Joint Venture Modes in the Development Financing of Waqf Properties

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Abstract

In addition to other modes of financing, joint-ventures using the Islamic contracts of mudarabah and musharakah are suitable methods for financing the development of waqf properties. Two forms of mudarabah and four types of musharakah contracts in accordance to the nature of waqf properties are proposed by Muslim jurists and are discussed in the proceeding sections. Issues relating to the ownership of waqf land and also the practicability of contracts under Islamic as well as civil laws are raised. In the final analysis, the co-ownership consequent to the contracts of mudarabah and musharakah is kept divided. This is in line with the separation of land and building under the Islamic law and the civil law. For a more effective application of these contracts, a single asset-based joint venture whereby the land is leased to a wholly owned legal entity of the waqf institution is proposed as a vehicle.

Keywords : *Waqf financing, mudarabah, musharakah, joint venture, divided co-ownership.*

1.0 INTRODUCTION

1.1 What is a Joint-venture?

A Joint-venture under the conventional legal system is different from a partnership or a corporation, as the latter are often the subjects of their special governing legislations. A joint-venture is created by individuals or existing legal entities in order to realize a particular business or project. It may or may not be intended by the founders as an on-going concern for the parties beyond such venture. In the recent Malaysian Court of Appeal's case, *Kwan Chew Holdings Sdn Bhd v Kwong Yik Bank Bhd* [2006] 6 MLJ 544 at 561, Gopal Sri Ram JCA, approved the definition of a joint venture by *Williston on Contracts* (3rd ed. 1959) Volume 2 at pp 555–556; that is: '... A joint venture is an association of persons, natural or corporate, who agree by contract to engage in some common, usually *ad hoc* undertaking for joint profit by combining their respective resources, without however, forming a partnership in the legal sense (of creating that status) or corporation; their agreement also provides for a community of interest among the joint venturers each of whom is both principal and agent as to the others within the scope of the venture over which each venturer exercises some degree of control.' Earlier, on a different matter but relevant to this discussion, the Malaysian Federal Court had held that a joint venture may or may not be viewed

as a partnership under section 4 of the Malaysian Partnership Act, 1961. Thus, in deciding whether or not a partnership exists, the court, 'must consider the intentions of the parties as appearing from the whole facts of the case and the contract they had made' (see the decision of the Federal Court, *Chooi Siew Cheong V Lucky Height Development Sdn Bhd & Anor* [1995] 1 MLJ 513, at 522).

Under the Islamic law, however, joint- ventures come within the general framework of partnership law. It is this context upon which this article is based.

A joint-venture, thus, refers to an agreement for a business venture, upon certain mutually consented terms, whereby they undertake to share losses and profits in the targeted business. It may be founded on either *mudarabah* or *musharkah* principles where all parties venturing into the business share the risks and profits as agreed upon or according to the capital ratio contributed by them.

1.2 The Parties

The parties to a joint-venture contract may be considered joint investors. That is, any party who participates in the development of *waqf* land, not being a third party whose services are contracted or born by one party, is an investor, but then one of them may play the role of a financier such as that of banks, and the others would consist of an owner, a manager, and a builder in the project.

Generally, the partnership can be between the *Majlis*, and a bank or the *Majlis* and a developer, or all the three. The *Majlis*, through its agents or its own incorporated entity (hereafter referred to as the *Majlis*), would play the role of a landowner-cum-investor who needs a long-term financing for the development of the *waqf* land. Other parties may play the role of financiers, and builders. The financiers would comprise individuals, statutory or corporate bodies, banks, financing companies, financial institutions, and developers. Sometimes, the developer besides the building and construction business may be able to finance the project. If this is the case, the developer may act both as financier and builder. The builder who wishes to complete the project in return for a share in the revenue generated by the project would be called a developer. A builder for a fixed fee, however, is termed merely as a builder. He is not an investor. (see figure 1; see also Abdul Hamid Mar Iman Model on Istibdal)

1.3 The Need to Incorporate a Waqf Holdings Corporation

Waqf Holdings Corporation, so far, with the exception of Negeri Sembilan, does not exist in Malaysia, although it is strongly recommended for the development of *waqf* properties, within each component state of the Federation, including the Federal Territories.

This corporation has two primary advantages: Firstly, as a separate legal entity, it can hold land and therefore would be able to liquidate the land within the Shari'ah framework. The liquidization of the *waqf* land is possible through a long lease which can be latter used as a collateral for the purpose of financing. Secondly, it can incorporate its own single project-based subsidiary, especially for joint-ventures, thereby minimizing its liabilities in the event of a failing business venture. This will save costs for the *waqf* property as well as for the investors in the joint-venture undertaking, for they will invest knowing their risks and profits, thus, avoiding expensive court proceedings later.

1.4 The Need for Joint-ventures

The need for a development joint-venture, generally, arises where a landowner lacks expertise and finance, or a development company lacks land, capability to raise development finance, or where a developer seeks to reduce debt and, thus, development risk.

