

SALE BY NON-REFUNDABLE DEPOSIT (‘ARABŪN) AND ITS CONTEMPORARY IMPLEMENTATIONS

By:

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ABSTRACT

Economic activities have been tremendously increased all over the world in last few decades. Among them is a practice of receiving non-refundable deposit (‘arabūn) before selling vehicles, apartments, etc., renting houses, or leasing properties is well practiced both in the West and in Muslim World. The objectives of this paper are to investigate whether Islam allows the practice of receiving non-refundable deposit (‘arabūn) in selling, and to examine its contemporary practical implementations. In order to reach these objectives, verses of the Qurān, ahādīth of the prophet (p. b. u. h.) and opinions of Muslim jurists would be critically and analytically reviewed by using classical and modern works of fiqh literature. Moreover, the researcher would conduct a field study on some companies at Kuala Lumpur about their implementations of this type of sale.

INTRODUCTION

Prior to start with other sections of this paper, the definition of ‘arabūn in Islamic fiqh should be discussed. Islamic fiqh books

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use Arabic word ‘*arabūn* for the deposit mentioned above. This word literally means to pay or receive in advance. As a technical term of fiqh, it means deposit of an amount of wealth or money by an expected buyer to a seller, by a tenant to a landlord, or by a leaseholder to a lessor, provided that if the buyer, tenant, or leaseholder comes back before the given deadline and accomplishes the transaction, the deposited amount or ‘*arabūn* would be counted as part of the price of the sold material or portion of the rent or lease. But if the intended buyer, tenant, or leaseholder refrains from accomplishment of the transaction, he would lose his right to get the deposited wealth back and it would be the property of the seller, landlord, or lessor.¹

According to this definition, there are two types of ‘*arabūn*: First one is that if sale, lease, or rent is completed, the deposited money will be for the interest of the buyer, tenant, or leaseholder.

¹ Abū al-Tayyib Muḥammad Shams al-Haqq al-‘Azīm Ābādī, (2001) *‘Awn al-Ma‘būd Sharḥ Sunan Abī Dawūd*, ‘Isam al-Din al-Sabatī (ed.), vol. 6. Cairo: Dār al-Ḥadīth, p. 355; Abū Bakr Aḥmad bin al-Ḥusayn bin ‘Alī al-Bayhaqī (n.d.), *Al-Sunan al-Kubra*, Muḥammad ‘Abd al-Qadīr ‘Ata (ed.), vol. 5. Beirut: Dār al-Kitāb al-‘Ilmiyyah, p. 559; Abū Ishāq Burhān al-Dīn Ibrāhīm bin Muḥammad bin ‘Abd Allah bin Muḥammad ibn Muflih al-Ḥanbalī (n.d.), *Al-Mubdi‘ Sharḥ al-Muni‘*, Muḥammad Ḥasan Muḥammad Ḥasan Ismā‘il al-Shāfi‘ī (ed.), vol. 4. Beirut: Dār al-Kutub al-‘Ilmiyyah, p. 58; Abū Muḥammad ‘Abd Allah bin Aḥmad bin Muḥammad bin Qudāmah al-Maqdisī (n.d.), *al-Mughni*, vol. 4. Riyadh: Maktabat al-Riyādh al-Ḥadīthah, pp. 256-257; Muḥammad al-Khatīb al-Sharbinī (1955), *Mughni‘ al-Muḥtāj ilā Ma‘rifat Ma‘ānī Alfāz al-Minhāj*, vol. 2. Cairo: Maṭba‘at al-Istiḳāmah, p. 39; Abū al-Walid Sulaymān bin Khalaf bin Sa‘d bin Ayyub al-Bajī (1999), *Al-Muntaqā Sharḥ Muwaṭṭa‘ Mālik*, Muḥammad ‘Abd al-Qadīr Aḥmad ‘Ata (ed.), vol. 6. Beirut: Dār al-Kutub al-‘Ilmiyyah, pp. 24-25; Abu Zakariyya Muḥyi al-Din bin Sharaf al-Nawawī (n.d.), *Rawdat al-Talibin wa ‘Umdat al-Muftīn*, vol. 3. (n.p.): Al-Maktab al-Islāmī, p. 399; Majid Abū Rakhayyah (n.d.), “Ḥukm al-‘Arabūn fī al-Islām” in *Buḥūth fiqhiyyah fī Qaḍayā Iqtisādiyyah Mu‘āshirah*, vol. 1. (n.p.): Dār al-Nafā‘is, pp. 395-397; ‘Abd al-‘Aziz bin Muhammad al-Rabish (1999), *Ḥukm al-‘Arabūn*. Riyadh: Jāmi‘at al-Mālik Sa‘ud, pp. 6-8.

This deposited amount would be deducted from the price of the sold good or from the amount of rent or lease. All jurists unanimously maintain that this type of deposit is lawful.

