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ISLAMIC *MUDARABAH*: BACK TO THE FUTURE

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Finance sector businesses across the Channel Islands are turning increasingly to new markets within the Islamic world whose numerology and legal concepts have played a major role over the centuries in shaping the financial heritage of the West. This article outlines the grounds for recognising the limited partnership concept as a reception into Europe from the Islamic world; it traces an approach to synthesising the Jersey limited partnership with its Islamic counterpart; and raises the possibility of drawing on Shari'a law principles to aid interpretation of local limited partnership law requirements.

1 Commercial and financial activity is dependent on the use of figures and legal relationships to support entrepreneurial activity. In both these areas, the financial heritage of the West has been shaped by Islamic numerology and legal concepts.[1]

2 This article traces an outline of the likely origins of the limited partnership concept as a reception into European laws from the Islamic world in the medieval period, and the eventual arrival of the concept into Guernsey during the nineteenth century and finally into Jersey within the last two decades.[2] It also argues that a reflection on Islamic

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[1] Leonardo of Pisa (c1170–c1250), alias Fibonacci, was an Italian mathematician who is best known for spreading the Hindu-Arabic numeral system in Europe, principally through publication in 1202 of his book entitled *Liber Abaci* (Book of Calculation).

[2] The writer of this article acknowledges the analysis and critiques of the authors of the following works and articles consulted in the preparation of this article: Chandhry, *Fundamentals of Islamic Economic System* (1999), Burham Education and Welfare Trust, Lahore; Siddiqi, "Some Economic Aspects of Mudarabah", 1 *Review of Islamic Economics* 2 (1991): 21–33; Ali & Kamal, "Standardising Islamic Financing: Possibility or Pipe Dream?", 1 *Business Law International* 1: 19–26; Harris, "The Institutional Dynamics of Early Modern Eurasian Trade: The Commenda and the Corporation" (3 November 2008), available at http://ssrn.com/abstract=1294095; Sachs

foundations of the concept may assist in interpreting modern day requirements for the establishment of a valid limited partnership in Jersey, and provides a perspective on the limited and unlimited liability dichotomy that lies at the heart of the commandite notion of limited partnerships but which is not treated with such prominence under the parallel rules of Shari'a law.

3 The vital role that credit plays as a lubricant of commercial activity is well understood in these straitened economic times. Medieval Catholic Europe also faced the issue of how to fuel economic growth by the provision of credit to merchants and traders during an era when both canon law and the Scriptures outlawed all loans at interest. Inevitably, financing methods developed to circumvent the Church's prohibition on usury.

4 One of the methods which emerged in northern Italy around the eleventh century to finance maritime trade initially was that of the *commenda* (from the Latin "*commendare*" meaning to entrust or commit to the care of). This simulated a loan financing transaction but wrapped it into a risk sharing commercial venture which converted the loan into an equity participation with the added benefit of limited liability for the capital provider. This marked a major advance on earlier forms of business association in Europe where the liability of participants was unlimited in respect of the debts and obligations contracted for the association.

5 The *commenda* was a legal relation defined by contract and based on a sharing of profit. In its basic form it involved two parties, a capital provider (called the commendator in Italy) and a travelling party (the tractor) who managed the capital and used it in trading activity, typically a single commercial voyage. The travelling party or manager would buy goods locally with the capital and ship them to overseas markets for resale, or buy goods abroad and import them for local resale, or combine the two transactions as part of a single venture. At the end of the voyage, the manager would return to the capital provider his invested capital as well as, typically, three-quarters of the profits of the venture and would keep one quarter of the profits as remuneration for his labour and effort. If there were no profit there would be no pay for the manager; losses would be borne by the capital provider alone but the capital provider would not be liable beyond his capital contribution for any debts to third parties.

"Hidden Interest: The Prohibition of Usury and its Evasion in the Commercial Revolution" (2000), available at http://www.stevesachs.com/papers/paper_rsf. html.

6 The *commenda* relationship between capital provider and the travelling party or manager and the interface with creditors and trading counterparties was unique in medieval Italy and exhibited a complex and multi-faceted legal relationship.

