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Legal Consequences of the Death of a Member of a Limited Liability Company: A Comparative Study of Positive Law and Islamic Law

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Abstract: A Limited Liability Company as a business entity that has a major role in improving the economy, must deal with something that it cannot control such as the death of one of the members of the Company. In this case, the law, becomes the last gate that strengthens the establishment of the Company. Positive law is a provision that applies in a country that often deviates from Islamic values. On the other hand, Islamic law is believed to contain better benefits than other laws. Positive and Islamic law have different provisions regarding the legal consequences of a member of a joint stock company dying. The purpose of this article is to analyze the similarities and differences in the provisions of the legal consequences of a Limited Liability Company because one of the members dies in the review of positive and Islamic law. The type of research conducted is a literature study with documentation as the data collection technique and comparative study as the analysis technique. The results of the study show that positive law and Islam according to the jumhur ulama have similarities in the legal consequences of the death of a member of the Limited Liability Company, which considers the Company to end immediately. The difference is that in positive law the company ends if it is agreed at the beginning of its establishment, except for the type of joint stock company. Meanwhile, according to the Maliki school of thought, the Company is not canceled even without an agreement at the beginning.

Keywords: Limited Liability Company; Islamic Law; Positive Law.

INTRODUCTION

The modern world starting in the 20th century has entered the years of the greatest economic growth in the world of entrepreneurship. Since the industrial revolution in the West, humans seem to have found a bright spot in the utilization of business *capital* goods and the important factor of *entrepreneurship*. Industrial factories supporting the community's economy have massively grown in various forms in pursuit of increasingly varied technological developments. Currently, there are various types of businesses and businesses that support the economic facilities and infrastructure of the community. Each form of business requires a business entity that is managed in a structured and precise manner by more than one person. In addition, the rapid flow of globalization also creates various kinds of economic competition from various directions and has an impact on the complexity of the form of business entities created. Therefore, organizational management is needed that can exist amid the turmoil of modern trade activities. One of these organizations is called a company.

A company is a place where production activities occur and all factors of production of goods and services are gathered. In Indonesia, there are many types of companies engaged in trade. Among others: individual companies, such as UD (Trading Business) including shops, supermarkets, pharmacies, service companies (bureaus, workshops, salons, rentals), industrial companies (silver crafts, shoe producers, livestock), and partnership companies, such as: CV (*Commanditaire Vennootschcaap*) or limited liability company, firm and PT (Limited Liability Company). One of the most widely used forms is the *Perseroan komanditer*, due to considerations of easy establishment and lower initial capital costs than other forms of companies.

Limited liability company or CV (*Commanditaire Vennootschcaap*) is one of the many types of modern partnership companies that have been studied by Muslim scholars in Muslim-majority countries. Its provisions in Indonesian positive law are regulated through the *burgerlijk wetboek* (Civil Code) and *wetboek van koophandel* (KUHDagang). In positive law, a Limited Liability Company is a partnership established by two or more people, in which one party acts as a passive ally (commander) or a releasing ally and one party as an active ally (complementary) acts to manage the CV. Meanwhile, in Islamic law, a Limited Liability Company is referred to as a *shirkah mudharabah* contract. *Shirkah mudharabah* is a contract involving two parties in which one party (the investor) gives his property to the other party (the worker), so that the worker trades the property in order to generate mutual profits.

Since long ago, many Muslim scholars have studied the form of the partnership in every aspect in detail. The study is comprehensive, starting from the form of the contract made, the capital, the requirements of the

business actors, the distribution of profits, the responsibilities of the business actors, and the factors for the end of the partnership. The scholars differ on almost every important aspect related to the running of the partnership. One of the important aspects to be studied is the factor of the end of the partnership because one of the partners dies. The factor of the end of the partnership due to the death of one of the members is an important issue that must be understood by business actors, because this factor is unexpected and at the same time cannot be controlled by humans. On the other hand, trade associations such as CVs are the main drivers of the community's economy in raising the level of welfare to fulfill the needs of life. At the same time, when the business enters a phase of economic prosperity, the partnership must end because one of its members dies. In this condition, the law should play a role in handling the issue.

The legal consequences if one of the company's allies dies are important to be studied and understood through the perspective of positive and Islamic law. This is because Islamic law holds a dominant factor that is believed to contain better benefits than other laws. Meanwhile, positive law as the applicable law in a country, often has considerations that are far different from Islamic values. Legal effect is a term in law that means all the consequences that occur from all legal actions carried out by legal subjects¹ against legal objects² or other consequences caused by certain events by the law concerned itself has been determined or considered as a legal effect, or the result of an action taken to obtain an effect desired by the perpetrator and regulated by law.³ In simple terms, legal consequences can be interpreted as the consequences caused by legal events^{4,5} In this case, the legal event that results in other laws arising is the death of one of the members of the limited liability company. Other laws that arise are referred to as legal consequences.