1.5 The Form and Structure of the Transaction

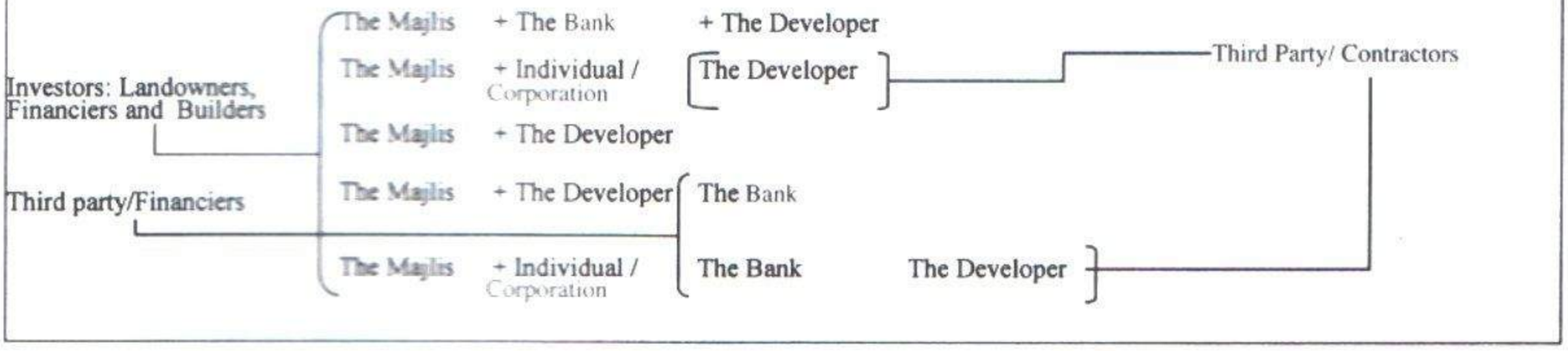
After a feasibility study, the *Majlis* may wish to attract other investors in order to finance the proposed land development; thereafter, the transaction would be based on a *mudarabah* or *musharakah* contract.

1.5.1 The Form

The joint-venture between the *Majlis* and other parties, be it based on *mudarabah* or *musharakah*, can be entered through a formation of a partnership or a limited liability company, as recognized by the Malaysian law. In either way, the investors would have a co-ownership of the project and thus would share losses and profits. Partnership, however, is more risky due to the unlimited liability of the partners, unless the Majlis forms a single project-based limited company, subsidiary to the Waqf Holdings Corporation, and thereby enters into a partnership

with other investors. Where the joint-venture is in the form of a limited liability company, the need for the formation of a new subsidiary company to Waqf Holdings Corporation may not arise. There, the *Majlis* and the investors can form a limited liability company for the purpose of the development of the given *waqf* land, whereby the liability of the members will clearly be defined and be limited to the project alone. Where the *Majlis* seeks partial financing, the equity, in the newly formed limited liability company or the partnership, can be divided according to a certain ratio (e.g. 40/60), depending on the sum of the financial facility provided by the investors to the *Majlis*. Where a hundred percent finance is envisaged, the *Majlis* is advised to lease a piece of land on *hukr/hikr* basis (long term lease), discussed above, to its development arm, the Waqf Hholdings Corporation. The value of the land can be used as a capital for partnership and also be used as a vehicle for avoiding the current legal restraint on the transferability of the *waqf* land.

Table 1: Parties to the contract



1.5.2 The Structure

The joint-venture may be formed between the parties in three manners:

Firstly, it could be between the *Majlis* and a bank where the land would come from the *Majlis* and the financier would bear the development costs. The completion of the project would be contracted to a third party i.e. a builder.

Secondly, the transaction could be between the *Majlis*, a bank and a developer. The *Majlis* would be the landowner, the bank would be the financier and the developer would be the builder. The financer will pay for the costs and the developer would be responsible for the project management. All three will share risks and profits according to an agreed predetermined ratio. In adopting this form the joint-venturers can minimize considerably the costs of the completion of the project as they would be shared between the financier and the developer.

Thirdly, the transaction may be between the *Majlis*, and a developer where the latter would finance and build the project, and the *Majlis* would contribute only the land. Here, the finance and the completion of the project is undertaken by the developer, irrespective of his financial position. The developer who has adequate financial and human resources would be able to complete the project, without seeking a third party, otherwise, he would need to seek for a project funding or contractors elsewhere , thereby, saving the *waqf* land from being used as a loan security. Should the *waqf* land is needed for a loan security, it can be used as a collateral provided that the charge runs along with the life span of a long-term lease (*hukr/hikr*), granted by the *Majlis* to its incorporated development arm, which hereafter, for the purpose of clarity, presumably, is called the *Waqf* Holdings Corporation.

Following the foregoing discussion, this article explains the two methods of *waqf* development financing namely *mudarabah*, and *musharakah*, for materializing a joint-venture between the *Majlis*, a financial Institution and a developer. A special attention is given to the nature of *waqf*; that is the issue of perpetuity of *waqf* and, thus, the permissibility of, or otherwise, of the co-ownership of *waqf* land.

2.0 MUDARABAH

Article 1404 of the *Majelle* has defined *mudarabah* as 'a type of partnership on the condition that the capital is to be found by one party and the labour and work by the other. The owner of the capital is called *rab al-mal* and the worker is *mudarib*'. Simply put, it is 'a business in which a person participates with his money and another with his effort or skill or

both and shall include unit trust and mutual funds by whatever name called (Zaidi, Nawazish Ali, 1986, p. 11). This definition is the upgrade of the typical form of *mudarabah* which needs a brief mention.

The founding jurists of Islamic law have mentioned two types of *mudarbah*. A typical form of *mudarabah* (hereafter called cash capital *mudarabah*) refers to a partnership in which the investor (*rab al-mal*) and the fund manager (*mudarib/amil*) agree that the former is to provide cash-capital while the latter is to manage it (through investment and trading) and the profit would be shared according to a predetermined ratio. Once the capital is returned, the partnership is dissolved.

