



# **The Legal Regime of Real Estate Investment Financing by Musharaka Contract**

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***THE LEGAL REGIME  
REAL ESTATE INVESTMENT FINANCING  
BY  
MUSHARAKA CONTRACT***

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To the one who gave her life for my life:

Dear late mother HALIMA

To the one who fought during his life so that I would be a fulfilled man:

Dear late father IDRIS

To the one who filled my heart with joy and my life with enjoyment:

Dear wife OUAFAE SALHI

To those who dazzled my existence and warmed my vitality:

DEAR TAHA, RAYANE AND NAIL Children

I dedicate this noble work to you.

**Latin proverb:**

"Do not make a vain display of your knowledge, but prove, by your actions, the profit you have been able to derive from it. »<sup>1</sup>

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<sup>1</sup> -The proverbs and sayings of the Latin (1757)

## LIST OF MAIN ACRONYMS AND ABBREVIATIONS

**ACERFI**: Audit, compliance, ethics and research in Islamic finance

**ACP**: Prudential Supervisory Authority

**Al. (al.)** :Paragraph

**AMF**: Financial Markets Authority

**Art. (art.)** : Article

**IDB.** : Islamic Development Bank

**Bull. civil.** : Bulletin of judgments of the Court of Cassation (civil chamber)

**Bull. Crim** : Bulletin of judgments of the Court of Cassation (criminal division)

**C.civ.** : Civil Code

**C.com** : Commercial Code

**C. Consume.** : Consumer Code

**C. my. end.** : Monetary and Financial Code

**C.Proc. civil.** : Code of Civil Procedure

**Cass.** : Court of Cassation

**EC**: Judgment of the Council of State

**EEC**: European Economic Community

**Mixed Chamber**: Mixed Chamber of the Court of Cassation

**Time.** : Chronic

**Civil. Judgment** : of the Civil Chamber of the Court of Cassation

**Coffis** : French Council for Islamic Finance

**coll.:** Collection

**Com.** : Judgment of the Commercial Chamber of the Court of Cassation

**Comm.** : Comment

**Criminal. Judgment** : of the Criminal Division of the Court of Cassation

**IFSB.** : Islamic Financial Services Board

**D.** : Dalloz collection

**dir.** : guideline

**Ed. (ed.)** :Publishing

**Fasci.:** Booklet

**Gas. Pal.** : Palace Gazette

**Ibid.** : Same reference

**IFAAS** : Islamic Finance Advisory & Assurance Services  
**IIFA** : International Islamic Fiqh Academy  
**infra Below** : Below or after  
**J.-Cl. (J.Cl.)** : Jurisprudence Classer (Encyclopedia)  
**J. Cl. Com** : Commercial jurist-classifier  
**JCP** : Jurisprudence Classer periodic (The legal week)  
**JCP A Periodical** : Jurisprudence Classer (The legal week), edition  
 Administration and local authorities  
**LGDJ**: General Library of Law and Jurisprudence  
**LPA** :Small Posters  
**Foot note number** : foot note number  
**Obs.** : Observation  
**AAOIFI**: Accounting and Auditing Organization for Institutions  
 Islamic Financial Institutions  
**OIC** : Organization of Islamic Cooperation  
**Op.cit.** “opere citato”: aforementioned work  
**UCI** : Collective investment scheme  
**OPCI** : Real estate collective investment scheme  
**UCITS**: Undertaking for collective investment in transferable  
 securities  
**p.** : Page  
**para.** : Paragraph number  
**p.p.:** from page to page, pages  
**pref.** :Preface  
**Report.** :Report  
**RD bench.** : Journal of banking and finance law  
**Reg. CRBF**: Banking and Financial Regulation Committee  
 Regulations  
**Rep. com.** : Dalloz directory of commercial law  
**Rep. dr. civil.:** Dalloz directory of civil law  
**Rep. dr.** : Dalloz directory of criminal law  
**Rep. soc.** : Dalloz directory of company law  
**Request.:** Judgment of the Petitions Chamber of the Court of  
 Cassation  
**Rev. dr. immo** : Real Estate Law Review  
**rev. by (rev.)** : Reviewed by  
**Rev. scientist crime.** : Journal of criminal sciencesLegal review of  
**USEK** : Legal Review of the Holy Spirit University of Kaslik

RLDA : Lamy Review of Business Law  
RTD : Quarterly Law Review  
RTD Civil. : Quarterly review of civil law  
RTD Com. : Quarterly review of commercial law  
s. : Next  
S.A. (SA) : Public limited company  
LLC : Limited Liability Company  
SAS : Simplified joint stock company  
SCA : Partnership limited by shares  
SNC : General Partnership  
soc. : Social  
sum. : Summary  
under dir. (ed.): Under the direction of  
supra : higher or before  
All. : Volume  
TGI : High Court  
trans. by (trans.) : translation by  
flight. : Volume



# SUMMARY

## GENERAL INTRODUCTION

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## GENERAL INTRODUCTION

Although ethical finance is a derivative of business morality and another type of modern convergence of ethical values and their protection in the financial world, it is the continuity of conventional finance in a position halfway between morality business in classic finance and social responsibility. As a result, its definition in economic practice is similar to that of ethical business, which integrates ethics (aligned with religious criteria) into the financial circuit.

This means acting in the world of finance with actions and behaviors consistent with social justice; that Islamic finance considers as unavoidable and indispensable in its conception and its practice, building from this character a common point and resemblance with ethical finance.

Also some confirm this resemblance by thinking that ethical finance is the antithesis of speculative finance, they believe that with the integration of social concerns in the decision-making process, this finance generated a bridge between the economy, the environment and social solidarity in a regional and global dimension while being part of a constructive moralization of the economic and financial fields.

In this context, regulators have witnessed an intervention to moralize finance, such as the Sarbanes–Oxley law of July 2002 in the United States and that on financial security in France with the NRE law in 2001, tending to regularization with a new look at ethical and Islamic finance.

Acclaim without exception by the universal charter of human rights of the United Nations, and procedural circuitry in universal finance, and translated into Islamic finance by the protection of moral values in the decisions of its institutions and structures. Hence our choice to study a mechanism of pure effect of moralization of finance, focusing on financial partnerships in investment according to the rules of Islamic finance law, contributing to economic development and accommodating social justice.

In the Islamic perspective, all aspects of life are governed by religion which is dictated by Islamic law defines as the plan set by God <sup>2</sup>. and governing all aspects of a Muslim's life as a religion and a way of life <sup>3</sup>.

Islamic law (Sharia الشريعة) is the path that every Muslim must follow, as dictated by the sacred text of Islam, the Koran, and the acts of the Prophet of Islam, the Sunna <sup>4</sup>.

The Islamic doctrine (fiqh الفقه), which generally covers all the rules and methods established from Islamic law <sup>5</sup>. It is The intelligence of the Law <sup>6</sup>, and traditionally divided into two fields:

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<sup>2</sup> - MILLIOT Louis, "The idea of the Law in Islam", International Review of Comparative Law, 1952, N°4, p. 6-7, according to the author, "the Law originates in the primordial pact made between God and the man who lends it obedience", on the same point COULSON Noël J., History of Islamic Law, Paris, Presses University of France, 1995, "Islamic Collection", 1995, p. 41.

<sup>3</sup> - "Islamic law in the life of Muslims is universal during the period of man's responsibility which began during the primordial pact and ended at the end of time," TURKI Abel Majid, Polemics between Ibn Hazm and Bagi on the principles of Muslim law, Algiers, Studies and Documents, 1975, p. 424.

<sup>4</sup>- The Koran affirms in this regard: "Those who do not judge according to what God has sent down, those are the perverts, [...] the unjust, [...] the bad (5: 44, 45, 47)" and "When God and his messenger have decided on a matter, it is not for a believer to have a choice in their matter. Anyone who disobeys God and his messenger has gone astray in a manifest error (33:36). »

<sup>5</sup>- MILLIOT Louis, The idea of Law in Islam, International Review of Comparative Law, 1952, N°4,.,p. 3. For Abu Hanifa (أبو حنيفة النعمان) Islamic doctrine "is the knowledge of what a man is permitted or forbidden to do". It is for Louis Milliot a "science of Muslim rights, duties and ethics".

<sup>6</sup>- BLANC François-Paul, Muslim Law, Paris, Dalloz, 1995, "Collection Knowledge of Law", p. 25.

- The law of acts of devotion (فقه العبادات), which concerns religious rites and the spiritual interests of the Muslim.

- the Law of transactions ( **فقه المعاملات** ), which governs social relations in Muslim society and Can be assimilated directly to an Islamic business doctrine governing obligations, contracts and commercial relations with an approach similar to the doctrine of civil law <sup>7</sup> .

Transaction law largely deals with commercial relations and applies the principles aimed more at: the enrichment of human heritage, the equitable redistribution of wealth, honesty in commercial relations <sup>8</sup> , transparency in the negotiation and execution of contracts <sup>9</sup> , for predictability of consequences <sup>10</sup> and fairness in contractual relations <sup>11</sup> ,

Because its source is the orders of the Koran and Sunnah which always converges towards equality of individuals in economic affairs within Muslim society.

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<sup>7</sup>- MILLIOT Louis, BLANC François-Paul, "Introduction to the study of Muslim law", Paris, Dalloz, 2001, 2nd edition, p. 181. On the same point JAHEL Selim, "The general principles of law in Arab-Muslim systems with regard to contemporary legal technique", International Review of Comparative Law, 2003, N°1, p. 107;

EL SHAKANKIRI Mohammed, "Divine Law, Human Law and Law in the Legal History of Islam", International Review of Comparative Law, 1981, N°3, p. 14.

<sup>8</sup>-Quran Sura 17,Verse. 34:

و لا تقربوا مال اليتيم الا بالتتي هي احسن حتى يبلغ أشده و أوفوا بالعقد إن العقد كان مسؤولاً. « سورة الإسراء آية 34 »

<sup>9</sup>- ALGHAZALI, إحياء علوم الدين, Cairo, 1352 of Hegira, T.II, p. 68 . Al Ghazali thus commits the merchant not to praise the qualities of his merchandise, but on the contrary to show the defects.

<sup>10</sup>- On the contrary, the unpredictability of the contractual consequences will result in its nullity for gharar,

<sup>11</sup>- ABDELHAMID Hassan, The nature of liability in classical Islamic law, Master 2 research course, Liability law, p. 14, "the notion of equivalence of benefits implies the general theory of the contract in Muslim law, it is the basis of the prohibition of Riba. »

In particular to the methods of remuneration by the sharing of risks<sup>12</sup>, the principle of equity<sup>13</sup> is therefore at the base of the economic conception of Islamic business law. Thus, based on these ethical principles of this right, the instigators of the Islamic banking system intend to establish a new financial model, carrying positive values and offering Muslims the legitimate possibilities of benefiting from financial services without being in conflict with the rules tracing the good way of the god. Islamic business law is based on principles and constraints that govern all these financial instruments, namely the principle of sharing profits and losses, the principle of materiality of the underlying asset, the prohibition of payment or interest and the prohibition of excessive uncertainty.

Islamic business law also advocates the “equitable” sharing of profits and losses (risks) between the contracting parties in a financial transaction. Thus, it is prohibited to transfer all the risks of an investment project or to reserve all the profits to one of the contractors. The legitimacy of the profit depends on the participation in the risks of the project and any financial operation must be backed by an obvious asset.

Finally, the investment activity must be in lawful sectors according to Islamic principles prohibiting trade in gambling, tobacco, alcohol, and the rent of money by interest as well as investment in over-indebted companies.

From a general point of view, the prohibition of Riba is considered as the main feature of Islamic business law. This prohibition stems from the perception that money in Islam has no real value without being associated with work, it fulfills the role of intermediary between capital and work, and not between capital – capital as in the case of conventional banking.

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<sup>12</sup> –AL AMIN Hassan, ‘Legal status of transactions with interest’, Jiddah, IRTI, 2002, p. 24.

<sup>13</sup>– "God commands you, in truth, to return to people their deposits, and when you judge between people, to judge justly". سورة النساء آية 58

No doubt The cooperation between the banker and his client is established on a cooperative basis, by offering products whose remuneration, instead of being calculated beforehand, will be based on the sharing of the losses and profits made by the financial transaction in issue <sup>14</sup>.

Islamic principles are embodied in contractual financing transactions, which fall into two main categories; participatory contracts with random income (Moucharaka, Moudaraba) and commercial contracts with fixed income (Mourabaha, Ijara, Istisna'a, Salam). And Like any financial system, Islamic finance shares the same purpose with its conventional counterpart, aiming to mobilize financial resources and allocate them between different investment projects.

Moreover, alongside Islamic banking law, conventional banking law recognizes the general principles in terms of equality, justice, sociability, and by condemning all forms of unfair exploitation, speculation and unjust enrichment.

Nevertheless, these approaches do not strongly conflict with the spirit of conventional finance, since the latter can also be part of a perspective of partnership, investment and respects the requirements of transparency and clarity in the contract.

As a result, we find that in application of these rules, Islamic financing methods share certain legal aspects with those of conventional financing, which results in the rapprochement of financing methods between the two systems.

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<sup>14</sup> - CEKICI Ibrahim Zeyyid, "Islamic Finance in France: Problem of form or substance(s)", Islamic Finance Notebooks, N°2, Strasbourg School of Management, University of Strasbourg, p. 2-3; See A.-L. MACHHOUR, Investment in the Islamic Economy, preface. A.-H. AL-GHAZALI, Dar Madbouly, 1st ed., Cairo, 1991, p. 362. , see AL ZAR-KA Mustapha, *الفقه الإسلامي هي ثوبه الجديد* Beirut, 7th ed., p. 31.



Islamic banking is increasingly involved in commercial and economic activities<sup>19</sup>; it uses “alternatively”<sup>20</sup> modes of financing that are participatory in nature, even fiduciary, and others of a commercial nature. In the first case, its return is not fixed in advance but depends on the result of the funded project, while in the second case, it is predetermined but respecting the constraints of Sharia<sup>21</sup>.

From this perspective, subject to certain differences, the Islamic contract superficially shares certain instruments whose operation is similar to that of conventional bank financing methods, with some significant differences, particularly at the level of risk distribution and the mechanism of bank remuneration<sup>22</sup>.

This comparative approach therefore illustrates the interest of this study by emphasizing, on the one hand, that certain principles of Islamic finance harmonize with the spirit of conventional finance, which reflects a relative resemblance between their contractual structures of financing and their legal and managerial mechanisms.

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<sup>19</sup> - K. TOUMI, Capital structure, profitability and risks of Islamic banks, Thesis in joint supervision, University of Montpellier I, France and University of SFAX, 2011, p. 12

<sup>20</sup> - A. ABOZAID, “Modes of contemporary Islamic financing: between the technical specificities of contracts and the objectives of sharia”, trans. by M. BOUDJELLAL, Studies in Islamic Economics, vol. 5, no. 1, dec. 2011, p. 39.

<sup>21</sup> - M. HANIF, “Differences and similarities in Islamic and conventional banking”, International journal of business and social science, vol. 2, no. 2, Feb. 2011, p. 168.

<sup>22</sup>- E. JOUINI & O. PASTRE, “Challenges and opportunities of the development of Islamic finance for the Paris market: ten proposals to collect 100 billion euros”, Rapp. submitted to Paris Europlace, 8 Dec. 2008, p. 34.

Akkizidis’i) & Khandelwal(S.k), Financial Risk Management for Islamic Banking and Finance, Edition Palgrave Macmillan, 2008.



and other parts of this resemblance we have specific contracts at the base of an Islamic financial system<sup>23</sup> which interests a world population flush with a third without counting non-Muslim customers, giving rise to a capital bordering on thousands of billions of dollars<sup>24</sup>; which makes the importance of the subject that we will address very felt economically. And legally because dealing with a problem in a new legal field: Islamic contractual law .

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**23-** Regulated by certain bodies:

\_ Islamic Development Bank (IDB) plays a key role in financing and setting standards and procedures for Islamic finance. The IDB is to Islamic finance what the World Bank is to traditional finance.

\_ International Islamic Fiqh Academy "IIFA". This Academy was created by the decision of the second summit of the Organization of Islamic Cooperation in 1974 and inaugurated in February 1988. Its role is to study and formulate legal opinions (fatwas) aimed at serving common position in economics, finance and banking. Many Islamic financial institutions generally call on it through their Sharia Committee (Shari'a Board) to ensure the consistency of their rules of operation with those enacted by the Academy. .

\_ Accounting & Auditing Organization for Islamic Financial Institutions (AAOIFI). This Organization was created in 1990 in Algiers and very quickly settled in Bahrain in 1991. Its main missions consist of developing accounting standards, auditing, governance, ethics as well as the implementation of establishment of legal standards for all Islamic financial institutions

\_ International Islamic Financial Market (IIFM). It aims to promote and harmonize the legal opinions issued within the framework of the structuring of Islamic products, to implement such products abroad and also to promote their cross-border listing.

\_ Islamic Financial Services Board (IFSB). It is an organization bringing together central banks, monetary authorities and various organizations active in the field of regulation and supervision of institutions operating in the sphere of Islamic finance . It has the role of standardization and good morals supplementing the supervision rules enacted by the Basel Committee, the international organizations for the control of market activities (IOSC) and insurance (IAIS). His official website:

**24-** See F. NAMMOUR, "Islamic banking: the Lebanese experience", USEK legal review, no. 9, 2008, p. 12.

Also Morocco is building an Islamic finance industry. Start with the adjustments introduced in banking law 103.12 relating to credit institutions and similar bodies.

Today Casablanca Finance City offers an interesting platform to establish Morocco as a regional hub of Islamic finance. When all the bricks of the ecosystem are formed, Morocco hopes to capture more than 7 billion dollars in flows from the countries of the Gulf Cooperation Council and Malaysia <sup>25</sup>. This will be achievable by first opting for specific and effective regulations designed through well-developed legal and economic scientific research in order to have a more dynamic Islamic finance market.

So, because of this national financial interest in the development of Islamic finance, our choice is to participate in the legal enrichment of Islamic contract law through our Thesis. In addition, this choice is justified by two realities. The first is that financial law is a branch in full expansion in all legal systems. The second is that financial law by its importance is associated with several legal fields: contract law, banking law, company law, credit law, real estate law... In addition, Islamic financial law is a privileged subject for comparative law because its legal operations carved out with respect for Islamic law have made it possible to increase the circulation of wealth with maximum security. And Producing an attitude of appreciation through economic law.

Worse still The need for financing today in a globally crucial economy, opens promising prospects which lead to encourage the rise of Islamic finance which is developing surprisingly so fast, creating an emerging world of Islamic finance old by its directives and recent through its mechanisms seeking legal support guaranteeing continuity and effective regulation for the success of this finance

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<sup>25</sup>—"What was originally only a niche market, today weighs more than 2,200 billion dollars" according to a report on the development of Islamic finance published in the newspaper L'ECONOMISTE on Monday 26 November 2018 on page 12.

Today the answer to the question raised is did the Islamic bank report the challenge? is yes . with a main merit of the Islamic bank is that it has managed to put in place a range of practical legal mechanisms likely to meet the expectations of financing requests from natural and legal persons, especially in investment financing, in addition the bank Islamic may also take stakes in business which it deems to have promising prospects.

Thus, ensuring compliance with Islamic and legal principles, the modes of financing it provides for the various projects obeying harmonious financial and legal engineering in order to guarantee the continuity and efficiency of the Islamic banking system, such as for real estate investment projects. the method of financing closest to Islamic teachings and the great guarantee of the project financing fund by controlling it by the Islamic bank for the benefit of the beneficiary of the financing, and the most tax-paying mode for wealth creation and economic development. creation of an economic association of the company type is the method of financing real estate investment by Moucharaka contract.

In a descriptive and comparative approach, we will illustrate the interest of our study with an emphasis that certain principles of Islamic finance in real estate investment agree with the spirit of conventional finance, which reflects a relative resemblance between the contractual structure Moucharaka real estate investment financing in Islamic and conventional banking; therefore it is interesting to first study the points of agreement of this contractual structure with other conventions to weave an exact and real relationship between the Moucharaka contract in real estate investment and contracts that are close to it in common law.

Something that will be produced by our in-depth and precise legal research in certain legal disciplines: banking law, civil law, Companies and Islamic law because together these disciplines are the source and the pillar of the creation and development of the method of financing by Musharakah contract in general and the method of financing real estate investment by Musharakah contract in particular.

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This thesis focuses on the characteristics of the Moucharaka real estate investment financing contract in common law and Islamic banking law.

Use as a mode of financing Islamic banks which in their operation respect the first fundamental rule which characterizes them is the prohibition of interest rates in financial transactions. . The second Fundamental principle is the requirement of equitable sharing of losses and profits. Any form of injustice, unjust enrichment and unfair exploitation are severely condemned in Islamic finance.

Also, Islamic finance requires financing sectors that are consistent with Muslim ethics such as our case study real estate investment The last Islamic banks propose to finance economic agents by offering banking services on the condition of respecting the principles listed above.

The purpose of this thesis is to explain the profitability, structure and profile of Musharakah real estate investment financing contract of Islamic banks.

Focusing on the particularities of the Islamic context.

The starting point of our reflection is a detection of the specificities of Islamic contractual law that could lead to profitability for the Islamic bank and its agents in general.

The study of the capital financing structure has long been the central theme of corporate finance. Corporate finance theories are primarily developed to explain the choice between debt and equity financing. Each Theory offers a certain number of variables and mechanisms which determine the capital structure of firms. Hence the importance of the study of the structure “Musharaka Real Estate Investment Financing Contract”. In addition, rare studies have focused on the analysis of Moucharaka contracts in real estate investment by Islamic banks, based on the contributions of classical legal concepts and theories.

Hence our thesis is part of this approach. It attempts to explore the legal characteristics of the Musharakah contract in the real estate financing of Islamic banks by referring to existing concepts and theories of common law in comparative law.

These ambitions direct us towards a global problem relating to the study of profitability, structure and profile Moucharaka real estate investment financing contract.

In order to answer this problem, we propose to answer the following research question: What is the legal nature of Moucharaka real estate financing contract by determining its profitability, structure and profile?

To answer our formulated research question, this doctoral work is divided into two main parts, articulated in several chapters. The first part analyzes the profitability the second part will discuss the structure and the unique nature of Moucharaka real estate investment financing contract

**TITLE ONE.**

**CONCEPTS AND EMERGENCE  
REAL ESTATE INVESTMENT FINANCING  
BETWEEN  
CONVENTIONAL AND ISLAMIC BANKING LAW**

After the American real estate investment crisis, the financial crisis mainly affected the international conventional financial system, while Islamic finance proved to be more resilient when it began to make its place on the podium of the best financial systems, almost competitive with conventional finance precisely through its ideological essence.

Islamic finance which is based on principles governing all these financial instruments, namely the principle of sharing profits and losses, the principle of materiality of the underlying asset, the prohibition of payment or collection of interest and the prohibition of excessive uncertainty. And these approaches which do not strongly clash with the spirit of conventional finance, since this too can be part of a perspective of partnership, investment and respects the requirements of transparency and clarity in the financing contract .

As a result, we find that in application of these rules, the modes of Islamic real estate financing shares some legal aspects with those of conventional real estate financing, which is noticeable by the nature of conventional real estate investment financing (Chapter I)

With a purely legal perspective, even if the techniques of assignment and Mobilization of funds differ from one system to another, the realization of profit remains the major interest of any bank. Obviously governed by the prohibition of unjust enrichment and the need to rationalize risk taking when financing. This highlights the existence of similarities between Islamic and conventional financial legal engineering (chapter 2)

## **FIRST CHAPTER:**

**Emergence and fields of application  
Real estate investment financing contract  
In conventional banking law**



Corporate and investment banking is one of the most Not well known to banking professions, for several reasons.

The first is that, by nature, these are activities intended for the wealthy. Customers, companies or financial institutions, and not large activities public, such as consumer credit, or directly affecting the general public, such as asset management or life insurance.

The second reason is that the concept of investment finance banking actually covers a wide variety of businesses, ranging from simple financing to capital markets, including structured financing of all kinds, advice on mergers and acquisitions or even stock-related activities.

These various professions also have the characteristic of being interdependent. from each other, but in proportions which vary according to the banks and according to the times.

The past period will have been marked by numerous shocks, sometimes contagious, both for financing activities (Asian and Russian crises, spectacular bankruptcies) and for equity activities (bursting of the technology bubble, etc.) and also by a strong structuring of the investment finance banking business with the gradual elimination of weak or destroyed players. But the banks that have been able to adopt an efficient organizational model corresponding to their business and their natural know-how, have emerged in excellent health overall.

Finally, the best sector for Investment Banking is the real estate financing activity, so what is its scope? (Section 1) and its characteristics (Section 2).

## *Section 1: Fields of application of the real estate investment financing contract under conventional banking law*

### *§1-Birth of the real estate financing regime in the Anglo-Saxon and Latin legal system.*

Financing is the operation which consists in consenting, for those who finance monetary resources, and for those who are financed, to obtain the monetary resources necessary for the realization of a project<sup>26</sup>. Knowing that He can means the action to finance, to provide funds necessary for the functioning. Also Funding can be defined as providing funds (money) to an economic agent. Funding, from another economist point of view, refers to all the methods by which economic agents obtain the funds necessary to carry out their professional or civil activities<sup>27</sup>.

Following the idea of division of labor and the development of society consistent with industrial production in the nineteenth century; we have witnessed a need for financing to fill the financial gap of any production that we have recognized by the synonym 'capital'<sup>28</sup>, in addition to the development of banking business since 1200 A.J especially in currency exchange, supply of average credit term / long term and the growth in the number of commercial markets have increased the need for financing. This led to having a general funding body globally, resulting in the creation of economic rules governing this new science of economics. who is interested in the study of how to have money in the twenty nth century<sup>29</sup>. Thus the how to have money with respect for the law and the rules of finance dictated by the market economy is resolved by four financing method.

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<sup>26</sup> -<https://fr.wikipedia.org/wiki/Funding> .

<sup>27</sup> - <https://www.universalis.fr/>

<sup>28</sup>- See: 'Financing', Encyclopedia Britannica, William Ben tom, U.S.S, 1964, Vol.9, p.272; "VALEUR ET CAPITAL", John Richard Hicks, Publisher: Error Périmes Dunod, collection: Finance and Applied Economics, January 1981.

<sup>29</sup>-مستطفي رشدي شيخ اقتصاديات النقود و المصارف و المال دار المعرفة الجامعية الاسكندرية ص 436 ص 1996

- Internal financing, which means self-financing through the use of savings or financial gain dedicated to future financing.
- Direct financing is financing between the financier and the borrower without bank intervention.
- Indirect financing is that which takes place through a banking process in such a way that the credit institution provides money to a third party responsible for carrying out the investment for a beneficiary who has had the granting of credit on investment. .
- New financing is all recently created financing schemes such as: the stock market, leasing, investment funds, guarantee funds, solidarity funds, social financing funds.

In this context The origin of real estate investment financing on the modern international level is the Anglo-Saxon legal system <sup>30</sup>. Starting from two principles the first: the emergence of real estate investment financing as a legal concept is linked to the development of the theory legal property mortgage in English law, and the second principle is purely financial arising from the need for financing to meet housing needs, especially after the first global financial crisis in 1930 <sup>31</sup>.

Based on English law The American legal system has developed three theories on the immovable mortgage:

- Theory 1: " theory of ownership " which consists in having the ownership of the real estate in the hand of the creditor during the period of the mortgage loan contract, except that it is legally confirmed when the debtor does not reimburse his credit to creditor <sup>32</sup>.

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<sup>30</sup>- Grant S. Nelson & Dale A. Whitman, "Real Estate Finance Law", Fifth edition, Thonsen, West U.S.A 2007, p.9.

<sup>31</sup> -Robin Paul Malloy & James Charles Smith, "Real Estate transaction", Problems cases and Materials, Aspen law of Business, New York, 1998.

<sup>32</sup>- Robin Paul Malloy, & James Charles Smith, op.cit p.675 .

-Theory 2: "theory of the right to foreclosure" which is defined by the fact that the real estate remains in the right of the mortgaging debtor during the term of the mortgage except in the event of non-reimbursement of the credit to the creditor at the end of the debt period, the creditor has the right of precautionary seizure on the real estate concerned by the debt, after he has the possibility of seizure of real estate for his benefit. Currently this "theory of the right to foreclosure" is the most applied in the U.S.A <sup>33</sup>.

- Theory 3: 'the medium theory' which uses the two previous theories at the same time, because the property of real estate remains in the heritage of the mortgaging debtor until the unpaid credit at this moment it is transformed into real estate property of the creditor from the beginning procedure of the precautionary seizure followed by the seizure of real estate. Conveniently this theory and also the frequent one with the financing of real estate investment of the American legal system. <sup>34</sup>

These three theories are the tools that the American legislator has legally exploited for whatever the basic concepts of real estate investment financing, hence his innovation of limiting the scope of real estate investment financing in its three theories, and framed a legal definition of this type of financing that does not go beyond the scope of these theories.

In particular, real estate investment financing is defined as being a real estate mortgage contract or as a fiduciary deed with a difference between the two, in that the latter is a real estate investment financing agreement with a third party named as caretaker of the building ; and mandate to be judicial executor or not on the building in the event of the debtor's non-performance of his obligation to repay the credit, While the real estate mortgage contract executes the theory of ownership or the theory of medium <sup>35</sup>.

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<sup>33</sup>- Robin Paul Malloy, James Charles Smith, op.cit p.676 et seq.

<sup>34</sup>-Robin Paul Malloy, James Charles Smith, op.cit p.677 et s

<sup>35</sup> -MINNIE LUSH & DAVID SIROTA, "California Real Estate Finance", Fifth edition, Aborn U.S.A, 2003

So the trust deed and the real estate mortgage contract are the legal tools that make up a real estate investment financing scheme in the Anglo-Saxon legal system. On the other hand, Latin law like French law began by exploiting the French real estate investment financing regime through the development of the French real estate trust institution instituted by Louis Napoleon Bonaparte as a national financial institution in the year 1852; for the purpose of collecting financial funds dedicated to real estate transactions, especially the purchase of agricultural land in order to grant loans on real estate investment. Such promising sorts that the term of credit can reach fifty years .<sup>36</sup>

Thus seen the need for habitat after the First World War and the Second World War in 1948. the legislator legislated laws concerning the rent of habitat to allow citizens emerging from a devastating war to have their habitats rented with a large ease, which gave a gloomy situation of the business climate in real estate investment throughout the fifties until 1977. From then on, we witnessed the special legal regime of the financing of real estate investment by its legal definition in French law according to law 1/77 of January 3, 1977<sup>37</sup> which instituted the creation of special financial institutions in real estate credit in order to restore a legal system of financing real estate investment starting with law 1/77 and supplementing with the laws:

- SKRIFTER law of June 13, 1979 on the organization of real estate fiduciary transactions.
- Law 8/83 of January 7, 1983 concerning public establishment providing housing and housing financing
- Law 86/1290 of December 23, 1986 for the promotion of real estate investment
- Housing valuation and organization of its financing (leasing or acquisition)

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<sup>36</sup>- PIERRE ALLINNE, " Credit Foncier de France 1852-1920 ", Doctoral Thesis Paris, 1978, p.54; DEDIEU DANIELLE, " The financing of housing in France and its social aspects ", Thesis Doctorate in Economics, Toulouse 1, 1977, p.13.

<sup>37</sup>- PIERRE ASTORY, "Housing financing in 1980", Mixture Pierre Vigreux, Toulouse, 1981, p.12.

- Law 44/90 of May 31, 1990 concerning the right of habitat.
- Law 93/94 which is only the right of the French consumer.

Also in Egyptian law the financing of real estate investments follows the legal rules of the mortgage contract, guaranteed by authentic mortgage, according to the general rules of private law until the promulgation of law 148 of the year 2001. which organizes the financing of real estate investment in Egypt with an essential goal, the development of real estate promotion, its stimulation for the benefit of economic and financial growth and the favoring of the poor social strata in housing supply<sup>38</sup>.

On the other hand, the Moroccan legislator began by supporting the financing of real estate investment in 1920<sup>39</sup> by creating "the Caisse de Prêts Immobiliers du Maroc" called CPIM by the Crédit Foncier of Algeria, of Tunisia and the Crédit Foncier of France. The CPIM financed, under the supervision of the three bodies, the construction of collective buildings. Then at the beginning of independence, the Moroccan authorities, sensitized by the good effect of real estate investment financing on Moroccan economic growth, which was rather fragile and new suddenly. Inciting the legislator to publish the Dahir of November 5, 1962 which reserves Société de Crédit Foncier, and considerably increases its field of action in the real estate and hotel sectors. Immediately in 1967 following the extension of the activity to the hotel development sector, the CPIM became the "Crédit Immobilier et Hôtelier" with a commercial abbreviation "CIH" and better and better integrated into the financial fabric until 1986. it benefits more from the Authorization to practice banking operations in the finance law of the same year<sup>40</sup>. Which shows that Moroccan legislation was before and after independence a legal system designing specialization and monopolization in investment financing real estate by granting it to the CIH to be the sole title in this method of financing?

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38- انظر محمد أبو زيد اتفاق التمويل كآلية جديدة للتمويل و تنشيط سوق المال 1984

39-1906: creation of the State Bank of Morocco following the Algeciras conference, in 1919 France took control of the State Bank of Morocco and in 1920 the demonetization of the HASSANI and establishment of the Moroccan franc

40 - [www.CIHBANK.ma](http://www.CIHBANK.ma)

Until the fulfillment of banking law 34-03 relating to credit establishments and similar bodies, promulgated by dahir n° 1-05-178 of February 14, 2006, explicitly authorizing other banking establishments to exercise the activity of Real estate investment financing. But under a legal regime based on the debtor creditor relationship following the building mortgage loan contract model, financed by an approved credit institution.

## ***§2. Legal definition of real estate investment financing.***

The legal definition of real estate investment financing is a definition rather doctrinaire than legislative, because we find this definition search, scatter among the doctrinaires of financing law in several definitions. Arising from the same concept which is 'real estate investment financing '.

Really this financing is a legal action consisting of having monetary financial resources, where real, where service destined to a productive or consuming profession.

Among its doctrinal definitions 'the financing of real estate investment is the need of individuals, where companies, where establishments and others to finance the purchase or industrialization of real estate' <sup>41</sup> .

Distinctly to other doctrinaires HALA ASSAID who defined real estate financing being 'long-term financing offered by financial institutions for subjects, with the aim of purchase, where construction or renewal of real estate property by using the latter as a guarantee to have credit' <sup>42</sup> .

Also the doctrinaire MAHMOUD ABD ALFADIL defined it: 'the financing Real estate is a regime that is interested in financing housing in such a way as to provide long-term financial facilities; the more it offers financing for the purchase of real estate with the condition of paying it in monthly installments. And the property of

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<sup>41</sup> -Article, Themes of modern real estate financing in Islamic Sharia balance, licit and illicit in Islamic law , Hussein Hassan CHIHATA, p.2 , see [www.islamouse.com](http://www.islamouse.com) .

<sup>42</sup>- Link number nine, in Egyptian Banking Institute, Cairo 9/June/2004, see [www.ebi.gov.eg](http://www.ebi.gov.eg)



The real estate passes definitively to the buyer in the event of the total payment of the total price of the property ‘<sup>43</sup>.

Other doctrinaires have not dissipated in their definition of real estate financing between its fields of application being an activity; and domain of definition being a convention. Because they described it as follows: real estate financing aims for a natural person or legal person to provide a sum of money intended to appropriate real estate. And in return for this money collected by the debtor where a legal center transfers the real estate to the beneficiary.’<sup>44</sup>.

According to this general definition we can define real estate financing as: "an activity which consists in having a financial and legal operation including a sum of money invested in an investment activity or a non-productive real estate business by persons exercising this real estate financing activity"<sup>45</sup>.

Along the same lines, Robert H. cole and Jean Calais Auloy have defined real estate financing as an activity: 'real estate financing is all financial operations within a legal framework allowing the supply of financial resources for a real estate investment operation where of consumption by defined persons'<sup>46</sup>.

This confirms that real estate financing is an activity. And that the Anglo-Saxon system study real estate financing as a science of economics and finance.

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<sup>43</sup>- Role of the non-banking financial sector in economic activity (real estate financing), research presented to the information center and decision-making support of the presidency of the Egyptian ministerial council, June 2008, p 4 .

<sup>44</sup> -Chirs -Atials, and others, Real Estate Law Glossary, Real Estate Credit, Dalloz, 1989, p.57.

<sup>45</sup> -William B. Brueggemen, Jeffrey D. Fisher, Real Estate Finance and Investments, 12 TH Edition, Mc Graw-Hill/Lrwin, 2005, p.70 et seq.

<sup>46</sup> -Robert H. cole, consumer and commercial credit management, R.D.U.S.A, 1980, p.187; , jean Calais Auloy , Frank Steinmetz, consumer law , Dalloz , 2006, p.25 et s.



We consider real estate financing an economic activity; there we judged that the real estate mortgage is only a guarantee and security for this activity<sup>47</sup>.

Similarly, French law has defined real estate financing as "an activity which is carried out by financial establishments authorized by the State for the purpose of financing in the field of construction, where ownership of a property, where equipment, development, where maintenance real estate where real estate construction dedicated to individual ownership, where credit for business specializing in the field of medium-rent housing"<sup>48</sup>

So real estate financing is an activity operating in an investment business. whatever the financing guaranteed by the State or not guaranteed or also a self-financing of real estate project.

The definition of real estate investment financing law is the law which stipulates in its rules all financial transactions in which a financial offer is offered. As it is in real or money or in service is mandatory to complete a transaction of real estate investment or consumption within a financial and economic legal framework.

which leads us to say that the rules of real estate investment financing law, takes care of the organization of the legal centers of the people involved in real estate investment financing activity. Plus rules for organizing support and guarantee operations provided by the State or private establishment as part of the housing financing offer.

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<sup>47</sup>- Grants Nelson & Dale A. Whitman, Real Estate Finance Law, Keenan's, English Law, Eleventh Edition, GLBS.1998, p.479 et seq.; J.G. Riddal M.A ,TDC, Introduction to Land Law, Fifth Edition ,Butter Worth's. London, 1993, p.382.

<sup>48</sup> -according to article 93 of the French savings and financial guarantee law; Heugas & Daraspen, rev. Dr. Imm, 1999, p.571; Philip & R.Wood, 'Law and Practice of international Finance', title Finance , Derivatives securitizations, e.et Off and Netting, London , Sweet & Maxwell ,1995, p.7et s.

Especially economic housing, when the promoter is in the promotion of social housing for subjects of social precariousness.<sup>49</sup>

In comparative law finds that the French legislator to expose the legal nature of the rules regulating the convention of the financing investment real estate as having a directive nature. To the point that we are not entitled to contraries, this is confirmed by law n ° 596/79 of June 13, 1979 which concerns the security of mortgage borrowers<sup>50</sup>,

Indeed this law has been included in consumer law n° 949-93 of June 26, 1993 and it has been cited that the law regulating the real estate investment financing agreement is directive and falls within public order; with the confirmation of article L 313/6 of French consumer law. However, this rule is only recognized when the agreement is between professional and non-professional consumer, but in other cases the rules governing the investment financing agreement real estate are subject to the general rules of the credit and sale contract in French civil law<sup>51</sup>. Worse still, it is affirmed in the savings and financial guarantee law of June 25, 1999.

On the other hand, in the Anglo-Saxon legal system, where the domination of the system of case law gives rise to the sovereignty of the rule of freedom to contract<sup>52</sup>.

we find that the rules of real estate investment financing are not all of public order, especially in the American and English legal systems.

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<sup>49</sup> -Frank Steinmetz & Jean Calais Auloy, Consumer Law, Dalloz, 2006, p.445 and S; J.Smith & Roger, Property Law, Cases and Materials, Longman, London, 2000,p.754.

<sup>50</sup> -Jacques Ghestin, Treatise on civil law, obligations, the contract. Paris, L.G.D.J 1980, p. 80

<sup>51</sup>- Jérôme Huet, discusses civil law, the main special contracts, work crowned by the academy of sciences and policies, Paris Dupin Ainé, 1980 under the direction of jacques ghestin, L.G.D.J 1996, p.865 and S; Marie Gnoelle & jabard bachelor, civil law, land security, tenth edition, Dalloz, Paris, 1992, P.75 and S; François Collart Dutilleux & Philippe Del becque, civil and commercial contracts, 3 edition, Dalloz, 1996, p. 693 and S.; Dayot N., sale of buildings and protection of the purchaser, JCP, 1980, 1-2793;

<sup>52</sup> -Real Estate law, and Regulation of the Real Estate commissioner with other relevant Excerpts from the California codes, California department of real estate, 2006, Alameda

county, Library ...infinity possibilities, p.13 et seq.; Smith & Keenan's, English law, Eleventh edition, El. .BS, 1998, p.464;

Because of the domination of banking customs in the regulation of real estate investment agreements, and in the regulation of real estate financing activity because these rules are not of a security nature as is the case with the French legal regime, but there are some rules of regulation of real estate financing investment agreement designing the role of directive rule and falls within public order so it must not be upset <sup>53</sup>. this remark is well stipulated in regulation concerning the law of organization of property of the year 1925 , and the Finance Act 2002 in England, and the Banking Act in 1987, and the Consumer Protection Act in 1987 also the Mortgage Act in 1975 in the U.S.A concerning gifts and State guarantees in investment agreements of real estate financing in state and state-guaranteed loans such as loans granted to veterans of the American army corps. and the financing of real estate transactions for habitat use guaranteed by federal or union housing establishments, also there are directive rules prohibiting racism (according to color, religion or sex) between Americans in operations 1 granting of credits.

While Egyptian law falls within the rights that their real estate investment financing law is linked to the rules of public order according to doctrinaires<sup>54</sup> Because the law 148 of the year 2001 of the real estate financing of Egyptian law insists on the role of the right to secure the consumer who returns as weak party in front of the financial backer party; therefore the obligation to have rules of real estate financing law of directive order and public order has been realized in Egyptian law based on the fact that all the doctrine of comparative law confirms that the rules of real rights stipulated on real estate property are of public order. <sup>55</sup>

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<sup>53</sup>- Graham Roberts, "law Relating to Financial Services", 6 TH edition, Le 550, N.5, Financial Publishing, London, 2005, P;57 and S;

<sup>54</sup>- فيصل زكي عبد الواحد, المدخل لدراسة القانون, وحدة توزيع الكتاب الجامعي, كلية الع

<sup>55</sup>- Beauchard, distribution and consumer law, puf, 1996;

Henry Slous & Jacques Ghestin, "The protection of the weaker party in contractual relations Franco-Belgian comparisons", L.G.D.J, Paris, p.3.

## *Section 2: Characteristics and specificities of the real estate investment financing contract*

### *§1- The characteristics of the legal classification of the real estate investment financing contract in comparative law*

*A- The real estate investment financing agreement is a financial act, of successive execution and act of consumption.*

*1) The real estate investment financing agreement is a financial and successive execution act.*

*a) The real estate investment financing contract is a financial act.*

The specificity of the real estate investment financing contract is to be a profit-making act is a financial characteristic, because all the real estate investment financing activity offers the financial resources for the investor in return for a financial commission where a bank interest where a share of gain, Following the association in real estate investment

which leaves to say that the real estate investment financing contract is only the legal framework which envelops the commercial-financial action by allowing the financial backer a financial benefit, in all legal transparency, moreover the idea that the act of real estate investment financing is a financial act materialized by the fact that the domination of banking and financial customs on the regulation of real estate investment contracts, especially in the Anglo-Saxon legal system, is very real.

And among the remarks which gives the financial aspect to the real estate investment financing contract, and that the practitioners in this field are the financial establishment which practices the financing activity and also the securitization, a concept introduced in this legal framework of financing through the transformation of these agreements into title by the right of securitization <sup>56</sup>; So the investment financing agreement is a financial act that falls within the means of investment in financial engineering under the designations and legal tools of the stock market.

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<sup>56</sup>- In Moroccan law the law of securitization of mortgage loans N° 10-98 governs the regulation of securitization, in Egyptian law in its article 11 of the law of real estate Financing N° 148 year 2001 stipulates the financial specificity of agreement real estate investment financing

**b) The real estate investment financing contract is executed successively:**

Contracts are classified in relation to time according to whether time enters as an element of the obligations born, in instantaneous and successive contracts<sup>57</sup>, the instantaneous contract is the contract where time is not taken into consideration to measure the payment in each obligation arising from this contract<sup>58</sup> example the contract of sale is an instantaneous contract because its obligations are instantaneous execution and time does not enter its quantity, and the relationship between seller and buyer is not a continuous legal relationship over time<sup>59</sup>,

Also the contract remains instantaneous even if one postpones an obligation of one of the contractors until the future, where one divided the counterpart in installment of executable payment distributed in the future time, because the time in these cases is not element due in the obligations arising from the contract except that he fixes his appointment to execute it<sup>60</sup>. on the other hand, the successive contract is the contract where time is a potential element, because it produces enforceable obligations at a precise moment in time where this execution is repeated during the time of the obligations resulting from the contract<sup>61</sup>.

However, in the real estate investment financing contract, time is not an element but an external element of the agreement because it does not enter into the quantity of the obligations of the contractors and it does not change according to the duration of payment. Also the overall costs of the financial and legal operation for the financing is recognized in advance and the time has no influence on this operation, but the time in this case is only an appointment for the performance of the obligations of the contractors, and the monthly payment is only the regulatory appointment of the payment of the financing, because the investor can pay the financing in advance in whole or in part.

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<sup>57</sup> نبيل إبراهيم سعد, النظرية العامة للالتزامات, مصادر الالتزامات, دار الجامعة الجديدة, الإسكندرية, 2009, ص 86

<sup>58</sup> محمد حسين منصور, النظرية العامة للالتزام, الكتاب الأول, مصادر الالتزام, دار الجامعة الجديدة, الإسكندرية, 2005, ص 52

<sup>59</sup> محمد حسين منصور, النظرية العامة للالتزام, الكتاب الأول, مصادر الالتزام, مرجع سابق, ص 52 - 53

<sup>60</sup> شمس الدين الوكيل, مبادئ القانون الخاص, منشأة المعارف, 1965, ص 292.

<sup>61</sup> عبد الرزاق أحمد السنهوري, الوسيط, جزء الأول, مصادر الالتزام, منشورات الحلبي الحقوقية بيروت لبنان, ص 180

In addition, the convincing thing in our approach is that the financial backer has the right in some cases to be reimbursed, by all future monthly payments or the rest of the financing, such as the case where the investor has used the guaranteed real estate or renting it. without the permission of the financial backer, which means serious damage to the interests of the financial backer<sup>62</sup>, and in this case the weather has no real influence on the real estate financing contract from which it is concluded that the contract real estate investment financing and an instantaneous act therefore this contract operates by non-retroactivity in the event of cancellation of the real estate investment financing contract and the contracting parties return to their legal status before the conclusion of this contract.

Even if in French law the legal nature of the Real Estate Investment Financing contract is an act of credit, but the French Court of Cassation has decided in several decisions that the legal nature of this contract is to be an instantaneous act, by removing the financial backer's right to interest in the event of a decision to cancel this contract; following the idea that this contract contradicts the rules of consumer protection 'the investor' according to article 5 of the law of June 13, 1979 in consumer law and which took the number L 312 / 8 in new law of the right of consumer .<sup>63</sup> unlike other doctrinaires insisting on the fact that the qualification of the real estate investment financing contract falls into the category of contracts with successive performance. According to them, the duration or time is not an essential element in the contract but remains important in the designation of the numerical value of the monthly quota issued by the financial backer for the benefit of the borrower.

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<sup>62</sup> –Articles 7 and 8 of the Egyptian real estate financing law and articles 1045, 1047,1048 of the Egyptian civil code.

<sup>63</sup> – Jean calais –Auloy & Frank Steinmetz, p.429 and s, p.504 and s, p.511 and s; cass.civ.1 March 9, 1999, D.aff.1999-628 and March 23?1999, D.aff.1999, 754; Stéphane pidlievre “Law of the building” chronicle, JCP, éd.. National , N°.47, 1302, 2007, p.22; Cass.civ 1, March 9, 1999, RD. IMMOB. , 2000, p.376. ; Cass.Civ. 1, December 198, R.Dimmob, 1999, P.291 and note H.Hugas –Darraspen–F.Schaufflberger?RD immob, 1999-16 No.171 and Obs and Cass.civ.1, 9 Nov 1999, RD immob 2000P.224

However, French law on consumer rights requires the obligation in the lender's offer, a future monthly payment schedule for a period.

So long as the duration of the financing is long, the advances of the lender are of minimum numerical value compared to the case where the duration of the financing is small, this numerical value will be high in the opposite case.

Therefore, this real estate investment financing contract is a contract of successive execution to be determined, whatever the credit, with variable or fixed interest.

Similarly, English and American law confirms the qualification of this contract as being a credit contract with successive performance.<sup>64</sup>

Therefore the real estate investment financing contract is a successive performance contract in French case law. Because “we have two legal results the first is that each monthly payment of the credit follows the regime of the limitation period apart from other monthly payments and is not linked to the limitation period of the real estate investment financing contract. the second result is that the beginning of partial execution of this contract prevents the investor from having the right to recourse for cancellation of this contract during a lawsuit initiated by the lender against the borrower in the event of non-payment of the monthly payment due to the borrower”<sup>65</sup>, is a decision of the French Court of Cassation in the legal case of a woman and her husband who concluded a real estate investment financing contract with a borrower. and they stopped paying the monthly installments, asking the court of cassation to cancel this contract. However, the verdict of the judges of cassation was that the cancellation of contract is only authorized in the case of qualifying contracts having the right to be canceled before their execution, however for contracts with successive execution such as real estate investment financing contracts and or cases where the execution began with the payment of the monthly installments, the right to recourse to its cancellation is unacceptable<sup>66</sup>.

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<sup>64</sup> -Grant S .Nelson & Dale A .Whitman, Real Estate Finance law, Fifth edition, Thomson ,west, U.S.A ,2007.

<sup>65</sup>- و ثروت عبد الحميد الحقوق العينية و التبعية ابو ظبي 1998 ص 17

<sup>66</sup> - F. Terre, Ph. Simpler & Y. Lequetie, Civil Law: obligations, 6th edition, Dalloz, 1999, No. 392, P.421 and Cass.Civ, June 1, 16, 1998, Defrenois, 1998, N36,895,P.1413



## 2) The real estate investment financing contract is an act of consumption.

### a) Scope of definition of the consumer in law:

The origin of the word consumer appeared in economic sciences, then by its importance and its granted weight in legal regulation of the relations between people within the company, one introduced the idea of the protection of the consumer and the realization of balance in a contractual relationship between consumer and professional in the legal environment, by extension the paramount legal interest in the study of consumer contracts. was to identify the field of definition of the consumer in common law.

The scope of the consumer is well defined in comparative law by consumer or consumer protection laws such as law 31-08 of Moroccan law which stipulates in its article 2: “consumer means any natural person or who acquires or uses for the satisfaction of his non-professional needs products, goods or services which are intended for his personal or family use”.

So we have three mandatory elements by the Moroccan legislator to specify the consumer:

a- The consumer is a natural or legal person <sup>67</sup> (also the Spanish legislator in legislation of July 29, 1984 concerning the defense of the consumer took the same element into obligatory consideration <sup>68</sup>, likewise the Syrian legislator in law n ° 2 of the year 2008 concerning consumer protection <sup>69</sup>, and the Belgian legislator in its law of 14 July 1991 on consumer protection <sup>70</sup>).

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<sup>67</sup> المسى لومبي حماية المستهلك من الشروط التعسفية أثناء التعاقد مجلة المحاكم المغربية العدد 100 2006 ص 104

محمد  
<sup>173</sup> ويعيد عباس مفهوم المستهلك على ضوء العمل التمهيدى لمشروع قانون حماية المستهلك المجلة المغربية الاقتصاد والقانون المقارن العدد 37 السنة 2002 ص

<sup>68</sup>-Paissant (G) : « les nouveaux aspects de la lutte contre les clauses abusives »,D.1988,T4,P.255

<sup>69</sup> عابد فضيلة حماية المستهلك في جمهورية العربية السورية مجلة جامعة دمشق العدد الأول 2001 ص 125

<sup>70</sup> -Domont & Naert (F) : la protection de la partie faible dans les rapports contractuelles, Apports Belge », L.G.D.J, 1996, P.222



b- The consumer is the person who acquires or uses products, goods or services for the satisfaction of his non-professional needs.

C- Products, goods or services that are intended for the personal or family use of the consumer.

While other legislations have restricted the legal quality of the consumer to the simple natural person. As in the case of Canada, in its article one of its consumer protection law, defining the consumer as follows: “a natural person, except a merchant who obtains a good or a service for the purposes of his trade”. The protection measures are intended solely for natural persons.

Partnerships and legal persons are not considered to be consumers within the meaning of law <sup>71</sup>, moreover the definition of article 1384 d of the Quebec civil code reflects the intention to protect the “natural person” consumer, excluding partnerships and legal persons.

Contrary to consumer protection law, the Quebec Civil Code positively expresses the purpose of the consumer contract: “for personal, family and household purposes” with the intention of excluding any commercial purpose. In practice, despite different terms in consumer protection law. The effect is similar because the case law had brought out the same elements from which the protection of the consumer both in the civil code and in the consumer protection law is reserved for the user of the goods and services usually of an inexperienced person . <sup>72</sup>

However, the French consumer law legislator has defined that the real estate investment financing contract is a consumer contract if and only if the loan is within a framework cited by law <sup>73</sup>.

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<sup>71</sup>- **L'heureux Nicole** , « l'identification du consommateur , son besoin de protection », (1979) 39 R. du B.41 ;**Moore Benoit**, « Sur l'avenir incertain du contrat de consommateur » , (2008) 49C. de D.5

<sup>72</sup> **Lafond pierre Claude**, « Conteurs et ramifications de la nouvelle définition du contrat de consommation du code civil du Québec », (1996) 56R. du B. 569 ; **Jobin pierre – Gabriel**, « l'équité en droit des contrats », Mélanges Claude Masse –En quête de justice et d'équité, Cowansville ,Editions Yvon Blais, 2003, P. 473.

<sup>73</sup>- jean calais –Auloy, Frank Steinmetz, op cit p.492 et s

Also the funder is always a professional person in real estate financing activity that is why the Egyptian legislator has classified it into three categories (real estate finance company, banks authorized for this type of financing by the central bank and public parties which falls within its object the activity of real estate financing) in article 03 of law 148 of 2001 on real estate financing, also in French law we find that the French real estate bank since its creation in 1852 is specialized in financing real estate transactions<sup>74</sup>. in addition to other real estate financing institutions and banks authorized under the rules of the French law of 25 June 1999 concerning savings and financial security (according to article 93)<sup>75</sup>. So the financial backer in the real estate investment financing contract is professional and carries out financing activity either in France or in Egypt, on the other hand the borrower is a consumer if he is a natural person. but in article one of the law of the protection of the Egyptian consumer n°67 of the year 2006 stipulates that the contract of the real estate financing is considered as contract among the contracts of consumption if the person investor contracting that one returned to him service or real estate financing to meet his personal or family needs.

Therefore the consumer protection rules on Egyptian real estate financing law are not beneficial for a professional investor as a party to a real estate financing contract. Thus the beneficiary is only the non-professional consumer. A conclusion that is inconsistent with French doctrine, which sees in French law a right that does not prohibit legal persons from benefiting from the legal regulation of real estate financing in its protectionist sense, considering the legal person as a consumer<sup>76</sup>.

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<sup>74</sup> -Charles-Albert, "The investments of French savers from 1815 to the present day, P.13.

<sup>75</sup>- H.heugas-Darraspen, "the reform of land credit companies", RD IMNEb, 1999, P.571

<sup>76</sup> -P. Sargos, the jurisprudential doctrine of the Court of Cassation in matters of mortgage, Rep.Defrenois, 1998, N°.5, P.371

Now the consumer benefits from the protectionist rules governed by the French consumer law in real estate financing contracts which have as their object the realization of professional habitat <sup>77</sup>. moreover, article L312-3 (originally from article 114 of law 31-08 in Moroccan consumer protection law) of French consumer law has excluded professionals from having the designation of consumer and benefiting from its legal protection <sup>78</sup>, also the French Court of Cassation took the decision not to apply the rules of consumer protection in this contract which finances companies whose activity is real estate transactions regardless of the number of real estate which manages in its activity <sup>47</sup>, except that the parties to this contract may agree that their contract be governed by the protectionist rules of French consumer law, because the French Court of Cassation has decided that the real estate financing contract for professional real estate activity is governed by consumer law in the event that there is a clause in the contract between the contracting parties allowing this contract to be governed by the protectionist rules of the law of consumption <sup>79</sup>

**b) The real estate investment financing contract is a consumer contract.**

the consideration that this contract is a consumer contract has legal consequences, among them the obligation of the financial institution providing the funds to give the consumer investor a period of reflection on the contract to propose and respond to him according to the rules consumer protection in French real estate financing and according to the rules of the Moroccan consumer protection law 31-08. and also following the articles of Law 67 of 2006 of Egyptian consumer protection and above all to protect it being the weak party according to the general rules and if only if the investor is a natural person having real estate financing for a non-professional need such as the case of his habitat.

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<sup>77</sup> - P. Ancel, Manuel de droit de crédit, 2eme édition, Litec, 1992, P.13

<sup>78</sup>- Cass.Civ.1, 1october, 1994, R.D, IMMOB, 1995,P.363 et Cass.Civ. 1,1fevrier,1993, R.DIMMb,1994 ?p.490 et s

<sup>79</sup> - H. heugas-D .darraspen, , D .Schaufelberger, Not sous, Cass.civ .1mars 1999, J.C.P,1999,1,N.171.

Really the financial institution undertakes to inform sufficiently about the real estate financing operation, its advantages, its disadvantages, explain the conditions of the financing and its object. which further protects the investor and makes him a contractor knowing the reality of his rights and obligations. Even more so, this obligation to inform the real estate financing contract is a financial act requiring more information to have sufficient protection for the investor in the context of good faith in contracting

And what enhances this obligation, for example, article 6 of the Egyptian law on real estate financing which stipulates the obligation to have data on the real estate financing contract, such as the conditions of consent of the seller and buyer in the event of the sale of real estate per monthly payment, better still we will have to have the data on the real estate, its price in advance, the number of monthly payments, their values and others Indeed.

Law No. 31/08<sup>80</sup> of Moroccan law enacting consumer protection measures, which constitutes a complementary law to the legal system in terms of consumer protection. Gives a very precise definition of the operations to which the rules of the real estate financing agreement are applied.

These are loans which, regardless of their qualification or technique, are granted in the usual way by any person, in order to finance the following operations:

- \* for buildings for residential use or for professional and residential use:
  - \_ Their acquisition in ownership or enjoyment.
  - \_ The subscription or purchase of units or shares of companies giving rise to their allocation in ownership or enjoyment.
  - \_ Expenses relating to their construction, repair, improvement or maintenance.

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<sup>80</sup>- The Law No. 31/08 on consumer protection promulgated by Dahir No. 1-11-03 of Rabaii 14, 1432 (February 18, 211) entered into force on April 7, 2011, Official Bulletin No. 5932.

\*\* the purchase of land intended for the construction of the buildings mentioned in the professional.

The conditions that must be observed by any real estate financing institution are:

- 1- mention the identity of the parties, and of the declared sureties;
- 2- specify the nature, object and terms of the loan;
- 3- establish a schedule of amortizations detailing for each maturity the distribution of the repayment between the capital and the interests.
- 4- indicate, plus the amount of credit likely to be granted, its total cost, its overall effective rate, as well as, if applicable, the terms of indexation;
- 5- giving an evaluation of the credit cost, the stipulations, the insurances and the real or personal sureties required, for the conclusion of the credit;
- 6- recall that the sending of the offer obliges the lender to maintain the conditions it indicates for a minimum period of fifteen days from its receipt by the borrower. Also, the borrower does not accept the offer until seven days after he has received it. Acceptance must be given by registered letter with acknowledgment of receipt,

Also A costly divorce, a dismissal, a precarious financial situation, are all reasons that can stop the payment of installments. Borrowers then find themselves in a dead end<sup>81</sup>, because banking establishments very often refuse to suspend maturities or impose restrictive conditions on it.

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<sup>81</sup> - Because of Article 243 of the Moroccan Code of Obligations and Contracts stipulating "...judges may nevertheless, in consideration of the position of the debtor, and using their power with great reserve, grant moderate time limits for payment and stay of proceedings, all things remain as they are", this is the rule of grace period of Islamic law origin;

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Article 149 of Law No. 31/08 on consumer protection stipulates that "the performance of the debtor's obligations may be, in particular in the event of dismissal or unforeseeable social circumstances, suspended by order of the president of the competent court. The ordinance may decide that, during the grace period, the sums due shall not produce interest. The borrower can now obtain the suspension of maturities for a maximum period of two years. He has the right to ask the court that, during these two years, the unpaid sums do not bear interest.

The borrower must prove his financial precariousness, or a delicate family or medical situation. This is done through an expertise, and a counter-expertise requested by the financing institution.

The suspension of deadlines has many advantages. But, things get complicated when the bank pronounces the forfeiture of the term and that in the same stride the borrower, having become a debtor, requests the judicial suspension of the maturities of the loan. "Even if the forfeiture has been pronounced, the suspension of the debtor's obligations may be ordered", ruled on this subject the Court of Cassation in February 2015.

Therefore, the real estate investment financing agreement can be considered a consumer contract if the investor is a natural person and not a professional; worse still, in comparative law, real estate financing for housing or housing construction or its development is always under legal protection, which is why it is governed as a consumer contract <sup>82</sup>.

So the investor in a real estate financing contract is under a legal mechanism which establishes the contractual balance based on two principles the defense of the consumer against an excessive advantage of the trader (bank) and against the exploitation exerted by the beginner (bank) <sup>83</sup>.

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<sup>82</sup> - C.J. Miller BA, LM, *Brainw Diaries* M.A.LIM, Consumer and Trading law , Cass. and Materials, 1985,Bullerm, London,p.352 et S.

<sup>83</sup> -JEAN CALAIS-AULOY , « l'influence du droit de la consommation sur le droit civil des contrats », 1994 Rev. Trim. Dr. Civil 239, 245 .

B- The real estate investment financing contract is an act between equality contract, membership contract and its special characteristics

1) The real estate investment financing contract is an act between a contract of equality and a contract of adhesion

a) Definition of equalities and membership contract.

Before starting to debate, we transcribe the definitions of the equality and membership contracts such as:

\* the equality contract is the contract which is based in its consent on the effective and legal equality of the contracting parties. In such a way that each of the parties to the contract can negotiate its conditions and there is consent of the parties after equal negotiation between the contracting parties. For example, the contract of sale and rental contract and other contracts <sup>84</sup> .

\*\*\*The membership contract has two definitions, one traditional and the other recent, the first definition the membership contract is a contract that one of the contracting parties is subject to the conditions of the other contracting parties (the economically weak party) and the strong party according to its effective and legal state can oblige the other party to accept the conditions of the contract in all its majority without having the right to discuss it or to change it <sup>85</sup> .

While the second definition of the adhesion contract is that the adhesion contract is prepared in advance by one of the parties, defining the effects of the rights and obligations of the contract in such a way as to preserve its interest without the other party has the right to negotiate the content of the contract <sup>86</sup> .

From now on the importance of differentiating between contract of equality and contract of adhesion is important because the legislator to insist on the protection of the weak part in contract of adhesion so that one can give to the judge the power of appreciation in change abusive conditions and explanation of the doubt in favor of the weak party and others <sup>87</sup> .

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84 57 محمد حسين منصور النظرية العامة للالتزامات الكتاب الأول مصادر الالتزام دار الجامعة الجديدة الإسكندرية 1998 ص 57 voir MAZEAUD (D) , « le contrat ,liberté contractuelle et sécurité juridique » , Defrenois art 36874,1998..

85 74 نبيل إبراهيم سعد النظرية العامة للالتزامات الجزء الأول مصادر الالتزام دار النهضة العربية بيروت 1995 ص 74 CHOLEY, « l'offre de contracter et la protection e l'adhérant dans le contrat d'adhésion » thèse (dactyle), Aix, 1976 ;

86 91 نبيل إبراهيم سعد نمو قانون خاص بالانتماء بوجه عام عناصر قانون الانتماء دراسة تحليلية منشأة المعارف الإسكندرية 1991 ص 91

87 - en législation française l'article L 421-6 du code consommation donne ce pouvoir au juge d'éliminer les contrats illicites et abusives .



**b) The real estate financing contract is an adhesion contract.**

Between case law and doctrine, is this contract a contract of adhesion or not? we find that the case law by its judgment of the court, second instance Colmar in France refused a report describing this contract as a contract of adhesion because its conditions are not abusive<sup>88</sup>.