This research examines the Company Commanditer by focusing on the aspect of legal consequences that occur because one of the members dies according to Indonesian positive law and Islamic law. The difference in objects and related variables in the study will make the research results different from

¹ Legal Subject is a legal term that means bearer of rights and obligations. It can also be said that every creature is authorized to exercise rights and obligations in legal activities. Legal subjects are divided into two entities, namely humans and legal entities. Romli. Arsad, *Introduction to the Science of Law*, (Sumedang: Alqaprint Jatinangor, 2014), 162.

² Legal object is a legal term that means everything that has a beneficial relationship to the subject of law and can be the object of a legal relationship. Fence M. Wantu, *Introduction to the Science of Law*, (Gorontalo: Reviva Cendekia, 2015), 41.

³ Soedjono Dirdjosisworo, *Introduction to the Science of Law* (Jakarta: Raja Grafindo Persada, 1999), 117.

⁴ Legal events are societal events arising from the relationships of members of society to which the law gives legal consequences. Yuhelson, *Introduction to the Science of Law* (Gorontalo: Ideas Publishing, 2017), 125.

⁵ Muhammad Sadi Is, *Introduction to the Science of Law* (Jakarta: Kencana, 2017), 91.

previous studies. Some previous researchers, the majority have conducted analytical studies with similar themes but packaged with different variables. Such as Momon Ardiansyah, Siti Hamidah and Dewi Astuti Mochtarya who studied the making and realization and fairness of the deed of the Commodity Partnership based on the *mudharabah* contract.⁶ This research uses the principle of justice of Islamic law in the *mudharabah* contract against the formation of a limited liability company in positive law. The research of Raysha Anggtaini Sitompul and Muhammad Fajri Mekka Putra analyzed the validity of the establishment of a deed of establishment of a Commodity Partnership (*Commanditaire Vennootschap* or CV) established by a married couple without a property separation agreement.⁷ The focus of this research is the validity of the contract in positive law review only without involving Islamic law.⁸ Nurul Ihsan reviewed the forms of companies in conventional economics through Islamic law. This last research has not been able to provide a detailed description of the termination of a limited liability company due to the death of one of the allies, because the comparative analysis only reviews the general concept of the Company.

Thus, it is clear that research related to the legal consequences of the death of a member of a joint stock company according to positive and Islamic law is a new research that has never been studied, so it contains novelty value. The consideration of conducting this study is also caused by several things. *First*, positive law and Islam have differences in regulating the legal consequences when one of the members of a limited liability company dies. *Secondly*, the factor of the end of the Company due to the death of an ally can be an obstacle to the economic progress of the community. In this case, positive and Islamic law are the main considerations that can be used as a reference by modern business actors.

⁶ Nurul Ihsan, 'An Overview of Company Forms in Conventional Economics and Islamic Fiqh', *Journal of Islamic Economics* 3, No. 1 (April 2023): 168–200. <http://repository.uinjkt.ac.id/dspace/handle/123456789/42910>.

⁷ Raysha Anggarani Sitompul and Mohamad Fajri Mekka Putra, 'Validity of Deed of Establishment of a Limited Liability Partnership (Commanditaire Vennootschap) by Spouses without a Property Separation Agreement', *Journal of Social Science and Education* 6, No. 3 (July 2022). <https://doi.org/10.36312/jisip.v6i3.3356/http://ejournal.mandalanursa.org/index.php/JISIP/index>

⁸ Nurul Ihsan, 'A Review of Company Forms in Conventional Economics and Islamic Fiqh Concepts'. *Journal of Islamic Economics* 3, No. 1 (2013): 168-200. https://www.researchgate.net/publication/329874923_Bentuk_Bentuk_Perusahaan_dalam_konsep_Ekonomi_dan_Fiqh#fullTextFileContent

RESEARCH METHODS

This article is a *library research* because it discusses the legal consequences of the death of a member of a limited liability company in the perspective of positive and Islamic law. Data collection techniques using documentation techniques. The documents in question are the Civil Code, the Commercial Code and the fiqh books of the four madhabs. Data collected in the form of articles and provisions of the two laws related to the legal consequences of the death of members of the company.

The data that has been collected is then analyzed using a comparative study technique, namely, after the data on the legal consequences of CV members dying are collected, described from both positive and Islamic law perspectives. Then compare the two to find out the similarities and differences between the two laws regarding the legal consequences of the death of a company member in the law.

RESULTS AND DISCUSSION

Limited Liability Company in Positive Law

The definition of a limited liability company or *Commanditaire Vennootschaap*, hereinafter abbreviated as CV, according to article 19 of the KUHD is a company⁹ established by one or more persons who are jointly and severally liable for the whole, and one or more persons as money releasers (limited partners) on the other side.¹⁰ Molengraff views CV as an association (*vereeniging*) cooperation agreement, in which one or more allies bind themselves to enter a certain capital for estimation (financing) together by one or more other allies running commerce.¹¹ The idea behind the formation of this company is that one or more people entrust money or goods to be used in commerce or a company to another person or several other people who run the company. Therefore, only the person who runs the company (complementary) is the one who relates and is fully responsible to third parties, and not all of its members act out.

