

# The Agent-Manager's Conduct of *Mudārabah* Contract in Islamic Commercial Law

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## Abstrak

*Mudārabah* ialah akad perkongsian di antara pihak yang mempunyai modal dengan pihak usahawan. Dalam akad ini, pihak pemodal atau pelabur akan menyerahkan modal kepada usahawan untuk menjalankan sesuatu perniagaan yang mendatangkan keuntungan dan dia tidak akan terlibat dalam urusan perniagaan itu. Keuntungan dalam perniagaan akan diagihkan antara kedua-dua pihak mengikut nisbah yang dipersetujui bersama semasa akad dimeterai dan kerugian yang bukan disebabkan oleh faktor kecuaiian usahawan, jika berlaku, akan ditanggung oleh pihak pelabur. Artikel ini menjelaskan tugas, tanggungjawab dan peranan yang dimainkan oleh usahawan (*agent-manager*) dalam akad *mudārabah* menurut terma-terma akad yang dibuat dengan pelabur dari sudut, antaranya, jenis perniagaan yang boleh diceburi, lokasi perniagaan, batasan dan bidang kuasa usahawan dalam melaburkan modal pelabur berkenaan, dan tanggungjawabnya jika dia melanggar terma-terma akad berkenaan.

## Introduction

The most problematic aspects of the operation of the *mudārabah* contract received in the legal sources are those concerned with the agent-manager's (*'āmil*, *mudārib*, *muqāriḍ*) conduct of *mudārabah* trade. By far, the largest portion of the legal discussion is devoted to elaborating and defining the extent of the agent-manager's freedom of action and clarifying his relationship to the investor and to the third parties. This discussion takes

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place within the same framework of those concerning the rights and duties of a partner in his conduct of partnership (*sharikah*) business.

## 1. The Definition of *Mudārabah*

*Mudārabah* or dormant partnership is synonymous with two other Arabic terms which are used to designate this kind of business organization, *qirad* and *muqāradah*. These three terms are interchangeable with no essential difference in meaning or connotation among them.<sup>1</sup>

The divergence in terminology was probably originally due to geographical factors. The term *qirad* and *muqāradah* apparently originated in the Arabian Peninsula, especially the Hijaz,<sup>2</sup> and the term *muḍārabah* was of 'Iraq provenance.<sup>3</sup> Subsequently, the difference was perpetuated by the legal schools, with the Malikis<sup>4</sup> and Shafi'is<sup>5</sup> adopting the term *qirad* and, to a lesser degree *muqāradah*, and the Hanafis<sup>6</sup> and Hanbalis<sup>7</sup> adopting the term *muḍārabah*.

<sup>1</sup> Ibn Manẓūr, Abū al-Faḍl Jamāl al-Dīn Muḥammad b. Mukarram al-Anṣārī (d. 751/1350), *Lisān al-'Arab*, Vol. VII. Beirut, n.d., pp. 217-218; Al-Zabidī, al-Sayyid Muḥammad Murtaḍā (d. 1145/1791), *Tāj al-'Arus*, Vol. XIX, (eds.) Mustafā al-Hijazī, et al., Kuwait, 1973, p. 19; A.L. Udovitch, "Qirad", *The Encyclopaedia of Islam (Second Edition)*, Vol. V, p. 130; Abdullah Alwi Hj. Hassan (1994), *Sales and Contract in Early Islamic Commercial Law*, Islamabad, pp. 86-87.

<sup>2</sup> Al-Zamakhsharī, Abū al-Qāsim Maḥmūd b. 'Umar (d. 538/1144), *Al-Fā'iq Fī Gharīb al-Ḥadīth*, (eds.) 'Alī Muḥammad al-Bajawī and Muḥammad Abū al-Faḍl Ibrāhīm, 1945-1948, pp. 11 and 339; Ibn al-Athīr, Majd al-Dīn al-Mubārak b. Muḥammad (d. 606/1210), *Al-Nihāyah fī Gharīb al-Ḥadīth wa al-Athār*, Vol. IV, (eds.) Ṭāhir Aḥmad al-Zāwī and Maḥmūd Muḥammad al-Tanahi, Cairo, 1383 A.H., p. 41; See also A.L. Udovitch, "At The Origin of The Western Commenda: Islam, Israel, Byzantium?," *Speculum*, Vol. XXXVII, 1962, pp. 202-207.

<sup>3</sup> Al-Zurqānī, Abū 'Abd Allāh Muḥammad b. al-Bāqī (d. 1122 A.D.) (1981), *Sharh al-Zurqānī 'Alā al-Muwatta' al-Imām Mālik*, Vol. III, Beirut, p. 345; Ibn Juzayy, Abū 'Abd Allāh Muḥammad b. Muḥammad b. Aḥmad (d. 741/1340), *Kitāb al-Qawānīn al-Fiqhiyyah*, Beirut, n.d., p. 242.

<sup>4</sup> Ibn Rushd, Abū Walīd Muḥammad b. Aḥmad (d. 595/1198) (1984), *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid*, Vol. II, Lahore, p. 303; 'Abd al-Raḥman al-Jazirī, *Kitāb al-Fiqh 'Ala al-Madhāhib al-Arba'ah*, Vol. III, Cairo, 1969-1970, p. 42.

<sup>5</sup> Muḥammad al-Sharḥīnī al-Khātīb (1958), *Mughnī al-Muḥtaj ila Ma'rifah Alfāz al-Minhaj*, Vol. II, Cairo, p. 309; Al-Shirāzī, Ibrāhīm b. 'Alī (d. 476/1083) (1994), *Al-Muḥadhdhab fī Madhhab al-Imām al-Shāfi'ī*, Vol. I, Beirut, p. 505.

<sup>6</sup> Al-Marghīnānī, Burhān al-Dīn Abū al-Ḥasan 'Alī b. Abū Bakr (d. 593/1197), *Al-Hidāyah*, Vol. III, Cairo, n.d., p. 202; Al-Sarakhsi, Abū Bakr Muḥammad b. Aḥmad (d. 473 or 483/1090), *al-Mabsūt*, Vol. XXII, Cairo, 1324-1331 A.H., p. 18.

<sup>7</sup> Ibn Qudāmah, Abū Muḥammad 'Abd Allāh b. Aḥmad b. Muḥammad (d. 620/1223), *Al-Mughnī*, (eds.) Muḥammad Salīm Muhaysin and Sha'bān Muḥammad Ismā'īl, Vol. V, Cairo and Riyadh, n.d., p. 26; Al-Bahutī, Maṣṣūr b. Yūnus b. Idrīs (d. 1051/1641) (1982), *Kashshaf al-Qinā' 'An Matn al-Iqnā'*, Vol. III, Beirut, p. 507.

