

**INTERNATIONAL JOURNAL OF
CREATIVE RESEARCH AND STUDIES**

www.ijcrs.org

ISSN-0249-4655

**THE BASIC OF AGREEMENT SYIRKAH MUDHARABAH
IN THE ESTABLISHMENT OF A LIMITED COMPANY****Martoyo, M. Khoidin, Dyah Ochterina Susanti, Moh. Ali**

Student Doctorate Program, and Lecturer, Faculty of Law, Universitas Jember, Jember

Abstract

This research is conducted based on the background of the existence of a business entity in the Indonesian civil law system such as Limited Liability Companies which are currently most widely used in economic and business activities in Indonesia which from the beginning, it never been based on a corporate system such as syirkah in its various forms, so that there is no concept of a business entity based on the provisions of Islamic law. Whereas the practice of establishing a business entity that is managed using the principles of shari'ah has been and will continue to develop. The research method used is a Normative Juridical Research with an approach; Legal Philosophy Approach, Statute Approach, Conceptual Approach, Analytical Approach, and Comparative Approaches. This research produces conclusions; The mudharabah syirkah contract is very relevant to the demands of sharia business development and can be the basis for reconciling or perfecting the agreement for forming a Limited Liability Company (PT). This contract concept model embodies equality, balance and proportionality between allies which is reflected in the arrangements regarding the proportion of capital, the percentage of profits and losses as well as the termination of the Limited Liability Company so that it is relevant to the needs of the formulation of an equitable Limited Liability Company Agreement and following sharia principles.

Keywords: *Syirkah mudharabah, Limited Liability Company, Justice.*

Background

Indonesia's national development is a constitutional mandate that the government must implement through a planned, comprehensive, directed, integrated, gradual and sustainable program to spur the improvement of national capacity in the context of continuing the ideals of Indonesian independence and realizing social justice and general welfare for all Indonesian people.¹ That statement will have implications for the Indonesian nation's prestige through the international community, especially in the field of economic

¹ The essence of the Preamble of the Fourth Paragraph of the 1945 Constitution of the Republic of Indonesia.

development, and position Indonesia as a competitive country and contribute to realizing a just and prosperous economic order.²

The form of a business entity currently the most widely used in economic and business activities is the Limited Liability Company and continues as the Indonesian economy grows and develops. Limited Liability Companies have become the most widely used legal entities in financial institutions, trading businesses, distributor businesses, mining businesses, domestic and foreign (export-import) on a small, medium, and large scale.³ Even Limited Liability Companies are seen as more representative and make it easier for business actors than other forms of business entities. However, the regulation of Limited Liability Companies in Indonesia from the beginning until now, has never been based on a corporate system such as *syirkah* in its various forms, so there is no concept of a business entity based on the provisions of Islamic law.

On the other hand, most of Indonesia's population is Muslim, so of course, most of the economic actors, workers, are Muslim majority. It will be an opportunity for a legal scholarship if there are solutions and contributive efforts to place sharia business law as an alternative to solve legal problems for Limited Liability Companies that are following Shari`ah principles. Through the advantages of the sharia *mudharabah* contract principles, it's considered that the formation of a special Limited Liability Company arrangement for business entities which asserts that they are managed based on sharia principles accordingly that there is a link between the institution and its management system.

The problems that can be identified in this dissertation research are as follows: First, philosophical issues, Pancasila and the 1945 Constitution primarily accommodate the economic, legal system & Islamic business, while sharia values in the economic sector have become a belief a fair, balanced and financial system. *maslahat*, and sharia principles (*syirkah mudharabah* contract) have not been transformed in the agreement to form a business entity, especially a Limited Liability Company. Therefore the *mudharabah syirkah* agreement must be elaborated on the arrangement of a new Islamic economic business entity in the form of a Limited Liability Company to offer a concept of managing a Limited Liability Company based on sharia principles in Indonesia.

Secondly, there are juridical problems. There is a conflict of norms between the provisions of Article 109 paragraphs 1-3 of Law Number 40 of 2007 concerning Limited Liability Companies and article 1 number 1 of Law Number 21 of 2008 concerning Islamic Banking. The Company Law only regulates DPS as an element of PT managed based on sharia, even though the UUPS (Article 1) requires that the business entity institutionally complies with the principles of shari`ah. Furthermore, there was an inconsistency between article 1 number 1 and article 7 UUPS, which stated that the legal entity form of a Sharia Bank is a Limited Liability Company.