Second type of deposit occurs when sale, rent, or lease is not completed because of abstaining of the intended buyer, tenant, or leaseholder from accomplishing the transaction. In this case, the seller, landlord or lessor would be the owner of this deposited money. Muslim jurists don't have the unanimous view about this second type of *'arabūn*. Rather, they have two opposing opinions over the permissibility of this *'arabūn*: first, a group of jurists doesn't allow this type of payment, while another group allows it. Arguments of both groups are discussed below.²

ARGUMENTS OF 'ARABŪN'S OPPONENTS

Majority of classical Muslim jurists, i.e., scholars of Hanafī, Maliki and Shafī'ī schools of law maintain that this second type of *'arabūn* is not permitted in Islam. 'Abd Allah ibn 'Abbās, Ḥasan al-Baṣrī, al-Thawrī, al-Awzā'ī and al-Layth ibn Sa'd also support this view. Likewise, from among modern and contemporary Muslim jurists, al-Shawkānī, al-Ṣiddīq Muḥammad al-Amīn al-Dārīr, al-Shaykh Mujāhid al-Islām al-Qāsīmī, and some others maintain the same view.³ This group tries to prove their view through the following arguments.

² Al-Bājī (1999), *op.cit.*, p. 26; al-'Azīm Ābādī (2001), *op.cit.*, p. 356; al-Rabīsh (1999), *op.cit.*, p. 7; Abū Rakhayyah (n.d.), *op.cit.*, pp. 397-398.

³ Abū Rakhayyah (n.d.), *ibid.*, pp. 399-400; al-Rabīsh (1999), *ibid.*, pp. 12-20; al-Bājī (1999), *ibid.*, p. 26; al-'Azīm Ābādī (2001), *ibid.*, p. 356; Ibn Qudāmah (n.d.), *op.cit.*, pp. 256-258; Al-Ṣiddīq Muḥammad al-Amīn al-Dārīr (1994), "Bay' al-'Arabūn" in *Majallat Majma' al-fiqh al-Islāmī*, al-Dawrah al-Thāminah, Issue no. 8, vol. 1, 1994, pp. 645-652, 658, 666; al-Shaykh Mujāhid al-Islām al-Qāsīmī, "al-Munāqashah (on *'arabūn*)," in the same issue of *Majallat Majma' al-fiqh al-Islāmī*, pp. 781-783.

First, they argue through the Qur'anic verse:

“O you who believe, do not eat wealth among yourselves wrongly.”

Surah al-Nisa'(4): 29

Receiving the above type of *'arabūn* is considered to be eating wealth of people wrongly, which is forbidden by this verse. Second, they also argue through a ḥadīth of the Prophet, i.e., “‘Amr ibn Shu‘ayb narrated from his father, who narrated from ‘Amr’s grandfather that the Messenger of God had ordered not to conduct sale through *'arabūn*.”⁴ This negative order or *nahy* requires that *'arabūn* of this type should be void and forbidden. Third, they also argue rationally that this type of sale has a possibility of risk (*gharar*), because of which it should be forbidden, just like other pre-Islamic sales, which were forbidden by the Prophet because they would lead to eat wealth of other people in vain. Fourth, they also put forward another rational argument that this type of sale contains an invalid condition, i.e., the buyer must pay in advance and in case he does not want to accomplish this transaction, he would lose his advanced payment, which, as a free benefit, would be received by the seller.⁵ Based on these arguments, the first group of jurists maintains that *'arabūn* is forbidden in Islam.

ARGUMENTS OF ‘ARABŪN’S SUPPORTERS

According to their famous opinion, jurists of Ḥanbalī school of law maintain that the *'arabūn* of this type is allowed in Islam for selling goods, renting houses, or leasing properties. In other words, if the transaction were not accomplished, it would be lawful for the seller, landlord, or lessor to keep the deposited amount of money or wealth. This is also the view of ‘Umar ibn al-Khaṭṭāb, his son ‘Abd Allah, Ibn Sīrīn, Mujāhid, Nāfi‘ ibn al-Ḥārith and Zayd ibn Aslam. Additionally, most of the contemporary Muslim jurists, such as ‘Abd al-‘Azīz bin Muḥammad al-Rabīsh, Majīd

⁴ Al-Bājī (1999), *op.cit.*, p. 24; al-‘Azīm Ābādī (2001), *op.cit.*, p. 355; al-Bayhaqī (n.d.), *op.cit.*, p. 559.

⁵ Al-Rabīsh (1999), *op.cit.*, p. 18; Abū Rakhayyah (n.d.), *op.cit.*, p. 400.

Abū Rakhayyah, ‘Abd Allah bin Sulaymān bin Manī’, Wahbah al-Zuhaylī, Rafīq Yūnus al-Miṣrī, al-Shaykh ‘Abd Allah al-Bassām, Yūsuf al-Qaradāwī, al-Shaykh ‘Abd al-Sattār Abū Ghuddah, ‘Alī Muḥy al-Dīn al-Qārah Dāghī, ‘Alī al-Taskhīrī and many others maintain the legality of this type of ‘*arabūn*.⁶ This group tries to prove their opinion through the following arguments.