According to the Hanafi jurist al-Sarakhsi, the term *muḍārabah* is derived from the expression “making a journey” (*al-darb fī al-ard*). This term is used because the agent-manager (*muḍārib*) is entitled to the profit by virtue of his effort and work. Indeed, he is regarded as the partner of the investor (*rabb al-mal/sahib al-mal*) in matters relating to the profit, the capital used on the journey and expenses of an ancillary nature.<sup>8</sup>

The people of Medina called this contract *muqāraḍah* (or *qiraḍ*), based on a report concerning ‘Uthmān b. ‘Affān, the third Caliph, who entrusted funds to a man in the form of a *muqāraḍah* contract.<sup>9</sup> This term derives from *qarḍ* meaning cutting; for in this contract, the investor cuts off the disposition of a sum of money from himself and transfers its disposition to the agent-manager. It is, therefore, designated by that name (*muqāraḍah*).<sup>10</sup> The other term, *muḍārabah*, corresponds to that which is found in the Qur’an: “While others travel in the land (*yadribuna fī al-ard*) in search of God’s bounty”,<sup>11</sup> that is to say, travel for the purpose of trade or commerce.<sup>12</sup>

The basis of a *muḍārabah* contract is an offer and acceptance. For example, if the owner of the capital (*rabb al-māl*) says to the person to take the capital and use it and to share the profits between them equally (“Take this capital and do the work and labour in return, on terms that profits are to be divided between us, half and half, or, as two to one”) or in ratio of two thirds and one third, or says something indicative of an intention to form a *muḍārabah* as when he asks such person to take so much money and use it as capital and share the profits with him in a certain ratio and the latter (agent-manager/*muḍārib*) accepts, a contract of *muḍārabah* is concluded.<sup>13</sup>

Generally, *muḍārabah* or *muqāraḍah* connotes a fiducial contract or an arrangement in which an investor (*rabb al-māl*) or group of investors (*arbāb al-amwāl*) entrust capital or merchandise to an agent-manager (*‘āmil, muḍārib, muqāriḍ*) who is to trade with it and then, without delay, return to the investor(s) the principal and a previously agreed share of the profits.<sup>14</sup> As a reward for his labour and management, the agent-manager

<sup>8</sup> Al-Sarakhsi, *op.cit.*, Vol. XXII, p. 18; Cf. A. L. Udovitch, “qiraḍ,” *Encyclopaedia of Islam* (Second Edition), Vol. V, pp. 129-130; Abdullah Alwi Hj. Hassan, *op.cit.*, p. 87.

<sup>9</sup> Al-Sarakhsi, *op.cit.*, Vol. XXII, p. 18; Muḥammad al-Sharbinī al-Khatīb, *op.cit.*, Vol. II, p. 309.

<sup>10</sup> Al-Sarakhsi, *op.cit.*, Vol. XXII, p. 18; Al-Zurqānī, *op.cit.*, Vol. III, p. 345; Muḥammad al-Sharbinī al-Khatīb, *op.cit.*, Vol. II, p. 309.

<sup>11</sup> Al-Qur’ān, Surah al-Muzammil (73): 20.

<sup>12</sup> Al-Sarakhsi, *op.cit.*, Vol. XXII, p. 18; Cf. Muḥammad al-Sharbinī al-Khatīb, *op.cit.*, Vol. II, p. 309; Ibn Humām, Kamal al-Dīn Muḥammad b. ‘Abd al-Wahid al-Siwasi (d. 861/1457) (1980), *Sharh Faṭḥ al-Qādir*, Vol. VIII, Cairo, p. 445.

<sup>13</sup> Cf. *Majallah al-Ahkām al-‘Adliyyah*, art. 1407.

<sup>14</sup> Al-Sarakhsi, *op.cit.*, Vol. XXII, p. 22; Ibn Rushd, *op.cit.*, Vol. II, p. 303; Muḥammad al-Sharbinī al-Khatīb, *op.cit.*, Vol. II, p. 309; Ibn Humām, *Faṭḥ al-Qādir*, Vol. VIII, p. 447; Ibn Qudāmah, *op.cit.*,

receives the remaining share of the profits.<sup>15</sup> Any loss resulting from the exigencies of travel or from an unsuccessful business venture is borne exclusively by the investor(s); the agent-manager is in no way liable for a loss of this nature, losing only his expended time and effort.<sup>16</sup>

The agent-manager's complete freedom under normal trading circumstances from any liability for the capital in the event of partial or total loss and the disjunction between the owners of the capital and third parties are distinctive features of *muḍārabah* and made it an ideal instrument for the purposes of long-distance trade and of obtaining a profitable contract.<sup>17</sup> This type of contract was, therefore, widely recognized and practised in pre-Islamic times and afterwards.

## 2. Legitimacy of *Muḍārabah*

Although the validity of the *muḍārabah* contract is not mentioned in the Qur'an, Islamic law justifies it on the religious grounds of the traditional practice of the Prophet (*sunnah*), consensus (*ijmā'*) and, more interestingly, on the practical grounds of its economic function in society.

It is unanimously agreed by jurists that the legal validity of the *muḍārabah* contract is derived from the traditional practice of the Prophet.<sup>18</sup> There are numerous traditions which attribute its practice to the Prophet, before his prophethood, and to his leading companions.

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Vol. V, p. 26; Ibn Juzayy, *op.cit.*, pp. 242-243; Abdur Rahim, *The Principles of Muḥammadan Jurisprudence*, Lahore, 1911, p. 324; A. Gaiani, "The Judicial Nature of the Moslem *Qirad*", *East and West*, Vol. IV, (July, 1953), p. 81; A.L. Udovitch (1980), "qirad", *The Encyclopaedia of Islam* (Second Edition), Vol. V, p. 129.

<sup>15</sup> Al-Sarakhsī, *op.cit.*, Vol. XXII, p. 22; Ibn al-Athīr, Vol. III, p. 79; Al-Zabīdī, *op.cit.*, Vol. I, p. 349; Ibn Hazm, Muḥammad b. 'Alī b. Aḥmad b. Sa'īd (d. 456/1064), *al-Muḥallā*, Vol. VIII, (ed.) Aḥmad Muḥammad Shākīr, Beirut, n.d., p. 247; 'Alā' al-Dīn al-Samarqandī (d. 539/1144) (1959), *Tuhfat al-Fuqahā'*, Vol. III, Damascus, p. 3; Al-Jazīrī, *op.cit.*, Vol. III, p. 34; Ibn Humām, *op.cit.*, Vol. VIII, p. 447.

<sup>16</sup> Al-Sarakhsī, *op.cit.*, Vol. XXII, p. 22; Ibn Rushd, *op.cit.*, Vol. II, p. 303; Muḥammad al-Sharbīnī al-Khātib, *op.cit.*, Vol. II, p. 309; Ibn Qudāmah, *Al-Mughnī*, Vol. V, p. 58; Al-Jazīrī, *op.cit.*, Vol. III, p. 34; Ibn Hazm, *Al-Muḥallā*, Vol. VIII, p. 247; Abdullah Alwi Hj. Hassan, *op.cit.*, p. 87.

<sup>17</sup> Abraham L. Udovitch (1980), *Partnership and Profit in Medieval Islam*, Princeton, 1970, p. 171; *Idem*, "qirad", *Encyclopaedia of Islam* (Second Edition), Vol. V, p. 130.

<sup>18</sup> Ibn Rushd, *op.cit.*, Vol. II, p. 178; Ibn Qudāmah, *op.cit.*, Vol. V, p. 26; Al-Sarakhsī, *op.cit.*, Vol. XXII, p. 18; The Shafi'is add a third traditional ground for the *muḍārabah*'s permissibility, that of analogy (*qiyās*) with the agricultural lease contract, *musāqāt*. See Muḥammad al-Sharbīnī al-Khātib, *op.cit.*, Vol. II, p. 309.