This form of company is not regulated separately in the KUHD, but is incorporated together with the regulations regarding the firm company. For

⁹ The term company has the equivalent of the words partnership and association. These three words are often used to translate the Dutch terms "vennootschap" and "maatschap". "Guild" means a union of people who share the same interest in a particular company. The administrators are called "allies". The company has the same definition as an alliance, the difference lies in the company's capital in the form of shares. The managers are called "pesero" or shareholders. If the business entity does not run a company, it is called a "union". The people who manage the body are called "members". Mulhadi, *Company Law: Forms of Business Entities in Indonesia* (Depok: Raja Grafindo Persada, 2017), 25.

¹⁰ Republik Indonesia, 'Kitab Undang-Undang Hukum Dagang Article 19 Year 1938 Chapter III Regarding Several Types of Companies', Pub. L. No. LN. 1938-276 (n.d.), <https://jdih.kemenkeu.go.id/fulltext/1847/23tahun~1847stbl.htm>.

¹¹ Mulhadi, *Company Law: Forms of Business Entities in Indonesia*, 71.

this reason, HMN. Purwosutjipto defines CV as a firm partnership that has commoditer allies, while a firm partnership is a civil partnership, so that the provisions of Articles 1618 and 1619 of the Civil Code also apply to special forms of civil partnership, namely firms and CVs, and are still considered not legal entities^{12,13} If the regulations regarding the firm partnership are regulated in Articles 16 to 35 of the KUHD, then the five Articles in between, namely Articles 19, 20, 21, 30 (2) and 32 of the KUHD are regulations regarding the CV. That is why Article 19 of the KUHD states that a commoditer partnership or a money releasing partnership is another form of a firm, which is a more perfect firm and has one or several money releasing partners (commoditer). Whereas in a firm, there is no known commoditer ally, so that each ally is obliged to provide income in the same amount and also has the same position and responsibility.¹⁴

In a CV, there is a distinction between committal allies (silent or *sleeping partners*) and complementary allies (*working partners*). A committal ally¹⁵ is an ally who is not responsible for the management of the partnership, this ally only places capital (money or goods) in the partnership and has the right to take part in the assets of the partnership if there is a profit equal to the value of his contribution. Likewise, he will bear losses to the extent of the value of his contribution.¹⁶ Complementary allies, on the other hand, are management allies who are responsible for the running of the partnership, even to the extent of their personal assets.¹⁷ Complementary allies may also consist of just one or more. If there is more than one complementary ally, then they constitute a partnership with a firm, so that Article 18 of the Commercial Code applies, namely that they are each personally liable to fulfill the debts of the partnership.¹⁸

The basis of the legal relationship between CV allies is basically a cooperative relationship to seek or share profits, as stipulated in the provisions

¹² Legal entities are legal subjects, just like private human beings. According to Meijers, a legal entity is something that can support rights and obligations. Mulhadi, 86.

¹³ Yetty Komalasari Dewi, *New Thoughts on Limited Liability Partnerships (CV): A Comparative Study of the KUHD and Works as well as Indonesian and Dutch Court Decisions*, (Jakarta: Raja Grafindo Persada, 2016), 79.

¹⁴ Mulhadi, *Company Law: Forms of Business Entities in Indonesia*, 72.

¹⁵ A committing ally is only obliged to deliver money or objects to the partnership as promised, has the right to receive profits, his/her liability is limited to the amount of income promised, and may not interfere with the duties of the complementary ally (Article 20 KUHD). If violated, the responsibility changes to complementary responsibility, based on Article 21 of the KUHD. Dwi Tatak Subagio, Shanti Wulandari, and Fries Melia Salviana, *Company Law* (Surabaya: Revka Petra Media, 2017), 16.

¹⁶ Mulhadi, *Company Law: Forms of Business Entities in Indonesia*, 73.

¹⁷ Mulhadi, 73.

¹⁸ Paramita Paraningtyas, *Company Law Textbook* (Semarang: Yoga Pratama, 2019), 59.

of Article 1618 of the Civil Code.¹⁹ There is a difference in the internal relationship between the management (complementary) allies and the committal allies, where the management allies, in addition to putting money or objects into the partnership, also put in labor in order to manage and run the partnership.²⁰ In addition, complementary allies also bear unlimited responsibility for losses suffered by the partnership in its business. Complementary allies, on the other hand, are not liable for losses in excess of the amount of capital they have put in.²¹ In external relations, only the managing allies can run the company and act out and deal with third parties.²²

The establishment of a limited liability company does not require a certain formality, it can also be done orally or in writing.²³ If it is made in writing, then it can be made an authentic deed or a deed under the hand which regulates the organization of the joint stock company as well as the rights and obligations of its members.²⁴ In addition to not requiring notarial deed and registration, the KUHD also does not require announcement.²⁵