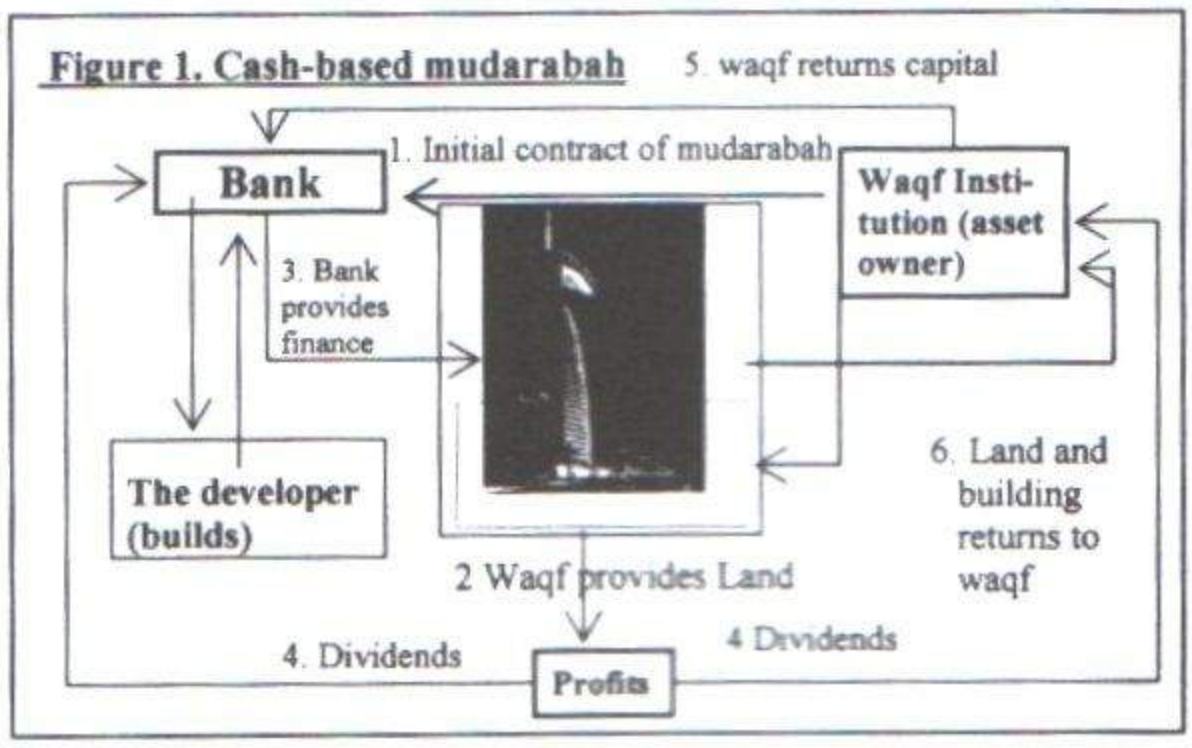
The Shafi'i and Maliki jurists allowed *mudarabah* only in trading, provided that the investor does not interfere in the management (Al-Sharbini, (n.d.) vol. 2, p. 310). The second form of *mudarabah* is mentioned by Imam Ibn Hanbal. In addition to the first type of *mudarabah*, Imam Ibn Hanbal has also allowed *mudarabah* between the owner of a fishing net and a fisherman, where the catch would be shared between them (Ibn Qudamah, *al-Mughni*, vol 14; Al-Zarqa, 1994, p. 197). This means that, here, one provides non-cash capital and the other provides labour or productive effort. This is similar to the muzara'ah form of transactions due to the similarity of capital thereof, namely asset plus labour as explained by Ibn Qudamah and will be discussed in due course.

In the context of *waqf*, both of the aforementioned models are proposed by Muslim jurists. They are discussed below.

2.1 Cash capital-based mudarabah

According to Monzer Kahf (2000, p. 258-59) this mode of *mudarabah* can be used when the *Nazir*, in this case the *Majlis*, assumes the role of an entrepreneur. He can receive liquid funds from the financing institution to construct a building on *waqf* land. The management will exclusively be in the hands of the *Nazir* and the rate of profit-sharing will be set in a way that compensates the *waqf* institution (*nazir*) for the effort of its management as well as the use of its land. The *waqf* institution does not consider the land as part of the capital . (See figure 2)