According to Ibn Ishāq, the Prophet himself, prior to his prophethood, had acted as an agent-manager in a *muḍārabah* contract with an investment provided by Khadijah bt. Khuwaylid, a merchant woman of dignity and wealth who later became his wife. He took her goods to Syria and traded with them. He sold them at a profit and it amounted to double or thereabouts.<sup>19</sup>

From this evidence, it appears that this form of commercial association was popularly practised in pre-Islamic trade between the Quraysh and other tribes,<sup>20</sup> and continued to be practised throughout the early centuries of the Islamic era as the mainstay of caravan and long-distance trade.<sup>21</sup>

Another tradition attributed to Muḥammad an unequivocal endorsement and approval of those engaging in trade by means of *muḍārabah*. The Prophet was sent at a time when people were using *muḍārabah* in their dealing and he confirmed them in this practice.<sup>22</sup>

‘Aishah and ‘Abd Allah b. ‘Umar are reported to have invested the money of

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<sup>19</sup> Ibn Ishaq said that Khadijah used to hire men to carry merchandise outside the country for a share of the profits a profit (*muḍārabah*). According to him, when Khadijah heard about the Prophet's truthfulness, trustworthiness and honourable character, she sent for him and proposed that he should take her goods to Syria and trade with them. See Ibn Hishām, Abū Muḥammad ‘Abd al-Mālik (d. 218/834), *Al-Sīrah al-Nabawiyyah*, (ed.) Taha ‘Abd al-Ra’ūf Sa’d, Vol. I, Beirut, pp. 171-172; See also al-Ṭabarī, Abū Ja’far Muḥammad b. Jarīr (d. 310/922-23), *Tarīkh al-Rusul wa al-Muluk*, (ed.) Muḥammad Abū al-Faḍl Ibrāhīm, Vol. II, Cairo, p. 280; Ibn Hazm (1983), *Jamharat Anṣāb al-‘Arab*, ed. unidentified editors, Beirut, p. 16.

<sup>20</sup> Ibn Hazm, *Al-Iḥkām fī Uṣūl al-Aḥkām*, (ed.) Aḥmad Muḥammad Shākir, Vol. II, Cairo, p. 95. For the use of *muḍārabah* in pre-Islamic Arabian trade between the *Quraysh* and other tribes, see M. J. Kister (1965), “Mecca and Tamim”, *Journal of Economic and Social History of the Orient*, Vol. VIII, Leiden, pp. 117ff.

<sup>21</sup> Ṣāliḥ al-‘Alī (1953), *al-Tanzīm al-Ijtimā’iyyah wa al-Iqtisādiyyah fī al-Baṣrah fī al-Qarn al-Awwal al-Hijrī*, Baghdad, pp. 242-243; ‘Abd al-‘Azīz al-Dūrī (1948), *Tārīkh al-‘Iraq al-Iqtisād fī al-Qarn al-Rabī’ al-Hijrī*, Baghdad, p. 121ff. See also L. Udovitch, “The ‘Law Merchant’ of The Medieval Islamic World”, in G. E. Von Grunbaum (ed.) (1970), *Logic in Classical Islamic Literature*, Wiesbaden, pp. 115-117; Eric R. Wolf (1951), “The Social Organization of Mecca and The Origin of Islam”, *Southwestern Journal of Anthropology*, Vol. VII (4), Albuquerque, pp. 330-337; Abdullah Alwi. Hassan (1987), “The Arabian Commercial Background in Pre-Islamic Times”, *Islamic Culture*, Vol. 61 (2), pp. 70-83; Ziaul Haque (1968), “Inter-Regional and International Trade in Pre-Islamic Arabia”, *Islamic Studies*, Vol. VII (3), pp. 207-232; W.M. Watt (1961), *Islam and Integration of Society*, London, p. 14; S. M. Imamuddin, “Commercial Relation of Spain with Iraq, Persia, Khurasan, China and India in the Tenth Century A.C.”, *Islamic Culture*, Vol. XXXV (3), 1961, p. 177; Raef T. A. Husein (1986), “The Early Arabian Trade and Marketing”, *Islamic Quarterly*, Vol. XXX (2), pp. 109-117.

<sup>22</sup> Al-Sarakhsī, *op.cit.*, vol. XXII, p. 19.

orphans and other money left in their safe keeping in *muḍārabah* contracts.<sup>23</sup> ‘Abd Allah b. Mas‘ūd, a prominent companion of the Prophet<sup>24</sup> and al-‘Abbās b. ‘Abd al-Muṭṭalib, the uncle of the Prophet, engaged in *muḍārabah* contracts,<sup>25</sup> the latter having obtained the Prophet’s approval for the conditions he imposed upon his agent-manager to whom he entrusted his money.<sup>26</sup>

Further, according to the Hanafī jurist al-Kasānī, the practice of *muḍārabah* was carried out by the Companions, and no disapproval was ever stated by the Prophet.<sup>27</sup>

The above traditions indicate that the Prophet approved of engagement in trade in the form of *muḍārabah*, and this approval amounts to his acknowledgement of the legality of *muḍārabah*. This contract also constituted one of the most widespread tools of commercial activity from the pre-Islamic Arabian caravan trade to the early centuries of the Islamic era.

It has also been noted by the jurists that one of the major reasons for its acceptance is the resulting ease and efficiency achieved in the functioning of the economic system. In this regard, al-Sarakhshī notes that this contract is allowed because “people have a need for this contract. For the owner of capital may not find his way to profitable trading activity, and the person who can find his way to such activity, may not have the capital, and profit cannot be attained except by means of both of these, that is capital and trading activity. By permitting this contract, the goal of both parties is attained”.<sup>28</sup>

Moreover, this type of business arrangement has a very healthy effect on the position of the labourers. They feel happy and satisfied with the share of the profit. They will feel encouraged to work harder because every increase in the gross profits, increases their share at the termination of business.

### 3. Investment Form

All jurists are unanimous concerning the eligibility of *dīnārs* (gold) and *dirhāms* (silver) currency in whatever shape or form for investment in a *muḍārabah* contract just as in the

<sup>23</sup> Al-Shaybānī, “Kitab al-Aṣl, Kitāb al-Muḍārabah”, MS. Dār al-Kutub al-Miṣriyyah, Fiḥḥ Ḥanafī 491, fol. 42b, II., pp. 11-14 ( hereinafter referred to as Shaybani); Al-Sarakhsi, *al-Mabsūt*, Vol. XXII, p. 18.

<sup>24</sup> Shaybānī, fol. 42a, II, pp. 8-12.

<sup>25</sup> Al-Sarakhshī, *Al-Mabsūt*, Vol. XXII, p. 18.

<sup>26</sup> *Ibid.*

<sup>27</sup> Al-Kasānī, Vol. VI, p. 79; See also Ibn Hazm, *Al-Iḥkam fī Uṣūl al-Aḥkam*, Vol. II, p. 95.

<sup>28</sup> Al-Sarakhshī, *op.cit.*, vol. XXII, p. 19; Aḥmad b. Muḥammad al-Sāwī al-Mālīkī (1978), *Bulghāt al-Sālik li al-Aqrāb al-Masālik ila Madhab al-Imām Mālīk*, Vol. III, Cairo, p. 79.

case of the investment form of partnership contract.<sup>29</sup> The validity of a *muḍārabah* contract with *dīnārs* and *dirhāms* is accepted because they possess intrinsic value and as such are recognizable as legal tender at all times and in all places.<sup>30</sup> It is, therefore, self-evident that they should be eligible for investment in any and all commercial transactions.