There are three known types of limited liability companies:²⁶

1. A tacit CV, which is a partnership that has not declared itself openly to third parties as a CV. In outward relations, this partnership still declares itself as a Firm, but inwardly this partnership has become a CV, because one or more of the allies has become a limited partner.
2. An open CV is a limited liability company that openly declares itself to third parties as a CV. This is evident from its actions in the form of publication in the form of a signboard that reads "CV" (such as CV Sejahtera). It can also be in writing to a letter explaining the name of the CV in dealing with third parties.
3. CV with shares, which is an overtly limited liability company, where the capital consists of a collection of shares. This last type of CV is not regulated at all in the KUHD, it only appears in practice by

¹⁹ Republik Indonesia, 'Civil Code Article 1618 of 1847 Chapter VIII on Partnership' (n.d), <https://www.bpkp.go.id/public/upload/unit/maluku/files/Viewer.js/Peraturan/Hukum/KUHP-Perdata-Bagian-1.pdf>.

²⁰ Mulhadi, *Company Law: Forms of Business Entities in Indonesia*, 76.

²¹ Mulhadi, 76.

²² Christine S.T. Kansil, *Principles of Knowledge of Indonesian Trade Law* (Jakarta: Sinar Grafika, 2010), 86.

²³ Paraningtyas, *Company Law Textbook*, 60.

²⁴ Kansil, *Principles of Knowledge of Indonesian Trade Law*, 88

²⁵ In France, the announcement of the establishment of a limited liability company is considered a core requirement, which results in the cancellation of the company agreement if this is ignored. According to Sukardono, looking at the development of the establishment of a joint stock company in Indonesia now, in commercial practice it turns out that a notarial deed of establishment, registration, and announcement is also held. Kansil, 88.

²⁶ Dhaniswara K. Harjono, *Textbook of Company Law and Insolvency* (Jakarta: UKI PRESS, 2020), 31.

entrepreneurs or in the world of commerce. In essence, this type of limited liability company is the same as an overt CV, but the only difference is that the capital consists of shares.

Limited Liability Company is not specifically regulated by law, but its regulation is subject to the provisions of *maatschap* in the Civil Code and firm partnership in the KUHD (Articles 19,20,21,30 paragraph (2) and 32.²⁷ The provisions of *maatschap* are applied only to the extent that they do not conflict with the special provisions in the KUHD as mentioned above.²⁸ Therefore, the dissolution of a limited liability company also refers to the Civil Code and KUHD in the articles above.

The method of dissolution of a limited liability company is the same as that of a firm with reference to Article 31 of the KUHD, which is as follows:²⁹

1. The expiration of the term of the limited liability company as stipulated in the articles of association.
2. Result of resignation or dismissal of allies.
3. As a result of amendments to the articles of association.

In addition to referring to the KUHD, the dissolution of a limited liability company is also supplemented by the rules set out in Articles 1646 to 1652 of the Civil Code. Namely as follows:³⁰

1. The time stipulated in the agreement has expired.
2. Due to the destruction of goods used for the Company's purposes or the achievement of the Company's objectives.
3. By the will of several allies or one of the allies.
4. Because one of the allies dies, is placed under a pardon or is bankrupt or is declared an incapacitated person by a court.

Cancellation or dissolution of the company due to the death of one of the allies is excluded if there has been a prior agreement about a successor or heir who will replace the ally, or there is an agreement to continue with the remaining allies.³¹ This indicates that the contract of a joint stock company can be inherited to another person, or can continue to run with the death of one of the allies with an agreement at the beginning of its formation. However, in a

²⁷ Mulhadi, *Company Law: Forms of Business Entities in Indonesia*, 79.

²⁸ Mulhadi, 79.

²⁹ Republik Indonesia, 'Kitab Undang-Undang Hukum Dagang Article 31 Year 1938 Chapter III Regarding Several Types of Companies', Pub. L. No. LN. 1938-276 (n.d.), <https://jdih.kemenkeu.go.id/fulltext/1847/23tahun~1847stbl.htm>.

³⁰ Republik Indonesia, 'Kitab Undang-Undang Hukum Perdata Article 1646 Year 1847 Chapter VIII Regarding Various Methods of Termination of Partnership' (n.d.), <https://www.bpkp.go.id/public/upload/unit/maluku/files/Viewer.js/Peraturan/Hukum/KUHP-Perdata-Bagian-1.pdf>.

