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## **Syari'ah Appraisal On Mudharabah (Profit and Risk Sharing) Product In Islamic Banking And Financial Institutions In Indonesia**

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### **ABSTRACT**

This study is designed mainly to assess the Syari'ah compliance on mudharabah (profit and risk sharing) product offered by Islamic banking and financial institutions in Indonesia. This study employs the descriptive analysis based on syari'ah perspective. As a result, the study found that the product of mudharabah (profit and risk sharing) offered by Islamic banking and financial institutions were problem and not totally Islamic. The most reasonable arguments of the problem were derived from the operating system of Islamic banking and financial institutions which is parallel with the conventional counterparts that prohibited by Islam. The problem are as follows: (1) conflict in dual system of funding and financing based on the concept of real mudharabah and mudharabah musytarakah; (2) Islamic banking and financial institutions do not have real business; (3) Islamic banking and financial institutions are not able to bear losses; (4) Islamic banking and financial institutions customers are given profit sharing, whereas some of the cutomers' funds have not yet been invested; (5) and profit sharing calculation method is convoluted or complicated. Therefore, to overcome the significant problem, it is necessary to reform the current operation of Islamic banking and financial system. Besides that, the optimalization of the Shari'ah supervision (al-raqabah syar'iyah) aspect should be taken positively and seriously by the National Syari'ah Council of the Indonesian Ulama' Council in order to prevent the Islamic banking and financial institutions from breaking the Syari'ah principles and values.

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## **Introduction**

Islamic banking and financial institutions have evolved and adopted various Islamic sales contracts to help finance their customers. These contracts are deeply expressed in syari'ah and developed through along history by Islamic economic scholars. One of them is *mudharabah* (profit and risk sharing) product as practiced by Islamic banking and financial institutions. But in the modern world, the term is already an extension of its

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classical sense. Its application to Islamic banking and financial institutions is that customers apply financing with the system of *mudharabah* (profit and risk sharing) to Islamic banking and financial institutions to buy goods (productive and consumptive) that are known to its properties, where customers and banks know the goods are real and by the bank ready to hold goods required by customers. Then made a contract or agreements between the customer and the bank or micro financial institutions regarding their ability of financial institutions to buy the desired goods and the ability of customers to buy the goods. This contract is not a contract of sale, but a contract to hold a sale.

According to Obaidullah (2008),<sup>1</sup> savings account based on *mudharabah* (profit and risk sharing) contract is a contract between a capital provider (*rabb al-mal*) and an entrepreneur or a fund manager (*al-mudharib*), whereby the entrepreneur or fund manager can mobilize the funds of the former for its business activity within the *Syari'ah* guidelines. Profits made are shared between the parties according to a mutually agreed ratio upon which they agree at the time of the contract. In the event of raising funds, BMT institution becomes as *al-mudharib* or investment manager and the owner of the funds as *sahib al-mal*.

## Methods

This study is based on a sample survey in addition to published data that had been taken from selected IBF institutions in Riau Archipelago; it is descriptive in nature. It was thought that these methods seemed more appropriate to achieve the objectives of the study, given the nature of the problem. In conjunction with this aspect, both qualitative and quantitative data were analyzed. The descriptive statistic model was used for conducting an assessment of the *Syari'ah* compliance of the IBF products and services.

The population of this research encompasses all the institutions in Indonesia which are approximately 5000 units. They are spread over 38 provinces of the country, including around 14 *Syari'ah* Commercial Banks, 18 *Shari'ah* Business Units and 171 *Shari'ah* People's Financing Banks (BPRS) as well as Islamic cooperative units (BMT). Due to limited time, budget and scope of the research, it is impossible to cover all IBF institutions in the country. The only way to handle this problem is to select some of them as samples. Therefore, the total selected was 10 IBF institutions.

The area that was used as a sample was the Riau Archipelago province territory as among the provinces in Indonesia that have been successful in establishing approximately 800 units of IBF and conventional financial institutions. Moreover, Riau Archipelago occupies a strategic geographical location as the main gate to enter the Straits of Malacca which is adjacent to Singapore and Malaysia. The process of data collection went on for about six months, from July 2024 to December 2024.

## Result and Discussion

### Descriptive Analysis on *Mudharabah* Product

As we have already discussed before, savings account and their investment based on *mudharabah* (profit and risk sharing) contracts are considered as the most popular products of microfunding and microfinancing after the *bay' bi thaman ajil* product that is offered by Islamic banking and financial institutions in Indonesia. In respect to this matter, the researcher has found that Islamic banking and financial institutions have fully applied

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<sup>1</sup>Mohammed Obaidullah, *An Introduction to Islamic Microfinance*, 60. See also, al-Sharbashi, Ahmad, *al-Mu'jam al-Iqtisad al-Islami*, (Beirut: Dar al-'Alam al-Kutub: 1987), 13.

the new concept or technique of *al-mudharabah*, named as *al-mudharabah al-musyarakah* (two tier *mudharabah* or parallel *mudharabah*) in their operational system. They did not apply the concept of pure *al-mudharabah* which was already famous among the Muslims since in the early days of Islam and it found in the literature books of *fiqhi* scholars.<sup>2</sup>

Therefore, in order to compare it with the definition of the pure *al-mudharabah* concept, Muhammad Uthman Shubayr (1996)<sup>3</sup> has defined and clarified the definition of the concept of *al-mudharabah al-musyarakah* (two tier *mudharabah* or parallel *mudharabah*) as follows:

المضاربة المشتركة هي الصيغة التعاقدية المطورة لشركة المضاربة الفردية أو الثنائية، وهي تقوم على أساس أن يعرض المصارف الإسلامي -باعتباره مضاربا- على أصحاب الأموال استثمار مدخراتهم لهم، كما يعرض المصرف -باعتباره صاحب مال أو وكيل عن أصحاب الأموال- على أصحاب المشروعات الاستثمارية استثمار تلك الأموال، على أن توزع الأرباح حسب الاتفاق بين أطراف الثلاثة، وتقع الخسارة على صاحب المال. أما المضاربة المعروفة في الفقه الإسلامي هي التي تقوم على أساس أن يكون المال من شخص والعمل من شخص آخر على أن يكون الربح بينهما بحسب الاتفاق، والخسارة على صاحب رأس المال.