Al-Shaybani, however, on the basis of *istiḥsān* (juristic preference) is of the opinion that a *muḍārabah* contract can be formed with *fulus* (copper coins) just as with gold or silver currency since the former are currency comparable to *dīnārs* and *dirhāms*,<sup>31</sup> and because they are in circulation and accepted as currency.<sup>32</sup>

Based on this consideration, non-circulation copper coins are excluded from eligibility as capital in *muḍārabah* investment. Furthermore, they are held to be commodities and not currency and hence ineligible for *muḍārabah* investment.<sup>33</sup> From the above principle, any type of currency that is accepted and recognized as a medium of exchange in the economic transactions is valid for investment in *muḍārabah* contract.<sup>34</sup>

In the case of goods ('*urud*), majority of jurists reject the eligibility of goods and commodities as the capital for investment in a *muḍārabah* contract. There are two general considerations underlying the rejection of goods and commodities for investment in a *muḍārabah* contract.<sup>35</sup> The first is the opposition to uncertainty and unjustified enrichment which permeates the entire Islamic law of obligations.<sup>36</sup> The second consideration is that

<sup>29</sup> Al-Sarakḥṣī, *Al-Mabsūt*, Vol. XXII, p. 21; Ibn Rushd, *op.cit.*, Vol. II, p. 178; Khalīl b. Ishāq (d. 776/1374), *Al-Mukhtaṣar* (Translated into English by F. H. Ruxton, *Maliki Law*, London, 1916) Paris, 1318/1900, p. 189; Al-Nawawī, Abū Zakariyya Yahyā b. Sharaf (d. 676/1277), *Minhaj al-Ṭālibīn*, Beirut, n.d., p. 154; Wahbah al-Zuhaylī (1989), *Al-Fiqh al-Islāmi wa Adillatuh*, Vol. IV, Damascus, p. 843; Al-Kasānī, 'Ala' al-Dīn Abū Bakr b. Mas'ūd (d. 587/1191) (1982), *Kitāb Badā'i' al-Sanā'i' fī Tartīb al-Sharā'i'*, Vol. VI, Beirut, p. 82; Cf. Joseph Schacht (1964), *An Introduction to Islamic Law*, Oxford, p. 152.

<sup>30</sup> Al-Sarakḥṣī, *Al-Mabsūt*, Vol. XXII, p. 21; al-Kasānī, *op.cit.*, Vol. VI, p. 82; Wahbah al-Zuhaylī, *op.cit.*, Vol. II, p. 843; Udovitch (1970), *op.cit.*, p. 177.

<sup>31</sup> Al-Sarakḥṣī, *Al-Mabsūt*, Vol. XXII, p. 21.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*; Al-Sharḥīnī al-Khaṭīb, *op.cit.*, Vol. II, p. 310; Sahnun, 'Abd al-Salām b. Sa'īd b. Ḥabīb al-Tanukhī (d. 240/854), *Al-Mudawwanah al-Kubrā li al-Imām Mālik b. Anas*, Vol. XII, Cairo, 1323 A.H., p. 86; Al-Ghazālī, Abū Ḥāmid Muḥammad b. Aḥmad (d. 505/1111) (1979), *Kitāb al-Wajīz fī Madhḥab al-Imām al-Shāfi'i*, Vol. II, Beirut, p. 221.

<sup>34</sup> Al-Kasānī, *op.cit.*, Vol. VI, p. 82.

<sup>35</sup> For the inadmissibility of goods as capital for *muḍārabah* investment, see Al-Sarakḥṣī, *op.cit.*, Vol. XXII, p.33; Mālik b. Anas al-Aṣbahī (d. 179/795), *Al-Muwatta'*, (The Version of Yahya b. Yahya al-Laythi) (ed.) (1983) Faruq Sa'd, Vol. II, Beirut, p. 531; Sahnun, *op.cit.*, Vol. XII, p. 87; al-Kasānī, Vol. VI, p. 82; *Mughnī al-Muhtāj*, Vol. II, p. 310.

<sup>36</sup> J. Schacht (1964), *op.cit.*, p. 114.

the object of any contract must be determined (*ma'lūm*), i.e. clearly known and defined.<sup>37</sup>

In explaining the inadmissibility of goods and commodities as capital in a *muḍārabah* contract, al-Kasani says that *muḍārabah* with goods leads to uncertainty concerning the amount of the profit at the time of division. This is so because the value of the goods is known only by estimation, chance and conjecture and will differ with the difference of those who do the estimating. Furthermore, uncertainty in the value of goods leads to the undesirable possibility of dispute and discord between the investor and the agent-manager.<sup>38</sup>

Besides that, the possible fluctuation in their value may lead to the even more undesirable result of inequitable advantage to one of the parties and disadvantage to the other.<sup>39</sup> Since the profit in a *muḍārabah* arrangement emerges only after the capital has been returned to the investor, any marked rise in the market value of goods serving as the basis of the *muḍārabah* contract would cancel out any profit for the agent-manager. At the same time, if the market value of the goods drops, it would put the investor at a disadvantage and provide the agent-manager with unjustified profit.<sup>40</sup>

The legal school which purportedly permitted goods and commodities as *muḍārabah* capital is that of Ibn Abi Layla,<sup>41</sup> although a similar position is attributed by al-Sarakhs to Malik.<sup>42</sup> However, no source is given for this opinion and in *al-Muwatta'* and in subsequent major works, the opposite position is taken:

Malik said, "The *qiraḍ* (*muḍārabah*) is valid only if the investment is in the form of either gold or silver. It may not consist of any goods ('*urud*) or merchandise (*sila'*)".<sup>43</sup>

### 3. Conduct of *Muḍārabah*

It is interesting to note that there are a number of guidelines on the agent's freedom of actions. Generally, his actions must be consonant with the overall purpose of the contract, namely, that of achieving of profit and it must fall within the bounds of recognized and customary commercial practice.

<sup>37</sup> *Ibid*, p. 147; Wahbah al-Zuhaylī, *op.cit.*, Vol. IV, p. 844.

<sup>38</sup> See al-Kasānī, *op.cit.*, Vol. VI, p. 82; see also Ibn Rushd, *op.cit.*, Vol. II, p. 178; Wahbah al-Zuhaylī, *op.cit.*, Vol. IV, p. 843.

<sup>39</sup> Sahnun, *op.cit.*, Vol. XII, p. 87.

<sup>40</sup> Al-Sarakhsī, *op.cit.*, Vol. XXII, p. 33.

<sup>41</sup> *Ibid.*, p. 38; Ibn Rushd, *op.cit.*, Vol. II, p. 178.

<sup>42</sup> Al-Sarakhsī, *op.cit.*, Vol. XXII, p. 33; Cf. Al-Kasānī, *op.cit.*, Vol. VI, p.82.

<sup>43</sup> See Mālik b. Anas al-Aṣbahī, *op.cit.*, Vol. II, p. 531.



More specifically, his freedom of action depends on the type of mandate he receives from the investor and whether or not any specific conditions or limitations are imposed at the time the contract is negotiated. An agent's conduct of *muḍārabah* trade can be in the form of a limited or unlimited mandate.

### 3.1. Unlimited *Muḍārabah*

In the case of unlimited *muḍārabah*, the investor (*rabb al-māl*) authorizes the agent to act completely at the latter's discretion in all business matters. Such authorization is conveyed by the investor's statement to the agent: "Act with it (the investment) as you see fit."<sup>44</sup>

There are nine types of business activities authorized to the agent-manager in unlimited *muḍārabah* mandate, as follows;

1. To buy and sell all types of merchandise as he sees fit;
2. To buy and sell for cash and credit;
3. To leave goods as a deposit or pledge (*rahn*);
4. To hire helpers as needed;
5. To rent or buy animals and equipment;
6. To travel with capital;
7. To mingle the *muḍārabah* capital with his own resources;
8. To invest the *muḍārabah* capital in a *muḍārabah* with a third party; and
9. To invest the *muḍārabah* capital in a partnership (*Sharikah*) with a third party.<sup>45</sup>

In other words, an unlimited *muḍārabah* mandate is when the agent-manager (*muḍārib*) is authorized to do everything necessitated by the *muḍārabah*<sup>46</sup> in the ordinary course of business or the customary practice of the merchants.<sup>47</sup> Such a contract does not specify the period, the place of business, the specific time of business, nor the industry or service and the suppliers or customers to be dealt with. Al-Sarakhṣī notes that the agent-manager thereby has the right to engage in a *muḍārabah* contract with a third party and to mingle the *muḍārabah* capital with his own capital, because this is the practice of the merchants.<sup>48</sup>

<sup>44</sup> Al-Sarakhṣī, *Al-Mabsūṭ*, Vol. XXII, pp. 39-40; Cf. *Majallah al-Aḥkām al-'Adliyyah*, arts. 1416 and 1417.