The third is theoretical problems, the stagnation of the theory transformation from the classical business agreement system (*syirkah*) to the modern business entity system. At the same time, some people see the current concept of establishing a Limited Liability Company as not accommodating the community (business actors/entrepreneurs) who wish to run their business. Based on sharia principles. The *syirkah mudharabah* agreement can serve as a theoretical basis and serve as the basic concept for the formation of a sharia-based Limited Liability Company. And the fourth is Sociological Problems, Public doubts about the implementation of sharia compliance due to value conflicts, conflict of norms, inconsistencies and even contradictions in the provisions of Limited Liability Companies with business management based on the *syirkah mudharabah* agreement to hinder the acceleration of business development based on shari`ah principles in Indonesia.

² This national purpose is in line with Islamic law because it guarantees the realization of the principles of balance and justice, including in the economic field. See Muchlis Usman, *Filsafat Hukum Islam* (Malang:LBB Yans Press, 1999), p. 38.

³ Binoto Nadapdap, *Hukum Perseroan Terbatas*, (Jakarta: Jala Permata Aksara, 2009), p.1.

Therefore it is necessary to study about the syirkah mudharabah contract in the formation of a Limited Liability Company by exploring the meaning, values, and principles in the Islamic legal system accordingly the concept formula for the establishment of a Limited Liability Company company is found following the principles of shari'ah, as well as the basis for the formation of future laws (*ius constituendum*) which can be applied easily to achieve the benefit and welfare of the community.

Discussion

The Syirkah mudharabah contract is a combination of the Syirkah contract and the Mudharabah contract. Syirkah, in terms of syirkah is the right of ownership of something (cooperation in business) by two or more people according to a certain percentage by providing capital contributions provided that the profit and risk of loss will be shared according to the agreement.⁴ While mudaraba is a cooperation agreement to generate profits with the assets of one of the two parties working together, on the other hand with work expertise,⁵ the earnings in this contract are divided based on the agreed calculation, and losses become the full responsibility of shahibul maal, unless the failure is due to mudarib negligence.⁶

The combination of the two contracts creates syirkah mudharabah, a business cooperation agreement between two or more parties. One party is the owner of the asset capital (shahibul maal / rabb al-mal) and on the other hand is a business actor who has job expertise (mudharib). In this agreement, the partners may be more than one person or one party and business actors (mudharib) can take part in investing their assets. Thus, on the one hand, mudarib as a business actor, but on the other hand, mudarib is also part of the allied capital owner (shahibul maal).

The syirkah mudharabah agreement is a term that is rarely found in various fiqh books, especially those that discuss the field of mu'amalah fiqh. Both classical and contemporary fiqh scholars do not specifically address this contract in a complete discussion in the chapter on syirkah. In the Muamalah fiqh literature, there are many discussed separately between the syirkah and mudharabah contracts, and even the four classical era fiqh scholars only recognized four types of shirkah, especially those categorized as syirkah uqud, among others; syirkatul `inan, syirkatul mufawadhah, syirkatul abdan / amal, and syirkatul wujuh.

The legal status of the syirkah mudharabah contract in the study of classical fiqh scholars does not have a specific and complete discussion, in contrast to the mudharabah fardhiyah contract very complete and clear in most books. This, according to the author, is motivated by conditions of simple business dynamics so that the contract system developed is based on a system that is in tune with current business developments. Even though the classical fiqh scholars did not write completely about shirkah mudaraba, they did provide indicators through their opinions written by later fiqh scholars in fiqh books.

Al-Baghawi in the book *Al-Ta'hdzib fi Fiqh Al-Imam Al-Syafi'i*, says that; "If two men are doing business in Mudaraba with another man for 1,000 dinars, the two people claim to be doing Mudharabah business, half the profit for the owner of the funds, the rest for the mudharib, this is permissible."⁷ Concerning allies in mudaraba, Ibn Qudamah in *Kitab al-Mughni* states, "if two people do business in mudaraba with another person with an amount of 1000 dirhams belonging to them both, then it is permissible".⁸ Regarding working capital, allies, and the sharing of profits and losses on the mudharabah contract, Muhammad Abd al-Mun'im

⁴ Al-Sayyid Sabiq, *Fiqh al-Sunnah* (Beirut: Dar Al-Fikr, 1983), vol. III, p. 294, see Ahmad Azhar Basyir, *Hukum Islam tentang Wakaf, Ijarah, Syirkah* (Bandung: PT. Al-Maarif, 1987), p. 46-66.

⁵ *Ibid.*, p. 190.

⁶ Wahbah Azzuhaili, *Al-Fiqh al-Islami Wa Adillatuhu*, (Beirut: Dar Al-Fikr, 1997), Juz V, p. 3924.

⁷ Al-Baghawi, *Al-Ta'hdzib Fi Fiqh Al-Imam Al-Syafi'i*, Juz IV (Dar Thibah li An-Nasyr wa At-Tawzi', 1417 H./1997), p. 382.

⁸ Abu Muhammad Muwafiq al-Din Abdullah bin Ahmad bin Qudamah al-Maqdisi, *al-Mughni*, (Cairo: Maktabah Al-Qahirah, 1997) Juz V, p. 19.