First, they argue through a *ḥadīth* of the Prophet: “Ibn Abī Shaybah narrated from Zayd ibn Aslam that the Prophet had allowed ‘*arabūn* in selling.”⁷ This *ḥadīth* clearly indicates that ‘*arabūn* is lawful. Second, it is narrated from Nāfi‘ ibn al-Ḥārith, a governor of ‘Umar in Makkah that he bought from Ṣafwān ibn Umayyah a house for ‘Umar ibn al-Khaṭṭāb with four thousand dirhams, and Nāfi‘ imposed a condition that if ‘Umar is satisfied with this transaction, the house will be for him, but if he is not satisfied, Ṣafwān will receive this four hundred dirham.”⁸ Imām Aḥmad had accepted the apparent meaning of this narration and said: “There is no problem to conduct sale through ‘*arabūn* because ‘Umar had did it.” Third, al-Bukhārī narrated on the authority of Ibn Sīrīn that a complaint was submitted to Qādī Shurayḥ regarding a person who told his camel driver to prepare his camel for a travel. This person also said that if he could not travel with this driver in so and so day, the former would pay one hundred dirhams to the latter. Then this person did not travel. Hearing this, Shurayḥ

⁶ Ibn Muflīḥ al-Ḥanbalī (n.d.), *op.cit.*, pp. 58-59; al-Bājī (1999), *op.cit.*, p. 26; al-Maqdisī (n.d.), *op.cit.*, pp. 256-258; al-‘Azīm Ābādī (2001), *op.cit.*, p. 356; Abū Rakhayyah (n.d.), *op.cit.*, pp. 401-402; al-Rabīsh (1999), *op.cit.*, pp. 13, 20-27; al-Shaykh ‘Abd Allāh bin Sulaymān bin Manī’ (1994), “Ḥukm al-‘Arabūn fī ‘Uqūd al-Bay’ wa al-Ijārah,” in *Majallat al-Majma‘ al-fīqh al-Islāmī*, issue no. 8, vol. 1, pp. 671-688; Wahbah Muṣṭafā al-Zuhaylī, “Bay’ al-‘Arabūn” in the same issue of *Majallat al-Majma‘ al-fīqh al-Islāmī*, pp. 689-706; Rafīq Yūnus al-Miṣrī, “Bay’ al-‘Arabūn,” in the same issue of this *Majallat*, pp. 707-743; a number of contemporary jurists, “al-Munāqashah (on ‘*arabūn*),” in the same issue of *Majallat*, pp. 745-790.

⁷ Muḥammad bin ‘Alī al-Shawkānī (1973), *Nayl al-Awtār min Aḥādīth Sayyid al-Akhyār Sharh Muntaqā al-Akhbar*, vol. 5. Beirut: Dasr al-Jīl, p. 137.

⁸ Al-Maqdisī (n.d.), *op.cit.*, p. 257.

said: “The one who imposes a condition upon himself voluntarily without any duress he is obliged to fulfill it.” Ibn Qayyim al-Jawziyyah maintains that this narration of al-Bukhari proves that advance payment for selling [or renting] anything, i.e., ‘*arabūn*, is considered to be lawful.⁹ Fourth, Ibn Sīrīn comments about ‘*arabūn*: “There is no objection to do it.” Likewise, both Sa‘īd ibn al-Musayyab and Ibn Sīrīn say: “If the buyer does not like a good, there is no objection to return it along with something.” Imām Aḥmad said that this “something” mentioned in this narration is considered to be ‘*arabūn*.¹⁰ On the basis of these arguments, Ḥanbalī jurists opine that it is permissible for a seller, landlord, or lessor to keep deposited money or ‘*arabūn* if the transaction is not completed.

CRITICAL ANALYSIS OF THE ARGUMENTS OF BOTH GROUPS

Argumentation of the opponents through the Qur’anic verse “don’t eat your wealth among yourselves wrongly” is considered to be general, which does not fit ‘*arabūn* exactly. This type of general statement could be specified or qualified by *ḥadīths* of the Prophet regarding legality of ‘*arabūn*.

1. The *ḥadīth* that is narrated by ‘Umr ibn Shu‘ayb regarding forbidding ‘*arabūn* is not suitable to quote for this issue because it is a weak *ḥadīth*, from which a narrator was dropped. Without mentioning the name of this narrator, Imām Mālik said that he narrated this *ḥadīth* from a trustworthy person, who narrated it from ‘Amr ibn Shu‘ayb. Other scholars investigated this trustworthy person and found out that he was Ibn Lahī‘ah, a weak narrator. Al-Nawawī, mentioning all chains of narrators of this *ḥadīth*, commented: “The conclusion is that this *ḥadīth* is weak.”
2. The matter of risk in ‘*arabūn* is not acceptable because the good and its price are known, and capacity to hand over the good does exist. It could be said that risk comes from the

⁹ Muḥammad ibn Isma‘īl al-Bukhārī (n.d.), *Saḥīḥ* al-Bukhārī, vol. 3. (n.p.): Dār al-Da‘wah, p. 91.

¹⁰ Al-Maqdisī (n.d.), *op.cit.*, p. 257.

possibility that the intended buyer, tenant, or leaseholder might abstain from accomplishment of the transaction. In fact there is no risk in it because the seller, landlord, or lessor calculates this possibility in advance.