*Al-Mudharabah al-musyarakah* is the contractual formula developed for the company and individual or bilateral which is based on that the displays of Islamic financial institutions -as a speculator- funds invest their savings to the owners, also displays the Islamic financial institutions -as the owner of money or an agent for the owners of money- the owners investment projects investment of those funds to be distributed profits by agreement between the three parties and the loss is situated on the owner of the money. As for the *mudharabah* which is well known in Islamic jurisprudence is a partnership in profit-loss based on one side providing work in trade and on the other side providing the capital. Profit is shared between the two parties according to a mutually agreed ratio upon which they agree at the time of the contract. In the event of loss or damage of business, the *sahibul mal* will be responsible for all losses and damages and they may not take an advantage of business.

Furthermore, Muhammad Uthman Shubayr (1996) has commented:<sup>4</sup>

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<sup>2</sup>See, Imam Abu al-Walid Ibn Rushd al-Qurtubi al-Andalusi, *Bidayat al-Mujtahid wa Nihayat al-Muqtasid*, (Egypt: Matba'ah Mustafa al-Babi al-Halabi), vol.2, 236. See also, Abu Bakr Muhammad ibn Abi Suhayl al-Sarakhsi, *al-Mabsut*, (Lubnan: Dar al-Ma'rifah), 187.

<sup>3</sup>Muhammad Uthman Shubayr, *al-Mu'amalat al-Maliyyah al-Mu'asirah fi al-Fiqh al-Islami*, 347.

<sup>4</sup>Muhammad Uthman Shubayr, *al-Mu'amalat al-Maliyyah al-Mu'asirah fi al-Fiqh al-Islami*, 347. Ibid., 20.

المضاربة المشتركة حقيقتها هي أسلوب من أساليب الإستثمار الجديدة التي استحدثها العلماء المعاصرة الذين لم يقفوا عند الصورة الفقهية القديمة لها, بناء على أن الأصل في العبادات الحظر حتى يرد النص من الشارع بالطلب لئلا يحدث الناس في الدين ما ليس منه. أما الأصل في المعاملات من عقود وشروط الإباحة , فلا يمنع منها شيء إلا ما منع نص صريح الدلالة صحيح الثبوت, ويبقى ما عدا ذلك على أصل الإباحة.

*Al-Mudharabah al-musytarakah* is a speculative style of the new investment techniques developed by contemporary *ulama'* who did not stand with old image of Islamic jurisprudence, based on the origin of *ibadah* (worship) is permissible. The origin of transactions of contracts and conditions of permissibility, it prevents them anything but what prevent the explicit text of the true significance of constancy and otherwise stays out of the permissibility.

Based on above definition and clarification, it can be said that the application of *al-mudharabah al-musytarakah* or two tier *mudharabah* is accepted and it can be applied in Islamic financial institutions whether in macro level or micro such as in the Islamic banking and financial institutions. Moreover, this new technique or concept of *al-mudharabah* was allowed by some contemporary Muslim scholars such as Sami Hammud, 'Abd Allah al-'Arabi and Baqir Sadr to be applied into the Islamic financial institutions today as an alternative to overcome usury (*riba*) based economy in the country. However, although this new technique or concept of *al-mudharabah* was developed by Muslim scholars and operated by many Islamic financial institutions but in the operational of Islamic banking and financial institutions in Indonesia seems problematic and not totally Islamic. The problem can be seen when the Islamic banking and financial institutions take action as entrepreneurs (*ashab al-'amal*) and the customers who invested their funds became the owners of capital (*ashab al-mal*), those Islamic banking and financial institutions take action as the owners of capital (*ashab al-mal*) and the other customers to be financed become entrepreneurs (*ashab al-'amal*). In this transaction, Islamic banking and financial institutions did not state clearly the amount of investment to be carried out and did not mention what concept of *mudharabah* will be used, whether pure *mudharabah* or *mudharabah musytarakah*, whereas this type of transaction is substantive and become very important to be known by every customer of s Islamic banking and financial institutions.<sup>5</sup>

As stated before in the previous finding that majority of Islamic banking and financial institutions customers were coming from the lower educated level. Most of them

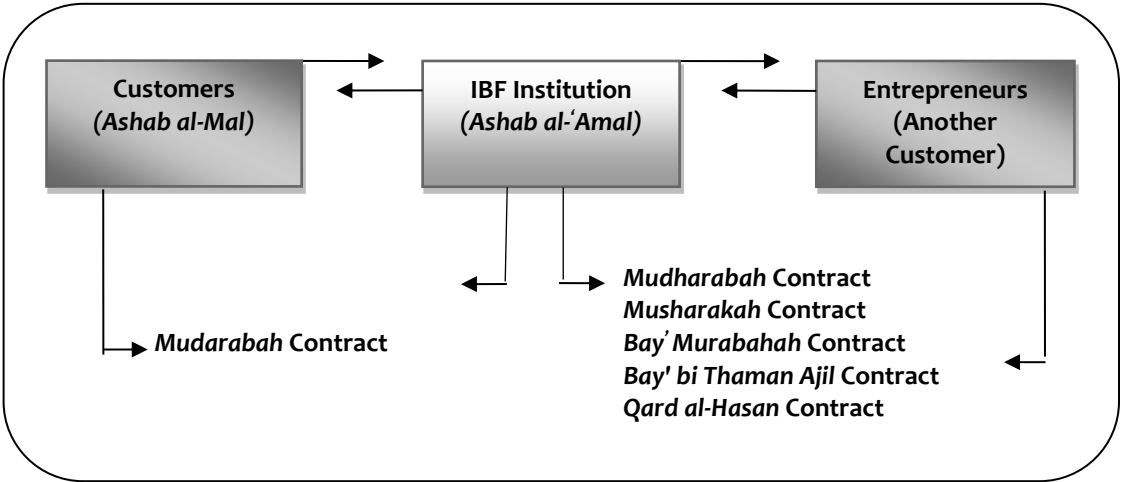
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<sup>5</sup>Based on brochures and advertisements which were distributed by selected IBF institutions in Indonesia, it were only mentioned the form of pure *mudharabah*, instead *mudharabah musytarakah*. Whereas in the operational of funding and financing products and services those institutions it seem they used both concepts of *mudharabah*. For example, BPRS al-Azhar, "Laporan Bulanan BMT al-Azhar Batam" (*Monthly Raport of BMT al-Azhar Batam*), December 1<sup>st</sup> until 24<sup>th</sup> 2010, 1-7.; BMT Iskandar Muda, "Lembaga Keuangan Mikro Syari'ah: Bermu'amalah Meraih Berkah", Annual Brochure, 2012, (n.d); BMT Nurul Islam, "Produk dan Jasa Layanan", (*BMT's Products and Services*), November, 2004.; See, <<http://www.batamtoday.com/berita/BMT-Syariah-Iskandar-Muda>>(accessed, December 15<sup>th</sup> 2014).