But in French doctrine, the current most responded to is that which sees that the investment financing contract is a contract of adhesion with part of the case law conditioning that one of the contracting parties is in a position of fortress with respect to the other party with regard to its economic capacity, professional experience, its cultural organization, its typical and exemplary offer to all its real estate financing contracts<sup>89</sup>.

In addition, French consumer law has considered the real estate investment financing contract a consumer contract, especially in article L 312/1 of the consumer code, which gives it a right of protection as a contract of membership.

And what reinforces this current the Egyptian law which to give to the legislator the right to choose the direction of the general committee of the affairs of real estate financing according to the articles from 42 to 44 of the real estate financing law n ° 148 of 2001 as having the power of inspection, of subordination on the intermediaries in real estate financing and it concretizes the models of the real estate financing contracts without the consent of the financial backer, which demonstrates that this real estate financing contract is a contract of adhesion favoring the consumer investor in its protection is guaranteed granted by the Egyptian legislator and by the jurisprudence. From now on, the same legal formalization is observed in the French legal regime<sup>90</sup>.

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<sup>88</sup>- Cass. Com.10 Mai, 1989, RTD.C 1990, 89, OBS.B.BOULOC ; MALINVAUD, PH, « La protection des consommateurs », D , 1981 CHRON, 49

<sup>89</sup> 389 رقم 389 حسام الأمانبي المصادر الإرادية للالتزام الطبعة الثالثة دار النهضة العربية القاهرة 2000

<sup>90</sup> - MAZEAUD (D), « la cour de cassation poursuit son œuvre de dissuasion à l'épreuve de la jurisprudence en matière de la consommation », Defrénois ,art 36210-149,1995 ; voir MARTIN (d), « la défense du consommateur à crédit ,R.T.D.Com, 1978»



## **2) Special characteristics of the real estate investment financing contract.**

**a) Real estate investment financing contract between civil contract and commercial contract.** There are two types of contracts in private law: civil contracts and commercial contracts, the latter are those that the merchant concludes in the event of a commercial transaction with a commercial person, or not but concludes this contract to have a profit by use of wealth.<sup>91</sup>

Therefore the real estate finance contract is always a commercial contract because part of the contract is the real estate finance company or a bank. but for the investor there are two cases of qualification, in the first case when the investor wants by this contract a commercial business or a commercial service or productive work we have a commercial contract. and in the second case the investor does not have a commercial or Professional purpose. the real estate financing contract is a civil contract. therefore this real estate financing contract is a mixed contract. Or for the third party who may be the contractor who built the building the contract is a commercial contract and for the seller of the building a commercial contract if he has the profession of real estate salesman.

### **b) Contract for the financing of real estate investment a contract for valuable consideration.**

This contract is a contract of fiduciary contracts that rely on trust in the investor for its funding<sup>92</sup>, and it is considered a contract of contracts that is based on personal consideration<sup>93</sup> saw each party to this contract : borrower and lender taken into consideration, the economic and legal status of the other person in the event of contracting.

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<sup>91</sup> -article 2 of the DAHIR August 12, 1913 of the law of obligations and contracts confirms this doctrinal definition also articles 4 to 8 of the Egyptian commercial code (law n ° 17 of 1999); see G, Ripert Ch, Lyon –Caen- de l' influence of commercial law on civil law since 1804. Book of the centenary of the civil code.1969 P.205 and S; Jauffret, the extension of commercial law to traditionally civil activities. Mixtures Kayser, T2 P.59 and S P.U.F. 1979; محمد الشيبور - عز الدين بنسني ↑ مدونة التجارة القانون رقم 15 95 سلسلة المعارف ال

<sup>92</sup>- RIPERT and ROBLOT, Basic Treatise on Commercial Law, L.G.D.J, Paris, Volume II, 9 edition, 1981, P.689, N°. 2811.

<sup>93</sup> -F. COLLART DUTILLEUL & PH. DELEGECQUE, civil and commercial contracts, Dalloz, Paris, 1991, No. 27, P. 23 and S; MAZEAUD and CHABAS, Lessons in Civil Law, Volume II, 1 Volume, No. 159, P.89

This trust between contractors is based on their history in commercial transactions and their solvency in their previous obligations between them or with third parties, especially for the financial backer its essential verification concerning the ability of the investor to pay the monthly installments and respect his commitment. towards the funder. Because in case of error on the person of the investor, there is a reason for cancellation of the contract in favor of the lender.

In addition, taking into account that the sales contract and business contract according to the general rules are not considered personal consideration contracts, because the personality of the buyer or the business owner has no effect, its contracts within the real estate financing contract have become elements of this contract. With the important interest of the personality of the investor who will be the object of consideration. So this contract is a fiduciary contract which considers the personality of the contracting investor great object of consideration<sup>94</sup>.

From now on, each of the parties to this lender and investor contract poses in its prior contractual commitment the personal solvency of the other party. because the stake of the transaction is expensive for all the parties because one and the other gives sums of money either before establishment investment or in progress and after accomplishment investment. hence this contract is a contract of onerous, precise contracts and over-the-counter contracts. Even if it is believed that it is a formal contract because of the formalities required by the English, French, American, Egyptian and Moroccan legislators. implementation phase of this real estate financing contract .

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انظر سمير إسماعيل الاعتبار الشخصي في التعاقد رسالة دكتوراه كلية الحقوق جامعة الإسكندرية 1975 94

## §2. Specificities of the real estate investment financing contract compared to other contracts:

### A – The real estate investment financing contract compared to the leasing contract:

#### 1) Real estate investment financing contract and leasing contract.

##### a) Similarity between real estate investment financing contract and leasing contract.

The leasing contract is a rental operation of the origins of production according to a contractual relationship between the lender (leasing company) and borrower (the beneficiary investor), in return for which the borrower pays the lender according to a defined period. Which is the time agreed in the contract<sup>95</sup>. the leasing contract is a method of financing by financial intermediation because the role of the lender is to finance the purchase of the capital origins at the request of the borrower, by specifying its technical specifications satisfying its activity, on the other hand the lender rents its professional purchases in a non-cancellable period. And in return will receive from the borrower the value of the lease predefined in the contract without the borrower having the obligation to buy his origins at the end of the agreed term. However, the purchase remains a choice among his choices which works with his economic interests. However, we can see a similarity between the leasing contract and the real estate financing contract because the profession of the leasing company is the financing of productive investments, which specifies it as a contract of a financial and complex nature, hence its resemblance to the contract of real estate financing, especially in the situation of a real estate finance lease .. Certainly in Egyptian legal organization we have the financial lease is governed by law n ° 95 of the year 1995 and modified by law n ° 16 of the year 2001 and considering it a contract independent of other contracts. And similar with the real estate financing contract because the two contracts are characterized by three parties: the seller or the entrepreneur, the beneficiary investor and the leasing finance company.

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<sup>95</sup>-نجوى إبراهيم البدالي عقد الإيجار التمويلي دار الجامعة الجديدة الإسكندرية 2005 ص 97

The resemblance becomes clearer in a real estate leasing contract with the observation of the same object in both contracts, which is the financing of real estate leases for productive purposes and the change of owner of the building for the benefit of the borrower if he so desires. recommended .

Overall other similarities between its two contracts are felt example of real estate financing contracts (real estate lease case), the borrower is always the establishment specializing in real estate financing and applies the obligation of personal consideration of investor in the two contracts . More so the operation in both contracts is tripartite (company or seller and borrower and lender).

**b) Difference between real estate investment financing contract and leasing contract.**

Even if there is a similarity between a real estate investment financing agreement and a financial lease agreement, we find differences between a real estate investment financing agreement and a real estate financial lease agreement in different things.

Among them: in the case of a leasing contract, the financing granted to the beneficiary is given at 100% of the value of the capital origins, while in a real estate investment financing contract granting the investor no more than 90% of the value of the real estate or construction or development costs, falling within the scope of the financing.

Better still, real estate leasing charges the beneficiary of the guarantee of the property of capital origin <sup>96</sup> except that the investor in a real estate financing contract owns the object of the real estate transaction subject to the financing with a real estate guarantee. formalizing the real estate property as a mortgage.

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**96 – GIOVANOILI MORIO** , « le crédit –bail-Leasing en Europe, développement et nature juridique », Litec , 1980,N° 34 , P.26 e t s ».

**P.Simpler & F.terre**, « le crédit et ses garanties »,1éd, LexisNexis , coll. Juris-compact, 2004,p.346-347.

Also in a finance lease contract, the beneficiary of the financing does not have possession but de facto control over the object of the finance lease contract for the purpose of leasing<sup>97</sup> . . Without forgetting that the rental contract is a contract of trust contracts<sup>98</sup> .

Therefore the beneficiary of the financing, if he behaves as the owner of the object of the leasing contract, he will be in the process of an offense of betrayal of trust. property (object of the contract) and its behavior as an investor in real estate, is not an offense and may be a breach of the latter's commitment to the financial backer.<sup>99</sup>

The imposing differences between leasing agreement and real estate financing agreement is that the first is a contract of temporary contracts on the other hand the second is a contract of instant contracts because time does not fit into its constitution. In addition, the investor in a real estate financing contract does not benefit from any tax exemption, on the other hand, in a finance lease agreement, the beneficiary of the financing is entitled to a reduction in the rental value of capital origin of the tax base by considering it costs accountants.

## 2) Real estate investment financing contract and building sale contract in future completion (VEFA)

### a) Definition and characteristics of the VEFA contract.

In Egyptian law, for example, a special legal organization such as VEFA cannot be found. Worse still, there is no guarantee rule for the buyer of a building. We only have a qualification of the VEFA contract in a company contract. On the other hand, other legislations such as Morocco On the one hand we have Dahir n° 1-16-05 of February 3, 2016 promulgating law n° 107-12 amending and supplementing law n° 44-00 relating to the sale of buildings in the future state of completion (VEFA) (published on 02/18/2016 in BO no. 6440) .

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<sup>97</sup> -GOYET, "renting and ownership put to the test by leasing and super-financial leases", L.G..D..J, Paris, 1983, P.5 et s.

<sup>98</sup> -ALTER (M), "initiation to the leasing contract, doctoral course, 1985 P.14

<sup>99</sup>- Articles 7.8 of Law N° 148 year 2001 concerning Egyptian real estate financing

In this law the VEFA<sup>100</sup> is defined as follows "any agreement by which the seller undertakes to build a building within a specified period and to transfer ownership to the purchaser in return for a price to be paid by the latter as and as the work progresses" (article 618-1).

The sale in the future state of completion, also called VEFA or off-plan sale, is a legal technique allowing real estate developers to pre-sell their programs before the end of the construction work. This technique also allows them to finance the completion of the work by advances from buyers. It is also a way for buyers to pay in several installments for a purchase representing a colossal amount, to the point of sometimes being the savings investment of a lifetime. This technique is subject to article 618-1 and following of the Dahir of Obligations and contracts since 2002 and law n° 44-00. This law and the devices it contains having demonstrated some flaws, the legislator took up the subject and adopted a reform. This reform took the form of Law No. 107-12. This law also began by modifying the definition of VEFA by specifying that it is "any agreement by which the seller undertakes to build a building within a specified period and the buyer to transfer the price to be paid by the latter as the work progresses". This law intervened in many respects in modification or in addition to the existing law to date. Law 107-12 brings real substantive changes to the existing one. First of all, and this is more reassuring for all stakeholders, the practice of reservation contracts is explicitly authorized by law.

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<sup>100</sup> – DAHIR No. 1-02-309 of Rejeb 25, 1423 (October 3, 2002) promulgating Law No. 44-00 supplementing the Dahir of Ramadan 9, 1331 (August 12, 1913) forming the code of obligations and contracts. (B.O. of November 7, 2002) Law No. 44-00 on the sale of buildings in the future state of completion supplementing the dahir of Ramadan 9, 1331 (August 12, 1913) forming the code of obligations and contracts this text does not has so far been published only in Arabic. According to the information, this difficulty seems quite political rather than legal. The fact remains that the translation into French is nevertheless important given the sector weighed down by French investors.

This is an additional point of security for the relationship between promoter and buyer. The difficulty arises from the fact that the contracts, including the reservation contract, must be notarized or, where applicable, signed by a lawyer with legalization of the signature by the president of the court of first instance. This new formalism, at least for reservation contracts, makes the practice very cumbersome. By pointing out that the reservation is not compulsory in Moroccan legislation.

The preliminary contract, well known also under the name of VEFA contract, remains obligatory from the moment when the construction works reveal the foundations at the level of the ground floor<sup>101</sup>.

In substance, this contract must now provide for the final price of the property. It is therefore no longer a global price but a price per square meter. The tolerance of 5% in areas without price variation that existed is no longer acceptable.

Similarly, it has become illegal to attribute a property to a buyer before any building authorization has been granted. This constitutes a priori a protection of the buyers, but it is above all a return to the prohibition to collect funds before the conclusion of the VEFA contract. Indeed, the attribution of a property is normally done on the basis of architects' plans which must necessarily be drawn up before the conclusion of the reservation contract. Moreover, it would be particularly imprudent to reserve a property without there being authorization to actually build it.

Changes are planned in terms of the documents to be attached to the VEFA contract. Thus, the specifications which were already planned before are modified in their content since they must foresee the estimated date of delivery.

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**101** – The law has largely modified this breakdown by presenting the following terms by default:

- 5% at the conclusion of the reservation contract (if there is one)
- 5% upon conclusion of the preliminary contract (or 10% if there is no reservation contract),
- 10% at the start of the work and 60% to be divided between the foundation work phase at ground floor level, the structural work phase for the entire building, the finishing and procurement phase of the residence permit and 20% at the conclusion of the final contract and the handing over of the keys.



Among the annexes to the VEFA contract, it is necessary to note a modification concerning the deposit which must be provided by the promoter. However, the terms of the guarantee allowing the good end, must be supplemented by decree. The vagueness therefore remains in this area.

So we recap on the Main provisions concerning the VEFA:

- \*Modification of the definition of VEFA as follows "any agreement by which the seller undertakes to build a building within a specified period and to transfer ownership of it to the purchaser in return for a price to be paid by the latter at the as the work progresses" (article 618-1);
  - \*Institution of the nullity of the VEFA if the contract has not been concluded in accordance with the provisions of this law (articles 618-2 and 618-3);
  - \*Obligation to authenticate the VEFA contract with a notary or to have the signature of contracts drawn up by lawyers legalized, with the president of the court of first instance of jurisdiction (art 618-3);
  - \*Fixing of the mandatory information that the VEFA contract must contain (including the final price and the delivery time) (art 618-3 bis);
  - \* Prohibition, on pain of nullity, to conclude contracts for the assignment of a building in a future state of completion, before obtaining the building permit, with the possibility for the purchaser to waive the assignment in a period of one month and obligation for the seller to return to him the full amount he would have paid him, and this within 7 days (article 618-3);
  - \*Fixing the validity period of the assignment contract at six months at the end of which the VEFA contract must be concluded or the waiver must be exercised (art 618-3 bis 3);
  - \* Prohibition of concluding a off-plan contract before obtaining the building permit (art 618-5);
  - \*Fixing of the percentages of the amounts to be paid by the purchaser according to the progress of the work (art 618-6);
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- \* Nullity of any payment made before the conclusion of the VEFA contract or the assignment contract (art 618-8);
- \* Possibility for the buyer to register a pre-rating if the payments he has made exceed 50% of the price of the acquisition (art 618-10);
- \* Possibility for the buyer to assign his rights to another person, subject to informing the seller (art 618-13);
- \* the conclusion of the final contract after obtaining the residence permit or the certificate of conformity and preparation of the land titles and payment of the remainder of the price (art 618-15 and art 618-16);
- \* in the event of refusal by one of the parties to conclude the definitive contract, there are penalties (art 618-18).

On the other hand in French legal organization we law n ° 3/67 of January 3, 1967 which concerns the VEFA contract without giving a definition <sup>102</sup> a this type of contract until the law of the same year produced in June 7 we have defined this contract in article 1/1601 of the French civil code being a sales contract, This is a strong reaffirmation of one of the major differences with the VEFA regime in Morocco for example. In the latter case, in Morocco, the transfer of ownership only occurs at the end, so in France the VEFA constitutes in itself a transfer of ownership. Under the condition of being under construction according to the legislator, this contract obliges the seller to construct the building within a period defined in the contract <sup>103</sup>.

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<sup>102</sup> -SAINT-ALARY (R), "the sale of building to be built and the obligation of guarantee for construction defects", JCP, 1968, N°102146, P.9 and S; WILLIAM B. BRUEGGEMAN & JEFFREY D. FISHER, "Real estate finance and investment", 12TH edition, Mc Graw-hil/Lrwin 2005, P.406 and s and 429 and s

<sup>103</sup>- JESTAZ (PH), "variations on the concept of completion in the sale of building to be built", RD immob, 1982, P.336;  
MEYSSON (P) &TIRARD (M), "sale of building to be built", JUR. class. construction, fasc 82, No. 6; Cass .civ 3, May 20, 1980, Bull .Civ ,N°.104 ,P.76,D.1981, IR,P.409, obs F.MOGIN.

We note that the VEFA contract and the FII contract are similar in that they are a means of appropriating property and building buildings, so in this context we have a great resemblance. but we are concerned with the main element of the two contracts, we have a difference between the two because in the first we find that the essential element is the seller's obligation to build the building during the designer construction period. hence without this element the contract is no longer a VEFA contract, for the second the mandatory element is real estate financing, so a very glaring difference between the two contracts is felt but not felt in the case of purchase financing in course of completion because the organizing rules of the contract are difficult to determine, especially as an example of Egyptian law in the existence of special regulations of the real estate financing agreement in Egypt, but in France we have no problem in this case because the rules of the consumer protection is the most practiced in real estate credit, also the rules of sale of building under construction which is a real estate credit contract, are always under consumer protection.

However, the VEFA contract loses its notoriety as a contract but becomes an element of the legal elements constituting the real estate financing contract. This can be seen in Egyptian law, because in this last contract the obligation of the creditor the financing and the obligation of the seller the construction of the real estate within a defined period and to pass the property to the investor-buyer by respecting the legal clauses which organize the borrower-creditor relationship, by respecting moreover the law of real estate financing number 148 of the year 2001 and the rules of the sales contract and company contract<sup>104</sup> in respect of the rights of financial backers as is also the case in the Anglo-Saxon legal regime, especially in the USA, such as the financing of land division projects and development projects<sup>105</sup>.

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<sup>104</sup> GRANT S.NELSON & DALE A. WHITMAN , “real estate finance law”, fifth edition , Thonsen ,west , U.S.A , 2007, P.502 et s .

<sup>105</sup> le Droit des obligations et contrats marocain a régit le droit de la société contractuelle d’article 982 au article 1091.

## **B– Real estate financing contract, partnership contract and furniture financing contract.**

### **1) Real estate financing agreement and partnership agreement.**

Companies allow the exercise of either commercial or civil activities they are governed by law n ° 20.05<sup>106</sup> in Moroccan law, in France they are governed by the commercial code and civil code, and particularly for civil societies law n ° 66–879 of November 29, 1966 relating to professional civil companies, however we have the simplest definition of the partnership contract is that of article 505 of Egyptian civil law being: "the partnership is a contract or two or more persons s 'require that each of them will be a shareholder in a financial project, giving a financial or service share in order to distribute any profit or deficit of this project'. This contract can only be created by a contractual formalism dictated by law (article 507 of Egyptian civil law). So the contract of partnership is a contract of good and formal with a resemblance to the contract of real estate financing in the event of association of the lender and borrower in a project with one giving the land and the other the financing, or a is in charge of construction and at the end sells the real estate with the distribution of the profit between the partners. Carefully this finding of resemblance is not absolute because there are differences among them the partnership contract is a formal contract. While the investment financing contract is a consensual contract. Hence the partnership contract is a means according to the general rules in private law for the financing of real estate transactions in addition the real estate financing contract and partnership contract are different by the incompatibility of their characteristic elements: definitions and themes.

In addition, in a real estate financing contract, the borrower is specified by law, all other people do not have the right to borrow in this area of financing. Contrary to the partnership contract, anyone can be a partner. In real estate financing contract the obligation of the borrower is bound by a reimbursement of the investor.

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<sup>106</sup> – Including Law No. 17.95 relating to limited companies, Law No. 5.96 (on the collective society, the simple limited partnership, the partnership limited by shares, the limited liability company and the joint venture), and the law No. 13.97 relating to economic interest groups.

While the partner in partnership contract is obliged to give a real financial share, or a service. Also there is a distinction between the obligation of the borrower<sup>107</sup> and the obligation of the partner because for the latter he can support the deficit or for the first he does not support the deficit.

## **2) Real estate financing contract and furniture financing contract:**

The real estate credit agreement is a contract for the loan of a sum of money which generally falls under common law. except that in Moroccan law the law 31.08 concerning the protection of the consumer has put a panoply of clauses protecting the consumer and introducing the field of application of the financing of real estate investment from article 112 to article 141, and declaring the qualification of loan being real estate investment financing is all financing transactions of:

\* Buildings for residential use or for professional and residential use.

-Their acquisition in ownership or enjoyment;

- The subscription or the purchase of shares or shares of companies giving vocation to their attribution in ownership or enjoyment;

-Expenses relating to their construction, repair, improvement or maintenance

\* The purchase of land intended for the construction of the buildings mentioned before <sup>108</sup>.

This definition of real estate credit or real estate investment financing was legislated in January 2011 in law 31.08 after years of waiting and application of the law of 17 December 1968<sup>109</sup> governing real estate credit .

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<sup>107</sup> – Martin (d); “Consumer protection in credit transactions”, Gaz. Pal. 1978.1556;

–Moury (j), “Of the indivisibility between obligations and between contracts”, R.I.D.C. , 1994.

–Piedlièvre, “Building Law”, contraction, JCP. ed. National, NO.47,1302,2007

<sup>108</sup>- According to Article 113 of Law No. 31.08.

<sup>109</sup> – Royal Decree being Law No. 552.67 of December 17, 1968 (Ramadan 26, 1388) concerning real estate credit, construction credit and hotel credit, Official Bulletin No. 2931 of January 1, 1969.

This legislative awakening after a decline in real estate investment financing forced us to compare the two movable and real estate financing in French law; which is more advanced than Moroccan law in the matter and of which this context it defined the mortgage contract being a loan contract in article e 1905 of the civil code, from now on it no longer has the nature of a contract real<sup>110</sup>.

The rules of common law governing the formation of contracts stipulated by articles 1108 and following of the Civil Code, also consumer law containing rules derogating from common law in order to enlighten and protect the consumer in real estate investment financing.

The scope of the provisions of the Consumer Code relating to real estate credit appears rather general with regard to the persons concerned than that of the provisions concerning personal property credit are precise, even if in both cases, the parties concerned are the credit institutions and people who habitually contract loans.

Yet by declaring applies to loans regardless of their qualification or technique<sup>111</sup>, the result is that the code applies to all credit transactions which serve to finance any of the transactions covered by its articles.

On the other hand, for the credit to be subject to the code, it must be used to finance one of the operations listed by it, namely for buildings for residential use or for professional and residential use. :

- Their acquisition in ownership or enjoyment;
- The subscription or the purchase of shares or shares of companies giving vocation to their attribution in ownership or enjoyment<sup>112</sup>;
- Expenses relating to their construction, repair, improvement or maintenance

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<sup>110</sup>- Cass. 1st Civil. , May 27, 1998, Bull. civil. I, no. 186; D., 1999 194, note BRUSCHI.

<sup>111</sup> - Article L 312-2 para. 1 of the consumer code.

<sup>112</sup> - for the application of the provisions of the Consumer Code to acquisitions of shares in companies allocating buildings in timeshare enjoyment, v. Civil. I, June 27, 1995, Bull.civ. I, no. 287, p.200, Dr. Soc. October 195, n°186, notes Bonneau.

On the other hand, excluded from the scope of the said code are loans intended for the financing of buildings for exclusively professional use as well as those granted to legal persons governed by public law and those intended in any form whatsoever to finance a professional activity (art L312- 2 and 3, consumption code).

The parallel between personal property credit and real estate credit can be pursued on the ground of the system. this is how, as with personal property credit, information relating to real estate credit is both general and specific, the code regulating both the content of the advertising<sup>113</sup> made to promote the transactions which are subject to it and the content of the preliminary offer intended for a possible borrower<sup>114</sup> and which does not have to be repeated in the event of renegotiation of the loan<sup>115</sup>. Similarly, like the rules governing personal property credit, the code establishes, with regard to real estate credit, a link between the credit contract and the main contract and organizes the protection of the borrower during repayment. The identity between the mortgage loan and the mortgage loan is not total.

The code has provided in the personal loan for the benefit of the borrower, a right of repentance, such a right has not been identified in the real estate field, but its protection is ensured by the period of reflection which is required of it. 1 The borrower can only grant the offer ten days after he has received <sup>116</sup>.

In personal property credit, the interdependence of credit and sales contracts is reflected in the rules relating to the effective date of the contracts and in those organizing the resolution of the credit contract as a consequence of that of the sales contract. Interdependence provides different aspects in the real estate credit field based on the resolute<sup>117</sup> and suspensive conditions and the insurance contract. worse still In the case of mortgage loans, early repayment does not give rise to any compensation,

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<sup>113</sup>- Art. L 312-4 to L 312-6 of the Consumer Law Code

<sup>114</sup>- Art. L312-7 and L 312-8 of the code.

<sup>115</sup>- Court of Cassation Civ. 1, January 6, 1998, Bull. civil. I, no. 5, p.3;

<sup>116</sup> - Art. 312-10 par. 2 of code

<sup>117</sup>- Art. L 312-12 para. 1 of the code: civ. 1, July 7, 1998, Bull. civil. I, no. 242, p.169.

par contre en cas de crédit immobilier le contrat de prêt peut préméditer une indemnité au titres des intérêts non encore échus qui ne peut sans préjudice de l'application de l'article 1152 du code civil , dépasser un montant qui dépendant de la durée restant à terme du contrat , est fixée suivant un barème reconnu par décret <sup>118</sup> .

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<sup>118</sup> - Art. L 312-21 al.2 of the consumer law code

## **CHAPTER TWO :**

**Doctrinal and legal concepts  
Real estate investment financing  
In Islamic banking law**



Islamic banking doctrine is a branch of Islamic law that requires specialized training and study composed of Islamic Shariah and banking law such that the researcher in this discipline must be legally multidisciplinary in common law and Islamic law. in order to approach the subject of Islamic banking doctrinal research with effectiveness, efficiency and good scientific synthesis avoiding a minimum risk of bad suggestion and an erroneous conception of thematic research in Islamic banking law, otherwise we will fall into poor Islamic banking research, especially French-speaking becoming a reference cornerstone in Islamic banking law because A French-speaking jurist, with a French university education, finds himself in this type of work confronted with difficulties of several kinds. He must first of all develop a priori knowledge of the Arabic language and Arabicized Islamic legal sciences. In perspective Whether it is positive as many jurists can be with works extolling the merits of an idealized Islam, or without this recommended development we will have negative research in Islamic banking law, leaving aside the richness of a protean millennial culture summed up in the outrageous and overly vindictive practice of Muslim fundamentalism <sup>108bis</sup>.

So venturing into research on concepts and the emergence of Islamic banking doctrine necessarily begins with the in-depth study of the sources of Islamic law of business relations which are detailed Islamic rules and shaped based on the Koran, Sunnah and doctrine of Muslim jurisconsults treating the design of business relationships between individuals according to total respect for Islamic Shariah and righteousness in business transactions suddenly ingenuity in research could direct towards the sources of Islamic finance law, which includes financial services and financing transactions primarily implemented to comply with Shariah principles.

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<sup>108bis</sup> –«Comparative theory [...] requires scrutinizing legal discourse for signs of Bias. The comparison is thus likely to free legal reasoning from certain paralyzing conceptual shackles by opening the door to other reading grids. » MUIR WATT H., « Subversive function of comparative law », International Review of Comparative Law, 2000, N°3, p.503.

In order to lead to business relations ending in a sharing of equitable material gain between subjects of a society. By submitting to the purposes and approaches dictated by Islamic law and Islamic banking law without deviating towards transactions prohibited by Sharia <sup>109</sup> , Sharia or Islamic law is today the most important source of Islamic finance law. Even if it can be a partial or total source depending on the society, Defined and traced by the Koran <sup>110</sup> and the Sunna <sup>111</sup> of the Prophet, it affects all sectors of society since it organizes them in all its guises: personal, family, social, financial, judicial, environmental. And that it regulates the public and private affairs of the lives of Muslim or non-Muslim individuals in a Muslim or non-Muslim society.

Islamic law obeys principles, which make it possible to grasp this discipline in an enlightened way, especially the science of the foundations of Islamic law. In this fact, the law is conceived as a principle authorizing a comprehensive and appropriate use of Islamic jurisprudence, which itself is derived from Islamic law. The believer is bound to maintain five sacred purposes: life, religion, sonship, dignity, and property.

Knowledge of Islamic law and specifically the law of Islamic business relations is essential to the practice of Islamic finance and Islamic banking.

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**109-** M.wassili defined sharia as: “a set of canonical and social rules revealed by god to the prophet Mohammed with the aim of organizing relations between men and providing prerogatives and rights for them”, the rules Civil and Commercial Relations in Sharia, Cairo, Et-Tawfiqyya Bookstore, 1997, P 13 .

**110 -**The Koran has about 10 that relate to the constitutional organization; 70 verses relating to personal status; 10 to economics and finance, 70 relating to “civil law”; 30 relating to criminal law; judiciary; 25 to “international law” and 13 relating to the procedure .

**111** On the other hand, secondary sources, based on human reasoning, which include the consensus of jurists, analogical reasoning and interpretation.

From the point that ethics, good manners and moral behavior are the essential rules in Islamic business relations plus the principle of aman –ah<sup>112</sup>, a fundamental notion in social relations and financial transactions. By virtue of which the believer is the one who observes the commitment in relation to his partner in a business relationship, especially in a credit commitment<sup>113</sup>.

The law of Islamic business relations is divided into three branches: the first consists of regulations and decisions relating to criminal and political law; the second is the legal provisions concerning the family and finally the third the regulations and decisions related to contracts and conventions, commercial transactions, and exchanges. From this last branch of law of business relations are born the fundamental principles of finance Islam which was born at the dawn of Islam following the revelation of the Holy Koran to the Prophet Mohamed, in the 7th century AD. Thus, out of a total of 6219 verses revealed over 23 years, about ten relate to the divine instructions to be adopted in matters of commercial transactions and finances. Framing commandments relating to prohibition, equity, and good faith. And as anti-Islamic values practices have been made illicit such as the creation of money from such money we have the prohibition of loan sharking, of the unexpected, of uncertainty in trade and speculation. Offering the opportunity to create an Islamic finance built on a system that includes a legitimate Islamic business sector.

this is why Islamic finance is constituted thanks to the juxtaposition between financial rules and the commandments and Islamic wisdom of origin: Koran, Sunna, and interpretation of Muslim jurisconsults (by instruments: customs, consensus, analogy, approval, adaptation for common interest, and reasoning). Producing Islamic finance governed by Islamic business law and mechanized by modern financial science.

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<sup>112</sup>- Sunnah and secondary sources,

<sup>113</sup>- “its etymology” crédère, which means confidence. » A. Berrada: Banking and credit techniques in Morocco .ed. SECCA 1985 p 255.

The main objective of Islamic finance law is to bring financial practices into line with what is encouraged by Sharia in order to meet the financing needs of investors who reject “classic” or “conventional” finance<sup>114</sup>. And the most important aspect in Islamic finance law is the practice of risk sharing. Giving a doctrinal framework specified by concepts of bank financing by debt contracts or investment contracts respecting Islamic law. And decidedly to assimilate real estate investment financing in Islamic banking law or Islamic finance law will answer the question what are the doctrinal and legal concepts of real estate investment financing? By studying the sources of financing law in Islamic law (section 1) and the legitimization of investment financing by Islamic banks. (section 2)

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**114**– The growth rate of the sector is estimated between 10 and 15% per year, according to a study by the consulting firm McKinsey the wealth of investors in the Gulf region would reach 1500 billion dollars among them 20 to 30% could opt exclusively for Islamic financial products and even 50 to 60% if they have characteristics equivalent to those of conventional products. See SERHAL Chucri Joseph, SAINT MARC Gilles, “Islamic securitization: how to access a new base of investors”, *Revue Banque et Droit*, 2006, N°109 p. 29 and JOUINI Elyès, PASTRE Olivier, Jouini and Pastré report submitted on November 13, 2008, Challenges and opportunities in the development of Islamic finance for the Paris marketplace, Paris Europlace, 2008, p. 6: “by 2020, this market should represent 1,300 billion dollars (i.e., by way of simple perspective, the equivalent of a third of the capital of all the world banks in 2007 or the equivalent of half of the market capitalization of the Financial Center of Paris today). ; Christine Lagarde, then Minister of Economy, Industry and Employment, praised Islamic financial ethics in her speech on November 26, 2008, at the 2nd French Islamic Finance Forum organized by Secure Finance and the Franco-Arab Chamber of Commerce in Paris. ; STIGLITZ Joseph, Press conference by the Chairman of the Committee of Experts on the reform of the international monetary and financial system, Press release, March 26, 2009, New York, United Nations Organization.: “Joseph stiglitz has recognized the interest of the Committee to Islamic finance. First of all, he said, Malaysia is the South-East Asian country which, at the time, best managed, and ethically, the Asian economic crisis. “, “It would seem that Islamic finance has kept in mind that for a financial system to work, it needs, at its base, real liquidity”.

## Section 1 – Sources of Islamic financing law

### §1. Fundamentals of Islamic financing law

#### A– Principles of equal financing in Islamic law <sup>115</sup>

##### 1) Equality from a religious point of view:

The prophet said "believers are equal". This means under Islamic law that any individual believer is linked to another believer by an affinity of brotherhood and equality before Muslim society, thus this principle of non-preference of one on the other, takes on a special dimension if it is in the field of contractual relations. A believer must be sincere and cooperate with his brother by moving away from selfishness according to the words of the prophet "no one can claim to be a believer if he does not love for his brother what he loves for himself. ". And by virtue of this principle, usury has been considered by the rules of the Sharia as a means which promotes inequality. The verses relating to its prohibition in the Koran are preceded by verses which encourage individuals to cooperate and show solidarity. Mutual by reassessing charity for the most disadvantaged.

##### 2) Social equality

Wealth should be harnessed for the benefit of all members of society. The capital must in turn benefit the one who holds it and also who makes it fruitful. a source of social inequality and will concentrate wealth in the hands of a minority. However, in Islamic law wealth can in no way be a source of social inequality. It is only a means to achieve an end, namely the well-being of society as a whole.

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<sup>115</sup>-The law is presented by two schools, sometimes as an ideal, sometimes as a realism. In the law being normative discipline, the conception of law is ideal of the world. So there will be a solution of rational origin of law.

suddenly Islamic law is an ideal law because all its norms are of divine origin. while the school of realistic law declares that the law would result from the human will because god left men free to promote the legal rules as they please. Supported by the English Hobbes who will found the law on a single source: social contract, thus striving to secularize the law.

### 3) Equality from an economic point of view:

Islam managed the economic market of Muslim society in order to establish an egalitarian society. In this sense, the prohibition of interest, for example, finds its foundations in the idea that the Muslim must not abuse it vis-à-vis –vis his Muslim brother or others, namely that the goods and wealth belong to god and that the subjects of god are only holders: "A god says the Koran all that is in the heavens and all that is safe earth"<sup>116</sup>. . Wealth is not a cause of superiority and economic power, it must be circulated in an economic-financial circuit framed by what is permitted by Sharia. and must be spent in the licit of the sharia while remaining essentially a means to help each other and help the poor. in a coordinated and cooperative way so that they become actors benefiting from the financial and economic system without being excluded and disadvantaged by the rich social stratum in the economic market.

A priori in Islam, economic activity is exercised only in accordance with religious and moral precepts following the order of the god: "Do not seek in what god has brought you the final resting place and do not forget your quota depart in this life and be beneficent as God has been beneficent to you"<sup>117</sup>.

These precepts constitute a component of economic life determined by the temporal and the spiritual without one prevailing over the other.

Equality in Islamic economy is more noticeable in the contractual field of commercial business, falling within the notion of balance of services between the contracting parties. Because some modern authors have stipulated the theory of attrition to a great extent <sup>118</sup>.

So any contract in which there is exploitation of one of the parties, and in any operation by which a person exploits the weakness, the ignorance, the need of the contracting party to impose on him obligations that do not equalize the benefits: we have the Wear prohibited by Sharia.

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<sup>116</sup> – Surah Al Baqara verse 284

<sup>117</sup>– surah AL KASAS VERSE 77

<sup>118</sup>– Farouk annaabhah: "the notion of usury in the light of contemporary economic and social developments" (in Arabic) Rabat p 107 and S

## B- Principles of justice

### 1) Justice from a religious point of view:

Relations between believers must be in a spirit of equality because the Sharia does not differentiate between believers. A Muslim cannot afford to unjustly appropriate a property or his brother's property, he must cooperate with him and move away selfishness according to the instruction of the prophet: "no one can claim to be a believer if he does not love for his brother what he loves for himself" <sup>119</sup>. and if a Muslim seeks to take advantage of the need of his brother to subject him to embezzlement he has committed an act of injustice.

The Koran encourages the union of Muslims and animates in them the feeling that they belong to a community charged with a mission according to what God said: "you are the best community that has been designated for men, you command the good, you proscribe the evil and you believe in god" <sup>120</sup>. but usury is considered as a means that creates the spirit of hatred it is caused by this that our prophet prevailed equity in business relations between Muslims and he condemned any profit derived directly or indirectly from any civil or commercial practice.

### 2) Justice from a social point of view:

The prohibition of usury and interest by Islamic law aims to produce social justice between the holder of capital and who intervenes through his work because, contrary to the equality of capital and work, a consistent situation arises has lowered the values and raise the price of materials by promoting social disparities and channeling wealth without risk or pain into the hands of a minority.

Capital becomes a source of social injustice, a means of exploitation of the individual and an instrument of unjust domination. It is this result that the Koran to proclaim its avoidance when God said:

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عن انس عن انبي ص قال لا يؤمن أحدكم حتى يحب لأخيه ما يحب لنفسه، صحيح البخاري كتاب الإيمان، 119

120 Surah verse



so that the riches with which God has endowed you, do not simply circulate among the rich among you and so that the days of glory and prosperity follow one another in a circuit affecting all men”<sup>121</sup>.

### 3) Economic justice.

In Islamic law, the prohibition of interest in a financial relationship between creditor and debtor aims to achieve justice, from an economic point of view. On this aspect, the creditor whose financial funds are used for investment purposes must derive an appropriate part of the profits, rather than the pre-established amount of income represented by the interests and if the investment accumulates losses, he must also assume these losses. .

But it will be exhaustive on the part of the capital holder to ensure profits without risks or penalties; Sample Loan Agreement Capital and labor belong to one person who if the lessee uses them at his own risk. if the capital has just deteriorated it is exclusively for its own account. if we want to make the praetor participate in the profit made, we must at the same time make him participate in the loss suffered.

Islamic law has prohibited hoarding because in Islam wealth is not meant to be a source of economic power to be tied up. wealth must be spent in the direction dictated by god to help others and also allow them to earn according to god: "to those who hoard gold and silver without spending them in the voice of god announce a painful punishment a day these metals made incandescent with the fire of hell will be applied to them on their sides and their back here is what you collected for yourselves therefore savor what you have hoarded » <sup>122</sup> .

In the Islamic economy, money has a value over time which is uncertain and variable in nature, which cannot be predetermined.

Unlike the classic economy where money has a value recognized hastily over time by adding interest

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121- SURAH                  verse

122 - SURAH ATTAWBA verse 34



Indeed, the use of a predetermined interest has one result: an inequitable distribution of risks between the parties concerned. Similarly, monopolies are not permitted by Islam because the possible exploitation resulting from an inequitable distribution of risks is evident here.<sup>123</sup>

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<sup>123</sup> Hamid El Gabid, les banques islamiques éd ECONOMICA 1990 p 30

## §2. The Guiding Principles of Financing in Islamic Law

### A– Prohibitions in financing in Islamic law

#### 1) The general prohibition on credit in Islamic financing

##### a–general prohibition domain definition

**a.1– The evolution of the prohibition of usury through the different monotheistic religions**

##### **a.1.1– Interest through monotheistic religions:**

Interest is at the heart of economic activity, more particularly in that of the banker, it is as old as the world <sup>124</sup>. At a time when the phenomenon of interest was less known and where there was little reflection on the issue, the great philosopher Aristotle condemned interest by writing: “Interest is money which begets money and. ., of all acquisitions, it is the most unnatural. A hundred or a thousand pieces of silver or gold materially remain at the end of a year what they were before, they do not make children; rather, they experience a slight loss through use and expense...”<sup>125</sup>.

The banker is a trader who speculates on money and credit<sup>126</sup>.

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<sup>124</sup> –P. Gruson, Interest rates: Understanding the value and return of a financial security, Dunod, Paris 1992, pp. 42 and later; In the absence of conventional interest stipulation, the loan is granted free of charge...Civ. 1, 26 Nov. 1991, Bul. Civil. I, no. 335.

<sup>125</sup> – Aristotle, The Politician, trans. J. Aubonnet, ed., les Belles Lettres, 1968–1973, Book I, chapter III. p. 23.

<sup>126</sup> – G. Ripert and R. Roblot & Ph. Delebecque and M. Germain, Treatise on commercial law, t. II, 16th ed., LGDJ, no. 2216. Cf R. Routier, Obligations et Responsibilities, Dalloz, 2008 pp. 40–41, the author lays down the principle in matters of credit, “it is precisely that there is no right to credit. No one can therefore by virtue of this principle force a banker to grant assistance against his will. This solution is logical from an economic point of view because the banker to whom funds have been entrusted must not manage them lightly: if solvency is not considered sufficient, the banker must be able to freely decide not to contribute, and this assessment of customer risk must belong to him”. Cass .Ass. full. October 9, 2006, Dalloz.06 Jur. p. 2933, note D. Houtcieff; JCP G. 2006 II, 10175, note Th. Bonneau "except in the case where he is bound by his previous commitment, the banker is always free, without knowing how to justify his decision which is discretionary, to offer or grant credit whatever in either form, to abstain or refuse to do"

In addition to its place in the banking sector, interest plays an indispensable role in maintaining the employment cycle, because through interest the banker will be remunerated and will inject money into the credit circuit, the more it is with interest that he insures a certain number of risks related to his activity.

Although it has been replaced in the Islamic banking system by the principle of profit and loss sharing, interest remains well known in all societies, however primitive and ancient it may be, traces of it can be found. This universality of the phenomenon is manifested by the fact that it has been the subject of studies and reflections not only in all the Monotheistic religions but also among the great philosophers<sup>127</sup>.

Since the first experiments in economics and finance, history has been marked by a persistent polemic on the question of interest (formerly called usury) across religions and currents of thought. This is why Islam, by prohibiting the practice of interest, does not constitute a precedent<sup>128</sup>. All monotheistic religions have strongly condemned the practice of interest<sup>129</sup>.

This unanimous condemnation is justified by the legalistic character of Judaism as well as that of Islam. The latter take into account the relationship between man and God in their daily life.

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**127** – Aristotle, K. Marx. This similarity on the prohibition across religions is justified by the root of the word *riba* and *ribbit*, also designating interest in Talmudic law: *riba* in-dicates, in both cases and means "a lot", "too", see I. Chapellière., *Ethics and Finance in Islam*,. p. 92; and. A. Toussi, *The interest rate in the Islamic financial system*, Harmattan 2010, p. 8.

**128** – G. Causse Broquet, *Islamic banks*, p. 13.; I. Chapellière., *Ethics and Finance in Islam*, p. 91.

**129** – I. Zeyyad Cekici, "The prohibition of interest and Islamic credit transactions in France" *Revue Lamy Droit des Affaires*, October 2008, p. 1.

"The Christian and Muslim religions agree to recognize usury as a sin for three reasons: time belongs to God and must not be sold, it is the notion of delay that is reprehensible here; To collect interest is to show idleness, but work must be the source of income, as Calvin said: "work is a thing so good, so divine (...) which makes the body vigorous and strong". , G. Tribou, *the Muslim Entrepreneur*, Harmattan, 1995.

Unlike Islam and Judaism, Christianity is primarily a moralistic religion<sup>130</sup> and the prohibition of interest was primarily intended to moralize the economy with the establishment of a just and equitable society. This moralistic character only reinforces the prohibition of interest, which justifies the ethical and moral foundation<sup>131</sup>.

For canonist authors<sup>132</sup> drawing inspiration from the Bible and the Gospel to develop a certain number of arguments. The same notion As with the Greeks: "money can only generate money through work", but if there is a surplus it must come from work and not from money itself. "Money does not breed money"<sup>133</sup>. Their second argument takes into account the distinction between fungible and durable goods. And money is a consumable good, which disappears through use or through consumption. Hence they found it hard to conceive of making people pay successively for a thing and its use, which are inseparable. In their third argument they agree with the Muslim religion, on the fact that time belongs to God, so we cannot make someone pay interest by the mere fact of the passage of time<sup>134</sup>. Interest pays for a common good for all, time "usury is the daughter of time" but time belongs to no one except God, so we cannot lend it. This doctrine even went so far as to qualify the debtor who pays interest in return for a loan as a man who is not free.<sup>135</sup>

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**130** –S. A. Aldeeb AbuSahlieh, "Interests and Banks in Jewish, Christian and Muslim Law", Lecture at the Faculty of Law of Luxembourg, March 10, 2010, p. 7.

**131** –F. Guéranger, Islamic finance, an illustration of the finance of ethics, p 78.

**132** –The appellation of canonist comes from the word "canon" which, according to the Christian meaning,

Signified rule or norm. Towards the middle of the third century, the word was used to designate the

doctrines officially recognized by the Church. Later it was used to designate collectively the list of books called holy scriptures. The term cannon also designates the catalog or register of Saints.

**133** –Aristotle, Politics, trans. J. Aubonnet, ed., les Belles Lettres, 1968–1973, Book I, chapter III. p. 30

**134**–M.Thiam, "Time in the outcome of bank transactions: The case of Islamic banks", Law and Religion Directory, Aix-Marseille Vol. 6, Volume 1, 2012–2013, p. 565.

**135** –Saint Thomas Aquinas, nicknamed the angelic doctor and Italian theologian who is one of the main Catholic theologians "Encarta Encyclopedia"

### **a.1.2– Easing of the condemnation of interest.**

Despite all these prohibitions and attacks on interest, lending at interest has continued to occupy a significant place in the economic system of many countries<sup>136</sup>. Yet for a long time, France had always remained faithful to this prohibition<sup>137</sup>. French civil legislation was, moreover, for a very long time considered to be the strictest in Europe at a time when all its neighbors had validated interest-bearing loans in all their forms<sup>138</sup>.

French law was faithful to the Catholic ideology of the time<sup>139</sup>. Calvin was the first theologian of the modern era to morally legitimize the practice of lending at interest. According to Calvin the Bible condemns interest where charity should manifest itself, it does not speak, on the other hand, of another practice, called "the loan of production", that is to say the type of loan that 'requires the expansion of a market and which does not fall within the scope of the duty of charity<sup>140</sup>.

In opposition to this Calvinist opinion legitimizing the practice of lending at interest, the Catholic Church continued to prohibit this practice. It only lifted the ban on interest by canon 1543 of the 1917 Code of Canon Law.<sup>141</sup>

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**136–** Quoted by Ph. Bazard, *The riba and the monetary conception in medieval Islam* (VIIth–XIIth century), memory of DEA, Paris 1 Year 93. p.16 the author does not cease to perceive in the interest an absolute rent, because of the distinction between absolute voluntary agreement and conditional voluntary agreement.

**137 –**A. Lapidus, "Doctrine of usury and theory of interest". Contribution presented at the 2nd International Day of Monetary and Banking Economics, Nice, June 1985.

**138–** P. Gruson, *Interest rates understand the value and yield of a financial security*, Dunod, Paris, 1992, p. 14.

**139 –**F. Aftalion, P. Poncet, *Interest rates*, Presses Universitaires de France, 1984, p. 3–4.

**140 –**R. Denis, "The remuneration of capital in the light of the traditional doctrine of the Catholic Church", in: *Catholica*, n°86, winter 2004/05.

**141 –**It was with a law of 1789 promulgated by a decree of October 12, 1789, that France had formally repealed the prohibition of interest and fixed the rate of the latter at 5%. Decrees n° 2002-927 and 2002-928 of June 10, 2002 established domestic law in accordance with Community law, *Banking and Sept–Oct. 2002*, p. 44.

At the same time, England was the country where the legalization of the practice of interest had taken place without doctrinal agitation<sup>142</sup>. The development of its industry and the growth of its commerce were a corollary of the collection of interest.

Italy, which was a country where the Church had a great influence, had a strong place in European commerce. Its hybrid position making this country a place of worship but also a commercially sensitive European platform, had led the legislator to favor the practice of interest. Its economic development meant that this country could not live without an economy based on the practice of interest<sup>143</sup>.

## **a.2- The evolution of the prohibition of interest through Islamic law.**

### **a.2.1- The use of usury among Arabs before Islam .**

In the pre-Islamic period, usury entered the commercial uses commonly used by Arab tribes. However, the term of a claim has arrived, the debtor asks his creditor for an extension of the term against the payment of a certain sum of money, interest which constitutes the price of the extension of the term<sup>144</sup>.

The operation is repeated several times to such an extent that a debt, however small it may be, continues to multiply, which provides creditors with a certain source of income at the expense of their unfortunate debtors<sup>145</sup>.

Was practiced within all the tribes that made up the Arabian Peninsula, It resulted in the ruin of the debtor, or in his slavery when he could not find enough to pay his debt. The transaction was likened to a sale and therefore nothing reprehensible was seen in it.<sup>146</sup>

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<sup>142</sup> -R. Dhordan, O. Clodong, Interest rates. Monetary instrument at the heart of the economy, Les éditions d'Organisation, 1993, pp. 50-51.

<sup>143</sup> -M. Johner, "Liberty and Money: Calvinism and Economics", La Revue réformée, p. 1.

<sup>144</sup> - Ibn jarir TABARI: jAMI al Bayane T3, P 79.

<sup>145</sup> -IBN KATIR, commentary on the Koran, T1, P 404.

<sup>146</sup> -Ibn Jarir Tabari, jami al bayane T3, P 82

### **a.2.2 – Criminalization of usury by the Koran and hadith.**

Usury was a vicious habit rooted in Arab commercial custom before Islam and at its historical beginning. From then on, a custom that did not correspond to the main principles of this new religion, from where by its pedagogical and educational attitude the Koran has prohibits usury in stages and gradually over time between Mecca and Medina in order to root its illicitness in the practice of Muslim commercial and financial affairs. and starting with a severe reaction initiated by the Koran from the first stage of its prohibition in the following verse "what you give as usury to increase the goods of others, will not grow with God, it is what you give in alms for the face of god that will be doubled" <sup>147</sup> . The remark made is that the verses of the Koran do not contain any prohibitive provision but a completely negative exhortation as we can see: no reward and no punishment.

After God issues a warning to Muslims by invoking the example of the Jews: "Because of the injustice of the Jews, we have forbidden them goods which were and because they have strayed from the way of God and that they took usury while they received the prohibition, and that they devoured the goods of others by vain operations, and we have prepared for the infidels among them a painful punishment" <sup>148</sup> .

These verses intended for Muslims are given the example of the Jews who had engaged in operations which were forbidden to them and they practiced usury and used deceived means to appropriate the property of others in a contrary way. to what the god has allowed. So the prohibition is only implicit but this Koranic text is a legal preparation with regard to Muslims to arrive at a formal prohibition in the next stage; also the explicit prohibition of usury came only after in a partial way in the Koran: "O you who believe do not eat usury by doubling and redoubled, and fear God, perhaps you will be happy, fear the hell which is reserved for the infidels" <sup>149</sup> .

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<sup>147</sup> - surah ARROUM verse 39 سورة الروم

<sup>148</sup> - surah ANNISAE (les femmes) verse 161 سورة النساء

<sup>149</sup> - surah AL IMRANE verse 125 سورة العنكبوت

this prohibition is not total because it designated only the anatocism which is a practice in the cases where the debtor cannot pay his debt there is extension of the term with the capitalization of the interests to such an extent that a debt also weak keeps multiplying <sup>150</sup> .

until this stage of prohibition is only partial because it concerns only the anatocism therefore the low interest is however allowed but the Quran has set out a call categorically prohibiting all that exceeds the capital to lend in an exhaustive way in the eyes of believers: "Those who eat usury will only rise like those whom the devil violently shakes, this because they said that selling is like usury, but God has allowed selling and forbidden wear; he who would have reached the advice of god and who would have ceased, his gains belong to him and his case would be up to god. Those who reoffend will be the guests of hell or they will remain forever"<sup>151</sup> then the Quran added: "O you who believe, fear God and renounce what remains to you as interests, if you are truly believers. do not expect a war from god and his prophet; if you repent, your capital will belong to you, do not harm anyone and you will not be harmed if your debtor is in the gene wait until he is more comfortable, if you give alms by giving up your rights it would be preferable for you if you knew. Dread a day when you will return to god and when everyone will receive the reward for their deeds without being harmed."<sup>152</sup>

God in these verses orders believers to renounce interest and to be entitled only to capital and if they do not abstain they will be fought by God and his prophet.

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150 Ibn katir, commentary on the quran, T1 p 404

151 surah AL BAQARA verse 276 سورة البقرة

152 surah AL BAQARA verse 278 سورة البقرة



The passages in verse of the Koran quoted above defining usury called usury of the term which the interest is taken by the creditor in return for the time he gives to his debtor.

The incrimination of usury in the Koran is limited to the usury of the term while the prophet established around this crime a bordering zone which he struck from taboo, assimilating it to usury itself. it is not a loan, but certain terms of sale or rather of exchange. Some items cannot be exchanged on credit, even without profit. Others are capable of profits, but not of credit; some others can realize one and the other. <sup>153</sup>

this remark is advanced according to the words of the prophet according to Abou Said AL Khoudri: "Gold against gold, silver against silver, barley against barley, dates against dates, equality against equality, hand to hand, the one who receives more practical usury whether it is giving or taking" <sup>154</sup> , also according to Omar Ibn Khattab the prophet said: "Gold against gold constitutes usury except in the case of yours ((simultaneous delivery), wheat against wheat constitutes usury, except in the case of yours , dates against dates constitutes usury except in the case of yours yours" <sup>155</sup> .

Oubada Ibn Assamit brings the same Hadith, adding another word of the prophet according to which: "in case of difference of these species, sell as you wish, but hand to hand" <sup>156</sup> .

So the incrimination of the prophet was expressed by prohibiting the modalities of exchange of six articles which are either precious metals or consumer products. Under the hadiths of the prophet previously cited, the exchange of two items of the same species and the same purpose (gold against gold) is subject to two conditions: quantitative equality and simultaneous delivery. the exchange of two items of different species and for the same purpose (gold against silver) is subject to a single condition: immediate delivery.

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<sup>153</sup>– Malika Kettani, the original bank Islamic bank, dar al kotob al ilmiyah bayrouth lebanon 2 edition 2005 P72.

<sup>154</sup> –Sahih Muslim T5 p 44.

<sup>155</sup> –Sahih Bukhari T3 p 68.

<sup>156</sup> –Sahih Muslim T5 p 44

The DAHIRITE school, which attaches great importance to the literal meaning of the text, and only admits analogy among the sources of Islamic law, considers that the prohibition only applies to the articles stated by the prophet. But the other jurisconsults of the Orthodox rites (Chafii, Abou Aanifa, Ibn Hanbal), consider that the things enumerated by the prophet are only specimens and that the prohibition must extend to other products which are analogous to them (in currency and foodstuffs). Thus, according to Ahmad Ibn Hanbel and Abu Hanifa, gold and silver are considered as examples of what weighs <sup>157</sup>. consequently everything that weighs can be considered usurious <sup>158</sup>. especially lead, iron, copper, metals which are not precious but which weigh. Also Malik and Chafii consider them as usurious, because of their purpose, namely a means of evaluation. Therefore the usurious nature does not extend to other metals such as iron, lead, because they are not a standard of prices. As for wheat, barley, dates, and salt, the jurisconsult Ahmed ben Hanbel and Abu Hanifa consider them as examples of what is weighed. consequently is extend the usurious character to everything that is likely to be weighed <sup>159</sup>. The hadiths refer here to the trade of barter, alongside the trade of currency. This leads to an extension of the domain of the prohibition of usury, an extension that has been analyzed by Muslim jurisconsults as a means of preventing pretexts in order not to practice usury of the term <sup>160</sup>.

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<sup>157</sup> Ibn Houbaira , Al Ifsah An Maani Assihah, p 170

<sup>158</sup> Ibn Jarir Tabari / Jami Al Bayane , T3 ,p 70 et S

<sup>159</sup> Ibn Rochd , Bidayat Al Moujtahid T2, P 78

<sup>160</sup> Ibn Al Kayyin , ialame Almoukiine *إعلام الموقعين* éd .Maniria , Egypte

### **a.3 –Interest on credit between conventional and Islamic financing.**

#### **a.3.1 – Opinions in favor of interest on credit.**

Doctrine is far from unanimous on this issue, for various reasons. The first is certainly due to the exact meaning of the word RIBA. This notion goes beyond the simple notions of usury and interest.<sup>161</sup> In the Arabic language, the notion corresponds more generally to illicit profit and to an increase in goods or an advantage without equivalence of service rendered<sup>162</sup>. Most of the time, authors equate wear and interest when they are two different notions. The Quran does not make this distinction since the word RIBA is translated in some verses as usury<sup>163</sup>. This semantic difference is at the root of this dispute. It is necessary to take into account the existence of the prohibition, in the other monotheistic religions, the prohibition of the interest existed before, but with the evolution of the mentalities and in the concern of a better taking into account of the realities this prohibition has been, abandoned in certain religions, at least attenuated especially with the secularism of modern States. One cannot talk about civil law in Egypt without referring to Abd-al-Razzaq Al-Sanhuri who is what Napoleon is for the French Civil Code, in other words he is the father of the Egyptian Civil Code<sup>164</sup>.

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<sup>161</sup>– M. Rumuy, *Islamic Finance in the Age of Globalization*, Ed. Revue Banque. 2009, p. 46

<sup>162</sup> –Larousse Arabic Dictionary, Paris, 1987, p.571; jurisconsults generally define it as "any advantage or surplus perceived by one of the contracting parties without any acceptable and legitimate counterpart from the point of view of Muslim law" AL-Jaziri (1986) we will see in this chapter that *riba* does not is not an interest. Biblical scholars have recognized that there is a difference between legitimate interest, paying for the elapsed time etc. and usury which is a profit resulting from the granting of credits. Quoted by M. EL-Gamall, *Islamic Finance, Legal, Economic and Practical Aspects*, De Boeck, 2010.p.77

<sup>163</sup>– M. EL-Gamal, *Islamic Finance, Legal, Economic and Practical Aspects*, De Boeck, 2010. p.77, according to the author, the term *riba* originates from the Arabic verb *raba* which means increased and increased thing from itself.

<sup>164</sup>– S. Aldeeb, "Banks among Jews , Christian and Muslim", p.12.

At the outset, he posits the principle expressed in the Koran and in the Sunna and, even if at the outset these prohibitions allude to the barter contract and not to the loan contract, he recognized this prohibition by focusing on the idea of exploitation of the part of the contract which is in a weak position.

But he rejects serious forms of prohibition such as the forms set out in the Koran. The latter allows or recognizes the social interest and, moreover, it authorizes the saver to receive the interest drawn from the loan since it is the weak party of the contract <sup>165</sup>.

What is said in Islamic law comes from Fiqh, the work of jurisconsults who are fallible to make mistakes. Then he looks at the absence of a clear text on interest, because for him the texts prohibit the barter contract and not the loan contract. And he pays attention at the same time to the verses of the Koran condemning the interest, except in what is a factor of imbalance between people. This conception of interest will show

By the Egyptian judge Muhammad Sa'id Al-Ashmawi The latter is the best known in this current which defends the legitimacy of the interest. Judge Al-Ashmawi begins to draw a distinction between Fiqh and Sharia. For him the term sharia does not mean the law but rather the way to be followed by the believer. On the other hand, the Koran <sup>166</sup> did not establish a distinction between usury and interest. a believer to eat the meat of a dead animal when he is starving and has nothing to eat. So the Koran allows to break this prohibition well mentioned in the Koran text, and will accept to break that of RIBA which is imposed by Fiqh and not by the Koran. The judge approved the notion of necessity to allow the loan <sup>167</sup>.

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<sup>165</sup>- Al-Ashmawi, Muhammad Sa'â. Masadir al-haq fil-fiqh al-islami, Al-majma' al-ilmi al-arabi alislami, Beirut, 1955, vol.3, pp. 244-249

<sup>166</sup>-Quran, Sura 45 Verse 18

<sup>167</sup> -Certainly in Egypt today there are people who borrow to provide for their immediate and urgent needs, to house themselves, to feed themselves; these needs must be within the competence of social organizations such as the Nassir social bank or the Ministry of WAQF which lend money without interest or at a preferential rate depending on the needs in question.

But unlike the first, the judge defines the notion of necessity. He also proposed to establish an interest system with control and the setting of a ceiling rate so that beyond such a rate the loan becomes usurious, between 4 and 7% <sup>168</sup>. Different arguments are developed. First of all, the Koran did not provide any precision as to the content of the verses prohibiting interest, leaving believers the possibility of doing so and of instituting sanctions in the event of abuse. Caliph Omar ibn al khatab said that the verse "God allowed the sale and he forbade usury" (2:275) was among the last revealed to Muhammad and he died without clarifying its meaning. the most divergent opinions have been expressed by jurists regarding interests. Efforts have also been made by jurisconsults in declaring that the prohibition of interest referred to in the Koran does not relate to the credit contract <sup>169</sup>, but to the barter contract. In addition, the prohibition of interest concerned the case of the non-needy who were in difficulty to meet their needs.

Today, on the other hand, the borrower is often looking for money to trade, the interest on depositing money in any form (savings book, bonds, investment certificate) is considered by Islamic law as illicit whereas, in the case of modern institutions, neither the Koran nor the Sunna have been able to speak of them. This kind of perceived interest cannot lead to the exploitation that the Koran wants to prohibit.

It is in this spirit that the Egyptian Court of Appeal presided over by this same judge Al-Ashmawi reversed in 1986 a decision of a court of first instance which had refused to award interest based on the following reasoning. The trial judge must apply positive law by virtue of his oath of office. It is wrong to say that interest, allowed in Egypt since 1883, is contrary to Islamic law. The trial judge cannot invoke the constitution which says that the principles of Islamic law are the main source of law, without specifying their content.

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<sup>168</sup>– S. Aldeeb, "Interests among Jews, Christians and Muslims", p. 9.

<sup>169</sup> –S. Al-deeb, "Banking and interest, in the Jewish, Muslim and Christian religions", p. 12.

Due to the differences of opinion, it is up to the Egyptian legislator and not the judge to choose one in accordance with the requirements of the situation and the judge is obliged to apply the law of the legislator, otherwise would violate legal norms and established legislative principles.

The Quran says: "O you who believe, do not live on usury that produces twice as much" (3:125). This verse makes us think of characterized usury than of a simple loan at reasonable interest. The rate was 100%. And when the debtor who was unable to repay his debt when due and who obtained an additional period will repay after twice the capital borrowed.

By prohibiting all lending at interest, the Oulema have created Shariah-acceptable solutions that replace lending at interest with tricks such as Salam sale to satisfy economic demands. The farmer sells his crop which he will deliver after picking while he collects the price immediately, which gives him cash. But this presents that he accepts future risks for the peasant. This is why, some legislators (for example Tunisia after independence) abolished the Salam sales contract.

Undeniably the recognized finding that to counter the ban, Islamic banks resort to disguising conventional credit mechanisms as credit mechanisms respecting Islamic law. Thus these banks operate on the basis of contracts of the ta'jir, mourabaha, Salam type which are disguised interest loan contracts, with the particularity that the interest is not clearly fixed in advance. It is obviously an engineering banking tool in financial marketing in order to access another clientele, especially Muslims, who ban interest-bearing banking services.

### **a.3.2 – Opinions against credit interest .**

All Muslim countries have banks operating with the system of interest, but Muslim religious authorities continue to assert that interest, and by extension the banking system which operates there, is illicit from the Islamic point of view. This is the meaning of the decision of the Academy of Islamic Research of Al Azhar taken on the occasion of a congress in 1965 at which scholars from thirty-five Muslim countries were represented.