³¹ Republik Indonesia, 'Civil Code Article 1651 Year 1847 Chapter VIII Regarding Various Ways of Terminating an Association' (n.d.), <https://www.bpkp.go.id/public/upload/unit/maluku/files/Viewer.js/Peraturan/Hukum/KUHP-Perdata-Bagian-1.pdf>.

limited liability company with shares, the position of the shareholders can be transferred and inherited to others even without an agreement at the beginning, because the rules regarding the position of shares and shareholders in this type of CV are the same as the rules governing shares in a limited liability company (PT).³²

Limited Liability Company in Islamic Law

Islamic law actually provides freedom for humans to trade to fulfill their needs. The concept of cooperation between humans in trade has been widely practiced since the time of the Prophet Muhammad SAW, although the form is not exactly the same as the practice of modern human alliances. Whatever the form, the rules of fiqh state that the original law of muamalah is permissible as long as there is no evidence that forbids it.³³ In Islamic law, in general, the concept of a limited liability company transaction can be equated with the concept of *shirkah* and *mudharabah* contracts^{34,35} *Shirkah* in language is mixing, namely the mixing of two or more things until they can no longer be distinguished.³⁶ The majority of scholars then used this term to refer to special transactions, even though there was no mixing of assets or shares, because what caused the mixing was the transaction.³⁷

Scholars differ on the terminology of *shirkah*. According to the Hanafi school, *Shirkah* is a transaction between two people who are partners in capital and profit.³⁸ According to the Maliki school, *shirkah* is the granting of permission to business partners or to other partners to manage the assets of both.³⁹ The Shafi'i school of thought defines *shirkah* as the permanent right of

³² Mulhadi, *Company Law: Forms of Business Entities in Indonesia*, 79.

³³ Abu Muhammad Sholih Ibn Muhammad Ibn Hasan al-Usmuri al-Qaththani, *Majmu'at al-Fawa'id al-Bahiyah 'ala Mandzumat al-Qawa'id al-Fiqhiyyah* (Saudi: Dar al-Shumai'i, 2000), 75.

³⁴ The terms *shirkah* and *mudharabah* are generally the same, i.e. a contract of partnership (cooperation) between two or more parties (a business relationship between more than one person). The difference lies only in the capital, where in a *mudharabah* contract, one party is allied with business capital, and one party with material capital (money / objects). Whereas *shirkah* is the mixing of the assets of both parties. That is why the scholars of the Hambali school of thought included the discussion of *mudharabah* in the chapter on *shirkah*. This was also done by Shaykh Wahbah Zuhaili by using the term *shirkah mudharabah* in his book of fiqh. Wahbah al-Zuhaili, *Fiqh Islam Wa Adillatuhu*, trans. Abdul Hayyie al-Kattani, vol. 5 (Jakarta: Gema Insani, 2011), 476.

³⁵ Nurul Ihsan, 'A Review of Company Forms in Conventional Economics and Islamic Fiqh Concepts', 190.

³⁶ 'Utsman bin 'Ali bin Muhjan al-Bari'i Fahrudin al-Zaila'i al-Hanafi, *Tabyin al-Haqaiq Sharh Kanzi al-Daqaiq wa Hashiyah al-Shilbiy*, 1st ed., vol. 3 (Kairo: al-Mathba'ah al-Kubro al-Amiriyah, 1313), 312.

³⁷ Wahbah al-Zuhaili, *Fiqh Islam Wa Adillatuhu*, 5:441.

³⁸ Muhammad Amin al-Syahir bi Ibn Abidin, *Hasyiyah Radd al-Mukhtar 'Ala al-Darr al-Mukhtar Syarh al-Tanwir al-Abshar*, vol. 4 (Mesir: Syaikh maktabah wa mathba'ah al baabii al halabi, 1386), 299.

³⁹ Muhammad Ibn Ahmad Ibn 'Arofata al-Dasuqi al-Maliki, *Hasyiyah al-Dasuqi 'ala Syarh al-Kabir*, vol. 3 (Beirut: Dar al-Fikr, 1815), 348.

two or more people equally over something.⁴⁰ The Hambali school defines *shirkah* as the association of rights or authority.⁴¹ Wahbah Zuhaili considers that the definition given by the Hanafi school is more precise than the others, because it explains the essence of *shirkah*, which is a transaction.⁴²

Shirkah is a contract that is permitted by Shari'ah. The legal basis of *shirkah* is in the Qur'an,⁴³ Sunnah⁴⁴ and Ijma'.⁴⁵ *Shirkah* is generally divided into two; *Shirkah amwal* (capital partnership) and *shirkah mudharabah*. However, the *shirkah* that is closest to CV is *shirkah muhdarabah*. In the terminology of the fiqh scholars, *shirkah mudharabah* is a contract involving two parties in which one party (the investor) gives his property to the other party (the worker), so that the worker trades the property to produce mutual profits according to the contract agreement.⁴⁶