those who only finished elementary school (37.84%) and were uneducated people (5.48%). They did not understand so much about *al-mudharabah* concept, types and its operation. In their mind that *al-mudharabah* is one of the famous types of microfunding and microfinancing product offered by Islamic banking and financial institutions which was recognized by Islam financial institutions and it based on profit and risk sharing besides intent to save keeping their money in order to help another Muslims entrepreneur in order to develop their businesses activities and quality of life.<sup>6</sup>

In conjunction with above matter it seem that Islamic banking and financial institutions did not described the *al-mudharabah* concept which were used in their transactions whether using the real or pure *mudharabah* or parallel or two tier *mudharabah* (*mudharabah mushtarakah*). Another problem is raised that in early transaction, Islamic banking and financial institutions firmly entitled to share a mutually agreed ratio upon which they agree at the time of the contract, whereas their status is only as the financial intermediary or brokers (*al-samasirah aw al-wassatah*). Actually, Islamic banking and financial institutions get only the fees (*al-ujrah*) for its administration if they applied the pure or real *mudharabah* concept.<sup>7</sup>

Moreover, another problem was found in the implementation of the concept of two tier *mudharabah* (*mudharabah musyarakah*) in Islamic banking and financial institutions sector is that some of them seem not only confine their products based on the *mudharabah* contract to gain profits of investment, but at the same time they also offer many types of microfinancing products to entrepreneurs based on the concept of pure *mudharabah* product on a variety of contracts such as, *musyarakah* contract, *murabahah* contract, *bay' bi thaman ajil* contract, *bay' istisna'* contract, etc. Figure 1.1 presents an illustration of current operational system of the two tier *mudharabah* (*mudharabah musyarakah*) product applied by Islamic banking and financial institutions in Indonesia.



<sup>6</sup>Refer to Profil Analysis and Assessment on the Analysis of the Customers' Perception, Chapter Five, Page 174.

<sup>7</sup>Interview by Author with Madam Marlia Rohani, BMT Syari'ah Iskandar Muda Batam Municipality, November 2012. In regard to the *ujrah* (fee) which is more appropriate for the BMT's administration can be referred to the views of some Muslim scholars such as al-Quzwayni, *Fath al-Aziz bi Sharh al-Kabir*, (Bayrut: Dar al-Fikr, 2010), vol. 6, 27-28.; al-Nawawi, *Rauwdah al-Talibin*, (Cairo: Dar 'Alam al-Maktabat), vol. 5, 132.; See also, al-Baghawi, *al-Tahzib fi Fiqh al-Imam al-Shafi'i*, (Beirut: Dar al-Kutub al-Ilmiyyah, 1997), vol. 4, 392.; al-Sharbayni, *Mughni al-Muhtaj ila Ma'rifah Ma'ani al-Faz al-Minhaj*, (Beirut: Dar al-Kutub al-Ilmiyyah, 1994), vol. 2, 314.; and al-Silmi, *Shirkat al-Mudharabah fi al-Fiqh al-Islami: Dirasah Tahliliyyah Muqaranah*, (Mamlakah 'Arabiyyah al-Sa'udiyah: Manshurat Jami'ah Umm al-Qura, 1997, 202.

Figure 1.1  
Illustration of Two Tier *Mudharabah* or Parallel *mudharabah* (*Mudarabah Musytarakah*)  
Operations Applied by Islamic banking and financial institutions

In sum, the general operation of *mudharabah* product applied by the IBF institutions as shown in the above discussion and illustration seemed problematic and according to researcher it causes related contracts to the *mudharabah* product becomes non-Syar'iah compliant. In regard to the above matter, researcher intend to address some views of some contemporary Muslim scholars (*al-'ulama' al-mua'sirun*) and how the earlier Muslim scholars' statements (*ara'u al-'ulama' al-mutaqaddimin*) towards the implementation of both concepts of *mudharabah musytarakah* and pure *mudharabah* in Islamic financial institutions today including the Islamic banking and financial institutions in Indonesia.

Therefore, in the following part researcher intend to show the most reasonable arguments of the problem faced by Islamic banking and financial institutions in Indonesia from his points of view such as follows: (1) conflict in dual system of funding and financing based on the concept of real *mudharabah* and *mudharabah musytarakah*; (2) Islamic banking and financial institutions do not have real business; (3) Islamic banking and financial institutions are not able to bear losses; (4) all Islamic banking and financial institutions are given profit sharing, whereas some of the customers' funds have not yet been invested; (5) and profit sharing calculation method is convoluted.

(1) Conflict in Dual System of Funding and Financing Based on the Concept of Real *Mudharabah* and *Mudharabah Musytarakah*

At the beginning of funding and financing operations based on *mudarabah* contract offered to their customers, Islamic banking and financial institutions have taken action as entrepreneurs (*ashab al-'amal*) and their customers as owners of capital (*ashab al-mal*). However, at the same time this status is altered and modified by the Islamic banking and financial institutions to become the financiers or brokers (*al-samasirah aw al-wassatah*) when dealing with the entrepreneurs (other customers) who need funds to expand their business.

In such transactions, Islamic banking and financial institutions did not state clearly and described it to their customers about the type of *mudharabah musytarakah* that will be operated, whereas their customers basically know that said transaction was based on the pure *mudharabah* concept. Actually, such invalid transaction cannot be happen because it was involved with an element of uncertainty in terms of formatting contract (*al-gharar fi sighat al-'aqd*) which was forbidden in Islam.<sup>8</sup>

If we refer to Ridwan's previous study in chapter three (2004),<sup>9</sup> we find that all funds raised by BMT institutions can be categorized as capital funds, linkage funds and savings and investment. However, from those funds which are considered as the main incomes of Islamic banking and financial institutions that are obtained only from equity funds, whereas the rest of funds are obtained from linkage funds and savings and

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<sup>8</sup>Refer to a study was conducted by Muhammad Arifin Badri, "Mencari Solusi Instansi Keuangan Syar'iah", (*Looking Solution for the Operational of Islamic Financial Institutions*), (Jawa Tengah: Majalah As-Sunnah, 2008), 4. In regard to uncertainty in terms of formatting contract (*al-gharar fi sighat al-'aqd*) refer to Muhammad Uthman Shubayr, *al-Mu'amalat al-Maliyyah al-Mu'asirah fi al-Fiqh al-Islami*, 18-19.

<sup>9</sup>Refer to Muhammad Ridwan, *Management of BMT Institution*, 126.

investment funds. From this perspective, the operational system of funding and financing products in Islamic banking and financial institutions in Indonesia are based on debts contracts (*'uqud al-duyun*), instead of pure *mudharabah* contract.