<sup>45</sup> *Ibid*; For details, see 'Ali Haydar, *Durar al-Ḥukkām Sharḥ Majallah al-Aḥkām*, (Translated into Arabic from Turkish by Fahmi al-Husayn), Baghdad and Beirut, n.d., pp. 465-469.

<sup>46</sup> A loan is excluded from the practice of the merchants, because it is regarded as a favour on the part of the lender, not as a commercial transaction from which some advantage can be expected. See Al-Sarakhṣī, *op.cit.*, Vol. XXII, pp. 39-40.

<sup>47</sup> *Ibid*.

<sup>48</sup> *Ibid*.; See also al-Kasānī, *op.cit.*, Vol. VI, pp. 7-8.

Unlimited *muḍārabah* authorizes the agent-manager to use the widest techniques of commerce he may employ in the pursuit of profitable trade. He is permitted to transmit this unlimited mandate to a second agent-manager, and the second agent-manager is equivalent in this respect to the original agent-manager.<sup>49</sup>

This type of unlimited *muḍārabah* contract opens the way for its use as an instrument of financial entrepreneurship. Capital could be entrusted to a well-known and experienced trader (agent-manager) who could then skillfully reinvest it with others, sharing in the profit.

In the absence of any blanket authorization, the agent-manager's freedom of action is somewhat restricted, especially with regard to transactions with third parties. If the investor does not use the phrase, "act according to your judgement" or a substitute phrase conveying the same intention, the agent-manager may engage in all business transactions as long as the goal is the achievement of profit, except in any practice involving mingling the capital with his own resources, investing it in a *muḍārabah* or partnership with a third party.<sup>50</sup>

In this regard, the Malikis rule that the agent-manager is entitled to invest the capital with any party on *muḍārabah* contract only with the permission of the investor.

"Malik spoke about an agent-manager who took *qiraḍ* money from a man (the investor) and then gave it to another man (the second agent-manager) to use as a *qiraḍ* without the consent of the investor. He said: The agent-manager is responsible for the property. If it is decreased, he is responsible for the loss. If there is a profit, the investor has the stipulation of the profit and then the agent-manager has the stipulation of what remains".<sup>51</sup>

The Shafi'is have a different regulations on the question of the two-tier *muḍārabah*, whereby the agent-manager is not allowed to enter into a *muḍārabah* contract with another party regardless of getting express permission or not of the investor. The contract is regarded as void if it has been done.<sup>52</sup> Despite the general trend of the Shafi'is school to disallow this kind of arrangement, there are certain Shafi' jurists such as al-Shirazi who held that such practices were be allowed.<sup>53</sup>

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<sup>49</sup> Al-Sarakhṣī, *op.cit.*, Vol. XXII, pp. 39-40.

<sup>50</sup> Al-Sarakhṣī, *Al-Mabsūṭ*, Vol. XXII, pp. 38-39.

<sup>51</sup> Mālik b. Anas al-Aṣbahī, *op.cit.*, Vol. II, p. 534.

<sup>52</sup> Al-Ghazālī, *Al-Wajīz*, Vol. I, p. 223.

<sup>53</sup> Al-Shirāzī, *op.cit.*, Vol. I, p. 540.

### 3.2. Limited Muḍārabah

In a limited mandate *muḍārabah* contract, the agent-manager's freedom of action is regulated by the terms and conditions set by the investor. For example, the agreement may specify the period or the place of business or the specific line of trade or industry or service or the supplier or customers to be dealt with by the agent-manager. The agent-manager must respect those restrictions imposed by the investor. If the agent-manager goes beyond what is permitted and acts contrary to the restrictions imposed, he alone is responsible for the consequences.<sup>54</sup>

Thus, even in a limited mandate *muḍārabah* contract, the agent-manager's freedom of action extends almost unto the commercial horizons in which he functioned. The only criterion for the legitimacy of the agent-manager's actions is the customary practice of the merchants.<sup>55</sup>

This standard is applied with remarkable consistency to all the agent-manager's activities even to the point of bending and adopting rules of law to the requirements of the marketplace. For example, the agent-manager possesses the right to pay off a *muḍārabah* debt with the *muḍārabah* capital, so too does he possess the right to give it as a pledge (*rahn*),<sup>56</sup> for this is part of the practice of the merchants. In other words, as long as matters are part of the practice of the merchants, the agent-manager's freedom of actions concerning the disposition of the *muḍārabah* capital is in the same category as that the owner of the capital (investor).<sup>57</sup>

Al-Sarakhsi points out that the conditions governing the *muḍārabah* agent-manager's actions differ from those applying to others who are entrusted with the safekeeping and welfare of property other than their own. For example, a guardian of the property of

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<sup>54</sup> Al-Sarakhṣī, *op.cit.*, Vol. XXII, p. 47.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Al-Rahn* (security; pawn) literally means readiness or immutability and durability. It also implies that a thing is inseparable from or tied up with its acquisition, earnings and deeds. (See: J. Schacht (1936), "Rahn", *Encyclopaedia of Islam* (First Edition), Vol. III, p. 1105; Ibn Manẓūr, *Lisān al-'Arab*, Vol. XIII, pp. 188-189; Al-Zabīdī, *Tāj al-'Arus*, Vol., XI, p. 221; E.W. Lane (1984), *Arabic-English Lexicon*, Vol. I, Cambridge, pp. 1172-1173). Legally, *al-Rahn* means to pledge or lodge a real or corporeal property of material value, in accordance with the law as security for a debt or pecuniary obligation, so as to make it possible for the creditor to regain the debt or some portion of the goods or property. (See: al-Ṭabarī (1968), *Jamī' al-Bayān 'An Ta'wīl Ay al-Qur'ān*, Vol. XXIX, Cairo, p. 165; al-Qurtūbī (1935-1950), *al-Jāmi' li Aḥkām al-Qur'ān*, Vol. XIX, Cairo, p. 85; Al-Kasānī, *op.cit.*, Vol. VI, p. 135; Al-Shāfi'ī (1990), *Al-Umm*, Vol. III, Beirut, pp. 141-142; Ibn al-Athīr, *op.cit.*, Vol. I, p. 422; Ibn Qayyim (1973), *I'lām al-Muwaqqi'in 'An Rabb al-'Ālamīn*, Vol. I, Beirut, p. 478; Ibn Hazm, *al-Muḥallā*, Vol. VIII, p. 88; Sahnun, *op.cit.*, Vol. XIV, pp. 296-340; Cf. J. Schacht (1967), *The Origins of Muhammadan Jurisprudence*, Oxford, p. 186.)