3. Receiving or keeping *'arabūn* is not considered to be eating wealth of other people wrongly because whatever deposit the seller, landlord, or lessor takes, takes it against any financial loss that might come to him because of holding the good, land, or house, and delaying the completion of transaction. Additionally, the deposit is paid with the mutual consent of both parties, which in case of abandoning the transaction could be considered as gift.
4. The *ḥadīth* of Zayd ibn Aslam through which the supporters of *'arabūn* have argued its permissibility is weak and not appropriate for argumentation. This is because this *ḥadīth* is *mursal*, i.e., Zayd ibn Aslam was a successor who was unable to narrate it from the Prophet (p. b. u. h.) through a companion. Likewise, one of the narrators of this *ḥadīth* Ibrāhīm ibn Abī Yaḥyā is considered to be weak.
5. The case of buying the house of Ṣafwān ibn Umayyah through which Ḥanbalī jurists argue the permissibility of *'arabūn* resembles *'arabūn* because both has a condition of paying some money in advance. This argument is considered to be appropriate and valid.
6. Whatever Sa'īd ibn al-Musayyab and Ibn Sīrīn said also resembles the issue of *'arabūn*. This is because an abstainer from buying a good loses the amount that he pays with the returned good, as mentioned by Sa'īd and Ibn Sīrīn. This amount is similar to *'arabūn* or advance payment.¹¹

PREFERABLE OPINION

A modern jurist al-Shawkānī has preferred the opinion of the majority of the jurists who do not allow *'arabūn*. He has pointed out two reasons for maintaining this view: First, although the *ḥadīth* of 'Umr ibn Shu'ayb is weak, the prohibition mentioned in

¹¹ Al-Rabīsh (1999), *op.cit.*, pp. 15-26; Abū Rakhayyah (n.d.), *op.cit.*, pp. 403-405 (with some modification and addition).

it is narrated through several chains of narration, some of which were connected to the Prophet properly, while some others were not. These narrations support each other and make the point of discussion stronger. Second, the *ḥadīth* of ‘Umr ibn Shu‘ayb indicates a prohibition, while the arguments of the supporters indicate permissibility. A principle of Islamic jurisprudence says that if prohibition and permission contradict each other, prohibition should prevail permission.¹²

On the other hand, a contemporary scholar Dr. Majīd Abū Rakhayyah has preferred the view of permissibility of ‘*arabūn* in selling goods, tenancy and leasing. In other words, if the expected buyer, tenant, or leaseholder abstains from accomplishment of the transaction, the seller, landlord, or lessor is allowed to keep the deposited money or ‘*arabūn*. However, Abū Rakhayyah has added that it is better to return this deposited money, if the expected buyer, tenant, or leaseholder wants to abstain from accomplishment of the transaction. This is because returning this amount would help removing a difficulty from the expected buyer, leaseholder, or tenant. In a *ḥadīth* the Prophet said:

*“The one who removes a difficulty from a Muslim, Allah would remove his difficulty on the Day of Resurrection.”*¹³

For his preference, Abū Rakhayyah has mentioned the following reasons:

First, arguments of the opponents of ‘*arabūn* are not strong; Second, the cases mentioned by Ḥanbalī scholars to allow ‘*arabūn* are appropriate to argue through them; Third, this type of transaction is well spread among people in a way that it has become a custom (*‘urf*). It is known that jurists accept custom if it removes difficulty from the public.¹⁴

However, Abū Rakhayyah has not imposed any condition for allowing ‘*arabūn*. On the contrary, another contemporary Muslim jurist, Dr. ‘Abd al-‘Azīz ibn Muḥammad al-Rabīsh and also the Academy of Islamic Jurisprudence in Jeddah, have imposed a condition, i.e., ‘*arabūn* is lawful for the first party [seller, landlord,

¹² al-Shawkānī (1973), *op.cit.*, p. 183.

¹³ *Sunan ibn Majah*.

¹⁴ Abū Rakhayyah (n.d.), *op.cit.*, pp. 405-406.

or lessor], if both parties agree upon a fixed deadline to accomplish the transaction but the second party [buyer, leaseholder, or tenant] fails to come back and complete it before this deadline.¹⁵ This is because if the deadline for this accomplishment remains open, it would cause financial loss to the seller, landlord, or lessor. Likewise, any contract is considered null and void, if the time of its accomplishment remains unknown.

In order to prefer one opinion to another in this regard, the researcher would like to discuss a few more factors in the following paragraphs.

EXAMINATION OF SOME FACTORS THAT INFLUENCE THE LEGALITY OF THE PRACTICE OF 'ARABŪN

In the past, utilization of 'arabūn in selling, renting or leasing was much less than its utilization during modern time. Moreover, in the past most of the schools of Islamic law and Muslim jurists were against it. Only Ḥanbalī school of Law maintained its legality. To the contrary, most of modern and contemporary Muslim jurists are in favour of it. The researcher, therefore, examines here four factors, i.e., influence of Ḥanbalī school of law, influence of 'urf (custom) and wide practice of both Muslims and non-Muslims all over the world, influence of contemporary civil laws of Muslim countries, and public necessity for 'arabūn, to determine how far have they influenced the contemporary Muslim jurists to maintain the legality of the practice of 'arabūn. This examination is primarily based on the statements of a sizable number of contemporary Muslim jurists from several Muslim countries who provided their views on 'arabūn during 21-26 June 1993 in the eighth session of

¹⁵ *Majallat Majma' al-fīqh al-Islāmī* (1994), *op.cit.*, p. 793; Wahbah al-Zuhaylī (1997), *Al-fīqh al-Islāmī wa Adillatuh*, vol. 9. Damascus: Dār al-Fīkr, p. 5218; al-Rabīsh (1999), *op.cit.*, pp. 26-27.