Abu Zaid stated in the *Nahwa Tathwir al-Mudharabah* Book, saying: "There are two capitals with the entity (person) who owns one of the wealth. This form combines *shirkah* with *mudaraba*; and the law is valid."⁹

Ibn Rushd in the book *Bidayah al-Mujtahid Wa Nihayah al-Muqtashid* also said that the two assets were mixed up after obtaining permission from one of them, getting a permit from both of them was better because each of them would think his property was better than the other.¹⁰ Al-Nawawi, in the Book of *Raudlah Al-Talibin* also argues that: "if two people do business in *Mudaraba* with another person, then the two people should explain the share of the profits for *al-mudharib* and the rest is divided between them according to the size of their assets."¹¹ From the opinion of the *fiqh* scholars as explained above, it becomes clear that the legal subject or allies in the *mudharabah syirkah* agreement consist of several people or more than one party - both in their capacity as an ally of the owner of capital (*shahibul maal*) as well as a business actor (*mudharib*). The development of this contract is based on allies who are no longer single but consist of several parties, according to the author, this is one party, namely the partners of the owners of capital (*shahibul maal*) and on the other hand the business actors (*mudharib*) only the number of each. Each party can be more than one. Therefore, the *syirkah mudharabah* contract as a combination of the *syirkah* contract and the legal *mudharabah* contract is permitted.

The development of the contract as an effort to respond to the dynamics of society is based on the principle of *fiqh* "al ashl fi 'l-mu'amalah al-ibāhah illā an yadulla dalīl' alā tahrīmihā", meaning: (that the law of origin of *muam* is permissible unless there are arguments that indicate the prohibition). As for the validity reasoning formulation that can be used as a foundation for the validity of the *mudharabah syirkah* agreement, it is built on five foundations, namely:

First, the *syirkah mudharabah* contract is based on the renewal of *syirkah inan*. Because the legal relationship between the owners of capital can be collected from many parties, then the venture capital is merged into a whole (*al-iktilath*) whole. At the same time, the workforce is also involved in carrying out work in cooperation. The business referred to. *syirkah`inan* is agreed upon by all *fiqh* scholars.¹² Second, it is based on the *kemu`tabar shirkah w Tujuh*, and because the *syirkah* contract that is most compatible with the *syirkah mudharabah* contract is *syirkah w Tujuh*, but the difference in principle is that *shirkah mudharabah* investors are parties who do not understand how to manage their assets, on the other hand, some parties have businesses that need capital. Regarding the *kemu`taraan syirkah w Tujuh*, in the Book of *Al-Mabshuth*, the *taqabbul* partnership agreement is *shahih* even though the Imam *Shafi`i ra.*, Only recognizes *syirkah`inan*. However, according to Sheikh *Syamsuddin As-Sarkhasy*, it was permissible for *syirkah w Seven* because it was based on the *wakalah* contract.¹³ Third, the *syirkah mudharabah* is a contract based on the *wakalah* contract. According to Imam *Al-Ghazali* (W. 405 H), the essence of *syirkah* is the *wakalah* contract, namely the contract of handing over power. In that contract, someone appoints another person as his substitute in acting (*tasharruf*). For *Al-Ghazali shirkah* has a strong foundation in *shara`*. Through this partnership agreement, the partners manage the asset capital which becomes joint capital.¹⁴ Fourth, the validity of the *syirkah mudharabah* contract is based on the permission of the owner of the capital (*Shahibul maal*), the valid license is something related to the appropriateness and ethics of business communication, however, when the *syirkah mudharabah* contract has been agreed, then the permission from the owner of the capital (*shahibul maal*) will

⁹ Muhammad Abd al-Mun'im Abu Zaid from Kitab *Nahwa Tathwir al-Mudharabah*, (al-Qahirah: Maktabah al-Ma'had al-'Alami li-al-Fikr al-Islami, 2000), p. 411.

¹⁰ Abu al-Walid Muhammad bin Ahmad bin Rusyd Al-Qurthubi, *Bidayah al-Mujtahid Wa Nihayah al-Muqtashid*, (Mesir: Dar Al-Hadis, 2004) Juz IV, p. 21.

¹¹ Al-Nawawi, Abu Zakariya Muhyiddin Yahya bin Syarif, *Raudlah Al-Thalibin*, (Beirut: Al-Maktab Al-Islami, 1405 H), Juz V, p. 125.

¹² Sayyid sabiq, *Fiqh Sunnah..* 1985, *Op. Cit.*, p. 295-296.

¹³ Abu Bakr Muhammad bin Ahmad bin Abi Sahl asSarakhsi, *Al-Mabshuth*, (Beirut Libanon : Dar al- Libanon, juz xi,tt), p.283.