According to this opinion, wrongfulness is expressed as follows:

- 1) Interest on loans in any form is unlawful.
- 2) Interest is unlawful regardless of its rate.
- 3) Lending at interest is unlawful. It is the same with the loan against interest, the sin which ensues from it being set aside only in case of necessity; every person having to appreciate for himself what his necessity is.
- 4) Banking activities such as current accounts, exchange of checks, letters of credit, internal drafts are legal.
- 5) Term accounts, letters of credit and any other loan against interest are illegal.

A 1986 decision taken by the Islamic Law Academy dependent on the Muslim World League considers it illegal for a Muslim to have transactions with usurious banks if it is possible for him to carry out such transactions with an Islamic bank.

Some Muslim authors do not hesitate to provide for a punishment of up to the death penalty against anyone who engages in transactions with interest. Sheikh Isma'il Khalil explains that whoever denies the prohibition of interest denies a prohibition clearly prescribed by the Quran in this way, becomes a disbeliever. Mustafa Al-Zarqa, consulted by the Islamic Development Bank, evokes the Hanafi school to give some answers.

– A Muslim in a non-Muslim country can lawfully withdraw interest from his money placed in foreign banks.

The 1986 decision of the Academy of Islamic Law attached to the League of the Muslim World gives indications:



A Muslim must withdraw interest already accrued from usurious banks but he is forbidden to use it to meet his own needs or the needs of people who depend on him, these interests must be spent on charity.

- It is not allowed to leave these interests to the said banks.
- It is forbidden to continue to have links with these usurious banks, whether with or without interest.

It should also be noted that Islam does not only prohibit the interest paid by the debtors during the loan but it also prohibits the collection of interest produced by the funds deposited in the accounts. Thus simple savings books, bonds, investment certificates are considered illicit. This idea is rejected by Judge Al-Ashmawi because the saver who deposits his money is insured for loss theft and the only way to pay the banker is to allow him to obtain a benefit in return which justifies the interest in this view.

The view unfavorable to self-interest is found in all Sunni thought. The qualifier Sunni comes from the importance given to the Sunna, that is to say all the words and actions of the Prophet Muhammad, which all believers must strive to imitate.

This current of Islamic thought also condemns the practice of interest through different schools of thought.

The first is the Hanafi school. It is the one that relies more on individual reasoning and analogy. This current was well represented in Iraq and Syria as well as in Afghanistan, Pakistan and Turkish Central Asia. It is characterized by the use of reason and opinion in the resolution of specific cases and by its caution with regard to tradition. It was the favorite school of the Ottoman Turks which enjoyed exclusive official recognition throughout the Ottoman Empire.

From the point of view of the question of interest, the jurisprudence of Iraq prohibits any unequal exchange of goods of the same kind because this transaction is tainted with *riba*. On the other hand, the exchange of goods in unequal quantities, if they are of different species, is authorized. The Hanafi disapprove of the bill of exchange and consider it



As an act that is discouraged but not prohibited, which would attest to the modernity of this finance <sup>170</sup> .

The second school is the Malekite school. It comes from the teaching of Imam Malik. It advocates a strict interpretation of the Qoran <sup>171</sup> and the hadiths of the Prophet, the Maliki school extends westward, in Egypt, in North Africa, in West and Central Africa. Jurisprudence is that of Medina. Its proponents are much stricter on the rule of simultaneity. Thus Imam Malik explains that "If a man with a term credit benefits from a reduction of his creditor by paying cash, it is undoubtedly an operation tainted with riba". <sup>172</sup>

The third school is the Shafi'ite school. It marks a clear return to traditionalist theses, restricts the role of personal reasoning and emphasizes consensus. This school is dominant in Lower Egypt, South Arabia, East Africa and among Muslims in Indonesia, Malaysia and the rest of Southeast Asia.

The fourth is the Hanbali school, founded by Ibn Hanbal, which is characterized by a return to a strict traditionalist, personal judgment being accepted only in cases of absolute necessity and on the express condition of consensus. It applies the rule of equivalence and simultaneity.

Alongside these schools mentioned above, we must add the various Shiite schools whose principle is to maintain free research from the sacred texts or the traditions of its Imams, which is obviously the very important point of differentiation with the 'Sunni Islam.

Shiism takes its name from Chi'at-Ali, the party of Ali, the fourth caliph and the son-in-law of the prophet Mohamed. For the latter, the leadership of the community belongs to the descendants of the Prophet and his family. They represented 10% of all Muslims in the world.

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<sup>170</sup> L. Aldo, Islamic finance, authorized and prohibited financial operations, towards a humanist fi-nance, Gualino, . "The Extension", 2012, p. 65.

<sup>171</sup> The main source of the Muslim religion

<sup>172</sup> in chapter of the wear of the book الموطأ

They are present in Iraq and Iran, but also in Lebanon, Syria, Pakistan and Afghanistan. Shiites and Sunnis disagree on several points of doctrine but nevertheless find themselves in agreement on the practical prohibition of interest.

## **a.2– the annexed prohibitions on Islamic financing by Islamic law**

### **a.2.1–GHARAR.**

The main prohibition after usury and on which Islamic business law is based is the prohibition of gharar<sup>173</sup> which means hazard, chance, uncertainty<sup>174</sup>.

The gharar is founded by the second Surah of the Quran, verse 219 “They ask you about wine and gambling, say in both there is a great sin and some benefits for people; but in both, the sin is greater than the utility” and on the hadith, “we went to the front of the caravans to buy food there. The Prophet forbade us to resell them before the caravan had reached the grain market”. Islamic law rejects the random contract as envisaged by French law<sup>175</sup>. In contractual matters, the prohibition of gharar concerns the refusal to base a transaction on an element subject to chance. This prohibition of gharar joins the constant concern in Islamic law to protect equity, equivalence in transactions. The indeterminacy and even the ignorance that one of the contracting parties could suffer will lead to the nullity of the contract<sup>176</sup>. This prohibition further emphasizes that it is through effort and labor that the believer seeks profit, not through the possible occurrence of a chance event.

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**173** –AMMEEN AL-DHAREER Siddiq Mohammed, Al-gharar in contracts and its effects on contemporary transactions, IRTI, Jeddah, Saudi Arabia, 1997, p.12.

**174**– Who authorizes them if the hazard is equitably distributed between the parties, on the notion of random contracts in French law, BENABENT Alain, Civil law, Special civil and commercial contracts, Domat Private law, Montchrestien, Paris, 2001, 5th edition , p. 578.

**175** –Historically, the Prophet of Islam forbids city dwellers from selling an object to a Bedouin who does not know the market price. Business and company law”, 1995, p.58.

**176** –AL AMMEEN AL-DHAREER Siddiq Mohammed., p. 12.

Valiantly to this prohibition of Gharar and within the framework of a sales contract, the jurisconsults insist that the object be real, available, that its possible delivery time as well as its quantity and quality are clearly known by the two contracting parties. . Then its price must be determined, otherwise the contract will be void.

The sale of future things, the submission of the contract to the occurrence of an uncertain event and speculation are therefore rejected by Islamic law <sup>177</sup>.

Just like any contract containing in its essence an uncertainty due to conditionality<sup>178</sup>. This is the case of agreements involving two sales in one. For example, in the case of a sale conditioned by another reciprocal sale or a sale whose stipulated price is different depending on the method of payment, cash or term<sup>179</sup>. The notification of a credit in a sales contract is also prohibited.

But in the conception of an Islamic banking law, this type of prohibition could be circumvented, either by dividing these contracts into two distinct acts<sup>180</sup>, or by removing the conventional nature of one of the two notifications <sup>181</sup>.

In addition, the assessment of the exhaustive nature, where minimal tolerated <sup>182</sup>, of the uncertainty which founded the nullity of the contract for gharar in Islamic law will be raised in the light of new possibilities .

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<sup>177</sup> EL KHOURY Michèle, "Islamic financing techniques, a discipline little known in France", *Revue Banque et Droit*, 2007, N°92, p. 18, and SAKRANI Raja, "The game of inter-normative exchanges, law, morality and religion in Western and Muslim legal cultures", *Revue de la recherche juridique, Droit prospective*, 2009, N°4, p. 1708.

<sup>178</sup> AL AMMEEN. AL-DHAREER Siddiq Mohammed, *Al-gharar in contracts and its effects on contemporary transactions*, Jeddah, Saudi Arabia, IRTI, 1997, p. 15.

<sup>179</sup> AYUB Muhammad, *Understanding Islamic finance*, Southern Gate, Chichester, West Sussex, England, John Wiley & Sons Ltd, 2007, "Wiley Finance Collection", p. 112.

<sup>180</sup> example In the sale the tawarruq. .

<sup>181</sup> example In the MOURABAHA contract. .

<sup>182</sup> see COMAIR-OBEID Nayla, p. 63.

The concern to preserve equity in transactions cannot, in the eyes of many authors, be assessed in the same way as in the past<sup>183</sup>

The object in Islamic law must meet a number of criteria in addition to its existence at the time of the conclusion of the contract. It must be possible and determined. Indeed, it is not enough that the object exists, it is also necessary, for the legal act to be valid, that the thing can be delivered. This rule is common to all legal acts: rental, loan for use, deposit.

What makes the sales contract in Islamic law, a real contract. And The object must also be determined in its genus, species, quality and value. This principle, which advocates the determination of the object, aims to protect the parties against the risks of gharar and uncertainty. This limitation of the object according to these imperative characters makes it possible to safeguard a desired balance between the services of the two parties in the name of social justice, specific and characteristic of Islamic law to limit any injustice or iniquity in the transactions or exploitation of the weak part. Although these rules are part of an anti-principle concept of freedom of contract and autonomy of will, but they are an effective tool for the protection of the parties, which is in line with the objective of freedom of contract and the autonomy of will. Because a contract in touch of gharar is like an act mentioning only the unilateral commitment of a party and presenting a pre-established lack of precision on certain aspects of the transaction, this contract is declared invalid. Moreover unfair because it benefits one party at the expense of another.

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**183** The insurance contract, a typically random contract for which the subscription of a policy is based on the commitment by the insurer to cover the insured for a specific risk whose occurrence is beyond his control, is generally rejected for gharar. Some authors, including Mustapha Al Zarqa and Nejatullah Siddiqi, claim the nullity of the insurance contract under Islamic law. ; on this subject EL-GAMAL Mahmoud A., *Islamic Finance Law Economics and Practice*, New-York, Cambridge University Press, 2006, p.154, and p. 149. We have testimony and opinion going in the same direction of the mufti of Egypt Ali jom'a

### **a.2.2– Legality of the investment**

Islamic philosophy subjects economic and financial activities to instructions and restrictions provided for by the Koran which is the main source of norms and which contains both recommendations and prohibitions applicable in the life of Muslim women. Worse still, as the Koran is also a code of conduct, a collection of moral, ethical and religious principles.<sup>184</sup>

It should also be remembered that the Koran established some of these principles as clear rules, authorizing or prohibiting such and such an act or activity: such as the prohibition on investing in illicit sectors<sup>185</sup>. All Islamic asset-backed financing assumes that the asset is lawful from an Islamic perspective. They cannot relate to assets or sectors of activity that are harmful to people and the environment (example: sale of alcohol, games of chance, etc.).<sup>186</sup>

Most of the acts prohibited by religion are fixed by the Koran or the Sunnah of the prophet. This amounts to saying that Islamic law belongs to the ideal law different from other realistic positive law, in Islamic law everything that is not prohibited is permitted. In French civil law, article 1128 sets out “are necessary for the validity of a contract: the consent of the parties, their capacity to contract, and a lawful and certain content”,<sup>187</sup>

Also The things whose trade is prohibited are numerous for various reasons either for the protection of the general interest, because of their nature, the goods of the public domain which are inalienable, certain rights declared such by the law as the right to use and the right of habitation<sup>188</sup>

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<sup>184</sup>– Articles 631 and 634 of the Civil Code, “the right of habitation cannot be transferred or rented

<sup>185</sup>–F. Gueranger, Islamic finance an illustration of ethical finance, op. cit. p. 12.

<sup>186</sup>–L. Sbai El Idrissi, The remuneration of capital in Islam, op. cit. p.17

<sup>187</sup>– I. Zeyyad Cekici, “The Islamic prohibition of interest and Islamic credit transactions in France” p. 8.

<sup>188</sup>–Cass. Com. April 7, 2009, No. 08-12.192; Bul. Civil. IV. n° 54, The court cancels a bank loan for lack of cause.

Some things are forbidden in order to avoid the worst harm to people, such as all drugs. Similarly, the human person cannot be the subject of agreements, which prohibits contracts that undermine the integrity of the natural person unless this is justified by the legitimate interest of the person who consented to it <sup>189</sup>.

The transfer of the civil clientele of the liberal professions was for a long time considered by the case law as non-commercial because of the link between the professional and his clientele which is based on personal trust and could not be the subject of a transmission.

We know that today a reversal of case law has been made by the first civil chamber, the court having specified, in connection with a dispute relating to the liquidation of assets between spouses, one of whom was a doctor, that the “liberal practice fund” includes clientele, materials and premises”.<sup>190</sup> Things prohibited in Islamic law are as well imposed as prohibited by religion, given the implication of morality in religious rules. This is in line with the provisions of the Civil Code in its article 6, laying down the principle of the conformity of contracts with good morals <sup>191</sup>.

But the Civil Code remains far from Islamic law, which makes morality and ethics the basic principles of all financial and commercial transactions.

The religious field is well framed by principles and rules emanating from the Koran, the sunnah and other sources. From this delimitation flow two diametrically opposed spheres, on the one hand the perimeter of the licit or and on the other that of the illicit. This distinction finds its meaning and its scope during the formation of contracts.

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<sup>189</sup> –Article 1211-1 of the Public Health Code

<sup>190</sup> –Cass. civ 1. May 2, 2001; JCP. 2002, II, 10062, note O. Barret.

<sup>191</sup> – CE, 27 Oct. 1995, Dalloz, 1996, 177, note Lebreton.

Indeed, among the conditions for drawing up contracts there is one that affects more the content of the contract than its form. In Islamic law, the doctrinaires distinguish between things prohibited by the Islamic religion and things prohibited by morality.

Most schools and currents of thought agree on a number of prohibitions in Islamic law. This concerns, for example, the prohibition against consuming animals that have died or that have not been slaughtered according to Islamic law <sup>192</sup>. All these schools also mention that the sale of alcoholic beverages is null, absolutely null <sup>193</sup>. Eating Pork is also prohibited<sup>88</sup>. So we can note in addition to *riba*, which Islam classifies within the scope of illicit,

Any transaction, whether commercial, financial or economic, must not only obey religious recommendations, that is to say the rules laid down by the Koran and the *sunna*, but also moral requirements. This complementarity between morality and religion reveals principles that have their source in the moral and ethical domain, which is consistent with good morals and public order.

The requirement of purity of the object of the contract in Islamic law reinforces the protection of the contracting parties and also allows respect for choice. To be lawful, the object must also be useful either for the contracting party or for society <sup>194</sup>

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<sup>192</sup> -A. Hassoun, "Islamic finance in the international financial system and in globalization: global Islamic finance is experiencing dizzying but fragmented growth", in French-style Islamic finance, a driving force for the economy, an ethical alternative (dir.) by J.P. Laramée, Secure finance, Bruno Leprince editions, 2009, p. 91..

<sup>193</sup> - Qoran Surah V, verse 90: "O believers, do not dispose yourselves for prayer, if you are drunk, or else: they ask you about wine and games of chance. Tell them that in both there is great sin and some benefit to people, but in both the sin is greater than the utility. O believers, wine, games of chance are an abomination due to the work of Satan; avoid them for your salvation."

<sup>194</sup>- Quran verse II, surah 173

The principle of the requirement of the utility of the act imposes the realization of the object of the contract, in other words, if the objective fixed at the beginning is not achieved, the contract or the act in question is deemed void. This object of the act is null when it prevents this act from developing all the effects that it should normally produce<sup>195</sup> therefore This principle, which seeks to give a precise purpose to the act that is the subject of the contract, is far from being rational, because the thing that has no finality is assimilated to the non-existent thing and at this level Islamic law agrees with French law, in the sense that in French law, certain things cannot be the object of a legal obligation, because of their uselessness. It is the same with the air, the sea, the rivers, the lakes.

This principle of utility of the act joins and reinforces at the same time the principle of the prohibition of the hazard in Islamic law<sup>196</sup>, Even if the realization of the act and its utility remain important elements in the elaboration and the Enforcement of Contracts in Islamic Law.

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<sup>195</sup>- A. Zahra, *Al mulkiyawa-wanazariyyal al-aqd*, Cairo, 1939, p. 255

<sup>196</sup>- L. de bellefonds, *Treaty of comparative Muslim law, the theory of the legal act*, Paris, ed. Mouton and Co., 1985, pp. 195 sec.



## **2) The interest of sums of money prohibited in Islamic financing**

The notion of interest whether it is damages due to the delay in the performance of a pecuniary obligation (doc art. 132,263,264 and civ code. Fr art 1153) or the remuneration of the term in the event of loan of money (doc and art 1905 of the civil code FR) are always presented as an annual percentage of a principal sum of the loan. of or legal situation comprising a debtor held towards a creditor of an obligation which consists in paying a amount of money ; according to three factors: the duration of the wait for payment, the amount of the sum due and the quantum of the rate.

From this notion of interest we find that its role is only to compensate for the loss suffered by the private creditor of the enjoyment of the capital whether it is a lender who transfers a sum to his borrower voluntarily deprives himself of his employment or of a debtor of sums of money who do not pay the sum on time, the creditor is deprived of the interest, therefore the interest comes in return and in proportion to the duration of this desired or suffered divestiture. the situation of the debtor who does not pay indentation appears to merge with that of a borrower during the execution of a loan contract during the period in which he retains the sum he is bound by the same obligations as a borrower to return the thing (the capital) and the interest on this thing (fruit).

### **2.1-classification of interests in the law of property and obligations**

Despite the explicit terms of articles n°870,871,872,873,874,875,876,877,878 of the DOC and article 584 of the French civil code, the belonging of the interests to the category of fruits has been questioned, several arguments have been invoked in particular by Mr. Philippe and Mrs. Marie Maulaurie<sup>197</sup> to distinguish the interests of the fruits. Their distinction is based on their distinct characters while the production of the fruits would be variable that of the interests would not be it because the variability of the fruits characterizes the natural and industrial fruits and not the civil fruits without forgetting that interests are civil fruits.

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<sup>197</sup> – . Malaurie (M), restitutions in civil law ,thesis, Paris II ed. Cujas 1991

The difference between interest and the fruits would rest on the cause. We see that the fruits would result from the conjunction of work and the nature of the thing, the interest would come from the mere fact of the passage of time. In addition to the interests unlike other varieties of civil fruits have an object, the money exactly identical to that of the generating good.

Unlike interest due for late payment or interest remunerating a credit, the rules relating to the refund of interest are neither uniform nor specific to obligations of sums of money. However, because the texts sometimes mention fruits and interest and sometimes the fruits only, we could believe that the rules applicable to the fruits of the thing were not necessarily applicable to the interests of the sum <sup>198</sup>, also the jurisprudence in certain hypotheses establishes an identical regime between the fruits and the interests and that the doctrine <sup>199</sup> mixes the two because the interests are fruits in their own right and must follow the regime of the restitution of the fruits.

in the law of obligations the confusion of interests in a single category is not convincing because the interests stipulated on the occasion of a loan cannot be confused with default damages because to admit the contrary would amount to assimilating the situation of a debtor in arrears to that of a debtor who benefits from a term and must pay interest in return for the right to retain the sum and more generally the remuneration for the exercise of a right with compensation for the infringement to this right what can be seen in the French Civil Code because there are two main categories of interest: approximately and schematically the system of interest on term receivables is dealt with in articles 1905 C.civ and following relating to the loan of money while that that of default interest is envisaged in articles 1153 C.civ and following. And if the term usury is no longer used to qualify the interest on the loan, it is because the word has acquired a pejorative connotation<sup>200</sup>

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<sup>198</sup> –contract: Baudry –Lacantinerie, Précis de droit civil, t.2 (4th ed. 1892), P314, No. 453

<sup>199</sup>– Ph Remy note under Civ 1re, June 1981, J.C.P (N) 1982.II.25; .Schmidt–Swaleski "the consequences of the cancellation of a contract" J.C.P (G), 1989.I.3397, n°18 .

<sup>200</sup> –A.dumas "interest and usury", in dictionary of canon law p. 1497

As the interest remunerating a credit had been prohibited by canon law, usury took on the meaning of illegitimate interest<sup>201</sup> when the interest remunerating a credit had the right of citizenship, it seemed inappropriate to keep the ancient terminology and the usury has taken on the meaning of exaggerated interest<sup>202</sup> the term interest has therefore become generic, bringing together all varieties of interest regardless of their cause and their function and their source.

Interests are conventional when they are stipulated by the parties, they are legal (or judicial) when they run without the parties having agreed. Prior to that, this classification is specifically enshrined in the Italian Civil Code<sup>203</sup> and by certain provisions of French law<sup>204</sup> suggesting that the contractual or legal origin of the interests is an efficient criterion. It is also corroborated in whole or in part by the doctrine. Sometimes, the authors fully devote the criterion of the source of the interest by distinguishing the legal interests<sup>205</sup> mainly those of the French article 1153C.civ from the conventional interests governed by the article 1905 French C.civ most often, the doctrine referred to it only partially in certain classical authors<sup>206</sup>.

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<sup>201</sup>– Domat, civil laws in their natural order 51771), part 1 book 3 tit 5 sect 1 P 196

<sup>202</sup> –Wahl, in Baudry – the canteen, Theoretical and practical treatise on civil law, t 20: society, loan, deposit (1ed 1898), n°801 p 421.

<sup>203</sup>– In article 1284 OF THE ITALIAN CIVIL CODE RELATING TO THE RATES OF INTEREST the Italian legislator distinguishes between legal interest (interest on arrears) and conventional interest (interest in compensation)

<sup>204</sup> –The French article L621-48 C.com (art .55 of the law of January 25, 1985) provides that “the judgment of opening of receivership stops the course of legal and conventional interests ...”

<sup>205</sup> – Demogue, deals with obligations in general, t 6 (1931), n°380, p 428

<sup>206</sup> –DEMOLOMBE, Napoleon code course t24: Treaties of contracts or conventional obligations in general (2nd ed. 1870), No. 613, P 609.

Also modern<sup>207</sup> and contemporary<sup>208</sup> adopt the criterion of origin to become the interest of the loan, described as conventional without attaching to the interest of delay the qualifier of legal.

If the interests remunerate a credit continue to be qualified as conventional interest, it is because they actually find their source in the convention<sup>209</sup> which alone can make a credit transaction onerous.

In addition, interest is frequently classified according to the origin of its rate, which may be legal when it is determined by law, and conventional, when it is fixed by agreement or judicial when it is assessed by the judge.

The provisions relating to interest rates appear mainly in the French Civil Code in Chapter III of Title X entitled “du Prêt à Interêt”.<sup>210</sup>

Thus, interests can be classified by their source: conventional, legal or more rarely judicial; but this classification tells us nothing about their specific function, while article 1153 French C.civ specifies that the damages resulting from the delay in the execution never consist only in the condemnation at the legal rates which leaves to say that interest at the legal rate is a moratorium while interest at the conventional rate is remunerative, which is defended by some authors<sup>211</sup>.

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**207-** ESMEIN, RADOUANT and GABOLDE in PLANIOL and RIPERT, Practical treatise on French civil law t. 7: obligations (1 ed.1931), n°882; H.DE PAGE, elementary treaty of Belgian civil law, t.3 (2nd ed.1950), n°143, p 168.

**208-** PH. MALAURIE and L.AYNES, “the conventional interest rate”, Rep. Defr. 1991 art. 35014, p 466 the symposium organized by the private law laboratory of Montpellier and published in the R.J.C 1994 (p265 and S.) devoted exclusively to the study of interest remunerating a credit operation is entitled “Legal regime of conventional interest » ; Ph .SIMPLER surety ship and autonomous guarantees (3 ed, 2000), n°577, p 524: the author distinguishes between “conventional or moratorium” interest.

**209** -HP. BIQUET-MATHIEU the fate of interest in credit law (1998), n°2, p 8: “because it most often draws its source from the agreement of the parties, this interest is generally designated by the expression interest conventional»

**210-** The provisions relating to usury have never been inserted into the civil code. They are now integrated into the French consumer code (art L.313-3)

**211-** J.STOUFFLET, note under CIV.1<sup>er</sup>, July 23, 1974, D.1975.2.588; M.CABRILLAC and J.L.RIVES-LANGE, OBS UNDER COM, June 3, 1980, R.T.D.com.1981, n° 9, p 120.

It should be noted that the qualification of interest is not determined by the legal or conventional origin of their rate, the legal rate is in reality a supplementary rate <sup>212</sup> intended to compensate for the absence or insufficiency of a conventional rate stipulation, a once admitted we have that the legal rate is not reserved for default interest and can apply to interest remunerating a credit.

Note that the category of remunerative interest is homogeneous, that of compensatory interest is not. Current account credit, forward sale, etc.) Are always intended to remunerate a granted enjoyment. Under the convention, the debtor benefits from the right to keep the funds until the end of the term in return for an interest which constitutes the price, the rent of the money <sup>213</sup>.

This qualification reflects at the same time the cause of the obligation to interest and the function of interest stipulated on the occasion of a credit agreement which constitute the remuneration the consideration for the capital lent.

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<sup>212</sup>–B.BOULOC, note under Civ; 2nd, November 18, 1970, D. 1971.2568: "the fixed assessment is only supplementary to will"; J.L RIVES–LANGES note under Civ.1ère, February 9, 1988 bank 1988, n°483, p 591; R.LIBCHABER, obs. under Civ. 2ème May 31, 2001, Rep. Defr 2001 art 37441, n°96 p 1436.

<sup>213</sup> –J.AROQUEPLO, interest, editions of savings, coll. what is it, 1975, p.15 "interest is not defined, it is not calculated and paid from the money and time.

## 2.2 Interest functions and interest rates.

### 2.2.1 Functions of Interests.

#### a– Remunerative interest.

Whatever the expression used by lawyers and economists to define the interest of credit, it is always the remunerative function of interest that is highlighted today<sup>214</sup>. Interest constitutes the price of the enjoyment of a sum granted to the borrower<sup>215</sup>, the counterpart of the provision of capital or the price of immobilizing a sum of money; they take the place of consideration paid in currency for the use of currency<sup>216</sup>. Therefore, the credit transaction brings together a credit company, or a bank and a customer the debit interest paid and credit interest when they are owed by the bank in return for a deposit made by the customer. And the creditor's remuneration consists of the interest claim, the quantum of which depends on a plurality of factors<sup>217</sup>: the amount of the sum lent which constitutes the base of interest, the duration of the advance, and the interest rate<sup>218</sup>. Interest corresponds to the remuneration for the provision of capital this provision is analyzed as a service provision whose is the price like the rent which remunerates the provision of the rented property<sup>219</sup> is therefore the provision of a consumable good which the interest remunerates rather than its transfer of ownership.

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<sup>214</sup>– C.SAINT-ALARY-HOUIN, law of companies in difficulty (4th ed., 2001), n°782, p.507: the interests of the loan are those which “are intended to remunerate the activity of the lender”; in French law the law n ° 66-1010 of December 28, 1966 relating to usury,

<sup>215</sup> –MARCADÉ Theoretical and practical explanation of the Napoleon code, t 4 (6th ed, 1869), n°528, P .438 .

<sup>216</sup> –R. BARRE, Political Economics, t 2, P. 135.

<sup>217</sup> –O .VAGASSE, the cost of bank credit, in Lamy right of financing (1994), n°2712 p 1319: “the remuneration of credit is due to the correlation of two factors: time, that is to say the duration of the credit, and the money i.e. its amount”,

: <sup>218</sup> –J.LRIVES-LANGES and M.CONTAMINE-RAYNAUD, Banking law (6th ed, 1995), n°431, p.427.

<sup>219</sup> –Y.SALAT, “interest rates”, Rep. Defr.1986, art.33691, n°1, p.337

## **b- Default interest**

Default interest is a variety of damages, they are intended to repair the damage resulting from the non-performance in the long term of an obligation to pay a sum of money. The legitimacy of this traditional function has never really been disputed: for Domat, the interests constitute exclusively the “compensation that the law orders for the creditors of sum of money, against the debtors who are in default to pay what they owe” <sup>220</sup> .

default interest then constitutes compensation for the damage suffered by the creditor as a result of the delay. From this point of view, the expression price of the delay sometimes used to define the default interest is false because the price is intended to remunerate a right while the default interest is used to compensate for the damage resulting from an infringement of a right.

Therefore, default interest constitutes compensation for the damage suffered by the creditor of a sum of money as a result of the delay that the debtor brings to his payment, that is to say that they are intended to compensate for the harm that the creditor suffered by not obtaining the sum at the time when it was due to be paid to him <sup>221</sup> .

Under French law, the judge is exempt from having to determine the amount of default interest in the event of non-performance of pecuniary obligations, thus article 1153 C.civ indeed presumes the existence and the quantum of the damage; the creditor is exempted from having to demonstrate the damage, the judge from assessing the amount. the final and prior fixing of the amount of default interest is in principle operated by the law which determines the legal rate of interest; however, as article 1153 C.civ is not of public order, the amount of interest is not completely invariable; the parties can validly determine the rate of interest which is then similar to a penalty moratorium clause.

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<sup>220</sup> -DOMAT, civil laws in their natural order, Paris: Cavalier, 1771, part.1, liv.3, tit.5, p.196, n° 1.

<sup>221</sup>- LAURENT, principles of civil law, t.6, Brussels, 1875, n°326, p.389-390.



Default interest repairs an abstract and presumed damage because the use of the sum is not taken into account. as money is a frugiferous asset (..) the creditor is necessarily defrauded of what he could have gained from the investment of his capital <sup>222</sup> .

Default interest represents the foreseeable damage resulting from the delay in the performance of the pecuniary obligation and compensates in kind for the loss of the fruits of the sum. Moratorium interest constitutes for the creditor both the lost gain and the loss suffered generated by the deferred execution: depending on the case, it represents the approximate income of the money that the creditor would have received (lost gain) by placing the sum immediately on the money market<sup>223</sup> or the rent of the money that he had to pay to a lender (loss suffered) if he needed to have this sum at his disposal<sup>224</sup> .

### **c- Compensatory interest**

the area of compensatory interest mainly includes interest awarded to the victim of a crime <sup>225</sup> as “ancillary supplement to the pecuniary compensation to which the debtor is condemned towards him”<sup>226</sup> . The courts, which sovereignty assess the amount of damages, have within the limits of the damage suffered <sup>227</sup> , full power to determine and the conditions of payment,

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<sup>222</sup> -POTHIER, ed, .Dupin, t.1, Treaty of obligations, n°170, p.89

<sup>223</sup> -Y.CHARTIER, compensation for damage in civil liability (1983), n°420, p.526

<sup>224</sup> -DEMOLOMBE, NAPOLEAN code course, Paris: Durand-Hachette, t.24, , n°619, p.613

<sup>225</sup>- In French and Belgian law, "it is essentially in tort matters that the Court of Cassation has had the opportunity to specify the notion and the legal regime of compensatory interest", BIQUET-MATHIEU (CH), the fate of interest in credit law: topicality or obsolescence of the civil code? , Liège: Scientific Collection of the Faculty of Law of Liège, 1998, n° 4, P.14

<sup>226</sup> -DEMOLOMBE, op.cit, t 24 (2nd ed., 1870), n°613, p.609.

<sup>227</sup>- French case law recalls that the method and form of reparation do not influence its amount, which must necessarily compensate for the entire damage, i.e. "represent exactly in one case as in the other the damage experienced "Civ. February 5, 1964, Bull. civ II, n°110, p.26; Civ.2ème, July 2, 1981, D.1982.IR.106.



They also have full latitude to define the form of compensation awarded as compensatory damages, i.e. the method of reparation that seems to them the most appropriate<sup>228</sup> they can opt for reparation in kind or by equivalent. In this second hypothesis, the judge is still free to pay the compensation in the form he considers most appropriate, an annuity or capital and in the latter case by means of a single, fixed and determined lump sum, or by means of a principal sum and an allowance of compensatory interest<sup>229</sup>. the ability to award interest in addition to the main indemnity was expressly enshrined in French legislation by the law of July 5, 1985, which allows the judge to set the starting point for the interest of the indemnity from a date prior to the decision (art 1153-1 C. civ (2011) .F)<sup>230</sup>. Even if the qualification of compensatory interest remains ambiguous<sup>231</sup> it responds to a real need due to the time lag between the occurrence of the damage and its liquidation, the compensatory interest actually serves to compensate the victim for incidental damage occurring during the duration of the proceedings. (this is for the reason that the judges have never been able to award compensatory interest for a period prior to the occurrence of the damage), damage both distinct from the damage repaired by the main indemnity<sup>232</sup> and independent of the loss of fruit of the sum, it must be admitted that the compensatory interest does not really repair a special and concrete damage but a diffuse prejudice, both moral and material, which finds its source in the language of expectation inflicted on the victim and in the deprivation of the indemnity<sup>233</sup>.

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**228-** J.NORMAND, R.T.D civ 1991, p 399; F.ZENATI, obs. on the law n°85-677 of July 5, 1985 tending to the improvement of the situation of the victims of traffic accident and the acceleration compensation procedures, R.T.D civ. 1985, n° 14, p 796.

**229** -Req.18 December 1866, D.1867.1.427: the judge may choose to settle the amount of damages "either by a single capital fixed on the day of the judgment, or by a lesser capital increased by the interest accrued since the day of the mistake»

**230-** The article stipulates that in principle the order for compensation bears interest from the pronouncement of the decision, it is specified that the judge may decide otherwise.

**231** -I.DURANT and N. VERHEYDEN-JEANMART, "damages and interest awarded for the repair of contractual damage", in sanctions for the non-performance of contractual obligations, 2001, n°31, p 329.

**232** -J. NORMAND, R.T.D. civ.1991, p 399: "this is an independent head of prejudice".

**233-** J.L AUBERT, obs. sous civ, 1ère, 28 avril 1998, Rép. Defr. 1998, art 36890, n° 111, p 1050.

#### **d- Reimbursement interest**

Unlike default, remuneratory and compensatory interest, they do not depend on a formal notice or a stipulation or a court decision but accrue automatically due to a special provision in French law (art 1231 of the French Civil Code, 2011 edition). they are qualified as legal interest or legal interest because their course and their rate are necessarily fixed by law, however as the reference to the source of the interest debt is not relevant, the doctrine<sup>234</sup> generally integrates them into the category of default interest for which they share the compensation for the delay, the judge, who does not have to find out what use the debtor has made of the sum and the benefit he has actually derived from it, cannot consequently condemn the debtor to a interest higher or lower than the legal rate, the flat rate is imposed on him <sup>235</sup>. In the absence of legal qualification, doctrine and case law have been forced to innovate.

Hey sometimes use the qualifier of interests “representative of fruits” <sup>236</sup>. Of the loan has been reserved for the interest of claims for damages resulting from an offense or the non-performance of a contract, these interests which serve to compensate for the damage caused during the period necessary for the liquidation of the value date are not identical to the interests of refunds which accrue on a debt of sum of money whose cause is unrelated to an offense or the non-performance of a contract for lack of anything better, we can adopt the qualifier of refundable interests which allows on the one hand to distinguish them from moratorium, remuneratory and compensatory interest but also to link them to the law of restitutions which governs the systems for the restitution of fruits and interests.

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<sup>234</sup>– G.VINEY & P.JOURDAIN in J.GHESTIN, treatise on civil law: the effects of liability (2nd ed, 2001), 343, p 613–614.

<sup>235</sup>–PH. LETOURNEAU, "Mandate", Civ Rep, vol VII, n°242, p 23

<sup>236</sup> –Civ 1st, 2 /6/ 1992, Bull civ I, n°172, p117

### **e– Reimbursement interest**

comminatory interest most often proceeds from the will of the parties which provide as a penalty moratorium clause that the debtor must pay increased interest <sup>237</sup>, the result of legal and regulatory provisions which prescribe increases in the legal rate. these penalties are part of French common law, article 3 of law n° 75-619 of July 11, 1975 provides that in.” expiration of two months from the day the court decision became enforceable”. .legal penalties also belong to special French law, certain provisions of the consumer code or the insurance code provide against professional sellers and insurers with an increase in the legal rate <sup>238</sup>.

### **2.2.2 Interest rate functions**

#### **a– the functions of the conventional rate.**

the interest whatever its function is fixed in the form of an annual percentage of a principal sum <sup>239</sup>, sometimes determined by law (legal rate) other times by convention (conventional rate) the rate marks the attention of the legislator admitting the lawfulness of the interest, does not intend to leave it to the parties to fix the amount of its quantity by legislating the ceiling of the conventional rate stipulations and that it has submitted them to a formalized rate to serve as a basis for the condemnation of the usury and the protection of the praetor. Interest at the conventional rate is only one of the components of the cost of credit, in the same way as the various commissions and ancillary costs borne by the lender <sup>240</sup> (e.g. account opening commission, overdraft commission, etc.), by the plurality of its interest charges.

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<sup>237</sup> –M. PLANIOL elementary treaty of civil law, t 2, (7th ed 1917) n° 263, p 91

<sup>238</sup>– Article L 122-3 and L 311-25 of the consumer code and ART L 132-5-1, al 3 and art L 211-13, art L211-9 of the insurance code

<sup>239</sup> –LAROMBIERE, Theory and practice of obligations, t 1 (1857); WAHL in BAUDRY-LACANTINERIE, theoretical and practical treaty of civil law t 20: society, loan, deposit (1898), n ° 811, p 425.

<sup>240</sup> –M. VASSEUR, remuneration of bank credit to companies, bank 1990, p 1024.

he legislator to create a new indicator distinct from the recognized interest rate, the overall effective rate which corresponds to the rate actually<sup>241</sup> practiced for a specific credit transaction<sup>242</sup>. therefore the T.E.G includes interest and costs of any kind related to credit services<sup>243</sup>.

The interest rate depends on the cost of money at which the creditor may be forced to refinance and the variable risks that he incurs by making a sum of money available to the borrower for a certain period of time (risk of not reimbursement, monetary risk or change in rates, etc.) this plurality of risk factors gives the rates an exact mathematical reality which ensures remuneration to the lender by guaranteeing him the maintenance of his value of the capital borrowed.

#### **b- the functions of the legal rate.**

A ceiling rate is the bygone function of the legal rate, it first served as a usurious threshold<sup>244</sup> with French legislation according to the law of September 3, 1807 relating to the interest rate of money fixed the legal rate and has makes the threshold of usury therefore the parties could only stipulate a conventional rate on the condition that it does not exceed the legal rate, any higher perception is subject to restitution. Then the usefulness of the legal rate of interest disappeared, by its abandonment in commercial matters (law of January 13, 1886) and in civil matters (law of April 18, 1918) of the device repressing the usury which made lose to the legal interest its function as a ceiling. After in 1935 by the decree law of August 8, 1935 the conventional rate framed and the threshold of usury is carried out by comparison with the real cost of money so the usurious rates have been determined in relation to the conventional rates despite the multiple reforms which affected the calculation of the wear threshold.

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<sup>241</sup> -The overall effective rate is not only the apparent rate but the all-inclusive cost of the credit that the borrower provides financially. Also the notion of T.E.G is defined in French law by the law of December 28, 1996 (its method of calculation was specified by the decree of September 4, 1985, article one of which stipulates that the overall effective rate of a loan is a nominal rate annual, in arrears expressed as a percentage.

<sup>242</sup>- J.L RIVES-LANGE & M.CONTAMINE-RAYNAUD, Banking law (6th ed, 1995), n°437, p 429

<sup>243</sup>- T. BONNEAU, banking law (4th ed, 2001); No. 69, p 48.

<sup>244</sup> -AUBRY and RAU, French civil law course, t 4, (4th ed 1871), n°396, p 603

Recently the French legislator (law of July 11, 1975) distinguishes two varieties, The simple rate which serves as a supplementary rate for default and compensatory interest and an aggravated or increased rate, intended to put pressure on the recalcitrant debtor unlike the simple rate which is applies independently of the cause of the obligation, reparation or remuneration, the increased rate only applies in the event of non-performance.

And as this law of July 11, 1975 with these reference rates did not faithfully reflect the monetary fluctuations in eu the law of June 23, 1989 <sup>245</sup> modifying the conditions for fixing the legal rate defined by decree each calendar year by reflecting market data monetary.<sup>246</sup>

However, in Morocco the legal interest rate and the maximum rate of conventional interest were fixed the first time by Dahir of 8 KAADA 1331 (October 9, 1913) fixing in civil and commercial matters, the legal interest rate and the maximum interests (B.O n° 51 of 10/17/1913, p.425), and was modified by Dahir of 02/10/1948 (B.O n° 1848 of 03/26/1948 p.360) then Dahir of 16 /06/1950 (B.O n° 1968 from 14/07/1950, p.931),

But article 115 of law n° 34-03 relating to credit institutions and similar organizations articulates that the provisions of Dahir 1913 are no longer applicable, moreover article 116 of the same law specifies that the interest rates are fixed by circular of Bank al Maghreb.

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<sup>245</sup> –Article 12 of law n° 89-21 of June 23, 1989 amending the law of July 11, 1975 and entering into force on July 15, 1989.

<sup>246</sup>– J. CARBONNIER, civil Law 4.: obligations, paris: PUF, 22nd ed, 2000.

### **2.2.3 – Conventional interest prohibited in Islamic financing**

#### **a– The TEG: an informative function.**

Under the terms of the credit agreements, the conventional rate and the overall effective rate (TEG) must be mentioned. the conventional rate, also called nominal, is the rate seen from the banker's side, of which it is both the working tool and the measure of remuneration: it allows him to draw up the amortization table, or to operate the account. the overall effective rate is, on the contrary, the rate seen from the client side, because it incorporates in principle, in addition to the conventional rate, the impact of all the costs linked to the credit, which reduce the capital borrowed, or increase the deadlines. the TEG has no useful role in the life of the credit. it will not intervene in the calculation of the sums remaining due, in the event of default or repayment of the borrowed capital, the overall cost of the loan offers ancillary costs included, and thus to assess the financial effort that it will have to make.

#### **b– Composition of the TEG.**

The cost of credit depends on the amount of the sum lent and the duration of the loan. But the remuneration of the granted assistance is not limited to the collection of interest and takes into account other components the commissions constitute the price of services rendered by the bank. There are, for example, account and account movement commissions which consist either in keeping the customer's accounts, or in remunerating the cash service provided by the bank. , it is the service rendered by the bank which has promised its client to make a certain sum available to him.

Components and elements of calculation make it possible to determine the TEG.

It's about :

- \_ The interest rate of the loan;
- \_ Costs of any kind regardless of their qualification, which includes administrative costs, costs relating to notarial deeds;
- \_ Insurance premiums when an insurance contract linked to a loan is taken out by the borrower or required by the lender.

## **B – The legal Islamic doctrinal principles vectors of legal standardization in Islamic financing**

### **1) MASLHA, DARURA and Ijma**

#### **a-La MASLAHA**

##### **a.1 – The principle of creating new standards by seeking the general interest**

"There is no doubt that the rules of law change with the times"<sup>247</sup>, this is the principle according to which Islamic law must seek to apply to new situations, while ensuring respect for the general interest of Islam and the Muslims. This Islamic doctrinal principle, MASLAHA (the general interest), is therefore exclusively an Islamic doctrinal source at the service of the creation of norms by adaptation to the social life of believers.

Islamic legislation (CHARIA) is instituted to safeguard the five essential needs of man: religion, person, procreation, property and reason. In this perspective of protection of Islam and Muslims with their property, the required condition is respect for MAQUASSID (Islamic purposes) which is expressed by the three main sources, the KORAN, the SUNNA and AL IJMAA. which can be supplemented by certain additional sources developed by Islamic doctrine among them the MASLAHA principle determined by the great Muslim jurisconsults of the Malikite school SHATIBI as "general interest which cannot be directly linked to a Koranic text or a testimony of the sunna"<sup>248</sup>.

Ghazali in his Shifat al Ghalil thus summarizes that, on the application of the MASLAHA, "all this must be considered authoritative provided that it is not invented and unknown, that it does not contradict a text, nor a cause of alienation from the Sharia"<sup>249</sup>.

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<sup>247</sup> –Article 39 of the Ottoman MAJALLAH quoted by JAHEL Selim, "Business Law and Religions", International Review of Comparative Law, 2001, volume 53, N°4, p. 879-910.

<sup>248</sup>– SELLAMI Mohamed-Moktar, The Qiyas and its contemporary applications, Jeddah, IRTI, 1999, p104.

<sup>249</sup> – Ghazali, Shifat al Ghalil p.184, quoted by HASSAN Hussein Hamid, Jurisprudence of the maslaha and its contemporary applications, Jeddah, IRTI, 1995, p. 27.



MASLAHA is thus the method for safeguarding the purpose of the Law in Islamic Law<sup>250</sup>. MASLAHA can relate to necessities (DARURA) or needs (HAJIAT) or to facilitate (TAHSSINAT) the application of rules within the domain of the Law<sup>251</sup>. The difficulty, in the application of the MASLAHA in a legal system of a precise Law is not to slow down the continuity of the safeguard, of the MAQUASSIDS.

MASLAHA, as a tool for the doctrinal construction of Islamic law, makes it possible to deviate from a majority solution without infringing Sharia. For this, MASLAHA must have a greater advantage than the possible damage it implies and be inspired by the opinion of a qualified lawyer.

In addition, the establishment of a MASLAHA must not defeat another more important MASLAHA. This is the case, for example, if it is considered that the defense of a TAHSINAT outweighs a necessity<sup>252</sup>.

#### **a.2- Consequences in the development of Islamic banking standards**

the role assigned to Islamic doctrine to complete the Koran or Sunna text according to the evolution of contingencies<sup>253</sup>, gives Islamic law an evolutionary and adaptive capacity with the cultures of the peoples and their Different customs. speculation in the market economy having led to a sharp rise in tariffs. Can open the possibility of pricing imposed by the state, with the aim of defending the general interest characterized here by the necessary food supply for the populations. Similarly, the implementation of MASLAHA may have allowed the loan at interest, under restrictive conditions, if the purchase on credit of a good opened up the possibility of protecting an essential need with regard to the aims of Sharia<sup>254</sup>.

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**250-** TURKI Abel Magid, *Polemics between Ibn Hazm and Bagi on the principles of Muslim law*, Algiers, Studies and Documents, 1975, p 399.

**251-** SELLAMI Mohamed-Moktar, *The Qiyas and its contemporary applications*, Jeddah, IRTI, 1999, p 90.

**252** -HASSAN Hussein Hamid, *Jurisprudence of MASLAHA and its contemporary applications*, Jeddah, IRTI, 1995, p. 62.

**253-** MILLIOT Louis & BLANC François-Paul, *Introduction to the study of Muslim law*, Paris, Dalloz, 2001, 2nd edition, p.154 et seq.

**254** -HASSAN Hussein Hamid, *Jurisprudence of MASLAHA and its contemporary applications*, Jeddah, IRTI, 1995 p. 35.



hus, the tendency among modern Hanbalites, the majority in the process of development of Islamic banking law, is to confuse the use of qiyas by MASLAHA by giving it their preference because of the more general solutions offered by this method while the qiyas applies to a specific case. This perspective comes up against the desire to propose global solutions to a problem, to make banking practices totally Islamic, whose solutions are specific to each situation<sup>255</sup>.

The defense of the general interest is not analyzed in the same way depending on whether one considers access to financing for disadvantaged populations, in rural areas, or the tax optimization of international project financing. We readily recognize that the two perspectives can come together, and that the legitimization of large-scale economic operations contributed to improving the economic conditions of the population who will benefit from the consequences, thus characterizing the use of MASLAHA.

#### **b-the exception by necessity (La darurah)**

##### **b.1- Exception by necessity for the preservation of the fundamentals of Sharia**

The use of the notion of necessity derives from the general interest method. It allows, for the protection of a higher interest, to exclude the application of a rule of more relative importance. This principle according to which necessity makes the law, or that necessity lifts prohibitions was formalized in the Ottoman Majallah, in its article 2. The following articles, 22, 23 and 24, specifying that necessity must be assessed with regard to the other principles and that the exception must cease as soon as the state of necessity ceases<sup>256</sup>. Thus, as for the MASLAHA have it is only an application, the darurah is allowed in preservation of the religion, the life, the reason (from the point of view of Islamic doctrine).

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<sup>255</sup>-SELLAMI Mohamed-Moktar, *The Qiyas and its contemporary applications*, Jeddah, IRTI, 1999, p. 107.

<sup>256</sup>- JAHEL Selim, "The general principles of law in Arab-Muslim systems with regard to contemporary legal technique", *International Review of Comparative Law*, 2003, N°1, p. 105-121., p. 114.

Particular This aims to remove what calls into question the Islamic dogma, from the Property and posterity. The application of the principle of necessity is instituted to safeguard such is the purpose of the Law, it is considered for example that illness during Ramadan must lead to the breaking of the fast to safeguard the life of the sick person.

The principle of necessity, by calling into question the principles it allows, is not always accepted by Muslims anxious to conform to the strict text of the Law of God. This is how this principle is generally little used. However, the obligation to deviate from the normal application of Sharia is only justified insofar as it must make it possible to end the state of necessity. As, if it is permitted, in a situation of danger, to eat pork, it is only in view of the pursuit of the effort necessary for survival.

#### **b .2- Consequences on the development of Islamic banking standards**

In the creation of Islamic banking law, recourse to the principle of necessity is most often used for cases in which it is impossible to emancipate oneself from conventional rules contrary to Islam. This, in order to allow the Islamic banking system to develop in an evolutionary way by removing the prohibitions which would automatically disqualify it<sup>257</sup>

In addition, recourse to the *hiyal*, whose link Joseph Schacht has shown with the notion of *darurah*<sup>258</sup>, is traditionally analyzed with regard to the Muslim conception according to which "the ever-increasing corruption of the conditions of the time" authorized the recourse to techniques blameworthy in principle, but were legitimized by the Koranic precepts of obedience to legitimate authorities<sup>259</sup>. Especially when we know that for some, necessity is characterized in the loan at interest by its purpose of contributing to production and raising the standard of living that it allows to foster<sup>260</sup>.

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<sup>257</sup> -CHAPRA Umer KHAN Tariqullah, Regulation and Control of Islamic Banks, Jiddah, IRTI, p. 105.

<sup>258</sup> -SCHACHT Joseph, Introduction to Muslim Law, Paris, Maisonneuve & Larose, "Collection Islam of yesterday and today", 1992, .p.74.

<sup>259</sup>- Koran S.IV, V.59, "Believers, obey God and His Messenger and those of you who have authority".

<sup>260</sup>-GALLOUX Michel, Islamic finance and political power, Paris, Presses Universitaires de France, "Islamic Collection", 1997, p 43.

The principle of necessity, or its partial understanding, has several consequences for banking law. In the daily life of Islamic banks, it is frequently used to facilitate reconciliation with conventional methods of financing, in areas that the principles of Islamic law prohibit.

This is a paradox that raises the question of the general interest pursued in this process of creating rules. An example is thus often found in doctrinal debates in Islamic banking law, and concerns the comparison between the use of a drug containing alcohol and another containing less alcohol<sup>261</sup>. But the perspective of Islamic banking law suggests that it is more commendable to buy a car through Islamic credit than to acquire, by conventional means, a utility vehicle allowing the continuity of a commercial activity producing resources for families. By modeling Islamic products on their conventional equivalents, legal theorists necessarily deduce that the *maslaha* is the same, with the wealth produced through the same channels.

### **c- The *ijma'***

#### **c.1- Acceptance of the *ijma'*:**

The *Ijma'* is based on the principle that the unanimous agreement of the Muslim community on a legal solution carries its legitimation<sup>262</sup>. In their work of renovation, the jurists of Islamic banks have therefore endeavored to seek the solutions of past *ijma'*, legitimizing situations likely to be used in the process of creating banking law. According to 'abd el Wahab Khallaf, "the *ijma'* is the agreement of all Muslims at a given time after the death of the envoy, on a legal qualification, in a given case"<sup>263</sup>.

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<sup>261</sup> EL-GAMAL Mahmoud A., *Peddling, Islamic Finance Law Economics and Practice*, New York, Cambridge University Press, 2006, p12

<sup>262</sup> according to the hadith "My community will not meet on an error". Hadith reported by IBN MAJAH, *Sunan*, Volume 2, Cairo, ed. al Baqi, 1953, No. 3950.

<sup>263</sup> BERNAND Marie, *The unanimous agreement of the community as the basis of the legal statutes of Islam according to Abu l Husayn al Basri*, Paris, Librairie Philosophique J. Vrin, "Collections Études Musulmanes", 1970, p. 99.

In practice, it is through the particular qualifications of jurisconsults that such an agreement is possible. Even if in theory, the closing of the doors of new Islamic normalizations **الاجتهاد** and the consequent disappearance of its great doctrinaires, prohibit that one can again use this process to create legal norms<sup>264</sup>, an important doctrinal current considers that the ijma' is possible at each era. Based on the Hanbalite opinion that each era produces its doctrinaires. Through the search for a unanimous agreement between the qualified representatives of the different schools, a certain number of organizations have agreed to define the new standards of Islamic banking law.

### **c.2- Consequences on the development of unified Islamic banking doctrine**

Indeed, the scope of a current Ijma' seems to have consequences only to the extent of the legal certainty it provides to players in the Islamic banking sector. The doctrinal debates on the acceptance of the ijma' today do not seem to have to end, a legal recognition of a new principle by an assembly of lawyers specialized in banking law and will only have a limited impact on certain legislations. What we mean by this is that within the various Islamic communities, a current Ijma' on a banking notion will not arrive at the same level of legitimacy as a unanimous agreement passed by the companions of the Prophet or the masters of the four large schools. In addition On the commercial level, customers are generally satisfied with the opinion of an authority in which they place their trust, and which, in most cases, does not affirm the legality of the new standard, but rather its absence. contradictions to the principles of Sharia. The current ijma' therefore does not seem to have any practical interest. And on the economic level, on the other hand, in the case of Islamic banking, one of the obstacles to development most often noticed is the lack of uniformity in the acceptance of compliance with Sharia. Therefore, the future development of Islamic banking law requires the adoption of commonly accepted standards, strengthening contractual exchanges on a secure basis.

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**264-** MILLIOT Louis & BLANC François-Paul, Introduction to the study of Muslim law, Paris, Dalloz, 2001, 2nd edition, p 115. .

Certainly the overall evolution of banking law, the process of which Professor Matou has described: "the growing interdependence of the various markets, the acclimatization of foreign techniques, the great homogeneity of banking behavior, the means of communication contribute to the formation of very close in different countries. These practices secrete habits from which standards emerge to gradually form a binding legal norm for those involved"<sup>265</sup>.

Stability and uniformity are the new paradigms of international business law of which Islamic banking law now forms a segment.<sup>266</sup> This relationship between economics and law, whose terms the British economist Ronald Coase<sup>267</sup> redefined, applies today to Islamic banking law in its asserted desire to establish itself as a system as efficient as conventional banking law. On the other hand, as eminent specialists have proven, "the law and the market are interdependent, one serving the other and vice versa [...] for the market to be generalized, everything must be assimilated to goods" <sup>268</sup>. The definitive formulation of Islamic principles in recent Islamic banking law seems to us an opportunity to participate in this movement which presents itself as based on ethical values,

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<sup>265</sup> – **MATTOUT Jean-Pierre.**, International Banking Law, Paris, Revue Banque Edition, "Collection Droit Fiscalité", 2004, 3rd edition, , p. 22-23.

<sup>266</sup> See the remarks of the governor of the central bank of Pakistan, AKHTAR Shamshad who proposes among the crucial points relating to the development of the Islamic banking industry the necessary "standardization of the rules of the Shari'a", Building an effective Islamic financial system, Global Islamic financial Forum, Kuala Lumpur, Malaysia, March 27, 2007, , p.5-6,

<sup>267</sup>– According to this Nobel laureate in economics, founder of the theory of transaction costs and mastermind of the doctrinal current of Law and economics, in the economic analysis of Law, "the law to a certain extent controls the economic system through transaction costs. transaction that he organises". On this subject **GROSSEIN Jean-Pierre & WEBER Max**, "Introduction to the economic ethics of universal religions", Archives of the social sciences of religions, 1992, volume 77, N°1, p. 139-167.

<sup>268</sup> – **TONNEL-MARTINACHE Mariette**, "Degree of development of financial systems and Geographical redeployment of banks", Economic Review, Year 1987, Volume 38, n° 1, p. 117-148,

He interest of Islamic banking should, we recall, be analyzed to the extent of the "need not to dissociate human rights from economic law, as it is true that the economy has become the engine of globalization »<sup>269</sup>.

In the early days of Islamic legal history, the rapid growth of the Islamic empire led to the emergence of several legal schools based on the primary sources available in their midst. The continuous development of Islamic law that followed led to the blocking of *ijtihad* in order to preserve the path of the god in Islamic law and not to crystallize the solutions by the permanent search for an *ijma'* and to preserve its adaptability, undoubtedly the he blind imitation that was then imposed led over the generations to limit the creative power of Islamic law so that, little by little, ways were found to deviate from this fixed vision of law. Local particularisms thus continued to express themselves, contributing to the affirmation of their own identities. The process of standardization of Islamic banking rules leads, in our view, to the risk of weakening the regulatory variety in Islamic law and of causing annoyance and disinterest in these standards modeled on conventional banking law. Moreover, by giving too much force to the new standards, by the search for an *ijma'* with legal value, there is a risk of leading to the blocking of the evolutionary process of the creation of banking law.

Finally A standardization of the law by the reopening, tacit or affirmed, of the doors of *ijtihad* contains an essence aware of the future divergence.

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**269-** Mireille Delmas-Marty quoted in FARJAT Gérard, "Economic law and the essentials (for a colloquium on ethics)", International review of economic law, anniversary issue, Review and perspectives of economic law, 2002, p. 154.

## 2) Unified Islamic banking doctrine in regulation.

### a-regulation of Islamic banking

#### a.1- A regulation of religious originality

The Islamic bank is subject to specific regulations drawn from religious and moral rules. Its implantation in the banking system of Morocco which has a conventional banking legal system or rather different from this one. based on a new system by integrating this mode of Islamic finance by respecting the regulations in force while preserving the religious principles which found this finance.

The case of Morocco can also be a good example, in this country made up of a good number of Muslims and which has known the election of Islamists to the government, since then the establishment of Islamic banks has been formalized by law 103.12, using instead of Islamic financing, the terminology, the term alternative financing and alternative products. It is Chaabi Bank, a subsidiary of the Banque Populaire Marocaine group, which set up the first Islamic bank account in France in June 2011. Alongside these so-called alternative products, products from the traditional system compete with these alternative products, in operating on the basis of interest rates, which are prohibited in Islam. The regulations cannot constitute an obstacle for the qualification of bank of Islamic establishment which is a bank like all the others. Because what is important for the Islamic financial system is to operate in compliance with the rules of Islamic law.

Banking regulations are the set of legislative and regulatory provisions that govern banking operations and those who carry them out in a professional and habitual capacity. These regulations include in particular the regulations adopted by the Banking Regulation Committee. It concerns the organization and supervision of these, with a view to ensuring the protection of depositors and directing the resources entrusted to them <sup>270</sup>.

These provisions clarify the types of companies or funds that must exercise the banking activity, but also the rules for exercising such a profession.

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<sup>270</sup> - R. Routier, The obligations and liability of the banker, p. 34.



Access to such a profession is reserved for institutions that meet the definition of the banking profession<sup>271</sup>. For the exercise of such a profession, many criteria have been laid down by the legislator. This regulation which organizes the operation of banks from their creation until their dissolution.

Islamic banks are based on religious and ethical rules<sup>272</sup>, which means that banking activities are regulated according to Islamic law. However, only certain financial institutions operating in purely Islamic banks in countries such as Pakistan, Sudan, or Iran operate in absolute compliance with Sharia rules<sup>273</sup>. All the others are installed in countries where a system governs their operation, based on national regulations. Under these conditions, which of the two regulatory systems should take precedence in the face of such a duality? This confrontation of the two systems also poses the problem of the integration of the Islamic system into other systems of law and that of the mechanisms to achieve this.<sup>274</sup>

#### **a.2- The purpose of this regulation**

The banking regulations set themselves the task of announcing the conditions of access to the profession, its functioning and the responsibility of the actors of the bank<sup>275</sup>. The role of the banker has increased in recent years with the emergence of new types of obligations<sup>276</sup>, such as the obligation to warn which is above that of advice and information of the banker, thus giving rise to a diversity of responsibility<sup>277</sup>.

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**271-** J. J. Burgard, Ch. Cornu and Olivier Robert de Massy, *Banking in France*, Political Science Press and Dalloz, Paris 1995, p. 9.

**272-** F. Guéranger, *Islamic finance, an illustration of ethical finance*, p. 19

**273-** L. Siagh, *Islam and the business world*, Ed. d'Organisation, 2003, p. 171.

**274-** K. Djaraouane & Ch. Joseph Serhal, "The designation of the applicable law in Islamic financing contracts", *Revue droit des affaires internationales*, n° 2 2009, p. 115.

**275-** Article 1 of the banking law of January 4, 1984, relating to the control of the banking system in France JGP. G., p. 3176.

**276-** D. Legeais, *The new obligations of the banker*, *Review of banking and financial law*, n° 29

**277-** R. Routier, *Obligation and responsibility of the banker*, op. cit. p. 142.



Also The client is in a weak position, because it is he who is asking, his banker, for a loan. The rate of this loan must comply with usurious regulations. The bank, for its part, must have sufficient guarantees to ensure its obligation to reimburse and refund. Seen under this logic, this regulation remains legitimate<sup>278</sup>, all the more so any violation of banking rules calls into question the trust between customer and bank but also with regard to the State, which guarantees the proper functioning of the bank and is a shareholder in certain banking establishments. The State must also guarantee that these establishments to which it has offered the right to receive public funds are indeed able to reimburse them, under conditions which do not endanger the assets of the population and do not harm by far neither to the currency of which he is the manager, nor to the financial center<sup>279</sup>.

#### **b- The legal nature of the Islamic investment bank**

##### **b.1- The obligation of restitution in Islamic investment banks.**

The term bank in appearance covers in practice very different economic realities. The 1931 Geneva International Conference on the Law of Checks failed to formulate a definition of banking<sup>280</sup>. The discussions initiated since 1965 in Brussels for the harmonization of banking legislation would suffice to show that this is a concept whose content varies greatly depending on the country<sup>281</sup>. This difficulty in defining the bank lies in the variety of activities of bankers. Despite its universality, which is called into question in the current reform project in the hemicycle, demanding the separation between lending and speculative activity<sup>282</sup>.

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**278- Ch. Gavalda & J. Stoufflet**, "The banking law of January 24, 1984", JGP. G. 1985, No. 11, p. 3176.

**279-** The violation of this banking monopoly is sanctioned both civilly and criminally. A term of imprisonment of 3 years with a fine of 375 thousand euros, in addition to the nullity of the act concluded in violation of this rule, Ass. Full. March 4, 2005, Dalloz, 2005, 785, obs. B. Concern, this decision comes to dry up the divergence which reigned between the civil room and the commercial room about the civil sanction of the violation of the banking monopoly.

**280 -A. Abi Haidar**, The Islamic Bank. An Attempt at Integration into a Western-Type Legal System, Thesis, Paris II. 1991, p. 369.

**281 -Ch. Gavalda, J. Stoufflet**, Banking law, 8th ed. Litec 2010, No. 51, p. 71.

**282 - G. Raveaud**, "Banking law: Taxpayers should not pay for finance", L'économie politique, February 2013.

he Islamic bank is “a banking institution which collects funds and uses them on the basis of the Islamic sharia, with the aim of founding a united society<sup>283</sup> and achieving a certain justice in the distribution of wealth<sup>284</sup>”. Banking activities in the Islamic system are subject only to the requirements of Sharia, in other words the five principles of Islamic finance remain the only conditions required for the validity of an Islamic product. Unlike the Western system and more precisely in French law (article L.311-1 of the Monetary and Financial Code), where banking operations are clearly set out. Thus they concern the receipt of funds from the public, in the form of a deposit, on condition that they are returned; the provision of means of payment and credit transactions.

To attribute to the Islamic bank a banking qualification, it must respect the banking legislation of each country that it wishes to exercise its investment banking activity as in France it will have to exercise the banking activities listed in the Monetary Code and finance which remain the monopoly of credit institutions. No one doubts that conventional investment banks receive funds from the public These funds are used in the form of investment finance credit, since it is the onerous nature of the operation that makes it a investment financing.