the congress of the Academy of Islamic Jurisprudence (*Majma' al-fiqh al-Islāmi*) held in Brunei Dār al-Salam.¹⁶

INFLUENCE OF HANBALI SCHOOL OF LAW

It has been discussed earlier that in the past Ḥanbalī School of Law or minority of jurists supported the legality of 'arabūn, while other three schools of law or majority of jurists did not support it. Contradicting this status of previous jurists, majority of contemporary jurists support the legality of 'arabūn. Probably in this regard contemporary jurists are partially influenced by Ḥanbalī School of law, which could be discerned from the statements of a number of them. All four paper presenters on 'arabūn in the above congress have cited the view of this school. For instance, 'Abd Allah bin Sulaymān bin Manī', referring to al-Sanhūrī, says: "Surely the Western Jurisprudence conforms to Ḥanbalī School of Law in its view that a purchaser loses 'arabūn, if he does not like to accomplish purchase, but if he chooses to accomplish it, 'arabūn will be counted as a part of price."¹⁷ Mentioning a number of justifications, another paper presenter Wahbah al-Zuhaylī gives preference of Ḥanbalī School of Law to the view of majority of jurists. He says: "Although al-Shawkānī gave preference of the opinion of majority of jurists... I maintain that the view of Ḥanbalīs should be preferred."¹⁸ Third Paper presenter Rafīq Yūnus al-Miṣrī says: "I support Ḥanbalī School of Law... in regards to legality of 'arabūn in selling and renting."¹⁹ Fourth paper presenter Al-Ṣiddīq Muḥammad al-Amīn al-Dārīr opposes the legality of 'arabūn. Yet he proposes that the opinion of Imām Aḥmad regarding legality of 'arabūn is acceptable, if it is counted as a portion of price in case of accomplishment of purchase, which is considered to be right of buyer. al-Dārīr also proposes that the view of Imām

¹⁶ The articles delivered in this session and comments given by attending scholars on 'arabūn had been published in an issue of the journal of this academy. See *Majallat Majma' al-fiqh al-Islāmi* (1994), *op.cit.*, pp. 641- 793.

¹⁷ Ibn Manī' (1994), *op.cit.*, p. 683.

¹⁸ al-Zuhaylī, (1994), *op.cit.*, p. 697.

¹⁹ Al-Miṣrī (1994), *op.cit.*, pp. 736-737.

Aḥmad regarding legality of ‘*arabūn* is also acceptable in case of non-accomplishment of the deal with a modification, i.e., with fixing a deadline of waiting period. But the seller has no right to keep the whole ‘*arabūn*. Rather, he is allowed to keep an amount of it, which equals to actual loss that occurred because of non-accomplishment of the deal. The rest of ‘*arabūn* should be given back to the purchaser.²⁰ Although al-Dārīr maintains that this modification of fixing a deadline is something new, a discussant of the above congress Al-Shaykh ‘Abd al-Sattār Abū Ghaddah mentions that in fact it had been proposed long ago by some later Ḥanbalī jurists.²¹ All these statements prove that these jurists are influenced by the view of Ḥanbalī School of Law.

INFLUENCE OF ‘URF AND WIDE PRACTICE OF BOTH MUSLIMS AND NON-MUSLIMS ALL OVER THE WORLD

A paper presenter of the above congress and discussant Wahbah al-Zuḥaylī mentions ‘*urf* (custom) and wide practice of people of using ‘*arabūn* in their dealings as a justification of his supporting the legality of ‘*arabūn*.²² Likewise, Abū Rakhayyah, an independent researcher on ‘*arabūn* also considers ‘*urf* as a justification to legalize ‘*arabūn*.²³ From among 15 discussants (not including those who are both paper presenters and discussants) of the above congress seven of them, i.e., al-Shaykh ‘Abd Allah al-Bassām, Yūsuf al-Qaraḍāwī, al-Shaykh Muḥammad al-Mukhtār al-Sulamā, al-Shaykh ‘Abd al-‘Azīz al-Khayyāt, al-Shaykh Nāji ‘Ajam, ‘Abd al-Qaḍīr al-‘Imarī and ‘Alī al-Taskhīrī consider ‘*urf* as a justification to maintain the legality of ‘*arabūn*.²⁴ For instance, countering the view of al-Shaykh al-Ṣiddīq al-Dārīr, al-Qaraḍāwī

²⁰ al-Dārīr (1994), *op.cit.*, p. 666.

²¹ ‘Abd al-Sattār Abū Ghuddah, “al-Munāqashah (on ‘*arabūn*),” in the above mentioned issue of *Majallat*, p. 770.

²² al-Zuḥaylī (1994), *op.cit.*, pp. 697, 777.

²³ Abū Rakhayyah (n.d.), *op.cit.*, p. 406.