The definition of *shirkah mudharabah* explained by the jurists does not accurately describe a limited liability company because the concept is very general. This is understandable given that a partnership is a modern form of partnership that did not exist in ancient times. Wahbah Zuhaili, a contemporary scholar, legitimized the validity of the partnership and called it *Shirkah Tawshiyah Bashithah*. He argues that this *Shirkah* is allowed and is considered a *shirkah mudharabah* with a slight difference.⁴⁷ The difference is as explained in the definition of *shirkah tawshiyah bashithah*, which is a partnership (company) established by people who are allies in entrepreneurship where some of the partners only deposit capital and others are mutually responsible for the running of the company.⁴⁸ The responsible partners are those who own the capital and run the company, and are mutually responsible for fulfilling their duties and assuming the obligations of the company, such as paying the company's debts. While allies who only deposit capital are those who do not have the authority to operate the Company and are not responsible for assuming the obligations of the company.⁴⁹

Based on the above definition, the point of difference between *shirkah tawsiyah basithah* and *shirkah mudharabah* lies in the worker's partner (*mudharib*)

⁴⁰ Shamsuddin Muhammad bin Muhammad al-Khatib al-Syirbini, *Mughni al-Muhtaj ila ma'rifati Ma'ani al-Faazi al-Manhaj*, vol. 3 (Beirut: Dar al-Kotob al-Ilmiyyah, 1994), 221.

⁴¹ Abu Muhammad Abdullah Ibn Ahmad Ibn Muhammad Ibn Qudamah, *Al-Mughni*, vol. 5 (Cairo: Maktabah al-Qahirah, 1969), 3.

⁴² Wahbah al-Zuhaili, *Fiqh Islam Wa Adillatuhu*, 5:441.

⁴³ Surat al-Nisa' ayat 12 dan al-Shad ayat 24. Wahbah al-Zuhaili, 5:442.

⁴⁴ Hadis Riwayat Abu Dawud.

⁴⁵ Qudamah, *Al-Mughni*, 5:433.

⁴⁶ Abdurrahman Ibn Muhammad 'Aud al-Jaziri, *al-Fiqh 'ala Mazhahib al-Arba'ah*, vol. 3 (Beirut: Dar al-Kotob al-Ilmiyyah, 2003), 34.

⁴⁷ Wahbah al-Zuhaili, *Fiqh Islam Wa Adillatuhu*, 5:517.

⁴⁸ Wahbah al-Zuhaili, 5:517.

⁴⁹ Wahbah al-Zuhaili, 5:517.

and the liability for the partnership's losses. In *shirkah mudharabah*, the *mudharib* does not own any capital, except for his efforts and energy so that the loss of the partnership is borne entirely by the capital of the investor. Whereas in *shirkah tawsiyah basitah*, the *mudharib* must also be fully responsible for the loss of the partnership up to his personal property. In addition to the above provisions, the pillars, conditions, characteristics, types and cancellation of the *shirkah tawsiyah basitah* contract are subject to the provisions of the *shirkah mudharabah* contract.

The pillars of *shirkah mudharabah* according to the *Hanafiyah* are only *ijab* and *qabul*.⁵⁰ Meanwhile, according to the *majority* of scholars there are three, namely:⁵¹ the contractor, the object of the contract and the *sighat* (*ijab qabul*). The *Shafi'iyah* are of the opinion that there are five pillars: the contractor, *sighat*, capital, work, and profit.⁵²

The requirement for the perpetrator of the *mudharabah* contract is to be capable of carrying out partnership activities, not to be Muslim.⁵³ So that the *mudharabah* contract is still valid even if it is done with non-Muslims. The capital in a *mudharabah* contract is required to be handed over to the *amil* (worker) with a clearly known amount in the form of money that is valid at that time, not debt.⁵⁴ The amount of profit must be known by both parties in the form of a percentage and become joint property.⁵⁵

Mudharabah shirkah is divided into two types, namely *muthlaqah* and *muqayyadah*.⁵⁶ *Mudharabah muthlaqah* means a cooperative transaction on business without limiting '*amil* in using capital. *Mudharabah Muqayyadah* is a *shirkah mudharabah* contract that gives restrictions to '*amil* on his trading activities. Such as limiting time, place, type of business, interaction with certain people, and so on. The *Shafi'iyah* and *Malikiyah* scholars are of the view that *mudharabah* must be *mutlaqah*, so that anything other than this form (*muqayyadah*) is invalid.⁵⁷

The majority of scholars agree that before the *amil* starts working, the contract is not binding (*ghairu lazim*), which means that both the investor and

⁵⁰ 'Alauddin Abu Bakar Ibn Mas'ud al-Hanafi, *Bada'i al-Shana'i fi Tartibi al-Sharai'*, vol. 6 (Mesir: Dar al-Kutub al-Ilmiyyah, 1328), 79.

⁵¹ Musthafa al-Khin, Musthafa al-Bugha, and 'Ali al-Syirbaji, *al-Fiqh al-Manhaji 'ala Madhab al-Imam al-Syafi'i*, vol. 7 (Damaskus: Dar al-Qalam li al-Thaba'ah wa al-Nasyr wa al-Tauzi', 1992), 74.