7 The manager was clearly more than a mere hired employee acting for the capital provider. The manager invested his labour and expertise in the venture which could, in the context of maritime trade, expose him to the risk of personal injury. Reflecting the dependency by the capital provider on the knowledge and skills of the manager and the manager's degree of engagement in the venture, the manager was to be remunerated not on a fixed salary basis but through receipt of a profit share.

8 The agency mandate conferred by the capital provider on the manager was typically much more sophisticated than an execution-only authority to effect a specific set of instructions. The *commenda* mandate would typically authorise the manager to trade with the invested capital for a specified duration, with a full management discretion and a view to maximising the profit return. In place of a simple agency mandate the arrangement gave rise to a *de facto* managing partner role in respect of the business transacted for account of the *commenda*.

9 While the capital provider had advanced capital to finance the *commenda*, this did not constitute a loan relationship and the manager did not assume a personal obligation to repay the capital provider. The manager had no responsibility for returning any part of the capital which might be lost as a result of the commercial risks of the enterprise. But at the same time the manager did assume risk in terms of the potential for no return on the labour and effort he expended if the venture proved unprofitable.

10 However, the manager would be liable towards the capital provider if he breached the mandate conferred on him or failed to act in accordance with the *lex mercatoria*, and caused loss as a consequence to the venture.

11 By contrast the manager would be solely responsible towards third parties in connection with the activities of the *commenda*. Such third parties would typically be contractual creditors who had undertaken dealings with the manager. Third parties would generally not know of the identity of the capital provider, who would in many cases be remote and resident in a different country, and could not therefore be easily sued. This practical explanation for the limited liability of the capital provider also had a juristic explanation. The manager was not authorised to act for the capital provider generally, but only in respect of the specific arrangement comprised within the *commenda* contract

and therefore it was only the capital dedicated to the *commenda*, constituting a separate and distinct pool of assets, which should be available *vis-à-vis* the capital provider to discharge the debts incurred for the *commenda*.

12 In summary, the *commenda* coupled the financing of a venture with the employment of managing agents invested with wide management powers; it gave rise to a separate pool of assets to finance and collateralise the business undertaking; it involved the allocation of risk and the division of profits between the participants.

13 But how did the *commenda* emerge as a recognised form for merchant adventurer activity in Italy? Historical studies indicate little evidence for the existence of the *commenda* before the second crusade, around the middle of the twelfth century. Historians of Islamic law, however, are able to identify Islamic forms of contract which bear a striking resemblance to *commenda* and which in their origins pre-date the Islamic period which commenced about 570 CE with the birth of the Holy Prophet.

14 Islamic legal texts refer to an Islamic form of contract described using various terms interchangeably – *mudarabah*, *quirad*, *muquarada*. In this article the term *mudarabah* will be used. *Mudarabah* originated in caravan and long distance trade in and around the Arabian peninsula. It is to this day one of the most widely used Islamic forms of business organisation for both trading and investment business activities.

15 *Mudarabah* is said to be a “partnership in profit”. It is a form of business organisation in which one person gives capital to another person for agreed-upon business purposes, and both of them share in the profits in mutually-agreed proportions.

16 The party supplying the capital is called the “*rab al-maal*” and the manager of the capital is called the “*mudarib*”. In the event that the venture incurs loss, the entire loss is borne by the capital provider, who assumes full responsibility and makes no claim on the *mudarib* in respect of the non-return of any part of the invested capital, although the *mudarib* also suffers because he does not receive any share of profit as a reward for his services.

17 “*Mudarabah*” is an Iraqi term which is derived from the Arabic word “*darb*”. *Darb* means to walk or travel over the land; and *mudarabah* are so called because in ancient times the “*darb*” or “*mudarib*” had to travel into distant lands to undertake commercial ventures in order to generate profits. Some Islamic scholars categorise *mudarabah* as a partnership contract because both the *mudarib* and the capital provider participate in sharing profits, but others categorise it

as an agency contract between the capital provider as principal and the *mudarib* as agent, because the entire loss is borne by the principal.