<sup>57</sup> Al-Sarakhṣī, *op.cit.*, Vol. XXII, p. 47.

minors is restricted in the disposition of their property to transactions which are unequivocally in the minor's better interests. The guardian or father is not permitted to take risks in disposing of any of their property by accepting a *hawalah*<sup>58</sup> with a person who is less prosperous than the purchaser. This is because the transactions of the guardian or father are restricted by the condition of that which is best and most advantageous.<sup>59</sup> By contrast, a *muḍārabah* agent-manager is not restricted by any similar condition, but only by that which is the customary practice of the merchants.<sup>60</sup>

The Hanafis' concept of the scope of the agent-manager's freedom of independent action with the *muḍārabah* capital as discussed above is different from other schools of Islamic law. According to the Malikis<sup>61</sup> and Shafi'is,<sup>62</sup> the agent-manager's task is the achievement of profit primarily by means of buying and selling for cash. In their view, the right to engage in any other transactions<sup>63</sup> does not inhere in the mandate the agent-manager receives from the investor.<sup>64</sup> In other words, if engaging in any other transactions relating to business without getting prior express permission from the investor, the agent-manager is subject to liability for the investment in case of loss.<sup>65</sup>

### 3.3. Specific Restrictions

Commenting on business methods, al-Dimashqī said concerning *muḍārabah* that the agent-manager is not bound to indemnify the investor for accidental loss of the investment so long as he does not go beyond the localities agreed upon.<sup>66</sup>

<sup>58</sup> Literally *hawalah* (transfer of obligation) means "turn". Legally, it means the transference of a debt from one person to another. It is an agreement by which a debtor is freed from a debt by another becoming responsible for it. (See: E.W. Lane, *op.cit.*, Vol. I, p. 675; Sahnun, *op.cit.*, Vol. XIII, pp. 288-294; Muḥammad al-Sharbinī al-Khātīb, *op.cit.*, Vol. II, p. 193; Ibn Qudāmah, *op.cit.*, Vol. IV, p. 528; Ibn 'Ābidīn (1979), *Hāshiyah Radd al-Mukhtār 'alā al-Durr al-Mukhtār*, Vol. IV, Beirut, p. 300; Al-Bāḥuti, *op.cit.*, Vol. III, p. 370; Ibn Rushd, *op.cit.*, Vol. II, pp. 224-225.)

<sup>59</sup> Al-Sarakhsī, *Al-Mabsūt*, Vol. XXII, p. 47.

<sup>60</sup> *Ibid.*

<sup>61</sup> Sahnun, Vol. XII, pp. 103-123.

<sup>62</sup> Muḥammad al-Sharbinī al-Khātīb, *op.cit.*, Vol. II, p. 315.

<sup>63</sup> Without the express permission of the investor, the agent-manager is not permitted: a. to sell *muḍārabah* goods on credit; b. to accept a *hawalah* in payment for them; c. to entrust them as a *bida'ah* to outside parties; d. to invest *muḍārabah* capital in a *muḍārabah* or partnership with third parties; and e. to leave *muḍārabah* capital as a deposit in extreme and extenuating circumstances. See Sahnun, *op.cit.*, Vol. XII, pp. 103-123; Muḥammad al-Sharbinī al-Khātīb, *op.cit.*, Vol. II, p. 223.

<sup>64</sup> See references at footnote no. 63.

<sup>65</sup> See references at footnote no. 63.

<sup>66</sup> Abū Faḍl Ja'far b. 'Alī al-Dimashqī (1983), *Kitāb al-Ishārah Ilā Mahasīn al-Tijārah wa Ma'rifat al-A'rad wa Radi'iha wa Ghushush al-Mudallasīn Fiha*. (Edit. and Intro. by Fahmi Sa'd), Cairo, (First edition 19620), pp. 1-30.

This does not apply to all *muḍārabah*; it is only true for cases in which a geographical limitation on the agent-manager's activities is specifically included in the agreement. There are a number of specific restrictions that the investor could impose on the agent-manager.

These specific limitations could appear in a limited as well as in unlimited mandate *muḍārabah* contract, and could be related to the place, object and method of trade. The only requirement is that the restriction be a "beneficial stipulation", (*shart muḍīd*), that is, a useful and beneficial condition from the investor's point of view.<sup>67</sup>

Al-Sarakhsi notes that the imposition of, for example, a geographical restriction fulfils the notion of "beneficial stipulation", since the investor might consider it desirable to have quick and direct access to his capital. In such a case, the agent-manager may not move the capital out of the restricted area or transfer it to anyone else who would do so. If he does so, he becomes liable for any loss.<sup>68</sup>

An explicit restriction to work only in a specific market or specific place in the market is construed in an economic and not strictly geographic sense, i.e. as an injunction to trade only at the general price level of that market. In this regard al-Sarakhsi notes:

"If the investor (*ṣāhib al-māl*) entrusts him with a *muḍārabah* on a condition that he works with it in the market of Kufah, and the agent-manager works with it in Kufah, but not in that place, then according to analogy (*qiyās*) he is a violator and liable because he violated the stipulation imposed upon him by the investor. But by *istiḥsān*, his transactions are effective in *muḍārabah* and he is not liable, because a stipulation which is not beneficial is not taken into consideration, and there is no benefit in confining his transactions to the market, for the investor's intention applies to the price level of Kufah, not the market itself; in any place in Kufah in which he transacts business, his transactions conform to that which the investor has stipulated. If the investor instructs him to work with the investment in the changer's market and he work in a different market, or if he instructs him to work in the house of so and so, and he works in some other place, will he be liable? He will not be liable for anything in this connection by reason of the unity of the city".<sup>69</sup>

In addition to this, the investor also has the right to impose restrictions on the agent-manager's trading activity and trade policy. In the case of trading activity, the investor may limit the agent-manager to buying and selling only a specific commodity such as

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<sup>67</sup> Al-Sarakhṣī, *op.cit.*, Vol. XXII, p. 40.

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*, p. 45.

wheat and barley or to a category of merchandise such as textiles, foodstuffs, etc.<sup>70</sup> The general rule in a restricted *muḍārabah* of trading activity is that the agent-manager may do “anything that merchants engaged in that branch of trade do”.<sup>71</sup>

A restriction by the investor on the agent-manager’s trade policy, for example, designate the parties from whom the agent-manager is to buy goods and to whom he is to sell them.<sup>72</sup> Al-Sarakhsi notes that the imposition of binding restrictions on the agent-manager’s trade policy is a “beneficial stipulation” because people differ from one another regarding their trustworthiness and reliability in fulfilling obligations, and the investor has the right to protect his investment by confining the agent-manager’s transactions only to people in whom he has confidence.<sup>73</sup>

#### **4. Two Agent-managers**

The basic model for a *muḍārabah* contract is an arrangement between one investor and one agent-manager. There is no barrier, however, to a multiplicity either of investors or of agent-managers in the same contract. In the latter case, the agent-managers are considered as one with respect to the conduct of the *muḍārabah* business. If an investor hands over the capital to two agent-managers, instructing them to “act in it according to their judgement”, the agent-managers may act only in accordance with mutual agreement and approval.<sup>74</sup>

According to al-Sarakhsi, if either agent-manager acts independently without his colleague’s permission, he becomes liable to the investor for any loss. The rationale underlying this rule, according to him, is that the investor, in choosing two or more agent-managers, is entrusting his capital to their joint discretion, and since “the opinion of one is not like the opinion of two”,<sup>75</sup> no independent unauthorized action on the part of either agent-manager is permissible.<sup>76</sup>

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<sup>70</sup> Al-Shaybānī, fol. 58b; al-Sarakhsi, *op.cit.*, Vol. XXII, p. 24.

<sup>71</sup> Al-Shaybānī, fol. 61a, I. 16.