Admittedly, Islamic investment banks do not charge interest, but they operate according to the rule of profit and loss sharing, which makes it possible to qualify the investment financing operation as long as there is credit remuneration.

However, the obligation to return the funds, the Islamic investment banks do not respect this obligation in the case where the project has failed, it requires participation according to the contractual clauses and the type of contract.

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<sup>283</sup> – S. Hamoud, “The Islamic Banking Experience”, Al-Iktisad and Al-Amaal Review, Economy and Business”, in Arabic, May 1985, p. 55.

<sup>284</sup> – O. El Kattani, “The Islamic bank theoretical framework and practical experience”, in Ethics and Business Perspectives Maghreb, p. 42.

Therefore, failure to fulfill this obligation will lead to a responsibility for the Islamic investment bank without disqualifying it from its qualification as an investment bank. to guarantee the deposit of its customers.

This idea was mentioned during the first application for approval for the establishment of Islamic banks in England. This request was rejected on the grounds that this system based on religious rules would not be able to comply with the rules governing the function and organization of the banking sector in England<sup>285</sup>

In the conventional system are regulated on the one hand the remuneration of deposits but also the return of funds. The Islamic system would not be able to meet these two imperatives. As we know, this system banishes the remuneration of operations by the passage of time, which means that it is the principle of sharing profits and losses which replaces the mechanism of interest. The fact for the depositor to receive less than the sum he had deposited with his bank, constitutes a violation of the obligation of restitution of the banker and yet it is on this basis that the system of Islamic investment banks operates. .

In French law, the deposit contract is characterized by the depositor's right to full reimbursement of the money collected by the bank. Article 2 of the French banking law qualifies this money as funds received from the public: "Funds received from the public are considered to be funds that a person collects from a third party, in particular in the form of deposits, with the right to dispose for its own account, but it is responsible for returning them..."<sup>286</sup> This article establishes the obligation to return funds as a corollary of the deposit operation. As long as the banker, in the Islamic system, does not respect such an obligation.

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**285 – M. AINLEY**, "Islamic banking in the United Kingdom, the FSA is ready to follow market developments" in *Islamic finance in Europe* Revue banque n°696 Nov. 2007, p.33.

G. Naulleau, "The Islamic financial system, development and perceptions", Paris Business School, working document, n° 80-86 p. 35

**286 – J. Stoufflet**, "The banking law of 24 January 1984", JGP. G. 1985, No. 3476.

In the Islamic system, the depositor agrees to be remunerated according to the principle of sharing profits and losses. The latter does not guarantee the return of the funds deposited, because in the Islamic conception the actors of an investment must share the risks which differs from the conventional system

## **b.2– The Islamic banker, agent bound by professional obligations**

The agent in the conventional system is subject to a double obligation and failing to respect them, he engages his responsibility. Firstly, he has an obligation to execute the mandate, an obligation qualified as a means exercised by a salaried representative. He is required to be diligent in a good way. The second obligation, consisting in giving an account of the accomplishment of its function. According to some authors, as an obligation of result<sup>287</sup>. What is different within the framework of the operation of the Islamic bank.

Care must be taken not to confuse the obligation of result, where the fault of the debtor is presumed as soon as the result is not achieved, with the obligation to report on the result of the operation carried out by the agent. –this exists even if the agent is bound only by an obligation of means<sup>288</sup>. This obligation of means remains to be discussed, because the banker who is a professional and who must be able to deploy all possible means to carry out these credit operations<sup>289</sup> should rather be bound by an obligation of result, which would ensure a more effective depositor protection.

However, the argumentation of the Islamic investment bank based on the non-guarantee of the return of investment deposits in its entirety is well founded, as long as it does not in reality target a classic deposit but a real investment in a investment project.

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<sup>287</sup> – P. Henry Antonmattei & J. Raynard, Civil Law: Special Contracts, Litec, Paris 2008, p. 395

<sup>288</sup>– Jurisprudence requires the existence of a fault to incur liability, which makes us think that it is an obligation to do, Civ. 1, 16 May 2006, Bull. Civ., I, n° 241, Dal-loz 2006 IR 1564

<sup>289</sup> –H. Bogler, The agent banker? The mandates aiming to carry out a movement of funds, thesis Nice 1992, pp. 12 et seq..

## **SECTION 2. FINANCING CONTRACTS REAL ESTATE INVESTMENT LEGITIMIZED IN ISLAMIC BANKING LAW**

**§I–Mudaraba and Istisna real estate investment financing contracts in Islamic banking law.**

**A– Mudaraba real estate investment contract**

**1) Validity and reconciliation between Mudaraba and convenience**

**a– Validity**

Historically, venture capital began with the Islamic concept of Mudaraba and from the tenth century, this concept was used by the Italians, developing via Europe<sup>290</sup>.

The Mudaraba emphasizes the Sharia principle that money has no value unless it is associated with work. This is an alternative form to the prohibition of "RIBA", which consists of the prohibition to grant credit in return for an amount of interest fixed in advance and paid periodically.

In practice, this method of financing makes it possible to facilitate investment between the supplier of capital, who is not ready or competent enough/available to manage his capital by himself, and the entrepreneur, a professional or expert who is not is not solvent to start a business and invest.

The Mudaraba<sup>291</sup> contract, like the general partner, is a form of cooperation between two parties, a sponsor investor who advances capital for commercial purposes and a sponsor entrepreneur who makes a contribution to the industry (expertise, know-how). Normally, both partners are entitled to a profit reached, which will be distributed between them according to an agreed ratio.

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**290**–A. ABDULL MUTALIP, "Islamic venture capital and private equity: legal issues and challenges", Azmi & Associates, Malaysia, 2000, p. 4 .

**291**– In Islamic law, the contract of Mudaraba can also be qualified as Moukarada, or kerad. The divergence in terminology is due to geographical factors; kerad and Mouka-rada originate from the Arabian Peninsula and Moudaraba is Iraq. Moreover, the Malikite schools and the Shafiites have adopted kerad and, to a lesser extent, Mukarada, and the Hanafites, the Mudaraba. AAOIFI, Shari'a Standards for Islamic financial institutions, shari'a standard no. 13 "Mudaraba", art. 4/1, 2010, p. 235.

In addition, some relate to the practice of investment capital, in the Mudaraba, when an investor provides funds to the capital of an unlisted company, in need of equity, possibly representing a new option. to finance small and medium enterprises in Islamic countries, and the Islamic bank can then play the role of a venture capital institution. Also, it is superficially close to the trust when the entrepreneur holds the funds given to him by the investor to use them according to the terms of the contract, without incurring losses<sup>292</sup>.

From a financial perspective, it is quite clear that the Mudaraba cannot be likened to a credit operation. It is not a lender-borrower relationship but an investor (capital provider)-entrepreneur (fiduciary) who share profits and possibly losses among themselves. Unlike credit, Islamic banking is concerned with the nature of the investment in question and may impose certain restrictions on the investment by its client. It also has the right to oversee its activity without actually intervening in the management of the funded project.

In addition, the conventional bank guarantees the rate of return which is fixed and known in advance. Thus, in Islamic finance, this rate is variable since it is generated by the assets financed by these investment funds. The depositor and the Islamic bank share the profits according to the agreed ratio and only the depositor bears the losses incurred except in case of breach of contract or negligence by the bank

Sometimes, the bank can assume a double role in case of two-pronged Mudaraba: first, it collects funds from depositors in investment accounts and therefore plays the role of an entrepreneur; secondly, these investment funds are then made available to entrepreneurs to finance projects, the bank then assumes the role of an investor.

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**292-** GUERANGER, Islamic finance: an illustration of ethical finance, Dunod, Paris, 2009, p. 94. 48.

However, the Mudaraba is advantageous compared to fixed rate financial instruments (such as bank deposit or credit contract), since the remuneration of the Islamic bank is neither fixed nor predetermined. It is variable, depending directly on the return on the investment project, which obliges the entrepreneur to manage the capital entrusted to him as well as possible.

**b- Reconciliation between Mudaraba and convenience:**

In Islamic law, the legitimacy of the Mudaraba is recognized by the Koran<sup>293</sup>, the Sunnah of the Prophet<sup>294</sup>, as well as the consensus of Islamic jurists. Under French law, the limited partnership is governed by Articles L. 222-1 to L. 222-12 of the Commercial Code. The constitution of the Mudaraba is subject to certain conditions, mainly concerning the partners, the object, and the type of investment.

As far as the partners are concerned, there must be at least two people, who must have legal capacity<sup>295</sup>.

Concerning the capital, there is no legal requirement of a minimum amount, whether in Islamic law or in French law. In principle, capital must be determined in terms of quantity and quality, in a very precise way.

And on the other hand to ensure its availability to the contractor Article L222-4 of the French Commercial Code underlines this requirement by providing that the articles of association must contain the value of the contributions of all the partners.

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**293** -Sura (Al-Mozamile), verse 20: "Your Lord...knows that there will be among you the sick, and others who will travel the earth, seeking the favor of Allah, and still others who will fight in the way of Allah...".

**294-** As reported by Al-Bayhaqi 6/111, it was customary that al-Abbas Ibn Abd. al-Muttalib became accustomed to exercising the Mudaraba as a rab-al-mal, he provides the capital to a Mudaraba, on the condition that he does not travel by sea, or pass through the valleys or engage in the cattle trade, and he will therefore be liable for any losses incurred in the event of non-compliance with these restrictions. The Prophet approved the validity of these conditions. As cited by AAOIFI, Shari'a Standards for Islamic financial institutions, Shari'a standard no. 13 "Mudaraba", Appendix (B) "Basis of the Shari'a rulings", 2010, p. 244.

**295** -Under French law, general partners all have the status of merchants. C.com., art. L221-1 and L222-1.



And the share in this value of each general partner or limited partner; and the aggregate share of the general partners and the share of each limited partner in the distribution of profits and in the liquidation proceeds. Gold According to the standards of the AAOIFI, the capital must be provided in cash, but also can be in the form of fixed assets whose value can be fixed by experts or by agreement of the parties. Similarly, under French law, a limited partner can make a contribution in cash and/or in kind, but he cannot make a contribution in industry <sup>296</sup>.

In addition, the entrepreneur can mix his own funds with those of the capital investor, and in this case, he becomes a partner by right to a share of the profit in proportion to his contribution to the capital. However, he is qualified as an entrepreneur within the limits of the investor's capital and the profits are distributed as agreed in the Mudaraba contract.

Unlike French law, Islamic law requires that the capital be, totally or partially, made available to the entrepreneur, or even that the latter have free access to it. Despite this apparent similarity in terms of the conditions of validity, there are certain requirements, particularly in terms of the type of investment envisaged. Under Islamic law, the investment project financed by Mudaraba must not relate to illicit activities.

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<sup>296</sup> .Concerning the contribution in kind, the Maliki and Hanbali schools accept this contribution on condition that it is assessed separately according to the market price on the date of signature of the contract. Conversely, the Hanafi and Hanbali schools prohibit any contribution in kind. They consider that contributions in kind, necessarily distinct from contributions in cash, conflict with the unity and indivisibility of the common heritage of the company.

In this sense, see: \* **H. MARTIN-SISTERON**, "Ethical financing", *Revue Lamy droit du financing*, 2013, para. 5496.

- **Kalaoui Ghassan**, "interest-free banks: Islamic banks", Thesis, University of Montpellier I, June 1988.
- **Moate Michael**, "the creation of an Islamic banking law", Thesis, University of Rochelle , 9 December 2011



According to the strictest interpretation of Sharia, it is also prohibited to engage in any activity that relates, directly or indirectly, to RIBA, as well as investing in a company that pays or receives interest. However, Islamic scholars have gradually established tolerance thresholds for indebtedness or interest income, when the rate in financial instruments represents a minor fraction<sup>297</sup> of a company's funding or income which is considered eligible to receive Islamic financing. These requirements reflect the conception of legality of investment and the principle of prohibition of RIBA in Islamic law. Moreover, in certain cases, the Moudaraba would make it possible to structure an undertaking for collective investment under French law<sup>298</sup> subject to compliance with the principles of Islamic law. Of assets and application to UCITS declaring compliance with Islamic law<sup>299</sup>.

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**297-** The generally accepted debt threshold is a debt ratio below 33%. E. JOUINI & O. PASTRE, "Challenges and opportunities of the development of Islamic finance for the Paris market: ten proposals to collect 100 billion euros", Rapp. Delivered to Paris Europlace, 8 Dec. 2008, p. 29-30.

**298-** An undertaking for collective investment is an investment fund made up of sums pooled by investors who decide to let professional managers manage these sums on their behalf in the best performing funds. The sums contributed by the investors entitle them to securities of the fund which are generally offered on a continuous basis. Such as, for example, Undertaking for Collective Investment in Transferable Securities (UCITS), or Real Estate Collective Investment Undertaking (OPCI).

In this regard, see I. RIASSETTO, "Alternative finance: which investment funds for which aspirations? », Banking and Financial Law Review, No. 3, May 2013.

**299** -AMF, Position n° 2007-19 "Extra-financial criteria for the selection of securities and application to UCITS declaring compliance with Islamic law", 17 July. 2007, amended Jan. 9. 2013. This is the first text of French law that expressly targets Islamic finance. Taking advantage of the provisions of this position, BNPP created in July 2007 the first Islamic index UCITS under French law. The change concerns the integration of the reference to sharing UCIs defined by AMF position no. 2012-15. G. SAINT-MARC, "Islamic finance: a challenge for France", in French-style Islamic finance: a driving force for the economy, an ethical alternative, under dir. J.-P. LARAMÉE, Secure finance, Paris, 2008, p. 293.

- I. RIASSETTO, "The content of the guide to good practices for Islamic investment funds of the Luxembourg Association of Investment Funds (alfi)", The notebooks of Islamic finance, n° 4, Ecole de Management Strasbourg, 2013 , p. 90.

CITS may use criteria other than financial to select the securities in which they invest. These same elements of assessment apply for the authorization of UCITS declaring themselves to be in conformity with Islamic law, known as Islamic funds<sup>300</sup>. In this respect, the elements subject to particular vigilance as a financial market regulator can be analyzed as follows: the preservation of the management company's autonomy (article L. 214-9 of the Monetary and Financial Code), excluding the selection of assets being carried out by an entity separate from the management company responsible for the financial management of the UCITS and the autonomy of the latter will be assessed taking into account the role of the body in charge of the establishment of the index; the possible intervention of a third party entity must not replace the implementation within the management company of the means necessary for the exercise of its activity (article 313-54 of the general regulations of the AMF<sup>301</sup>); the extra-financial criteria used must comply with all the legislative and regulatory provisions in force (criteria based on the consideration of the race or religion of company directors cannot be accepted as they are considered as contrary to principles of public order; As RIASSETTO points out, subject to respect for public order, the approval in France of a religious investment fund – or compartment – is not incompatible with the principle of secularism<sup>302</sup>. In its positive dimension of respect for all beliefs, secularism in fact allows these funds to be taken into consideration insofar as they constitute manifestations of a religious belief and the negative dimension of "neutrality" is not opposed more to the creation and approval of these funds, because secularism only concerns the public sphere and not the private sphere, which includes business law and, more specifically, the law of undertakings for collective investment. The prerogatives of the Islamic moral order and conventional financial regulation can therefore coexist harmoniously in a legal structuring of the Islamic UCITS type where the first must necessarily be part of the second without being distorted by it.

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<sup>300</sup> -I. RIASSETTO, "Islamic funds", Review of banking and financial law, study 18, May – June 2011, p. 43-48.

<sup>301</sup> -AMF is the French financial market regulator

<sup>302</sup> - I. RIASSETTO, "The "faith-based", a concept in business law", in "Emerging concepts in business law", under dir. E. LE DOLLEY, LGDJ-Lextenso, 2010, n° 27 .

## 2) Allocation of management and profits/losses in Mudaraba

### a – management and profit/loss.

The management of the Mudaraba project, or sponsorship, is entrusted unilaterally to the entrepreneur, the general partner. Acts of internal management or day-to-day operations concluded by the entrepreneur under normal conditions, in the usual manner within the framework of the company's activity, do not have to be submitted to the approval of the investor<sup>303</sup>. Mudaraba, the partners cannot agree that the capital investor has the right to manage or participate in the sale and purchase activities with the entrepreneur<sup>304</sup>. And the contribution of capital does not necessarily entail the right of scrutiny for the limited partner investor on the conduct of the company<sup>305</sup>. Considering that interference by the investor in the management can lead to limiting the freedom of the entrepreneur and prevent him from making profits, except with the prior consent of the latter<sup>306</sup>.

Similarly, under French law, only the general partner can manage the limited partnership in accordance with the rules provided for the partnership and the limited partner investor cannot even under power of attorney perform any act of management. In the event of contravention of this prohibition, he is jointly and severally liable with the general partners for the debts and commitments of the company resulting from the prohibited acts and, depending on their number or importance, he may be declared jointly and severally liable for all the commitments of the company or for a few only.

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**303–** H. MARTIN-SISTERON, “Ethical financing”, Review Lamy financing law, 2013, para. 5495.

**304–**AAOIFI, Shari ‘a Standards for Islamic financial institutions, sharia standard no. 13 “Mudaraba”, art. 9/3, 2010, p. 240.

**305 –**F. GUERANGER, Islamic finance: an illustration of ethical finance, Dunod, Paris, 2009, p. 93.

**306–** P. GRANGEREAU & M. HAROUN, “Financing of projects and Islamic financing: some prospective reflections for financing in civil law countries”, Bank & LAW, n° 97, Sept. – Oct. 2004, p. 54.

Good management by the contractor is always required. Thus, for example, he must not sell goods at a price lower than the current price or that of the market, or buy them at a price higher than the current one, unless such transaction is in the interest of both parties, allowing to achieve the intended objective of the Mudaraba; and he must not perform a charitable act using the funds granted by the investor since these acts may cause losses and fall outside the purpose of the contract; offer a right in connection with the Mudaraba except by the consent of the capital investor. But, he must communicate to the investor the books and the social documents and answer the questions relating to the social management.

Precisely, the extent of the powers of the entrepreneur depends on the nature of the Mudaraba, limited or unlimited:

- The Mudaraba is limited or restrictive when the social purpose is precisely defined. The investor has imposed restrictions on the acts of management of the entrepreneur. For example, by limiting his field of activity to a certain type of investment, in a specific place, for a fixed period, or even by specifying the people with whom the entrepreneur can contract. The Hanbali and Hanafi schools have endorsed the restrictions related to time or people but this is not the case for the Shafia and Maliki schools<sup>307</sup>. The entrepreneur must observe these restrictions provided that he does not restrict his freedom and prevent him from making a profit. Under French law, the manager's power of administration may also be limited by the corporate purpose and the company's articles of association.

- While the Mudaraba is unlimited or absolute when the object of the contract is left to the free choice of the entrepreneur, within the limits of the interest of both parties in order to achieve the objective of the contract. In the absence of restrictions on the part of the investor, the actions of the entrepreneur must be in accordance with professional usage in relation to the subject of the contract.

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<sup>307</sup>- A. SARKER, « *Islamic business contracts, agency problem and the theory of the Islamic firm* », *International journal of Islamic financial services*, vol. 1, n° 2, July-Sept. 1999, p. 4.

The entrepreneur can thus freely conduct his business in the common interest, for example by choosing the area of investment corresponding to his expertise and professional abilities.

The absence of *affectio societatis* between the sponsored entrepreneur and the sponsored investor, contrary to what could exist between the sponsor and the general partner in the case of a French sponsor: in *Moudaraba*, the *rab-al-mal* must not intervene in the management of the activity, which deprives the parties of the possibility of working together on an equal footing. In French law, even if it is possible to impose certain statutory restrictions on certain rights of the limited partners, but there does not seem to be a loss of *affectio societatis* in this case. Nevertheless, the *rab-al-mal* can have a right of inspection, even of participation in an activity within certain limits, subject to the prior agreement of the *Moudareb*. Without achieving total legal equality, the presence of an *affectio societatis* does not seem to have to be totally excluded<sup>308</sup>.

Whatever the nature of the *Mudaraba*, the entrepreneur must do his best to achieve the intended objectives, and invest the capital transmitted to him by the investor in the best permissible ways.

#### **b– Breakdown of profits and losses.**

The process of allocating profits and losses in a *Mudaraba* marks its distinction from sponsorship. In Islamic law, the norms of the AAOIFI define the mechanism of distribution of profits in the *Mudaraba* in a detailed manner<sup>309</sup>. According to which, the parties to the contract participate in the profits according to a clearly specified ratio at the time of the conclusion of the contract<sup>310</sup>, makes it possible to avoid any uncertainty or disagreement.

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**308– P. GRANGEREAU & M. HAROUN**, “Financing of projects and Islamic financing: some prospective reflections for financing in civil law countries”, *Banque & Droit*, n° 97, Sept. – Oct. 2004, p. 54 (footnote 16).

**309– AAOIFI**, *Shari'a Standards for Islamic financial institutions*, shari'a standard no. 13 “*Mudaraba*”, art. 8/1, 2010, p. 237.

**310 – A. SARKER**, “Islamic business contracts, agency problem and the theory of the Islamic firm”, *International journal of Islamic financial services*, vol. 1, No. 2, July–Sept. 1999, p. 4.

Islamic law makes contractual freedom prevail here, by not requiring any particular proportion<sup>311</sup>. As a result, different distribution keys can be agreed depending on the nature of the activity concerned. In the absence of its determination, the parties refer to customary practice, designating the equitable sharing of profit, if any, to determine the shares of profit. Failing this, the contract is considered null and in return, the contractor receives consideration for the services rendered, fixed according to the market.

It is prohibited to fix this ratio in the form of a lump sum or a percentage of the capital. It should also not be stipulated that the profit of a transaction is provided to one party and that resulting from another transaction is the right of the other party.

Indeed, the distribution of the profit depends on the final result of the operations of Mudaraba at the time of the dissolution of the contract. It must take place after the investor has recovered his capital and paid the management fees to the entrepreneur as agreed in the contract<sup>312</sup>. The right of the entrepreneur to a share of profits upon realization of the profit is subject to the retention of interim profits in order to protect the capital. No party can claim a profit unless the capital of Mudaraba is intact.

Under French law, the share of each partner in the profits is determined in proportion to his share in the share capital and the share of the partner who has contributed only his industry is equal to that of the partner who has the least provided, all unless otherwise agreed.

But the statute of the company that ultimately defines the process of distributing profits. Their distribution is not necessarily proportional. The law accepts the validity of the clauses of unequal treatment, as well as those of equal treatment. And the partners have the right to subsequently modify the key of such distribution.

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**311-** H. MARTIN-SISTERON, "Ethical financing", Review Lamy financing law, 2013, para. 5497.

**312-** W. MZID, "Islamic finance: fundamental principles and essential contributions in financing growth and development", Emerging new economic policy makers in the Arab Mediterranean, p. 58 .

Any contractual stipulation which totally excludes profit, as well as losses, or makes one of the partners responsible for all losses is a leonine clause, which is deemed unwritten.

The distribution of losses differs from a Mudaraba to a sponsorship<sup>313</sup>.

In a Mudaraba, it is the investor who assumes all of the losses suffered and the entrepreneur only loses his remuneration. The entrepreneur is indeed supposed to be a fiduciary. Thus he does not bear any loss, except in the event of negligence or mismanagement on his part.

In a limited partnership, the investor is only liable for the debts and losses of the company up to the amount of his contribution to the capital<sup>314</sup>, hence his liability is limited. While the entrepreneur is infinitely and jointly responsible for the social debts. However, both rights make it possible to engage the liability of the managing entrepreneur in the event of fraud, mismanagement or gross negligence on his part and the investor may sue him for payment of what he should have returned.

Indeed, Islamic law considers this type of transaction to be a kind of crowdfunding, which allows partners to share profits and losses. The principle that the entrepreneur suffers no loss and it is the investor who bears all losses (except fraud or negligence of the entrepreneur), consists of an application of risks of loss relating to the property. In other words, the investor is the owner of the capital and the entrepreneur is responsible for his efforts. Thus, in the sense of an equitable sharing, everyone suffers a risk, the risk of loss of capital by the owner of funds and the risk of loss of remuneration by the entrepreneur. Whereas under French law, the liability of the sponsor is limited to its contribution to the capital and that of the general partner is unlimited. This contradicts the main feature drawn from this method of crowdfunding by the Mudaraba in Islamic law.

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**313**– E. JOUINI & O. PASTRE, “Issues and opportunities of the development of Islamic finance for the Paris market: ten proposals to collect 100 billion euros”, Rapp. Delivered to Paris Europlace, 8 Dec. 2008, p. 29.

**314** – C. French Commerce, art. L.222–1.



After having dealt with the operation of Mudaraba, it is interesting to also study its dissolution. Generally, the partners agree in the statutes on the causes of dissolution of the company and the mechanism of its liquidation.

The company is automatically dissolved by the common agreement of its partners or at the end of its term, unless the majority decides on its extension.

The death of the limited partner does not put an end to the company while that of the general partner can do so, as provided for in Islamic law according to the standards of the AAOIFI and in French law, according to article L222-10 of the Commercial Code .

From now on, the partners can agree that the company is not dissolved by the death of one of them, but continues with its heirs or legatees, except to provide in the statutes that they must be approved by all of them and it can, however, be agreed that this death will result in the dissolution of the company or that it will continue only with those surviving. In the same sense, the article mentioned above specifies that "If it is stipulated that despite the death of one of the general partners, the company continues with his heirs, these become limited partners when they are unemancipated minors . If the deceased partner was the sole general partner and if his heirs are all unemancipated minors, he must be replaced by a new general partner or the company transformed, within one year of the death. . Failing this, the company is automatically dissolved at the end of this period.

After the dissolution of the company, an inventory of the assets and the liabilities will be drawn up, and take place the transfer of all the assets, the payment of the creditors, and, if necessary, the distribution of a bonus of liquidation to the partners . In addition, the assets, and the liabilities, if any, will be distributed between them in proportion to their share in the share capital, or they will be sold and the proceeds will be distributed if they cannot be separated.

In conclusion, although the Mudaraba seems close to sponsorship, the latter is distinct, particularly with regard to the requirement of legality of the type of investment in question as well as in terms of its management and the distribution of losses.

Also La Moudaraba highlights the application of the principle of equitable sharing of profits and losses between the partners. This is not the case for sponsorship because of the limited liability of the sponsor and the contractor is infinitely and jointly liable for the social debts.

On the other hand, the Mudaraba sometimes leads, in practice, to information problems between the bank, the investor, and its client, the entrepreneur.

### **B-Istisna'a real estate investment contracts**

The Istisna'a is a contract by which one party (mustasni) asks another (sani), to carry out construction or manufacturing work on its behalf. First, the client contacts the bank for the creation the property specifically described; then, the bank approaches a supplier to order the manufacture of the product requested by its customer and the manufacturer builds the requested good by receiving periodic payments from the banker according to a schedule agreed in advance and carries out the transfer of ownership by delivering the bank ; finally, the bank delivers the good to the customer who pays the price of the good in full or in several installments <sup>315</sup>.

The istisna'a contract is defined in the French tax instruction, dated July 23, 2010<sup>316</sup>, as "a construction contract under which a Customer asks a third party in charge of construction, called "the Manufacturer", to build him movable or immovable work for a price payable in advance, in installments, on a term basis or on an installment basis. The contract provides that the ownership of the constructed asset is transferred to the Customer on completion<sup>317</sup>.

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<sup>315</sup> -H. MARTIN-SISTERON, "The funding arrangement by compiling Sharia project", Journal des Sociétés, Dossier La Finance Islamique, n° 77, June 2010, p. 20.

<sup>316</sup> -General Directorate of Public Finance, Tax Instructions of 23 July 2010 "Income tax (IR), corporation tax (IS), value added tax (VAT), registration fees, regime applicable to transactions 'istisna'a", Official Tax Bulletin No. 78 of August 24, 2010, 4FE/S4/10 (NOR: ECE L 10 00004 J).

<sup>317</sup>- K. TOUMI, Capital structure, profitability and risks of Islamic banks, Thesis in joint supervision, University of Montpellier I and University of SFAX, 8 dec. 2011, p. 47.

Regarding parallel istisna'a operations, the Financier concludes a parallel istisna'a contract with its Client before its contract with the Manufacturer and these two contracts have the same specifications concerning the work to be built. In the contract between the Financier and the Client, payment generally takes the form of a deferred payment granted by the Financier to the Client and the ownership of the work is transferred to the benefit of the Client upon its completion.

### **1) Regulation of the istisna'a contract**

In the contract of istisna'a, it is necessary to determine with precision the object, the price

of sale, the time and place of delivery. In the same sense, according to article L.261-12 of the French Construction and Housing Code, "the contract of sale of the building to be built must specify:

a) The description of the building or part of the building sold;

b) Its price and the terms of payment thereof;

c) The delivery time;

d) When it takes the form provided for in Article 1601-3 of the Civil Code, reproduced in Article L. 261-3 of this Code, the guarantee of the completion of the building or the reimbursement of the payments made in the event of termination of the contract for lack of completion. However, when the sale concerns a part of the building, the contract may only include the particulars specific to this part, the other details provided for in the preceding paragraph must then appear, either in a document annexed to the deed, or in a document filed in the minutes of a notary and to which the deed refers"<sup>314</sup>.

As in all Islamic contracts, the object of istisna'a must be lawful under Sharia law. Thus, it should not be a question of financing investment projects in certain sectors such as the manufacture of alcohol or its derivatives or the construction of gambling clubs, etc.

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<sup>314</sup> -General Directorate of Public Finance, Tax Instructions of 23 July 2010 "Income tax (IR), corporation tax (IS), value added tax (VAT), registration fees, regime applicable to transactions 'istisna'a", Official Tax Bulletin No. 78 of August 24, 2010, 4FE/S4/10, p. 3\_4..

It cannot also consist of natural products (such as fruits, vegetables and cereals), which must exist at the time of the conclusion of the contract or are the subject of a forward sale contract, unless they must be processed industrially (frozen or stored for a long time and put in suitable packaging) <sup>315</sup>.

Certainly, the price must be known at the time of the conclusion of the contract to avoid any uncertainty. Unlike Salam where the price must be paid in advance, in *istisna'a*, it is not required that the price be paid in advance, or even at the time of delivery. It is up to the parties to agree on the date and terms of payment. For example, the client can start making installments as soon as the *istisna'a* contract is signed and continue during construction, even after delivery. Thus, it is possible to defer payment or to pay in instalments for a certain period or as the delivery stages progress <sup>316</sup>.

Remuneration for the service including the cost of construction or manufacture is increased by a financial charge. With regard to the price, it is provided for in article L.261-12 of the Construction and Housing Code that "1. In the case of sale in the future state of completion, the seller cannot require or accept any payment, deposit, subscription or acceptance of negotiable instruments before the signing of the contract, nor before the date on which the debt is due.

The forward sale contract can only stipulate that security deposits will be made, as the work progresses, to a special account opened in the name of the purchaser by an organization authorized for this purpose. The funds thus deposited are non-transferable, unseizable and unavailable within the limit of the sums owed by the buyer, except for the payment of the price".

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<sup>315</sup> –M. H. TOUJKANI, "Salam et *istisna'a* contracts", Seminar organized in the Republic of Niger on the theme "The Sciences of Sharia for economists: the sources of *fiqh*, its principles and its theories; the *fiqh* of financial transactions and corporations; and its contemporary application", seminar proceedings no. 44, April 20-29, 1998, p. 220.

<sup>316</sup> – AAOIFI, Shari'a Standards for Islamic financial institutions, shari'a standard no. 11 "Istisna'a and Parallel Istisna'a", art.3/2/2, 2010, p. 184.

Furthermore, the bank is not obliged to grant a rebate when the actual costs of manufacture are substantially higher than the estimated costs or when he has had a rebate from the manufacturer, since the contract of istisna'a and that of parallel istisna'a are independent in terms of obligations and effects<sup>317</sup>. Moreover, it is possible not to set the delivery date, but the buyer can also set a maximum date for delivery. In the event of a delay by the manufacturer, the buyer is not obliged to accept the goods and pay the price.

It remains, moreover, that the istisna'a contract has the major drawback of allowing the return of the object of the Istisna'a sale after inspection, therefore after delivery, in the event of non-compliance, which thus entails the cancellation of the sale, which would naturally affect the banking transaction of the project<sup>318</sup>. Moreover, the product manufactured at the end of the fixed term must be free from all defects and the buyer is required to pay the price as agreed. This is a warranty against hidden defects by the seller. The buyer has the right to terminate the contract if these conditions are met:

- The defect exists before the conclusion of the contract;
- The defect exists when the buyer takes possession of the good;
- The buyer is unaware of the defect at the time of delivery of the goods;
- The defect exists at the time of the request for cancellation of the contract by the buyer;
- The defect is not minor and in this case, the buyer has the choice, either to cancel or to confirm the contract with the whole of the stipulated price; either to cancel the contract or to confirm it by asking for a discount on the price.

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<sup>317</sup> - AAOIFI, *op. cit.*, Appendix (B): Basis of the Shari'ah rulings, p. 195. 396 Ibn 'Abidin, Radd al-Muhtar, 5:225, cité par T. USMANI, *An introduction to Islamic finance*, Idaratul-Ma'arif, Karachi, Pakistan, 1998, p. 137.

<sup>318</sup> -P. GRANGEREAU & M. HAROUN, « *Financements de projets et financements islamiques : quelques réflexions prospectives pour des financements en pays de droit civil* », *Banque & droit*, n° 97, sept. – oct. 2004, p. 60.

This is similar to the system of the guarantee of hidden defects in French law when the professional seller cannot be exonerated from his responsibility for the defects of the thing sold rendering it unfit for its intended use<sup>319</sup>. As article L261-5 of the Construction and Housing Code specifies, by repeating article 1642-1 of the Civil Code (law n°2009-323 of March 25, 2009, art. 109): "The seller of a building to be built cannot be discharged, neither before acceptance of the works, nor before the expiry of a period of one month after the purchaser takes possession of the construction defects or defects of conformity then apparent. There will be no need to terminate the contract or reduce the price if the seller undertakes to repair. »

By examining the istisna'a contract, we notice that it has a certain particularity compared to other modes of commercial Islamic financing. The Salam, like the Murabaha, the ijara are much more suitable for commercial activities while the istisna'a is suitable for industrial activities<sup>320</sup>. Firstly, istisna'a is distinct from Murabaha, which relates in particular to the sale of goods which already exist at the time of the conclusion of the contract and whose price covers the purchase price plus a profit margin agreed by the two parties involved<sup>321</sup>. The price in the istisna'a contract must be known as soon as the contract is concluded and the actual cost will be known after the completion of the work<sup>322</sup>.

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**319-** H. MARTIN-SISTERON, « *Adapting the demands of the Islamic moral order to project finance: prospects for French law in connection with an istisna'a - ijara (construction financing and lease-to-own) structure* », Chair of ethics and financial norms, Paris I Pantheon – Sorbonne University and King Abdul Aziz University, Seminar of 1st June 2011, p. 12.

**320** -M. AL-JARHI & M. IQBAL, « *Banques islamiques : réponses à des questions fréquemment posées* », Banque Islamique de Développement, document périodique n° 4, Royaume d'Arabie Saoudite, 2002, p. 19.

**321** -S. HARON, « *A comparative study of Islamic banking practices* », J.KAU: Islamic Econ., vol. 10, Malaysia, 1998, pp. 23-50.

**322** -AAOIFI, *Shari'a Standards for Islamic financial institutions*, shari'a standard no. 11 « *Istisna'a and Parallel Istisna'a* », Appendix (B): Basis of the Shari'ah rulings, 2010, p. 195

Furthermore, in Murabaha, the validity of the transaction is conditioned by the taking possession of the goods by the bank before transferring them to the buyer, as well as the risks relating thereto as owner, whereas in Istisna'a, the goods will only be transferred upon completion. Secondly, concerning the istisna'a the manufacturer undertakes to make the requested goods, either by his own materials or by obtaining them from others. On the other hand, it is not istisna'a, but ijara when the materials are provided by the customer and the manufacturer uses only his labor and skills, in the sense of rendering services for a certain remuneration. After the seller has made the requested goods, the buyer's right to refuse them at this stage is interpreted differently by Muslim jurisconsults: Abu Hanifa believes that the buyer can exercise his "option to see" after having seen them, since the istisna'a is a contract of sale and if one buys something that one has not seen before, one has the option of canceling the sale after having seen it, and therefore similarly in the event of istisna'a<sup>323</sup>. However, doctrinaires provide that the buyer is required to accept the goods, without exercising such an option; this position was preferred by the jurists of the Ottoman Empire and codified in Hanafi law. According to them, the manufacturer has incurred expenses to manufacture the thing and deliver it in conformity with the contractual specifications and thus he suffers losses in this case<sup>324</sup>.

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<sup>323</sup> -T. USMANI, *An introduction to Islamic finance*, Idaratul-Ma'arif, Karachi, Pakistan, 1998, p. 137. 136

<sup>324</sup> - AAOIFI, *Shari'a Standards for Islamic financial institutions*, shari'a standard no. 11 « *Istisna'a and Parallel Istisna'a* », Appendix (B): Basis of the Shari'ah rulings, 2010, p. 193



## 2) Termination of the istisna'a contract

Normally, the delivery of the thing by the seller and the payment of the price by the buyer entails termination of the contract. But, extraordinarily, the obligation can also be extinguished in the event of non-performance of the service by the debtor. Classical Hanafi jurists examine the binding effect of the istisna'a contract in three stages: First, the manufacturing work has not yet begun, they are unanimous in saying that the contract is therefore not binding and both parties have the right to release themselves from their respective obligations; in a second step, the manufacturer has completed the construction of the good, but the customer has not yet seen the goods, then the manufacturer still has the right to sell it to a third party; and finally, in a third step, the goods have been manufactured and presented to the buyer, and opinions differ on the point whether the buyer has the right to refuse the goods<sup>325</sup>.

For some, the istisna' contract is binding from the first stage and revocation is not allowed because it would put the manufacturer at risk. In this sense, Islamic banks base the use of this contract on article 392 of Islamic law (the Majella – Ottoman uniform civil code) which states that "Once the contract of istisna'a is concluded, neither of the contracting parties has the right to break it. If the product, which is the subject of the contract, does not correspond to the expected criteria, the purchaser has the right to choose between maintaining or terminating the contract<sup>326</sup>.

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**325** – Ibn al-Humam, Fath al-Qadir, vol. 8, p. 116 ; Al-Kasani, Badai' al-Sanai', vol. 6, p. 2680 voir H. MARTIN-SISTERON, « *Financements éthiques* », *Revue Lamy droit du financement*, 2013, para. 5470.

**326**– H. MARTIN-SISTERON, « *Adapting the demands of the Islamic moral order to project finance: prospects for French law in connection with an istisna'a – ijara (construction financing and lease-to-own) structure* », Chair of ethics and financial norms, Paris I Pantheon – Sorbonne University and King Abdul Aziz University, Seminar of 1st June 2011, p. 12

Thus, when the buyer finds that the product ordered does not meet one of the desired criteria, he is then entitled to question the contract, maintain or terminate it or even accept the product as it is while requiring a discount on the purchase price in compensation for the missing criterion<sup>327</sup>. In the event of a defect in the product, rendering it unsuitable for the use for which it is intended, he also has the right to maintain the contract and appropriate the defective product, by demanding damages and repairs from the supplier according to the seriousness of the defects, or terminate the contract and return to the initial situation.

The Islamic Fiqh Academy has asserted that *istisna'a* is a form of irrevocable commitment whose payment can be deferred. This contract creates a moral obligation on the manufacturer to manufacture the goods, and either party can terminate the contract unilaterally after giving notice to the other party, unless the manufacturer has started his work; in this case the contract cannot be terminated unilaterally. Hardship refers to judicial intervention to restore the balance of a contract whose execution has become abnormally onerous to the detriment of one of the contracting parties.

In French law, the Court of Cassation has firmly rejected any possibility for the trial judge to modify a contract under article 1134 of the Civil Code<sup>328</sup>.

In Islamic law, according to the AAOIFI, it is possible, in case of force majeure, to change the price of the contract, by increase or reduction, either by agreement of the parties, or by arbitration, or legal procedure, provided that not to extend the payment period in return for an additional amount, constituting *riba*<sup>329</sup>.

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**327-** M. H. TOUJKANI, "Salam et *istisna* contracts", Seminar organized in the Republic of Niger on the theme "Shari'a sciences for economists: the sources of fiqh, its principles and its theories; the fiqh of financial transactions and corporations; and its contemporary application", seminar proceedings no. 44, April 20-29, 1998, p. 222.

**328** -Civil Code, French art. 1134: "agreements legally formed take the place of law for those who have made them. They may only be revoked by their mutual consent or for causes authorized by law. They must be performed in good faith. »

**329** -AAOIFI, Shari'a Standards for Islamic financial institutions, shari'a standard no. 11 "Istis-na'a and Parallel Istisna'a", art. 4/1/3 and 4/2/1, 2010, p. 185

Moreover, within the framework of *istisna'a*, it is possible that the parties release themselves from their obligations when events make the execution of the contract impossible or fundamentally different from that which had been envisaged *ab initio*<sup>330</sup>. However, it is possible to propose a revision of the contract: either on a contractual basis, if the parties agree, or on a judicial basis, if the parties disagree and the judge then intervenes in the contract as a third party. If all the conditions are satisfied, the judge may, before revising the contract, ask the contracting parties to renegotiate the contract between themselves, and in the absence of an agreement between the parties, the judge will reduce the excessive obligation. Sometimes the bank inserts a penalty in the contract to penalize the late delivery by the manufacturer. Under French law, damages constitute financial compensation to compensate for damages and losses suffered by a contracting party, and the amount of damages is based on the losses suffered and the loss of income. It does not matter whether the damage results from delay in the execution or non-execution of a contract and the remuneration is the payment of an equivalent amount in capital or an annuity<sup>331</sup>. Moreover, the AAOIFI allows the stipulation of a penalty clause in the *istisna'a* contract, since it is in the interest of the contract on the one hand and concerns an obligation of production and delivery of the products in the future, not in relation to a monetary debt<sup>332</sup>.

Moreover, Muslim jurisconsults meeting in Saudi Arabia unanimously approved the legality of inserting a penalty clause in the *istisna'a* contract, but it should not be used as a means of pressure on the debtor and the damages, not being accounted for in the bank's income, will have to be entered in a *zakat* account, and donated to a charity or charity<sup>333</sup>.

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**330**– H. MARTIN-SISTERON, “Ethical financing”, Review Lamy financing law, 2013, para. 5472.

**331**–consult Geneviève Viney; the decline of individual responsibility; Jouve printing works; January 2014

**332** –AAOIFI, Shari'a Standards for Islamic financial institutions, shari'a standard no. 11 “*Istisna'a* and Parallel *Istisna'a*”, Appendix (B): Basis of the Shari'ah rulings, 2010, p. 195.

**333** –H. MARTIN-SISTERON, “Ethical financing”, Review Lamy financing law, 2013, para. 5471.

## §2. Legitimization of financing by Moucharaka investment contract in the Islamic banking system

### A- Conceptual generality of the Moucharaka investment contract

#### 1) Conceptual generality of the Moucharaka investment contract

Crowdfunding, insofar as two parties subscribe to the capital of a company and participate in the profits and losses of the latter in proportion to their respective contributions.

In fact, a client who wishes to finance a specific project obtains funds from a bank for this operation. the bank acts as a passive investor, because the business is managed by the client, only the relationship that is created in this way between the bank and the client is based on a partnership relationship.

Musharakah is a form of partnership when two or more people contribute to finance a project, whose contributions are in equal or unequal proportions. Profits are distributed according to a ratio agreed between the partners and losses are distributed in proportion to the capital contribution. All capital contributors are entitled to participate in management, but this is not necessarily the case<sup>334</sup>.

This form of financing makes it possible to mobilize funds for the creation or expansion of a company, or even the financing of a specific operation, mainly used in small-scale investment projects.

Some authors compare the Moucharaka to the joint venture in the terminology of conventional finance<sup>335</sup>.

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<sup>334</sup> –A. SARKER, “Islamic business contracts, agency problem and the theory of the Islamic firm”, *International journal of Islamic financial services*, vol. 1, No. 2, July–Sept. 1999, p. 6.

<sup>335</sup> –F. GUERANGER, *Islamic finance: an illustration of ethical finance*, Dunod, Paris, 2009, p. 96.; G. SAINT-MARC, “Islamic Finance and French Law”, *Gide Loyrette Nouel (AARPI)*, Round tables organized by the Senate Finance Committee, May 14, 2008, p. 18.; E. JOUINI & O. PASTRE, “Challenges and opportunities of the development of Islamic finance for the Paris market: ten proposals to collect 100 billion euros”, *Rapp. Delivered to Paris Europlace*, 8 Dec. 2008, p. 31.

This term comes from Anglo-Saxon law but in French law, it does not correspond to any specific legal structure. It is formally a joint venture (SEP)<sup>336</sup> set up by the bank and its client for a specific project<sup>337</sup>. The company can take the form of a partnership or a capital company, and can also consist of a capital participation by the bank in an existing company.

Comparable to a joint venture, recourse could be had, under French law, to the system of equity loans, provided for by articles L. 313-13 et seq. of the Monetary and Financial Code, and under the terms of which the lender is not necessarily a credit institution; the lender can be remunerated with a fixed part and a variable part<sup>338</sup>.

However, in our opinion, the approximation of the Moucharaka to the participatory loan is not very convincing, especially when the remuneration of the conventional bank, in the event of a participatory loan, can be in the form of a fixed rate, which resembles the prohibited *riba* in Islam, while the income of Islamic banking, in case of *Musharakah*, is always random depending on the return of the investment.

The *Musharakah* is not a bank loan but a full and complete participation in the financing of a project with an interest in the results, whether positive or negative<sup>339</sup>. Also the *Musharakah* makes it possible to invest directly and concretely in a transaction therefore the bank can monitor more the projects financed by the *Musharaka*.

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**336-** SEP is governed by articles 1871 to 1873 of the French Civil Code.

**337** M. RUIMY, *Islamic finance*, Arnaud France editions, coll. Finance today, Paris, 2008, p. 98..

**338-** H. MARTIN-SISTERON, "The arrangement of financing by Sharia-compliant project", *Journal des Sociétés*, Dossier La Finance Islamique, n° 77, June 2010, p. 20.

**339-** K. TOUMI, *Structure of capital, profitability and risks of Islamic banks*, Thesis in joint supervision, University of Montpellier I and University of SFAX, 8 dec. 2011, p. 37..

During a Musharakah partners may appoint an administrator to operate the partnership or perform special functions to the business. Also as for a modern society the members of a Mou-charaka can choose one or more of them or a third party, a non-member, to manage the Moucharaka. This possibility is derived from the Sharia principle stating that all partnership contracts contain an agency contract.

In Musharakah has some: continuous Musharakah and degressive or decreasing Musharakah. This gives the possibility to one of the partners to gradually buy back the shares of the other, until he becomes the sole owner of the In this case, this provision allows Islamic banks to gradually withdraw from the investments in which they are engaged.

When the Musharakah is designed as a fixed income product, the financier provides that a promise to purchase is granted to him in order to allow him, when certain events expire, to sell his shares.

Until the end of 2007, in the vast majority of transactions based on Musharakah it was common for an associated investor to act as guarantor under a promise to purchase. However, the compatibility of such structures with regard to the Sharia has been called into question, so that it is currently increasingly rare to have recourse to a promise to purchase within the framework of a transaction based on a Moucharaka <sup>340</sup>.car a promise to purchase is reserved for fixed income contracts (non-participatory).

2) Specific risks related to the Musharakah investment contract.

The risks faced by Islamic financial institutions can be classified into two categories: risks common with traditional banks and risks specific to Islamic banking due to compliance with Sharia <sup>341</sup>.

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<sup>340</sup>- Herbert Smith LLP, « Guide de la finance islamique », en collaboration avec Gleiss lutz et Stibbe, 2009,p.15 .

<sup>341</sup>- V. Charbonnier ,Islam : droit , finance et assurance . larcier, 2011,P.78.

The majority of the risk incurred by conventional financial institutions such as credit risk, market risk, liquidity risk, etc., are also present in Islamic financial institutions. Also Islamic institutions face particular risks. Which arise from the different characteristics of assets and liabilities. the profit-sharing function of Islamic finance presents additional risks. More specifically, the payment of deposits for investment shares of bank profits introduces a fiduciary risk<sup>342</sup>.

Islamic banks are based on a system of cooperation in this system, the risk can naturally increase because Islamic banks are also high risk by the fact that the partner of the bank is free to carry out the projects. This can potentially lead to a project risk.

In a study carried out by KHAN and AHMAD<sup>343</sup> for the development bank, on a sample of 17 banks and financial institutions from 10 Islamic countries. It has been shown that cooperative contracts (Moucharaka) were more risky than other contracts indeed it is noted that the skills of existing banks in terms of project evaluation are limited in cooperation contracts and in particular in that of Musharaka . because in Moucharaka contract the control of expenses in the framework of project evaluation, in cooperative contracts is not very reinforced

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**342** -. Sandrarajan in. Proceedings of the 13th Islamic Banking Seminar; Risk Management in Islamic Banking, Higher Banking Institute of Iran, Tehran, 1381 H.S, August 2002 source cited: AKBARIAN, Reza. DIANITI, Mohamed Hossein, "risk management in the banking system without riba", Eghtesad Eslami, 6th year, n° 24. winter 1385 H.S, p.153-170

**343** -KHAN Tariqullah & Ahmed Habib, "Risk Management: an analysis of Issue in Islamic Financial Industry", Islamic Research and Training Institute (IRTI), JEDDAH, 2001. Zahid.Abdelkader,"The Islamic bank: efficiency and constraints",Thesis, University of Law and Health, Lille, January 25, 2007.

Benarous .Mondher. "The loan of money, interest or participation balance? the case of the Islamic bank, Thesis, University of Limoges, January 14, 2000 .



In addition the bank does not have asymmetric information therefore it does not know the real profit of the company so the banks cannot share the profit and the exact loss resulting from the project.

Finally, it should be noted that in the Moucharaka contract, savers being at the same time investors do not have the same rights as their colleagues who are shareholders in conventional investment companies even if they have the same risk.

## **B-Legal specifics of the Moucharaka investment contract**

### **1) Domain definition investment contract Moucharaka**

#### **a- Constitution of Moucharaka**

It is recalled that in the Moucharaka, the Islamic bank and its client, make contributions to the capital of the latter. Its constitution must satisfy certain conditions.

The Moucharaka is recognized as legitimate in the Koran<sup>344</sup>, the Sunnah of the Prophet<sup>345</sup> and by the unanimity of Islamic jurists. In French law, the legislator has defined the partnership contract in article 1832 of the Civil Code<sup>346</sup>.

The Moucharaka can be constituted in different social forms subject to compliance with the conditions of its validity.

There is no single form of Musharakah. Two types are essential.

- Continuous or Permanent Musharakah: when all parties are permanently engaged in the business.

- 1- The company is set up by two or more persons who agree by a contract to allocate goods or their industry to a common enterprise with a view to sharing the profit or taking advantage of the savings which may result therefrom.

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<sup>344</sup> -Surah "Sâd", verse 24: "Many people transgress the rights of their associates, except those who believe and do good works - however they are very rare".

<sup>345</sup>- As Abu Hurayra reported: "Allah says: I am the third of two partners since no one cheats the other, and if one cheats the other, I go out".

<sup>346</sup> -Civil Code (2011 edition), art. 1832 (law n° 85-697 of July 11, 1985, article

2- It can be instituted, in the cases provided for by law, by the act of will of a single person.

3- The partners undertake to contribute to the losses".  
his allows them to regularly receive a share of the profits as a co-owner partner.

- Degressive Musharakah: This is a novelty introduced by contemporary Muslim authors<sup>347</sup>. In this form of financing, the bank and the customer first enter into a Musharakah contract, in order to create a company and, secondly, a progressive sale contract to allow the bank to gradually withdraw from this partnership and therefore sell all his shares to his client<sup>348</sup>. According to the report of Jouini and Pastré, the methods of the repurchase of the part of the first associate correspond economically to the refunding of the principal and the payment of the interests to the lender.

Some authors<sup>349</sup> refuse to equate degressive participation with crowdlending insofar as degressive participation is remunerated exclusively on the uncertain results of the company with a progressive redemption of bank shares by the partners, whereas in the case of finance conventional, the participatory lender can benefit either from a fixed rate of remuneration over a variable period depending on the results of the project, this rate is supposed to be a fixed interest rate, and by extension of the *riba*, prohibited by Islamic law, or a variable rate of remuneration over a fixed period, resulting from the addition of a fixed rate and a variable supplement depending on the results of the project.

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**347- E. ANAS**, "The Principle of Profit or Loss Sharing in Islamic Banks: Modeled Illustration of Mudaraba and Moucharaka Crowdfunding Contracts", *Global Journal of Management and Business Research*, vol. 11, Nov. 2011, p. 10.

**348 -E. JOUINI & O. PASTRE**, "Issues and opportunities of the development of Islamic finance for the Paris market: ten proposals to collect 100 billion euros", *Rapp.* submitted to Paris Europlace, 8 Dec. 2008, p. 33.

**349 -R. SAADALLAH**, "Islamic financing: concept and general principle eminar jointly organized by the Islamic Research and Training Institute and the Islamic Mauritanian Al-Baraka Bank on the theme "Introduction to Islamic financing techniques", proceedings of the seminar n° 37, 1st ed., Kingdom of Arabia Arabia, 1996, p. 22.

The fixed rate constitutes a *riba* and consequently the Islamic bank cannot use this type of financing<sup>350</sup>.

In principle, the *Musharakah* contract must be in writing and must specify the conditions governing the relationship between the partners. It is therefore necessary to define in particular the object of the contract, its duration, the capital and the contribution of each party, the methods of distribution of profits and losses, the guarantees possibly given by the entrepreneur for the benefit of the investor for the cover losses suffered due to negligence on the part of the latter, the causes and consequences of termination of the contract, the conditions for taking over the bank's participation in the event of a declining *Musharakah*. Similarly, article 1835 of the Civil Code provides that the statutes of the company must be established in writing and determine the object, the share capital and the contributions of each partner, the form, the registered office, the duration of the company and the terms of its operation.

The bank can enter into a partnership contract with non-Muslims or conventional banks, provided that it invests in activities in accordance with the spirit of *Sharia*, unless it is obvious that the funds or contributions of these banks come from illicit sources. Moreover, this partnership must be managed in full compliance with the principles of Islamic law<sup>351</sup>. Notwithstanding, the conventional bank does not take these criteria into consideration when entering into the partnership. And definitely, the legality of the object is a condition of validity of the contract. Thus, article 1833 of the Civil Code requires that the object be lawful and the company be constituted in the common interest of the partners. However, this notion of lawfulness is differently conceived in each system. *Sharia* committees or council of *ulama* in Islamic banking should monitor the compliance of financial transactions with Islamic law, and ensure the dissemination and effective application of Islamic norms and laws governing investment and economic activity.

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**350** -Seminar jointly organized by the Islamic Research and Training Institute and the Islamic Mauritanian Al-Baraka Bank on the theme Introduction to Islamic financing techniques, proceedings of the seminar n° 37, 1st ed., Kingdom of Saudi Arabia, 1996, p. 179-180.

**351**- AAOIFI, *Shari'a Standards for Islamic financial institutions*, shari'a standard no. 12 "Sharika (*Musharaka*) and modern corporations", art.3/1/1/2, 2010, p. 204.

Regarding capital, Sharia does not set a minimum amount of capital, but requires its full release. However, a progressive release is allowed if it concerns all the partners. While French law may require a certain minimum for the constitution of some companies. The main thing is that it is necessary to determine precisely when signing the contract the nature, type and amount of the capital.

In principle, the capital contribution must be in cash. So, the contribution in kind is the subject of different doctrinal opinions: it is accepted by the Maliki and Hanbali school on condition that it is assessed separately according to the market price on the date of signature of the contract; and conversely, it is prohibited by Imam Abu Hanifa and Imam Ahmad considering it opposable to the unity and indivisibility of the common heritage of society<sup>351</sup>. The French Civil Code, in its article 1843-3, accepts a contribution in cash or in kind or even in industry.

Sometimes the Musharakah can be in the form of the bank's stake in an existing company. In this regard, one must be careful when it comes to shareholding of the Islamic bank in a joint stock company. This question gives rise to certain controversies: on the one hand, a minority of contemporary jurists believe that it is in no way permitted for a Muslim to be a shareholder in a public limited company. On the other hand, the majority of Muslim jurisconsults allow the Muslim to buy and sell ordinary shares, either for the purpose of investment with the intention of keeping the action for a long time and benefiting from the dividends paid by the company, or for commercial purposes to take advantage of the difference between the purchase price and the resale price<sup>352</sup>.

Moreover, the Islamic Fiqh Academy resolved in 1992 that a Muslim can establish a joint-stock company and become a shareholder of companies provided that the activities carried out are lawful under Sharia<sup>353</sup>.

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**351**– H. MARTIN-SISTERON, “Ethical Financing”., para. 5485.

**352** –M. PATEL, Shareholding in Islamic law: status and conditions, ACERFI, 2010, p. 3–4.

**353** –International Fiqh Academy, Resolution No. 63, Jeddah, Kingdom of Saudi Arabia, 1992., p.5.

However, if the main activity of the company is lawful but some activities carried out occasionally are illicit, such as investing in interest accounts, some Muslim jurisconsults do not accept any investment by a Muslim in a listed company under any circumstances. who carries out an illicit activity, even in a secondary way<sup>354</sup>. the objectives of the company thus defined in its articles of association do not include the carrying out of illicit activities<sup>355</sup>; the company's income from such activities is minimal, without exceeding the tolerance threshold of 5% of all its income;

the total amount of debt (the repayment of which includes interest) of the company (short or long term loan, bonds issued) is not too large, which, thus divided by the average value of its market capitalization over the twenty –last four months must be less than 33%; the total amount of riba-earning investments (interest-bearing investment, bonds) made by the company is not too large, when the total amount of cash and interest-bearing securities divided by the average value of its market capitalization during of the last twenty-four months must also be less than 33%<sup>356</sup>; and the value of the non-monetary assets of the company represents a significant part of the total value of its assets, thus this value must represent according to certain jurisconsults at least 51% of the total value of all the assets under the legal principle which gives the major part the status of the whole, and according to others at least one-third (30% according to AAOIFI) of the total value of all assets, and others the Hanafis there is no precise and definitive threshold which is fixed, but it is necessary to ensure that the value of illiquid assets is not insignificant<sup>357</sup>.

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**354** –This opinion is in particular the one adopted by the Permanent Commission for Research and the Iftâ of Saudi Arabia, as cited by Mr. PATEL, *L'actionnariat en droit islamique: statute et conditions*, ACERFI, 2010, p. 6 (footnote 9).

**355** –AAOIFI, *Shari'a Standards for Islamic financial institutions*, shari'a standard 21 “Financial paper (shares and bonds)”, art.3/4/1, 2010, p. 381.

**356** –Dow Jones Islamic Market Indexes, *Screens for Shari'ah Compliance*. According to AAOIFI, the rate is set at 30%.

**357**– M. PATEL, *Shareholding in Islamic law: status and conditions*, ACERFI, 2010, p. 13.

## **b- The different forms of the Moucharaka**

Islamic Fiqh distinguishes two categories of shirka (شركة):

\* the association of property: This is a common property acquired voluntarily from the partners as in the case of two people accepting the same indivisible property as a donation or involuntarily as in the case of two people inheriting jointly from a Property. The property association is therefore not a corporation in the sense generally reserved for this term. Its conclusion does not require offer and acceptance and its purpose is not generally linked to a specific commercial activity. The essential condition of this form of shirka is the inseparability of the partners' shares. A partner can only dispose of the shares of his partners if he has the capacity to do so (agent or guardian for example).

\*Contractual association: can be considered as Musharakah because the parties concerned have voluntarily agreed to associate themselves in an investment project and to share the resulting profits and losses. In this context, what is important is that the partners agree to jointly bear the risks to which the project is exposed. The contract can be informal or formal, but it is preferable that the terms of the contract be written in the presence of witnesses. The terms and conditions of the contract must be in accordance with Sharia, i.e. in accordance with Islamic laws governing debts and commercial transactions, as described by Quranic verses 282-283 of Surat Al Baqarah: "O believers! When you contract a debt with a fixed term, put it in writing; and let a scribe write it down between you in justice; a scribe does not have to refuse to write according to what Allah has taught him; let him therefore write, and let the debtor dictate: let him fear Allah his Lord, and take care not to diminish anything. »

The partnership contract is not mandatory according to the majority opinion of jurisconsults: any partner can denounce it. Only the Mālikite school has a contrary opinion since it admits that the Moucharaka contract is obligatory as soon as it is concluded; if one of the partners wants to dissolve it, the others can oppose it and if he wishes to liquidate the capital, the case will be brought before the judge who only sells the assets of the company if a favorable offer arises. Moreover, the contract

Moucharaka is automatically null and void following the death of one of the partners and in the event of bankruptcy or total loss of the capital of the company.

Jurisconsults distinguish the following forms of sharikat al-aqd:

\*Sharikat al-abdan (Society of work)

In this case, the partners contribute their expertise and their effort to the management of the economic activity, without any contribution to the capital.

\*. Sharikat al-wujuh (Credit Company)

In Sharikat al-wujuh, the partners (two or more) do not possess any capital but are known for their respectability and enjoy moral authority and high esteem among businessmen. Their high social rank allows them to start an economic activity without personal investment.

\*Sharikat al-amwal In this case, the investment by the partners is based on a personal monetary participation.

\* Sharikat al-mufawadah (Unlimited Commercial Association)

In this case, the partners must be adults, participate equally in the capital required and engage their responsibility as regards their share as that of their partners with regard to the losses and profits and be able to undertake the total responsibility vis-à-vis their share of profit and loss and have full authority to act as the representative of others. Each of them is therefore considered responsible for the debts of his co-partners provided that these debts were contracted during the activity (considered). Thus, each partner can act as a wakil (agent) for the company and acts as a guarantor (qafil) for the other partners.

\* Sharikat al-inan (Limited company)

In this financing model, the partners do not necessarily have to be of legal age or have the same share in the capital. Their participation in the management of the activity can be differentiated. Consequently, the distribution of profits is not necessarily made on the basis of their respective financial contribution. On the other hand, the losses are distributed between all the partners, in proportion to their shareholding. In sharikat al-inan, the partners therefore act as agents. But not as guarantors (qafil).



Sharikat al-inan occupies a special place in contemporary investment in the Islamic sense, because it represents one of the most important modes of financing on which financial institutions, in particular Islamic banks, will be based to develop participatory financing methods.

But it should not be forgotten that all Islamic schools unanimously recognize the legality of this form of society. This legality is deduced from the three main sources which are the Koran, the Sunna and the Consensus.

## 2) The financing of participation and its application by Islamic banks



### **a– The applications of the Moucharaka contract**

Musharakah as a mode of financing is applied in several Islamic financial institutions. In particular, this mode of financing is applied by Islamic banks to finance internal trade, the importation of goods, the issuance of letters of credit, agricultural projects, etc.

#### **\* The application of Musharakah to commerce.**

Musharakah can be applied to trade in the following way. The Islamic bank signs a Musharakah contract with a client for the purchase and sale of a local product whose specificities are given by the client. The total cost of these goods is divided between the partners, each of whom agrees to provide its share of financing for the purchase of these goods. A Musharakah account is opened at the bank specifically for this type of operation immediately after signing the contract, where all transactions related to these accounts are recorded. It therefore becomes the responsibility of the partners to arrange the buying and selling of these goods. The profits are distributed in the following way: First, a fixed percentage of the profits is given to the customer who took care of the purchase and the sale of the goods, the rest is divided between the associates as previously fixed by the contract. In the case of losses, these are distributed among the partners in proportion to the contributions. This type of contract is applied by the El Baraka Islamic Bank in Sudan.

#### **\*The application of Musharakah to the importation of goods**

This contract is essentially the same as the one just discussed, but differs in a few details. The importer asks the bank to participate in the financing of the import of certain goods and also to participate in their sales. The cost of the entire operation is converted into currency. The importer pays part of his contribution immediately after signing the contract and pays the rest after receipt of the invoices. A Moucharaka account is specially opened by the bank for this operation. After that, the Islamic bank opens a letter of credit for the

importer and pays the total sum to the exporter after receiving the shipping papers. Cargo insurance charges are added to the transaction account. The importer is responsible for the importation, customs clearance and final sale of the goods in question. The profits are distributed in accordance with the proportions described by the contract. Losses, if any, are distributed in proportion to the initial contributions. This type of technique is also used by the El Baraka Islamic Bank in Sudan.