18 This form of business relationship was also known in Medina as "*muqaradah*" which is derived from the Arabic word "*quard*". *Quard* means a loan and signifies the surrender of rights over capital by the owner to the user. At the same time, *muquaradah* is not a true loan relationship as the *mudarib* is not under any personal obligation to pay back the capital if the venture is not successful through no fault on the part of the *mudarib*.

19 The summary descriptions in the preceding paragraphs disclose a strong similarity between the *mudarabah* concept and the *commenda*. The fact that *mudarabah* pre-dates *commenda* suggests that the *commenda* may have been copied or absorbed into Italian commercial practices in the late eleventh and twelfth centuries through trading contact by Italian merchants with the Islamic world in the Eastern Mediterranean and the ports of North Africa.[3]

20 Once established in Italy, the *commenda* concept migrated northwards through Europe evolving into the commandite partnership concept. In Germany this concept is known as Kommanditgessellschaften.[4] In France it is recognised as the *société en commandite*.[5] Reception into the United Kingdom was slow and long-delayed until the enactment of the Limited Partnership Act 1907.

21 Interestingly, a few years before Jersey introduced in 1861 its first limited liability statute, Guernsey enacted in 1856 the *Loi Relative aux Sociétés en Commandite*.[6] The Guernsey statute introduced a basic framework for what were referred to as corporate partnerships modelled on the French *Code de Commerce* and which recognised a distinction between managing partners and capital providing partners whose liability was limited to the amount of their capital contribution.

[3] Udovitch, "Origins of the Western Commenda: Islam, Israel, Byzantium?", *Speculum* 37 (1962): 198–207.
[4] Sections 161–177 *Handelsgesetezbuch* (German Commercial Code).
[5] Articles L222-1–L222-12, *Code de Commerce*.
[6] *Ordres en Conseil*, Guernsey vol I, p 262; the regime providing for *sociétés en commandite* in Guernsey survived until its abolition in 1978 pursuant to The "*Sociétés en Commandite*" (Abolition) (Bailiwick of Guernsey) Law 1978; Guernsey subsequently introduced a modern form of commandite partnership with the enactment of the Limited Partnerships (Guernsey) Law 1995.

22 138 years after Guernsey first introduced the concept within the Channel Islands, Jersey grafted the commandite partnership into its law with the adoption of the Limited Partnerships (Jersey) Law 1994.[7]

23 The similarity between the commandite partnership and the *mudarabah* opens up the possibility of structuring limited partnerships domiciled in the Channel Islands which simultaneously satisfy the requirements for *mudarabah*. The contractual nature of both concepts provides the flexibility to achieve this assimilation by adaptation of the content of the limited partnership agreement. Across the Channel Islands, efforts are being made to nurture cross-border finance sector business with countries in the Near East and a small number of pilot schemes have been developed in Jersey using the framework of the Limited Partnerships (Jersey) Law 1994 (the "JLP Law") in combination with the requirements for *mudarabah* set down by the Accounting and Auditing Organization for Islamic Financial Instructions (AAOFI) which is based in Bahrain.[8] Shari'a law is not codified or subject to a centralised defining authority. It is derived from a combination of sources including the Qur'an (the Holy Book of Islam), the Hadith (the sayings and conduct of the Holy Prophet) and the writings of Islamic scholars. There are different interpretations depending on five main schools of Islamic jurisprudence: four Sunni and one Shia. Within Shia there are also a variety of sects. One of the challenges for the Islamic world has been how to move towards a more conformed approach to the definition and development of Shari'a concepts. AAOFI is one of a group of Islamic institutions which has been responsible for establishing and publishing a series of Shari'a standards defining the requirements and permitted practices for Islamic financial institutions in connection with a series of Islamic legal forms. Standard No (13) published by AAOFI in 2002 deals with *mudarabah*.[9]

24 The next section of this article summarises certain of the key features of *mudarabah* as described in Standard No (13) which need to be present in the Jersey limited partnership to achieve the assimilation aimed for. This assimilation is produced by careful drafting of the

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[7] In Jersey, the Limited Partnerships (Jersey) Law 1994 has now been supplemented with two further variations on the commandite partnership model pursuant to the Separate Limited Partnerships (Jersey) Law 2011 and the Incorporated Limited Partnerships (Jersey) Law 2011.