²⁴ A number of contemporary Muslim jurists, “al-Munāqashah (on ‘*arabūn*),” in the above mentioned issue of *Majallat Majma‘ al-fiqh al-Islāmī*, pp. 767, 769, 775, 784, 786, 788.

states: “Al-Shaykh al-Şiddīq says that there is no necessity for this matter (*‘arabūn*). How there cannot be necessity for it, while all people deal with it? The necessity is urgent.” He also says that the issue of a deadline should also be referred to and based on public custom (*‘urf*).²⁵

Influence of Contemporary Civil Laws of Muslim Countries

In most of Muslim countries their contemporary civil law has legalized the practice of *‘arabūn*. This legalization has some influence on the contemporary Muslim jurists to consider *‘arabūn* as lawful. Two paper presenters of the above congress clearly mention this civil law. For instance, ‘Abd Allah bin Sulaymān bin Manī’, referring to al-Sanhūrī, states: “Surely all civil laws of Arab countries consider it (legality of *‘arabūn*).”²⁶ Another paper presenter Rafīq Yūnus al-Miṣrī maintains that one of the justification to fix a deadline for *‘arabūn* is that the modern manmade laws impose it.²⁷ Statements of two discussants of the above congress show a great extent of being influenced by these contemporary civil laws. One of them Ibrāhīm Bashīr al-Ghāwil states that he supports the view of al-Shaykh Muḥammad al-Mukhtār al-Sulamā regarding the right of the seller to keep *‘arabūn* according to his actual loss because in civil law there is compensation for loss, which should be equal to it (loss), so that there will be no eating property of people wrongly.²⁸ The other discussant al-Shaykh ‘Abd Allah Muḥammad says: “My special point of view is that I don’t see any hindrance from supporting the view of the legality of selling with *‘arabūn* because most of the [civil] laws support it. Since these laws conform to one view of fiqh the matter has become easy (to accept).”²⁹

²⁵ Yūsuf al-Qaraḍāwī, “al-Munāqashah (on *‘arabūn*),” in the above issue of *Majallat*, p. 769.

²⁶ Ibn Manī’ (1994), *op.cit.*, p. 683.

²⁷ Al-Miṣrī (1994), *op.cit.*, p. 737.

²⁸ Ibrāhīm Bashīr al-Ghāwil, “al-Munāqashah (on *‘arabūn*),” in the above issue of *Majallat*, p. 778.

²⁹ Al-Shaykh ‘Abd Allāh Muḥammad, “al-Munāqashah (on *‘arabūn*),” *op.cit.*, p. 783.

Public Necessity for ‘Arabūn

‘*Arabūn* is necessary for public interest. Businessmen want confirmation of seriousness of dealings from their clients. They also want to proceed quickly in their dealings so that lingering of period of accomplishment of dealings would not cause loss for them. Likewise, most of the people of today are not trustworthy, who might easily abandon accomplishment of their promised business dealings. Utilization of ‘*arabūn* is an effective tool to achieve the first aspect or goal and to get rid of other two problems. Three paper presenters of the above congress acknowledge this necessity. One of them ‘Abd Allah bin Sulaymān bin Manī‘ states: “It is appropriate for us to look at the necessity of the banks and Islamic financial institutions for it [‘*arabūn*] as a factor to activate business and investment.” He also says: “There is no doubt that supporting/accepting the principle of ‘*arabūn* is one of important regulations of seriousness in economic movements of selling, buying and renting. This means that people need to utilize ‘*arabūn* for their dealings.”³⁰ Another presenter Wahbah al-Zuhaylī says: “People urgently need it (‘*arabūn*) to strengthen contracts and to be sure about confirmation of dealing and to adhere to it and to fulfill its conditions.” He also remarks that ‘*arabūn* is lawful because of its necessity in selling and renting with the condition of fixing a deadline of waiting.”³¹ Third presenter Rafīq Yūnus al-Miṣrī considers necessity as one of three factors that strengthen the legality of ‘*arabūn*.³² A few of the discussants of the above congress also recognize this necessity. For instance al-Shaykh ‘Abd al-‘Azīz al-Khayyāt says that because of change of price rates, public disorder, absence of trustworthiness and widening of sale today the necessity of ‘*arabūn* has become stronger than what was in the past.³³

In addition to the above factors, a number of contemporary jurists have tried to provide some additional proofs to consider ‘*arabūn* as lawful. For instance, a paper presenter of the above

³⁰ Ibn Manī‘ (1994), *op.cit.*, pp. 683-684.

³¹ al-Zuhaylī (1994), *op.cit.*, pp. 703, 705.

³² Al-Miṣrī (1994), *op.cit.* pp. 730, 737.

³³ Al-Shaykh ‘Abd al-‘Azīz al-Khayyāt, “al-Munāqashah (on ‘*arabūn*),” in the above issue of *Majallat*, p. 779.

congress Wahbah al-Zuhaylī maintains that there was a silent consensus among the companions of the Prophet (p. b. u. h.) regarding the legality of *'arabūn*. This is because there is no proof of opposing the view of 'Umar on the legality of *'arabūn*. al-Zuhaylī also says that since *'arabūn* involves promise, it must be fulfilled because Allah says:

“*You should fulfill your promise.*”