⁵² Abu Zakariya Muhiyyiddin Yahya Ibn Syaraf al-Nawawi, *Raudlat al-Thalibin wa 'Umdat al-Muftin*, vol. 5 (Beirut: Maktabah al-Islami, 1991), 117.

⁵³ Sulaiman Ibn Muhammad Ibn Umar al-Bujairami al-Syafi'i, *Hasyiyah al-Bujairami 'ala Syarh al-Minhaj*, vol. 3 (Mesir: Matba'ah al Halabi, 1950), 42.

⁵⁴ Ali Khafif, *al-Sharikat fi al-Fiqh al-Islami* (Mesir: Dar al-Fikr al-'Arabi, 2009), 92.

⁵⁵ Ali Khafif, 93.s

⁵⁶ Abdullah Ibn Muhammad Ibn Ahmad al-Thayyar, *Wabal al-Ghamamah fi Sharh 'Umdat al-Fiqh li Ibn Qudamah*, vol. 4 (Riyadh: Dar al Watn, 2011), 220.

⁵⁷ Wahbah al-Zuhaili, *Fiqh Islam Wa Adillatuhu*, 5:480.

the 'amil can cancel it.⁵⁸ However, they differ in their opinion once the 'amil has started working. The majority of scholars are of the view that the contract is not binding, so it can be canceled if both parties wish.⁵⁹ Imam Malik, on the other hand, is of the opinion that the contract is binding (*lazim*).⁶⁰ Imam Malik's opinion is based on the benefit of the partnership, where if the contract is canceled at any time, it will bring *harm* to one of the contracting parties. The Maliki school is also of the view that the *shirkah mudharabah* contract can be passed on to descendants or people who are considered capable of continuing the partnership.⁶¹

The *mudharabah shirkah* agreement ends for the following reasons:⁶² First, cancellation and prohibition of business or dismissal. Second, the death of one of the contracting parties. Third, one of the contracting parties becomes insane. Fourth, apostasy of the owner of the capital, according to the Hanafiyah scholars. Fifth, the capital is destroyed in the hands of the *amil* (*mudharib*) before it is spent (still in the form of money).

According to the Maliki school of thought, the death of one of the contractors does not necessarily invalidate the *mudharabah* contract because the contract can be passed on to another person who is considered capable.⁶³ Regarding the cause of insanity, the Shafi'i school of thought does not exclude the period of insanity of the perpetrator of the contract, contrary to the majority of scholars, which means that whether the insanity is permanent or temporary, the contract is still void immediately.⁶⁴ The scholars agree that insanity removes the status of a person's *ahliyyah* (ability) in carrying out transactions so that it does not fulfill the requirements of the contract actor.⁶⁵

Apart from the five points above, the cancellation of the *mudharabah* contract according to the Hanafi school of thought is closely related to the conditions in the *mudharabah* contract, namely if there are other conditions that cause one of the valid conditions of *mudharabah* not to be fulfilled. Such as a condition that causes uncertainty of profit.⁶⁶ For example, if the owner of the capital requires the *mudharib* to give his land to be planted by the owner of the capital or to give his house for a certain period of time. According to the Hanafi

⁵⁸ Abu Abdullah Muhammad al-Khirashi, *Sharh al-Khirashi 'ala Mukhtasar Khalil*, vol. 6 (Bulaq: al-Mathba'ah al-Kubro al-Amiriyyah, 1899), 203.

⁵⁹ Wahbah al-Zuhaili, *Fiqh Islam Wa Adillatuhu*, 5:480.

⁶⁰ Wahbah al-Zuhaili, 5:480.

⁶¹ Ibnu Rusyd al-Hafid, *Bidayah al-Mujtahid wa al-Nihayah al-Muqtasid*, vol. 4 (Cairo: Dar al-Hadis, 2004), 24.

⁶² Wahbah al-Zuhaili, *Fiqh Islam Wa Adillatuhu*, 5:511.

⁶³ Ibnu Rusyd al-Hafid, *Bidayah al-Mujtahid wa al-Nihayah al-Muqtasid*, 4:24.

⁶⁴ Wahbah al-Zuhaili, *Fiqh Islam Wa Adillatuhu*, 5:512.

⁶⁵ Dubayyan Ibn Muhammad al-Dubayyan, *Al-Mu'amalat al-Maliyah Asalah Wa Mu'asirah*, 2011, 127.