Figure 1. Cash-based mudarabah

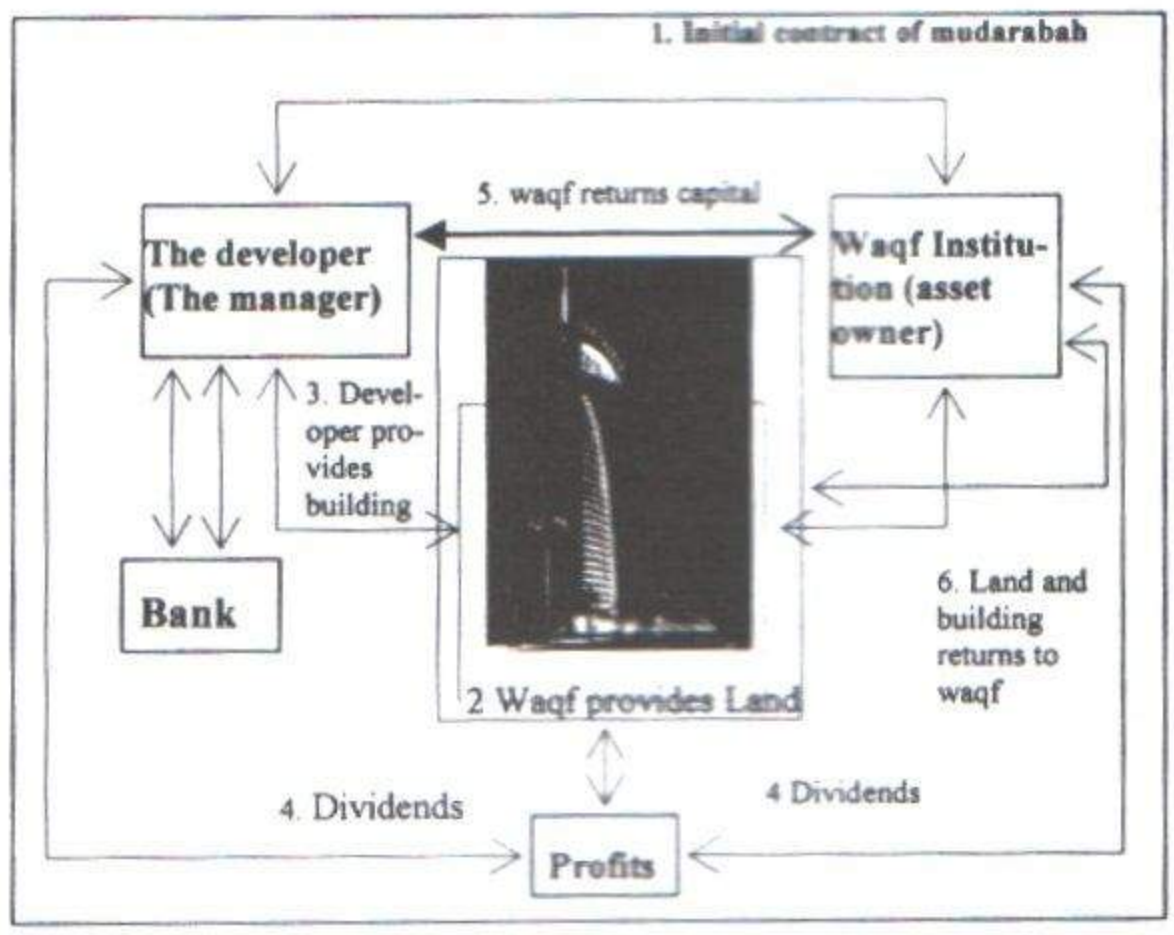


2.2 Non-cash capital-based mudarabah

Anas Al-Zarqa (1994, pp. 196-7) has proposed that a *waqf* institution can use *mudarabah* in its land development projects. The institution can let a developer to construct a building on the said *waqf* land, and after completion, the developer can rent the building to a third party. The institution and the developer can then share the rental income. The *waqf* institution (e.g. the *Majlis*) has to divide its revenue from the building into two: one is to increase its share in the building and the other is to distribute it among its beneficiaries. (see figure 3)

The results of the above two types of *mudarabah*, as highlighted in Table 2, is contrastable. The institution of *waqf* takes the role of entrepreneur under the typical form and the role of the investor in the other form.

2.3 The effect of the divergence



The result of the difference of the juristic views on the nature of *mudarabah* is not necessarily negative; it has offered options for different cases. The trustees or the institution of the *waqf* properties would be free to choose either of the two types of the transactions,

according to the surrounding circumstances. For example, where the *Majlis* has no cash or has no skilled managers and employees, it can choose to use the *muzara'ah* based mode of transaction, for it is the best suitable method for financing the development of *waqf* land, as all that *waqf* institution has to contribute is the land; other costs and services would come from the investor-cum-manager. This is true in the case of Malaysian *waqf* institutions that, predominantly, are short of cash and expertise and have several idle and underdeveloped *waqf* assets. In case, where the institution of *waqf* has some cash and expertise it can employ the *mudarabah* concept for its transactions with the investors. This would be beneficial to the *waqf* institution as it can earn both from its investment as well as its management services.

2.4 Practicality of the transactions

The application of conventional and *muzara'ah*-based *mudarabah*, both have *fiqhi* as well as practical difficulties that need to be explained.

2.4.1 The Difficulties from *Shariah* Perspective

In the context of Islamic law two issues need addressing namely the *fiqhi* framework of the contracts and the ownership of the co-partners in the capital.

a. From the perspective of *fiqh*, Al-Zarqa's (1994, p. 197) view is supported only by the opinion of Imam Ahmad Ibn Hanbal as in the case of fisherman and the owner of net (Ibn Qudamah). Other jurists apparently do not agree. The Hanafi, Shafi'i and Maliki jurists would not allow it, because *mudarabah*, in their opinion, is used only in commercial transactions (Al-Sarakhsi, vol. 22, p. 26; Al-Sharbini, vol. 2, p. 310). Since the *waqf* institution provides asset while the developer provides cash and services, it hardly fits into the concept of conventional *mudarabah*. Additionally, the Hanafi jurist, Al-Sarakhsi (vol. 22 pp. 18, 26, 35), disapproved this type of transaction because he considered this mode of *mudarabah* as a bad contract (*mudarabah fasidah*) (p. 26). Thus,

Table 2. The Incidents of *mudarabah*-based joint venture

	Non-cash capital-based	Cash Capital-based
The structure :	Build, Operate, Share and Transfer	Build Operate, Share and Acquire
Parties:	Waqf Holding Corporation (WHC) and ABC Developer	Waqf Holding Corporation (WHC) and X Bank
Builder :	ABC	ABC Developer (contracted out)
Property Manager :	ABC	Waqf Holdings Corporation
Nature of Dealing :	Capable of a Single Asset Based Joint Venture: WHC 40% and ABC 60%	Capable of a Single Asset Based Joint Venture: WHC 40% and ABC 60%
Land or Development Site Ownership :	Waqf; leased to WHC for 99 years	Waqf; leased to WHC for 99 years
Building Ownership :	WHC & ABC	WHC & X Bank
Third Party Leasing Contract :	Yes. YZ for 10 years revised after 3 years	Yes. YZ for 10 year revised after 3 years
Option to purchase investor's rights:	Yes. But as agreed, maximum after 30 years	Yes. But as agreed, maximum after 30 years

unlike the Hanbalis, he thought that the catch belongs to the fisherman only; the owner of the net has no share in it. The owner of the net is entitled only to the rent. He also gives more examples of bad *mudarabah* transactions two of which need to be highlighted: (a) a land owner allows another to develop his barren land on the condition that the building should be shared between them, or (b) he allows the developer to construct a housing estate on a *waqf* land that can be rented out, and the revenue from the rental would be shared among them. None of these two is an enforceable form of *mudarabah* transaction. In the first case, according to al-Sarakhsi, the