¹⁴ Muhammad Syamsudin, *Persekutuan Bagi Hasil Usaha Jenis Mudharabah dalam Fiqih Muamalah*, (Aswaja NU Center PWNU Jawa Timur 2019 (<https://islam.nu.or.id>).

automatically it is considered valid even though there is no permission from other investors because the syirkah between the owners of the capital is categorized as syirkah idhthiriyah (automatic, without a contract). Fifth, the mudharabah syirkah agreement, is based on a mixture of different business capital submitted by the owner of the capital (shahib al-mal) in assets / money / valuables and business actors (mudharib) in the form of expertise/skills. The syirkah mudharabah contract is a mixture of ayn (real asset) and dayn (financial asset). This contract occurs when there is an owner of capital who acts as a funder and gives it to someone who has the skills to do business as a manager. The mixing character of the syirkah mudharabah contract is almost the same as the syirkah w Tujuh. Still, the difference lies in the knowledge of the owner of the capital to manage his business.¹⁵

From the description above, according to the author, in essence, the mudharabah contract cannot be separated from the syirkah contract, because mudharabah is a part of syirkah. As explained above, syirkah is a form of certain business cooperation agreements to get profit (profit-oriented). Thus, the mudharabah contract in the view of several scholars is part of the syirkah contract, so conceptually syirkah mudharabah is a combination of syirkah amwal (cooperation with asset capital) and syirkah abdan (cooperation with expertise/skills capital) which can be used as the basis for the agreement to form the Company Limited.

Elements of the Syirkah Mudharabah Agreement

Based on the explanation of the nature of the syirkah mudharabah contract as a contract formed from the development of a syirkah contract which can be used as the basis for an agreement in contemporary sharia business transactions, it is necessary to describe the elements that become harmonious and the terms of the mudharabah syirkah contract. As for the aspects of the syirkah mudharabah contract. As follows:

a) The subject of the Syirkah Mudharabah Agreement

Subjects in a syirkah mudharabah are mandatory considering the perpetrator/subject in a harmonious; if not fulfilled, the contract will be canceled. However, in this contract, not all of them can become the subject of the contract. Because there are several prescriptions that become the basis for determining the subject whether as an owner of capital (shahibul maal) or as a business actor (mudharib) who has the expertise to develop a particular business. The owner of capital (shahibul maal) must be legally competent both in syar`i and in the applicable legal provisions in a country. Shahibul maal is a subject who has capital, understands workflow, but he does not have the expertise to develop his assets in the form of a business that is being run by Mudharib.

Another subject is the fund manager/business actor (mudharib), who has expertise in running a business. Mudharib is obliged to manage the industry by making efforts to profit through well-planned business activities in all business sectors or individual companies as the contract system (mudharabah muqayyadah).¹⁶ According to the provisions of fiqh regarding the subject of the syirkah mudharabah contract, it still refers to the mudharabah contract, which consists of two subjects, namely the owner of the fund (shahibul maal) and the business actor (mudharib). However, in the syirkah mudharabah contract, the two subjects are each allowed more than one party, the subject of the owner of funds (shahibul maal) can be more than one party. The following business actors (mudharib) can also be more than one party; at the same time, mudharib can take part in invest in the said cooperation.¹⁷

¹⁵ Fathurrahman Djamil, *Penerapan Hukum Perjanjian dalam Transaksi di Lembaga Keuangan Syariah*. (Jakarta : PT. Sinar Grafika, 2012), h.100-107

¹⁶ Wahbah al- Zuhaili, *Al- Fiqh Al- Islami Wa Adillatuhu* (Beirut :dar al- Fikr al- Mu'ashir.1997), vol. V, p. 3.949-3950.

¹⁷ See Al-Baghawi, *Al-Tahdzib Fi Fiqh Al-Imam Al-Syafi'iy*, Juz IV (Dar Thibah li An-Nasyr wa At-Tawzi', 1417 H./1997), p.382 and see Abu Muhammad Muwafiq al-Din Abdullah bin Ahmad bin Qudamah al-Maqdisi, *al-Mughni*, (Cairo: Maktabah Al-Qahirah, 1997) Juz V, p. 19.