\* Letter of credit on the basis of the mode of financing of the participation. Islamic Bank Malaysia issues letters of credit based on the principle of Musharakah. This method adopted can be described as follows: The client informs the bank of the requirements of his letter of credit and negotiates the terms of reference of the financing on the basis of the Musharakah. The customer pays the bank its share of the cost of importing the goods. The bank accepts this deposit under the principle of Al Wadiah. The bank then issues a letter of credit and pays the required amount of these products to the bank with which it negotiates using the customer's deposit to which it adds its share of financing. The bank then issues the documents to the customer. The customer takes possession of the goods and disposes of these goods in accordance with the terms of the contract. The profits resulting from this operation are shared as indicated in the contract.

\*The application of the method of financing participation in agriculture. The Islamic banks in Sudan and particularly the Sudanese Islamic bank, has implemented another technique of Musharakah which has great potential for the development of the agricultural sector in Islamic countries. The Islamic Bank of Sudan provides finance to the farmers on the basis of the Musharakah contract. This method can be described as follows:

The bank provides the farmer with the means of plowing and irrigation. It also provides him with seeds, insecticides, fertilizers, fuel, gasoline, etc. The farmer,

for his part, provides the land, labor and management. Since the contract is a Musharakah contract, the need for collateral or collateral is not required.

Profits are shared as follows. The farmer takes 30% of the profits for his work and the remaining 70% is shared according to the rules of the contract.

In summary, the mode of financing participation was successful for the following reasons:

1. The mode of Musharakah is consistent with the risk-averse attitude of small entrepreneurs.
2. Musharakah is accepted because it conforms to the religious beliefs of the customers (Muslims).
3. The Musharakah has succeeded because it does not require guarantees or collateral from small entrepreneurs.
4. The Musharakah gives its success to the just evaluation of the resources of its clients.
5. The Musharakah has succeeded because it reaches a large number of clienteles from different fields: services, agriculture, industry, and commerce.

### **b-Distribution of management and profits / losses of the investment resulting from the MOUCHARAKA**

The partners are all deemed to be managers to act in the name and on behalf of the company. They can conclude any act in the interest of the company, such as selling or buying for cash or on credit in its name. However, a partner may not, without the authorization of the other partners, either alienate the capital of the company for the benefit of a person by a Musharakah or mandate him to grow this capital<sup>358</sup>.

They can also appoint a manager and determine his powers in the articles of association. In this case, all partners, including the bank, have the right to monitor the management of the project and its smooth running. Everyone has the right to withdraw if the prospects are not satisfactory to them. Normally, the bank ensures the proper functioning of the project without intervening in its management, as long as the client has the skills and professional experience, allowing him to master the project.

The methods of distributing profits and losses in a Musharaka testify to the application of the principle of sharing profits and losses in Islamic finance. In principle, under French law, the rights of each partner in the share capital are proportional to their contributions when the company is formed or during its existence. Similarly, according to AAOIFI standards, the profit share must be in proportion to the percentage of each partner's contribution to the capital<sup>359</sup>.

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**358** -B. BENDJILALI, "The moucharaka or mode of financing participation", Seminar organized jointly by the Islamic Research and Training Institute and the Mauritanian Islamic al-Baraka Bank on the theme "Introduction to Islamic financing techniques", seminar proceedings no. 37, 1st ed., Kingdom of Saudi Arabia, 1996, p. 37.

**359**- AAOIFI, Shari'a Standards for Islamic financial institutions, shari'a standard no. 12"« *Sharika (Musharaka) and modern corporations* », art.3/1/5/3, 2010, p. 207.C. civ., art. 1844-1, al. 1.

However, under the principle of freedom of contract, the partners may agree otherwise, subject to respecting the principle of equity. Consequently, according to their common agreement, the profits may not be distributed according to the capital contribution, provided that the additional value exceeding such contribution is not in favor of the so-called sleeping Partner. Some schools of Islamic jurisprudence reduce the scope of freedom of contract: the Malikites and the Shafiites require that each partner obtains a share of the profit exactly proportional to his share in the capital of the company, otherwise the contract is invalid, whereas the Hanafites and the Hanbalites consider that the profit share may not represent the capital invested by the partner, even if their contributions are equal, provided that this ratio is determined *ab initio* and accepted by all the partners<sup>360</sup>. Their point of view is based on the fact that partners exert unequal efforts according to the variety of their skills and their expertise. Indeed, Islamic law requires that this share be in the form of a percentage of the result or a fraction of the profit. It is forbidden to fix a lump sum or to guarantee to one of the parties his share of the profit. Moreover, the partners can freely decide to change the profit ratio at the time of profit sharing. It is then not permitted to begin the allocation of profits between the partners until the operating costs, fees and taxes have been deducted and the capital of the partnership has been preserved. The partners are also free to set aside a certain ratio of the profit to build up reserves, as an investment risk reserve, or to make it as a charitable donation. On the other hand, in the event of losses, this contractual freedom is reduced. And the partner is not liable for the losses suffered, whether through his fault or his negligence<sup>361</sup>.

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**360-** H. MARTIN-SISTERON, "Ethical financing", *Revue Lamy financing law*, 2013, para. 5485.

**361-** B. BENDJILALI, "The Moucharaka or mode of financing participation", Seminar organized jointly by the Islamic Research and Training Institute and the Mauritanian Islamic al-Baraka Bank on the theme "Introduction to Islamic financing techniques", seminar proceedings no. 37, 1st ed., Kingdom of Saudi Arabia, 1996, p. 40.

Losses must be distributed according to the equity interest<sup>362</sup>. It is prohibited to pass all the losses on to a single partner or a group of partners. Moreover, it is not allowed to distribute the losses to the partners in a percentage not proportional to their contribution to the capital.

Some believe that the Mudaraba reflects the sharing of profits only while the Musharakah reflects the principle of sharing profits and losses. In our view, these two forms of financing demonstrate the application of the principle of profit and loss sharing; in the case of Mudaraba, the parties share the profits according to the agreed ratio and in the event of losses, it is the owner of the capital who, in principle, suffers them entirely except in the case of negligence or poor management on the part of the mudareb. But, the latter also suffers a loss which consists of his remuneration or the result of his work. In case of Musharakah, the partners share the profits according to the agreed ratio also and the losses in proportion to their capital contribution in the project.

This variety of application of the principle of sharing profits and losses can be justified by the difference in capital contribution in each contract: in the Mudaraba, it is the rab-al-mal, the owner of the capital, who is the contributor of funds and the mudareb bring their know-how and manage the project, whereas in the case of Moucharaka, all the partners participate in equity in the company and are deemed to be managers. And it is in this perspective, the liability of the partners of Musharakah is unlimited but in the case of Mudaraba, the liability of the owner of the capital is limited to his investment except in the event of authorization by the mudareb to conclude debts in his name. After studying the constitution and functioning of the society, it is interesting to consider the causes and consequences of its dissolution.

According to the majority of Islamic jurists, the partnership contract is non-binding and thus any partner can denounce it, whereas only the Maliki school considers it compulsory from the moment of its conclusion, and the partners can therefore oppose its dissolution if envisaged by a partner and the case will be submitted to the judge who only sells the assets of the company if an offer is favorable.

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<sup>362</sup>- C. civ. François (edition 2011) art.1844-1, al. 1.AAOIFI, art.3/1/5/4, p. 207



In principle, the partners are free to determine the causes of the dissolution of the partnership. Normally, the partnership contract ends on the arrival of the agreed term, or even before by the common agreement of the partners.

Notwithstanding, the parties may agree to extend the company, the decision is taken according to the majority required for the modification of the articles of association.

Moreover, each partner has the right to leave the company after giving notice to the other partners, but this does not lead to the dissolution of the company and the obligations and acts that took place before the end of the contract remain enforceable<sup>179</sup>. The partners must specify in the articles of association the terms of exit of a partner from the company, or even those of the sale of his share to the other partners or to a third party. These mechanisms are different from one society to another.

After the dissolution of the company, the liquidation phase begins. During which, an inventory of assets and liabilities will be drawn up, and take place the assignment of all assets, the settlement of creditors, and, if necessary, the distribution of a liquidation bonus to the partners. In the event of a liquidation mali, each partner is deemed to be responsible for the settlement of the liabilities according to the proportion of its capital contributions, unless the liability has been caused by the negligence of one or more partners who are responsible for it. In addition, the assets will be distributed between the partners in proportion to their share in the share capital, or they will be sold and the proceeds will be distributed between the partners if they cannot be separated. Finally, the Moucharaka does not seem to constitute a form unique to Islamic finance. Its conventional counterpart adopts the joint venture structure, under which the bank participates in the capital of a company in creation or an existing company and thus becomes a shareholder.

It is clear that unlike the conventional credit mechanism, the cash contribution of the Islamic bank does not constitute a debt, it is equity financing. As a result, the bank has the right to vote and is more involved in the management and monitoring of the investment. Consequently, this transaction subjects the bank to liability and risks which are not borne by the bank in the case of credit at interest.

In conclusion, the Moudaraba like the Moucharaka are the modes of Islamic financing by capital. Unlike conventional finance, Islamic banking is remunerated on the results of the investment and participates in the profits and losses incurred.

But, in these contracts, the uncertainty of the rate of return on capital is very high due to the asymmetry of information, creating a moral hazard and an adverse selection problem <sup>363</sup>.

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<sup>363</sup> A. SARKER, «*Islamic business contracts, agency problem and the theory of the Islamic firm*», *International journal of Islamic financial services*, vol. 1, n° 2, July–Sept. 1999, p. 6.

***TITLE SECOND:***

***SCOPE AND IDENTITY FINANCING REAL ESTATE  
INVESTMENT  
BY  
MUSHARAKA CONTRACT***

CHAPTER 1 :  
SCOPE BY APP  
FINANCING REAL ESTATE INVESTMENT  
BY  
MUSHARAKA CONTRACT

Real estate financing is an economic and financial activity exercised by people according to transactions governed by legal tools among them the real estate financing agreement in general and the real estate financing by Moucharaka contract in particular, this contract is specific by its character of agreement of real estate financing, in the field of real estate financing law and within a framework governed by Islamic banking law and company law, because the Moucharaka contract meaning the company contract, between two shareholder parties in this company having a status that does not is that the contract of society or known as Musharakah except in the case of a decreasing Musharakah contract which cannot be.

That is to say that the Moucharaka contract in real estate investment is a real estate financing agreement within a legal framework of society according to Islamic banking law.

So the overall legal nature of the Musharakah contract in real estate is an agreement for the financing of real estate investment by association of the two parties, funder and investor, according to the legal rules stipulated by the law of conventional and Islamic real estate financing. Hence our study of the legal nature of this contract will be within the framework of conventional law and Islamic law dealing firstly with the field of definition and stakeholders and then in the second installments the legal rules of the Moucharaka real estate investment financing contract.

## **SECTION 1. Scope of definition and stakeholders in Moucharaka real estate investment contract**

### **§1-Participants in Moucharaka real estate investment financing contract**

#### **A- The funder and investor in real estate investment financing**

##### **1) Institutional framework of the financial backer in real estate investment financing.**

###### **a- Field of definition of the financial backer.**

Some doctrinaires define the financial backer in real estate investment financing is the person who exercises the activity of real estate financing, by offering loans to applicants for real estate financing with a counterpart in the form of a guarantee, most of the time a real insurance, under condition of payment by the borrower of the sum of the financing and interest and fees on the periodic monthly payments <sup>364</sup>, while others define the financial backer as the person who puts under the hand of the investor a sum of money specified for s discharge its obligations of a legal transaction which falls within the scope of real estate financing law <sup>365</sup>. . In Moroccan banking law, the funder of the Moucharaka contract is always an Islamic financial institution either an Islamic bank, or a window of Islamic products of a conventional banking institution, or an Islamic investment company approved by Bank AL MAGHREB <sup>366</sup> being a participatory financial institution. So in the case of the Musharakah contract in real estate investment, the financial backer must be a person approved by BANK AL MAGHREB being a participatory financial institution and who puts under the investor's hand a specified sum of money to fulfill his obligations. a legal transaction that falls within the scope of real estate financing law.

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<sup>364</sup> محمد لعزیز فهمی، مبحث موسوعة المصطلحات الاقتصادية و الأحكامية، بيروت 1976، ص 107

<sup>365</sup> أيمن سعد سليم مشكلات التمويل العقاري دراسة مقارنة دار النهضة العربية القاهرة 2005، ص 30

<sup>366</sup>- According to Banking Law No. 103.12 relating to credit institutions and similar organizations in Moroccan law .

The legislative and regulatory framework in which Islamic banks operate is the constitution, banking law and Islamic Shariah.

in addition, the legislator has certainly considered as Islamic or participatory banks (in Moroccan banking law)<sup>367</sup>, legal persons governed by banking law, authorized to exercise as a usual profession in accordance with the precepts of Sharia.

Governments of central banks and monetary authorities of Islamic countries had first adopted the Islamic model law in 1981 on banking regulation. This law should serve as a model for the creation of Islamic banks, but be adapted to each case and each country. It recommends as a legal status for Islamic banks, that of a limited liability company, whereas in Morocco for example banks can only be constituted in the form of a public limited company<sup>368</sup>, and cannot under any circumstances be adopted in other legal forms.

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**367**– the choice between the name participatory and Islamic bank will be determined by the second choice throughout our subject because firstly Islamic banks is the legal name in comparative law and secondly participatory banks is a name based on the participatory contracts that offer this kind of bank is abandoning the others offer of this bank in commercial contracts with fixed income which means a designation by the Moroccan legislator demonstrating only part of the banking activity of this bank from where its inconvenience has the overall activity of the bank which is a banking activity respecting Islamic law and the closest nomination to its activity is Islamic banking, hence our choice which is based on this reflection specific to the activity of this type of bank .

**368** –Article 9 of the Dahir of April 21, 1967 and Article 28 of Law No. 34-03 relating to credit institutions and similar bodies promulgated by Dahir No. 1-05-178 of February 14, 2006 (which replaced Dahir of 1993 by article 149) stipulating: "credit establishments having their registered office in Morocco can only be constituted in the form of a public limited company with fixed capital, with the exception of those which the law has endowed with a special status . »



Absolutely the Moroccan banking regulations before requiring the kind of public limited company as legal type of bank company gave a definition of the bank: "is considered as a bank any company which makes habitual profession of receiving from the public as a deposit or otherwise , funds that it uses, either for its own account or for the account of its clients or of third parties designated by them, in financial, credit, stock market or foreign exchange transactions"<sup>369</sup>, although distinguishing itself from the conventional bank by islamic principles islamic bank works from the same functional mechanism as the conventional bank because it works as a payment system administrator and as a financial intermediary and moreover its raison d'être is the exploitation of the imperfection of the financial market<sup>370</sup>, also the international association of Islamic banks (AIBI) in 1975 organized the international congress of banks is lamics without forgetting to define the Islamic bank as being: "a banking institution which collects funds and uses them on the basis of the Islamic Shari'a, with the aim of founding a united society and achieving a certain justice, in the distribution of wealth"<sup>371</sup>.

Thus the Islamic bank is a banking establishment subject to ethical, social and religious rules, based on the capital-labor association. .in this sense, the Islamic bank responds to a need of practicing Muslims (individuals and business decision-makers) or non-Muslim customers who want a banking relationship with their bank, framed by a participatory cooperation partnership and not a partnership based on the money leasing.

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**369** –Article 1 of Royal Decree no. 1067-66 of 10 moharrem 1387 (21 april 1957) relating to the banking and credit profession.

**370**– MIRAKHOR (A), Theory of Islamic financial system, in Financing Economic development MALAYSIA 1992, page 147

**371**– Notebooks of Islamic finance n° 5.2013, page 85

Moreover, money in an Islamic bank is not a commodity that can be sold or bought and time is only an instrument for measuring purchasing power and a tool intended to facilitate commercial transactions. therefore time is impartial, that is to say that it does not respond to utilitarian considerations as in the case of conventional banks, time is used to calculate the interest rate according to the passage of time.

These characteristics of the Islamic bank lead it to develop a different functioning of the conventional bank, which will be governed by a mode of operation of the banking production. Consisting of successfully merging and adapting various functions, namely:

- \*The function of basic banking services, which are similar to those offered by conventional banking, for example: international financial services, such as documentary credit and bank transfers, as well as bank guarantees.

- \* The investment function, which concerns the execution of the bank's own investment policy, for the maximization of results. To this end, the Islamic bank operates most of the investment vehicles permitted by Islamic canon law. In addition, investments can be made using the bank's funds or through the contractual combination of its funds with deposits from the client's investment accounts. Like the case of MOUCHARAKA contract.

- \*The investment management function for the benefit of customers, which concerns the management of accounts assigned to restrictive accounts. Within the framework of a .MOUDARABA contract or agency contract established, according to precise directives.allowing the Islamic bank to invest the allocated funds, with a remuneration of the customer or loss according to the result of the investment.

- \*The function of social solidarity and contribution to the establishment of social justice. By collecting funds from legal alms (ZAKAT) and redistributing it in a policy to fight against poverty.

ther specificities of the Islamic bank is its mode of management. which is managed by a coexistence of two distinctive entities one operates directly, it is the board of directors, the other intervenes indirectly, it is the Shariah committee. The first has the function of executing the strategy of the bank

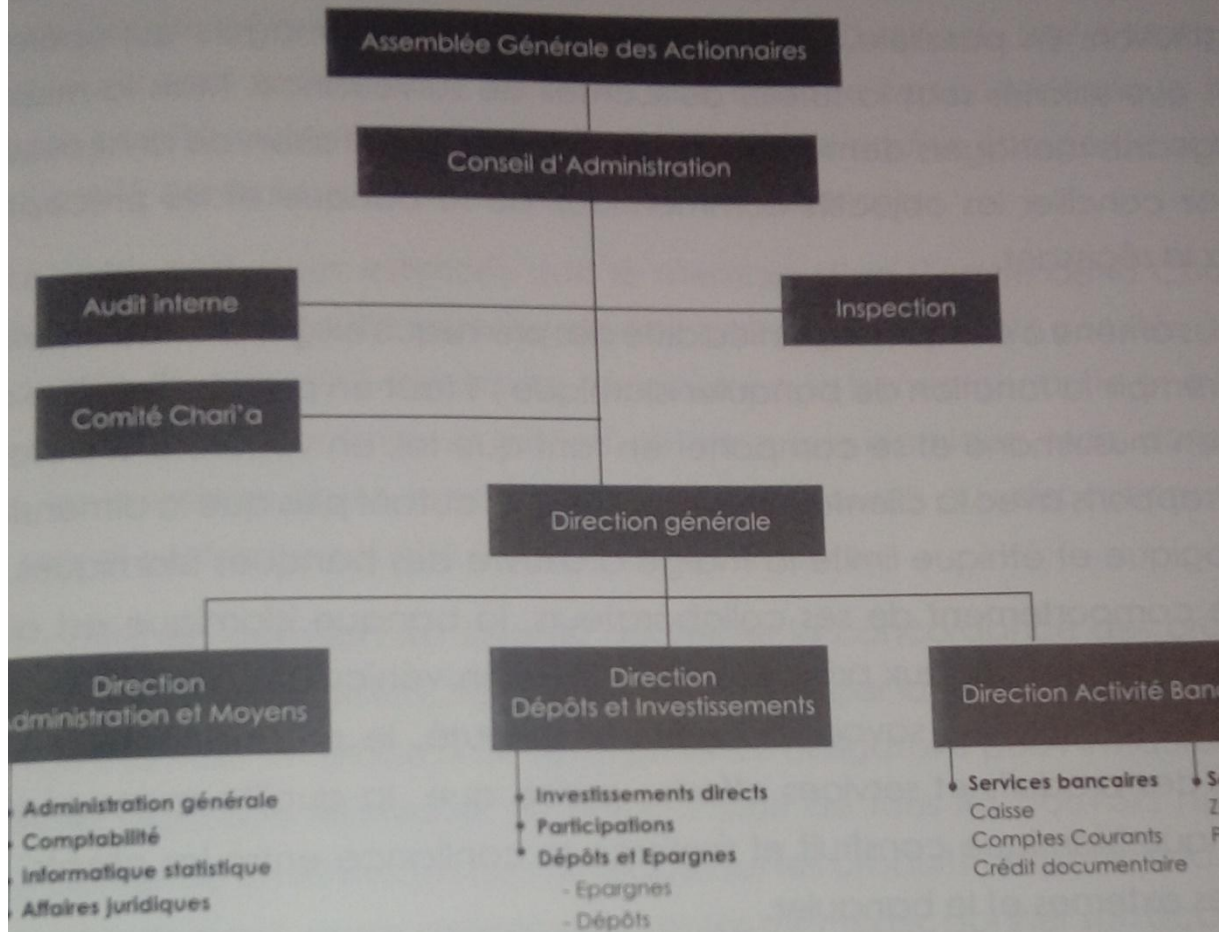
according to the directives of the international association of Islamic banks which has drawn up a model of the organization chart of the Islamic bank which is presented on the following page.

And the second entity, which is the committee, is responsible for verifying the consistency of the procedures with the principles of the Shari'a. To validate them by following the standards of the AAAOIFI and the directives of the higher council of the ulemas as the case in Moroccan banking law<sup>372</sup>:

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**372** –According to Articles 62 and 63 of Banking Law No. 103-12 relating to credit institutions and similar bodies.

## Structure organisationnelle d'une banque islamique



## **b- Organizational framework for the management of the Islamic bank**

The board of directors of the Islamic bank is composed of directors, appointed on time, revocable, salaried or free, appointed by the general meeting of shareholders.

The rules provided by the law of public limited companies in Morocco, concerning the administrators are consistent with the rules of management of the company in Islamic law, according to which the management can be entrusted to a partner or to a third party, it can also return to the community of partners each of them received a general mandate to act positively or negatively. it can also result from the fact of all or part of the partners having received a special mandate to conclude such or such an operation <sup>373</sup>.

However, admission to the board of directors of Islamic banks is subject to a very important condition, which results in the requirement of Islam for the members of the board of directors because the special nature of the Islamic bank whose transactions are governed by Islamic law obliges.

The board of directors fixes the policy of the bank, establishes the regulations concerning the financial and administrative operations as well as the statute of the civil servants. it has free disposal of the goods of the bank and can carry out whatever the act of acquisition or of alienation in his interest and on his behalf. Without forgetting the observation that Islamic law ignores the legal person. In an Islamic law society we have:

- \* The partner remains a co-partner of the other members of the group;
- \* Third parties do not deal with the abstract entity company;
- \* The partner does not act in the interest of the company;

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<sup>373</sup> -IDRISSI ALAMI MACHICHI MOHAMED: "contribution to the definition of companies in Malikite Muslim law", Revue des companies 1976-1977, P.212.

\* A partner who acts on his own behalf and on behalf of other partners <sup>374</sup>

The general manager of the Islamic bank plays the role of managing director of the public limited company under Moroccan law with the specificity that the managing director under Moroccan law can be a legal person <sup>375</sup>

While in Muslim law the general manager of an Islamic bank can only be a natural person

The shareholders are also involved in the management of the Islamic bank as in the case of conventional banks they meet in ordinary and extraordinary general meetings. But it should be noted that, like conventional banks, attendance at general meetings is reserved for shareholders only, but in the context of Islamic banking the relationship between. The Bank and its depositors is a lender-borrower relationship insofar as the bank works mainly with depositors' funds and the share capital only represents a small part of the deposits.

the depositor of the Islamic bank is a partner of this bank he participates in the same way as the latter in the profits and losses of the investments he must therefore exercise the right of control through these assemblies in the same way as the shareholders.

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<sup>374</sup> DRISSI ALAMI MACHICHI MOHAMED: "contribution to the definition of companies in Malikite Muslim law", *Revue des Sociétés* 1976-1977, P.212

<sup>375</sup> PAUL DECROUX: "Corporate Law", ed la porte, P.156

## **2) the control bodies of the Islamic bank. Islamic investment fund and Islamic investment company**

### **a\_ the bank's supervisory bodies**

The control of Islamic banks is ensured in the forefront by the central bank and jointly by the accounting censors and the members of the board. They are appointed by the general meeting of shareholders, which sets their remuneration and the duration of their function, in accordance with the positive law of public limited companies by assuming the mission of management control of the bank. So that decisions relating to the management of the bank are taken with full knowledge of the facts.

The religious council of the Islamic bank: it is composed of a president and several members chosen among the Oulemas, and the specialists in comparative law, believing in the idea of the Islamic bank. The activity of this council consists in issue opinions regarding the application of Sharia provisions in Islamic banking.

The Supreme Religious Council: With the aim of unifying the opinions of the members of the religious councils of the various Islamic banks. a supreme religious council is created at the level of the Islamic banking federation it is composed of the presidents of the religious councils of the various Islamic banks, as well as a certain number of jurisconsults having an in-depth knowledge of sharia, or in Moroccan banking law this council is simply the superior council of the Oulama <sup>376</sup> .

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**376-** According to article 63 of law 103.12 relating to credit institutions and similar bodies.



## **b-Islamic investment fund and Islamic investment company financial backer in real estate financing.**

The Islamic bank is a universal bank which is in general terms the establishment which carries out all the operations of the banking and financial fields. Respecting Islamic law and being able to have a simple banking domain such as:

- \* Private Islamic bank: a bank that provides very personalized and sophisticated financial services, often summarized under the expression "wealth management", to individuals with "significant" net assets.
- \* Islamic commercial bank: a financial institution whose basic activities are mainly aimed at individuals (deposits, investments, savings solutions, credit), companies or public authorities.
- \* An Islamic retail bank: a bank that provides credit and offers investment products to individual customers: individuals, liberal professions, small businesses.
- \* Merchant banks. Islamic: a financial intermediary for businesses regarding financial transactions. It deals only with companies. Its role is not the financing of the company
- \* An Islamic investment bank: a bank, or a division of the bank, which brings together all the advisory, intermediation and execution activities relating to so-called corporate finance transactions (IPO, issue debt, merger/acquisition).
- \* Islamic investment fund must be Sharia compliant. This implies that the investment objectives must themselves be compatible with the principles of Sharia, as well as the terms and conditions of these investments and the treatment of investors. In order to set up an Islamic investment fund, it is essential to ensure that the structure, management and investments made by this fund are themselves compatible with Sharia. Thus, a Sharia-compliant investment fund must be set up and managed under an agency agreement.

Under an agency agreement, the person or entity responsible for making the investments acts as an agent on behalf of the investment fund and, indirectly, investors, the agent invests the investor's funds on behalf of the latter. The agent can then be remunerated on the basis of fixed fees or according to an amount indexed to the performance of the funds invested, or even according to a system combining these two methods of remuneration. The asset management contract, whether concluded in the form of a mandate, must in principle mention the obligation of the manager to perform his duties using reasonable commercial precautions.

The manager must also and at all times act in the interest of the fund he represents. As part of the organization of the structure of a Sharia-compliant investment fund, a compliance committee is in principle appointed. The reputation of the shofars plays a major role in the choice of their designation. For example, investors from a certain region may be more inclined to invest in a fund whose compliance committee members they know.

Likewise, because of the possible divergence between the opinions of shofars at a regional, and sometimes even international level, it is not unusual to appoint to a committee shofars whose opinions relating to the investment targeted are known, or whose influence on the target market is significant. The work of the Shariah Compliance Committee is primarily to verify and analyze the structure of the fund and the role of the asset manager, but also to carry out the review of the fund documents and the terms and conditions of the prospectus, as well as as well as the determination of the appropriate investment criteria. The role of the shofars can lead them to issue fatwas, give advice on the purification of profits deemed illicit, examine investments, write the annual report on Sharia aspects or even prepare reports intended for investors.

The Shariah Compliance Committee is responsible for setting the investment criteria for investments made by the fund. As a general rule, companies operating in illicit sectors do not .

Are not considered acceptable investments for an Islamic fund. However, the committee of each investment fund remains of course free to express its own opinion concerning the compatibility or otherwise of the activity of such companies with the principles of Sharia.

Also Islamic investment funds represent one of the financing innovations that is experiencing remarkable development in the world. And this for the different opportunities they offer through the adoption of a range of financial instruments. Compliant with the principles of Islamic law "Sharia", as well as rigorous governance respecting rules and standards under the supervision of a committee board.

Indeed, several Islamic and/or conventional financial and banking institutions have embarked on Islamic investment funds and operate internationally for the financing of SMEs/SMIs, infrastructure; industrial companies, services, agriculture, petrochemicals, etc.

Investment funds or private equity are now operational in various countries of the world, led by the United States, this has aroused the interest of Islamic financial specialists in the development of investment funds in accordance with the principles of Islamic law "Sharia", in order to diversify and expand the sectors of intervention of Islamic financial engineering.

In one observation: although Islamic investment funds are a creation of the new millennium, the number and volume of these funds are experiencing a remarkable and sustainable evolution. Indeed, according to a report by the Kuwait Finance House, the number of Islamic investment funds around the world reached 876 funds with a volume of assets of 60 billion dollars in 2011. is intensified thanks to a panoply of products and instruments that offers a wide range of Islamic investment funds, thus allowing diversification in their sectors of intervention.

he various opportunities offered by conventional investment funds (management of resource allocation, offer of regular returns, project financing, etc.) have aroused the interest of Islamic financial and banking institutions but also conventional financial and banking institutions, the creation of Sharia-compliant funds. To this end, it is important to present the Islamic conception of investment and investment funds, and to provide an overview of the importance of the governance of these funds. But above all we have the Toupie dictionary, which defines investment as "the action of investing, that is to say, acquiring new means of production, improving their yield or investing capital in an economic activity, in a company, etc. The driving force behind investing is the prospect of making a profit. Indeed, investing consists of incurring a large expense today in order to obtain a profit in the future. Investment in Islamic design is defined as "the employment and exploitation of capital (in any form) in economic projects in order to obtain returns in accordance with Shariah for future needs" or alternatively "the development of capital according to Islamic laws, in order to grow it and exploit it in productive sectors, whether in commerce, industry or other economic sectors".

Ultimately, we can see that the notion of investment in the conventional or Islamic conception is only distinguished by the obligation to submit this activity to Sharia. Indeed, any investment following the Islamic concept must respect a certain number of requirements dictated by the teachings of Sharia. As for the investment fund, it can be defined as "a financial activity consisting of an investor entering the capital of companies, which need equity capital". As for FIIs, these have been defined by the Accounting and Auditing Organization of Islamic Financial Institutions (AAOIFI) as follows: "Funds are investment vehicles, which are financially independent of the institutions that establish them. The funds take the form of equal participation of shares/units of the shareholders/asset holders and the right to profits or losses. The funds are managed according to the Moudaraba or wakala (agency contract)". They are also considered "one of the Islamic financial institutions that collect funds from investors in the form of shares or investment instruments in order to entrust them to specialists and asset management experts.

\* Islamic investment company is designed for capital investments Reserved for well-informed investors, it is not subject to particular constraints in terms of investment policy, except that it must invest in capital with a large variety of possible structures – incorporation or not, open or closed fund, single portfolio or multi-compartment structure, multiple share classes, etc. Enables promoters to tailor products for specific markets or customer types.

So we see that the financial backer in real estate investment financing by Moucharaka contract is none other than either:

& the Universal Islamic Bank

& the Islamic Investment Bank

& the Islamic Investment Fund

& Islamic Investment Company

In addition to Moroccan banking regulations, each of these donors must be approved by the central bank<sup>377</sup> or have the prior agreement of the wali Bank AL Maghreb<sup>378</sup>.

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<sup>377</sup>–Article 60 of Law 103.12 relating to credit institutions and similar bodies

<sup>378</sup>–Article 61 of Law 103.12 on credit institutions and similar bodies

## **B– Stakeholders in Moucharaka contract**

### **1) The investor stakeholder**

#### **a–Field of investor definition**

The definition is one of the instruments of clarification <sup>379</sup> provided that it is itself sufficiently clear <sup>380</sup>; It is therefore necessary to work on an explicit definition, which highlights the characteristics of the legal concept of investor <sup>381</sup>. Legal personality is necessary to be an actor in business law, in fact designating the ability to be de jure, legal personality entails a more or less extensive legal capacity, that is to say the ability to hold rights or obligations and to exercise them" <sup>382</sup>. The investor granted legal capacity is thus endowed with "the general ability to participate in legal life"<sup>383</sup>, and his capacity for enjoyment allows him to hold rights or obligations, also the capacity to exercise allows them to be exercised. This means that a general incapacity of enjoyment would be equivalent to the absence of legal personality. Obviously the investor is a category composed of subjects of law therefore must be natural persons or legal persons.

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<sup>379</sup> G. CORNU, "definitions in the law", in Blends dedicated to Jean Vincent, Dalloz, 1981, P.77 and spé P. 90.

<sup>380</sup> V.D TRUCHET, "legislative definitions", in R. DRAGO, the making of the law, PUF, coll. . Cah. Moral and Political Sciences, 2005, P. 193 et s.

<sup>381</sup> G. MARTY & P.RAYNAUD, Civil Law, T.I, General Introduction to the Study of Law, Sirey, 2 ed, 1972, No. 60, P. 102.

<sup>382</sup> G .CORNU, Civil law, people, Montchrestien, coll. Domat dr.privé, 13 ed. 2007, No. 14 , P.27

<sup>383</sup> J.L. AUBERT & E. SAVAUX, Introduction to law and fundamental themes of civil law, Dalloz, coll. . Sirey University, 13th ed, 2010, n+ 191, p.200

A natural person is the legal personality granted to all human beings born alive and viable and all have in principle the full capacity for enjoyment <sup>384</sup> certainly any natural person should be able to be qualified as an investor, either that he is himself the author of an act of investment on own account, or because an act of investment is formed on his own account by another person. But we should not forget the provisions relating to the protection of minors and incompetent adults. Like natural persons, there are structures endowed with legal personality: legal persons under private law (example commercial companies, associations or religious congregations) or under public law (example the State, local authorities, public establishments; ..) structures without legal personality are not subjects of law, hence the legal concept of investor is designated either by public or private law.

Indeed, even disregarding the few cases where the legislator genuinely limits the capacity of enjoyment of legal persons, it is necessary to take into account that they are in principle all subject to a principle of specialty of a legal person is finalized by the purpose that this legal person must pursue; in addition, the capacity to enjoy is expressed within the framework of the activities of the legal person. In private company law, there is thus a question of legal specialty and statutory specialty (which designates the corporate object) <sup>385</sup>.

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<sup>384</sup>–R. CHAPUS, General Administrative Law, T.1, Montchrestien, coll.Domat dr.public, 15 ed, 2001 (reprint 2008), No. 518, P.377.

<sup>385</sup>– V.Y.CHAPUT, corporate purpose of commercial companies, Thesis: CLERMONT-FERRAND 1973, P.74; N.BARUCHEL, legal personality in private law, preface B.PETIT, LGDJ, coll. Bible. dr. private, T.410, 2004, n° 468 and S., P.269 and s.



However, a legal nature is discussed, which is that of mutual funds and securitization mutual funds, which are collective investment organizations without legal personality<sup>386</sup>. French law expressly provides for this<sup>387</sup> and, on the other hand, certain legislative provisions which at least in form treat them as entities endowed with legal personality<sup>388</sup> in such a way that it has been possible to refer to "the diffuse personality"<sup>389</sup> or "the quasi-personality" or "the underlying personality"<sup>390</sup> of mutual funds such as mutual debt funds, and today of securitization mutual funds, with regard to positive law and in any case the majority doctrinal analysis apprehends these common funds as patrimonies by appropriation<sup>391</sup>.

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**386–** T. BONNEAU, "Reform of the legal framework of mutual funds", DR banking and end. , July–August 2008 , comm. 127; M.GALLAND, "the reform of the legal framework of securitization", RLDA, 2008/32, n° 3–2008, p.83 et s.

**387–** for UCITS in the form of FCP we have article L.214–8 of the monetary and financial code article L.214–139 of the C.mon.fin for real estate investment funds, concerning investment funds open to investors professionals we have article L.214–24–34 by reference to articles L.214–143 (general-purpose professional funds) and L.214–152 (declared funds) and article L.214–71 by reference to article L.214–148 (professional undertakings for real estate collective investment) .

**388 –** T.BONNEAU, "mutual funds, mutual debt funds, and civil law", RTD civ., January–March 1991, p.1 et seq.

**389–** P.JESTAZ, "Fonds commun de placement", RTD civ., 1980, p.180 et seq.

**390–** T.BONNEAU, art .pre., SP2 . , no. 41, p.23

**391–** M.–C.AUBRY, "assigned heritage", thesis: Paris 13: 2010, dir .T. BONNEAU and A.–C.MULLER, n°328 et seq., p.241 et seq.

This exclusion from the legislation of the legal personality of these funds is also recognized in case law<sup>392</sup> but the fact remains that they are objects of law and not subjects of law<sup>393</sup>. They cannot be investors for lack of legal personality. It is true that other entities, even though they also have the nature of undertakings for collective investment, will not be excluded from the legal category of investors if we stick to the sole criterion of legal personality. certain UCIs have legal personality (SICAVs and securitization companies) because they are incorporated in the form of public limited companies or simplified joint-stock companies, like all commercial companies, they have legal personality from the date of their registration in the trade and companies register . actually even personified UCIs should not be included in the category of investor<sup>394</sup> .

So it appears that any investor should be a subject of law, natural or legal person. The legal concept of investor should not only be a legal category made up of people, it should be a legal category that is only made up of people, in other words a category of people.

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**392** the court of cassation issued a judgment of 1954 specifying that "the legislator has the power, for the purpose of high policing, to deprive of civil personality such determined category of groups", Cass.civ. 2nd, January 28, 1954, establishment committee of saint – Chamond c./Ray, JCP G, 1954, II 7978, concl. AV.gén. LEMOINE, D.1954, p.217 et seq. ; note G. LEVASSEUR. Adde, Y.CHARTIER, "the new mutual funds (commentary to Title 1 of Law No. 79-594 of July 13, 1979 and its implementing texts)", JCPG, 1980, 3001, p .30 and s.

**393** T.REVET, "summary report", in the legal personality, national days of the association Henri Capitant, la rochelle, June 4, 2007, Dalloz, coll, Themes and comm., 2010, p.109 and s.

**394** the regulation of the european central bank of october 17, 2012 defined the term investor as "an entity or person holding financial instruments"

On the other hand, in Egyptian law, the legislator has defined the investor and the investment by the following definition:

“For the application of the provisions of this law, the following words and expressions shall have the meaning assigned to them below:

\*Investment: The use of money for the establishment, expansion, development, financing, operation or management of an investment project in such a way as to contribute to the overall and sustainable development of the State.

\*Investor A natural or legal person, Egyptian or foreign, regardless of the legal system to which he is subject, who invests in the Arab Republic of Egypt in accordance with the provisions of this law.

\*Investment project

Carrying out an investment activity in the sectors of industry, agriculture, commerce, education, health, transport, tourism, housing, construction and building, sports, electricity, energy, natural resources, water, communications and technology.

The minister in charge of investment affairs may, in coordination with the competent ministry or ministries, add other sectors according to the national economic plan. The implementing regulations of this law must indicate the conditions and scope of these activities...” <sup>394</sup>

.also in Tunisian law we have the definition of investor being “any natural or legal person, resident or non-resident, who makes an investment”<sup>395</sup> .

But on Moroccan legislation we have the definition of the investor is an undefined concept, even in Framework Law n ° 18-95 of October 3, 1995 being an Investment Charter we have not devoted a legislative writing defining the investment and investor.

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<sup>394</sup> Article 1 of Law No. 72 of May 31, 2017 Promulgating the Law on Investment in Egypt.

<sup>395</sup> Article 3 of Law No. 2016-71 of September 30, 2016, on investment law in Tunisia.

But we simply dictated the means for the development of the investment without devoting ourselves to a legal stipulation of the fundamentals of the legal regulation of investment, starting by describing the scope of application and the field of definition of a participant in investment. and essentially the investor,

From now on, this observation is noted by studying the first article of this article which stipulates:

"Are set, in accordance with the provisions of the second paragraph of Article 45 of the Constitution, the fundamental objectives of the action of the State for the ten years to come with a view to the development and promotion of investments by improving of the investment climate and conditions, the revision of the scope of tax incentives and the introduction of investment incentive measures.

Certainly we conclude that we have a legal void concerning the legislative conception of the legal word investor, which leads us in our study to capture the concept of investor in comparative law.

#### b-Field of definition investor in real estate financing

The most recognized definition of investor in real estate financing in comparative law is in Egyptian law, certainly the doctrine has defined the investor (borrower) as "the person who obtains a sum of mortgage to fulfill his obligations towards the beneficiary »<sup>396</sup>

and others define it as "who has had financing, and may be the buyer in the event of the use of the financing in the purchase of real estate built such as a house or apartment or the seat of a profession in the event of no purchase he will be the person who has his account is the operation of construction or rehabilitation or fitting out of a building already constructed"<sup>397</sup>.

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أيمن محمد سليم مشكلات التمويل العقاري دراسة مقارنة دار النهضة العربية القاهرة 2005 ص 35 <sup>396</sup>

درويش عبد الحميد اتفاق التمويل العقاري دراسة في أحكام قانون التمويل العقاري و التشريعات المقارنة دار الجامعة <sup>397</sup>  
الجديدة الإسكندرية 2007

As soon as we described its definitions we notice that we consider the investor simply borrower of a loan which comes to the idea that the real estate financing agreement is a loan contract which is false because the real estate financing agreement is a composite contract having its specificity different from the loan contract which becomes in this convection only a legal bond element of the elements of the real estate financing agreement except that the legislators in comparative law have not excluded from the quality of the investor to be a professional or natural or legal person, public or private, who uses real estate transactions, and who is financial either in his commercial or industrial professional activity. or others .

therefore the investor is the natural or legal person or private or public person having a need for financing for the purchase or construction or rehabilitation or development of a building of the buildings mentioned in law <sup>398</sup>. That concerning the definition of investor, as a person from the real estate financing organization in general. but the definition of investor as part of the real estate financing agreement is the person who undertakes to pay the credit of the real estate financing to the lender, being the principal obligation in return an obligation of the lender to give him the amount of the financing for the benefit of the third party who is the seller of the property or the construction company of the property in exchange for the third party to complete the real estate transaction to finance for the benefit of the investor.

Then we go to the special investor, who is the person who needs the real estate financing of a category of the poor benefiting from a guarantee fund guarantee <sup>399</sup>

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<sup>398</sup> – According to the first article of the law n° 138 of the year 2001 concerning real estate financing in Egyptian law,

<sup>399</sup> – In Morocco we have FOGARIM which is a guaranteed capital fund (CCG) to guarantee the loans granted by banking establishments for the financing of the acquisition of housing for the benefit of populations with modest or irregular incomes

So he is obliged in the housing purpose real estate financing agreement, like the same obligations as the investor in general, except that his obligation to pay the real estate financing is guaranteed within the limits set by the agreement. However, in English-speaking and French comparative law, everyone differentiates between the real estate borrower for commercial purposes and the real estate borrower for non-commercial purposes because they have different organizing rules for the real estate financing agreement in the case of end-of-life real estate. and commercial end. Because we find the protective rules which achieve the balance in the contractual relationship between the real estate borrower "the consumer" and the lender "professional person" under the French legal organization of real estate financing boosted by the rules of protection of the consumer in credit housing or consumer property <sup>400</sup> . Apparently the natural person investor and the legal person investor have the right of real estate financing with guarantee, except that the public legal person, it is excluded from the duty to present guarantees to the lender because the state property is not mortgage able and is not subject to a right of lien on it <sup>401</sup> .

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**400-** Also the consumer investor in real estate in USA law is protected by the law "consumer credit protection" and the consumer credit protection act (CCPA) is a federal law which puts in place consumer protection against lenders . Passed in 1968, the law requires lenders to explain the true cost of borrowing money in terms understood by the consumer. The CCPA includes several important laws, including the Truth in Lending Act, the Fair Credit Disclosure Act, and the Debt Collection Practices Act. , and in England we find the consumer protection law "Hire Purchase act 1905, & 1965&1973" and the law "consumer credit act, 1974"

**401** ثروت عبد الحميد اتفاق التمويل العقاري دراسة في أحكام قانون التمويل العقاري و التشريعات المقارنة دار الجا

Hence the rules of the real estate financing law governs all real estate financing agreements, where the investor is a professional person, either a natural person, a public or private legal entity, and even if this person has a professional activity and its purpose of real estate financing the ownership or construction of a building for his professional commercial activities, or the seat of his professional activity, or this professional is an investor in real estate transactions <sup>402</sup>.

In France, the articles of the special law n° 596\_79 of June 13, 1979 concerning the information and protection of borrowers in real estate transactions, specified the beneficiaries of this law and the others who will not benefit from this law. quoted by the consumer law n° 949/39 of June 26, 1993 especially in matters of n° L 312/1 and after.

While Article No. L 312/3 has stated that the following persons are prohibited from benefiting from real estate financing, according to a real estate financing agreement governed by law 949/39:

- \*public legal entity;

- \*person of professional activity concerning the purchase of money and its rent and falls within this exception the civil companies which fall within their activities purchase and rent of real estate;

- \*persons who carry out real estate financing transactions governed by Law No. 332/52 of March 24, 1952;

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<sup>402</sup> –ALAIN COURET, "distribution of real estate credit", consumer credit law", work of the aggregation conference under the direction and with a preface by Ibrahim fadlallah, LITEC, 1982, p. 241\_242; Cass .Civ. April 25, 1984, R.Dimmob, 1985, p.84; Obs Lancereau and stoufflet, cass.Ci.1,7, Oct.1992, D.1992, IR 252.



Now the French legislator has prohibited this category from benefiting from the rules of consumer law, demonstrating that this legislator is returning to the protectionist model which encompasses all the rules of consumer law <sup>403</sup>

This protection is intended for the weak party in a real estate financing agreement, which is the natural person, i.e. the consumer against professionals equipped by the specialty that does not exist with the weak party.

So French law decreed that except for the categories cited prohibiting benefiting from the protectionism of consumer law, any natural or legal person can have the financing of real estate transactions under the protection of consumer law <sup>404</sup>, except that French case law has confirmed that it There is no prohibition on governing the real estate financing agreement by consumer law. Under the condition that the parties agree on this confirmation. in order to have optimal investor (consumer) protection <sup>405</sup>.

Then in the Anglo-Saxon legal regime, especially American and English law, gave the right to all persons of the real estate financing regime, either natural person or public or private legal entity <sup>406</sup>. And the special thing in this regime is that natural persons are the only to benefit from some advantages in real estate financing such as the case of housing real estate financing <sup>407</sup>

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<sup>402</sup> –A.SERIAUX, “the right to consumer credit” under the direction of the fadallah, LITEC, 1982, p.321 et s.

<sup>403</sup>– P. SARGOS, “The jurisprudential doctrine of the court of cassation in matters of real estate credit”, Rep. Defrenois, 1998, No. 5, p.371.

<sup>404</sup> –Cass.Civ.1,20Mars,2007,J.C.P,2007,p.23; Cass.Civ.1,11 OCT,1994,RD immob, 1995,p.363 and Cass.Civ?1,10 FEV.1993, RD immob, 1994, P.281.

<sup>405</sup>– Cass.Civ.1,1 Mars.1999, RD immob, 1999, p.448.

<sup>406</sup> –Robin PAUL MALLOY & JAMES CHARLES SMITH, “Real Estate Transaction, Problems, Cases and Materials”, Aspen law of Business, NEW YORK, 1998, p.466 and s&p.1042 and S.

<sup>407</sup> –WILLIAM B. BRUEGGEMAN & JEFFREY D. FISHER, Real Estate Finance and Investments, 12th Edition, Mc Graw-Hil/Lrwin.2005, p.20 et seq.

## 2) Other participants in the real estate financing agreement

### a- The third part of the real estate financing agreement

The entrepreneur or the seller of the building is the third party in the real estate financing agreement and according to the doctrinaires of Egyptian law, he is the person who concluded the real estate financing agreement in order to concretize his obligations, moreover he is the person who is given the sum of the credit that the investor (borrower) had from the lender <sup>408</sup>.

Immediately the third party in the real estate transaction is the object of the real estate financing which can be the seller in the event of the financing of the purchase of a building and can be a contractor, an architect or the construction engineer in the event of the object of the real estate financing transaction is the building construction company or its rehabilitation or development.

From now on the call to the third party is a guarantee so that the borrower does not use the credit in other uses different from the object of the financing contract, also to facilitate the transmission of the property in the name of the buyer, moreover , the ease of the operation to give rise to the right to the privilege and the mortgage in favor of the lender as a guarantee of the amount of the financing because the two operations are carried out simultaneously <sup>409</sup>. However, Moroccan law, we have the third part, is recognized by the legislator only in the case of the VEFA or the company is the subject of real estate financing. On the other hand, in comparative law, we note that the seller and the real estate entrepreneur are not a party to a real estate financing agreement,

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<sup>408</sup> أيمن سعد سليم مشكلات التمويل العقاري دراسة مقارنة دار النهضة العربية القاهرة 2005 ص 43

قدري عبد الفتاح الشهاوي شرح قانون التمويل العقاري رقم 148 لسنة 2001 و لائحته التنفيذية الصادرة بالقرار رقم 1 <sup>409</sup> لسنة 2001 و المعدلة بالقرار رقم 465 لسنة 2005 دار النهضة العربية القاهرة 2006 ص 65

However, the legal nature of the real estate financing contract in French, American and English law presumes that the real estate credit contract is binding on both parties, that is to say in double part but bound by another contract, which is the real estate sales contract. or real estate business contract <sup>410</sup> and the two parties to the agreement can guarantee the real estate financing agreement by conditions such as: the borrower requires the conclusion of the credit agreement with the conclusion of the borrower of an insurance contract, simultaneously as guarantee to pay the loan to the lender in the event of the risk of death of the borrower, his physical incapacity or his inability to have a regular financial source allowing him to pay his loans. <sup>411</sup>

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<sup>410</sup> STEPHANE PIEDLIEVRE, "Real estate law: contraction", JCP, éd.Nationale, N° 47, 1302, 2007, P.20..

<sup>411</sup> Cass.civ.1, March 17, 1998, RD immob, 1999, p.292 and Cass.civ 1, FEV, 1999, RD immob, 1999, P.292; ROBIN PAUL MALLOY & JAMES CHARLES SMITH, "Real Estate Transaction , Problems , cases an Materials, Aspen law of Business, New York , 1998 p. 172 and S. and P.747.

– the legal person "project company" effect of the "Musharaka" participation contract in real estate financing

Among the meanings given to the term "charika" in the Arab-Muslim culture, it is appropriate to mention the one that interests us here, namely the thing good or nature, capital, industry or know-how etc., held by two people or more without either party making exclusive use of it <sup>412</sup>. This is how the Malikite rite jurist IBN ARAFA defines society as being the consented alienation by a person of an undivided portion of the thing he owns, in return for an undivided portion of the thing of others, with the right to manage everything <sup>413</sup>. it appears that the company is an agreement by which the parties constitute a social fund. The manager in common and sharing the profits. With a principle of legality of contract. Which requires the equality or equivalence of contributions, as well as the equal sharing of profits, and first of all the Malikite doctrine distinguishes three types of companies:

\*The capital company, in which each of the partners contributes a share in money or valuable goods; the partners all contribute through their industry to making profits which will then be shared <sup>414</sup> this kind of company can take two forms of company العنان أو المفاوضة

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<sup>412</sup> –RABIA ARAFAT SHEHADAH DIAB the dignitary society and its rules in Islamic fiqh and in Jordanian civil law, Doctoral thesis, ANNAJAH University, NAPLOUSE, PALESTINE, 2010, P.8

<sup>413</sup> أبو عبد الله محمد الأنباري الأراسة شرح حدود ابن عرفة زاد الهداية الكافية الحافية لبيان حقائق الإمام ابن عرفة <sup>413</sup> الوفية دراسة نقدية و تحليل لمحمد أبو العجفان و طاهر المعموري دار الغرب الإسلامي بيروت أول نشر 1993 ص <sup>431</sup>

<sup>414</sup> –Islamic Development Bank, Introduction to Islamic Financing Techniques, Proceedings of Seminars No. 37, 1992, Research and Training Institute, p.34\_35

Under the rules governing the first company each of the partners acts not as guarantor **كفيل** but as agent **وكيل**, in the second each of the partners acts both as guarantor and agent<sup>415</sup>.

\*The work or industrial company contracted for example between two blacksmiths or a blacksmith and carpenter.

\*The dignitary partnership contracted in consideration of the personality of the partners or the power they hold, in which two or more people without capital use the credit they have at their disposal – the credit in question combining trust and esteem – to buy and sell, then share the profits of their operations. However, the imams Malik and al chafii reject such a contract, unless it is not a question of acquiring a specific thing, therefore of an isolated operation the principle of base being the obligation of a dosage for the creation of wealth. In this case capital and work.

Muslim canon law authorizes the company to be a part of onerous acts and free acts. With regard to acts for onerous title, the company can consider the sale and exchange through the transfer it operates, which confers on the partners the quality of co-owners of the values placed in the common fund. However, its values must be lawful things, such as the contribution in cash, furniture and etc. , with an imminent point in the legal relationship between the partners which is the mandate given by each of the partners to the others to dispose of the things pooled.

So we have a fiduciary contract, that is to say in good faith and based on trust between the partners, non-formal and requiring no particular condition of capacity on the part of the contractors.

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<sup>415</sup>- Islamic Development Bank, Seminar Proceedings No. 44 on "Sharia Sciences for Economists", 1998, p.17 and p.276-278.

The power of disposal of the partners is not unlimited any more than the faculty of mutual representation. In the absence of express delegation given to one of them, each may sell the corporate assets in cash and on credit and borrow on behalf of all. However, no shareholder may purchase under the same conditions with the pooled funds, nor lend corporate property without the consent of others. The handing over of corporate assets to one of the members of the association gives rise to a custody contract.

For any losses they are borne in proportion to the contributions, and the principle that each of the partners can terminate the contract at any time. And likewise the partnership may be dissolved by virtue of a legal provision in the event of death or insanity in which case the continuation of the partnership may be between the associates of holy spirit.

The non-observance of the contract to the prescriptions which have just been stated is sanctioned by nullity <sup>416</sup>.

Hence the fact that there is no lawful company except one which is constituted in accordance with the formula of equality or equivalence of contributions and equal sharing of profits and losses. Any other combination of association efforts for profit is its controversial validity.

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**416** –MOHAMED NAJIB BENKACEM , « les banques islamiques au Maroc : outil pratique du banquier et de l'investisseur », éditeur GRAPHEDIT , 2013, p.58 .

**§2– Conditions of validity and scope of the Moucharaka contract being a partnership contract of the real estate investment project.**

**A – Conditions of validity: partnership agreement for the real estate investment project in comparative law and Islamic banking law**

**1) Conditions of validity: company contract of the real estate investment project in comparative law**

In principle, the Moucharaka contract is a partnership contract according to Moroccan law. having the status of an investment project company and comprising the associated Islamic bank on the one hand and its borrower and partner investor client on the other hand <sup>417</sup>. also under article 982 of the dahir forming the code of obligations and contracts, “Society is a contract by which two or more persons pool their goods or their labor or both at the same time, with a view to sharing the profit which may result therefrom”.

The company is therefore considered as a contract subject to the general rules governing contracts. Its existence is based on the meeting of the will of the parties. It is in fact a contract on the basis of which the persons concerned agree to organize, in order to carry out a common project. compliance with the conditions common to all the clauses of the contract is therefore essential for the validity of the partnership contract and without constraining the legal framework governing company law <sup>418</sup>.

The validity of the contract assumes the existence of mandatory substantive conditions: the consent of the parties, legal capacity, object and cause.

For the validity of the contract of partnership, the consent of the parties is essential,

It must be real, confident and relate to the essential elements of the society <sup>419</sup>.

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<sup>417</sup> –According to article 31 of the circular of the wali BANK AL MAGHREB n° 1/17/ of January 27, 2017 concerning the Technical characteristics of participatory products.

<sup>418</sup>– PAUL DECROUX, “companies in Moroccan law”, 5th ed., 1988, the door, RABAT, p.57.

<sup>419</sup>– According to article 19 of the code of obligations and contracts in Moroccan law.



such as the fixing of capital, the mode of distribution of profits, the nature of the activity <sup>420</sup>, and the rules concerning the functioning of the company <sup>421</sup>.

The partnership contract must not be affected by one of the defects of consent, namely error (on the object or the person), fraud (fraudulent maneuvers that may mislead) and violence (coercion).

The partnership contract requires capacity, this has been set by the family code at eighteen Gregorian years completed <sup>422</sup>, some people cannot, despite their capacity, set up a company among themselves, this is the case of the father and of the son subject to paternal power, of the guardian and of the minor until the majority of the latter and of the curator of an incapable person or the administrator of a pious institution and the person whose property he administers <sup>423</sup>. Also minors who do not benefit from majority experience and who do not have an advance declaration of majority <sup>424</sup>.

The purpose of the company must be lawful and the form of the company is taken into consideration to be able to carry out certain activities as provided for in article 44 of law n° 5-96 which stipulates: "banking and credit companies investment, insurance, capitalization and savings cannot adopt the form of a limited liability company". Therefore, any activity the exercise of which is prohibited by law would result in the nullity of the partnership contract.

The inclusion of the object among the mandatory information in the articles of association because of its interest in the life of the company <sup>425</sup>.

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<sup>420</sup> the activity in our Musharakah contract case is real estate investment.

<sup>421</sup> احمد شكري السباعي الوسيط في الشركات و المجموعات ذات النفع الاقتصادي الجزء الأول مطبعة المعارف

<sup>422</sup> Dahir n° 1-04-22 of 12 Hijra promulgating law n° 03-70 relating to the family code, B.O. n°5184 of 05/02/2004.

<sup>423</sup> Article 984 of the Moroccan D.O.C In addition to the case of people with dementia or prodigality.

<sup>424</sup> the situation of the minor depends on the legal form of the company, seeing articles 3,17,20,29 of law n° 5-96 and article 109 of law n°17-95

<sup>425</sup> see Articles 5,50,23 of Law No. 5-96 and Article 2 of Law No. 17-95 on limited companies and Article 10 of Dahir No. 1-99-12 of February 5, 1999 promulgating Law No. 13697 on economic interest groups Bo No. 4678 of April 1, 1999 .

The cause of the contract is linked to the reason that prompted the parties to constitute it and in our case the cause is the partnership between the Islamic bank 'lender' and the investor 'borrower' in a real estate investment structure. therefore this is the basic reason for which people decided to create this structure. In addition to this last condition of the conditions common to all contracts is noted in article 882 of the Moroccan D.O.C with a count of four characteristic elements of the company contract:

- The plurality of partners

The partnership contract requires a plurality of partners, all done in article 982 of the Moroccan D.O.C stipulating that the contract is concluded between two or more people, therefore the meeting of two or more wills for the constitution of a company. This condition was taken up by Law No. 5-95 and Law 17-95 Two exceptions have however been provided for, the first in article 44 of law n° 5-96 which makes it possible to form a limited liability company by one or more persons, the second is in article 1061 Moroccan D.O.C which provides that "when there are only two partners, the one of them who has not given rise to the dissolution in the case of articles 1056 and 1057 can be authorized to pay off the other and to continue operating on its behalf by assuming the assets and the liabilities", that is to say that as long as the structure operates according to the rules fixed at the start and respecting the obligations arising from the contract it continues with two partners only the failure of one of the partners will allow the other to continue the operation.

- Pooling by the partners of the contributions

The contribution is the property that a partner agrees to make available to the company for joint operation, all partners must make a contribution to the company. it is the property or value that a partner allocates to the company for the constitution of its capital. Article 982 of the Moroccan D.O.C specifies that the contribution can be property, work or both. the nature of the contribution may depend on the nature of the company and the interest that the person has in its constitution even nothing prohibits people from making contributions of unequal value. This will affect the number of units or shares received by each.

And if the amount of the contributions has not been specified, the partners are deemed to have each contributed an equal stake. According to article 990 of the Moroccan D.O.C.

And under the terms of article 988 of the Moroccan D.O.C “the contribution may consist in cash in movable or immovable objects in incorporeal rights; it can also consist in the industry of a partner or even of all, between Muslims, the contribution cannot constitute in foodstuffs "thus in contract of project company real estate investment financed by an Islamic bank the contribution of investor can be a share in cash or constituting a sum of money or a contribution in kind such as a lot of land where the project will be carried out and built or a contribution from an already existing company and the borrower will be a partner according to the Moucharaka contract .

The freedom of persons as to the setting of the terms for the release of the cash contribution is limited in certain structures such as the case of the limited liability company.

The contribution in kind is made up of any property other than a sum of money (real or real estate, goodwill, patent of invention, operating license, etc.) and must be described and assessed in the company's statutes. .and the contribution can be carried out in two ways either by the transfer of the right of ownership of the goods brought or by the putting of its goods at the effective disposal of the company without transfer of the right of ownership but a contribution in enjoyment.

In addition, the contribution in industry is the contribution of a work of an intellectual activity or a know-how this type of contribution has a temporary character it ceases with the cessation of the activity of the contributor .

- Profit sharing and contribution to losses

On the one hand the purpose of the company is to make a profit, on the other hand all the partners share the profits and possibly the losses. If the aim pursued is to make a profit, possible losses also constitute a situation to be foreseen.

The share of each partner in the losses and in the profits is determined according to his participation, the article of the Moroccan D.O.C considers that any clause which attributes to a partner a share in the profit or in the losses greater than the share in the profits or losses greater than the share

proportion of his contribution is null and voids a partnership contract, the provision has a continuous exception in article 1036 of the Moroccan D.O.C. it in fact concerns the situation of the person who participates with a contribution in industry a share of profits greater than that of the other partners may be provided for the benefit of the person who contributes his industry.

- The will to collaborate in a corporate spirit (*affectio societatis*).

With regard to the desire to collaborate in the achievement of the objective determined at the birth of the company. The validity of any company is subordinated to the existence of this element of a psychological nature which pushes the partners to collaborate for the success of the economic project and the achievement of the expected objectives.

- The writing is necessary for the partnership contract it is considered as a condition of indirect form for the birth of the company. Article 11 of the law n°17 -95 requires the establishment of the statutes in writing also the Article 5 of Law No. 5-96 specifies that the articles of association must, on pain of nullity, be dated and indicate certain essential information for the partnership contract to be able to produce its effects (according to Articles 21,31 and 50 of Law No. 5-96) .

- The written act takes the form of statutes. they are the result of a negotiation between the investor (borrower) and the Islamic bank (the lender). The outcome of the project is not certain, it may be that the partners do not agree on the terms of their commitment to each in this case the possibility of withdrawing. but it is possible by the withdrawal to engage the responsibility of the person in the event of prejudice <sup>426</sup> .

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<sup>426</sup> – See articles 77, 78, and 231 of the Moroccan D.O.C the latter stipulates: any commitment must be executed in good faith and obliges.

He statutes can be in the form of a notarial deed or a private deed. The requirement of the statutes enshrines derogation from the principle of freedom of proof in commercial law. And the commitment in the corporate structure and effective only after the signature of the statutes by all the partners or the shareholders (article 17 of the law 17-95 and article 5 of the law 5-96) And finally the publicity which was planned to inform third parties it is done in two ways the first and the filing of the deed of incorporation at the registry of the court of the place where the registered office of the company is located and second the publication of a extract from the articles of association in a journal of legal announcements and in the official bulletin.

## **2) Conditions of validity of the company contract of the real estate investment project in Islamic banking law**

The partnership agreement must be in writing and must specify the conditions governing the relationship between the partners. It is therefore necessary to define in particular the object of the contract, its duration, the capital and the contribution of each party, the methods of distribution of profits and losses, the guarantees possibly given by the entrepreneur for the benefit of the investor for the cover losses suffered due to negligence on the part of the latter, the causes and consequences of termination of the contract, the conditions for taking over the bank's participation in the event of a declining Musharakah. Similarly, article 1835 of the French Civil Code provides that the statutes of the company must be established in writing and determine the object, the share capital and the contributions of each partner, the form, the registered office, the duration of the company. and the terms of its operation and whether under Moroccan or French or Islamic law, the partners must enjoy their full legal capacity.<sup>427</sup>

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<sup>427</sup>- M. M. ZEIN, "Comparison of the financing methods of Islamic banks and traditional banks", Seminar organized jointly by the Islamic Research and Training Institute and the Mauritanian Islamic Bank al-Baraka on the theme Introduction to Islamic financing techniques , seminar proceedings no. 37, 1st ed., Kingdom of Saudi Arabia, 1996, p. 179-180.

The bank can conclude a partnership contract with non-Muslims Or conventional banks, provided they invest in activities that comply with the spirit of Sharia, unless it is clear that the funds or contributions of these banks come from illicit sources and in full compliance with the principles of law. Islamic.

Notwithstanding, the conventional bank does not take these criteria into consideration when entering into the partnership. And definitely, the legality of the object is a condition of validity of the contract.