The reasoning given by Al-Sarakhsi seems confusing, however, other jurists such as Ibn Nujaim (*Bahr Raiq*, kitab al-Mudarabah) Ali Haider (*Durar al-Hukkam*, vol. 3, p. 455) define *mudarabah* as a partnership in profits, provided capital is provided by one and labour by the other. According to these jurists, the capital must be cash and one can ifer that their concept is mudarabah is similar to that of Shafi'i and Maliki jurists. Thus any form of *mudarabah*, where the capital is not cash, is not enforceable and, henceforth, the profits made under such a transaction belongs to the capital provider while the other parties is entitled to his service charges.

Nevertheless, the above critique can be answered. Ibn Qudamah, a Hanbali jurist, has considered *mudarabah* similar to *muzara'ah*, though the latter is a form of an agricultural contract. The principle of *muzara'ah* is accepted by all jurists. In both the capital of partnership includes assets plus cash and labour. Accepting the similarity between the two, analogical reasoning (qiyas) permits the practice of a *mudarabah* where cash is not the capital of the partnership. The difference between Hanbali, Hanafi, Shafie and Maliki jurists, therefore, is related to the form of the transaction, but not its substance. As profit is not necessarily made through trade, innovative modes of businesses should not be prevented in order to conform to an old form of transaction that is purely rational at the core.

The proposal of Monzer Kahf (2000) seems to be modelled based on the view of Ibn Qudamah as he called this transaction "output sharing mode". His model is contended by the Hanafi, Shafie and Maliki ulama, since a *waqf* institution does not carry out trading activity. Yet again the same critique can be answered by Ibn Qudamah as well as the aforementioned discussion concerning the view of Al-Zarqa.

Additionally, the Hanafi, Maliki and Shafi'i jurists envisage the *mudarabah* in cash capital plus labour; and since cash cannot generate revenue unless it is invested in commercial activities, they make it a condition that the *mudarabah* be used for trade and commerce. Goods that are used to form the capital of the partnership are not encouraged because their quantity and quality may not be intact when the capital manager returns the capital. Imam Ibn Hanbal, however, had a broad vision of the *mudarabah* contract. Firstly, he did not see cash to be the only form of capital provided by the *rab al-mal* (property owner). As the term *rab al-mal* implies, the word *mal* is broader than cash. Thus, to him not only cash but also non-cash property (e.g. the fishing net) could be the capital for a *mudarabah* partnership. This will include land and its fixtures as well as other moveable properties. This opinion of the Hanbali school may be modified, that the perishable goods can be converted to a cash value to eliminate any doubts. Secondly, Imam Ibn Hanbal identified the transaction in which one provides capital and other provides services. This is the reason for Ibn Qudamah to compare it with the *muzara'ah* contract. Likewise, al-Sarakhsi has looked at the element of services and therefore he called it an example of *ijarah al-fasidah* (deficient contract). In simple words, the Hanafi, Shafie and Maliki description of *mudarabah* applies to fund management activities as practiced today where the manager is free to invest the funds as he deems the investment to be profitable, while the Hanbali definition of *mudarabah* is general, that applies not only to fund management alone but also to joint-venture investments, whereby the profits are realized from the real property lease payments according to a predetermined ratio. Al-Zarqa may have captured this perception and proposed to apply it to the development of *waqf* properties. After all, the two concepts relating to *mudarabah* are no more than a divergence of juristic views. This being so, the disapproval of the Hanafis, Shafi'ies and Malikis of the foregoing type of *mudarabah* should not prevent the institutions of *waqf* to choose any suitable models for development financing. It is in the interest of the *waqf* and its beneficiaries and, thus, should be permitted.

b. Another *fiqhi* issue relating to both models (i.e. cash and non-cash capital *mudarabah*), raised by Al-Zarqa, is the ownership of *waqf* land, which he has answered it by saying that the building belongs to the developer. This is true as the majority of jurists, including Shafi'ies, imply that land may not include building if it is expressly stipulated in the *mudarabah* contract (see Al-Shirazi, 1999, vol. 1, p. 386; Al-Kasani, 2000, vol. 6, p. 273).

This, however, may work to the disadvantage of the investor, for, in the case of project failure, the developer-cum-investor may want to sell the land in order to compensate for his losses. Otherwise, the transaction may look risky to him, and probably would make him lose interest in the project. Alternatively, one may think of the risk that can be avoided if the land is transferred to a *waqf* holding corporation, who then enters into a joint-venture with the financier. At the same time, the would-be-constructed building is rented to another party with whom a lease agreement is signed. Only then, they start construction of the building. A guarantee provided by the tenant and the ability of the developer to sublease the land or the building running along with the term of master lease granted to the *waqf* holding corporation, would avert the risk.

2.4.2 Difficulties from the Practical Perspective

Al-Zarqa's and Kahf's proposals are suitable for a

single-asset joint-venture between an investor-cum-developer and a land owner in the property market. Since rental receivables are divided among the *waqf* and the financier. Mahmud Ahmad Al-Mahdi (1993, p. 82.) observes that this mode can be applied to commercial projects in big cities, as only then the *waqf* institution can have sufficient revenue from the development to pay for the costs of the development. Another down side of this proposal is that investors may need a guarantee for not being expelled from the partnership. This fear is more related to the view of al-Zarqa who thought that the *waqf* institution should divide the revenue into two, a portion of which should be used to increase *waqf*'s share in the project.

