a sale be known (ma'lum) to both parties. A consent given to an indeterminate future sale fails this requirement. The prior consent argument satisfies the formal condition of consent, consent was indeed given without satisfying its substantive condition: that the consent relate to a sufficiently defined transaction.

Step 2: The Bypass of Judicial Oversight Remains Unjustified

Neither the *al-shurut* doctrine nor the *wa'd* mechanism provides an adequate substitute for the substantive protection afforded by *hukm al-qadi*. The classical judicial requirement serves functions that no contractual mechanism can replicate: it provides an independent assessment of whether the conditions for dissolution have genuinely been met; it supervises the method and terms of sale in the interests of the non-consenting party; and it ensures that the distribution of proceeds conforms to the proportionality principle of *al-ghunm bil-ghurm*. A bank that initiates a forced sale pursuant to a contractual default clause performs all three of these functions unilaterally, in its own interest. The structural conflict of interest is not cured by the existence of the *wa'd* or the *shart*.

Step 3: The Shurut Doctrine Does Not Validate All Conditions

The permissive doctrine of *al-shurut fil-'uqud* has clear limits. A condition is *fasid* (corrupting) where it confers upon one party a right so structurally asymmetric as to negate the reciprocal character of the partnership. Ibn Qudama in *al-Mughni* and al-Kasani in *Bada'i' al-Sana'i'* both identify conditions that give one partner exclusive control over dissolution as potentially corrupting the essential bilaterality of the *shirkah*. A default clause that gives the bank the unilateral right to determine that a default has occurred, to initiate the sale, to select the method of realisation, and to apply proceeds under a priority structure of its own devising is precisely such a condition. The *shurut* doctrine justifies modification of default rules; it does not justify the wholesale transfer of the dissolution function from a neutral court to an interested party.

Conclusion

The jurisprudential position that emerges from this analysis can be stated with precision. The DM default clause is not straightforwardly *batil* (void) in all its aspects; the prior consent argument provides genuine, if incomplete, doctrinal support for some of its features. Equally, however, the clause in its standard commercial form cannot be regarded as fully compliant with the classical rules of *shirkat al-milk*, because the prior consent argument, while necessary, is not sufficient. The gap between what the argument establishes and what full compliance requires is the absence of specificity in the consent given.

The broader implication is structural. The DM is a financing instrument whose legal framework was constructed by financial institutions under

commercial pressure to protect capital recovery, and approved by *Shari'ah* supervisory boards operating within the governance constraints of those institutions. The prior consent argument was developed to serve this institutional purpose, and it performs that function adequately at a general level. What it does not do is satisfy the demanding conditions that classical *fiqh al-sharika* imposes upon any mechanism that overrides a co-owner's fundamental right to retain their specific property. The DM's claim to be a genuinely equitable instrument rather than a conventionally structured mortgage in Islamic dress requires that these gaps be acknowledged and addressed, not obscured by the formal adequacy of a consent that was given in the abstract and enforced in the particular.