Thus, article 1833 of the Civil Code requires that the object be lawful and the company be

Constituted in the common interest of the partners. However, this notion of lawfulness is differently conceived in each system. Sharia committees in Islamic banking should monitor the compliance of financial transactions with Islamic law, and ensure the dissemination and effective application of Islamic norms and laws governing investment and economic activity<sup>428</sup>.

Regarding capital, the Sharia does not set a minimum amount of capital, But demands his release entirely. However, a progressive release is allowed if it concerns all the partners. While French law may require a certain minimum for the constitution of some companies. The main thing is that it is necessary to determine precisely when signing the contract the nature, type and amount of the capital.

In principle, the capital contribution must be in cash. So the contribution Nature is the subject of different doctrinal opinions: it is admitted by the school Malekite and Hanbalite provided that they are valued separately based on the market price on the date of signing the contract.

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<sup>428</sup> B. BENDJILALI, "The Moucharaka or mode of financing participation", Seminar organized jointly by the Islamic Research and Training Institute and the Mauritanian Islamic al-Baraka Bank on the theme "Introduction to Islamic financing techniques", seminar proceedings no. 37, 1st ed., Kingdom of Saudi Arabia, 1996, p.39

On the contrary, the contribution in Kind is prohibited by Imam Abu Hanifa and Imam Ahmed considering it opposable to the unity and indivisibility of the common heritage of society. Also The French Civil Code, in its article 1843-3, accepts a contribution in cash or in kind or even in industry.

Sometimes Musharakah can be in the form of bank participation in an existing company. In this respect, one must be careful when dealing with Shareholding of the Islamic bank in a joint stock company. This question gives rise to certain controversies: on the one hand, a minority of contemporary jurists believe that it is in no way permissible for a Muslim to be a shareholder in a public limited company. On the other hand, the majority of Muslim jurisconsults allow the Muslim to buy and sell ordinary shares, either for the purpose of investment with the intention of keeping the action for a long time and benefiting from the dividends paid by the company, or for a commercial purpose to take advantage of the difference between the purchase price and the resale price<sup>429</sup>. Moreover, the Islamic Fiqh Academy resolved, in 1992, that a Muslim can establish a joint-stock company and become a shareholder of companies provided that the activities carried out are lawful under Sharia<sup>430</sup>. However, if the main activity of the company is lawful but certain activities carried out occasionally are illicit, such as investment in interest accounts, ribawi accounts, certain Muslim jurisconsults do not accept in any case any investment by a Muslim in a company listed on the stock exchange which carries out an illicit activity, even in a secondary way<sup>431</sup>.

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429 M. PATEL, Shareholding in Islamic law: status and conditions, ACERFI, 2010, p. 34.

430 International Fiqh Academy, Resolution No. 63, Jeddah, Kingdom of Saudi Arabia, 1992, as cited by Mr. PATEL, op. cit., p.5.

431 This opinion is notably that of Sheikh Abdoullah bin Bî'ah, Dr An Nachmiy, Sheikh Ahmad Al Kourdiy, Dr Ali Ahmad As Sâloûss and Sheikh Adh Dharîr; he is also the one who has been selected by Al Madjma' al Fiqhiy of Makkah (linked to the Islamic World League), the Permanent Commission for Research and Ifta of Saudi Arabia, the Shari'ah Board of Kuwait Finance House, the Dubai Islamic Bank and the Sudanese Islamic Bank, as cited by Mr. PATEL, Shareholding in Muslim Law: Status and Conditions, ACERFI, 2010, p. 6 (footnote 9).



While a group of contemporary jurisconsults<sup>432</sup> allow

The shareholding of a non-Muslim provided that mainly:

- \* the objectives of the company thus defined in its articles of association do not contain the Carrying out illicit activities<sup>433</sup>;

- \* the company's income from such activities is minimal, without exceeding the tolerance threshold of 5% of all its income

- \*the total amount of the debt (whose repayment includes interest) of

The company (short or long-term loan, bonds issued) is not too

Important, which, thus divided by the average value of its capitalization

Stock market value over the past twenty-four months must be less than 33%<sup>434</sup>;

- \* the total amount of riba's productive investments (interest investment, Obligations) made by the company is not too large, when the

Total amount of cash and interest-bearing securities divided by

the average value of its market capitalization over the twenty-four

Last months must also be less than 33%<sup>435</sup>;

- \* the value of non-monetary assets (tangible fixed assets and intangible assets and inventories) of the company represents a significant part of the Total value of its assets (including financial assets Availabilities, receivables).

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<sup>432</sup> -Among the jurisconsults who support this opinion, we can cite Sheikh Abdoullah Ibn Mani', Sheikh Taqi Usmâni, Sheikh Moustafa Ahmad Az Zarqâ, Dr Abdous Sattâr Abou Ghouddah, Cheikh Nizâm Ya'qûbi et Dr Nazîh Hammad. Cet avis est celui qui a été retenu par le Shari'ah Board de l'AAOIFI, de la *Shirkat Al Râdjihî Al Masrafiyah*, de la Banque Islamique Jordanienne, de la plupart des membres présents lors du sixième forum du groupe *Al Barakah*. Ainsi cite par M. PATEL, *L'actionnariat en droit musulman : statut et conditions*, ACERFI, 2010, p. 6 (note n° 10).

<sup>433</sup>- AAOIFI, *Shari'a Standards for Islamic financial institutions*, shari'a standard «*Financial paper (shares and bonds)* », art. 3/4/1, 2010, p. 381

<sup>434</sup>- Dow Jones Islamic Market Indexes, Screens for Shari'ah Compliance. Selon AAOIFI, le taux est fixé à 30%

<sup>435</sup> -Dow Jones Islamic Market Indexes, Screens for Shari'ah Compliance. Selon AAOIFI, le taux est de 30%.



Thus this value must represent according to certain jurisconsults at least 51% of the total value of all the assets, and according to others at least one third (30% according to the AAOIFI and 33% according to the DJIM) of the total value. of all assets, and others the Hanafi there is no precise and definitive threshold that is fixed, but it must be ensured that the value of illiquid assets is not insignificant<sup>436</sup> .

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436 M. PATEL, Shareholding in Islamic law: status and conditions, ACERFI, 2010, p. 13

## **B- Legal nature of the Moucharaka contract for the financing of real estate investment.**

### **1) Subject of the Musharakah real estate investment financing contract.**

From comparative law it is in Egyptian law that the legislator has clearly stipulated the articles of the real estate financing law while respecting Islamic law as a whole in such a way that it is certainly our legal guide, to define with reflection the subject and the legal nature of the Moucharaka real estate investment financing contract, which is only a real estate financing agreement and falls within the scope of real estate financing laws, and applies its legal rules.

That is to say that the legal nature and subject of the Moucharaka contract are the same observed and adopted in a real estate financing agreement governed by the real estate financing laws, with the specificity that they are in line with Sharia. .

Article 1 of Law 148 of 2001 being the Egyptian real estate financing law stated that "the rules of this law are intended for the investment financing activity in the field of purchase, construction, rehabilitation, habitat development , administrative units, services and constructions for commercial activity.." giving a field of operations and legal rules of conventions and law of real estate financing.

By this stipulation of article 1 it has been found that the organization of real estate financing is an eminent point in the policy of the investment of objective to regulate the real estate market. By creating a reliable demand in the real estate market and making a profit to all parts of this organism. It is thus that article 1 of the first matter of the real estate financing law limited the field of real estate financing, but other doctrinaires confirmed that this article developed the fields of application of the subject of the law of real estate financing <sup>437</sup> .

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<sup>437</sup> محمد محسن النجار الائتمان العقاري من خلال قانون التمويل العقاري رقم 148 لسنة 2001 مؤتمر المشكلة العقارية ص 3 و

Because the subject of this law affects all real estate and its financing is done by the supply of capital intended for its purchase, construction, rehabilitation and development...

Article L 312/1 of French consumer law has specified that real estate financing agreements (of which the Moucharaka contract in real estate financing is one of these agreements) will benefit from consumer protection rules<sup>438</sup>. decided on three subjects or three categories of real estate financing agreements:

- Category 1: is all credit transactions that finance access to property or possession of a building, for use in housing or housing and professional use.
- Category 2: containing real estate leasing sales operations intended for housing or professional housing<sup>439</sup>.
- Category 3: is presented in the financing of purchase operations or owning a share or share in a company working in the purchase of property and a company organizing temporary ownership or by participation over time.

Noting that the object of the Moucharaka real estate financing agreement is similar to the object of category 3, concludes that the subject of the Moucharaka contract in French real estate financing law is the same of category 3 protected by article L 312/1 of the French consumer law.<sup>440</sup>

However, we deduce that French law clarified the scope of application of protectionist rules and explained that the articles of real estate financing are considered common law rules in order not to infringe them because of its connection with the general interest.

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<sup>439</sup> -ROCK DAHAN; "The domain of Scrivener laws", R.T.D.Com, 1996, 1. , p.2

<sup>440</sup> -MARIE CLAIRE & ALAIN, "Credit law" Second edition, Review and update, French university press, 1987, Paris, p.28 and s.

In Anglo-Saxon law (English and Australian) we have the credit called participatory real estate mortgage (in English: Participation mortgage, Equity participations, <sup>441</sup>) which is a model of real estate financing applying the same legal technical rule as the Moucharaka contract in real estate financing, which provides a legal framework for this Musharakah contract in Anglo-Saxon law. Because in this credit model the real estate borrower gives up part of the annual income generated by his real estate investment for the benefit of the lender, specifying that this real estate financing is in the form of a participation of the lender with the borrower in buildings and for the benefit of the real estate transaction and wanting to finance it in return for the real estate financing.

As a result, the legal rules in this Anglo-Saxon system governing this mode of financing are the same that will govern the Moucharaka real estate financing agreement. So whatever the subject of real estate financing in the Anglo-Saxon legal system, it does not stop at financing credit operations for real estate reasons but affects other financing objectives provided that we have a real estate mortgage guarantee <sup>442</sup> which means that the subject in Musharakah contract of real estate financing exceeds real estate loans to any credit that is guaranteed by real estate mortgage.

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<sup>441</sup> - <http://WWW.enwikipedia.org/wiki/mortgage>

<sup>442</sup> - GRANT SNELSON & Dale A. WHITMAN, Real Estate Finance law, fifth edition, Thonson, west, U.S.A, 2007, P.597

2) Legal nature of the Moucharaka real estate investment financing contract  
The legal nature of the Musharakah real estate investment financing contract, through its adapted legal mechanism, has primarily a legal nature of a real estate financing agreement in comparative law, which leads us to determine the legal nature of real estate financing because we recognized on the legal nature of the Moucharaka contract in real estate financing.

In the French legal regime, we find that the consumer protection law n° 39/1949 declares that the real estate financing agreement is a credit agreement obliging both the borrower and the lender. but this convention has for cause the financing of contract of object construction real estate or real estate rehabilitation of the property of the borrower, from where the protection of borrower is necessary in this case and without forgetting here that the borrower is the non-professional consumer <sup>443</sup> .

The French legislator organized the rules that govern this relationship in consumer law from article L312/12 and later possibly as part of its insistence on the legal nature of the real estate financing agreement as being a credit agreement. But it is a preliminary contract to conclude a relationship or real estate contractual transaction <sup>444</sup> , either a purchase of a building or construction or rehabilitation or development of a building within the framework of the rules of consumer law.

Certainly the French legislator has created a dependency between the credit contract (real estate financing agreement) and the real estate financing contract.

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**443- FERRIER D.**, “the provision of public order aimed at preserving the reflection of the co-contractor”, Dalloz, 1980, p. 177

**444** voir جمال فاخر النحاس العقود و الاتفاقيات المعمدة للتعاقد و أهمية التفرقة بين العقد والاتفاق في المرحلة السابقة  
على العقد مجلة الحقوق السنة العشرون العدد الأول مجلس النشر العلمي جامعة الكويت 1996 ص 333 و ما بعدها

*But from another angle it created the reciprocal link between the two contracts either in the contracting stage, or in the implementation stage, therefore the legal nature of the real estate financing agreement, which is the same as the Moucharaka contract for real estate financing in France , is presented as it is a credit contract being means for objective, which is the real estate contract wanting to finance it, and the relation between means and objective here is a relation of condition for an obligation.*

*In the Anglo-Saxon regime (American and English) the legal nature of the most popular real estate financing agreement is that it is a credit agreement. the same will be the Moucharaka contract in real estate financing but specific to a real estate transaction and guaranteed by a real estate mortgage subject to financing<sup>445</sup> .*

*This specification is shown by the conditioning of one of the contracts by an obligatory condition which is the conclusion of the other contract. That is to say, the conclusion of the Moucharaka real estate financing contract is conditioned by the real estate contract to be concluded and carried out.*

*Finally, it is concluded that the legal nature of the Musharakah contract for real estate financing is an autonomous contract, it is neither a contract of traditional named contracts nor a contract of unnamed contracts, but a compound contract presents a tripartite or three-part legal operation<sup>446</sup>*

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<sup>445</sup> -J.G RIDDAL, MC TCD, "Introduction to land Law", fifth edition, Butter Worths, London, 1993, p.381

<sup>446</sup> - See in contract composes: TEYSSI B., "groups of contracts", Thesis, MONPELIER, L.G.D.J, 1975; TERR2 F., "the influence of individual will on qualifications, Thesis, PARIS, L.G.D.J, 1957

However, the contracts included in this contract (sales contract, business contract, credit contract) lose their independence and their specificities, so that its contracts become elements of the Moucharaka real estate financing contract or agreement, by creating an essential element which is the financing transaction in which the Islamic bank undertakes to finance the real estate investment project, through an intermediary company. With legal effects of this real estate transaction on the three parties to the contract (Islamic bank, investor and the company intermediary Musharakah);

So the Moucharaka contract in real estate financing is neither a credit contract nor a consumer contract, nor a business contract but a compound contract with a specificity of independence from other contracts.

## **SECTION 2:** Legal rules for the formation of the Moucharaka real estate financing contract

### **§1.** Elements and conditions of the contractualization of the Moucharaka FI contract

#### **A**–conditions before contracting the Moucharaka FI contract

##### **1)** supervision of the pre-contractual phase of F.I's Moucharaka contract

##### **a**– the advertising of F.I's Moucharaka real estate financing contract.

F.I's Moucharaka contract is a contract qualified by its object as real estate credit according to French law, so it is a contract for the loan of money which falls within the scope of real contracts <sup>447</sup>. The best known of the definitions of advertising is that it is “a commercial or professional information or advertisement whose purpose is to recognize a designer product or service by showing its advantages with compliments in order to create a good impression on this product, pushing the consumer to take ownership of this product or service. » <sup>448</sup>.

Generally, advertising is defined as “a non-personalized communication for a fee, disseminating a product or service by means of information intended for the public in order to convince it and solicit it to enter into a contract for this product or service” <sup>449</sup>.

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<sup>447</sup>– the French civil code considered as real contracts all contracts which suppose the delivery of a thing (example: the loan, the deposit, the pledge). On the other hand, case law has a different opinion (Cass. Ireciv., May 27, 1998 Bull.civ. I, n° 186; D., 1999 194, note Bruschi;

<sup>448</sup> –LABARTH F., “the concept of the contractual document”, L.G.DJ, 1994, n° 133, p.99;  
J. CALAIS-AULOY, “consumer law”, 2nd ed., 1986, Dalloz, p. 90 and S.

<sup>449</sup> احمد إبراهيم عطية النظام القانوني للإعلانات في القانون المدني دار النضى soon  
; SERGE GUINCHARD , Misleading advertising in French law and Swiss criminal law, 1971;  
Michael Borders, False Advertising, Thesis, Bordeaux, 1, 1974.



French case law has defined advertising in one of these judgments of the Court of Cassation deciding that commercial advertising is everything that is published to the public in newspapers, with the aim of influencing with sufficient compliment leading the public to buy advertising proceeds .<sup>450</sup>

Thus the means of advertising are the written press (newspapers, magazines) and means of audiovisual advertising mainly television, radio, and others (direct mail and announcements and booklets) and especially the modern means of communication especially the WEB and its various means <sup>451</sup> .

Although the advertisement is to consider an offer if and only its elements were present because there is no harm in the offer being intended for the public, and it may be that the advertisement is not an offer but an invitation to a contract or an invitation to negotiate as appropriate.

The purpose of mortgage advertising is to induce a consumer to borrow; it aims to be a catalyst for a process of consumption. Who is for the moment only a candidate benefiting from objective information which corresponds to the reality of what will be offered to him on the day of his loan contract. In this situation the law imposes on the author of the advertisement an obligation to loyalty.

The Consumer Code provides that its provisions apply to any advertising made, whatever its medium relating to a mortgage, falling within the scope of Article L 312-2 which requires a Specification of the advertisement concerning the duration of the operation, its total cost.

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<sup>450</sup> –Cass.com, January 13, 1971, JCP, II, 16932

<sup>451</sup> –WILLIAM M. KINCAID, “Promotion –products”, Services and Ideas, Second Edition, Merrill, 1990, p.226 et seq.;

السعيد الرفد حق المشتري في إعادة النظر في عقد البيع بواسطة التلفزي

b-the preliminary offer of the Moucharaka contract of F.I.

The content of the prior offer of this contract is provided for by article L312-8 of the consumer code. The material is formalistic in the extreme. its purpose is to inform the consumer in a complete and precise manner of the content of the contract he proposes to conclude<sup>452</sup>. allowing him, at a glance, to judge the financial effort to be made”<sup>453</sup>. The existence of this legal obligation to provide information does not release the banker, and even more generally any professional, from their duty to provide information and advice.

In the event of non-compliance with the formalism of the prior offer of bank financing, the legislator has provided for criminal sanctions and a civil sanction.<sup>454</sup>

Article L 312-33 of the consumer code provides that the praetor who does not respect the rules laid down by article L 312-7 and 312-8 will be punished with a fine of 3750 euros. This sanction is provided for the lessor in the event of rental – sale or rental accompanied by a promise of sale, which is similar to the Decreasing F.I Moucharaka contract. But this sanction is heavy and amounts to sanctioning very important lenders while the borrower had perhaps not suffered damage. The risk which is not only theoretical but some buyers take advantage to benefit from unjustified enrichment in disputing after bank financing offer <sup>455</sup>.

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<sup>452</sup> – v. Gourio, Consumer information and real estate credit, in real estate credit, notary, banker and consumer, LPA 29 June 1999, p.11.

<sup>453</sup> –Cass. 1RE civ., June 27, 1995, Bull. civil. I, No. 287; Defrenois, 1995 1416, obs. Mazaud.

<sup>454</sup> –Audier, the civil and criminal liability of the consumer credit provider, in consumer credit law, p.206.

<sup>455</sup> Crédot & Gérard, obs., under Cass. 1ST civ., 20 JULY 1994, RD Bancaire, 1994 261.

A difficulty arose due to the fact that article L312-33 of the consumer code does not indicate the prescription of this forfeiture.<sup>456</sup>

but case law has applied to it the ten-year prescription of Article L 110-4 of the Commercial Code<sup>457</sup>. Since the reform of prescription law, it is now five years.

The Moucharaka real estate financing contract is an investment contract and a composite contract, hence the old method of contracting no longer suits it, but it has become like any compound contract using modern means of contracting compound contracts which are of a complex composition.<sup>458</sup>, and among its means negotiation, and especially in the case of Moucharaka real estate financing agreements where the investor is a professional therefore a legal person whose main activity is real estate financing operations by negotiation in the price of buildings, and among its legal persons companies specializing in real estate commercial activity according to real estate financing contracts<sup>459</sup>, which is the case of Islamic investment companies.

Rather, according to this qualification of advertising in general, it is also considered that for the real estate financing contract Moucharaka is also an invitation to contracting.

Because the main element in the offer is that it be firm but in reality the advertising is not firm, especially in real estate financing transactions and agreements and in real estate financing advertising that does not automatically include a desire from the lender to contract definitively.

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<sup>456</sup> Cass. 1st civ., March 3, 2011, JCP, ed.N, 20011 1194, n°8, obs, Piedelièvre.

<sup>457</sup> Cass. First civ., September 30, 1997, Bank, December 1997 92, obs. Guillot; Cass. First civ., May 4, 1999, Bull. civil. I, no. 150; D..business 1999 934, obs. V.A.R.

<sup>458</sup> J.SCHMIDT, "Negotiation and conclusion of contracts", Dalloz, PARIS, 1982, p.2 and S.

<sup>459</sup> رجيب كريمة عبد الله التفاوض على العقد دار النهضة العربية القاهرة 2000 ص 5

In addition, the convention of what is confirmed by French doctrine and case law, specifying the obligation of the firmness of the offer by having a definitive will for contracting, and not a proposal for contracting in real estate financing Moucharaka<sup>460</sup> is a contract personal consideration contracts of the investor<sup>461</sup> so the offer is not positive unless the lender is satisfied with the investor's ability to repay the credit of the real estate financing, hence the advertising in real estate financing operation by Moucharaka contract , is only an invitation to contracting the Moucharaka contract. .

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<sup>460</sup> F. TERRE & PH.SIMLER & Y.LEQUETTE, "Civil Law, obligations", Dalloz, 6th edition, 1996, n° 104, p. 90; Cass. Com., March 6, 1990, JCP, 1990, 11.21583. and Note B.Cross.

<sup>461</sup> J.FLOURE & J.L.AUBERT, "Civil Law", obligations, 1st, the legal act, 5th ed., 1991, No. 139; JEGHESTIN, "Civil Law, The formation of the contract", 3rd ed., Dalloz, 1993, n° 292, p.260.

## **2) Information on the Moucharaka real estate financing contract:**

Following the importance of the real estate financing agreement, and its risk on the investor. The French legislator, admitted strict rules to follow. Among them is information on the real estate financing agreement by deciding on criminal penalties in the event of a breach by the lender of the rules concerning information. in addition to civil and administrative penalties which is not the case in Egyptian legalization but he declared in his article A/3 of the enforceable list of the law of real estate financing that it is necessary to have clear financing procedures and specify in such a way that the investor knows his obligations and his rights and among the documents of the real estate financing contract he must have a declaration of investor postulating his that he has received a photocopy of the model that the general committee of real estate financing to prepare concerning the main conditions of real estate financing and that the investor reads it and before signing the real estate financing agreement.

We deduce that the obligation of good faith is obligatory before the contractualization and during the contractualization and afterwards and its importance is seen before the contractualization in real estate financing because the knowledge and the information on the most important elements in the contract are decisive for the contractualization, this is why the banker is obliged to inform the investor before signing the real estate financing contract in general and the Moucharaka contract in particular.

In France, we find the rules of information in real estate financing agreements in the articles of consumer law from No. L312/4 to L321/6 which stipulate that there is an obligation to clarify and specify the data of the agreement of real estate financing in such a way that the borrower knows all his rights and obligations.

It is also necessary in Moucharaka FI contract in France to determine the duration (ten days from the date of receipt of the borrower's offer) to rethink the offer that the lender declares to the borrower<sup>462</sup>. But the French legislator has not clearly specify the information that the investor will need before signing the real estate financing contract and also he did not designate the person who is responsible for the information.

### **3) the legal nature of the request for real estate financing by Moucharaka contract.**

Some doctrinaire sees in request to conclude the Moucharaka contract of real estate financing a phase of negotiation which is downstream of the contract<sup>463</sup> committed a fault causing damage to the other party<sup>464</sup>.

Rarely do we oppose this legal theory because it is consistent with the fact that the legal definition of negotiation as defined by CARBONNIER:

"the preliminary stage during which we study and discuss the conditions of the contract, during this stage the contract is not yet existing, and we have no contract offer that we can accept it but in proposals and counter-proposals"<sup>465</sup>.

Practically the lending bank has the right to refuse to grant credit to a bank customer<sup>466</sup>.

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<sup>462</sup> BOUTEILLER, « La publicité du crédit à la consommation », JCP éd, E., 2004, p. 149.

<sup>463</sup> كريم عبد الله التفاوض على العقد دراسة مقارنة كلية الحقوق جامعة القاهرة 2000 ص 77 و ما بعدها

<sup>464</sup> محمد الصادق المهدي. الالتزام قبل التعاقد بالإدلاء بالبيانات المتعلقة بالعقد و تطبيقاتها على بعض أنواع العقود دار النهضة العربية القاهرة 1982 ص 200

<sup>465</sup> J. CARBONNIER, « Droit Civil, les obligations », 20 éd, puf.1996, n°.28, p.72.

<sup>466</sup> CH. GAVALDA, « le refus du banquier », JCP, 1962, p.727.; CH.LARROULENT, « Droit Civil, les obligations : le contrat », 3 éd .ECONOMICA, 1996, P.228 ; Cass.Com, 6 Mars 1990 JCP, 1990, II, 21583.

Even if the bank has broadcast to the public its intention to offer credits, hence it is assumed that this offer contains a margin of refusal to give credits by the bank, therefore it is not an offer on the contract of real estate financing Musharakah but an invitation to contract a Musharakah contract of real estate financing moreover the real estate financing agreement is a contract of adhesion therefore it is not negotiable<sup>467</sup> also the Musharakah contract is a contract of contracts which takes into consideration the personality of the investor in terms of financial solvency on his part, likewise French doctrine considers that fixed financing agreements are specified by the obligation of the investor's financial capacity to repay his credit<sup>468</sup>. Therefore the request for real estate financing by contract Moucharaka is not an offer but an invitation to conclude this contract not an invitation to negotiate on the contract Moucharaka of finan real estate cement.

#### **4) The framework of the consent of the investor in Musharakah contract in F.I**

The Moroccan and French consumer code wanted the consumer to reflect on the contract offered to him. This solution is justified by the fact that the financing of real estate is due to a greater complexity of this operation. Quite often the final conclusion of the financing is linked to the conclusion of ancillary agreements.

The borrower does not have the possibility of immediately accepting the offer made to him. Article L 312-10 paragraph 2 of the Consumer Code specifies that he can only accept the offer ten days after having received it<sup>469</sup>.

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<sup>467</sup>– J. SCHMIDT, "Negotiation and conclusion of contracts", Dalloz, Paris, 1982, p. 3 and S.

<sup>468</sup> –A.SUPIOT, "professional identity...", puf, 1992, p.409 et s.

<sup>469</sup> –Monachon-Duchene, protection of the reflection period of the mortgage borrower, JCP, 2004 I, 152.

This provision includes a rule of substance and a rule of evidence. The first results in setting aside the immediacy of the formation of the contract, the second makes it possible to verify that the period of ten years has not been eluded. This provision is of public order so acceptance will be after this period following receipt of the offer; waiver of the benefit of article L312-10 paragraph 2 of the consumer code is not possible. <sup>470</sup>

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<sup>470</sup> Cass. I<sup>re</sup> civ. , 9 décembre 1997 , Bull. civ. I, n° 368 ; Contrats, conc., consomm., 1998 n° 53



## **B- Elements of the contracting of the Moucharaka contract of F.I.**

The Moucharaka real estate financing agreement is a contract like any contract, needs for its concretization the existence of the general elements of the contract: the consent, the object and the cause.

### **1) Consent:**

The Moucharaka real estate financing contract is a consensual contract ie. All you need is the consent of all three parties:

- \* the Islamic bank (the praetor),
- \* The investor (the borrower)
- \* the intermediary company (Musharaka company):

Case 1: the company newly created by the partnership contract;

Case 2: the company that the bank will participate in its capital according to the Moucharaka contract

And this consent occurs by the acceptance of the investor following the offer of the Islamic bank, after having received a request for real estate financing. By the Musharakah contract filed by the investor. Then, the verification of the investor's ability to generate income from the project to be carried out by the intermediary company. And after proper assessment of the investor's request, the bank accepts. Giving effect to a birth of Moucharaka real estate financing contract if there is an absence of defects of the consent: the error (on substance or on person), fraud, violence.<sup>471</sup>

In addition, it is necessary to have the capacity to conclude a real estate financing contract or agreement for each of the parties to the Moucharaka real estate financing agreement, which is the capacity to exercise.

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<sup>471</sup> محمد حسين منصور النظرية العامة لالتزام مصادر الالتزام دار الجامعة الجديدة الإسكندرية 2005 ص 117 وما بعدها

## 2) the object.

The object element in the real estate financing agreement by Moucharaka is the legal transaction that we want to carry out by its conclusion, therefore the object of the real estate financing Moucharaka is defined by the financing of real estate investment project by creating an intermediary company which will benefit from the financing of its capital by the Islamic bank as an associate and partner and will carry out the real estate investment project. Whatever the building construction project or building purchase and resell it or building rehabilitation to resell it or building development to resell it.

by knowing the object, we must check if it has the general conditions of the object in a real estate financing agreement<sup>472</sup> from where it the object must be possible to carry out, existing, not impossible<sup>473</sup>, designer or it has a possible designation, legally licit and Islamic, that is to say, it is consistent with the general regime and societal ethics. In addition, the object must be linked to investment in real estate and not any other investment. And among the prohibitions in the object of the Musharakah contract, the conclusion of this agreement on the agricultural land project of a foreign investor as cited in Moroccan law<sup>473bis</sup> in the case of a natural person investor and especially in the digressive Moucharaka which is created by a simple contract between a natural person and a bank. Also in Egyptian law in its Law No. 15 of 1963 and Law No. 230 of 1996 agree on the prohibition of convections of financing investments in agricultural land and belonging to foreigners. Certainly if there is a prohibition in the subject of the real estate financing agreement, the obligation does not arise because the object is illicit and the Moucharaka real estate financing contract will be a contract absolutely void.

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<sup>472</sup> نبيل إبراهيم سعد النظرية العامة للالتزام مصادر الالتزام ص 203 وما بعدها

<sup>473</sup> اطعن رقم 5321 لسنة 64 ق نقض مدني جلسة 10.1.2005

<sup>473BIS</sup> -Dahir bearing law n° 1-72-277 of 22 kaada 1392 (December 29, 1972) relating to the allocation to farmers of agricultural or agricultural land forming part of the private domain of the State.

### 3) The reason:

The third element of every real estate finance contract or agreement is the cause, which is either a cause of obligation or the cause leading to a contract, hence for the cause of obligation is the purpose of that obligation, but the cause of the contract is the thing pushing to contract, which is a personal matter different from one to another. And must be lawful legally and Islamic, and its realization is done by the consent of the three parties to achieve a common goal and the main thing pushing to contract is lawful for all parties of the Musharakah contract of real estate financing. However, in the event of non-existence of a cause or that it is Illicit <sup>474</sup> the Moucharaka contract for real estate financing is null and void.

The cause in Musharakah contract of real estate financing for the investor is to be financed, and for the Islamic bank associates for a financial gain arising from a projected profit following its financing of the intermediary company.

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<sup>474</sup>- In Moroccan law of obligations and contracts, it is apparent from article 62: “an obligation without cause or based on an illicit cause is void; the cause is illicit when it is contrary to morals, public order or the law”

§2- obligations of the parties to the MOUHARRAKA real estate financing contract.

**A – Islamic Banking Bonds and Specific Bonds.**

**1) Offer on the MOUHARRAKA real estate financing contract**

has. The definition of the Moucharaka F.I contract offer:

The offer in general is a proposal of a person pronouncing his will to conclude a precise contract in such a way if one has an acceptance one has a conclusion of contract <sup>474</sup> but for other doctrinaire the offer is an expression of will in order to be bound by a contract, and expressing the essential elements of the contract wanting to conclude it and the contract materializes if we have an acceptance <sup>475</sup>, in addition the definition of the offer in a real estate financing agreement is described by the doctrine as an expression of the lender including his acceptance to conclude the real estate financing agreement with the borrower investor and beneficiary according to the conditions of the lender <sup>476</sup>.

This means that in the Musharakah contract for real estate financing, the part of the contract which is the intermediary company is the beneficiary of this contract, therefore in the operation of an offer, the most important thing is the opinion of the intermediary company (having the status of a Musharakah contract) vis-à-vis this offer of the Islamic bank.

Moreover, in comparative law, whether in the American, English or French legal regime, the legal nature of the real estate financing agreement is a loan agreement.

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<sup>474</sup> اسماعيل خانم النظرية العامة للالتزامات الجزء الأول مصادر الالتزام 1968 ص 104

<sup>475</sup> محمد حسين منصور النظرية العامة للالتزام مصادر الالتزام دار الجامعة الجديدة الإسكندرية 2005

<sup>476</sup> أيمن سعد سليم مشكلات التمويل العقاري دراسة مقارنة دار النهضة العربية القاهرة 2005 ص 58

However, the relationship between the loan contract and the real estate financing contract is that the first is only a means for the second to protect the consumer and the financial backer simultaneously, so the definition of the offer is the same. that the definition of the offer of the loan contract which is the offer of the lender either in France or in the Anglo-Saxon legal system <sup>477</sup>

**b. elements of the Moucharaka F.I contract offer:**

we note that the Egyptian real estate financing law is associated with the French consumer protection law, in their request to have essential elements in the offer of a real estate financing contract because we asked that the offer be in writing, clear, detailed and complete <sup>478</sup>.

in France the legislator has governed the offer of the lender in a real estate financing agreement in the legal rules of the consumer in article L312/8 and L 312/7 by declaring in the first article the obligation of the offer to be in written form and sent it to the funding applicant by post.

in Egypt we have the offer is solemn because we have prepared a model real estate financing agreement (same Musharakah contract) approved by the general committee of real estate financing affairs and stopped by a ministerial decree according to the articles of the financing law Egyptian Real Estate No. 148 of 2001 and other organic law articles.

In addition, the banker's solemn offer must be in Arabic and if it is written in another language, it must be translated into Arabic and this version must be understandable for the investor and understand his obligations and rights in the real estate financing agreement as well in Musharakah contract for real estate financing.

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<sup>477</sup>– Jean CALAIS AULOY & FRANK STEINMETZ, T2, p.494;

<sup>478</sup>– Article 3 of the Executory List of the Egyptian Real Estate Finance Law.

## 2) Islamic Banking Obligations and Specific Obligations

### a- Bonds of the Islamic bank in MOUCHARRAKA F.I contract

#### a.1- Obligation of confidentiality and professional secrecy.

In general, the bank is subject to general obligations, the most Important are those of good faith, information, advice and warning as well as banking secrecy and the duty of vigilance<sup>479</sup>. of its customers or third parties<sup>480</sup>.

In its profession, the bank is brought to hold information of a nature Confidential. It must protect the privacy of its customers and preserve the secrecy necessary for business<sup>481</sup>. And therefore, the bank must not communicate the banking information to anyone, except its client, the beneficiary of the secret. This obligation extends to all those who work or act on behalf of the bank. The information covered is that relating to confidential information of a private nature, such as the private life or wealth of individuals<sup>482</sup>.

An Islamic bank is required to maintain the confidentiality of information collected by the bank. It is both a means of protecting the client and defending business secrecy, plus a means of strengthening confidence in the banking system. It is also required to keep the information of its customers confidential, which is explicitly stipulated, for example, by the law of the Central Bank of Bahrain on Islamic banks<sup>483</sup>.

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<sup>479</sup>- W. HEGAZY "Islamic liability (Daman) as practiced by Islamic financial institutions", Wisconsin International Law Journal, vol. 25, no. 4, p.825.

<sup>480</sup> -W. HEGAZY "Islamic liability (Daman) as practiced by Islamic financial institutions", Wisconsin International Law Journal, vol. 25, no. 4, p.815.

<sup>481</sup>- F.-J. CREDOT, "Banking secrecy: its scope and limits, the provision of commercial information by banks", LPA, 17 Feb. 1993, p. 8; T. Bonneau, Communication of documents and banking secrecy", Review of banking and stock market law, 1995, p. 94.

<sup>482</sup>- In French law, article L. 511-33 of the Monetary and Financial Code subjects everyone employed in a credit institution to professional secrecy.

<sup>483</sup>- Central Bank of Bahrain, Rulebook, vol. 2 "Islamic banks", Principles of business, Oct. 2007. This is the fourth "confidentiality" principle.

This obligation has its origins in Sharia. It is a contractual obligation which also falls under the obligation of good faith.

Moreover, the Guidelines on Sharia Governance Systems for Institutions Providing Islamic Financial Services, issued by the Islamic Financial Services Board (IFSB)<sup>484</sup> in December 2009, comprehensively address the confidentiality issues applicable to Islamic banks regarding contracts. 485 As well as the duties and responsibilities of Sharia Advisory Councils in this regard. According to IFSB principles, Shariah board members should ensure that inside information obtained in the performance of their duties is kept confidential. In this sense, confidential information refers to "information received by members of the Shariah Compliance Committee or Shariah Advisory Board during the performance of their duties which is not of a public nature and is not authorized to be made public". .but Reports and declarations/resolutions of the Shariah Compliance Committee issued by the Islamic Financial Institution for public knowledge, and other information is permitted to be disclosed in public documents or proceedings". Additionally, the IFSB clarifies that "information that is not considered confidential includes Sharia rules and principles.

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<sup>484</sup> IFSB, Guiding Principles on Shariah governance systems for institutions offering Islamic financial services, Dec. 2009. M. PARKER, "Protecting confidentiality in Islamic financial contracts and structures", Arab news, 28 August 2011.

<sup>485</sup> For example, the bank must not communicate information concerning its customer to the associate or the parent company of this customer. And at the customer level, this obligation prohibits the bank from providing a customer making the request with information other than simply commercial information of a general and economic nature on the solvency of another of their customers, which is underlined by the Court of Cassation in its judgment: Com. September 18, 2007: n° 06-10.663 (n° 1000 FS-P+B), D. 2007, p. 2466, note X. DELPECH.

Any breach of the obligation of confidentiality is sanctioned by law. Applicable to contract. Thus, the bank that violates this obligation incurs civil, criminal and disciplinary sanctions. On the civil level, his civil liability can be engaged because of the damage suffered in particular by his client. In criminal terms, it is an offense of violation of professional secrecy and, where applicable, an offense of disclosing personal information likely to harm the reputation or consideration of persons. While on the disciplinary level, according to French law, the obligation to respect banking secrecy constitutes a legal obligation and the Prudential Control Authority can pronounce a disciplinary sanction against the credit institution in the event of transgression legal or regulatory provisions imposed on his profession <sup>486</sup>.

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<sup>486</sup> In French law, the monetary and financial code. article. L. 613-21, I. with exceptions such as at the criminal level, it is a repressive jurisdiction, acting within the framework of criminal proceedings. What is underlined by article 132-22 of the Penal Code: "The public prosecutor, the investigating judge or the court seised may obtain from the parties, from any administration, from any financial establishment, or from any person holding of the defendant's funds, the communication of useful information of a financial or tax nature, without the obligation of secrecy being invoked". Moreover, according to article 57, paragraph 2, of the law of January 24, 1984 relating to the activity and control of credit institutions that judicial police officers acting on the requisitions of the public prosecutor in the context of a preliminary investigation cannot be opposed to banking secrecy. And the Court of Cassation, Criminal Division, recalled this in its judgment dated April 27, 1994: Criminal. April 27, 1994: No. 93-82.976, Bull. c.iv. 1994 no. 152 p. 348; D. 1994, p. 402,



## **.2- Obligations related to information**

### **a.2.1- Customer information obligation**

Due to the unequal access to information between the customer and his bank, The latter may find itself indebted to the former for an obligation to provide satisfactory information<sup>487</sup>, which makes it possible to sanction the abuse of position against an inexperienced person. The obligation to inform the bank customer can be perceived in an active and passive way; actively when the bank is criticized for not having been active enough to seek out the information, and passively when it had to disclose it<sup>488</sup>.

Islamic law insists on this obligation with the aim of eliminating any form of uncertainty (or hazard). Moreover, in terms of the validity of the contract, the law requires that the terms of the contract be very clear and precise. Thus, the contract must not be doubtful or uncertain as far as the rights and obligations of the contracting parties are concerned.

This requirement also implies the obligation to respect formalism. To this extent, the two legal systems, French and Islamic, require that the credit agreement be written: in the Koran, the 2nd sura, verse 282, quotes "O believers! When you contract a debt with a fixed term, put it in writing; and let a scribe write it, between you, in all justice..."<sup>489</sup>.

Similarly, in French law, article L 311-11 of the Consumer Code stipulates that "the credit contract offer is established in writing or on another durable medium". This written formalism ensures that the client obtains clear and precise information. In general, any formalism imposed must be respected by the bank, the non-observance of which may lead to the nullity of the contract.

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<sup>487</sup> M. FABRE-MAGNAN, "Of the obligation of information in contracts", LGDJ, Paris, 1992, n° 174, as quoted by O. MADJOUR, The civil liability of the banker providing credit: Comparative law study French-Algerian, Thesis, Lyon 3 University, 11 Dec. 2009, p. 43. For the author, legitimate ignorance exists when the creditor of the information cannot know it, or when he has legitimate trust in his co-contractor.

<sup>488</sup> R. ROUTIER, "Obligations and responsibilities of the banker", 2nd ed., Dalloz, 2008, p. 381, No. 321.21;

<sup>489</sup> سورة البقرة الآية 282

French consumer credit law, furniture or real estate, is also and clearly based on the objective of properly informing the borrower, through the drafting of contracts containing precise and mandatory information.

In Islamic finance, the lesion is one of the causes of nullity of the contract. There are two types of injury, a minor injury which is tolerated and a major injury which is a cause of nullity if it reaches one of the following thresholds: 5% in furniture, 10% in livestock, and 20% in real estate, and so if the conditions of lesion are met, the buyer can either ask for the termination of the contract, or accept its execution<sup>490</sup>. Worse still, the bank must inform its client of any modification made to the terms of the contract<sup>491</sup>. Sometimes, it is concluded that such a modification must be the subject of a common agreement between the contracting parties.

#### **a.2.2- Duty to advise**

The duty to advise assumes that the borrower is obliged to make a Choice<sup>492</sup>, it encourages choosing between several options and opportunities, and giving an opinion on what is profitable to do.

Indeed, the bank is torn between its duty of prudence and advice and its obligation of non-interference in the affairs of its client.

Both the obligation of information and warning are imposed on it without a doubt, and to make its investment or management choices without being guided by the bank. If, however, the bank considers that the choices are bad, it can always refuse the credit, and sometimes this refusal becomes an obligation under penalty of being condemned for abusive support<sup>493</sup>.

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<sup>490</sup> -Ottoman Medjelle, s. 165 (مجلة العثمانية)

<sup>491</sup> - Bank Negara Malaysia, Islamic finance, Banking info, House financing-I, 10 Oct. 2003, p. 15.

<sup>492</sup> -M. STORCK, "The obligation of information, advice, warning of the banker providing credit", *Revue Lamy droit des affaires*, No. 31, October 2008, p. 84 et seq.

<sup>493</sup> -Jurisprudence is abundant; for example, Com. 18 Jan. 1994, no. 91-15279; May 22, 2001, No. 99-10437; The judge sanctions the bank when the credit is clearly out of proportion with the faculties of the borrower or with the "prospects of profitability of the operation": Com. 20 Nov. 2001, no. 99-13.894, Bull., no. 186, p. 180, RTD com. 2002 p. 119, note M.-H. MONSIEUR-GOOD; Civil. Feb 1, 21 2006: no. 02-19.066, Bull. civil. I, no. 91, p. 86 about a bank which "had taken in granting the loans a high risk, at the limit of what was reasonable; D. 2006, p. 1618, ob. J. FRANCOIS; Rev. dr. real estate 2006, p. 294, obs. H. HEUGAS-DARRASPEN. Com. Oct. 30, 2000: No. 97-21.154, Bull. No. 170, p. 150; Com. 10 dec. 2003: no. 01-03.746, Bull. no. 199, p.; 221.

To this extent, the client must comply with the requirements of transparency and good faith in his contractual relationship with the bank. So, if, for example, the customer voluntarily does not report all the loans taken out to the bank, which prevents the bank from being able to assess his situation exactly, then the bank is deemed to be deliberately deceived and cannot see blame for a lack of advice.

### **a.2.3 Duty to warn**

Recently, French case law has created the duty to warn, enshrined in the three judgments delivered by the First Civil Chamber on July 12, 2005<sup>494</sup> and clarified in the Mixed Chamber on June 29, 2007<sup>495</sup>. The warning consists for the bank in attracting the attention of its client to the risks of a given transaction<sup>496</sup>. This is more particularly a defensive measure which aims to ensure the security of a transaction. In application of this duty, the bank has the right to refuse financing, and at the same time not to grant financing which may aggravate the company's situation and cause harm to third parties, hence the obligation to warn the customer by the bank if the financing is contrary to banking practice. Thus, it must not put its clients at undue risk. Moreover, the bank must take all reasonable measures to identify and prevent or manage conflicts of interest that may be detrimental to the client's interest, and must indirectly guide its client towards the right decision.

But when it comes to a lay borrower, the bank must verify the financial capacities of this borrower and cannot grant him an excessive loan with regard to his contributory faculties, acting in this way, the bank fails in its duty of deposit On guard<sup>497</sup>.

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<sup>494</sup>– Civ. July 1, 12 2005: no. 03-10.770, no. 02-13.155, no. 03-10.921: Bull. civil. I, no. 325, p. 269; Bull.civ. I, no. 324, p. 268; Bull.civ. I, no. 327, p. 271.

<sup>495</sup>– Ch. mixte, June 29, 2007: no. 05-21.104, Bull. ch. Mixed No. 7; No. 06-11.673, Bull. c. mixed no. 8, D.2007, p. 1950 note V. AVENA-ROBARDET, D. 2007, p. 2081, note S. PIEDELIEVRE

<sup>496</sup>–Civ; 1st, June 27, 1995: No. 92-19.212, Bull. civil. I, no. 287, p. 200; D. 1995, p. 621, note S.PIEDELIEVRE.

<sup>497</sup> –Civ. July 1, 12 2005: No. 03-10.921: Bull. civil. I, no. 327, p. 271; D. 2005, p. 2276, note X. DELPECH

In addition, this duty assumes a pre-existing risk, and incurred by the borrower, if the risk is high beyond reason, the bank must check whether the borrowers are warned and if not, it must alert them to the importance of this risk<sup>498</sup>.

French case law sanctions the violation by the bank of its duty to warn by awarding damages in order to compensate for a loss of chance of not having contracted the loan: the damage resulting from a breach of the obligation warning consisting of a loss of chance not to contract appears as soon as the loans are granted<sup>499</sup>. The real damage consists of the excessive risk linked to the indebtedness of the borrower, so the greater the probability of the realization of the risk, the higher the compensation; but when the risk of default by the borrower is low or medium, the amount of damages will itself be low or medium<sup>500</sup>. But French case law only admits compensation for this damage to the extent of the loss of opportunity, that's to say the probability that the borrower would not have taken out the loan if he had been warned of these risks. Reparable damage therefore differs from the risk of indebtedness.

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<sup>498</sup>Civ. Feb. 1, 21, 2006: No. 02-19.066, Bull. civil. I, no. 91, p. 86; D. 2006, p. 1618, ob. J. FRANCOIS; Rev. dr. real estate 2006, p. 294, obs. H. HEUGAS-DARRASPEN.

<sup>499</sup> Com. 26 Jan. 2010, no. 08-20.505, unpublished, no. 08-18.354, Bull. civil. IV, No. 21; D. 2010, p. 934, ob. J. LASSERRE-CAPDEVILLE

<sup>500</sup> M. MIGNOT, "The duty to warn of the borrower and his guarantor: duty to inform, advise or refrain from contracting", in Credit: legal and economic aspects, under dir. J. LASSERRE-CAPDEVILLE and M. STORCK, Symposium at the University of Strasbourg, 14-15 and 16 September 2011, Dalloz, Paris, 2012, p. 81.

### **3- Obligations related to prudence**

#### **a .3.1- Duty of care**

During its mission, the bank encounters several risks and frauds. This can be detrimental to him as well as to his client and to third parties during banking operations. This underlines the importance of a mission of control, monitoring of operations by the bank at the request of its customers. These obligations are intended to influence the contract and the interests of the banking client. They consist of the duty of vigilance. It is a duty rather of jurisprudential origin, but constitutes an obligation resulting from legislative texts.

By application of this duty, the bank must generally identify its customer, as well as collect "information relating to the object and nature" of the business relationship and any other relevant information on its customer.

In addition, during the business relationship, the law requires "up-to-date knowledge" of the customer and a "careful examination of the transactions carried out", so that the taxable person is always in a position to assess the consistency of the transactions in question with regard to of the knowledge he has of the client<sup>501</sup>.

#### **a.3.2- Obligation to inquire**

The duty of vigilance implies an obligation to inform oneself by carrying out additional investigations to choose an appropriate behavior. This duty responds to an imperative to protect the interests of the client but also of third parties. The bank must not be satisfied with the raw data provided by its client, but must also use its professional reasoning and conduct its own analyzes before accepting or refusing the client's financing. Moreover, the bank must ensure the regularity and the sincerity of the accounting documents presented to it by the customer with a view to obtaining significant loans<sup>905</sup>. No party should engage or react blindly without sufficient knowledge, or risk themselves in the adventure without knowing the results or consequences<sup>502</sup>.

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<sup>501</sup> Code. monetary. French financier., art. L. 561-6, para. 2.

<sup>502</sup> M. AYUB, Understanding Islamic Finance, Chichester, John Wiley & Sons, coll. Wiley Finance, LTD, London, United Kingdom, 2007, p. 143.

## **b. Obligations specific to the Islamic financing provider**

### **b.1- Guarantee against hidden defects**

There are certain obligations of Islamic banking which highlights the ideological specificity of Islamic economics, hence the specificity of the obligations of Islamic finance provider and Despite the resemblance of obligations of Islamic banking with those of conventional banking, one does not cannot ignore the existence of a certain divergence and particularity between the obligations of each bank.

In general terms, the Islamic bank, a priori its compliance committee of Sharia "Sharia Board" or the Council of oUlemas is responsible for examining the validity of the contract with regard to the principles and rules of Sharia.

The Islamic financing provider may be bound by a warranty obligation against latent defects or interference in the client's affairs. It is important to note that these obligations are specific to some in the event of participation. In Islamic financing, particularly under the Musharakah contract, the bank plays the role of project partner. Thus, in its capacity as shareholder of the intermediary company, it must bear the related risks and guarantee the latent defects of all realizations of building projects.

This obligation is governed by article 1641 of the French Civil Code (2011), specifying that in a sales contract, any seller must guarantee "the hidden defects of the thing sold which render it unfit for the use for which it is intended (... )".

. But, the activity of the conventional bank does not essentially involve purchase and resale operations. Therefore, article 1641, mentioned above, does not impose on the Islamic bank the obligation of guarantee against defects. hidden but the guarantee is on the back of Musharakah's company,

### **b.2-. Interference in client's affairs**

Interference in the customer's affairs by the bank is a controversial issue in both French and Islamic law. Indeed, it is only a contractual obligation, weighing on the bank, depending on the nature of its intermediation in certain transactions. In other words, such interference may imply the bank's duty to

advise or warn the customer, or more broadly participation in the management of the project according to the financing technique in question.

Under French law, in terms of credit, the bank does not have to interfere in the choice or in the affairs of its client, for example by carrying out operations on its own on behalf of the latter or by encouraging people to take such and such a decision, this is the principle of non-interference by the banker, also called the principle of non-interference<sup>503</sup>

Thus, even if the bank must take into account the foreseeable risks of the transaction planned by the customer, it does not have to take the place of the latter in an assessment of the viability of the transaction to be financed, which seems to be a limit to the development of a duty to advise<sup>504</sup>

However, it must inform itself about its client's business before financing it, in order to avoid abusive support or financing granted to an illicit company. Thus, the bank is placed precisely in a position of neutrality.

This principle has a dual purpose: on the one hand, the protection of the client against

Interference by the bank in its own affairs and on the other hand, the preservation of the interest of the bank against actions for liability which could be brought against it in the event that the operation carried out proves to be detrimental for the customer or for the thirds.

Under Islamic law, the bank rigorously selects the projects it wishes to finance and constantly monitors the profitability of the project. To these ends, it intervenes as a shareholder by bearing the losses with its client<sup>132</sup> and sometimes insists on having a seat on the board of directors in the company in which it invests. It may also act as principal in an agency relationship with its client, the agent, and to that extent it may give instructions to him and may monitor the activities or the result of the investment.

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<sup>503</sup> –J. LASSERRE-CAPDEVILLE, “What remains in the 21st century of the banker's duty of non-interference? », *Banque & Droit*, n° 100, March–April 2005, p. 11–19

<sup>504</sup> –M. STORCK, “The obligation of information, advice, warning of the banker providing credit”, *Revue Lamy droit des affaires*, No. 31, October 2008, p. 84 et seq



Interference is not a rule in all modes of Islamic financing, it must be the subject of a common agreement between the parties. The conditions relating to the role of the bank and the extent of its intervention in the financed project must be well defined and precise in its agreement with the client.

Such an obligation raises issues particularly at the level of participation contracts. Thus, in a Musharakah contract, the bank and the client are partners in the project. Both have the right to share the management of the company, each in proportion to his contribution to the capital, unless they agree to choose one of them or a third party to assume the management.

In other modes of Islamic financing, such as murabaha, ijara, the bank is content to finance its client but does not actively participate in the management of the latter's affairs, thus dealing with commercial transactions in the form of debt financing.<sup>505</sup>

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<sup>505</sup> – M. K. HASSAN & M. K. LEWI, *Handbook of Islamic banking*, Edward Elgar Publishing, Inc., United Kingdom, 2007, p. 98.



## **B–Obligations of the beneficiary and the intermediary company of the Moucharaka F.I contract.**

### **1) Obligations of the beneficiary of the Moucharaka F.I. contract.**

#### **a– Reimbursement obligation.**

Like any contracting party, the beneficiary, in a financing contract, whatever the applicable law, is subject to general obligations, consisting of compliance with its contractual obligations, the obligations of good faith, transparency and loyalty. And in concluding the contract, he must have a serious intention to meet his contractual commitments and repay the debt on the due date.

In response to the information and advice obligations weighing on the bank, The borrower must read and understand all the terms and conditions of his financing, as well as observe them at all times during his financing<sup>506</sup>.

This resemblance of the obligations of the beneficiary in Islamic and conventional financing does not prevent the existence of certain obligations presenting nuanced differences.

In a credit transaction, during conventional financing, the reimbursement is made in nominal and fixed interest. The ability to repay the loan (debt ratio) usually determines the amount of the loan (line of credit) and some banks that even have rate mark-up schedules can raise the interest rate regularly when the borrower misses a loan. or more payments in order to penalize the latter<sup>507</sup>.

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<sup>506</sup> –Bank Negara Malaysia, Islamic finance, Banking info, House financing–I, 10 Oct. 2003, p. 15.

<sup>507</sup>– International Trade Center (ITC), The Islamic Banking System: A Guide for Small and Medium Enterprises, Geneva, 2009, p. 58

In the case of Islamic financing, the loan must be granted free of charge, being a Qard Hassan. This type of contract is mainly intended to help a person who is in financial difficulty and no profit should be made for the creditor except in the sense of doing a charitable deed.

However, the repayment obligation only comes into play in fixed-income commercial contracts, considered as Islamic “debt” contracts. However, it is not about taxation or charging an interest rate. This obligation is designed differently depending on the nature of the transaction in question.

In participatory arrangements such as the case of the Moucharaka contract, the customer shares the profits with the bank, so it is not a question of a reimbursement obligation as such. ; while in non-participatory arrangements, considered as commercial transactions and qualified as Islamic debt financing, the client reimburses the bank in installments, with the margin agreed in advance. This margin should not be considered an interest rate, whether fixed or variable.

Nevertheless, the time factor is not totally denied; it influences the price; but in Islamic financing, it is not subject to separate remuneration. By way of example, in the event of a digressive Musharakah, for the redemption of the bank's share by its associated client, the reimbursement will be made by putting into play put options in favor of the bank relating to tranches of participation thus allowing a staggered reimbursement of the crowdfunding at a determined price, and which can include a share of interest which will be taken into account in the calculation of the resale price of the bank's participation, but not of fixed interest since the resale price will have to be fixed and the variable part, for its part, will depend on the availability of cash flow generated by the revenues of the project<sup>508</sup>.

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<sup>508</sup>– P. GRANGEREAU & M. HAROUN, « *Financements de projets et financements islamiques : quelques réflexions prospectives pour des financements en pays de droit civil* », *Banque & Droit*, n° 97, sept. – oct. 2004, p. 54

In French law, the question arises as to whether an Islamic financing contract can be seen as a credit transaction within the meaning of French law. A credit transaction, as defined by Article L. 313-1 of the Monetary and Financial Code, assumes the provision of funds and a onerous aspect of the transaction. The article did not specify that this aspect must be manifested solely by a stipulation of interest, which makes it possible to include any form of direct or indirect remuneration, or even indexation of the capital<sup>509</sup>. The nature of the bank's commitment has an impact on the legal qualification of the operation, it may be a matter of future or immediate provision of funds. Islamic debt financing arrangements reflect a complex scenario, superimposing two levels of transactions and successive transfers of ownership within the framework of a triangular relationship: between the bank and the supplier of the underlying asset on the one hand and between the bank and the end customer on the other hand (murabaha, ijara, salam and istisna) and other arrangements (moudaraba, Moucharaka) adopt a participatory approach to profits and losses. Assuming that Islamic financing contracts can be qualified as credit transactions, consisting of the provision of funds for consideration, the question of the application of the TEG to these contracts arises. According to article L. 313-1, paragraph 1 of the Consumer Code. In addition, in the event of Moucharaka, the bank shares the profits and losses resulting from the financed project, the shares held by the contractors in the property and/or the financed activity can also be considered in the calculation of the TEG<sup>510</sup>

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**509-** R. GUILLEN, "Lexicon of legal terms", ed. Dalloz, 1995, thus quoted by C. SERHAL & I. CEKICI, "The application of the global effective rate to Islamic financing contracts", *Banque & droit*, n° 126, July-August 2009.

**510-** In its judgment, the first civil chamber of the Court of Cassation decided that "the cost of the shares whose subscription is imposed by the lending institution as a condition for granting the loan, constitutes costs necessarily entering into the calculation of the overall effective rate". Civil. 1st, Dec. 2010: no. 09-67-089, JurisData no. 2010-023213; Banking and financial R&D 2011, comm. 4, note N. MATHEY. C. SERHAL & I. CEKICI, "The application of the global effective rate to Islamic financing contracts", *Banque & droit*, n° 126, July-August 2009. F.-J. CREDOT & T. SAMIN, "Overall effective rate" in "Common law of credit techniques", *Banking and Financial Law Review*, No. 2, March-April 2011, p. 54.

Whatever the qualification given to a contract, the judge has the sovereign power to requalify the contract without stopping at the name that the parties had proposed, taking into account the will of the parties, but without distorting the contract if its clauses are clear and precise. The qualification attributed to the operation will determine the application or refusal to apply the TEG.

The difference in the object of reimbursement in the two forms of financing, Islamic and French, does not prevent the fact that in both systems, this obligation of reimbursement must be performed at the time agreed in the contract and that the banks encounter a significant risk. Credit, or even non-repayment.

Moreover, in the name of solidarity, Islam has encouraged those who are well off and those who are blessed with material wealth to help those in need. The Prophet encouraged creditors to show understanding, gentleness and magnanimity towards their debtors who find themselves in difficulty and in difficulty honoring their commitments French law does not exonerate the borrower from his repayment obligation,

But the penalty is rather, in practice, at the discretion of the bank and its willingness to grant a payment period to its defaulting borrower or in difficulty to repay the credit. Most often, this delay is accompanied by an increase in the interest rate. Notwithstanding, the bank may apply a late payment penalty to its client. Such a practice in Islamic<sup>511</sup> and French law gives rise to certain doctrinal controversies.

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**511** Z. CHAABANE, commentary on the article by M. AL-ZORKA "Is it acceptable under Shariaa to impose compensation for the creditor because of the debtor's procrastination? », Research Journal of Islamic Economics, vol. 2, no. 2, 1985, p. 217. See also T. USMANI, An introduction to Islamic finance, Idaratul-Ma'arif, Karachi, Pakistan, 1998, p. 94

## **2) Obligations of the intermediary company in MOUCHARRAKA real estate financing contract towards the Islamic bank**

has. The obligations of the intermediary company to be a legal personality according to the Musharakah mechanism, permanent and degressive

The classic concept, at the base of the Musharakah contract, practiced in Islamic banks is the sharikat al ‘inan, “the limited association”, which allows several partners to associate by participating each in the capital of the project in different proportions<sup>408</sup>. In classical Islamic law, there is no concept of a company as understood today, endowed with a legal personality, limiting the liability of shareholders. In addition to the legal implications that this raises in terms of possible research of the responsibilities of the partners, it causes the automatic dissolution of the company on the death of one of the partners. Today, legal personality is allowed in Muslim countries, the rules for the formation of companies being most generally derived from the company law of Western countries<sup>514</sup>.

The MOUCHARRAKA allows the financing of all types of projects, provided That they conform to Islamic ethics. In a Moucharaka, the banker as contributor to the capital of the company fully participates in its management, the expertise he provides can also justify that his share of profit is greater than his capital contribution.

As part of a permanent association, the banker and his client, Contractor, remain bound until the completion of the project, the dissolution of the Company or the resale of shares by the bank<sup>515</sup>

Alongside this simple form of association, contemporary jurists (Mainly Hanbalites) created an original form of Musharakah, decreasing.

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514 JAHEL Selim, “Business Law and Religions”, International Review of Law Comparé, 2001, volume 53, N°4, P.17, and AAOIFI, 2004–5A, Standard on moucharaka,

515 CAUSSE–BROQUET Geneviève, Islamic finance, Paris, Revue Banque Edition, 2009, “Finance Markets Collec

his legal instrument sets up two or three contracts (Musharaka, sales and leasing contracts), which must be distinct on pain of nullity. The Moucharaka, moutanakissa<sup>516</sup> is used most of the time in our context of financing construction projects or the renovation of housing, but the creation of this type of Musharaka, is indicative of the difficulty that Islamic banks have in developing a model based on the strict association. It also raises many questions with regard to classical law. Thus, by entering into a regressive Musharakah relationship, the bank and its client do not want the association as such, but simply a legal means of borrowing on credit. This is sufficiently clarified by the necessary prior fixing of the income generated by the project, income the sharing of which will be used to disinterest the two partners and the fact that the project cannot generate any loss other than the non-payment of the leasing by the client. In addition, the intermediary company has the obligation to ensure the binding nature of the leasing and the sale of the shares, which will therefore be materialized by promises of purchase and sale.

b- the obligation of financial intermediation

In the Moucharaka, the determination of profits is freely negotiable by the partners, but must necessarily be proportional (prohibition of a lump sum)<sup>517</sup>, the support of losses is on the other hand necessarily proportional to the share of the capital invested by each partner. The social capital of the Musharakah can, in the unanimous opinion of the schools.

Be contributed in cash or in the form of goods or merchandise.

The capital contribution can also be made by issuing securities, the liability of the subscribers being limited in proportion to their share of the capital. These securities are negotiable and any partner can dispose of them freely.

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<sup>516</sup> –BENDJILALI Boualem & KHAN Tariqullah, Economics of diminishing Moucharaka, Jeddah, IRTI, 1995, 57 p

<sup>517</sup> –AYUB Muhammad, Understanding Islamic finance, Southern Gate, Chichester, West Sussex, England, John Wiley & Sons Ltd, 2007, “Wiley Finance Collection”, p. 317

However, insofar as the Sharia does not authorize the sale of money claims only at their nominal value, it is necessary if the capital is composed of tangible assets and liquid assets, that the proportion of assets tangible is greater than 50%. The Musharakah suffers in practice from the many constraints produced by its functioning. The banks, as partners in the project, must carry out a precise study of the project, monitor its progress, in short be fully involved, whether at the financial level or at the level of Human Resources.

However, in practice, apart from the specific case of investment banks dealing with large-scale projects, banks do not have the know-how required to multiply small-scale equity investments.

Moreover, the principle of this type of partnership highlights the difficulty for banks to commit to it in view of the asymmetry of information they release, and on which it is worth dwelling for a moment.

As part of financial intermediation, the bank provides capital to its customers and resells these receivables on the financial markets. The relationship that it maintains with its customers and the means of information at its disposal legitimize its function as a financial intermediary since it is best equipped to determine the quality of the receivables it has and thus enable their exchange. However, from a certain point of view, the interests of the banker and his client are opposed. The banker wishes to lend money against a fair price.

To do this, he must ensure the viability of the planned project, the capacity to Reimbursement of the borrower, of his competence in the conduct of a company for example and set a price accordingly of the elements of which it has Knowledge. The borrower wishes to borrow from him at the lowest cost and will tend as far as possible to conceal a certain number Information available to him and which could increase the price of the credit.



However, within the framework of the Moucharaka, the intermediary company the Bank shares profits and losses whereas conventional credit or its Islamic equivalents involve fixed repayment.

the bank in this case, which will share with it any losses. It is therefore to be feared that the banks which market the Moucharaka, find themselves in a typical case of associating financier and commercial shareholder.