While it is agreed in principle with al-Zarqa that the revenue should be divided into two: one for the beneficiaries and the other for increasing the share of the *waqf*, the purchase of the investor's rights, however, unless agreed otherwise, should not be attempted. The amount taken from the revenue should be invested and be used for the purchase of the investor's rights in the project at the end of an agreed term between the investor and the *Majlis*. This means there must be a minimum period of partnership, after which the *waqf* institution can be allowed to return the capital to the investor, thus, enabling the *waqf* institution to own the land and the building free from any encumbrances.

3.0 PARTNERSHIP (MUSHARAKAH)

Musharkah is of two types: co-ownership (*shirkah al-milk*) and contractual (*shirkah al-uqud*). Both can be the basis of a joint-venture, and both are discussed respectively.

Shirkah al-milk or co-ownership means a co-ownership that comes into existence when two or more persons happen to get a joint-ownership of some asset without having entered into a formal partnership agreement (Al-Suwaidi, 1994, p.78).

Shirkah al-'uqud or contractual partnership is defined by *Majallah al-Ahkam al-Adliyah* as an agreement for association, on the condition that the capital and its benefit be common between two or more persons (the *Majelle* p 217). In the banking context, it means 'a mode of bank financing based on the principle of profit and loss sharing in which parties to the contract participate with their money or efforts or skills or a combination of them as may be provided for in the *musharaka* investment agreement'. (Zaidi, as quoted in Al-Suwaidi, *Finance of International Trade in Gulf*, 1994). It is thus a contractual relationship between two or more persons who have willingly entered into a partnership agreement to contribute property, skills and/or efforts for a joint-investment on the basis of profit and risk sharing. A contractual *musharakah* can be divided further into a full-pledged partnership and a diminishing partnership. The latter refers to a partnership whereby one of the partners can buy the shares of the other over time, so that at the end he can claim full ownership of the trade or project.

Musharakah, as a tool of financing for the development of *waqf* properties, fits into the partnership concept. Various forms of this contract are discussed by modern jurists for the purpose of its application to the development of *waqf* properties. These modes are discussed below:

3.1 The Islamic Development Bank's Models

Al-Mahdi (1993) reports that the first model proposed by the working committee formed by the Islamic Development Bank (IDB) in the 80s was that the institutions of *waqf* and bank should join together so that both could contribute to the said development. Later, the *waqf* institution should try to purchase the property from the bank.

The contribution of the *waqf* institution would come from (a) the price of the land, or (b) the land and a minimum contribution to other costs of the building. The bank would provide funds for the cost of the project.

Where the *waqf* institutions provides the land only the revenue from the project should be divided into two: for the payment of the costs provided by the bank, and distribution of profit among the bank and the *waqf* institution. Where the *waqf* institution provides land and the cash, the profit should be apportioned into two: a payment to the *waqf* as rental for its land (rental as an operation cost) and among *waqf* and bank according to their equity in the project. The IDB has implemented this instrument in several multi million development projects. In one of the proposed projects, the joint-venture was limited to a period of 13 years (Al-Mahdi, 1993, pp. 77-79).

Where the contribution of the *waqf* institution to the joint-venture comes from the price of *waqf* land, the contract is based on a financial *musharakah*. It is possible that the bank will accept it. In case where the

waqf institution provides land and a minimum amount to the building costs, thus, only the *waqf* institution owns the land, it resembles a hybrid joint-venture based on two types of *shirkah*: a co-ownership (*shirkah al-milk*) and a contractual partnership (*shirkah al-uqud*). It is pertinent to note that the apportionment of the net revenue to pay for the purchase of bank's shares may not be acceptable to conventional Islamic banks. Hence, the aforementioned model may be a special case of a transaction acceptable only to the Islamic Development Bank. (See Table 2)

3.2 Long Term Musharakah Model

As an alternative to the IDB's models, Nazih Hamad (1993, p. 185-86) has proposed that the institution of *waqf* offers its land for a particular development project while the investing developer carries out the construction. Thereafter, the developer owns the building while the *waqf* institution owns the land. The whole building would be leased or rented out, once completed. The revenue from the rental or leasing would be distributed among the *waqf* institution and the developer, according to the value of the land and the building. He justifies this based on the fatwa of some Hanafi scholars concerning *kadak* and *kerdar*, both a type of proprietary rights that would allow the developer-cum-investor of a *waqf* land to occupy it for an unlimited time period, as long as he is not paid for his expenses in return for a fair annual rental. Similar ruling is given about the validity of a unlimited long-term lease called *hikr*. Nazih Hamad uses the analogy of *musharakah* on this fatwa and

Major Comparables of the Joint-Venture

	Mamud Ahmad Mahdi (IDB)	**Al-Zarqa**	**Nazih Hamad**	**Munzer Kahf**
Status:	Divided Co-ownership Diminishing Partnership (IDB Model)	Diminishing **Undivided** Co-ownership Model	Long-term or Diminishing Contractual Partnership (Divided Co-ownership Model)	Diminishing Joint-ownership Partnership (Hybrid Model)
Structure	Build, Operate, Share and Transfer	Build, Operate, Share and Transfer	Build, Operate, Share and Transfer	Build, Operate, Share and Transfer
Financier:	ABC Finance and waqf	ABC Finance	ABC Developer	ABC Finance
Builder :	No restriction	Third party	ABC Developer	Third party
Operation Management:	_	Preferably Contracted	Third party (leasee)	Not the waqf institution
The Nature of Dealing:	Joint venture: waqf provides land or land and cash, ABC costs	Joint venture: waqf provides land, and ABC costs of construction of building	Joint venture: Waqf provides land and ABC construction of building + costs	Joint venture: Waqf provides land and ABC costs of construction of the building
Site Ownership (land only):	Not clear (waqf leases land)	Waqf and ABC finance	waqf	waqf
Building ownership	Waqf and ABC Finance	Waqf and ABC finance	ABC Developer	The Financier
Leasing contract with a third party:	Not clear (may be open to all)	Yes.	Yes.	Yes.
Repurchase option	Yes. (IDB practice: 13 years)	Yes	Yes.	Yes.