Regarding the duties of the two subjects of the owner of capital (shahibul maal) and business actors (mudharib) in the mudaraba contract it is stated in Article 238 KHES that "the status of objects in the hands of the mudharib received from shahib al-maal, is capital." and "Mudharib has the position of deputy shahib al-maal in using the capital he receives."¹⁸ Therefore, in syirkah mudharabah, mudharib is required to have the ability (legally competent/Ahliyat al-wujub wa al-ada') to represent/give power (for shahibul maal) and receive representation/power for mudharib because this agreement contains a wakalah contract, or power of attorney, the business actor, is conducting business based on the control of the owner of the capital and trying to develop his business to bring profit.¹⁹ Sharia business conditions that are concentrated in business entities such as Limited Liability Companies, which demand openness, honesty, cooperation, and care between fund owners and business actors so that economic justice can be realized.

b) Business Capital of the Syirkah Mudharabah Contract

Business capital (ra's al-maal) in the syirkah mudharabah contract has a significant role in driving the business carried out by shahibul maal with mudharib. The syirkah mudharabah contract capital is a mixture of business capital assets (ra's al-mal bil amwal) with other venture capital in the form of bodies and expertise (ra's al-mal bil abdan / `amal) which are combined into a single unit, if the capital is not include one of them then the syirkah mudharabah contract does not occur or can occur but with a different contract name.

The substance of this contract capital concept is based on the mixing theory, namely the mixing of ayn (real assets) and dayn (financial assets), this contract occurs when there is an owner of capital acting as a funder, providing a certain amount of funds as business capital to someone who has skills to do business as a manager by giving ayn (services/expertise, real assets), provided that the business actor (mudharib) also takes part in the investment in capital assets. The mixing character of the mudharabah syirkah contract is what differentiates it from other syirkahs, except for the syirkah wujuh which are almost the same but differ in the management understanding of the substance and technicalities of the mudharib business implementation.²⁰ Wahbah Azzuhaili also requires business capital in the form of assets to be in the form of; objects must be in the way of measuring instruments (nuqud/money)²¹, not in the form of goods, capital must be knowable and measurable, capital must be cash (not in the form of receivables), capital must be able to be handed over from shahib al-mal to mudharib.²² In this contract, a business actor (mudharib) is also allowed to invest in a business carried out on the condition that the owner's permission of the capital is agreed upon at the beginning of the contract.²³ Capital must be fully submitted by the owner of the capital to the business actor and may not be retained by the owner of the funds, either partially or completely. If part of the capital is still held by the owner of the capital, according to the scholars of the Hanafi, Maliki, and Shafi'i Schools, this is not allowed. However, the ulama of the Hambali School allowed it, on the condition that it did not interfere with the running of the business.²⁴ According to the fatwa of the MUI

¹⁸ Article 238 Republic Indonesia Supreme Court Regulation Number 1 of 2009 concerning Compilation of Sharia Economic Law.

¹⁹ Wahbah al- Zuhaili, *Al- Fiqh Al- Islami*. 1997 Juz.V., *Op.Cit.* p. 3.932.

²⁰ Fathurrahman Djamil, 2012, *Op.Cit.*, p. 100-107.

²¹ The amount / nominal value of the business capital submitted by shohibul mall must be explained. The type of currency used as ra's al-mal must be agreed upon by the parties (shahib al-mal and mudharib). If shahibul maal includes ra's al-mal in the form of different currencies, it must be converted into the currency agreed as ra's al- mall at the time of the contract and Ra's al-mal may not be in the form of receivables. See Hasan Sami Hamud, *Tathwir al-A' mal al Mashrafiyyah bima`Yattafi-qu wa al-syariah al-Islamiyah*. (Amman: Matbatu al-Syarq wa Maktabatuha, 1982), p. 187.

²² Wahbah al-Zuhaili, *Al-Fiqh Al-Islami Wa Adillatuhu* (Beirut: Dar al-Fikr al-Mu'ashir.1997), Juz.V, p. 3.932-3.935. See also Abdul Aziz Dahlan.(ed.). *Ensiklopedi Hukum Islam*, (Jakarta, PT. Icthiar Baru van Hoeve, 2003) volume 4, p. 1197. See also Sri Nurhayati Wasilah, *Akuntansi Syariah di Indonesia*, (Jakarta: Salemba Empat, 2014), p. 124

²³ Al-Baghawi, 1997.. *Op.Cit.*,h. h.382 and also see Abu Muhammad Muwafiq al-Din Abdullah bin Ahmad bin Qudamah al-Maqdisi, *al-Mughni*, 1968 juv V,*Op.Cit.*, p. 19.

²⁴ Hasan Sami Hamud, *Tathwir al-A' Mal al Mashrafiyyah Bima`Yattafi-Qu wa Al-Syariah Al-Islamiyah*. (Amman: Matbatu al-Syarq wa Maktabatuha, 1982) p.187.