Moreover, the capital funds owned by Islamic banking and financial institutions in general there are not many because the funds sourced only from special principle of savings that can be raised from individuals such as nearest rich people (*aghniya'*), as an extra fund for the savings fund principle shaped which is to be paid at the time when becoming a member of the Islamic banking and financial institutions besides mandatory savings which is becoming a source of capital of Islamic banking and financial institutions that can be utilized anytime.

Furthermore, it's also important to be noted in regard the operational of Islamic banking and financial institutions if using the concept of the pure *mudharabah* and the problem faced by Islamic banking and financial institutions in the operational of this concept that, any investment of funds in Islamic banking and financial institutions, whether based on restricted (*mudharabah muqayyadah*) contract or un-restricted (*mudharabah mutlaqah*) contract basically becomes a trust (*amanah*) or mandate from the owners of capital (*ashab al-mal*) that must be maintained by Islamic banking and financial institutions. They should manage and develop those invested funds in a real business that will be profitable and returned to Islamic banking and financial institutions and their customers as a whole.<sup>10</sup>

Therefore, based on the concept of real or pure *mudharabah*, Islamic banking and financial institutions should not invest on those funds again to entrepreneurs (other customers) and they should not be afraid of the losses or risks of business, otherwise they have to apply the concept of *mudharabah musytarakah* and inform it to their customers. If IBF institutions do this, it means that IBF institutions have neglected the mandate or trust (*amanah*) of their customers because the majority of investments belong to the owners of capital (*ashab al-mal*). In this case, Imam al-Nawawi (631-676H) has commented:

It is not justified for the entrepreneur (*al-mudharib*) to channel the capital that he received to the third party under the pure *mudharabah* agreement. However, if he did it under the approval of investor (*sahib al-mal*) until he came out from the first *mudharabah* and changed the status as the representative investor on the second *mudharabah*, it is then justified. Even so, it is not justifiable to require for himself the least of the profits, if he still requires it, then the second *mudharabah* become falsehood.<sup>11</sup>

Similarly, Imam ibn Qudamah al-Hanbali (541-620H) says:

It is wrong for the entrepreneur (*al-mudharib*) to distribute the capital which he received to others in the form of pure *mudharabah* agreement. Imam

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<sup>10</sup>As we have clarified earlier, the profit ratio (*nisbah*) that commonly is shared by the IBF institutions and their customers or entrepreneurs is namely: 40:60. The profits ratio 40% is taken by IBF institutions and the profits ratio 60% is given to their customers or entrepreneurs. Refer to Chapter Three on Financing Profits' Calculation, pages 158-159.

<sup>11</sup>Al-Nawawi, *Rauwdah al-Talibin*, (Cairo: Dar 'Alam al-Maktabat), vol. 5, 132.; See also, al-Baghawi, *al-Tahzib fi Fiqh al-Imam al-Shafi'i*, (Beirut: Dar al-Kutub al-'Ilmiyyah, 1997), vol. 4, 392.; al-Sharbayni, *Mughni al-Muhtaj ila Ma'rifah Ma'ani al-Faz al-Minhaj*, (Beirut: Dar al-Kutub al-'Ilmiyyah, 1994), vol. 2, 314.; and al-Silmi, *Shirkat al-Mudharabah fi al-Fiqh al-Islami: Dirasah Tahliliyyah Muqaranah*, (Saudi Arabia: Manshurat Jami'ah Umm al-Qura, 1997, 202.

Ahmads' affirmation . . . This opinion is same as the opinion of Imam Abu Hanifah, Shafi'i, and I do not know of another Muslim jurists who desputed it.<sup>12</sup>

Based on the above statements it can be understood that the *mudharabah* product basically when it's operation under a dual system (two tier or parallel *mudharabah*) by using the real *mudharabah* concept and those selected IBF institutions have received permission from the owners of the capital (*ashab al-mal*) and at the same time they do not participate in these operations carried out by the entrepreneurs (*ashab al-'amal*) or the user of funds, selected IBF institutions then are not entitled to share a mutually agreed ratio upon which they agree at the time of the contract, because their status is only as the financial intermediary or brokers (*al-samasirah aw al-wassatah*).

Conversely, selected IBF institutions get only the fees (*al-ujrah*) for its administration. All above Muslim scholars explained that the reason for this problem is because the profits from the pure or real *mudharabah* contract are only the right of the entrepreneurs (*ashab al-'amal*) and the owners of capital (*ashab al-mal*). Meanwhile, the party which does not become the owner of capital and does not participate in the real business is not entitled to share any profits of the investment.<sup>13</sup>

As have alluded before that actually some contemporary Muslims scholars have accepted and allowed the application of *mudharabah musytarakah* (two tier *mudharabah*) concept in Islamic banking and microfinancial institutions. Therefore, in the following part, researcher intends to put forward their views or statements in order to see how the Islamic financial institutions' attitude, particularly the selected IBF institutions in Indonesia in applying this new technique or concept in their funding and financing products and services. The views of contemporary Muslim scholars and their statements are as follows:

Firstly, Muhammad 'Uthman Shubayr (1996)<sup>14</sup> argues that basically all Islamic financial institutions may operate the concept of *al-mudharabah musytarakah* or parallel *mudharabah* in their business activities. In this context, the Islamic financial institutions may take an action as entrepreneurs (*ashab al-'amal*) and their customers as owners of capital (*ashab al-mal*) and at the same time this status is altered to become the financiers when dealing with the entrepreneurs (other customers) who need funds to expand their businesses. This concept or technique is accepted and can be referred to the opinion of *Hanafiyyah* and *Hanbaliyyah* scholars those who allowed the concept of *al-mudharabah al-mutlaqah*, where *al-mudharib* can invest their capitals with the entrepreneurs (another customers) those who more professional and can bring back profitable investments to all parties. As for the views of *Shafi'iyyah* and *Malikiyyah* scholars, they did not allow it unless the Islamic financial institutions got permission or outhorization from the owners of capitals (*ashab al-amwal*) to carry out the said concept. Furthermore, He [1996] has justified as he says:

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<sup>12</sup>Ibn Quddamah al-Hanbali, *al-Mughni wa Sharh al-Kabir*, (Beirut: Dar Ihya'i al-Turath al-'Arabi, 1985), vol. 7, 156.