[8] Accounting and Auditing Organization of Islamic Financial Institutions, P.O. Box 1176, Manama, Bahrain; www.aaofi.com.

[9] Standard No (13), Sharia Standards for Islamic Financial Institutions 1432H-2010, pp 231–250.

limited partnership agreement. The exercise is aided by the fact that, apart from setting down certain basic mandatory rules applicable to the JLP, the bulk of the provisions in the JLP Law are default rules which can be derogated from or modified by express provision in the limited partnership agreement.

25 The assimilation between *mudarabah* and the JLP is best viewed as an exercise in compliance through integration into the agreement constituting a JLP of the required elements for *mudarabah*. Substantively, of course, the JLP remains an institution recognised and given effect to under Jersey law. But as the general body of Shari'a law and principles as practised and developed across the Islamic world is not itself a national or state law, there is not necessarily any irreconcilable conflict of laws inherent in the arrangement. The rules for *mudarabah* are incorporated into the partnership agreement and given effect to under Jersey law. To the extent that there may be concern either about the willingness of a Jersey court to have regard to Islamic rules and principles as a guide to interpretation of a JLP operating on the basis of *mudarabah* or a perceived lack of certainty as to the applicable rules and principles to be taken into account, a solution may be to select binding arbitration in the limited partnership agreement as the preferred method for dispute resolution, as this would provide the ability to select experts in Shari'a matters to act as arbiters.[10]

26 The basic definition of *mudarabah* is that of a partnership in profit whereby the *rab al-maal* provides capital and the *mudarib* provides labour.[11] This can be equated directly to the division of roles and status between the general partner and the limited partner in a JLP.[12] The Islamic labels of *rab al-maal* and *mudarib* can be introduced into the text of the partnership agreement together with a recital to the effect

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[10] The English Court of Appeal in *Beximco Pharmaceuticals Ltd* v *Shamil Bank of Bahrain* EC [2004] EWCA Civ 19 refused to give effect to a governing law clause in respect of various Islamic financing agreements which overlaid a choice of English law as the proper law with an overriding application of the principles of shari'a law. The judgment reflected the particular circumstances of the case and it was common ground between the litigants that there could not be two separate systems of law governing the contract. Article 3.1 of the Rome Convention which by s 2(1) of the Contracts (Applicable Law) Act 1990 has the force of law in the United Kingdom (but not in Jersey) contemplates that a contract shall be governed by a single state law chosen by the parties.

[11] Para 2, Standard No (13), *op cit*.

[12] Arts 10 & 11, Limited Partnerships (Jersey) Law 1994.

that the partnership will seek to comply with the requirements for *mudarabah* in its operation. The partnership agreement will need to state clearly what the purpose of the arrangement is to be and whether a wide and unrestricted management mandate is to be conferred on the *mudarib*/general partner (unrestricted *mudarabah*), or whether authority is being conferred only in respect of a particular project or investment or trading opportunity (restricted *mudarabah*).[13] In its operation, the partnership will need to ensure that its activities are compliant with Islamic ethical principles and that prohibited (or *haram*) activities are avoided.

27 In order to avoid valuation uncertainty, the capital of the *mudarabah* must normally be provided in the form of cash rather than by contribution of tangible assets, and the capital contributed must be paid over and put at the disposal of the *mudarib*.[14] These requirements can be accommodated in the JLP agreement which will effectively write out the option which exists under the JLP Law for the limited partner to contribute capital in the form of assets or services.