National Sharia Council, that business capital must be handed over (al-taslim) in stages or cash according to the agreement.²⁵

Compilation of Sharia Economic Law (KHES) types of capital in the mudharabah contract must meet the requirements; "Capital must be in the form of goods, money and/or goods of value. Capital must be submitted to business actors / mudharib. And the amount of capital in a mudharabah contract must be stated with certainty."²⁶ The provisions on the prohibition of mixing capital from business actors (mudharib) with venture capital (ra'sl al-mal) in KHES, because only regulating mudharabah fardhiyah alone does not accommodate open syirkah mudharabah arrangements and allow business actors to participate in investing in the said business project. As for the terms of business carried out by mudharib to carrying out the capital provided by shahibul maal, it must comply with the following provisions: Lawful Business, Mudharib in conducting mudharabah business must be in the name of the mudharabah entity, it may not be in his name, costs arising from activities company on behalf of the mudharabah entity, may be charged to the mudharabah entity, Mudharib may not borrow, lend, donate, or gift ra's al-maal and profits to other parties, except on the basis of permission from shahibul maal and Mudharib may not commit acts which include: - ta'addi / at-taqshir and/or mukhalafat a syuruth.

The responsibility of shahibul maal is limited to the amount of capital he has invested.²⁷ This principle is fundamental because if this does not mean the responsibility of shahibul maal is not limited, it is not appropriate for Shahibul maal to only be a sleeping partener.²⁸ Mudharib is not allowed to make commitments with third parties exceeding the amount of capital that has been invested by Shahibul Maal. If the mudharib exceeds the limit of the amount of the mudaraba investment without special authorization or without authorization obtained from the shahibul maal, then the mudarib is personally responsible for the excess funds.²⁹

c) Sharing of Profits and Losses on the Syirkah Mudharabah Agreement

The profit distribution of the syirkah mudharabah contract must be clearly stated in the agreement based on the purpose between the allies of the capital owner (shahibul maal), both the distribution between shahibul maal as an implementation of the sharing of syirkah profits because the mudharib is also an investor with the allocation based on the initial agreement as in the syirkah agreement.³⁰ Furthermore, the profit sharing is divided based on the ratio (percentage) of net profit that has been agreed at the beginning, between the owner of the capital (shahibul maal) and the business actor (mudharib) based on the agreed ratio (percentage) to the net profit obtained in the business cooperation. The distribution system of distribution is based on the opinion of Ibn Qudamah in the Al-Mughni Book: "Mudharib (managers) may include funds in the capital accumulation with the permission of rabbul mal (the original owner of capital). Profits are divided (first of all) on the basis of musyarakah (between mudarib as a depositor of capital / funds and shahibul mal) according to their respective portions of capital. Then Mudarib takes his share of the profits based on fund management services."³¹

On the other hand, losses in a mudharabah contract are entirely the responsibility of the owner of the capital (shahibul maal). At the same time, the business actor (mudharib) does not incur the slightest loss. In

²⁵ Fatwa DSN MUI Number NO: 115/DSN-MUI/IX/2017.

²⁶ Article 235 RI Supreme Court Regulation Number 1 of 2008 concerning Compilation of Sharia Economic Law.

²⁷ Abdurrahman Al-Jaziri, *Kitâb al-Fiqh 'ala al-Mazâhibal-Arba'ah*. (Beirut: Darul Kitab al-Ilmiah, 1424). Jilid III. p. 249.

²⁸ Directorate of Sharia Banking, Bank Indonesia, Report on the results of a Mudharabah and Murabahah study agreement for Islamic banks, (Jakarta: BI, 2004), p. 208.

²⁹ Abdul Mun'im Fayadh, *Op. Cit.*, p.109.

³⁰ Dyah Ochtorina Susanti, *Syirkah sebagai Model Investasi Berbasis Syari'ah (kajian Ontologi)*, (*Rechtidee Jurnal Hukum*, Vol.9. No. 1 Juni 2014), p.19.

³¹ Abu Muhammad Muwafiq al-Din Abdullah bin Ahmad bin Qudamah al-Maqdisi, *al-Mughni*, (Kairo: Dar al-Hadis, 2004), Juz VI, p.348.

this case, there is a difference in understanding the ability to absorb losses between the two parties. If you get a profit, there is no problem to dispute profit/absorption. Still, if you experience a loss, shahibul maal to bear financial losses is not the same as the ability of mudharib. This is because the loss is divided based on the proportion of capital, and because the percentage of shahibul maal's (financial) equity in the contract is adequately capitalized (100%) then the loss is entirely borne by shahibul maal, while for mudharib it means the proportion of capital mudharib in the contract there is none so that in the event of a loss the mudharib does not bear anything. For this matter, mudharib is said to incur losses for the management/work carried out to not get results.

The distribution of losses in the syirkah mudharabah contract rests on two concepts: based on the syirkah contract and based on the mudharabah contract. However, according to the author, the actual loss still follows the mudharabah fardiyah contract. Still, because there is mudharib involvement in the investment, it is easy to bear the loss of capital limited to the investment. Therefore, the damages in the mudharabah syirkah contract are divided according to the portion of the respective funds as in the syirkah contract (including the mudharib invested capital), and further, the full capital loss (100%) is the responsibility of the capital owner (shahibul maal) while the business actor only bears the loss of time, energy, and thoughts used when the business is run, unless the failure is proven as a result of negligence or irregularities committed by the business actor (mudharib).