The Moucharaka, presenting a greater conformity to Islam than the murabaha, for example, according to the confessions of the jurists of the Islamic banks, one could suppose that the customers will favor it in this respect.

Moreover, the mode of financing used affects the extent of the rights of the bank. More particularly in partnership financing, such as the Musharakah contract, the Islamic bank becomes a direct investor, and has the right to participate in the project submitted to it. In its relationship with the intermediary company by making itself a real partner <sup>518</sup> And with its client, a partner in the moucharaka <sup>519</sup>. Each party then feels the need to ensure compliance with contractual commitments by the other party, the legislator has involved the intermediary company (being a construction company or a building investment project negotiator), as it is a party to the real estate financing agreement, and to have obligations and rights towards others parties to the same agreement, among its obligations the realization of the real estate investment project and the obligation to reimburse the financing to the Islamic bank with a share of gain in case of profit.

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**518–** J. CHARBONNIER, *Islam: law, finance and insurance*, pref. L.A. BARRIERE, ed. Larcier, Boeck Group, Brussels, 2011, p. 101.

**519–** K. JOUABER-SNOUSSI, *Islamic finance*, ed. Discovery, coll. Landmarks, Paris, 2012, p. 25.



## CHAPTER 2 :

Legal identity of the Moucharaka contract  
In real estate financing  
Between  
partnership agreement & trust agreement

## SECTION 1. originalities of company created by Moucharaka act of F.I.

§1- originality of the company created (in case the investor is an individual or the bank is participating in an existing company) by Moucharaka FI act

A- Rights and duties of the partners and managers of the company created by Moucharaka deed of real estate financing.

1) company created by Moucharaka deed of real estate financing.

a- Its legal nature

On the one hand, the most famous question has been to ask whether the Musharakah society is a person or a property.

in the case where the Moucharaka company has legal personality, an alternative is felt: is the Musharaka company a person or a property.

in French law the company Moucharaka is a person given that it is a company according to article 1842 paragraph 1 of the civil code providing: "companies other than the joint ventures referred to in chapter III enjoy legal personality from their registration. That the Moucharaka society can be a good is more surprising since the good is classically defined as an object having a value, while the Musharaka society is a person and corresponds to a subject of law. As appealing as the idea of presenting the Moucharaka company or simply social rights as property seems to be contradicted by the contractual basis of the company, in addition the social rights represent a set of claims of the partner on the Moucharaka company<sup>520</sup>.

In addition, Moucharaka is in the position of debtor of financial rights (dividends, etc.) for the benefit of the partner.

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<sup>520</sup> – Same meaning: F.X.LUCAS, "Return to the notion of security", Bull. Joly Societies, 2000, p.765.

he Moucharaka company is therefore not a good but a debtor of the partner and this part of the link represented by the action or the share. This nature is confirmed by the formalism of transfer of the shares of the Moucharaka company.

However, the Musharakah company being a person and not a property does not lead to the conclusion that the shares or shares are not property, these are concretely representative of a claim, and as such they are transferable <sup>property</sup> <sup>521</sup>

On the other hand, is the Moucharaka company a contract company or an institution company <sup>522</sup>?

In French law the contractual nature of the company is based on article 1832 paragraph 1 of the civil code which stipulates that the company is based on a contract between the partners, American theories evoke the idea of a contract between the partners of on the one hand and society on the other, or between society and the State.

In reality the company can result from the act of will of a single person which weakens the contractual conception in the company, one can also note a weakening of the contractual nature of the company in other European laws under the effect Community directive no. 89-667 of December 21, 1989 authorizing single-member limited liability companies.

The institutional nature of the society also finds further support in the repeated use of the term “instituted” in article 1832 of the French civil code.

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<sup>521</sup> B.REMY, “Investor exit clauses and article I of the first additional protocol of the EDH convention”, Bull. Joly Societies 2010, p.594.

<sup>522</sup> an institution can be defined as “a human community organized with a view to achieving a higher end and within which individuals accept or submit to the existence of a common authority” (G.CORNU, Vocabulaire juridique, Association Henri Capitant, PUF, 8 edition 2000)

Because the Moucharaka company is defined as a contract between the partners who wish to invoke the obligation which weighs on the parties to an agreement to perform it in good faith, so this company is widely considered today as a means, a technique of organization of the company<sup>523</sup> or more simply a legal instrument of Islamic banking financing of real estate investment with the aim of a financial return investment

Certainly identifying the nature of the Moucharaka society is identifying its elements allowing it to be qualified, and these constituent elements are: the contributions, the objective of the parties, commitment to contribute to profits and losses and the will to participate in society. on an equal footing between investor and Islamic bank, their identification is described in the statutes of the Moucharaka company as Moroccan law predicts according to the specificities made by the investor and the Islamic bank.

But in a decreasing Musharakah contract, the Moroccan legislator has given the possibility that it is not with a company statute according to Moroccan company law or in French law the courts have distinguished according to whether the qualification of the company is sought by the members of the group. or by third parties. in the first case, the judges require that all constituent elements be established by the plaintiff when the existence of a company is claimed by a third party, the courts are satisfied with the sole demonstration by the plaintiff of a simple appearance of a company<sup>524</sup>; this which resulted for the Decreasing Moucharaka in real estate financing by the existence of statutes French jurisprudence makes it and qualifies it as a Moucharaka company with real estate financing according to the rules of company law.

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**523** -J.PAILLUSSEAU, "the foundations of modern corporate law", JCP ed. E 1984, I, 3148;

**524** -A.VIANDIER & J.J.CAUSSAIN, No. 1, CA Saint-Denis de la Réunion, Nov. 15, 1992, JCP ed. E, 1993, I, 215, chron.

However, this joint exercise agreement, which is similar to the corporate form, will aim to avoid corporate formalism. Given the risk of reclassification as a joint venture, the parties will take care to clearly indicate to third parties the non-societal nature of their grouping. if the judges are not necessarily bound by the qualifications of the parties (according to article 12 paragraph 2 of the French code of civil procedure<sup>525</sup> . The expressed absence of any affectio societatis will be an obstacle to requalification.

## **b-powers of the leader and control of the Moucharaka company**

### **b.1- powers of the leader of the Moucharaka company**

the legal manager of the Moucharaka company is chosen by the partners (investor and Islamic bank) and will have on the one hand a power of management within the Moucharaka company which allows him to impose certain organizational and disciplinary measures .this power is exercised within the legal framework governed by company law, labor law and tax law. moreover, this manager will be endowed with a power of representation vis-à-vis third parties. This power will be exercised in the context of contracts, correspondence or declarations that she will sign on behalf of the company. In the event of multiple managers within the same Moucharaka company, each of them separately holds all powers vis-à-vis third parties. the manager's power may be affected by certain limitations under company law.

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**525-** this article specifies that the judge.: "cannot change the name or the legal basis when the parties, by virtue of an express agreement and for the rights of which they have free disposal, have bound him by the qualifications and points of law to which they intend to limit the debate"

- the first limitation is compliance with the conditions of legality common to all legal acts verified by Islamic banking law.

- limitation concerning the corporate purpose, i.e. the activity of the company as planned by the partners (investor and bank

Islamique) in the statutes, which is in the Musharakah real estate investment company the investment in real estate.

however, in a limited liability company, the managers commit the company for acts falling outside the corporate purpose, these acts will thus be valid and enforceable against the company. single social real estate investment the manager of this limited liability company will not have the privilege of contracting outside the corporate purpose in the absence of a risk of personal legal liability towards the company, in fact of a lack of bad faith in the management of the company's assets.

This risk in the structure of Moucharaka real estate investment companies with unlimited liability is non-existent because these companies are not bound by acts concluded outside the corporate purpose. Third parties can only act in liability against the manager. Third parties must be vigilant when dealing with representatives of this type of company and ensure that the planned acts fall within the scope of the company's corporate purpose.<sup>526</sup>

- limitation imposing that the act concluded by the manager does not affect the powers conferred on the other organs of the company (board of directors, general and ordinary meeting, etc.)

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<sup>526</sup> Cass. Com., February 26, 2008, Dr. companies 2008, n° 149, note R. Mortier

Limitation which requires that the act be in accordance with the corporate interest, the act contrary to the corporate interest would be unenforceable against the Moucharaka real estate investment company, as in French law Article L.242-6 of the Code of commerce penalizes the fact by:

“the chairman, directors or general managers of a public limited company to make, in bad faith, of the property or the credit of the company, a use which they know is contrary to the interest of the latter, to personal funds or to favor another company or business in which they have a direct or indirect interest”

- limitation of the capacity to act <sup>527</sup>, with regard to the capacity, the assessment of the powers of the manager of a Moucharaka company must be made in application of the *lex societatis*. that is to say according to the law of the company of which the manager is a representative. thus, in the event that an American company concludes a rental contract with a Moroccan lessor, the latter should ensure that the provisions of American law provide that his co-contractor who is the director of the American company has the power to sign this contract.

#### **b.2- control of the Moucharaka company**

the management of the Moucharaka real estate investment company is subject to a multitude of controls, some of which are carried out internally, they are implemented by the bodies of the Moucharaka company: assembly of partners, board of directors or council supervision in the public limited company; they may come under the prerogatives recognized individually by certain members of the Moucharaka society: administrators or partners.

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<sup>527</sup> regarding a declaration of claims: Cass.com, June 22, 2010, Bull. Joly Societies 2010, p.755, § 159, note J.L VALLENS.

The Islamic bank partner in a Moucharaka real estate investment company has control apart from its participation in the shareholders' meeting, it has certain control prerogatives. These prerogatives derive their strength from its large fraction of capital held and it can:

- obtain communication of social documents
- ask written questions to the leaders
- in the event of an emergency, request the meeting to be convened by justice (in the French commercial code, see articles L.223-27 and L.225-103)<sup>528</sup>
- the director representing the Islamic bank in a public limited company receives from the chairman or the general manager all the documents and information necessary for the accomplishment of his mission (French commercial code article L.225-105)<sup>529</sup>.

In addition, the external control of the Moucharaka company is carried out by people independent of the company. In some companies, it is firstly a question of the auditor who, beyond the certification of the accounts of the establishment of certain reports and the triggering of an alert procedure is required to reveal to the king's prosecutor any delicious facts of which he may become aware as part of his mission. It is in addition to the judge who can control certain acts, particularly in the context of a liability action linked to a mismanagement. Managers and partners can face conflicts of interest when their own interests collide with that of the company or the common interests of the partners.

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<sup>528</sup> –T.tom. Paris, 3 Dec. 2003, Miguet and ADACTE c/Eurotunnel, JCP éd. E 2004, p. 87, No. 71, note A.VIANDIER.

<sup>529</sup> –H. LE NABASQUE, “COMMENTARY of the main provisions of law no. 2003-706 of August 1, 2003 on financial security relating to company law”, Bull. Joly Societies 2003, p.859.



These conflicts often arise on the occasion of agreements signed by the company with a manager or a partner. These agreements are subject to very rigorous control in the Moucharaka company, some agreements are prohibited, others are subject to authorization or communication. . Failure to observe this control may in particular lead to nullity when the agreement has produced harmful consequences for the Moucharaka company.

This conflict arises when the partner carries out operations on securities of the Moucharaka company to the detriment of his partners or concludes contracts with third parties by taking advantage of information collected within the framework of his social functions, or transfers his participation to another partner and who alone is aware of certain information on the real situation of the Moucharaka company which would be likely to worry the transferee partner, certain authors affirm this on the grounds that the "concealment of the conflict of interest betrays the spirit of trust and cooperation between associates: allowing silence would give license to exploit this trust for personal ends<sup>530</sup> .

Conflicts are governed in Musharakah companies listed on the stock exchange by special rules or in other Musharakah companies by an obligation of loyalty which weighs more heavily on the manager than on the partner.

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<sup>530</sup> -D.SCHMIDT, "conflicts of interest in public limited companies", Joly ed., 1999, p.33 n°17.

## **2) Rights and duties of the associates of the Moucharaka company.**

### **a– the rights of the partners of the Moucharaka company.**

#### **a.1–the political rights of the partners of the Moucharaka company.**

The partner of the Moucharaka company whose object is real estate investment or others has political prerogatives, including:

##### **a.1.1– Right to remain associated in a Moucharaka company**

The right to remain associated is self-evident because it comes under the respect due to property.<sup>531</sup> and remains a right that is affected by various infringements. These infringements are the result of statutory exclusion clauses by the effect of which a partner may find himself excluded in the event of a violation of certain of his obligations. Jurisprudence has undertaken to limit the use of these clauses when they are put in place. A court of appeal considered that the introduction of an exclusion clause in the articles of association requires the unanimous agreement of the partners<sup>532</sup>. these infringements are also legal under French law, listed companies are thus aware of the squeeze-out procedure according to article 237-1 and following of the AMF General Regulations deemed to be in accordance with the EDH<sup>533</sup> convention; the legislator in article L.227- 16 of the Commercial Code authorized an exclusion mechanism in simplified joint-stock companies. Also, case law has ruled that exclusion can be based on the practices of large distribution<sup>534</sup>

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<sup>531</sup> judgment along the same lines: Cass.com., September 23, 2009, No. 8-18187.

<sup>532</sup> Paris, March 27, 2001, Bull. Joly Societies 2001, p.89, §18, note H.LE NABASQUE.

<sup>533</sup> Cass.com. , 29 APRIL 1997 , Bull.civ. Societies IV, No. 108.

<sup>534</sup> Grenoble Court of Appeal, September 16, 2010, JCP ed. G 2011, 273, note P. MOUSSERON.

### **a.1.2– Right to information of the partner in a Moucharaka company**

the legislator has ensured the partners' right to information by means of permanent information, such as the case of the Moucharaka company type public limited company according to article L.225-117 of the French commercial code. right to specific information on the occasion of certain decisions which is seen in article L.238-1 of the commercial code vivified by the law of May 15, 2001 conferring on the partners the possibility of asking the court to order under penalty the production of documents relating to the corporate accounts.

### **a.1.3– Right to attend meetings**

In French law in its civil code article 1844 paragraph 1 recognizes this right which is composed of three rights:

- The right to participate in meetings includes the first right of the shareholder to attend this prerogative forced by the NRE law of May 15, 2001 which abolishes a minimum number of shares to participate in meetings;
- The right to be represented, which is required by article L.225-10 of the French commercial code providing that: "a shareholder may be represented by another shareholder or his spouse" but the right to be accompanied, for example by a lawyer is prohibited except with statutory authorisation, this right is not granted on the grounds that the company (Musharaka also) is not a judicial or statutory body<sup>535</sup>;
- The shareholder's right to vote as the shareholder's right to vote is protected by criminal provisions;

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<sup>535</sup>– Cass.com., May 10, 2006, Rev. .Soc.2007, P.70, note L.GODON.

Article L.242-9 of the French Commercial Code sanctions certain transactions relating to voting rights. . this right was confirmed by the Court of Cassation which ruled that “every partner has the right to participate in collective decisions and to vote and that the articles of association cannot derogate from these provisions”<sup>536</sup>.

But in the case of a Moucharaka real estate investment company, the investor who commits upon the incorporation of the company to issue a vote in favor of certain measures (fund appeal, strict object of the investment in real estate) which affects its freedom to vote as is the case with many voting conventions which have just affected the freedom to vote.<sup>537</sup>

## **a.2-The financial rights of the partner in a Moucharaka company.**

### **a.2..1- The creation of the Moucharaka company**

the first financial right enjoyed by the partner consists in having rights proportional to his contributions according to article e 1843-2 of the French civil code (2011); and these social rights will be either social shares or shares. When the contribution will be made in industry, these social rights will be according to article 1843-2 paragraph 2 of the French civil code "shares giving rise to the right to share profits and net assets, subject to contributing to losses" .

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<sup>536</sup> -Cass.com. , February 9, 1999, Bull. Joly Societies 1999, p.566§ 122.

<sup>537</sup>- P.MOUSERON, “corporate agreements”, LGDJ, business law collection, 2010, no. 419 and S.

a.2..2- during the financial year of Moucharaka

a.2.2.1-the right to the profits of the Moucharaka company

The right to profits is exercised first on the share of profits that the partners decide to distribute at the annual meeting. It is the right to dividends, which are sums available after absorbing previous losses and endowed with reserves. legal and statutory and paid all the annual dues to the Islamic bank associated with the Moucharaka company. on the other hand the distribution of dividends requires a favorable vote of the majority of the partners even if one could prefer to reinvest the profits in the company, in this case there is no distribution therefore there is no dividend but in Moucharaka the statutes generally can decide the moment of payment first with a priority payment to the Islamic bank partner to anticipate the payment of the funds grant by it what is called precipatory dividends and who is called during the profits accumulated by the company from previous years the right to reservations.

a.2.2.2- the right to alienate social rights

the partners have the right to alienate their social rights by pledging them, the transferors to a third party or to the company in which case we speak of withdrawal, except that one company Moucharaka the investor undertakes to participate in a project of real estate investment which is a beginning and an end therefore the withdrawal of the investor's company is unacceptable because of its commitment to participate in this real estate investment, the conditions imposed on the exercise of this right of withdrawal are required by the bank participatory to guarantee the continuity of the investment project at its end.

### **a.2.3– at the end of the social life of Moucharaka society**

The partner can benefit from the right of liquidation of the Moucharaka company. This right is constituted by a share of the liquidation bonus after the investor has been able to repay his due to the Islamic bank, the financial backer of the Moucharaka company. partner may benefit from a preferential allocation on certain assets in accordance with the rules governing the sharing of partners. And in the event of dissolution due to a merger between two Moucharaka companies, the partners of the absorbed company can claim the status of partner of the beneficiary companies under the terms of the merger treaty.<sup>538</sup>

### **b– the duties of the partners of the Moucharaka company**

#### **b.1– the legal duties of Moucharaka partners**

At the beginning of the social life the partner has an obligation to release the contributions that he has subscribed, that is to say that he has undertaken to pay. in various forms either a contribution in kind the release will consist in the transfer of the right of ownership and the effective provision of the goods brought (example building land ..., thing generally done by the investor in contract Moucharaka of real estate financing), or a contribution in cash the release can be an ordinary form ( check remittance, bank transfer, provision..., generally done by the Islamic bank under a Musharakah contract) or extraordinary (compensation with a debt of the provider on the company). With regard to a contribution in industry, the release will consist in the realization of the work object of the contribution (generally in the case of Moucharaka of real estate financing the investor who is an entrepreneur can be his contribution in industry the work of building or fitting out or rehabilitate real estate investment.

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<sup>538</sup> the court of cassation ruled that once the merger has taken place and the company has disappeared “any assignment of shares, shares or rights conferred by these titles was void for lack of purpose” cass.com., May 26, 2009 , No. 08-12691; Dr. companies August September 2009, n° 152 , obs , M.L.COQUELET .

with regard to the contributor in kind, article 1843-3 of the French civil code distinguishes according to whether the contribution is in ownership or enjoyment of a thing of kind on the one hand or enjoyment of an individualized in the first case 1 The contributor is a guarantor towards the company as a seller towards his buyer, the legal guarantee against eviction and hidden defects will benefit the company Musharakah. In the second case, the bringer is a guarantor towards the company as a lessor towards his lessee. and for the contributor in industry has an obligation of non-competition at his expense <sup>539</sup> .

Similarly, to the extent that the partner is a contractor in a Moucharaka real estate investment company, he can be imposed the duties that are met with respect to any contractor in application of the articles of the second book of the law of obligations and contracts in the Morocco while applying article 1134 paragraph 3 of the French civil code. While case law has remained relatively discreet with regard to the identification of new duties between partners<sup>540</sup>, The debts of the Moucharaka company, that is to say the commitments made by the company to third parties. The scope of this obligation is limited in so-called limited liability companies (limited liability company, public limited company, simplified joint stock company) and this type of company which is taken as Moucharaka real estate investment company so that the participating Islamic bank in capital in case of losses or deficit of the Moucharaka company will not be put in the obligation to the debts since it is associated e in company Moucharaka of real estate investment.

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<sup>539</sup>– L.GODON, “the obligations of the partners”, *Economica*, 1999, p.32, n° 35 et seq.

<sup>540</sup>– Y.GUYON, “Treaty of contracts” companies, *Statutory adjustments and agreements between partners*, LGDJ, 5th edition 2002, n° 35 and s

however, in so-called unlimited liability companies (general partnership, most civil companies), the partners can bear the social debts.<sup>541</sup>

At the end of the social life of the Moucharaka investment company and when this end is linked to poor results, the partners are obliged to contribute to the losses. That is to say that the partners are required to pay the negative balance that appears at the time of the dissolution of the company.

This obligation exists for all companies under French law insofar as article 1832 paragraph 3 of the civil code stipulates that: "the partners undertake to contribute to losses". this duty does not have the same scope for all companies in the case of limited liability companies this obligation to contribute to losses is capped at the amount of the contributions made by each partner, according to articles L.223-1 and L.225-1 of the Commercial Code of the French law of July 24, 1966 concerning respectively limited liability companies and public limited companies specifying that the partners "bear only losses up to the amount of their contributions", in unlimited liability companies or indefinite this ceiling does not exist.

#### b.2- the conventional duties of Moucharaka partners

the legal duties of the partners can be modified by contracts between partners, the parties can specify the terms of their legal duties. they can thus modify the methods of information in the event of threshold crossing<sup>542</sup>, make voting compulsory, provide for an unequal contribution to losses<sup>543</sup>, or require partners to respond to calls for funds during their social life. Also the Islamic bank imposes on its investor partner an inalienability clause which imposes on the investor an obligation not to transfer his social rights during the duration of the real estate investment.

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<sup>541</sup> Articles L.221-1, 1857 and 1858 of the French civil code, article 15 of the decree of March 23, 1967

<sup>542</sup> -P. MOUSSERON, "the conventions sociétaires", LGDJ, coll. Business Law, 2010, n°372 and s.

<sup>543</sup> -H.LE NABASQUE & M.BARBIER, "Leonine clauses", Dr. Societies, Practical Acts, 1996, n°29, p. No. 33.



**B-financing and disappearance of the Moucharaka real estate investment company:**

**1) financing and remuneration of the company**

**a- financing of the Moucharaka real estate investment company**

**a.1-own financing of the Moucharaka real estate investment company**

Company law offers two ways of using lenders similar to the use of financing a Musharakah contract of real estate financing:

- the partner's advance is a first financing tool in the form of a loan made by partners, and which is technically called cash advance or current account contribution. This expression is more exact in the case of a Moucharaka company because the counterpart of the remittance of money is constituted by social rights.

the advance of partner has several advantages, it is very flexible in its implementation and its operation governed by article 1 of the decree of the French State n ° 92-704 of July 23, 1992 which limits advances to two times the share of the capital held, for the partners working in the company and once this share for the partners not working in the company the partner's advance can be used in the case of a Moucharaka real estate investment company such as the fund dedicated by the Islamic bank to this company in the first place and can serve as working capital for the company.

- the obligatory loan is a loan contract subscribed by a company at the end of which the credit of the lender is represented by a negotiable title of debt called obligation, of the same the company Moucharaka of real estate investment subscribes a loan becoming a title of debt negotiable belonged to the Islamic bank.

This negotiable title or obligation confers at first sight more limited prerogatives than those granted to shareholders insofar as their holders cannot vote at meetings

Shareholders, however the bondholders who may meet in the context of bondholders' meetings. this assembly of bondholders will have to deliberate on all measures relating to the defense of the bondholders and the execution of the loan contract as well as any proposal tending to modify the contract (according to article L.228-65 of the French commercial code). <sup>544</sup>

Hence similar prerogatives or shareholders giving the imprint of obligation a similarity to the financing by Moucharaka contract of real estate investment which is simplified by a loan from the Islamic bank to the Moucharaka company of real estate investment in return for its subscription of obligation which are its shares in this company. with a major difference and that the investor lender on the one hand is financially assured of a pre-established remuneration corresponding to the payment of the maturities of the compulsory loan except in the event of financial difficulty of the borrowing company it does not support a strong social hazard unlike the Islamic bank partner in the event of a Moucharaka ell company e supports social risks in the event of losses.

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<sup>544</sup> P.MOUSERON, "Turbulence around bond lenders", Bull.Joly Sociétés 2010, p.200, §44.

### **a.2– mechanism for prohibiting and authorizing financing of the Moucharaka real estate investment company**

the mechanisms of prohibitions which target a possible transferor or a possible transferee the partners of the Moucharaka real estate investment companies, especially the participatory Islamic bank, limits the exit of the investor on leaving the said company because all the risk study carried out by the bank takes into account the associated partner and its assets, and this limitation is in the form of an inalienability clause or a limitation on entry in the form of a non-aggression clause:

- the inalienability clause draws its strength from the fact that it has an effect on social rights. this effect indirectly affects the partners who will not be able to transfer the inalienable rights whether by way of assignment, contribution or exchange. It is also felt by third parties who, provided they have been informed, will not be able to seize these rights. These clauses are authorized in French law in article L.227-13 of the commercial code and by analogy with article 900- 1 of the Civil Code applicable to bequests, case law validates them provided that they are limited in time and justified by a serious and legitimate interest<sup>545</sup>, which is the case in a Moucharaka company because its time is limited and legitimized by the Moucharaka contract between the Islamic bank and the partner and having a serious interest because the partnership in Moucharaka company and linked to the personality of the partners and the object of investment and also linked to this partnership. While the effectiveness of these clauses is ensured by certain texts<sup>546</sup>;

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<sup>545</sup>– Cass.civ. October 1, 31. 2007, JCP edition. N, 2008, n° 1064, note R.MORTIER.

<sup>546</sup> –Article L.227-15 of the French Commercial Code relating to simplified joint-stock companies provides that: "Any transfer carried out in violation of the statutory clauses is void"

The entry ban which is the non-aggression clause requiring a person not to buy social rights from a given company. this clause is used to preserve the balance of power in the capital of companies. the Paris Court of Appeal thus sanctioned on January 30, 2002 the alleged non-execution of a non-aggression clause providing for "a prohibition on taking direct, indirect or intermediary interests in the capital of the other"<sup>547</sup>. hence the beneficiary of the clause criticizes his partner for having breached this obligation.

These prohibition mechanisms suffer from the limits placed on their effectiveness in the event of non-performance by the investor; legal remedies are indeed too slow to produce their expected effects. The authorization mechanisms are two the first is:

- Approval clauses are often statutory stipulations under which the transfer of social rights is subject to the prior agreement of a body or a person. these clauses are similar to the physiognomy clauses by which a party to a contract wishes to control the changes of associates of its partner French regulations impose an approval procedure in the event of a limited liability company (article L.223-13 of the code commerce and in public limited companies, the approval clauses are optional (article L.228-23 of the commercial code) .
- The sanction for the violation of the approval clauses is sometimes explicitly provided for by the texts of French law in article L.228-23 of the commercial code states that "any transfer carried out in violation of a clause appearing in the statutes is null", in the case not provided for by law, damages are naturally possible.

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<sup>547</sup>– Cass.com., December 14, 2004, Cora c/Casino GUICHARD-PERACHON, unpublished.

The nullity of the unauthorized assignment can only be pronounced if fraud is established. such as the case of a brother wanting to sell his shares to his sister but feared to come up against a refusal of approval. benefiting from the provisions of article L.228-23 of the commercial code which exempt the approval an ascendant or a descendant, the brother sold the shares to his mother who resold them shortly afterwards to her daughter<sup>548</sup>. thus the Court of Appeal of Lyon to consider in connection with an approval introduced in a car dealership contract "that if the right of approval is discretionary it must not be arbitrary"<sup>549</sup>

- The indemnification clauses under this mechanism, the investor partner in a Moucharaka real estate investment company may perform his social obligations in two ways, on the one hand by retaining his social rights, on the other hand by assigning them and paying a compensation which is the sum due by the investor to the Islamic bank participating in the Moucharaka company.

This mechanism is distinct from the penalty clause insofar as the indemnity is not the sanction of non-performance but a means provided for performing an obligation.

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<sup>548</sup>– Cass.com., January 21, 1997, RTD civ. 1997, p. 652, obs.J.MESTRE

<sup>549</sup> – CA LYON, 3rd chamber, May 17, 2001, opel France v Automobiles France finance, distribution letter, December 2001, Judgment quashed on another point by cass.co, July 2, 2002, LPA, October 28, 2002, p. 15, obs. P. MOUSSERON.

## **b– remuneration of the Moucharaka real estate investment company (SMII)**

### **b.1– Remuneration of contributors**

The contributors receive rights in return for their contribution this consideration is not remuneration this is understood as enrichment, will come from dividends these are defined as the fraction of the profits that the company allocates to its partners the dividend is subordinated the existence of a distributable profit

in the classification of goods the dividends have the legal nature of fruits they are the result of what a thing (the action) releases periodically in a significant alteration of its substance in this the dividends are distinguished from products which have no no periodicity and whose realization alters the substance of the thing (example the liquidation bonus is a product) this qualification is important when social rights will be the subject of a dismemberment between a bare owner and a usufructuary which is often the case in the event of the death of a partner, the surviving spouse benefiting from the usufruct and his descendants from the bare owner, the fruits indeed benefit the usufructuary while the products benefit the bare owner accordingly when an action will be dismembered between a bare owner and a usufructuary the first will benefit from the liquidation bonus and the second from the dividends except in Islamic law the stipulation is contrary therefore in the event of e SMII on the death of the partner the descendants and the spouse have fruits and products according to their share of inheritance governed by Islamic law in Islamic countries and in the case of Muslim partners, on the other hand, in the opposite case, company law and law apply. Civilian of the residence of the company Moucharaka F.I.

## **b.2– the remuneration of the manager of the company MII**

The manager can receive a social remuneration treated for tax purposes as a salary, the fees designate the remuneration paid to liberal professionals the term royalty shows on the one hand the repetitiveness of a payment and the independence of its beneficiary. these royalties particularly used in the context of remunerating the provision of intellectual property rights or the provision of administrative services. .in certain cases the work of the partners may be remunerated in social rights such as the case of professional civil companies in application of various decrees of application of the French law of November 29, 1966, these decrees state that "if the constitution of reserves by means of non-distributed profits or the release of capital gains from assets due to the industry of the partners allows it, the share capital is periodically increased and the shares thus created must be allocated to all the partners, including to those who brought only their industry »<sup>550</sup>

Given the advantages offered by capital or work, companies offer a wide variety of statuses; this variety is exploited within liberal companies, architectural firms and topographical firms or engineering firms; can thus propose the status of associate architect or associate topographer or associate engineers so his associates will be remunerated by fees.

This is applicable especially in the case of a Moucharaka F.I company with an external manager of the company and an architect, topographer or engineer profession. Or simply the associate manager who is the associate investor or a representative of the Islamic bank associate.

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<sup>550</sup>– J.J.DAIGRE, "SCP: the industrial partner is a potential capital partner", Bull. Joly Société, 1998, p.1131, § 349.

## 2) the disappearance of the Moucharaka real estate investment company

### a – the causes of the disappearance.

#### a.1-Desired disappearances.

Disappearances result from the will of the partners expressed at the time of the creation of the company Moucharaka F.I. According to article 1844-7 of the French civil code: “the company ends:

1- By the expiry of the time for which it was constituted, unless extended in accordance with article 1844-6;

2- by the achievement or extinction of its object”

In addition, article 1844-7 states in its 8° that the company also takes action “for any reason provided for in the articles of association”.

We note that the will of the partners is taken as the reason for the expiry of the MII company, and the reason for the expiry of the SMII at the time of creation is according to the four cases:

- 1st case: the will of the partners to invest in a single investment the cause will be the object of the SMII described as an investment in real estate specified in time and place.
- 2nd case: the will of the partners to invest in specified or unspecified projects, the cause will be a time of extinction determined in the statutes of the MII company
- 3rd case: in a declining Musharakah contract, the cause of extinction will be the date of the end of reimbursement due to the Islamic investment bank by the SMII
- 4th case: capitalization in an already existing company becoming an SMII, we will have the choice of the three previous cases in order to know the cause of extinction.

but at the extinction of the SMII the partners without the participative bank will have the choice to adapt the statutes of the SMII to another statute therefore



the extinction of the legal nature of the Musharka company of this company and the rebirth of a company with a new legal nature chosen by the partners remaining in its capital.

however, the will to disappear from the company could also have been expressed during the social life of the SMII; article 1844-7 of the French civil code states that: "the company comes to an end. 4°: by the early dissolution decided by the partners", the code does not give the conditions and especially the condition of majority required for this dissolution and account given the contractual nature of the company and in the absence of a specific clause in the articles of association, this decision must be decided unanimously.

But in the case of Moucharaka F.I, the participative bank may require in the statutes a clause concerning the early dissolution determined by particular conditions serving the interest of the participative bank.

a.2-Disappearances suffered.

Disappearance can result from:

\* A defect related to training because like any contract the company can disappear due to its cancellation coming to sanction a defect of training, even more than for the other contracts this cause of disappearance is strictly framed taking into account the troubles that the disappearance would cause. a priori of an economic actor, first of all the causes are rare under the terms of article 1844-10 paragraph 1 of the French civil code applicable to all companies: "the nullity of the company can only result from the violation of the provisions articles 1832, 1832-1, paragraph 1, and 1833 or one of the causes of nullity of contracts in general" and commercial companies the scope of this decision is limited by the terms of article L/235-1 of the francisa commercial code. therefore the ability to cancel a company (including the S MII) is very limited in any case given the non-retroactivity it would often be an inappropriate sanction such would be

In particular the case against front companies<sup>551</sup> or companies that conceal an employment contract.

\*A court decision at the request of a partner and another cause of disappearance governed by French law in article 1844-7 of the civil code consisting of an "early dissolution by the court at the request of a partner for just cause, in particular in the event of non-performance of its obligations by the partner, or of disagreement between partners paralyzing the operation of the company".

The judges have ruled that constituting a just reason for dissolution the situations:

\_ A breach of a statutory non-competition obligation by partners<sup>552</sup>.

\_ Accusations and proceedings between partners of a general partnership in which the dismissal of the manager was subject to the unanimity of the partners<sup>553</sup>

This position of the case law is contrary to the letter of the legislative text because the argument based on punctuation is not decisive since the two reasons mentioned in the text are not limiting given the use of the adverb "notably",

However, in the case of the SMII and taking into account the bank financial investment which is generally enormous, it is agreed to include at the time of the constitution of the SMII a contractual clause between the partners, which consists in prohibiting the partners from formulating a request for early disappearance. So that the company can achieve its real estate investment objective and deflect a loss caused by a judicial decision of disappearance.

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<sup>551</sup> -C.CUTAJAR-RIVIERE, "The front company, Essay on its notion and its legal system", LGDJ, Bibl. dr. Private, t. 292, 1998, sp. No. 419.

<sup>552</sup> -Cass. com. , 26 May 1961 , Bull.civ. III, p.207, no. 239.

<sup>553</sup>- Cass.com., March 12, 1996, Rev. Soc. 1996.554, note D.BUREAU.

\*The disappearance due to economic difficulties its last may be preceded by a monitoring phase when, due to the losses noted in the accounting documents, the equity of the company will have become less than half of the share capital <sup>554</sup>, in this case the partners must decide whether there is an early dissolution of the company and if the dissolution is not pronounced the partners will reconstitute the financial situation of the company.

b- The effects of the disappearance:

The disappearance of a company manifests itself as a death sentence, at first the death sentence: it is the dissolution, the execution is the liquidation and finally the distribution of the goods is the division.

Dissolution is the decision to put an end to the life of a Moucharaka II company when this company has legal personality, this decision will not be sufficient to cause its disappearance, on the other hand, in the case of an SMII not yet endowed with personality. legal as in the case of digressive Moucharaka in real estate, this decision may be sufficient.

Pursuant to French law <sup>555</sup> the legal personality of the company exists for the purposes of the liquidation. During the liquidation phase, the MII company will be represented by a liquidator, who may be a professional appointed by the court.

The liquidator's mission is to make the assets of the company liquid (which often leads to them being sold at auction through an auctioneer) and to pay the debts of the company certain assets are not intended to be liquidated and will be allocated to one or more of the partners.

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<sup>554</sup> articles L.223-42 of the French commercial code

<sup>555</sup> article 1844-8 paragraph 3 of the civil code. French.

After carrying out his operations, the liquidator draws up the liquidation accounts which show a positive (liquidation bonus) or negative (liquidation loss) balance and submits them to the partners.

The personality of the MII company will disappear on the day of publication in a newspaper of legal announcements of the closure of the latter.

If a debt of the MII company arises after this publication, case law authorizes the creditors either to act against the former partners<sup>556</sup> or to engage the liability of the liquidator<sup>557</sup>.

The mali gives rise to a contribution to the losses the bonus requires the realization of a sharing.<sup>558</sup>

Finally, the rules relating to the sharing of assets making up the liquidation proceeds of the MII company between its partners will have been provided for by the partners in the articles of association or by social decision 559 . in this case the agreement presupposes the unanimous agreement of the partners, the consent of one of them can only result from the voluntary execution of acts relating to the property alienated in application of the partition 560 .

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<sup>556</sup> Cass.com, July 3, 2001, JCP ed. E 2002, p.84, note Y.GUYON.

<sup>557</sup> Cass.com, October 11, 2005, Bull. Joly Société 2006, p.491, § 97, obs. C.REGNAUT-MOUTIER.

<sup>558</sup> the so-called “amicable” liquidation of companies, Bull. Joly Societies 2009, p.285 et seq. under the direction of F.-X.LUCAS.

<sup>559</sup> Cass.com. , May 30, 2007 , appeal no. 05-13851 .

## **A. The subjective elements of the organization of the new joint subsidiary.**

### **Moucharaka Company**

#### **1) Intuitus personae**

The joint subsidiary is not an additional form of company, but simply a host structure adopting the form of Moucharaka Company for specific cooperation in real estate investment,

Therefore, the Moucharaka contract for real estate financing on the one hand appears as an instrument making it possible to adapt the common structures to the needs of the associated companies (company of the investor and the Islamic banking investment company) for a strategic purpose. execution of real estate investment in the event of joint subsidiary capital in equal shares of the companies but in the event of need for more financing by the subsidiary adds the conclusion of a decreasing Moucharaka contract between the companies for a financing which will be reimbursed by the joint subsidiary ..

The principles of organization are marked by the foundations, among its foundations the originality which is due to the importance of the intuitus personae existing between the associated companies and the affectio societatis that these manifest, the partners want to have the same rights and the same powers in decision-making and in the management of the company <sup>560</sup>.

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<sup>560</sup> –The definition of joint subsidiary: "company whose capital is held by independent companies or which belong to different groups, none of which owns a sufficiently large fraction of the capital to enable it to dominate the others, so that they exercise jointly the control "by R.RODIÈRE & B.OPPETIT, Commercial Grouping, Dalloz, 1980, 10th ed. , no. 362, p. 422 and 423.

The *intuitus personae* is one of the elements that characterizes the common subsidiary, it is qualified as an *intuitu personae* group in which the consideration of the person of the other partner is for each of them determining the constitution of the subsidiary. , for the partners to unite financial means of the Islamic investment bank and human and structural means of a partner company in order to meet an objective of association of development of a real estate investment by the legal mechanism of the *Moucharaka* contract, the consideration of the person of the partner appears as an essential element for a foundation of economic union; thus any decision to create a joint subsidiary implies a choice of the partner(s) so that they can trust each other <sup>561</sup> .

Consequently, the procedures for setting up joint subsidiaries must therefore be such that the groups can share control without any of them being able to annex it <sup>562</sup> , hence the equality of forces is necessary in order to be able to build this equality of right . A goal sought by the companies by granting conventional credits and not contracting a *Musharakah* contract which demonstrates the lack of knowledge of the possibility of a joint subsidiary as a *Musharakah* company and remaining politically independent of the Islamic bank.

If it is obvious that the *intuitus personae* is important in the functioning of the common subsidiary, its content remains to be defined.

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<sup>561</sup> –A.BOULLAY, The common subsidiary and the groups of companies, in the common subsidiary, means of collaboration between companies and groups of companies, colloquium Paris 20–22 February 1975, Lib. Tech. 1975, p.49.

<sup>562</sup>– J. PAILLUSSEAU, The common subsidiary and the groups of companies, in the common subsidiary, means of collaboration between companies and groups of companies, conference Paris 20–22 February 1975, Lib. Tech. 1975, p.30.

Commonly it is defined as the consideration of the person of the contracting party, of his identity, of his qualities in a very general way <sup>563</sup> .and the consideration of each partner, of their reputation, their honorability, their credit or their solvency <sup>564</sup> . Thus the *intuitus personae* includes not only the qualities of the legal person itself but also the personal qualities of its members. Consideration of the person of the partner of the real estate investment bank is therefore an essential element in the constitution of the joint subsidiary: the Moucharaka real estate investment company and its operation. It makes its specificity and is explained by the search for an equality of forces by the partner of the Islamic investment bank.

However, the specificity of this organization of absolute equality is governed by other subjective elements which are the community of interests and the *affectio societatis* attached to it.

## **2) community of interests and *affectio societatis***

The joint subsidiary as a company is subject in France to article 1833 of the civil code (2011): it must be incorporated in the common interest of its members, this is the subjective clause of its constitution; in the common subsidiary: company Moucharaka, the common interest is the realization of a real estate project which motivates its creation.

The creation of a joint subsidiary is motivated by a community of interests meeting economic objectives that have been set by two or more partners.

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<sup>563</sup> -G. CAMERLYNCK, *Intuitus personae* in the public limited company, thesis Paris, 1929, p.7

<sup>564</sup> -P.JEANDEL, *the intuitus personae* in commercial companies, Thèse Nancy, 1932, p.5 .

In particular, these partners contribute to improving the production or distribution of products or to promoting technical progress or

Economic <sup>565</sup>. The parties tend to carry out the same project by actively participating together in its accomplishment, but the traditional conception is to consider that the contract is the seat of a conflict of interests of a relationship of conflict <sup>566</sup>.

The joint subsidiary corresponds to the traditional definition of the contract of society by the place given to the *affectio societatis* (which is the same for society, *Moucharaka*). This element is defined as the intention to treat each other as equals and to pursue together the common work <sup>567</sup>.

The *affectio societatis* has been broken down into three elements: the will to unite, the will to run certain risks in common and the will to actively pursue a common goal.

In the domain of the common subsidiary, participation in the common project is done on an equal basis and even if there is no equality in capital, the requirement of unanimity restores this absolutely.

Subjective elements have a capital influence in the relationship between partners. The contractual aspect of the brand is at the service of the common project and of legality in fact and in law between partners.

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<sup>565</sup> –F.HOPPENOT, The common subsidiary and French company law, in the common subsidiary, means of collaboration between companies and groups of companies, colloquium Paris 20–22 February 1975, Lib. tech. 1975, p.6.

<sup>566</sup> –J.CARBONNIER, Flexible law, for a sociology of law without rigor, LGDJ 1995, 8th edition, p.304

<sup>567</sup> –G.RIPERT & R.ROBLLOT, Treatise on commercial law, t. 1, by M.GERMAIN and L.VOGEL, 17th edition, LGDJ 1998, n° 1027, p.813.



### 1) The organization of equality

In the context of the organization of joint subsidiaries, it is a question of disproving the adage according to which “whoever gives himself a partner gives himself a master”. the drafting of the statutes and the protocol is marked by the concern for egalitarianism of the participating companies <sup>568</sup> and this, whatever the distribution of the capital, it is a question of setting up an association based on perfect equality.

The basis of the organization of cooperation in the joint subsidiary is the equal rights of the partners, therefore, whatever the type of structure chosen, this organization requires equality and community decision-making reflected in the requirement of unanimity and the joint composition of the bodies.

The practice has developed the habit of concluding a memorandum of understanding before drafting the statutes. which aims to prepare the framework for relations between parties. However, the preliminary contracts have the double character of being both compulsory and provisional <sup>569</sup>, this protocol of the joint subsidiary does not disappear when the company is incorporated, it is combined with the statutes. Like the Moucharaka II company, the protocol includes the acceptance of the continuous Musharakah contract and the digressive Musharakah contract in the event of the bank's participation more than the investor partner in common subsidiary capital.

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<sup>568</sup> -R.HOUIN, Synthèse, in the joint subsidiary, means of collaboration between companies and groups of companies, colloquium Paris 20-22 February, lib. trch. 1975, p 178

<sup>569</sup>- NAJJAR (I.), the agreement in principle, D. 1991, chron. , p.67.

## **2) The contract as an instrument of joint subsidiary cooperation.**

It appears that the joint subsidiary constitutes an example of the use of the contract instrument of cooperation between associates, like engine of cooperation, moreover the installations of the cooperation have a double seat: the protocol and the statutes. . these two types of contracts are in our case of Moucharaka real estate investment company the decreasing Musharaka contract in the first type and the second type is the Moucharaka contract of financing real estate investment. These two types of contracts complement each other in order to allow the partners to set up their common project.

Overall, case law flexibly assessed adjustments taking into account the economics of the contract, the objective of equality and quality of the parties. worse still, the creation by the legislator of a contractual structure specially designed for the creation of joint subsidiaries makes it possible to thwart these limits. The simplified joint-stock company, which translates the participation of the legislator in the movement of contracting of companies, presents the advantages of an organization adapted to egalitarian cooperation without risking hitting the classic obstacles of company law.

By its ability to adapt and by the principles that underlie it, the joint subsidiary represents a characteristic and promising illustration of the Moucharaka real estate investment company created by cooperation between investor companies and the Islamic investment bank.

## SECTION 2: the transposition of the Moucharaka contract into common law by bringing it closer to the mandate and trust contract.

### §1– Fundamental characteristics of the Mandate existing in Moucharaka F.I contract

#### A– The specificities of the close mandate contract in Moucharaka FI contract

##### 1) Definition of the mandate contract

About the mandate <sup>570</sup> in the current state of positive law, Qualified as "a real Swiss army knife of contracts" <sup>571</sup>, with the sale the mandate is a contract of great importance in common law, the first allows the transmission of wealth and the other develops the legal activity of all contracts.

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<sup>570</sup> –M. PLANIOL, "The transformation of the mandate since Roman law", in Critical Review of Legislation and Jurisprudence, Volume 22, 1893, p. 200; R.-TH. TROPLONG, Civil Law Explained – Mandate, Volume 16, PARIS, Charles Hingray, 1846. – More recent works: A. BENABENT, Civil Law – Special civil and commercial contracts, Montchrestien, coll. Domat private law, 9th edition, 2011, spec. No. 900, p. 427 et seq. ;FR. COLLART-DUTILLEUL and PH. DELEBECQUE, Civil and commercial contracts, Dalloz, coll. Precis, 9th edition, 2011, spec. no. 628 et seq., pp. 541 et seq. ; J. HUET, G. DECOCQ, C. GRIMALDI, H. LECUYER, with the collaboration of J. MOREL–MAROGER, The main special contracts, L.G.D.J., coll. Treatise on civil law, under the direction of J. GHESTIN, 3rd edition, 2012, spec. No. 31100, p. 993 et seq. ; PH. MALAURIE, L. AYNES, P.–Y. GAUTIER, Special contracts, Defrénois, coll. Civil law, 6th edition, 2012, spec. No. 520, p. 273 et seq.; A.–L. GRIZON, The qualification of mandate, under the direction of F. LABARTHE, PARIS, thesis typist., 2010. J.–L. GAZZANIGA, "Mandate and representation in the old law", Revue droits, n° 6, p. 21, spec. No. 23; L. PFISTER, "A contract in search of identity", in The mandate, a contract in crisis, ouvr. coll. under the direction of N. DISSAUX, Economica, Coll. Legal Studies, Volume 37, 2011, pp. 1 et seq., spec. No. 3, p. 3;

<sup>571</sup> J. HUET, G. DECOCQ, & C. GRIMALDI, H. LECUYER, & J. MOREL–MAROGER, The main special contracts, no. 31000, p. 983.

The mandate assures the person a kind of gift to have a person transform into a multi person, because by his agents he can be present at the same time in several places. And also allows the accomplishment of acts to all people who cannot do them.

Indeed the Moroccan legislator was able to define the concept of the mandate contract in article 879 of the D.O.C: which emerges from it: "the mandate is a contract by which one person entrusts another to perform a lawful act on behalf of the principal, the mandate can also be given in the interest of the principal and the agent, or in that of the principal and a third party and even exclusively in the interest of a third party", which is noticeable by this definition that the Moroccan legislator has well simplify the concept of the mandate contract because it is clear without legal ambiguity, on the other hand in French law the legislator has defined this contract with a globalizing and indeterminate legal logic requiring a great legal conception in order to define the scope of this contract. Indeed, despite the vagueness of article 1984 of the Civil Code, the mandate is defined as the agreement by which "one person gives another the power to do something for the principal and in his name". This text, it is generally accepted, in doctrine <sup>572</sup> as in case law <sup>573</sup>

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<sup>572</sup>– F. LEDUC, "Two contracts in search of identity, the avatars of the distinction between the mandate contract and the business contract", in Studies offered to Geneviève Viney, under the direction of J.-S. BORGHETTI, O. DESHAYES and C. PERES, L.G.D.J., Lextenso editions, 2008, pp. 595; P. TRISSONCOLLARD, "Attempt to distinguish between business and mandate contracts based on the object of the contract", L.P.A., February 7, 2001, p. 4 and so. <sup>573</sup> – Civ. 1, February 19, 1968 – Appeal no. 64-14.315: G.A.J.C., 11th edition, no. 260; D., 1968, p. 393.Com. January 8, 2002 – Appeal No. 98-13.142; Bull. civ., 2002, IV, no 1: D., 2002., A.J., 567, obs. E. CHEVRIER; *ibid.*, Sum., 3009, obs. D. FERRIER; R.T.D. Civ., 2002, 323, obs. P.-Y. GAUTIER. Civil. 1, November 28, 2007 – Appeal no. 05-13.153: D., 2008, Pa-norama, 2245, obs. V. BREMOND, M. NICOD, J. REVEL.

The mandate contract is a consensual contract and like any contract, the mandate gives rise to obligations characterized by the fact of conferring a power of representation moreover the relations of the principal and the agent are temporary and are based on the *intuitu personae*; indeed the agent represents the principal because the act is carried out bodily by the agent but produces its effects exclusively and directly in the patrimony of the principal, by ricochet it establishes relations between principal and agent more relations with regard to third parties.

## **2) consensualism, formalism of the mandate contract and Moucharaka FI contract**

The mandate is a contract of contracts which can be concluded by consent, according to the Moroccan legislator in article 883 of the D.O.C which stipulates "the mandate is perfect by the consent of the parties the commission given by the principal can be express or tacit , except where the law prescribes a special form. the acceptance of the agent can be tacit and results from the fact of the execution except in cases where the law prescribes an acceptance", also the French legislator to determine the consensualism of the contract of mandate in article 1984 of the civil code which emerges from it: " the mandate or power of attorney is an act by which a person gives to another the power to do something for the principal and in his name the contract is formed only by the acceptance of the agent ", therefore by the acceptance of the agent we have consent giving rise to a mandate contract. This is how we have seen that the Moucharaka contract in real estate financing is a consensual contract where the consent of the parties should be supplemented by a material fact at the handover of the thing lent so there is a common character between the two contracts. In principle, the mandate is consensual and sometimes solemn. it then becomes a contract in the validity is subordinated to the accomplishment of certain forms sometimes simple Sometimes authentic. The forms by the law can be simple when they are informative mentions, however the mandate written under private signature would be sufficient. certain texts specifying it expressly (in France the law of January 29, 1993 named Loi Sapin on the mandate).

the law sometimes requires that the mandate be authentic under penalty of nullity such as the case of donation of marriage contract and contract of transfer of property (nd of Moroccan real law....), and for the mortgage in French case law the Court of Cassation laid down in the middle of the 19th century a principle from which it no longer separated: “the consent of the debtor being the essential element of the mortgage agreement , if this debtor stipulates by proxy, the power of attorney must participate in the authenticity of the contract itself, these two acts form an indivisible whole and are subject to the same conditions” <sup>574</sup>.

Similarly, the Moucharaka contract in real estate financing is a solemn contract with a formalism dictated by Islamic banking law and Moroccan real law, especially since we have a transaction relating to real estate, which determines the reconciliation of the two contracts (mandate in real estate transaction and Moucharaka ) to both have a character of consensualism and are solemn contracts.

### **3) Temporary nature and intuitus personae of mandate and Moucharaka contracts in real estate financing**

The mandate must be for a fixed or indefinite limited period, it cannot be perpetual <sup>575</sup>, sometimes the parties do not indicate a duration , at this time then presumes an indefinite period , therefore cancellable at any time subject to use, unless the duration results from the execution of a precise mission. Of the same temporary nature as the Moucharaka contract for real estate financing because it is a company contract in its status for a maximum period of 99 years but not perpetual.

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<sup>574</sup> Cass.civ., February 7, 1854, from Barante, Dp 1854.1.49; S.1854.1.322; V. securities, coll.civil law; S. Becque, the parallelism of forms in private law, Thesis, Paris II, ed. Panthéon-Assas, 2004, no. 250.

<sup>575</sup> Cass.civ.1re, March 5, 1968, Bull.civ.I, No. 85; the cassation: “the contested judgment distorted the clear and precise clause”: the mandate was null because perpetual.

On the other hand, the death of the principal (or dissolution of the principal legal person) or agent (or dissolution of the legal person agent) the mandate is extinguished according to article 929 of the Moroccan D.O.C and article 2003 of the French civil code (2011).

Such effect is also in Musharakah contract of real estate financing because the amount is supposed to be the investor and Islamic bank and the agent is the company to create intermediary because at the dissolution of the intermediary company there is an extinction of the Musharakah contract and in death of the investor the contract is canceled by the nature of this contract being a loan contract because there is death of its rights and obligations therefore we have a common character between mandate and Moucharaka of the real estate financing.

#### **4) Irrevocability of mandate contracts of common interest and Moucharaka in real estate financing**

for a contract to be of common interest it must not have been concluded in the sole interest of the principal but also of the agent <sup>576</sup>, and the mere fact of being an agent is not enough but one must have a more characteristic interest linked to the achievement of the purpose of the mandate.

In this contract of mandate is irrevocable when because of its economy it is of common interest, that is to say that the contract cannot be revoked by the will of one of the parties but only by their mutual consent or by a cause recognized by justice except in the event of fault of one of the parties <sup>577</sup> or economic development <sup>578</sup> not favorable for the continuation of the mandate contract.

This character of irrevocability of the mandate contract of common interest and to note in real estate financing contract because it is a partnership contract which can only be resolved by the will of the partners together of revocation which is by effect that the Moucharaka contract real estate financing is irrevocable.

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<sup>576</sup> –Cass.com, February 29, 2000 BULL.civ.IV, No. 44

<sup>577</sup>– Cass.civ.Ire, 17 March 1987, Bull.civ.I, n° 94

<sup>578</sup>– Cass.com, June 20, 1967, Bull.civ.III, No. 267 .

**B– specificities of the mandate contract closer to the specificities of the Moucharaka F.I contract.**

**1) The legal nature of the mandate**

The cooperative nature of the mandate of common interest. A reflection must still be carried out about what is called the mandate of common interest.

Alongside the mandate as defined in article 1984 of the Civil Code, case law has gradually revealed the existence of a so-called mandate of common interest<sup>579</sup>. Unlike the mandate of exclusive interest, the mandate of common interest is based on several distinct interests, but nevertheless intimately linked. In other words, the fulfillment of the contractual object of this mandate does not have the sole purpose of satisfying the interests of the principal, but also aims to achieve certain interests of the agent. However, it is not enough, for the mandate to be qualified as “of common interest”, that remuneration has been provided for by the parties to the contract<sup>580</sup> . .

In other words, the consecration of a so-called mandate of common interest is not intended to characterize the existence of an interest of the agent which would be superior. On the contrary, a mandate will be of common interest when the interest of the agent converges with that of the principal.

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<sup>579</sup> –On the notion of common interest see not. A. BENABENT, “The common interest contract”, Colloquium CSNCRA, PARIS, April 1990;

T. HASSLER, “The common interest”, R.T.D. Com., 1984, 581. On the concept of mandate of common interest see also CH. PIGACHE, The mandate of common interest, thesis PARIS, 1991; J. GHESTIN, “The mandate of common interest”, in The activities and assets of the company: Mixtures offered to Jean DERRUPE, Litec, 1991; D. ALEXANDRE, “Art. 1984 to 2010”, in J.-Cl. Civ., Fasc. H, spec. n° 27 et seq..

<sup>580</sup>– Civ., March 4, 1914; D.P., 1916, I, p. 68. 408 Civil. 1, 25 June 1996 – Bull. civ., 1996, I, No 269. 409 Com., 7 October 1997; Bull. civ., 1997, IV, No. 252. 410 Com., 2 July 1979; Bull. civ., 1979, IV, no. 222. 411 Com., 2 March 1993; Bull. civ., 1993, IV, no. 90



However, more than the joint pursuit of two particular projects, it is indeed a single project that is involved, which supposes that the interest of the agent is linked to the achievement of the object of the mandate itself. same. Thus, the development of a joint enterprise justifies the common interest. The same applies to any participation in a business of interest to both parties.

By introducing the concept of common interest in a contract belonging, traditionally, to the category of contracts-permutation, the jurisprudence then the legislator have is certain as to the approximation of the legal nature of the mandate of common interest and Moucharaka contract of real estate financing by their similarity in interest of the monant and agent on the one hand and the intermediary company and the investor and the Islamic bank on the other hand which is characterized by two criteria of the cooperation contract which are, the pooling of goods or services for the benefit of a common activity, and the distribution of the results of this enterprise between the contracting parties.

Thus, the mandate of common interest “carries out one or more permutations of values between the contracting parties”: on the one hand, the management obligation; on the other hand, the obligation – if any, of remuneration. In other words, it would still be an “exclusive interest obligation”

According to this contract would be defined as the contract by which one party undertakes to provide means to the other party who undertakes to exploit them in their common interest Thus, in the mandate of common interest, as in any contract- cooperation, there is a community of interests and it is the same thing in Moucharaka contract of real estate financing. In concrete terms, the project determined by the contractual object of the cooperation mandate is common to the principal and the agent, so the interest of the bank and investor t (the benefits – the risks – linked to the exploitation of this clientele) not confuse with that of the principal and the same thing (the remuneration according to the value of the customers) merges with the interest of the intermediary company.

In this sense, the jurisprudential notion of mandate of common interest has indeed been enshrined by the legislator in article 1831-1 of the French Civil Code (2011) which expressly provides that "the real estate development contract is a mandate of common interest", giving a legal result based on the fact that the Musharakah contract in real estate financing is a real estate development contract which is that the common interest mandate is approximately similar to the Musharakah contract for real estate financing.

## 2) The structure of the mandate in relation to the Moucharaka F.I contract.

### a- The structure of the mandate in relation to the Moucharaka contract for real estate financing under European law

Unlike French civil law and most codifiers at the beginning of the 19th century, some European legislation has undertaken to integrate a theory of representation into common contract law. This was more particularly the case of the German legislator who was the first to take the plunge. The development of an autonomous theory of representation was born from a bitter observation: the absence of a "global understanding of the notion of representation" <sup>580</sup>. In a study by the two German doctrinaires **P. LABAND** and **Rudolf VON JHERING** in 1866 <sup>581</sup> drew the distinction between an abstract power of representation and a basic contract concluded between the agent and the intermediary.

While the second, considered in German law as the internal link, is solely intended to govern the relationship between the principal and the intermediary, the first, called the external link, is intended to regulate the relationship between the parties to the basic contract and third parties. The basic contract, or execution contract, is a management contract which can take the form of a mandate for consideration.

This theory of abstract power, which was at the origin of the separation between the internal link and the external link, won immediate success across the Rhine. The German legislator translated it as early as 1896 (Year of German codification. ) in practical terms to insert it into the B.G.B.

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<sup>580</sup> –**A.RIEG**, Art. Representation in Encyclopedia., Dalloz, Droit civil, Vol. VI, 1975, I.

<sup>581</sup> –**P. LABAND**, "Die Stellvertretung beidem Abschluss von Rechtsgeschäft nach dem allge-meinen Handelsgesetzbuch", Z.H.R., 10. 183, spec. 203 et seq. with the participation of **Rudolf VON JHERING** a German jurist of the XIXth century.

Thus, we find in the general part of the German Code, an autonomous theory of representation <sup>582</sup> while the mandate remains among the special relationships of obligation <sup>583</sup>. This results in an original dissociation in which two legal acts, one bilateral and the other unilateral <sup>584</sup>.

From article 1984 of the French Civil Code (2011). Concretely, for the German mandate to be assimilated to the French mandate, it must be noted, according to the terms of § 662 of the B.G.B 305, that a person has not only entrusted the management of a case to another who accepted (special and bilateral report) but also – and above all – that the former granted the latter the power of representation defined in § 164 of the same Code (unilateral act). An external link and an internal link which neither exclude nor include each other, but which, combined with each other, transform the basic contract into a representative mandate contract to which a particular regime will apply. Thus, the representation is not considered as a legal effect but as the cause of the agency contract. thus we see in Musharakah mechanism of real estate financing that the creation of the intermediary company is not a legal effect but a cause of this contract because the purpose of the Musharakah contract is the representation of the investor and Islamic bank in a unit of production of goods financial in such a way as to push us to say that the same cause in the two contracts is the representation and that it is a reason to convince us of the rapprochement of its two contracts by their resemblance in terms of their similar cause.

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**582**– § 164 to 181 of Title V of the BGB. The German legislator distinguishes between voluntary representation based on a power which presupposes a power of attorney.

**583**– § 662 to 674 of Title XII of the B.G.B., German Civil Code,

**584** –On the nature of the abstract act which confers power see not. M. FROMONT, A. RIEG, Introduction to German Law, Volume III, ed. Cujas, coll. of the Institute of Comparative Law of DIJON and STRASBOURG: contemporary legal systems, pp. 60 and s. ; M. PEDAMON, The contract in German law, L.G.D.J., Coll. Business law, 2nd edition, 2004, spec. n° 98 et seq., pp. 74 et seq. .

**b- The structure of the mandate in relation to the moucharaka contract for real estate financing under French law.**

The content of the dissociation. More specifically, the content of the internal report recalls that the mandate is intended to facilitate the implementation of management for others. This implies, as a consequence, that the interest of the principal is, in any event, at the heart of the action carried out by the agent. It is even about "the essential element of the mandate" also the interest of the Islamic bank and investor is an implementation of management for others which will be made by the intermediary company of the Moucharaka contract is or, in any case, of its "raison d'être" since, in any case, "it is a logical element in internal relations". It indicates that "the future effects of the operation carried out by the contractual manager are intended to ultimately benefit the principal, immediately or later". It is mainly defined through the obligations of the agent (articles 1991 and following of the Civil Code) and correlatively of the obligations of the principal (articles 1998 and following of the Civil Code). From this reciprocity of commitments we deduce the necessarily contractual nature of the internal relationship.

Alongside the internal report there is an external report, that is to say the one that determines the relationship of the parties to the contract with third parties. In the context of the Musharakah mandate and contract, it is the mechanism of representation which describes the way in which the legal effects are realized between the extreme parties and which justifies that this obligatory link is direct and automatic.

By this reflection It is at the same conclusion Results: is that there is a similarity between mandate contract and Musharakah of real estate financing.

### 3) Identification of the agency contract based on the criterion of action “in the name of others”

Indeed, in a first sense, representation is synonymous with transmission<sup>585</sup>. The contemporary definition<sup>586</sup> representation is the mechanism by which a person loses his status as a third party to a legal act<sup>587</sup>. In its function of transmission, in a contemporary conception, it is the represented who is the beneficiary of the effects of the mechanism of representation.

Because the mandate is a contract whose object is the conclusion of legal acts, we will retain the notion of absence as "lack of simultaneous physical presence of the contracting parties". From this point of view, representation must be understood as "a legal technique offering the opportunity to people who are not in the simultaneous physical presence of each other to communicate and conclude a contract".

when there is perfect representation<sup>588</sup>, the representative acts “in the name of”. Conversely, the person represented enters spiritually and legally into the contractual field, which allows communication between the extreme parties.

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**585-** Moreover, the Napoleonic Code does not include any general system of representation. Only the particular case of successions uses this term, but it is then in the sense of transmission that it must be understood.

586 F. SENN, *The institution of ecclesiastical confessions in France*, PARIS, A. Rousseau, 1903. .

**587-** Example, article 751 of the Civil Code: “Representation is a legal fiction which has the effect of calling the representatives to the rights of the represented to the succession”.