<sup>72</sup> If the investor designates the agent-manager to sell only for credit, and not for cash, this restriction is not binding. If the agent-manager then sells for cash, he does not become liable for the capital in his trust, “because he has done better than he was asked. Moreover, al-Sarakhsi says that selling for cash is a more efficacious means of attaining the primary purpose of the *muḍārabah*. Al-Sarakhsi, *al-Mabsūt*, Vol. XXII, p. 44.

<sup>73</sup> *Ibid.*, Vol. XXII, p. 46.

<sup>74</sup> *Ibid.*, p. 44.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*, p. 46.

Al-Shaybānī notes that the only circumstance in which one agent-manager can act without his colleague's permission is if he obtains permission from the investor, for "the permission of the investor in this regard and the permission of the other agent-manager are the same".<sup>77</sup>

## 5. Purchase and Sale

The agent-manager's freedom to invest and otherwise dispose of the *muḍārabah* capital is predicated on the assumption that this will be done responsibly and reasonably. The agent-manager cannot be held liable for any loss resulting from a reasonable use of the *muḍārabah* funds. If, however, loss results from some unreasonable transaction on the part of the agent-manager, he bears the liability for that loss. In the case of buying and selling *muḍārabah* property (capital), the criterion of reasonableness is that by which people will be fooled.<sup>78</sup> For example, if the agent-manager uses £1000.00 to purchase a commodity worth only £500.00 on the market he becomes liable, because the difference between the purchase price and the worth of the commodity is more than that by which people would normally be deceived.<sup>79</sup>

On the other hand, if the agent-manager uses the same sum (£1000.00) to purchase goods worth nine hundred and fifty pounds, he is not held liable for the difference because this is a slight deception (*ghabn yasīr*) and is a misjudgement that is easy to make.<sup>80</sup>

The same judgement also applies to the sale of *muḍārabah* goods by the agent-manager, that is, the difference between their original purchase price must not be greater than the amount the people would normally be fooled by; otherwise, the agent-manager is liable for the difference.<sup>81</sup>

The Malikis do not apply the standard of *ghabn yasīr* to the agent-manager's buying and selling activity. According to them, it is expected that he will exercise all the skills necessary to protect the capital entrusted to him. If he is clearly negligent in this respect, he will become liable for any loss that might occur; for example, if an agent-manager

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<sup>77</sup> Al-Shaybānī, fol. 66b.

<sup>78</sup> Al-Sarakḥṣī, *al-Mabsūṭ*, Vol. XXII, p. 54.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*; Ibn Qudāmah, *Al-Mughnī*, Vol. V, p. 43.

<sup>81</sup> This opinion is held by Abū Yūsuf, al-Shāfi'ī and al-Shaybānī; Abū Ḥanīfah, however, is of the opinion that any sale by the agent-manager is valid and binding on the *muḍārabah*. See Shaybānī, fol. 70a; Ibn Qudāmah, *op.cit.*, Vol. V, p. 43.

purchases some merchandise and pays the seller for it, and then, when he wishes to take possession of the goods, the seller denies that he has received the price from him, the agent-manager becomes liable on the ground that he caused the loss of the investor's capital by failing to have the sale witnessed when he paid the price.<sup>82</sup>

From the above, it is apparent that any other clear-cut cases of negligent and careless business transaction would also make the agent-manager liable.

The agent-manager who is regarded as "representative in trade" possesses the full range of options that any buyer or seller trading with his *muḍārabah* capital would have. In this regard, if the agent-manager sells some merchandise in which the purchaser finds a fault, he has the right:

- a. to deny that the fault exists;
- b. to contest it, claiming that the fault came about after the goods were sold; and
- c. to appease the buyer either by reducing the price or by offering him additional goods.<sup>83</sup>

In the case of absence of any fault or claim of fault from the buyer, the agent-manager cannot offer a reduction from the regular price because according to al-Shaybani, this is not part of trade; it is rather in the category of gift.<sup>84</sup> If he does so, he becomes liable and accountable to the investor, and the amount of the reduction is regarded as a debt of the agent-manager to the investor.<sup>85</sup>

## **6. Expenses**

The agent-manager is allowed to deduct all legitimate business expenses from the capital entrusted to him to cover his personal needs such as food and clothing. The limits of his freedom of deduction of *muḍārabah* capital are defined by its conformity to the two criteria of customary commercial practice and the pursuit of profit. The entire discussion of an agent-manager's personal expenses assumes that he will, in fact, travel on behalf of

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<sup>82</sup> Sahnun, *op.cit.*, Vol. XII, p. 123.

<sup>83</sup> Al-Sarakhṣī, *op.cit.*, Vol. XXII, p. 57.

<sup>84</sup> See Al-Shaybānī, fol. 64b, I.6. A gift is defined as an immediate and unqualified transfer of ownership of a determinate object in the lifetime of the transferor without an equivalent (*'Iwad*). (See for example: Muḥammad al-Sharbīnī al-Khatīb, *op.cit.*, Vol. II, p. 396; Ibn 'Abīdīn, *op.cit.*, Vol. IV, p. 530; Ibn Humām, *op.cit.*, Vol. V, p. 113; Ibn Rushd, *op.cit.*, Vol. II, p.248-249; Cf. Vesey-Fitzgerald, S. (1931), *Muhammadan Law: An Abridgement*, Oxford and London, p. 201.)

<sup>85</sup> Al-Sarakhṣī, *op.cit.*, Vol. XXII, p. 47.



the *muḍārabah* investment. If the agent-manager does not travel with the investment, but stays in his native town or with his family, he is not entitled to cover any of his personal expenses from *muḍārabah* funds.<sup>86</sup> Since he does not travel with it, his personal expenses are to be borne by himself.<sup>87</sup>

On the other hand, if the agent-manager travels with the *muḍārabah* capital entrusted to him to another place for the purpose of trading with it, then all his personal expenses such as clothing, food and the cost of travel are to be taken from the *muḍārabah* investment.<sup>88</sup> The duration of the travel and sojourn may last from six months to several years or only from one to three days.<sup>89</sup> In other words, the duration of the travel of agent-manager depends on the completion of the business purposes.

The rationale behind this procedure is custom, for the agent-manager's departure and travel are on behalf of the *muḍārabah* capital. He may not normally undertake this kind of hardship for the sake of an uncertain profit which he may or may not achieve, and then pay his personal expenses from his own money. However, he is willing to undertake such hardship with a view to the benefit that might accrue to him. This will not come about except by taking the sufficient personal expenses from the *muḍārabah* investment.<sup>90</sup>

The explanation of the agent-manager's right to personal expenses from the *muḍārabah* investment reflects one of the basic features of the contract which make it a practical and efficient instrument for profitable long-distance trade and business.

While every agent-manager in a *muḍārabah* contract is entitled to have his expenses for food, clothing and cost of travel covered by the *muḍārabah* capital by virtue of commercial custom, the quality of the food and clothing, and the comfort with which he travels are determined by his social status.<sup>91</sup> Examples of how the agent-manager's social status affect his expenses are not elaborated in the legal texts. Nevertheless, the social and

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<sup>86</sup> See Ibn Rushd, *op.cit.*, Vol. II, p. 181; al-Qayrawānī, 'Abd Allāh b. Abū Zayd 'Abd al-Raḥman (d. 389/996), *al-Risālah*, (on the margin of Ṣāliḥ 'Abd al-Samī' al-Azhari's *Al-Thamar al-Danī*, Cairo, 1948), p. 477.

<sup>87</sup> Al-Shaybānī, fols. 76a.10-76b. I. I; Ibn Qudāmah, *al-Mughni*, Vol. V, pp. 41-42.