Limited Liability Company (PT) was established based on the agreement of the founders as outlined in the deed of establishment as referred to in Article 1 number 1 of Law Number 40 of 2007 and subsequently the number of founders by 2 (two) or more persons contained Article 7 paragraph 1. Establishment of PT from an angle The viewpoint of this mudharabah syirkah agreement also has implications for the relationship between shareholders and directors who are seen as non-employee partners in a company, with the principle of justice through contractual stages including; Pre-contractual (akad), before the contract starts the allies are placed in a balanced way to determine the contents of the agreement. The Contractual Stage (contract), the partners in distributing capital built with mutual need and equality and in the distribution of profits and losses as described above. Post contractual (akad), the existence of a mudharabah syirkah contract in business is very dependent on the agreement and commitment and consistency of allies, with a time limit set by the partners.³²

According to the author, the above stages reflect a business cooperation relationship that is built on equality (al-musawa), balance (at-Tawazun) and proportionality (al-mututanasib) in maqashid Islamic economics is a manifestation of maintaining the property (hifz al mal) through mutual taking benefit among allies. Wealth does not only revolve around a group of wealthy people but rotates and will touch business actors in various sectors to drive the pace of economic growth. The business cooperation agreement system as the syirkah mudharabah contract concept above is following the principle of justice.

Conclusion

The essence of the syirkah mudharabah contract is the development and integration of the syirkah and mudharabah agreement, which is a business cooperation contract between two or more parties, namely the owner of asset capital (shahibul maal) and business actors (mudharib) and mudharib can take part in investing in asset capital. Profits are divided into two stages, namely calculated based on the syirkah contract and the benefit derived as the mudharabah contract. For losses are divided according to the respective portion of funds according to the syirkah agreement, the further loss is the full responsibility of the owner of the capital (shahibul maal), the business actor only bears the loss of time, energy, thoughts, unless the loss occurs due to negligence or irregularity by the business actor. The basis for the validity of the syirkah mudharabah contract is built after the syirkah inan, syirkah w Tujuh, the wakalah contract, permission from the owner of the capital

³² See Article 251 and 253 Compilation of Sharia Economic Law.

and the theory of mixing ayn and dayn. The position of allies in the syirkah mudharabah contract in the formation of a Limited Liability Company (PT) following the principle of justice can be found at the Pre-contractual, Contractual and Post-contractual stages, so that the mudharabah syirkah contract can be used as the concept of the agreement for the formation of a Limited Liability Company.

Recommendations

In this study, the authors provide suggestions to the legislative body (DPR RI) and the Government to create a legal governing the agreement's implementation to form a particular Limited Liability Company business entity that is managed based on sharia principles.

REFERENCES

BOOKS & JOURNAL

- Abu Zaid, Muhammad Abd al-Mun'im. (2000). *Nahwa Tathwir al-Mudharabah*, Kairo: Maktabah al-Ma'had al-'Alami li-al-Fikr al-Islami.
- Abdullah. (1414 H). *Al-Bunuk Al-Islamiyah Baina al-Nazariyat wa Tatbiq*. Riyadh : Muassasah al-Juraish.
- al-Baghawi, Abu Muhammad al-Husain bin Mas'ud bin Muhammad bin al-Farra' asy-Syafi'i. (1417). *Al-Tahdzib Fi Fiqh Al-Imam Al-Syafi'iy*. Juz IV. Dar Thibah li An-Nasyr wa At-Tawzi'
- Al-Jaziri, Abdurrahman. (1424). *Kitâb al-Fiqh 'ala al-Mazâhibal-Arba'ah*. Jilid III.Beirut: Darul Kitab al-Ilmiah.
- al-Maqdisi, Abu Muhammad Muwafiq al-Din Abdullah bin Ahmad bin Qudamah. (1997). *al-Mughni*, Kairo: Maktabah Al-Qahirah, Juz V.
- al-Nawawi, Abu Zakariya Muhyiddin Yahya bin Syarif. (1405 H). *Raudlah Al-Thalibin*. Beirut: Al-Maktab Al-Islami Juz V.
- Al-Qurthubi, Abu al-Walid Muhammad bin Ahmad bin Rusyd. (2004). *Bidayah al-Mujtahid Wa Nihayah al-Muqtashid*, Mesir: Dar Al-Hadis Juz IV
- Azzuhaili, Wahbah. (1997). *Al-Fiqh al-Islami Wa Adillatuhu*, Juz V. Beirut : Dar Al-Fikr.
- Basyir, Ahmad Azhar. 1987. *Hukum Islam tentang Wakaf, Ijarah, Syirkah*. Bandung: PT. Al-Maarif.
- Dahlan, Abdul Aziz.(ed.). (2003), *Ensiklopedi Hukum Islam*, Jilid IV, Jakarta: PT. Ichtiar Baru van Hoeve.
- Direktorat Perbankan Syariah, Bank Indonesia. (2004). *Laporan hasil Kajian Akad Mudharabah dan Murabahah bagi bank Syariah*, Jakarta : Bank Indonesia.