28 Again, in order to avoid uncertainty and dispute, it is essential in a *mudarabah* that the profit sharing ratio as between *mudarib* and *rab al-maal* and the profit distribution arrangements must be clearly known and these should be set out expressly in the partnership agreement. The profit sharing must be on the basis of an agreed percentage of the profit and not on the basis of a lump sum or a percentage of the capital.[15]

29 A *mudarabah* contract is categorised as a trust-based contract in Islamic law. Standard No (13) states that the *mudarib* should employ his best efforts to accomplish the objectives of the *mudarabah* contract. The *mudarib* should assure the capital provider that his money is in good hands and that the *mudarib* will act to find the best ways of investing it in a permissible manner.[16] We should understand the reference to the trust-based nature of the *mudarib*'s role as indicating a high degree of good faith and diligence that the *mudarib* must bring to his office. This suggests a status akin to that which we would label as fiduciary when analysing the role of a general partner in a limited partnership but without, perhaps, the detailed working out of the consequences and incidents that occidental jurisprudence has woven around the fiduciary concept. Standard No (13) makes clear that, as a consequence of the trust-based nature of the contract, the

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[13] Para 5, *op cit*.
[14] Paras 7/1 and 7/4, *op cit*.
[15] Para 8/1, *op cit*.
[16] Para 9, *op cit*.

mudarib is not liable for losses except where he is in breach of the requirements of trust such as misconduct in respect of the *mudarabah* fund, negligence or breach of the terms of the *mudarabah* agreement.[17] All non-fault losses are debited against the capital account of the capital provider. This loss allocation requirement is mirrored by the internal risk allocation operated by the JLP. In its pure form, the *mudarib* makes no capital contribution to the arrangement but contracts to provide its management skill and effort. In a JLP (set up to operate on the basis of *mudarabah*) where capital will be contributed only by one or more limited partners, all losses in excess of any income profits and any other gains will be carried to the capital accounts of the limited partners. In its external relations with creditors and counterparties, the JLP, acting through its general partner, will of course remain fully liable for the debts and obligations of the partnership. There is no contradiction here in the statement that the *mudarib* is not liable for losses incurred by the *mudarabah* as this refers to the internal loss allocation rule operated between the *mudarib* and the capital provider. The point of interest is that the focus of Islamic interpretation is fixed upon the nature of the agency and trust-based relationship between the parties, which explains and justifies why the *rab al-maal*, who is the owner of the capital, must bear all of the economic impact of losses which are incurred. From the perspective of an occidental legal tradition, we tend, when dealing with commandite partnerships, to be more focussed on the concept of the limited liability status of the limited partner, the rights of creditors and the ranking of claims in the event of an insolvency and a shortfall in assets available to discharge claims. This approach results from the detail of the registration procedures and statutory backing of the limited liability status of limited partners that generally apply in Western jurisdictions to give recognition and effect to this category of partnership. Standard No (13) states nothing expressly about the unlimited liability status of the *mudarib vis-à-vis* creditors of the *mudarabah*. Nor is there any mention in Standard No (13) of the liability of the *rab al-maal* being limited to the amount of the capital which it contributes to the arrangement. In *mudarabah*, the limited liability status of the *rab al-maal* and the responsibility for a shortfall in assets available to satisfy creditors are products of the mandate conferred on the *mudarib* coupled with the trust status of the *mudarib* role. It is a requirement that the *mudarib* should manage the affairs of the *mudarabah* prudently; there is an expectation that the *mudarib* will not over-extend or unduly leverage the business or investment activities of the *mudarabah*. There is no right for the *mudarib* to

[17] Para 4/4, *op cit*.

pledge the credit of capital provider generally. The mandate is conferred only in respect of the capital committed to the *mudarabah*. There is a strong emphasis on maintenance and preservation of capital. It is only in the case of negligence by the *mudarib* or a breach of the trading or investment mandate agreed with the *rab al-maal* that the *mudarib* becomes liable to the *rab al-maal* and by extension to unsatisfied creditors to indemnify relevant losses out of the *mudarib*'s own resources.