<sup>13</sup>Al-Quzwayni, *Fath al-'Aziz bi Sharhi al-Kabir*, (Bayrut: Dar al-Fikri, 2010), vol. 6, 27-28. See also, al-Nawawi, *Rauwdah al-Talibin*, vol. 5, 132.; al-Baghawi, *al-Tahzib fi Fiqh al-Imam al-Shafi'i*, vol. 4, 392.; al-Sharbayni, *Mughni al-Muhtaj ila Ma'rifah Ma'ani al-Faz al-Minhaj*, vol. 2, 314.; and al-Silmi, *Sharikah al-Mudharabah fi al-Fiqh al-Islami: Dirasah Tahliliyyah Muqaranah*, 202.

<sup>14</sup>See, Muhammad Uthman Shubayr and the view of Muhammad 'Abd Allah al-'Arabi, *al-Mu'amalat al-Maliyyah al-Mu'asirah fi al-Fiqh al-Islami*, 351.; See also, Mughni al-Muhtaj, Muhammad al-Sharbayni al-Khatib, (Cairo: Mustafa al-Babi al-Halabi, 1958), 28.



Although the application of *al-mudharabah al-musytarikah* (two tier *mudharabah*) accepted by some contemporary Muslim scholars as a new concept of *mudharabah* into the Islamic financial institutions, but it actually was raised another problem such as the issue of engaging capitals investment and profits sharing were being debated among the contemporary Muslim scholars that need to be addressed wisely by those Islamic financial institutions so as they do not hurt the owners of capitals (*ashab al-amwal*).<sup>15</sup>

Secondly, Sayyid Muhammad Baqir al-Sadr (1973),<sup>16</sup> commented that actually the position of Islamic financial institutions only become as representative of the owners of capital (*ashab al-mal*). However, this position was not become important aspect in *mudharabah* transactions because they do not become the owners of capitals. The position of Islamic financial institutions in this situation were only to become as a mediators or brokers of investment (*al-wassatah aw al-samasirah*) between the owners of capital and the entrepreneurs (another customers). Furthermore, the responsibility of the Islamic financial institutions in this position were became as a substitute of the professional workers (*ashab al-'amal al-khubara'*) to find investors (*al-mustathmirun*) or the owners of capital (*ashab al-mal*) to obtain business or investment. In this context, the Islamic financial institutions by using this concept or technique it seem they take an action to collect all capitals of investment and they give it to professional worker (*ashab al-'amal al-khubara'*) after agreeing on the distribution of profits and risks on the basis of the concept of *al-ju'alah*.<sup>17</sup>

Thirdly, Sami Hasan Ahmad Hammud (1982),<sup>18</sup> argues that Islamic financial institutions have essentially *muzdawijah* (parallel) properties which is more flexible, where the Islamic financial institution can become as *al-mudharib* in one condition and can also become as *rabb al-mal* in another conditions. When this institution associated with the *rabb al-mal*, they may become the *al-mudharib*, but when they were associated with another entrepreneur (customers), they may become the owners of capital. As for the problem of mixing of business capitals between the investors (*ashab al-amwal*) in *mudharabah mushtarakah* concept in Islamic financial institutions, He [1982] says that:

“The problem of mixing of business capitals in *mudharabah mushtarakah* concept actually there is no specifically passage from the Qur'an and al-Sunnah was stated and there were no opinion of earlier *fiqhi* scholars those who prohibits such transactions –so far in our study- or any comments was found from *al-madhahib al-mu'atabarah*. So, the way to go out from this problem is not getting out from the legal rulings of *fiqh* (*qawa'id* and *dawabit fiqhiyyah*) which was already set for the contract of *al-mudharabah* and put it

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<sup>15</sup>Muhammad Uthman Shubayr, *al-Mu'amalat al-Maliyyah al-Mu'asirah fi al-Fiqh al-Islami*, 351.

<sup>16</sup>Sayyid Muhammad Baqir al-Sadr, *al-Bank al-Lairbawi*, (Lubnan: Dar al-Kitab al-Lubnani, 1973), 87.

<sup>17</sup>*Al-Ju'alah* from etymology is defined as a promise of a gift or reward which will be given to a person because he or she is doing a particular job or carry something. As for the terms of terminology it is defined as *al-iltizam* (responsibility) to provide wages or certain voluntary gifts for the people who managed to do something or provide a service that has not been able to be implemented or generated as expected. See, 'Abd Allah Ibn Ahmad Ibn Qudamah, *al-Mughni wa Sharh al-Kabir*, (Beirut: Dar al-Fikr, 1979), vol 3, 241. See also, Wahbah Zuhaili, *al-Fiqh al-Islami wa Adillatuhu*, (Damascus: Dar al-Fikr, 1997), vol. 6, 358.

<sup>18</sup>Sami Hasan Ahmad Hammud, *Tatwir al-'amal al-Masrafiyyah Bima Yattafiquhu al-Shari'ah al-Islamiyyah*, (Jordan: Dar al-Fikr, 1982), 391-392.

out until could not be applicable. It is necessary to reach a new form (*al-sighah al-jadidah*) as long as it can keep the main purpose (*al-maqasid al-asasi*) in *mudharabah* transaction that will bring the benefits (*al-istirbah*) of business capitals by establishing of working relationships with other parties. The ability to obtain new atmosphere in *mudharabah* system or concept can actually add more products and services in Islamic financial institutions. This new form of *mudharabah* is called “*al-mudharabah al-musyarakah*”. The Islamic financial institutions in this context were become concomitant of capital or vice owners of capital for the entrepreneurs those who run the investment and donate they abilities for all parties wishes”.<sup>19</sup>

Based on the above discussion, according to researcher both concepts of *al-mudharabah* in above, i.e. pure *al-mudharabah* and *al-mudharabah al-musyarakah* can actually be combined into a superior product in the funding or financing products and services of IBF institutions with requirement that the concept of *al-mudharabah* which is to be run or operated in those financial institutions is clearly explained and understood by all customers those who deal with said product or service and they must know it terms and condition since the beginning of the transaction, whether they are apply products or services using the concept of pure *mudharabah* or *mudharabah musyarakah*. Moreover, both concepts of *al-mudharabah* must be operated in accordance with the rules of Islamic law of financial transactions (*fiqh al-mu'amalat al-maliyyah*). Moreover, IBF institutions should maintain the respective rights of all parties those who were involved in investment such as, profits and risks sharing based on maturity period as agreed at the beginning of the transaction. Thus, all parties will be spared from the usury transactions (*al-mu'amalat al-ribawiyah*) and they do not take another's treasures with vanity (*batil*).

## (2) The Islamic banking and financial institutions do not have real business

With respect to the application and operation of the concept of *mudharabah* at Islamic banking and financial institutions in Indonesia which tend to the concept of two tier or parallel (*mudharabah musyarakah*), instead the pure *mudharabah* and it seem problematic. Therefore, in this part researcher intend to share another problem which was found during the performance of the study. The problem is the IBF institutions do not have a real business.