⁶⁶ Ali Khafif, *al-Sharikat fi al-Fiqh al-Islami*, 94.

school, this invalidates the *mudharabah* contract because the owner of the capital seems to get excess profit from the capital of the *mudharib* that he manages, not from the growth of his capital. However, if the condition does not prevent the valid condition of the *mudharabah* from being fulfilled, then the invalid condition is automatically invalidated and the *mudharabah* contract remains valid. For example, if it is stipulated that all losses are borne by the *mudharib*, or the owner of the capital gives his house to the *mudharib* to live in for a certain period of time.⁶⁷

If the entire profit is stipulated to belong to the owner of the capital, and the *mudharib* works for free, then the contract is called a *mubadha'ah* contract.⁶⁸ 'Amil (worker) is called *mustabdhi*. But if it is the other way around, where all profits are stipulated to be the profit of the *mudharib* (worker), then it is called a loan contract according to the Hanafi, Maliki and Hambali schools of thought.⁶⁹ However, according to the Shafi'i school of thought, the contract is invalid and the 'amil (worker) is obliged to get a general wage for his work.⁷⁰

Comparative Study of Positive Law and Islamic Law Regarding the Legal Consequences of the Death of a Member of a Limited Liability Company.

The termination of the partnership in positive law is regulated in article 31 of the KUHD and article 1646 of the Civil Code. Article 31 of the KUHD explains that the company ends because the stipulated period of the company has expired, the resignation or dismissal of the allies and due to changes in the articles of association. In the Civil Code, the partnership ends because the time stipulated by the agreement has expired, the destruction of goods used for the purpose of the company or the achievement of the company's objectives, the will of one or several allies and one of the allies dies, bankruptcy or declared incapable by the court. The termination of a joint stock company in Islamic law is similar to the termination of a *shirkah mudharabah* contract. The *shirkah mudharabah* contract terminates due to the cancellation and prohibition of business, the death of one of the contracting parties, one of the contracting parties becoming insane and the destruction of capital in the hands of 'amil before spending anything.

Positive law and Islam have similarities in the termination of partnership transactions due to the death of one of the allies or partners, as mentioned in Article 1646 of the Civil Code. This rule is the same as the opinion of the majority of scholars in the *shirkah mudharabah* contract that the death of one of the allies causes the legal effect of the end of the *shirkah mudharabah*

⁶⁷ Ibnu Rusyd al-Hafid, *Bidayah al-Mujtahid wa al-Nihayah al-Muqtasid*, 4:22.

⁶⁸ Wahbah al-Zuhaili, *Fiqh Islam Wa Adillatuhu*, 5:488.

⁶⁹ Ibnu Rusyd al-Hafid, *Bidayah al-Mujtahid wa al-Nihayah al-Muqtasid*, 4:22.

⁷⁰ Ibnu Rusyd al-Hafid, 4:22.s

contract immediately, whether known or not. This is because the majority of scholars equate the *mudharabah shirkah* contract with a representative contract, i.e. when the one who is represented dies, the contract is also terminated. The majority of scholars consider that this contract of business partnership (*shirkah mudharabah*) cannot be inherited by anyone.

The difference lies in the notes or conditions that are raised when the contract is made. In Article 1651 of the Civil Code, it is explained that the death of one of the allies will not make the partnership end, if it is required in the agreement at the beginning of its establishment. This means that Indonesian positive law does not absolutely make the end of the partnership due to the death of one of the allies. Furthermore, the options offered by Article 1651 of the Civil Code regarding the agreement can be in the form of replacing one of the allies with another or bequeathing the duties of the ally to another person deemed capable, or it can also not provide a substitute for anyone, which is simply agreeing not to cancel the partnership when one of the allies dies. Also in CVs on shares, there is a special rule that even without an agreement at the beginning, the partnership will not be dissolved by the death of one of the allies, but a capable successor can be found immediately.

This provision is similar to the opinion of the Maliki school of thought, which states that the *shirkah mudharabah* contract does not end with the death of one of the parties or allies, rather the contract can be passed on to anyone who is considered capable, even without conditions or agreements at the beginning of the contract. This is because the Maliki school of thought believes that canceling the contract can cause harm (*mudharat*) in the continuity of the business. In their view, the *shirkah mudharabah* contract is a transaction that makes it easier for humans to earn a living in this world, because this contract is *tabarru'* (willingness and helping). So if the contract is canceled only by the death of one of the allies and cannot be inherited, this will eliminate the essence of the principle of the *mudharabah shirkah* contract itself, which is to improve the economic level of the community.

CONCLUSIONS

Commanditaire Vennootschaap (CV) in Islamic law is called a *shirkah tawsiyah basithah* contract, which is a new form of *shirkah mudharabah* contract. Therefore, its provisions are subject to the provisions of the *shirkah mudharabah* contract. According to the majority of scholars, the partnership contract is void if one of the partners dies absolutely. This is similar to the provisions of a joint stock company as stipulated in Article 1651 of the Civil Code. The difference is that in the Civil Code the partnership contract does not expire if it is agreed upon at the beginning of the partnership, except in CVs on shares, where the contract is not canceled even without an agreement at the beginning of its

formation. This provision is also similar to the opinion of the Maliki school of thought, which contradicts the majority of scholars, that the partnership does not end with the death of one of the partners even without an agreement at the beginning of the contract. This is because the Maliki school considers that the contract can be passed on to descendants, or other people who are considered capable of continuing the partnership.

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