Note: it is suggested
a. Repurchase option can be based on the mutual consent of the parties, not exceeding 30 years.
b. Lease should be for 10 year minimum, to be revisable according to the market practice.

therefore allows unlimited long-term *musharaka* where the land belongs to the *waqf* institution as in *kadak* and *hikr* and, likewise, the building belongs to the developer.

Nazih Hamad is mindful of the peril of a unlimited long-term *musharakah* (extending beyond 90 years), as the investor-developer may not be interested in such a transaction. Therefore, he offers a sufficiently long time horizon for investment (e.g. up to 35 years) that gives option to the investor-developer to sell his shares in the project over a specific period of time after the recovery of costs plus a percentage of profit. For this, the *waqf* institution has to divide its dividends into two: a portion used for the purchase of the equity shares from the investor, and the second portion be used for the interest of the beneficiaries. (See Table 2)

3.3 Undivided Co-ownership Model

Al-Zarqa (1994, p. 196) thought the *waqf* institution would offer a land to the developer to construct a building on his own expenses and accordingly they would be the co-owners of the building and the land. The price of the land and the building should be determined at the time of contract. The agreement should also stipulate that the building would be rented to a third party for a predetermined rental level, subject to a revision. The rental income should be shared between the partners based on the same agreement. (See Table 2)

3.4 Joint-Ownership Model

Kahf (2000, p. 261) justified the application of *shirkah* on the basis of a joint-ownership (*shirkah al-milk*), as defined earlier. It is not strictly a joint-ownership, rather a hybrid of contractual *musharaka* and joint-ownership, the latter being consequent to the former through an agreement. Under this scheme, the building can be built on *waqf* land by a developer at his own costs, or that the investor-financier may release funds to the trustee (*nazir*) to construct the building. In either case, the developer (be it the investor or the *waqf* institution) would be the agent for the other party; that is the financier-cum-developer will deal on behalf of the *waqf* institution in the land or the trustee would deal in the building on behalf of the financier. In both cases, the building should not be the property of the *waqf* institution, but must belong to the investor-financier or investor-developer. The income from the development should be divided on the value of land, cash, and the management fees (fee for management are based on the principles of *ijarah* or *mudarabah*). According to this principle, the maintenance fees would be born by the investor as land is not exposed to depreciation. (see Table 2)

3.5 Contentious issues of *musharakah*

Two issues, ownership of the *waqf* land and the right to repurchase equity shares of the financier, in the proposed methods of *musharakah* for the development of *waqf* properties need to be addressed.

3.5.1 Ownership of the assets

The first principle in *musharakah* is the co-ownership of the partnership assets between partners. Anas Al-Zarqa (1994, pp. 198-99), agrees to a joint-ownership in the *waqf* land and building, as he admits that through the agreement the developer becomes the co-owner of the *waqf* land. He justifies this by the application of *istibdal*. He thinks that the share in the *waqf* land is substituted by the share in the building and since both are immovable properties the substitution is justified. This, apparently, contradicts the nature of *waqf*, as based on the principle of perpetuity of the *waqf* property, a transfer of ownership in such a property is not approved by Muslim jurists. Nevertheless, the justification offered by Al-Zarqa is based on the opinion of jurists too. It is permitted when *istibdal* is needed or is in the interest of the *waqf* (Nazih Hamad, 1993, p. 182). In the case before hand, however, *istibdal* may not be in the interest of *waqf*, because the building is affixed to the land and, therefore, it follows the land and vice-versa. In bad times, it may expose the *waqf* institution to selling the whole building along with the land, according to the prevailing law; thereby it will also result in the loss of *waqf* land. It is, thus, not advisable to allow for a co-ownership in *waqf* property.

Nazih Hamad (1993), Al-Amin (1994) and Kahf (2000) do not allow a joint-ownership in *waqf* land and, hence, have proposed different models.

3.5.2 Repurchase of the equity

Apart from *fiqhi* concerns, Al-Mahdi (1993, pp. 81-82) thought that, considering the weak financial capability of *waqf* institutions, their financial contribution to the capital of the joint-venture would be minimum; further, the rental income of the *waqf* land may not be high too. Thus, the revenue from

the building may not enable the *waqf* institution to repurchase the share of the bank in the project according to a pre-agreed period of time.

This is an element of risk in the project and for this reason, the financing institution may not be willing to fund the project as proposed by the jurists.

4.0 LEGAL IMPEDIMENTS

At the moment, all *waqf* lands are governed by two rules, appertaining perpetuity of *waqf* property, and that of land and its fixtures.

Firstly, the current Malaysian legal system recognizes the non-transferability of *waqf* properties (see Administration of Islamic Law (Federal Territories) Act, 1999, section 90 and equivalent in the various State Enactments, and the case law).

Secondly, the present law, for purposes of sale and purchase and charge, unless otherwise agreed or sanctioned by custom, considers all buildings, permanently attached to land, part of the land and therefore cannot be separated (see Teo and Khaw, 1995, p. 93-5).