In the previous study we have alluded that some researchers said that although IBF institutions have proclaimed themselves as the promising model of Islamic banking and financial institutions (Rahardjo (1999);<sup>20</sup> Akhyar Adnan *et al.* (2003)<sup>21</sup> and Ridwan (2004),<sup>22</sup> but they seem half-hearted in implementing the Islamic economic system as a whole. Unfortunately, many IBF institutions seems have attempted to avoid the *sunnatu Allah* (provisions of Allah s.w.t.) which have been set in the world of business. The *sunnatu Allah* (provisions of Allah s.w.t.) intended here are the profits and the losses of business. Both aspects are not likely to be separated from the world of business. In this case, IBF institutions attempt to stop at the stage of safety and convenience, rather than attempt

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<sup>19</sup>Muhammad Uthman Shubayr, *al-Mu'amalat al-Maliyyah al-Mu'asirah fi al-Fiqh al-Islami*, 353.

<sup>20</sup>See, Dawam Rahardjo, *Islamic Financial Institution Prospects*, 1996, 4.

<sup>21</sup>See, Muhammad Akhyar Adnan *et al.*, *Study on Factors Influencing of BMT*, 2003, 14.

<sup>22</sup>See, Muhammad Ridwan, *Management of IBF Institution*, 2004, 127.

to overcome the risks or losses of business. Nowadays, it is still rare to find IBF institutions which are involved in the real business sector or have direct linkages to productive economic activities in order to generate profit.<sup>23</sup>

The products and services they mostly offer are limited to funding and financing products and services by using the concept of two tier or parallel *mudharabah*. IBF institutions simply act as financial intermediary or brokers (*al-samasirah*) in channeling the invested funds. Currently, the IBF institutions offer products on real *mudharabah* contracts to their customers, but they do not act as the entrepreneurs (*ashab al-'amal*). BMT institutions only channel the customers' funds; they fear the risks which they will probably face in their business. They just want to gain profits. If this is the case, the profit sharing under the real *mudharabah* which is required by IBF institutions in the early transaction from their customers becomes invalid (*batil*). This prohibition is confirmed by Imam al-Nawawi and previous Muslim jurists as mentioned in above discussion.<sup>24</sup>

(3) The Islamic banking and financial (IBF) institutions are not able to bear losses Departing from the unclear contract whether using the concept of pure *al-mudharabah* or *al-mudharabah al-musyarakah*, it can also be seen here that the selected BMT institutions actually use two concepts of *al-mudharabah* in one time that should not be applicable in a legitimate of any transaction according to *Syari'ah*, because it involved uncertainty contract (*al-gharar fi sighat al-'aqd*). The problem is when IBF institutions discussing about the division of profits in front of their customers, the IBF institutions use the concept of real *al-mudharabah*, but when discussing about the risks of investment or business, the IBF institutions use or alter to the concept of *al-mudharabah al-musyarakah*.<sup>25</sup>

Based on this unfair transaction, those IBF institutions seemed unprepared to bear the risk of *mudharabah* products of financing which they intertwine with the entrepreneurs (*ashab al-'amal*). If the entrepreneurs suffer from losses or risks, we find the IBF institutions immediately decline and request to a return of the entire capital that they have given to the entrepreneurs (*ashab al-'amal*) even though the losses or risks are not intentionally done by the entrepreneurs (*ashab al-'amal*).<sup>26</sup> This situation indicates that IBF institutions do not actually apply the real *mudharabah* contract and the concept of *al-'iwad* (profiting values).<sup>27</sup>

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<sup>23</sup>Based on the author's observation and primary data obtained from these institutions, it is found that from 40 selected IBF institutions are spread all over the Riau Archipelago, there are only 6 selected IBF institutions involved in the real businesses or direct linkages to productive economic activities. There are BMT Nurul Islam, BMT Syari'ah Iskandar Muda, BMT Sunduqul Amanah Ibnu Sina, BMT Masjid Raya Batam, BMT Islahul Ummah and BMT al-Fateh. It is very clear from this evidence that BMT institutions only channel the customers' funds; they fear the risks which they will probably face in their business. They just want to gain profits. See, Department of Community Empowerment (DCE), *Number of Cooperatives, Asset and Profile in Batam City 2010*, issued by the Ministry of Cooperatives and SMEs of Riau Archipelago, Indonesia.

<sup>24</sup>Refer to the discussion on conflict in dual system in BMT institutions based on *mudharabah* type of product, page 211.

<sup>25</sup>Muhammad Arifin Badri, *Looking Solution for the Operational of Islamic Financial Institutions*, (Jawa Tengah: Majalah As-Sunnah, 2008), 5. See also, Nur Kholis, *Study on Shari'ah Compliance of the Financing Practice at BMTs Sleman Yogyakarta*, *Journal of Islamic Economic*, UIN Yogyakarta, 2003, 19.

<sup>26</sup>Refer to previous discussion on the *fiqhi* regulations (*dawabit fiqhiyyah*) for the save account based on *mudharabah* contract, Chapter Three, page 131-132.

<sup>27</sup>Interview by Author with Sa'id Masykur, BMT Sunduqul Amanah Yayasan Pendidikan Ibnu Sina Batam, December 2013.; and interview by Author also with Madam Marlina Rohani, BMT Syari'ah Iskandar Muda, November 2013.

Subsequently, all Muslim jurists from various schools have confirmed that the owner of capital (*sahib al-mal*) is not justified to require the whole or part of the capitals given to the entrepreneur (*sahib al-'amal*) in the event of unintentional losses or risks, but in reality IBF institutions as the owner of capital (*sahib al-mal*) push the entrepreneurs (*ashab al-'amal*) to return the whole or part of the capital. Thus, what is applied by IBF institutions today, such as requiring the entrepreneurs (*ashab al-'amal*) to return the whole part of the capital in the event of losses or risks is clearly forbidden in *Syari'ah*.<sup>28</sup> Some *fiqhi* provisions (*dawabit fiqhiyyah*) state that if there is prohibited contract in the transaction, the solution is one of two things, namely: (1) If the contract and its terms become invalid, the respective parties must return all the rights of the opponent; (2) otherwise, that contract is to be continued if the prohibited requirement is omitted.<sup>29</sup>

For example: BPRS al-Ikhlas Pulau Batam disbursed capital of business to Mr. Ahmad Rp. 100,000,000 with a profit ratio of 60: 40 (60% for IBF institution and 40% for Mr. Ahmad). After running the business and it had matured, Mr. Ahmad suffered from an unintentional disaster, such as theft, water flood or something similar. Due to this unintentional disaster, the rest of capital which he received from IBF institution became only Rp. 20,000,000. However, BPRS al-Ikhlas Pulau Batam still pushed Mr. Ahmad to return the entire capital that BPRS al-Ikhlas had disbursed to Mr. Ahmad, i.e. Rp. 100,000,000.