**588-** PH. MALAURIE, *Anthology of legal thought*, ed. Cujas, v° BARTOLE: “The indisputable character of perfect representation was quickly supported in the 14th century by BARTOLE, an eminent Italian jurisconsult of his time and professor of law specializing in Roman law. Part of his work focused on a comparative study of the conditions formation of the contract in Roman law and in French law. »

From this point of view, the perfect representation really aims to "make present" one. In other words, when the representation is perfect, the representative is truly acting "in the name of others"<sup>589</sup>; in our opinion, that this technique can precisely define the mandate and also the same character of perfect representation is designed in the Moucharaka contract because the intermediary company legally falls within the contractual field of the Moucharaka contract in real estate financing.

Deduce that the field of similarity between these two contracts is growing and we are not disappointed in our quest to bring them together.

#### **4) Legal specificity of the effects of the mandate closer to the Moucharaka real estate financing contract**

##### **a- From an obligation of result to an obligation of means**

The imperfections of article 1984 of the French Civil Code (2011) include imperfections, in particular the expression according to which the agent must "do something" for the principal. This formula, which is a little vague, gives the mandate a formidable plasticity and makes it run the risk of conceiving it as a "catch-all" contract. It has thus been criticized for defining "a transaction having a very general scope"<sup>590</sup> and for confusing it with other contracts for which the debtor also undertakes to "do something".

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**589-** J.-L. GAZZANIGA, "Mandate and representation in the old law", Rev. rights n° 6, p.21, n° 23.: "At first deeply attached to Roman analysis, he finally broke away from it to become one of the precursors of consensualism".

**590** -A.-L. GRIZON, The qualification of the mandate contract, under the direction of F. LABARTHE, PARIS XI, thesis typist. 2010, spec. n° 103 et seq., pp. 70 and s.; J. VALERY, Distinctive characteristics of the mandate contract in the Civil Code, Thesis AIX, 1898, spec. p. 92

The term "power of attorney" directly recalls the mechanism of representation, although its insertion in the definition of the mandate regularly comes under doctrinal wrath. It would indeed result from a confusion between the instrumentum – that is to say the writing which contains the substance of the legal act<sup>591</sup> – and the negotium – the substance of the legal act itself or even the substantive issue addressed by this act. However, the power of attorney constitutes nothing other than written proof of the existence of a power. It is the unilateral act which confers power on a beneficiary, and not the mandate which is a synallagmatic contract. This is evidenced by paragraph 2 of article 1984 of the French Civil Code (2011) which provides that the mandate "is only formed by the acceptance of the agent". In other words, there will be conventional representation only if the offer of power is accepted, that is to say if the mandate contract is definitively formed.<sup>592</sup>

Within the mandate, the contract and the representative technique, a distinction which reveals the internal and external links. The idea finds serious arguments in the very body of the law. But the interest of this demonstration is not only of a theoretical order. The distinction between mandate and representation makes it possible to highlight the existence of two legal links with their own interests. On the one hand, an internal link that defines the content of management for others. As such, the principal-agent relationship highlights the interest of the parties to the main contract. On the other hand, an external link which exclusively concerns the relationship between the external parties, i.e. the conflicting interests of the principal and the co-contracting third party.

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**591**– Legal Vocabulary – Association Henri CAPITANT, under the direction of G. CORNU, foreword by PH. MALINVAUD, P.U.F., coll. Quadrige, 2011, v° "instrumentum".

**592**– E. GAILLARD, Power in private law, preface by G. CORNU, PARIS, Economica, coll. Civil law, studies and research series, 1985.



It should nevertheless be noted that, theoretically dissociable, these two elements must be combined for the contract in question to receive the qualification of mandate.

At present, it is an obligation of result that the case law first believed to detect. The Court of Cassation thus affirmed that "except in cases of force majeure, the agent was presumed to be at fault if he did not perform his obligations". a notary had been hired <sup>593</sup>. In this case, this professional had been given the mandate to lend a sum of money to a third party and to negotiate security for the reimbursement of this sum.

For this, he had a house of the borrower was specially assigned as collateral for the agreed loan. A few years later, expropriation proceedings took place and the property was sold at auction. The lender then claimed payment of the sum of which he was a creditor, in accordance with the guarantees he held. But, due to property depreciation, he could not obtain the full amount due.

Believing himself to be the victim of mismanagement, the principal brings an action for damages against his agent. In response, the notary recalls that at the time the guarantee was accepted, it was largely sufficient and that no fault can therefore be held against him. The argument is rejected by the Court of Cassation, which approves the Court of Appeal for having found the liability of the intermediary solely because of the non-performance of the purpose of the mandate, specifying that it was up to the agent to provide proof of a case of force majeure. Other judgments, less distant, recall that, except fortuitous event, the only nonperformance of the obligation makes presume the fault of the agent.

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<sup>593</sup>- Civ., June 21, 1893: S., 1893, 1, p. 339.

Thus, having received an assignment to sell a vehicle, the agent having automobile must answer for the theft of the property if the proof of a case of force majeure is not correctly reported by the agent <sup>594</sup>.

The lower courts subsequently adhered to the existence of an obligation of means by requiring the principal to provide proof of a fault on the part of his agent. In a judgment of 1964, the responsibility of a travel agency was engaged on the basis of article 1992 paragraphs 1 even though it had not committed gross negligence. The judges recalled that, whatever the seriousness of the fault, proof of disregard “of a general obligation of prudence and diligence”<sup>595</sup> was sufficient to incur liability<sup>596</sup>. In this way, it was up to the principal to demonstrate the fault of the agent and, in particular, the ignorance of this obligation, the simple non-performance being no longer sufficient. Similarly, in a case judged in 1965, the Court of Cassation approved the trial judges for having found the responsibility of the representative who, not having acted as a good father, had not carried out the mission which had been entrusted to him.<sup>597</sup>

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<sup>574</sup> –Civ. 1, 1 June 1954: D., 1954, Jurisprudence, p. 611

<sup>575</sup> –Moreover, for some authors, this expression expressly designates the obligation of diligence.H. and L. MAZEAUD and A. TUNC, Theoretical and practical treatise on tortious and contractual civil liability, Volume 1, Montchrestien, 6th edition, 1965, No. 103 – 110.

<sup>576</sup> –Civ. 1, 24 June 1964 – Bull. civ., 1964, I, no. 341: G.P., 1964, 2, p. 260. Another example: Civ. 1, January 8, 2002 – Appeal no. 99-16.142.

<sup>597</sup> –Civ. 1, 8 December 1965 – Bull. civ., 1965, I, n° 686.

**b- The liability of the agent and amount and its connection to the parties of the Moucharaka real estate financing contract**

**b. 1- The agent's liability for non-performance or poor performance of the assignment. :**

In general, with regard to the principal, the agent's liability for his personal act is regulated by articles 1991 and 1992 of the French Civil Code (2011) The first of these texts relates to the continuation of the mission.

It provides that "the agent is required to perform the mandate as long as he remains responsible for it, and is liable for any damages that may result from its non-performance". The second relates to the execution of the mission itself and states that "the agent is liable not only for fraud, but also for the faults he commits in his management".

The principle laid down by the legislator is that of subjective responsibility, that is to say, a responsibility attached to the concept of fault. The interest is obviously to encourage the intermediary to act diligently to escape any compensation charge. In this view, condemnation is the counterpart of efficient behavior. As such, the duty of care should be qualified as an obligation of means, which would mean that the burden of proof would fall on the principal, as well as the duty of care for the legal representatives of the intermediary company under the Musharakah financing contract. real estate is qualified as an obligation of means which is similar to an agent under a mandate contract.

**b. 2- The responsibility of the principal within the framework of a cooperation contract**

Brief reminder: the cooperation mandate of common interest. In order to mitigate the dangers of dismissal *ad nutum* with regard to professional representatives, case law has gradually developed the notion of mandate of common interest. The execution of the latter "must endeavor not only to guarantee the execution of the essential services by the parties, but also to allow their implementation.

Relationship as part of a common project for a certain period of time. In the presence of a cooperation mandate of common interest, it has been written that “among these real services, the most important, the one that is constant, is that which constitutes the power of representation”.

As a result, the principal's liability may be modified <sup>598</sup>. Adjustment of the legal regime of the mandate-cooperation: the principle of conventional termination of the mandate of common interest. On examination, there is indeed a difference in regimes, in positive law, between the rules applicable to the revocation of a traditional mandate and those specific to the early termination of a so-called mandate of common interest. The concept of mandate of common interest identified by case law has in fact made it possible to strongly temper the rule of revocation *ad nutum*, which is particularly dangerous for agents whose main activity is the exercise of the profession of intermediary. For a long time, case law has thus recognized that “when the mandate has been given in the interest of the principal and the agent, it cannot be revoked by the sole will of one of the parties” <sup>599</sup>. In our view, this development recalls the subtle balance achieved, in company law, with regard to the dismissal of corporate officers. Although the *Moucharaka* contract is a company contract, there is a legal similarity in this element of revocation compared to the mandate contract.

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<sup>598</sup> –article 1990 only targets emancipated minors, case law has extended this rule to any kind of incapacity

<sup>599</sup>– Civ., May 13, 1885; D.P., 1885, I, p. 350.

§2– special characters verifying the approximation of the Moucharaka contract of real estate financing to the trust contract.

A– special characters verifying the legal quality of the trust contract.

1) A concept totally unknown by Moroccan law and recognized by French law:

Has. A contract with special property transfer effects

Before analyzing the concept that it is planned to introduce into Moroccan law, it seems essential to specify the fundamental characteristics of the trust as they emerge from foreign experiences and to see how the instruments that are similar to it, in Moroccan law.

In accordance with the Romano–Germanic tradition, the trust is part of A contractual framework. Its object appears simple, in appearance, since it is To transfer ownership for a specific purpose. Legally, things are more ambiguous, insofar as the effects of this transfer of ownership are accompanied by unknown limits.

A synallagmatic contract, the trust has two main obligations:

First, the settler (or settler) transfers the right of ownership that he Holds on property to a third party, called a fiduciary; conversely, the fiduciary Undertakes, on the one hand, to manage the said asset, on the other hand, to return it, either to the

Trustee, either to another beneficiary previously designated by him, to a Specified deadline. The beneficiary is not an obligatory party to the contract; he is in a situation similar to the third party beneficiary of a stipulation for another person.

By entering into the trust agreement, the settler transfers the rights and Movable things to the fiduciary, who acquires guardianship of them. If he transfers these same rights to a third party, even free of charge, the latter then in turn becomes the owner. Consequently, the settler and the beneficiary can only claim rights of a personal nature, in the form of a claim for restitution.

However, the room for maneuver left to the fiduciary is Frame by contract. As a result, his actions are likely to engage his liability in the event of disregard of the objectives set when the trust was set up. In this sense, as observed by Mr. Henri de Richemont, rapporteur for the text in the Senate, on behalf of his law commission, fiduciary property takes the form of “degraded property” <sup>600</sup>.

Assets placed in trust are in principle administered for the benefit distinct from that of the person to whom they are transmitted. Also they fall of a somewhat special heritage status, insofar as they constitute a Appropriation patrimony separated from the personal patrimony of the fiduciary. The notion of patrimony by assignment covers two fundamental elements: an objective, which explains the attribution of the patrimony, and a master, French law does not accept a right without a holder.

The whole difficulty lies in ensuring that the assets transferred to the Fiduciary become part of his assets without him considering that they belong to him definitively, since he will have to return them after having kept and managed them. Most of the countries that have adopted a fiduciary regime have chosen, to overcome this difficulty, an organization based on the separation of the assets of the fiduciary.

This organization has a double advantage for the beneficiary of the trust: on the one hand, it protects its interests by avoiding confusion within the trustee's patrimony, on the other hand, it protects the trust assets from the claims of the personal creditors of the parties to the trust contract.

The fact remains that the concept of patrimony of assignment is in contradiction

with the principle of unity and indivisibility of heritage, which French law protected since the 19th century. This contradiction is put forward by the doctrine to oppose the introduction of the trust in our Moroccan law of obligations and contracts.

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<sup>600</sup> Report n° 11 of the French Senate, session 2006–2007, p. 12

However, the concrete meaning of this assignment patrimonial is above all the reduction of the general right of pledge of creditors, provided for in articles 2284 and 2285 of the civil code, since trustee and settlor will no longer be liable for their debts on the totality of their patrimony. It is also appropriate to insist on the ad tempus nature of the effect of transfer of ownership and, therefore, of the duplication of assets concerning the fiduciary, in order to put into perspective the departure thus made from a principle which, moreover, is not lacking in exceptions.

#### **b. Potentially diverse objectives**

The trust is fundamentally a contract of service, as has been strongly

Note a study of comparative law carried out by Mr. Antoine Bureau <sup>601</sup>.

This peculiarity comes from Roman law: the fiducia was then presented as a voluntary and solemn transfer of property (mancipio), to which was added a pact (pactum fiduciae). This pact determined the conditions under which the property was to be retransformed. It is therefore by the association, within the same legal transaction, of a transfer of property with different purposes, that we can recognize the fiduciary mechanism responsible for delivering them free of charge, within a specific time, to the beneficiary, and this outside the normal rules of inheritance. In this case, the trust is supposed to have many advantages, consisting, among other things, in deferring, over time, the consequences of the settlor's death by avoiding joint ownership, at the end of which the patrimony breaks up by sale and division of property;

This type of trust aims to facilitate, with liberal intent, the succession of natural persons. It involves transferring property to a preserve the heritage intact and guarantee the beneficiaries the same level of income, while sharing most often induces income less due to the breakdown of assets; consider, beyond the testamentary limits, a series of hypotheses of transmission by reason of death.

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<sup>601</sup> - The contract of trust: study of comparative law Germany, France, Luxembourg, Juripole of Lorraine.

As in particular requiring the fiduciary to pay an annuity to his grandchildren who have become orphans before their majority; promote the transmission of assets from grandparents to grandchildren, so as to avoid prodigality or poor management of parents. It remains that, in the current state of our law, many techniques combined make it possible to find certain advantages of the trust. In this regard, we can cite shared donations, residence donations or legacies, usufruct succession, donations without suspensive conditions or life annuities. Above all, the recent consecration of the posthumous mandate, in article 812 of the civil code (2011), as well as gradual and residual gifts, respectively in articles 1048 and 1049 of the same code, by the law of June 23, 2006, reforming the estates and donations <sup>602</sup>, makes the trust for the purpose of transmission even less attractive.

For the record, the mandate with posthumous effect confers on one or more persons responsible for administering or managing, subject to the powers entrusted to the executor, all or part of a succession on behalf and in the interest of one or more heirs. Important conditions have been set by the legislator for the use of this technique: a legitimate and serious interest, with regard to the heir or the inheritance; a period limited to two years, extendable by the judge. The process is not without analogy with the trust, with a major difference, however, since the person in charge of the administration of the heritage is not in any way transferred, on a temporary basis, the ownership of it.

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<sup>602</sup> -Law no. 2006-728, published in the official journal of June 24, 2006.



As for gradual and residual liberalities, the former are not without recalling the fideicommissary substitution, while the second consecrate the jurisprudential institution of the legacy of residuo. Here too, the transfer effects of ownership recall, in part, those of the trust.

So we have the objectives of the trust with two traditional uses: the management of property or rights and the constitution of securities.

The trust intended for the management of an estate is presented under a form using simplicity and flexibility. When it is put into service, the fiduciary receives ownership of the assets which he undertakes to manage on behalf of either the settlor or a third party beneficiary. Remuneration for the service rendered by the fiduciary may be provided for under the contractual clauses of the trust.

It happens that the fiduciary is an intermediary in a transmission as expensive. The restitution of the fiduciary asset then takes the form of a transmission for the benefit of a third party beneficiary and, if the latter is not a party to the trust, the agreement is seen as a stipulation for others.

First, certain situations require an agent to complete specific formalities. Thus, the sale of securities or property belonging to a protected adult and managed under mandate requires special authorization from the guardian, the guardianship judge. Similarly, when it comes to exercising extra-pecuniary rights within the framework of a company, representation at general meetings is confined to very strict rules. Secondly, the agent does not exercise any exclusive power over the values or assets entrusted to him, the principal retaining the possibility of acting even with the delegation that he had granted to him.

However, the existence of a few special cases of transfer of ownership for management purposes essentially concerning financial instruments, the establishment of the trust for management purposes in French law aims Especially to facilitate the realization of complex banking and financial operations.

This is particularly the case for bond issues and securities transactions. Securitization, i.e. the transfer to a dedicated structure of all the debts of a company in order to issue exchangeable bonds in return. To do this, companies are currently being forced, in most cases, to resort to trusts. But the trust could also promote operations of carrying securities or movable and immovable assets.

Finally, in a completely different scenario, the implementation of management fiduciary can be very valuable while waiting for a solution administrative or judicial of a dispute.

The use of the property as security is permitted by law.

French. Article 2367 of the Civil Code thus provides for the existence of securities by retention of title for the benefit of the creditor. However, apart from a few specific exceptions, which we will discuss later, the trust-surety is not currently recognized in France, although it has demonstrated real advantages abroad.

Fiduciary alienation by way of security is very old and constitutes a Rediscovery of the *fiducia cum creditore*, of Roman law. It is presented as a contract by which a debtor transfers to his creditor the ownership of an asset in order to guarantee the payment of his debt; property is thus placed at the service of an exclusive objective: the preferential payment of a claim.

By definition, this type of guarantee is the most comprehensive for creditors, insofar as it provides genuine real security. The trustee need not be the creditor. If the settlor fulfills his obligations vis-à-vis his creditor, the fiduciary is required to return to him the assets placed in trust. Otherwise, the creditor finds himself in the position of beneficiary of the trust and he is then attributed the patrimony.

The establishment in national law of a trust exercising the function of Security has little attraction for guarantees relating to real estate because the mortgage already constitutes a satisfactory security. On the other hand, the situation is quite different in the case of movable property and securities, areas in which the inconvenience and inferiority of the pledge with dispossession enhance the interests of the trust.

In the case of preventive and collective proceedings initiated in against companies in difficulty, for example, the security trust would be likely to encourage creditors to show a little more patience and understanding with regard to the settlor debtor. Likewise, in the event of claims multiple, it would facilitate bank syndications, the fiduciary agent becoming the sole creditor registered as the beneficiary of the securities, with responsibility for him to distribute, in the event of default, the proceeds of the sale of the property or assets placed in trust, between the various creditors according to their rank. Finally, nothing prevents a trust from being set up for the purpose of carrying out a commercial sale contract, the trustee being responsible for paying back the amounts of the installments previously issued by the settlor.

Proof of the ambiguity in which it finds itself, French law provides some legal mechanisms strongly inspired by the fiduciary in sectors relating to economic activity, even though he does not recognize any general status for the fiduciary contract.

The sale with repurchase, the oldest of these devices, is governed by the articles 1659 to 1673 of the civil code (2011). This is a contract for the transfer of securities, with the option of redemption within five years, aimed at guaranteeing or covering the purchaser. The seller who buys back his securities, the initial sale of which met a credit need, is then returned all of his values. The terms of the repurchase sale, in its guarantee component, are undeniably similar to the obligation of restitution of the fiduciary towards the settlor.

The other instruments inspired by the fiduciary institution have

multiplied in recent years in the monetary and financial code. Here too, the similarities appear clearly since, each time, there is a temporary transfer of ownership of securities or claims, which are administered by a separate legal person on behalf of a third party. Thus, the assignment of professional receivables as security, plus known as the “Daily sale”, provided for in Articles L. 313-23 to L. 313-29 and Article L. 313-35 of the Monetary and Financial Code, includes the obligation, for the assignee, to return the said debts in the absence of warranty claim. Similarly, the return of full ownership of goods or rights as security for present or future financial obligations, governed by Article L. 431-7-3 of the Monetary and Financial Code and Article 38-II bis of the General Tax Code, does it also entail an obligation to return the goods or equivalent rights in the absence of the guarantee being called into play. Finally, the lending of securities and the reverse repo of securities by mutual funds or debt funds, respectively referred to in Articles L. 432-6 to L. 432-11 of the Monetary and Financial Code as well as in Article 38 bis of the General Tax Code, for the first, and Articles L. 432-12 to L. 432-19 of the Monetary and Financial Code and Article 38 bis-O A of the General Tax Code, for the second, are also based on an obligation of restitution or retrocession of titles, securities or effects, on the part of the assignee vis-à-vis the assignor, the date and the price being agreed as soon as the reverse repurchase agreement takes effect.

## 2) a concept of trust in French legislation

The trust is a transfer agreement in which the property transferred is not the end of the contract but its means. When an asset is acquired under a traditional transfer contract (a sale or a donation, for example), this asset is the cause of the commitment; it is what you contract for. In a trust, the situation is different: the transferee receives the property only for the specific purpose assigned to him by the transferor and he knows, *ab initio*, that he is not destined to keep it. The trust is based on a transfer of ownership, but it assumes a certain behavior of the assignee (management, conservation) and his commitment to a subsequent retransmission. This makes it a very special legal act. The legislator of 1804 had not recognized the trust among the special contracts of the Civil Code. After several unsuccessful attempts, French common law ended up welcoming the figure by name by a law of February 19, 2007. It is defined in article 2011 of the Civil Code (2011) as "the operation by which one or more constituents transfer assets, rights or securities, or a set of assets, rights or securities, present or future, to one or more trustees who, keeping them separate from their own patrimony, act for a specific purpose for the benefit of a or more beneficiaries. This is a solemn fixed-term contract (art. 2018 c. civ.), registered at the competent tax office (art. 2019 c. civ.). The object of the contract is a transfer of property from the settlor to the trustee, so that it may be managed or kept as security, transmission for liberal reasons being prohibited (arts. 2011 and 2013 c. civ.). The trustee is necessarily a credit institution or, since a reform of August 4, 2008, a lawyer (art. 2015 c. civ.). The contract of trust supposes, moreover, a person to whom the assets will be retransformed when the purpose of the trust has been achieved; by default, this beneficiary of the trust is the settlor, who is deemed to contract on his behalf (art. 2017 c. civ.).

The basic regime of the fiduciary presupposes a distinction between patrimonial ownership and powers. If we observe the ownership of the trust assets, the Civil Code provides that they form an autonomous mass of which the trustee is seized (art. 2011 c. civ.) and that the personal creditors of the

trustee cannot reach neither by way of individual seizure (art. 2025 c. civ.), nor by the order of collective proceedings (art. 2024 c. civ.). The goods escape. Also, in principle, to the settlor's creditors (art. 2025 c. civ.). Only creditors whose rights arise from the management or conservation of the assets of the trust can seize them, the settlor being also, in principle, subsidiarily liable to them. If we look at the powers over trust property, they have the characteristics of being temporary and limited (arts. 2018 and 2023 c. civ.). The fiduciary, who exercises them, must be accountable to the settlor and the beneficiary, or to the person they have appointed to look after their interests (art. 2022 c. civ.). Since its introduction into the Civil Code in February 2007, the trust has already undergone four reforms. There was the law of August 4, 2008, the ordinance of January 30, 2009 aimed at giving a legal regime to the security trust, the ordinance of December 18, 2008 reforming the law of companies in difficulty, and the law of May 12, 2009, which ratifies the ordinances and corrects certain aspects thereof. These texts marked the topicality of the fiduciary in 2009, the year in which they all entered into force<sup>603</sup>. Moreover, a fifth reform was almost added to the previous ones. By an amendment to a law finally promulgated on October 19, 2009, the legislator wanted to clarify the definition of the trust. Voted, the text did not however integrate the pages of the Official Journal, following a censorship of the Constitutional Council for a problem of form.

This succession of texts leaves an unpleasant impression of headlong rush; it signals a significant theoretical hesitation around the trust, as if this special contract could not be governed solely by the general principles of contract law, property law and security law.

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<sup>603</sup> –The law of August 4, 2008 and the order of January 30, 2009 entered into force on February 1, 2009. The order of December 18, 2008 reforming the law on companies in difficulty entered into force on February 15, 2009 and the law of May 12, 2009 entered into force on May 14, 2009 .

In Roman law, the fiduciary supposed the combination of a formal act, transferring ownership, and an adjoining pact, creating obligations. The formal deed was a symbolic sale by virtue of which one person, the fiduciary, became master of the property; the annexed deed dictated that the trustee must transfer, in time, the legal control of the property entrusted to him. The Roman trust was thus an imperfect synallagmatic contract that could be performed; it was the ancestor of the mandate; it was the ancestor of the pledge and the mortgage <sup>604</sup>. However, it placed the settlor at the mercy of the fiduciary. And since the fiduciary was the owner, the fruits of the thing transmitted belonged to him and were not used to discharge the debt <sup>605</sup>. Moreover, if, at the end of the trust agreement, the fiduciary refused to transfer to the settlor the property entrusted, no one could force him to do so: the fiduciary had only to pay damages for being without good faith. Finally, since the property had been transferred, this meant that the settlor could no longer dispose of the property and that the trustee, owner, did not technically benefit from a "security interest". The debtor's property was "held hostage" by the trustee, but its value was not set off against the unpaid obligation.

The Roman trust led to a significant loss of credit for the settlor while being a source of enrichment for the trustee: it declined from the 3rd century AD. When the formal modes of transfer on which it was based fell into disuse. Justinian, moreover, suppressed his trace in the Digest.

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<sup>604</sup>– In addition to manuals on Roman law, we recommend reading the short Thesis on Roman law by F. GENY, *Droit romain, Étude sur la Fiducie*, Nancy, 1885.

<sup>605</sup>– In the Middle Ages, the trust–security was known by the evocative name of mort–gage – conveyance pledge of ownership relating to a frugiferous thing where the fruits of the thing are not set off against the claim. Canon law prohibited the stipulation.



But the evolution of the law of companies in difficulty in the 20th century, which disrupted the effectiveness of security interests, led to reconsidering this use of the transfer of ownership as a regressive trend in contemporary law<sup>606</sup>. Professional creditors wanted the reintroduction of instruments of a fiduciary nature, making it possible to no longer compete with others but to exclude them. And the trust of the Civil Code seems to consecrate their wishes. But did the law of February 19, 2007 really take over the Roman law trust? This would be to forget that internationally, the French law of the 21st century is competed, in its effectiveness and its predictability, by other legislation; and when it comes to managing the property of others, the trust in common-law countries is a model. In common law, the trustee receives the legal ownership, but he is obliged in equity towards the beneficiaries, whose real prerogatives (supervision, resale right) are qualified as equitable ownership. When the trust is concluded for the benefit of a person, the trust certainly makes it possible to approach it: still it is necessary that the beneficiary of the trust then has a right as strong as the property ... which goes against the conception traditional trust. Renaissance of the Roman fiduciary in contemporary French law? Acculturation of French law by the reception of the trust? The hesitation on the scope of the French trust leads to a question: who, when the contract is in progress, owns the assets placed in trust? In French law, the property of article 544 of the Civil code (2011) is one and indivisible: the right on my own thing is not comparable to the rights on the thing of others, and this reasoning is applicable by extension to property other than property rights.

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<sup>606</sup>– B. OPPETIT, “Regressive tendencies in the evolution of contemporary law”, *Mixtures* dedicated to Dominique Holleaux, Litec, 1990, p. 317 et seq., spec. p. 321.



The Roman tradition invites us to see the fiduciary as the true owner: in certain aspects, the recent reforms clearly respect this tradition, which we will discuss first. But, under the contemporary influence of the trust, other modifications testify rather to a right of ownership of the beneficiary, which we will observe in a second step.

The trust of articles 2011 and following of the Civil Code is traditionally presented as the heir to the Roman trust: it would be based on a transfer of ownership, the trustee being however an owner "obligated" by the contract of trust. The beneficiary would have no right to the trust assets but only against the trustee. Several amendments that came into force in 2009 went in this direction: they concerned the civil operation of the trust and its regime when the settlor is in collective proceedings.

With regard to the civil operation of trusts, the law of August 4, 2008 provided for a rule applicable to all trust contracts, whether entered into for management purposes or for guarantee purposes. The new paragraph 2 of article 1424 of the Civil Code provides that the placement in trust of common property is an act of co-management; the order of January 30, 2009 also provided that the two spouses would have to set up this trust before a notary, on pain of nullity

(Art. 2012 c. civ.). Why such a precaution with regard to the trust granted on a common good, even though it could only be concluded for the purpose of management and for a short period of time? In reality, the law seems to have considered that the common good will be subject to a transfer. Because the trust leads to the transfer of ownership (or title), the

Spouses who would like to conclude it on a common good must prepare for an act of disposition, which supposes their respective consent and the information of a notary.

The ownership of the fiduciary is also illustrated by the order of January 30, 2009 relating to the trust entered into for the purpose of security. The text provides that in the event of non-payment of the guaranteed debt, the fiduciary creditor has the right to dispose, on his behalf, of the assets of the trust (art. 2372-3 c. civ. for movables; art. 2488-3 c. civ. for buildings). The value of the goods, estimated by an expert, will be deducted from the guaranteed claim. If the fiduciary is not the creditor, the latter may obtain that the fiduciary transfer the property of the trust to him (unless it was provided that the property would be sold on his behalf) <sup>607</sup>. When the secured claim is not paid, the fiduciary will therefore not become the owner of the assets of the trust (he already was): he will obtain the right to dispose of it freely, a prerogative which he still lacked. The text thus certifies that the fiduciary is the owner or holder of the assets assigned as collateral, as indicated in articles 2372-1 and 2488-1 of the Civil Code (2011).

The ownership of the fiduciary is also attested by the order of December 18, 2008 reforming the law on companies in difficulty. The government, empowered by the law of August 4, 2008, had to reconcile the effectiveness of the trust with the principles of the law of companies in difficulty protecting the settlor. The text then took care to distinguish between the transfer of ownership on a fiduciary basis and the possible agreement to make the trust property available. The fundamental contribution of the order was to impose the property of the fiduciary on the settlor's collective proceedings. With regard to the security trust, paragraph 1 of Article L. 624-16 of the Commercial Code thus provides that the fiduciary may claim, in the forms and within the time limits required by the collective proceedings, the movable property subject to the trust that would be in the hands of the debtor in difficulty.

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**607** – It is noteworthy that the trustee can then be a “security holder for others”: since only certain professionals can be trustees, the legislator has provided that they could be trustees for other creditors.

Article L. 622-7 II. The Commercial Code also authorizes the derogatory payment of the fiduciary by way of exception to the principle of prohibition of payment of previous debts "to obtain the return of goods and rights transferred as security in a fiduciary patrimony, when this withdrawal or this return is justified by the continuation of the activity". Moreover, without distinguishing according to the purpose of the trust, it is prohibited to use the option of termination or continuation of current contracts for the trust contract, which is always excluded from these provisions (art. L. 622-13 and L. 641-11-1 in fine c. com.)<sup>608</sup>. The order of December 18, 2008 therefore clearly postulates that the trustee had become, under the trust agreement, the owner or holder property placed in trust. The collective procedure of the settlor cannot call into question its quality, except nullity of the suspect period (art. L. 632-1 and s. c. com.), and must therefore accommodate itself to it.

It still retains some leeway with regard to the exercise of ownership by the fiduciary. The procedure may, in particular, call into question the agreement for the provision to the settlor debtor of the property placed in trust, by exercising the right of option relating to contracts in progress<sup>609</sup>, except for the opening of a judicial liquidation (art. L. 641-11-1 c. com.) or a receivership by conversion of a safeguard procedure (art. L. 631-14 al. 4 c. com.).

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<sup>608</sup> We may also find such a generality harmful: a company in difficulty could have had an interest in terminating a trust-management agreement of which it was the settlor and beneficiary, and it would have been appropriate here to distinguish trust-security and trust-management.

<sup>609</sup> The trustee who has left the thing in the hands of the settlor must claim it to oppose his property in the collective proceedings (art. L. 624-9 and L. 624-16 al. 1 c. com.), but he does not will not be able to recover it as long as the provision contract is in progress (art. L. 624-10-1 c.com.).

That "When assets or rights present in a fiduciary patrimony are the subject of an agreement in execution of which the debtor constituting in Article L. 622-23-1 of the Commercial Code also provides for retention of use or enjoyment, no assignment or transfer of these assets or rights may take place for the benefit of the fiduciary or a third party solely because the opening of the procedure, the approval of the plan or even a default in payment of a debt arising prior to the opening judgment. This prohibition is provided for on pain of nullity of the assignment or transfer". This text, which has an identical domain to the continuation option of the agreement for the provision of trust property <sup>610</sup>, plays, for the trust, an identical role to that prohibiting, for the pledge or the mortgage, the setting in work of the commissary pact (art. L. 622-7 I. in fine c. com.). The text then paralyzes, in certain circumstances, the automatic implementation of the security trust. On the other hand, when the fiduciary is in possession of the things given as security or when the settlor is not the debtor <sup>611</sup>, the security may be implemented immediately, without the insolvency proceedings being able to contravene it. The ownership of the fiduciary thus remains largely dominant. The ordinance of December 18, 2008 ensured that the collective proceedings fairly largely respected the situation of the trustee, considering that the latter was the owner (or holder) of the assets placed in trust. But not all reforms have gone in this direction. There already existed, in the law of February 19, 2007, old clues making it possible to doubt the ownership of the fiduciary. They fueled the idea that the beneficiary was the owner:

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<sup>610</sup> -Article L. 622-23-1 of the Commercial Code applies to safeguard and receivership proceedings, with the exception of recovery following the conversion of a safeguard (art. L. 631-14 al . 4 c.com.). It is not applicable in compulsory liquidation for lack of an article operating referral.

<sup>611</sup> -If the settlor is a natural person, he cannot be sued during the observation period (art. L. 622-28 c. com.).

thus the tax regime of the trust (the settlor is liable for several taxes based on the trust assets as long as he is the beneficiary of their restitution), the prohibition imposed on the trustee from acquiring the assets placed in trust (art. 1596 c. civ. – but the act should be impossible if the fiduciary is already the owner), the supervision that the settlor and the beneficiary impose on the fiduciary (arts. 2022 and 2017 c. civ.) or the determination of his powers (art. 2018 c. civ.), inconsistent with the principle of freedom of article 544 of the Civil Code. The year 2009 saw the appearance of other elements attesting to this ownership by the beneficiary, which the abortive reform of last autumn had expressly sanctioned. Several modifications attest that the beneficiary (by default the settlor), destined to recover the in case of correct execution, to the traits of the owner.

When the settlor places a professional building in trust that he intends to continue to operate or use, an agreement for the provision of the trust property is concluded between the settlor and the trustee. The law of August 4, 2008 then came to derogate from the applicability of the rules of the commercial lease or rental-management (art. 2018-1 c. civ.). While he has placed the property in trust, the settlor – beneficiary by default of their retransmission – is therefore not a tenant like the others. The text also aims, in a remarkable way, for the settlor to "retain the use or enjoyment of a goodwill or a building for professional use". He therefore does not seem to have lost any real right to his property; the law takes into account that it is the trustee who has a temporary right, not the settlor (taken here in his capacity as beneficiary).

If the trustee fails in his mission or is the subject of safeguard or recovery proceedings, the law of February 19, 2007 provided that his replacement could be requested from the judge by the settlor or the beneficiary. Article 2027 of the Civil Code was amended by the law of August 4, 2008 so that the replacement of the trustee can also, in such a case, be organized by the trust agreement itself.

Contrary to appearances, the trustee is not an “exclusive” owner of the assets placed in trust. In the event of poor execution of the agreement, he may be ousted from the head of the fiduciary patrimony, of which he will be divested in favor of a new fiduciary. Inspired by trust law, the rule certifies that the settlor (or the third-party beneficiary) “actually” has control of the assets placed in trust.

Finally, the ordinance of January 30, 2009 laid down twin texts to govern the movable trust (art. 2372-1 and s. c. civ.) or real estate (art. 2488-1 and s. c. civ.). Articles 2372-5 and 2488-5 of the Civil Code then provide for the remarkable case of a “reloading” of the security trust for the benefit of the same creditor or another. Inspired by the recharge of the mortgage, the texts allow the use of the property already placed in trust to assign it again as collateral. The law of May 12, 2009 then came to specify that the recharge cannot exceed the value of the revalued property when the settlor is a natural person; conversely, for a legal entity, the top-up may be made with reference to another amount (the value of the new guaranteed claim, for example). This possibility of recharging the security trust is however surprising, while the settlor is supposed to have lost ownership of the property that he transferred to the trust mass, he can still reallocate it as collateral. He has retained, despite the transfer, the right to dispose of the property... His situation is therefore completely comparable to that of a bare owner who would constitute successive usufructs. The settlor (default beneficiary) appears to have ownership of the assets placed in trust.

There was, in fact, an attempt to modify article 2011 of the Civil Code so that it expresses, in a second paragraph, that “The fiduciary exercises fiduciary ownership of the assets appearing in the fiduciary patrimony, for the benefit of the of the beneficiaries, according to the stipulations of the contract of trust”. Article 6 of Law No. 2009-1255 of October 19, 2009, the law tending to promote access to credit for small and medium-sized enterprises, therefore affirmed that the fiduciary was not the owner within the meaning Traditional term: he exercises (he does not “have”) fiduciary property (not only is it not “his” property, but the latter, stamped

“fiduciary”, is not the general right of article 544 of the Civil Code) according to the stipulations of the contract of trust (its right does not exist independently, it is framed by the contract).

The fiduciary exercising fiduciary ownership for the benefit of the beneficiary(ies) The fiduciary certainly has an exclusive right towards third parties, but it is otherwise limited.

Who in the trust owns the assets? Far from solving the question, The reforms effective or sketched out during 2009 have fueled the doubts arising from the law of February 19, 2007 <sup>612</sup> While they sometimes reinforce the idea of absolute fiduciary ownership, they continue at the same time to build a strange "fiduciary property"; and in this

Second idea, it is the beneficiary (who is, by default, the settlor) who has the general right of ownership, even if his powers would be starved during the course of the trust. The transferable nature of the French trust finally becomes ambiguous – the settlor retains prerogatives linked to the right that he had nevertheless transferred in the

“Trust patrimony”: rather than questioning what the contemporary trust transfers, perhaps we should ask ourselves if it does not transfer ownership only in appearance.

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<sup>612</sup> R. LIBCHABER, The civil aspects of the trust in the law of February 19, 2007, Defrénois 2007 art. 38631 p. 1094 (1st part) and art 38639 p. 1194 (2nd part).

**B\_ the legal qualification of the Moucharaka F.I contract on the legal basis of the trust contract**

**1) similarity of Musharakah F.I contract and trust contract**

**a- Real estate security the trust and Moucharaka**

The security trust is a transfer of ownership subject to conditions of duration and user. This concept is the "trust" in English law and under the name of ("Treuhand"), in German law as well as in French law. It was introduced into civil law as part of the law on the modernization of economy in 2008.

The law on the modernization of the economy of August 4, 2008 authorizes an ordinance to allow any natural or legal person, with the exception of minors and persons under guardianship, to be a grantor, however, the maximum duration is now 99 years. The objective of this new reform is in particular to reconcile the trust system with French law in general and the law of collective proceedings and tax law in particular.

A Delors trust is transformed from an innominate contract to a named contract between three people: the settlor, the trustee and the beneficiary who must comply with a number of mandatory information to be valid.

Who And emerges from article 2018 of the French civil code

1. Determinable transferred assets, rights or securities;
2. The duration of the transfer is limited to ninety-nine years from the date of signature of the contract;
3. The identity of the constituent(s);
4. The identity of the trustee(s);
5. The identity of the beneficiary(ies) or the rules for their designation;
6. Mission and disposition. From the trustee

And which are mandatory under penalty of nullity:

According to article 647 of the General Tax Code If the transferred assets are real estate or real estate rights, their placement in trust must



Also comply with the registration formalities in the land registry at the mortgage office.

Ordinary property is also the most extensive powers over the thing: *usus, fructus and abusus*. The plenitude of these powers allows the owner to draw all his usefulness from the thing. On the other hand, fiduciary property does not by nature invest all the powers over the thing. It can certainly confer them all, but, most often, the agreement limits the powers of the fiduciary, and sometimes confines them within strict limits, in particular in the case of a security trust and a gift trust ( assuming it is permitted, which is not the case today: art. 2013 of the French Civil Code).

This limitation explains a number of provisions, such as the one Who, at the stage of the conclusion of the trust contract, requires the powers of the fiduciary to be stated in the deed (art. 2018-6, d French Civil Code), or who, at the stage of the execution of the contract , imposes on the fiduciary an obligation to render an account (art. 2022, C. civ.). Such provisions are not conceivable in the case of ordinary property.

Two observations on this property with variable prerogatives.

First, the powers denied to the fiduciary are powers lost

Ordinary property is perpetual in the sense that it is intended to continue indefinitely. In this respect, it differs from personal rights and other real rights. In contrast to it, fiduciary ownership is temporary. And it is not simply because of the maximum duration of 99 years assigned to it by law.

(art. 2018, C. civ.). It is so by nature, by its very essence. In the management trust, it lasts only the time of the management. In the fiduciary-liberality, it lasts only the time of the transmission, which can be spread over time. In the security trust, it lasts only until the end of the term, even if the debtor defaults, because the creditor does not then limit himself to keeping the fiduciary property of the property but acquires the ordinary property, which replaces the first: its property ceases to be only fiduciary to blossom into ordinary property. This passage, like any transmutation, is moreover difficult to arrange: the law states, simply and precisely, that in the event of default of the debtor the creditor acquires the freedom to dispose of the property (art. 2372-3 and

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2488-3, C. civ. (2011)), this accession to the freedom to dispose attesting that, from a simple fiduciary owner, he becomes a ordinary owner.

Ownership is exclusive, in the sense that the owner ousts, eliminates everything other than himself from the thing: he has the power to prohibit others from establishing a relationship with the property. It is its exclusivity that makes it a monopoly.

This character is indeed (finally!) found in fiduciary property. It is in this exclusive management that this variety of fiduciary finds its *raison d'être*, and it is in this that it is fundamentally distinguished from a simple mandate, from a simple mechanism of conventional representation.

What is involved is to allow the fiduciary to manage like an ordinary owner and therefore to exclude from management any other than him. In the security trust, no one other than the fiduciary can obtain payment of his claim on the asset in question. It is in this exclusivity of the right to the value of the property that the trust-security (like the retention of title, this other variant of property-security) also finds its *raison d'être*. And this is where it differs from traditional securities, which, conferring only a simple right of preference, expose their holder to the risk of one day being awarded by a creditor deemed preferable. This, then, is what ordinary ownership and fiduciary ownership have in common: exclusivity. It is not nothing, but it is nothing more. Hence the caution of the legislator, who rightly refrained from defining the contract of trust as a contract transferring ownership, preferring to say that it transfers "property, rights or securities" (art. 2011, Civil Code). The contract of trust is, by its economy, a contract of service or guarantee, much more than a contract of exchange of goods. It would certainly have been conceivable to speak of the legal property of the fiduciary and the economic property of the beneficiary. The first conferring power and the other wealth;

Admittedly, the security trust is provided for and regulated in sections entitled "Property ceded as security", and the law authorizes it by saying that "ownership of a property" movable or immovable "may be transferred to as security for an obligation under a trust agreement entered into pursuant to Articles 2011 to 2030 of the Civil Code" (arts. 2372-1 and 2488-1, C. civ) In the business world, they can use the trust as a guarantee to obtain financing. A process that has the advantage of greatly reassuring creditors. While access to financing is a key issue for companies wishing to invest, especially when it comes to acquiring real estate, it often remains problematic. By providing solid guarantees to creditors, the trust can be a solution to convince credit institutions.

To secure a debt, a financing institution may take out a mortgage or make pledges (pledges, editor's note) for example on a goodwill. The trust is another solution that protects the debt even better.

. By setting up a trust, the company effectively organizes a transfer of full ownership of the property concerned, as security for the payment of its debt. "The creditor thus holds exclusivity over this property in the event that the debtor defaults or fails to repay his claim.

If the loan is repaid, the property is returned to the debtor at the end of the fixed period. Otherwise, the creditor still has the certainty of being reimbursed.

"The fiduciary has the capacity, according to the contract, to attribute the property to the creditor or to assign it on his behalf, after expertise and determination of its value by a legal expert", explains Jean-Patrick Delmotte. In addition to facilitating its access to financing, the creation of a security trust has the advantage for the company of not prohibiting it from using the property whose ownership is thus transferred, during the term of the trust. It can in fact ensure its enjoyment by concluding, with the fiduciary, a Provision agreement.

The other advantage of the system lies in its tax neutrality. "This operation should lead neither to an increase nor to a reduction in taxation borne until then by the parties, Thus, the transfer of ownership of the property does not

give rise to the taxation of capital gains. The taxation of this possible capital gain will only take place, where applicable, if the claim is not Reimbursed, when the property is definitively transferred to the beneficiary. Finally, when the trust relates to buildings, it gives rise to the payment of the land registration tax and the building security contribution.

b- legal background and resemblance of the mechanism of the two contracts  
It remains to be determined, similarity of Musharakah contracts for real estate financing and trust contract, which is not a small task, what legal framework can be applicable to Musharakah contracts for real estate financing:

#### ARGUMENT 1:

As explained before concerning the mandate contract that the agent is mandated by my principal to make an object for the benefit of the principal through his representation, this mechanism is the same as the Moucharaka contract in real estate investment in that the Moucharaka investment company real estate is mandated by the investor and the participatory bank for a real estate investment object for the benefit of the investor and Islamic bank.

#### ARGUMENT 2:

The security trust contract is an original contract contract of the mandate

#### ARGUMENT 3:

The subject of the amendment tabled by Senator Philippe Marini in March 2009 on the occasion of the French law simplification law <sup>613</sup>. This amendment indeed suggested the adoption of a new 2014 article of the Civil Code according to which " the fiduciary acting on behalf of the trust may, in agreement with the settlor, issue financial instruments representing the ownership of the assets contained in the fiduciary patrimony".

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<sup>613</sup>- Amendment no. 145 of 18 March 2009 to the bill on the simplification of the law, art. 66a.

in this proposal on the trust contract we have a property transferred by the settlor to the beneficiary and generating a financial gain can be managed by a fiduciary in agreement with the settlor in the same way on Musharakah contract of real estate financing a property transferred by the settlors of the company Moucharaka has the company Musharaka and generating the profit, can be managed by this one by agreement of the constituents of the company.

Argument 4:

In French law. It should be remembered that a sukuk is defined by the AAOIFI <sup>614</sup>, a "standardization" body for Sharia standards whose head office is in Bahrain, as being titles representing legally or economically the co-ownership of a tangible asset, the usufruct of this asset, or services. Until now, most sukuk issues in the world have been made using the legal framework of the trust instrument under Anglo-Saxon law:

a borrower transfers the ownership of one or more assets to a trustee, and the trustee issues in return trust certificates which represent the "economic" co-ownership of the investors in this or these assets. The investors hold the beneficial ownership (or economic ownership) while the trustee holds the legal ownership (or legal ownership).

Since then, a committee of specialists led by Paris Europlace went to present to the AAOIFI board, in October 2010, two legal structures allowing the issuance of sukuk from existing French law tools.

These two structures have been accepted in principle by the AAOIFI.

One is based on a combination of securitization and trust The second, even simpler, is based on the issuance of debt securities whose principal and remuneration are indexed to the financed asset, more or less equivalent to the idea of "economic ownership" which underlies trust certificates under Anglo-Saxon law.

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**614** –AAOIFI Acronym for Accounting and Auditing Organization for Islamic Financial Institutions, standardization body for Sharia standards headquartered in Bahr .

In French law, the legal instrument that comes closest to a trust is the trust, which was introduced into French law <sup>615</sup>, Modified several times since

#### ARGUMENT 5:

an issue of sukuks can be structured under French law without creating new institutions but by combining securitization and trust: the economic borrower assigns to the common securitization fund under French law (or FCT) <sup>616</sup> the receivables that have arisen or are to arise that it holds towards debtors (for example rents in the case of financial leasing). The FCT issues co-ownership shares to finance the acquisition of these receivables. These shares constitute financial instruments <sup>617</sup> which have the advantage of responding very exactly to the definition of sukuks within the meaning of standard <sup>618</sup> of the AAOIFI. But the creation of an FCT is not enough. The assignment of receivables to an FCT makes it possible to transfer the economic value of the asset to investors. But a sukuk represents more than just an undivided right of ownership over cash flows. It represents an undivided right to the underlying asset itself. However, an FCT cannot currently hold tangible assets other than on a subsidiary basis (for example, in the event of realization of the securities from which it benefits (a mortgage, a pledge, securities, etc.)). Hence the idea of adding to the assignment of receivables to the FCT the transfer of legal ownership of the underlying assets to the trustee, who holds them on behalf of the FCT.

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<sup>615</sup> –by a law of February 19, 2007

<sup>616</sup>. –Law no. 2007-211 of 19 Feb. 2007 establishing the trust, amended in particular by law no. 2008-776 of August 4, 2008 on various measures to modernize the economy and order no. 2009-112 of January 30, 2009.

<sup>617</sup>.– Art. L. 214-42-1 sec. C. my. end.

<sup>618</sup>. –Art. L. 211-1 I 3o C. mon. End.

The units thus issued by the FCT are representative, on the one hand and directly, of the economic ownership of the asset (the receivables corresponding to the cash flows generated by this asset) and, on the other hand and indirectly, of the legal ownership assets held by the trustee on behalf of the FCT and therefore indirectly on behalf of the investors. It is in this context that article 16 of the bill was born, which proposed the addition of a new paragraph to article 2011 of the Civil Code under the terms of which "the fiduciary exercises fiduciary ownership of the assets appearing in the trust patrimony, for the benefit of the beneficiaries, according to the stipulations of the trust contract". The purpose of this amendment was to highlight the simple nature Trustee therefore assigned, finalized, the trustee's ownership of the assets delivered to the trust. This is for us an argument demonstrating the similarity of the skuks contract as a combined securitization and trust contract without forgetting that among the recognized skuks we have the company skuks which are Musharakah securities backed by projects or activities managed on the basis of a Musharakah partnership contract

**ARGUMENT 6:**

As demonstrated before that the Moucharaka contract is a partnership contract confirmed by the Moroccan legislator.

**ARGUMENT 7:**

During the term of the trust. It can indeed ensure its enjoyment by concluding, with the fiduciary, a provision agreement. Similarly in Musharakah contract the bank concludes a capital sale contract to the investor with a permitted use of the building during the repayment of the capital

**ARGUMENT 8:**

In American law, the fiduciary deed is a real estate investment financing agreement with a third party appointed as caretaker of the building and mandating to be judicial executor or not on the building in the event of the debtor's non-performance of his obligation of the repayment of credit, the same in Musharakah contract as the fiduciary deed.



## ARGUMENT 9:

The doctrinaire Mr F. GUERANGER in his book *Islamic Finance: an illustration of ethical finance*, Dunod edition, in 2009 on page 9 that

“The Islamic bank can then play the role of a venture capital institution. Also, it is superficially close to the trust when the entrepreneur holds the funds given to him by the investor to use them according to the terms of the contract, without incurring the losses”.

So we have a confirmation of this doctrinaire of the rapprochement between the trust contract and the Islamic contract giving the entrepreneur the fund to manage as the case of the Moucharaka contract.

## THESIS:

The wording of Law 103-12 in its participatory banking part is marked by its use of too generous terms likely to apply to multiple factual situations forming more disputes than the law is supposed to settle, these terms are chosen according to the style of the Islamic sharia and are considered as a statement of Islamic principles rather than as the enactment of legal rules directly applicable to the facts and therefore able to propose solutions.

Want to better understand this young institution that is the Moucharaka contract in real estate financing. And arising from our study and final arguments: this thesis will be as a legal theory describing with legal simplicity the complex concept of the Musharakah contract of Islamic real estate financing in comparative law.

in addition to the fact that the law must be normative<sup>619</sup>, intelligible<sup>620</sup>, in other words readable, clear and precise.

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**619-** In decision no. 98-401DC, Financial autonomy of local authorities, June 10, 1998, Rec. P. 258, the Constitutional Council stated “the purpose of the law is to set out rules and must therefore have a normative scope”

**620-** FRISON-ROCHE M. –A. , BARANES W., “the constitutional principle of the accessibility and intelligibility of the law”, D., 2000, p.361: “a law should be considered intelligible when an ordinary person who reads it understands the rights and freedoms that the law concretizes for its benefit or against it and also measures the means of effectiveness of these, in particular the litigation mode of their protection”.



what is not respected by this part of the law which includes the term Musharaka which is not clear, hence the legal need for the design of its rule of law which is close to the fact of this term therefore our need is the obligation to explain in great detail what enacts the Musharakah and to seek the adaptability of this legal rule because this is a source of legal certainty sought by jurists.

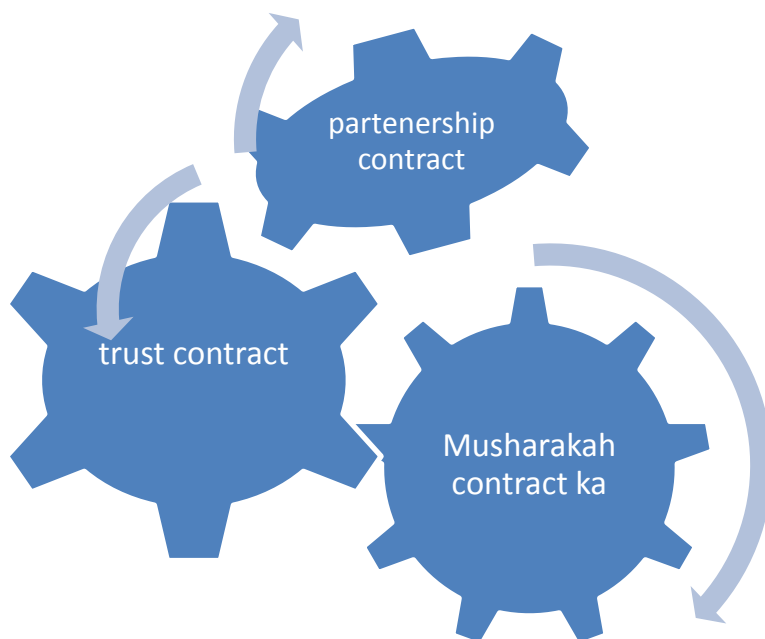
So from this starting point was born our search for a thesis qualifying in particular the IMFC.

This thesis restores all the richness of the analyzes carried out in our subject, hoping that it will therefore constitute an incomparable source of information and inspiration for all practitioners or academics or influential actors in legislation.

Our thesis is presented as a resolution of the following statement:

**THE LEGAL NATURE OF THE MUSHARAKAH CONTRACT IN  
REAL ESTATE FINANCING =  
IS A CONTRACTUAL LEGAL STRUCTURE  
COMBINING  
THE PARTNERSHIP CONTRACT AND THE TRUST CONTRACT**

WITH  
DIAGRAM OF ITS OPERATION



## 2) Effects of the legal qualification of the Moucharaka FI contract

### EFFECT 1:

In general, This theory of legal qualification of IMFC in terms of legal certainty is a legal instrument, ensuring the principle of transparency in law.

### EFFECT 2

Worse still, this qualification respects and defends the principle of legitimate expectation in common loyalty of the parties towards the object and the objective of the contract and to its legal implementation it becomes an element of the elements of the principle of protection of legitimate expectation in the stability of rights , commitments made and legal acts in business law .

### EFFECT 3

In special and in economic terms it is a question of insuring the present investments against the future legal risks by the good knowledge of the legal nature of the IMFC by the Islamic investment banks in such a way as to minimize the economic risks.

### EFFECT 4

As the Moroccan legislator has satisfied the world of finance by introducing into law 103-12 relating to credit establishments and similar bodies, the participatory bank as an economic actor recognized by law and investment stimulator.

in parallel to this feat, we find through our study that the concept of the trust contract is a complement to the nominate contracts and contracts falling within the Islamic banking field that the Moroccan legislator has not yet introduced into its legislative circuit, but if and only if by following the footsteps of French law in its introduction of this contract into legislation, Moroccan legislation will be enriched legally and will stimulate more investment by exploiting this contract; advancing national economic growth and causing a beneficial financial return for any existing economic actor in the Moroccan economic market

### EFFECT 5:

Initially, the idea was to use the trust to found the idea of a Moucharaka contract for real estate financing with a context already governed by French

law, according to a simple structure known to investors as much as to Scholars <sup>621</sup>. And in order to specify the regime applicable to this new category of financial instrument in Arab–French law

#### EFFECT 6:

In reality, our thesis was intended to allow the trustee of real estate, "dependent" owner of the assets (and therefore sole legal owner), to issue financial instruments representing the economic value of the assets he held. on behalf of the beneficiaries, using the legal instrument "the Musharakah real estate financing contract" to simplify the legal structuring of real estate trust contracts and to have a financial gain from the use of real estate for the benefit of the beneficiary without using the real estate

#### EFFECT 7:

the trust flourishes everywhere in legal journals, although it is not yet very present in Moroccan law. A request to introduce this concept of trust contract (even if it is of Muslim origin by its similarity to the waqf) has Moroccan legislation in the name of the economic attractiveness of Moroccan law, but following the French legislative development which had the dual purpose of expanding the empire of the trust and specifying its regime. This was done by the law on the modernization of the economy (LME) of August 4, 2008, order no. 2008–1345 of December 18, 2008 reforming the law on companies in difficulty, order no. measures relating to trusts, law simplifying the law of May 12, 2009 and, more recently, decrees of December 23, 2009 then no. 2010–219 of March 2, 2010 relating to the national register of trusts.

Much more than a simple special contract, or a small contract, the trust operation involves many disciplines: personal law, matrimonial regimes, successions, contracts, liability, property, credit, companies, collective procedures, private international law, tax or accounting or even social or criminal law. Nothing escapes the forces of the fiduciary empire:

We will be largely convinced of this during this rich day! Moreover, there is not a new edition of a manual or a treatise on these matters that does not

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<sup>621</sup> Scholars are doctors of Shariah law. The Shariah board, which issues the fatwa noting the compliance of a product with the Shariah, is composed of at least three Scholars

include its fiduciary developments.

The lines of private law are shifting, which makes its study more difficult. tribute should therefore be paid to the various stakeholders for having largely taken up the challenge of considering the trust in all its forms, or from all its angles.

Very often, the trust leaves Some acclaim a new queen of securities, From where one penetrates this concept in Moroccan law one can say that the future of the patrimonial engineering in Moroccan law, is the support of an Islamic finance succeeds,

## CONCLUSION

As a result, the current economic landscape is therefore experiencing an upheaval, because there is more interest in finance that is closer to economic reality. Thus, we have seen the appearance of an alternative finance to conventional finance, a finance which is called Islamic. The particularity is that it puts into practice religious principles linked in particular to Islam, which has integrated an ethics of action into the global economy. Islamic finance is therefore a finance where religion plays a preponderant role.

The Islamic finance market has grown very rapidly in recent years. This type of alternative financing will undoubtedly have an increasing role to play in the global finance market in the years to come. Governments, companies and financial institutions now have access to the considerable liquidity available to certain countries in the MENA (Middle East and North Africa) region.

Constantly evolving, the Islamic finance market offers increasingly structured and sophisticated products. Today, the Islamic finance market represents 1500 billion dollars of assets of banks and insurance companies, and with an average annual growth rate over the last 10 years between 10% and 30%.

The Islamic bank intends to satisfy a clientele asking for an additional possibility of seizing the chances and opportunities that they can identify but that they cannot otherwise realize, for lack of financial resources. Also through these financial products to encourage entrepreneurship while valuing the non-financial contribution "righteousness, integrity and transparency" of its customers and meet real needs through continuous effort.

Islamic finance offers a significant diversity of financing methods, which intensifies its competition with its conventional counterpart.

It significantly upsets the traditional role of the bank and extends the field of its financial intermediation. This transforms the traditional relationship between the bank and its client, of lender-borrower and creates either a partnership relationship or a commercial relationship of seller/lessor-buyer/tenant.

However, the spirit of the majority of Islamic financing contracts seems "superficially" close, or already appropriate, to certain conventional finance products.

Thus, these two financing systems share the same beneficiary purpose. And there is a nuanced cohabitation between participatory Islamic financing contracts and those of a commercial nature on the one hand and their quasi-correspondents in French law on the other (Moudaraba/commandite, Moucharaka/joint-venture, ijara / leasing or hire-purchase, mourabaha/purchase-resale, Salam/sale with deferred delivery and istisna'a/ sale of building to be built).

However, this apparent cohabitation is not perfect. The Muslim philosophy is not limited to using financing contracts that resemble those of conventional finance, since it is based on Shariah-compliant principles and each system applies different moral values and legal rules. and Morocco has managed not to distort the achievements and national strategic options, to maintain its Islamic position as a moderate country in its religion and its legislation, also when the two are involved, such as the case of legislating the Islamic banking structure and its regulation . Morocco has circumvented the fact of being at the mercy of the regulations and standardizations of this mode of financing which is dictated by the religious of the Gulf country, and it has given the task of regulating this mode of financing to two entities the Council of Ulemas and the central bank so we have decision-making independence from bodies foreign to our national policy, hence we congratulate this methodology for creating national wealth without being influenced by international actors, especially in the financial field. Hence the importance of paying great attention to the drafting of financing contracts. Each Islamic bank must have a Sharia advisory committee, made up of financial, legal and religious experts, which ensures that these contracts comply with Sharia, even if law 103.12 (article 62) obliges participatory banks to have opinions of conformity by the superior council of the ulema because the religious in their decision of conformity will need lawyers and financiers in order to give good decision-making results of conformity, this is why it is necessary to recommend the creation of a committee central sharia advisory body, attached to the Central Bank of Morocco, which lays down common rules to be followed by the committee of each bank.

Also for Morocco the new law 103.12 has given a real birth to the mode of Islamic financing in the form of participatory banking products, especially the Moucharaka contract, but without precise or enriching regulations on the banking technical level and without clarifying the management of the participatory banking and client system. or participatory bank and central bank and without forgetting the conditions to apply to the regulation of Islamic banking in general and Musharakah product in particular:

- \* competitiveness, good pricing, and transparency of the offer.
- \* support for Islamic banks and Moucharaka project manager by a body of experts in financial engineering (for the implementation of quantitative methods and principles of corporate finance) and in law (for the application of Islamic jurisprudence and the legal support for the Moucharaka company in order to apply Islamic law and company law and avoid conflicts of rights);
- \* innovation in legal adaptation for the globalization of Islamic banking law in non-Islamic countries in order to fluctuate more the flow of investment between the West and Islamic countries. Especially in Musharakah Islamic product which is a unique product of its kind through its goal of partnership and democratic method of distributing profit and loss between bank and client;
- \* Improve the method of operational, accounting and tax treatment of late payment penalties for customers of participating banks and their transfer to external charities;
- \* renew Inter-bank benchmarking in terms of accounting reporting (analysis by participatory product, by customer category, by geographical area;
- \* create new specific accounting rules specific to participatory banks, in particular for: the downgrading of receivables for overdue customers in "good faith", the provisioning of unpaid debts;
- \* Regulate specific prudential rules specific to participatory banks;
- \* combine between Musharakah Contract offer and socio-economic policies aimed at boosting the economy by creating jobs through Musharakah partnership between micro-investor and Islamic bank instead of microcredit, under the guarantee of the state especially with the new law allow to grant



more funds in microcredit (arriving at an amount of 150000 Dhs before the ceiling was 50000 Dhs);

\* facilitated the task of financing self-employed entrepreneurs through a Moucharaka partnership so that the self-entrepreneur focuses on his trade and his marketing and to move on to a better phase of real entrepreneur. Because with supervision and partnership with a bank increases the chances of success either of the micro-investor or of the auto-entrepreneur;

Therefore with these conditions and remarks and thesis note concerning the Musharakah contract we will exploit an Islamic legal mechanism to be developed to become a tool for economic and social growth. And transform the Islamic bank from a banking institution modeled on the conventional bank of interest to be an engine of financial bailout to become an Islamic bank of interest of distribution of wealth and assistance to human and economic development.

Because it supposes a contribution of funds, the MOUCHARAKA contract is the taking of a banking participation is a mode of financing of the possible companies. It is also a special mode of financing: it makes the Islamic banker take a shareholder risk, both specific and substantial, and gives him the right to participate in the operation of the financed company. But financial risk-taking proves to be poorly controlled and intervention in social affairs sometimes translates into intervention in the economy as a whole. However, Islamic banks have the double singularity of being custodians of public savings and of being responsible for ensuring the financing of companies. The Islamic banking activity appears as an activity of general interest rather than a commercial activity. This interest requires that bank equity investments be more governed by law and framed by financial and economic regulations than they are today. Addressing the theme of the shareholder banker under MOUCHARAKA contract therefore amounts to questioning the financing of companies and the role of the Islamic banker in the economic and social system. But After examination, this operation appears compatible with what should be the orthodox exercise of the profession of banker, on the condition however that certain precautions of a prudential and competitive order are taken so that the

Islamic bank is a pioneer in the development of investment through its participation in investment and overcoming the era where banking growth depends on investment growth, ie it will become both a growth player in investment especially and in the economy generally.

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