By virtue of section 5 of the National Land Code 1965, land includes '(a) the surface of the earth and all substance forming that surface; (d) all things attached to the earth or permanently fastened to any thing attached to the earth, whether on or below the surface;'. Paragraph (d) of section 5 is read together with the principle of common law that whether an article is a fixture depends on the degree of its physical annexation and the object of its annexation to the land. The degree of annexation is illustrated by the common law, i.e. a slight annexation, but not by its own weight, gives raise to a rebuttable presumption that it is part of land. A *prima facie* finding of a slight annexation will be strengthened or rebutted by the purpose of the annexation. If the purpose of the annexation was better enjoyment of the land or building as a whole so as to improve its usefulness and value of the building, it will be considered a fixture, otherwise, if the object of the annexation is merely for the more complete enjoyment and use of the item as a chattel itself, then the presumption established under the first test that it is a fixture would be rebutted and the item will remain as a chattel. Simply put, if the intention is to annex the item permanently so that it can improve the use and value of the land, the item is a fixture, but if the intention is to affix it temporarily then the item remains a chattel.

It seems, thus, uncertain whether the courts in Malaysia will recognize the separation between building and land as accorded by the Islamic Law in the aforementioned proposed models unless otherwise is found.

5.0 POSSIBLE SOLUTIONS

In order to answer the concerns raised in the early sections, i.e. the capability of the *waqf* institution to repurchase equity in the building, the non-transferability of the *waqf* property, under Islamic law and Malaysian National Code, the following suggestions are made.

Firstly, In order to repurchase the said equity, it is proposed that such a purchase may be possible if the *waqf* institution choose to use gearing ratios (e.g. increasing equity ratio, and decreasing barrowing ratio through partial self-financing mechanism like donations, *istibdal*, *qard hasan* etc).

To avoid the constraints under the Islamic Law, in Malaysia, the *musharakah* transaction needs to be carried out by a *Waqf* Holdings Corporation, which has the power to hold land, to whom the *waqf* land should be leased on a long-term basis. The land then can be transferred to another party subject to the term of the master lease.

Under the Malaysian land law, Teo and Khaw (1995, p. 93) have queried whether land under section 5 of the National Land Code will also include legal and equitable interests. The answer could have been found in the Singaporean case of *Khew Ah Bah v Hong Ah Mye* [1971] 2 MLJ 86 at the time, where Choor Singh J. refused to hear an argument in the context of the law of fixtures, about a house built with the permission from the title holder, in return for a sum as rental payable to the title holder of a land. He held that it is based on the principle of equity. The judge followed Lord Kingsdown in the case of *Ramsden v Dyson* LR 1 HL 125, who had held that "under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation created or encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord and without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation. This was the principle of the

decision in *Gregory* v. *Mighell*, and, as I conceive, is open to no doubt ..."

However, that was a Singaporean case. Nevertheless, it was recently referred to with approval by the Malaysian court of Appeal.

In *Majlis Perbandaran Pulau Pinang v Syed Ahmed a/l MM Gouse Mohamed* [2007] 1 MLJ 42, at p 44, Gopal Sri Ram, JCA, observed that

"[t]he type of ownership claim made by the respondent in the present case is not a stranger to our law. If you look at the early cases of ejectment decided by our courts you will find such examples. Land is owned by X and is rented out to Y with permission to construct a building (usually a house) on it. Occupation is permitted so long as the land rent is paid. So you have a situation where the land belongs to one person and the building belongs to another. The law places this type of relationship in the category of a licence coupled with an equity. The landowner may give notice to terminate the tenancy of the land. But he cannot evict the tenant without satisfying the latter's equity. This is usually achieved by the payment of reasonable compensation (see *Khew Ah Bah v Hong Ah Mye* [1971] 2 MLJ 86; *Pembangunan Darjat Sdn Bhd v Wong Jie Tshung & Ors* [2000] 2 MLJ 212)."

The explanation given in the foregoing Malaysian case is almost the reflection of the development of *waqf* land under the principle of *mirsad* in the Islamic Law, and the expression of the contemporary Muslim jurists mentioned above. It is thus presumed that where the *waqf* institution enters into a development project for *waqf* property under the foregoing principle of *musharaka*, or *mudarabah*, under the same terms as mentioned thereunder, the court will have no difficulty to apply the rule in *Majlis Perbandaran Pulau Pinang v Syed Ahmed a/l MM Gouse Mohamed* [2007] 1 MLJ 42. Thus, this rule will complete the omission under section 5 of the National Code, 1965.

6.0 CONCLUSION

A joint-venture, whether in the form of a partnership or a limited liability company or otherwise, requires an investor to have a co-ownership of a project. Both the *mudarabah* and *musharakah* modes of financing are suitable for the development of the *waqf* properties. Even though the ownership is divided and thus known, this will not affect the agreement to have dividends being distributed according to the contribution of each party to the project. Separation of the ownership of the land and buildings is recognized under the Islamic Law, and it is also possible under the Malaysian civil law. To give a further certainty to the security of the title of the *waqf*, it is proposed that a *Waqf* Holdings Corporation, which has the power to hold land, should be formed, to whom the *waqf* land can be leased, thereafter, for a long period of time. (Note: after the writing of this article *Yayasan Waqf Malaysia* was formed in 2007. The writer is yet to read its constitution). This corporation then can enter into a joint-venture with the investor advisably on a single-asset based project basis, and forming a limited liability company for the purpose. In the event of the project suffering losses, the consortium can transfer the land to its creditors along with the building or the building alone subject to the terms of the master lease.

The above discussion is limited mainly to the theoretical aspects of joint-ventures. A brief discussion of practical aspect of it is mentioned in passing; even that is in regard to Islamic Development Bank. A research into the practical aspect of these transactions in Malaysia, especially in the light of new developments of the law as well testing the foregoing proposals, is highly desirable.

ACKNOWLEDGEMENT

This article is a revised version of a portion of a paper presented in the Nation Convention of Waqf, 2006 which was itself an improved account of the research project paper "An Ideal Financial Mechanism for the Development of Waqf Properties in Malaysia", 2005, undertaken by this writer, Assoc. Prof. Dr. Abdul Hamid Mar Iman, and Assoc. Prof. Dr. Ismail Omar.

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