Any IBF institution may argue or defend their selves in this case as such, in any business, if the capital is returned without any profit, it is then considered as a loss or risk that should not happen to IBF institutions. In order to defuse this argument, we can say that if someone works without getting any salary it is then considered as a loss or risk that should not happen to customers. If we look deeper into the above case, we can conclude that the *mudharabah* contract which is carried out by IBF institutions actually take their entrepreneurs (*ashab al-'amal*) into two risky situations and have persecuted them, namely: (1) Although the entrepreneurs (*ashab al-'amal*) have worked with every effort, ultimately they do not get the salary; (2) at the same time, the entrepreneurs (*ashab al-'amal*) still have to recover the shortfall of capital that they have received from BPRS al-Ikhlas Pulau Batam. Indeed, selected IBF institutions should not gain any business profits from their customers if they are not liable for the losses or damages of products and do not pay compensation (*al-gurm*) for it and have no effort (*al-kasb*) when they commercialize their products to their customers or the public.<sup>30</sup>

(4) All IBFs' customers are given profit sharing, whereas some of the customers' funds have not yet been invested

In the operation of the *mudharabah* contract, IBF institutions have mixed the entire funds collected from their customers until this collection cannot be clearly separated between the customers' funds which have been disbursed and customers' funds which have been

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<sup>28</sup>See, BMT Nurul Islam. (2012, 5 July); An overview of BMT Nurul Islam Pulau Batam. *Monthly Bulletin*, p. ii.; BMT al-Azhar. (2010). "Laporan bulanan BMT al-Azhar Batam" (*Monthly Raport of BMT al-Azhar Batam*), December 1<sup>st</sup> until 24<sup>th</sup> 2010.; BMT Iskandar Muda. (2012). "Lembaga keuangan mikro Syari'ah: Bermu'amalah meraih berkah", Annual Brochure, 2012, (n.d.); and BMT Nurul Islam. (2004). "Produk dan jasa layanan", (*BMT's products and services*), November, 2004.

<sup>29</sup>See, Ibn Qudamah al-Hanbali, *al-Mughni wa Sharh al-Kabir*, vol. 7, 145.; al-Sa'idan, *al-Mausu'ah al-Fiqhiyyah al-Kuwaytiyyah* (Kuwayt: Dar al-Salasil, 1981), vol. 3, no. 64.

<sup>30</sup>Refer to the study done by Muhammad Arifin Badri, *Looking Solution for the Operational of Islamic Financial Institutions*, 8.

stored in IBF institutions. Surprisingly, all customers of IBF institutions get a share of the profits in the end of the month.<sup>31</sup>

This situation becomes a major problem in the operations of *mudharabah* products faced by IBF institutions, faced even by the Islamic banking system today because the profits distributed are coming from other customers whereas, the customers whose funds have not been mobilized for businesses are not entitled to get a share of the profits. They have no right to get any profit sharing from the other customers. Indeed, the distribution of profits to the customers whose funds are not used is clearly detrimental to other customers whose funds have been used.<sup>32</sup>

This is the reality faced by the entire IBF institutions in Indonesia as a whole. Not surprisingly, many IBF institutions in Indonesia today are haunted by excess liquidity problem, where they have obtained surplus funds from their customers. This situation indeed, has forced IBF institutions to keep such funds in banks such as *Mu'amalat Bank Indonesia (BMI)* or similar banks under the *Wadi'ah* certificates.<sup>33</sup>

Moreover, based on the data obtained from *Majalah Modal* (2004), in January 2004 IBF institutions had collected approximately 6.62 trillion Rupiah as capital funds from their customers, but only disbursed 5.86 trillion Rupiah. It seems that many IBF institutions, including in selected IBF institutions in Indonesia were haunted by excess liquidity problem in their business activities.<sup>34</sup>

(5) Profit sharing calculation method is convoluted or complicated

Another problem faced by IBF institutions from the view of researcher is regarding the profit sharing calculation method which is seen convoluted or complicated. However, understanding the method of profit sharing calculation applied by IBF institutions is not easy, especially for customers who come from lower educational backgrounds.<sup>35</sup>

Figure 1.2 presents a method of profit calculation that is generally applied by IBF institutions in Indonesia as a whole.

**Profit sharing for customers =  $\frac{\text{Total funds}}{\text{Rp. 1,000}} \times E \times \frac{\text{Ratio of customer}}{100}$**

**E = Average income of investment from every Rp. 1,000 from customers' funds**

Figure 1.2: Method of profit calculation applied by the IBF Institutions

Source: Marlina Rohani, interviewed by author, *BMT Syar'iah Iskandar Muda Batam Municipality*, 3<sup>rd</sup> December 2012.

<sup>31</sup>Interview by Author with Madam Marlia Rohani, *BMT Syari'ah Iskandar Muda Batam Municipality*, 3 December, 2012. See, Muhammad Arifin Badri, (*Looking Solution for the Operational of Islamic Financial Institutions*), 6.; See also, Muhammad Ridwan, Muhammad Ridwan, *Management of BMT Institution*, 165.

<sup>32</sup>Nur Kholis, "Evaluation to the Practice of *Murabahah* Mode of Financing in the Operations of *Bayt al-Mal wa al-Tamwil (BMT) Dana Shari'ah, Yogyakarta.*" *Journal al-Mawarid*, UIN Yogyakarta, 2007, 235.

<sup>33</sup>Muhammad Ridwan, *Management of BMT Institution*, 2004, 132.

<sup>34</sup>Refer to Muhaimin Iskandar (Member of Indonesian Parliament), *Modal Magazine*. Vol. 2, No. 18, (Mei 2004):5. See also, <<http://www.http:MajalahIslamOnline>>(accessed June 24<sup>th</sup>, 2013).

<sup>35</sup>Interview by Author with Madam Marlina Rohani, *BMT Syar'iah Iskandar Muda Batam Municipality*, 3<sup>rd</sup> December 2012.