30 In line with the trust-based nature of the *mudarabah*, no profit can be recognised or claimed unless the capital of the *mudarabah* is maintained intact. Whenever *mudarabah* activity results in losses, those losses must be made good out of the future profits of the arrangement before the amount of net profit available for distribution is struck.[18] Provisions to this effect can be written into the JLP agreement. The capital protection emphasis of *mudarabah* again highlights the trust-based focus of the relationship between manager and capital provider, with the manager being charged with the careful use and ultimate return of the contributed capital. The nearest similar provisions in the JLP Law again highlight an occidental focus on insolvency risk and creditor protection, with art 14 of the JLP Law establishing a simple solvency test for determining whether profit can be paid out of the JLP while it is a going concern. The Islamic requirement to preserve and maintain capital sets a more stringent requirement which must be reflected into the operational rules of the JLP.

31 Standard No (13) states that the capital provider is not permitted to stipulate that he has a right to work with the *mudarib* and to be actively involved in the business conducted for the *mudarabah*.[19] However, the *mudarib* is required to liaise with the capital provider and consult with him in relation to proposals that the *mudarib* proposes to implement for the *mudarabah*.

32 This requirement parallels the general prohibition in the JLP Law on a limited partner taking part in the management of the partnership. The rationale for the Islamic rule barring participation by the *rab al-maal* in the management of the arrangement is that this would curtail the freedom of the *mudarib* and could hinder him in achieving the objective of *mudarabah* which is focused on generating profit.

33 It is interesting to note again the occidental concern and emphasis on the liability exposure to the limited partner, with the JLP rule being

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[18] Para 8/7, *op cit*.
[19] Para 9/3, *op cit*.

expounded in terms of avoiding exposure to the unlimited liability status associated with the general partner which would arise if the limited partner were to trespass in an overt way into the management sphere.[20]

34 Standard No (13) provides for the liquidation of a *mudarabah* contract—

- by agreement of both parties;
- on the expiration of any fixed duration agreed for the *mudarabah*;
- when the *mudarabah* funds have been exhausted;
- by the death of the *mudarib* or the liquidation of the entity that acts as *mudarib*.

35 All of these termination events can be provided for consensually in the limited partnership agreement or reflect mandatory rules applicable to the JLP.

36 The final part of this article raises the question whether we can go beyond the exercise of synthesising *mudarabah* within the framework of the JLP and have recourse to the Islamic concept to inform interpretation of the requirements for JLP. The 1994 Law is not a codification of all the rules applicable to the JLP and if it is accepted that the commandite partnership is a lineal descendant of the concept of *mudarabah*, the Shari'a rules may prove a useful source of comparative jurisprudence to inform the understanding of our own limited partnership laws, particularly when there is only a small body of modern case-law on the subject within the Channel Islands.

37 An interesting test question is whether the rules for *mudarabah* can assist us in determining whether it is a fundamental requirement for the proper constitution of a JLP that the general partner must in all cases have a profit share, or whether it is permissible for the general partner of a JLP to be remunerated on a fixed fee or non-profit related basis.

38 Standard No (13) is quite clear on the matter in relation to *mudarabah*. Profit sharing between *mudarib* and *rab al-maal* is fundamental to *mudarabah*. *Mudarabah* is commonly referred to as a partnership in profit. As cited above Standard No (13) insists that the mechanism for distributing profit should be clear and that distribution of profit must be on an agreed basis by reference to a percentage division of the available profits and not on the basis of a lump sum or a percentage of the capital.

[20] Art 19(2) & (3), *op cit*.

39 Standard No (13) goes so far as to say that if one of the parties stipulates that he should have a lump sum of money by way of participation rights, the *mudarabah* contract will be void.[21]

40 The rules do, however, allow one of the parties to enjoy super-profits to the exclusion of the other party. For example, if the parties agree that if profit is generated over a certain level then the profit in excess of this level will accrue entirely to one party, while profits up to or equal to the specified level will be split between them in accordance with their profit share agreement.[22]

41 Islamic law does also allow the *mudarib* to earn agency fees in addition to a share of profit; however in this context it is a requirement that the parties enter into a separate agreement independent of the *mudarabah* contract which assigns to the *mudarib*, for a fee, the duty to perform a business activity that is not by custom part of the *mudarabah* operation.[23]

42 Under Shari'a law, the fundamental tenet remains that there must be some division and enjoyment amongst the parties of at least a portion, if not all, of the profit generated.