<sup>88</sup> Ibn 'Abīdīn, *op.cit.*, Vol. IV, p. 512; Al-Kasānī, *op.cit.*, Vol. VI, p. 106; Ibn Rushd, *op.cit.*, Vol. II, p. 181; al-Bahutī, *op.cit.*, Vol. II, p. 265.

<sup>89</sup> Al-Sarakḥṣī, *al-Mabsūṭ*, Vol. XXII, pp. 62-63; Ibn Qudāmah, *al-Mughni*, Vol. V, p. 64.

<sup>90</sup> Al-Sarakḥṣī, *al-Mabsūṭ*, Vol. XXII, pp. 62-63; Wahbah al-Zuhaylī, *Al-Fiqh al-Islāmi wa Adillatuh*, Vol. IV, p. 865.

<sup>91</sup> Sahnun, *op.cit.*, Vol. XII, pp. 92-94; Al-Sarakḥṣī, *op.cit.*, Vol. XXII, p. 63; Wahbah al-Zuhaylī, *op.cit.*, Vol. IV, p. 866; Udovitch (1970), *op.cit.*, p. 233.

commercial standing of the agent-manager must have been of considerable practical importance vis a vis his expenses.

The jurists are thoroughly consistent in their view of the division of the risks and investment in the *muḍārabah* contract and it must be carried out to its ultimate conclusion. In this regard, al-Sarakhsi responds that if the agent-manager is not given his personal expenses from the *muḍārabah* capital while engaged in trade and travel on behalf of the *muḍārabah* investment, the distribution of risks between the parties involved would be less equitable. As a result, the *muḍārabah* arrangement will become a less attractive and practical instrument for combining the capital and skills necessary for the success of the business and trade.<sup>92</sup>

### 7. Invalid *Muḍārabah*

Any invalid *muḍārabah* (*muḍārabah fāsidah*) is treated as a hire contract (*ijārah*); all profits accrue to the investor and all losses are borne by him.<sup>93</sup> The agent-manager's personal expenses, but not his business expenses are borne solely by him, who in turn, as an employee, is entitled to an equitable wage (*ajr al-miṭhl*).<sup>94</sup>

The grounds for declaring a *muḍārabah* invalid are numerous, and can be connected with almost any aspect of the contract. These include provisions for a non-proportional division of profit, non-alienation of the investment on the part of the investor (*ṣāhib al-māl*), the agent-manager's violation of a legitimate restriction placed on him by the investor, as well as many other circumstances. In all such cases, the nature of the contract, i.e. the relationship of the parties involved has been transformed. The investor's position becomes that of an employer and he is responsible for his goods and property and all profit from the investment fully accrues to him. On the other hand, the agent-manager's role is changed to that of a simple employee and he is entitled to remuneration for his time and effort regardless of whether his exertions on behalf of his employer are successful.<sup>95</sup>

<sup>92</sup> Al-Sarakhshī, *op.cit.*, Vol. XXII, p. 67; Cf. Sahnun, *op.cit.*, Vol. XII, pp. 92-94.

<sup>93</sup> Al-Dardīr, *Al-Sharḥ al-Kabīr 'Ala Mukhtasar al-Khalīl*, on the margin of al-Dusuqī's *Hāshiyat al-Dusuqī 'Alā al-Sharḥ al-Kabīr*, Vol. III, Cairo, p. 519; Al-Kasānī, *op.cit.*, Vol. VI, p. 108; Al-Sarakhshī, *op.cit.*, Vol. XXII, p. 22; Ibn Qudāmah, *op.cit.*, Vol. V, p. 65; al-Khatīb, *Mughnī al-Muhtāj*, Vol. II, p. 315; al-Margīnānī, *al-Hidāyah*, Vol. I, p. 388.

<sup>94</sup> Al-Sarakhshī, *op.cit.*, Vol. XXII, p. 67; Ibn Humām, *op.cit.*, Vol. VII, p. 60; al-Dardīr, *al-Sharḥ al-Kabīr*, Vol. III, p. 517; al-Khātib, *Mughnī al-Muhtāj*, Vol. II, p. 313; Ibn Qudāmah (1967), *op.cit.*, Vol. V, p. 34; al-Ramlī, *Nihāyah al-Muhtāj Ilā Sharḥ al-Minhaj*, Vol. IV, Egypt, p. 165.

<sup>95</sup> Ibn Qudāmah, *op.cit.*, Vol. V, p. 72; Wahbah al-Zuhaylī, *op.cit.*, Vol. IV, pp. 851-852.

## 8. Dispute Between Parties

If the agent-manager claims, without any evidence, that he has brought the profits with the capital, the statement or testimony of the investor who claims that the agent-manager has not yet returned the capital is accepted and the latter is entitled to receive his capital. This, however, does not apply if the agent-manager is able to provide evidence in support of his claim. In the latter case, the claim of the agent-manager will be accepted.<sup>96</sup>

The claim of breach of contract by the investor or of being afflicted by a disaster by the agent-manager is not accepted until evidence is produced.<sup>97</sup> If the agent-manager transgresses the contract, he is liable for repaying or replacing the capital to the investor. It is considered that liability for repayment or replacement falls on the agent-manager because he has been trusted to carry out the work.<sup>98</sup> In this case, if profits have been accrued in the business, they are to be shared as originally agreed by both parties.<sup>99</sup> It is also held that neither of them has the right to retain the profits from the venture in order to avoid further disagreement between the parties.<sup>100</sup>

If the investor sets conditions such as that the agent-manager should not make a transaction involving certain conditions, and then the latter does not follow these instructions for the best interest and benefit of *muḍārabah* transaction, he is not liable for any repayment or replacement of the capital.<sup>101</sup>

## Conclusion

The above discussion could be concluded that the agent-manager plays an important role in investing the capital entrusted to him by the investor. As a reward for his labour and management, the agent-manager receives the pre-determined rate of profits from the venture. Any loss resulting from an unsuccessful venture is borne exclusively by the investor, the agent-manager is losing only his time and effort. The agent-manager's

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<sup>96</sup> Al-Ṣan'ānī, Abū Bakr 'Abd al-Razzāq b. Hammām (d. 211 A.H.) (1972), *al-Muṣannaf*, Ḥabīb al-Raḥmān al-A'zāmī (ed.), Vol. VIII, Beirut, p. 251; Ibn Hazm, *al-Muḥallā*, Vol. VIII, p. 249; al-Kasānī, *op.cit.*, Vol. VI, p. 107; al-Sarakhṣī, *op.cit.*, Vol. XXII, pp. 20 and 105; Ibn Qudāmah, *op.cit.*, Vol. V, p.54; Ibn 'Abidīn, *op.cit.*, Vol. IV, p. 511.

<sup>97</sup> Al-Ṣan'ānī, *Al-Muṣannaf*, Vol. VIII, p. 252.

<sup>98</sup> Sahnun, *op.cit.*, Vol. XII, p. 116; Ibn Qudāmah, *op.cit.*, Vol. V, pp. 54 and 77; Al-Ṣan'ānī, *Al-Muṣannaf*, Vol. VIII, pp. 252-253 & 255.

<sup>99</sup> Ibn Qudāmah, *op.cit.*, Vol. V, p. 54; Al-Ṣan'ānī, *Al-Muṣannaf*, Vol. VIII, p. 252.

<sup>100</sup> *Ibid.*

<sup>101</sup> Ibn Qudāmah, *op.cit.*, Vol. V, p. 54.

complete freedom under normal trading circumstances from any liability for the capital in the event of partial or total loss and the disjunction between the owners of the capital and third parties are distinctive features of *muḍārabah* and made it an ideal instrument for the purposes of long-distance trade and of obtaining a profitable contract.