Surah al-Isrā' (17): 34

Moreover, he maintains that since *'arabūn* is related to some type of condition it must be fulfilled, i.e., the seller must have the right to keep it. This is because the Prophet (p. b. u. h.) says: “Muslims should fulfill their conditions.”³⁴ Another presenter Rafīq Yūnus al-Miṣrī adds the proof of *maṣlahah* (public interest). According to him, since *'arabūn* brings some benefit for public and removes some harms from them it should be considered as lawful.³⁵ A discussant of the above congress al-Shaykh 'Abd Allah al-Bassām adds another proof to legalize *'arabūn*. He says that a basic principle in transactions is that all of them are permitted. This principle should not be abandoned except if any [contradicting] sound text is found on a particular issue. Since there is no sound text to forbid *'arabūn* it should be considered as permitted. He also mentions that there is a practical consensus (*ijma' al-ummah*) of contemporary Muslims and non-Muslims in terms of utilization of *'arabūn*.³⁶

Based on the above four factors and additional proofs, the researcher maintains that the legality of *'arabūn* should be preferred to the view of its opponents. However, differing with Dr. 'Abd al-'Azīz and the Foundation of Islamic Jurisprudence in Jeddah, the researcher maintains that beside a fixed deadline and consents of both parties, some other conditions also should be imposed to consider the second type of *'arabūn* mentioned above as lawful.

³⁴ al-Zuhaylī (1994), *op.cit.*, pp. 697-698.

³⁵ Al-Miṣrī (1994), *op.cit.*, p. 737.

³⁶ Al-Shaykh 'Abd Allāh al-Bassām, “al-Munāqashah (on *'arabūn*),” in the above issue of *Majallat*, p. 767.

Such a condition is that because of holding the good or utility until the fixed deadline without being sold to the second party, if any monetary loss occurs to the first party, or his or her efforts and struggles to make the good or utility ready or to keep it intact are not compensated, only then the first party is allowed to keep the deposited money or wealth for him or her. This is because without this condition this deposited money could be considered as usury (*ribā*), which would be earned without doing any effort, which is forbidden in Islam. Allah says:

“Allah made buying and selling lawful, but He made usury unlawful.”

Surah al-Baqarah (2): 275

Likewise, without this condition there would be injustice to the second party, whereas Islam imposes justice in every type of dealing and transaction. Allah says:

“Surely Allah commends justice [in everything].”

Surah al-Naḥl (16): 90

Another additional condition should be imposed, i.e., the financial harm or loss of the first party should be measured. The compensation should be given or the portion of *‘arabūn* or whole of it should be kept according to the amount of the loss. If the loss is very minimum, the first party should not be allowed to keep the whole amount of *‘arabūn*. This is because without this condition no justice would be implemented.

EVALUATION OF RECEIVING ‘ARABŪN BY SOME COMPANIES IN KUALA LUMPUR

Many companies at Kuala Lumpur city, its suburbs and other parts of Malaysia do receive *‘arabūn* in their selling goods, renting apartments, leasing lands, etc. Because of the limitation of the space of this paper, the researcher discusses only one type of *‘arabūn*, which is being received for selling goods. He concentrates his discussion on three companies, i.e., Penternakan Berjaya, Gombak Farming, and New and Second Car Dealer.

Penternakan Berjaya

Penternakan Berjaya is a farming company of cows owned by Mr. Noor Azudin, who has been doing this business for last seven years. The researcher has organized an interview with Mr. Noor dated January 28th, 2005. The focus of this interview was on his receiving *'arabūn* for selling cows during this year's festival of sacrificing animals (*'īd al-Adhā*). Mr. Noor has sold 240 cows this year to Muslims of Kuala Lumpur who sacrificed these animals during the above festival. The price of each cow varies according to its size. The highest was RM 2,100/- and the lowest was RM 1,900/-. According to him, he has taken an advanced deposit ranging from RM 50 to 90% of the whole price of a cow from most of these customers, except a few who were his regular customers, who ordered their cows without even looking at them and paid the whole price after or at the time of slaughtering them.

According to Mr. Noor, the justification behind receiving advanced deposit was to confirm that people would not change their minds because of finding better cows in some other farms. This year every customer has showed up and completed his deal and slaughtered his cow. Therefore, the advanced deposit of everyone was deducted from the whole price of his cow. Only once in the past a customer canceled his order whom Mr. Noor had paid back the whole deposited money (*'arabūn*) without keeping a single penny for him, although the customer told the farmer to keep *'arabūn*. Mr. Noor did this because through his dealings with this customer he had understood that this man would not cancel an order unless he had a genuine and valid reason to do so. The farmer insists that in future if this type of cancellation of order happens again, he would give the whole deposit back to the customer because he can easily sell this ordered cow to anyone else. Likewise, he thinks that helping Muslims for their animals that would be sacrificed for Allah is considered to be an act of worship. Therefore, he is not supposed to keep this deposit, which is in fact not used to sacrifice an animal.

The researcher would like to evaluate the above business as follows:

1. This farmer has mostly utilized the first type of *'arabūn* in which the deposited money is deducted from the price

of sold goods. He has done a deed, which is agreed by all Muslim jurists.