43 In the JLP Law, there are no express provisions regarding profit share requirements for the general partner. But the Law states that the general partner has the same status as a partner in a partnership without limited partners, including all the rights and powers of such a partner, subject to certain safeguard provisions to ensure that the general partner does not undermine the JLP purpose.[24]

44 A saving provision at art 40 in the JLP Law preserves application of the customary law of *contrats de société* to JLPs except insofar as inconsistent with express provisions of the JLP Law. The presence of this provision indicates that the statute has not created an entirely autonomous institution which operates exclusively within the hermetically sealed environment of the JLP Law. The pre-existing customary law on partnerships as recognised and followed in Jersey flows in to fill the gaps in the JLP Law.

45 A useful comparison in this context can be made between the principles of *mudarabah* set out above and the conditions cited by

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[21] Para 8/5, *op cit*.
[22] Para 8/5, *op cit*.
[23] Para 8/2 *op cit*.
[24] Art 11, *op cit*.

Pothier in his *Traité du Contrat de Société*[25] as to what is of the essence in a contract of partnership—

> "*Il est de l'essence du contrat de société que les parties se proposent par le contrat, de faire un gain ou profit, dans lequel chacune des parties contractantes puisse espérer d'avoir part, à raison de ce qu'elle a apporté à la société.*"[26]

Therefore, if, pursuant to a purported partnership agreement, it has been agreed that the entire profit should belong to one of the contracting parties without the other being able in any case to make any claim on that profit, then such an agreement would not be a contract of partnership and would be void as being manifestly unjust. Pothier refers to the Roman jurisconsults who gave this kind of agreement the name of Leonine Partnership by allusion to the fable of the lion who, having entered into partnership with the other animals to go hunting, then appropriated to himself the whole of the prey.

46 Pothier goes onto say, however, that it is not essential that a partner should in all events have a share in the partnership profits. It is sufficient that he may have a right to profit on satisfaction of a condition.

47 Pothier gives the example of a partnership for the disposal of a valuable asset, where the bargain is that if the asset sells for an amount above an agreed level, a partner will get a profit share, but not otherwise.

> "*Il n'est pas néamoins nécessaire, pour la validité du contrat de société, que chacune des parties contractantes doive avoir, en quelque cas que ce soit, une part dans le profit de la société; il suffit qu'elle puisse espérer d'y avoir part; et on peut faire dépendre de la quantité à laquelle montera le profit de la société, comme d'une condition, la part que l'un des associés y aura*."[27]

48 According to Pothier there must be at least some expectation or likelihood of profit share for validity. This is a more liberal position than that which applies to *mudarabah* where there must be some sharing of profit to ensure formal validity. But in both arenas a situation where there is no expectation or right to profit share because a pretended partner is remunerated on a fixed fee basis does not give rise to either a *mudarabah* or a *contrat de société*.

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[25] Oeuvres complète de Pothier, nouvelle édition, 1821.
[26] Pothier, *op cit*, *chapitre premier*, §III, para 12.
[27] Pothier, *op cit*, *chapitre premier*, § III, para 13.

49 It follows that it is strongly arguable that a general partner in a JLP must have at least the possibility of a profit share to preserve the formalities required to constitute a *contrat de société* and avoid speculation that the JLP is defective on the basis that it enshrines merely a *contrat de mandat*. And if the JLP is to operate on the basis of *mudarabah*, the stricter rule according the *mudarib*, at least some share of the profit available for distribution will need to be adhered to.

50 The centre of gravity of global economic activity continues on its inexorable shift Eastwards which necessitates the financial services sectors in the Channel Islands engaging in markets and with clientele which will increasingly be found in jurisdictions where the majority or a significant proportion of the populations follow the Islamic faith. It would appear vital to the continued success of the financial services industry across the Channel Islands that we learn to adapt our services and products to the cultural norms of those we will seek to serve in increasing numbers in the future. And it is comforting to discover that in some areas it appears we share a juridical tradition that may facilitate the development of business relations.

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