In conjunction with the above figure, it can be identified clearly that one of the multipliers in the profit calculation in IBF institution is the total funds collected from all customers that in the view of the researcher has created many problems in the operation of the *mudharabah* product. Meanwhile, the profit calculation of *mudharabah* contract is calculated from the net profit income; that way the *mudharabah* product in Islamic law of financial transaction (*fiqh al-mu'amalat al-maliyyah*) is totally used for the profit sharing products. Imam Muhammad al-Nawawi al-Bantani al-Jawi (1898M) has said:

The fifth pillar of the *mudharabah* system is the profit sharing. This pillar has several requirements, namely: the profits belong only to the owner of capital and entrepreneurs. They should equally have it and each of those specified in percentage.<sup>36</sup>

This is what makes the method of profit calculation in *mudharabah* contract appears not easy to be understood and it is operated in IBF institutions today. In respect to this feature, Figure 5.3 proposes an alternative method of profit calculation of *mudharabah* contract to be applied by the IBF institutions.

$$\text{Profit sharing for customers} = \text{Net profits} \times \text{Customers ratio} \times \text{Capital ratio of total funds managed by the IBF institution}$$

Alternative method of profits calculation that should be applied by the IBF Institutions

The difference between the two methods of profit calculation applied by IBF institutions above can be clearly understood from the following example: Mr. Abu Bakar invested his business capital at BPRS al-Taqwa of Rp. 100,000,000 with 50% of the ratio for himself as the investors and 50% of the ratio for BPRS al-Taqwa as the entrepreneur. After collecting all customers' funds, including Mr. Abu Bakar's capital, BPRS al-Taqwa raised the investment to Rp. 10,000,000,000. Therefore, Mr. Abu Bakar's capital ratio is 1% from the total funds invested and managed by this IBF institution. At the end of the month, BPRS al-Taqwa obtained a net profit of Rp. 1,000,000,000 from that investment. However, after going through complicated profit calculation, BPRS al-Taqwa determined that any investment income from Rp. 1,000 is Rp. 11, 61. Therefore, by using this method of complicated profit calculation, Mr. Abu Bakar only get a profit sharing of Rp. 580, 500 from the total profit of investment. See Figure 1.4 below for the calculation.

$$\frac{\text{Rp. 100,000,000}}{\text{Rp. 1000}} \times \frac{\text{Rp. 11,61}}{100} \times 50 = \text{Rp. 580,500}$$

Complicated calculation of profits sharing applied by the IBF Institutions

<sup>36</sup>Nawawi al-Jawi al-Bantani, *Nihayah al-Zayn bi Sharhi Qurrah al-<sup>c</sup>Ayn*, (Beirut: Dar al-Fikr, 2011), 254.

Whereas, if we use the actual method of the real *mudharabah*, then the profit sharing given to Mr. Abu Bakar is calculated in Figure 1.5 as follows:

$$\text{Rp. } 1,000,000,000 \times 1 \times \frac{50}{100} = \text{Rp. } 5,000,000$$

Figure 1.5

Real Method of Profit Calculation that should be applied by the IBF Institutions

Based on the method of real profit calculation of *mudharabah* in accordance to *Syari'ah* compliance, Mr. Abu Bakar is actually entitled to receive Rp. 5,000,000 as profit sharing from BPRS al-Taqwa, instead of Rp. 580,500. Definitely, this convoluted calculation has created a big problem towards the presence and existence of IBF institutions in Indonesia. Nevertheless, it is seen very clearly from this profit calculation method that, IBF institution have adopted this convoluted method from their conventional banking counterparts and indeed has hurted many customers and entrepreneurs.

Moreover, another complicated method is the determination of the average investment income into Rp. 1000 which is difficult to be understood. Thus, the above convoluted profit calculation method applied by IBF institutions has proven public opinion that IBF institutions actually do not apply the real *mudharabah* which complies with *Syari'ah Islamiyyah*. Therefore, this exposure shows that IBF institutions as promising models in Indonesia are only in names with no substance.<sup>37</sup> Based on what has happened, this method is seen as simply an attempt to misuse the term of *Syari'ah Islamiyyah*.

## Conclusion

As defined earlier, *mudharabah* is a contract between a capital provider and an entrepreneur or a fund manager, whereby the entrepreneur or fund manager can mobilize the funds of the former for its business activity within the *Syari'ah* guidelines. Profits made are shared between the parties according to a mutually agreed ratio. Additionally, *mudharabah* can be of two types, which are: Un-restricted *mudharabah* (*mudharabah muqayyadah*), where IBF institution specifies a particular business in which investments may be undertaken. *Mudharabah* also can be an unrestricted one (*mudharabah mutlaqah*), in which case the *mudharib* may invests the capital provided in any business he deems fit.<sup>38</sup>

All the above assessments and findings indicate that the operations of several funding and financing products and services offered by Islamic Banking and Finance (IBF) institutions in Indonesia which society think are not in line with *Syari'ah* principles and values have been proven and are accurate as well. The survey has found that the significant

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<sup>37</sup>This matter makes some people to be in difficulty to get a meaningful difference between the Islamic financial institutions and conventional counterparts. Perhaps this is what makes the Western countries also attempt to set up many Islamic financial institutions, especially in banking system. Even some of them, for example, Singapore, has proclaimed as a center of Islamic economic and finance. Therefore, it is not surprising if Muhaimin Iskandar (Vice Chairman of the House of Representatives or DPR) said that there is no different between Islamic financial institutions and conventional financial institutions, they are just in name with no substance. See, Muhaimin Iskandar, "Majalah Modal" (Modal Magazine), vol 2. no. 18, (April 2004).

19.<<http://www.seribusatu.com/MajalahIslamOnline>>(accessed June 24<sup>th</sup>, 2013).

<sup>38</sup>Ibid.

problem was driven from the operating system of IBF institutions which is parallel to the conventional financial institution counterparts which is prohibited in Islam.

The problem faced by IBF institutions in Indonesia from researchers' points of view are namely: (1) conflict in dual system of funding and financing based on the concept of real *mudharabah* and *mudharabah musytarakah*; (2) IBF institutions do not have real business; (3) IBF institutions are not able to bear losses; (4) all IBF customers are given profit sharing, whereas some of the cutomers' funds have not yet been invested; (5) and profit sharing calculation method is convoluted or complicated.

Due to this situation, according to researcher that the optimalization of the *Syari'ah* supervision (*al-Raqabah al-Syar'iyyah*) aspect in IBF institutions should be taken positively and seriously by the National *Syri'ah* Council of the Indonesian Ulama' Council or *Dewan Syari'ah Nasional-Majelis Ulama' Indonesia (DSN-MUI)* at the central level and provincial level to prevent the entire IBF institutions from breaking the *Syari'ah* principles and values. Otherwise, it will cause many problems and will be considered a disaster to the future of the entire IBF institutions in Indonesia as whole.

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