- Djamil, Fathurrahman. (2012). *Penerapan Hukum Perjanjian dalam Transaksi di Lembaga Keuangan Syariah*. Jakarta : PT. Sinar Grafika.
- Fayadh, Abdul Mun'in. (1996). *Bai` al-Murabahah fil al-masharib al-Islamiyah:Al-Azmah wa al-Makhraj*. Mesir : Dar Al-Nasr li al-Jami`ah al-Mishriyah, Maktabah al-Wafa.
- Hamud, Hasan Sami. (1982). *Tathwir al-A`mal al Mashrafiyyah bima`Yattafi-qu wa al-syariah al-Islamiyah*. Amman: Matbatu al-Syarq wa Maktabatuha.
- Mufid. Moh. (2018). *Maqashid Ekonomi Syariah; Tujuan dan Aplikasi*. Malang : Empat dua Media.
- Nadapdap, Binoto. (2009). *Hukum Perseroan Terbatas*. Jakarta: Jala Permata Aksara.
- Sabiq, Al-Sayyid. (1983). *Fiqh al-Sunnah*, Vol III. Beirut: Dar Al-Fikr.
- Susanti, Dyah Ochtorina. *Syirkah sebagai Model Investasi Berbasis Syari`ah (kajian Ontologi)*, *Rechtidee Jurnal Hukum*, Vol.9. No. 1 Juni 2014.
- Syamsudin Muhammad. (2019). *Persekutuan Bagi Hasil Usaha Jenis Mudharabah dalam Fiqih Muamalah*, (Aswaja NU Center PWNU Jawa Timur 2019 (<https://islam.nu.or.id>)).
- Usman, Muchlis. (1999). *Filsafat Hukum Islam*. Malang: LBB Yans Press.
- Wasilah, Sri Nurhayati. (2014). *Akuntansi Syariah di Indonesia*. Jakarta: Salemba Empat.

LAWS AND REGULATIONS

Law Number 40 of 2007 concerning Limited Liability Companies.

Law Number 21 of 2008 concerning Sharia Banking.

RI Supreme Court Regulation Number 1 of 2008 concerning Compilation of Sharia Economic Law.

Fatwa of the National Sharia Council (DSN) of the Indonesian Ulema Council (MUI) Nomor:115/DSN-MUI/IX/2017 tentang Akad Mudharabah.

Writers Biography:

1. Martoyo, S.H.I., M.H. born in Sumenep, December 12, 1978, Completed Elementary School in Sapudi Sumenep Madura, SLTP, SLTA and Islamic Boarding School education for 8 years at the Misykatul Ulum Islamic Boarding School in Situbondo, took Bachelor's Degree at the Islamic Faculty of IAIN Jember and Master's Degree at Law Program, University of Jember. Currently pursuing a Doctoral Degree with a concentration in Sharia Economic Law at the Faculty of Law, University of Jember.

2. Prof. Dr. M. Khoidin, SH, M.Hum., CN, born in Lumajang, March 8, 1963, Bachelor's Degree at the Faculty of Law, University of Jember, Master's Degree from Gajah Mada University Yogyakarta, Yogyakarta 1994, Graduated from Specialist Education I Notariat from Diponegoro University Semarang 1997, and earned a Doctoral Degree in the Postgraduate Program at Airlangga University Surabaya in 2004, and in 2006 was appointed as Professor of Law at the Faculty of Law, University of Jember.

3. Dr. Dyah Ochterina Susanti, SH, M.Hum, born in Malang October 26, 1980, Bachelor's Degree from Faculty of Law, Universitas Brawijaya specializing in Civil Law in 2003, Completed her Master's Degree of Law Program at the University Brawijaya in 2006 with the predicate cum laude. And completed Doctoral Degree in 2011 at the Law Program, Brawijaya University, specializing in Economic and Business Law, with a cum laude predicate.

4. Dr. Moh. Ali, S.H., M.H. born in Gresik, October 14, 1972, completed his Bachelor's Degree at the Faculty of Law, University of Jember in 1993, finished Master's Degree from Law Program at Airlangga University Surabaya in 2008 and in 2018 succeeded completed his Doctoral Degree from Airlangga University, Surabaya with cum laude predicate.