2. He has fulfilled the condition of fixing a deadline for supplying the sold cows. In case anyone cancels his order, he would have the right to keep a portion of *'arabūn*, which would be considered as the second type of *'arabūn* that is disputed among the jurists.
3. Mr. Noor has only one chance during his seven years of farming to utilize the second type of *'arabūn* in which it was lawful for him to keep a portion of *'arabūn* for him because he had taken care of the sold cow for a period of time after the order of purchase was accomplished. But out of his piety, he did not keep *'arabūn*. Rather, he returned it fully to the customer. According to Dr. Mazid, this farmer had done a good deed by paying *'arabūn* back to the customer.
4. He has completed the condition of both parties' satisfaction, which is required for keeping the whole or part of *'arabūn*, though practically he has not kept it.
5. The dealings and business policies of this farmer indicate that he possesses a certain degree of piety.
6. It may be remarked that in terms of rulings of Islamic law regarding *'arabūn*, Mr. Noor has implemented them fully (100%). The researcher also would like to comment that business policies including policy regarding *'arabūn* implemented by this farmer have greatly caused him to be successful in his business.³⁷

Gombak Farming

Gombak Farming is a farming company of sheep and goats owned by Mr. Ismail bin Ahmed, who has been doing this business for last eleven years. The researcher has conducted an interview with Mr. Ismail dated January 30th 2005. This interview concentrates on his receiving advanced deposit (*'arabūn*) for selling 110 sheep and goats during this year's festival of sacrificing animals (*'īd al-Aḏḥā*).

³⁷ This discussion and evaluation are based on an interview conducted by the researcher with Mr. Noor Azudin, the owner of "Penternakan Berjaya," a cow farm in Kuala Lumpur, dated 28-01-2005.

Contradicting with the policy of Mr. Noor, Mr. Ismail usually does not ask advanced deposits from his customers because he believes that since most of his customers are intellectuals, highly educated, and religious, who come to him to do a good deed, they would not cheat him. Likewise, he insists that his intention is to facilitate the sacrificing of animals for his fellow Muslim brothers. Therefore, he should not be so particular to receive advanced deposits. Yet, seventy percents (70%) of his customers gave him advanced deposits ranging from RM 30 to 90% of the whole price of a goat or sheep. Around twelve persons gave him in advance the full price of the animals.

According to him, in the past it has never happened with him that a person ordered a goat or sheep from him but he did not show up to slaughter it. Therefore, all the deposited money was deducted from the whole prices of the animals. Once a customer brought his sheep to his own place instead of slaughtering it in the place of Ismail. But the sheep was dead because of its falling down to a whole. The owner had given another sheep to the customer without charging him a single penny. Mr. Ismail agrees that in future if any customer would not take his animal after payment of '*arabūn*, he would either give it back to the customer, or would deduct a portion of it, if any financial loss takes place.

The researcher would like to evaluate the above business as follows:

1. Mr. Ismail has the chance to use only the first type of '*arabūn*, in which the advanced payment was deducted from the whole price of the sold goats or sheep. All Muslim jurists unanimously maintain that this action is lawful.
2. He has indicated that in future he might use the second type of '*arabūn*, in which the owner has the right to keep the whole or part of '*arabūn*, if the customer does not take the sold animal after the payment of deposit. This is justified based on particular situations such as if the sold animal is not resold and after that the price went down, the owner would have the right to deduct his loss from '*arabūn*.
3. He has fulfilled the condition of determining a deadline for legality of receiving '*arabūn* for sold animals because the time of the festival of sacrificing was fixed. However, he has no chance to keep '*arabūn*.

4. He has also fulfilled the condition of consents of both parties, which is required in case of keeping the whole or part of '*arabūn*.
5. Policies of Mr. Ismail indicate that he, like Mr. Noor, also possesses a certain degree of piety.
6. It may also be noted that Mr. Ismail has fully implemented all the rulings of the *Shariāh* concerning '*arabūn*. Likewise, the researcher maintains that business policies including the policy regarding '*arabūn* implemented by this farmer have contributed greatly into success of his business.³⁸

New and Second Car Dealer

New and Second Car Dealer is a car company where different types of new and secondhand cars have been being sold for last three years. This company belongs to three persons, who are also considered to be three directors of it. One of them is Mr. Rizam bin Matsani, who owns 40% of this company. The researcher has organized an interview with Mr. Rizam dated January 30th 2005. According to Mr. Rizam, his company sells six to eight units of cars per month. This interview has focused on advanced payment or '*arabūn* for selling these cars.

Mr. Rizam has explained that following receiving all supporting documents from a customer for getting loan from a bank or any other financial institution to buy a car, his company submits them to this bank or institution for the approval of loan, which could be 90% of the whole price of a car or less depending on status of every customer. After obtaining this approval, the company receives '*arabūn* from the customer for two purposes, i.e., an advanced deposit for booking a car, and a portion of the whole price of a car, payment of which is not done by the financial institution, which could be 10%, 20% or more depending on status of every customer. Then the company books a car for this customer and registers it in his name with the related government office. After

³⁸ This discussion and evaluation are based on an interview organized by the researcher with Mr. Ismail bin Ahmed, the owner of "Gombak Farming," a goat and sheep farm in Kuala Lumpur, dated 30-01-2005.

this the company issues a delivery order for the customer, who is supposed to sign it. Then the company submits this signed delivery order along with registration card and insurance document to the financial institution for receiving the rest of the price of a car approved as a loan on behalf of the customer. Within three/four days the payment would be ready. Then the actual delivery of the car to the customer would take one month or more depending on stock availability or situation of the customer. However, this deadline is mentioned in the delivery order.

Once the deal is completed, all the amounts paid as *'arabūn* are deducted from the price of the car. However, if anyone declines to buy his car following the payment of *'arabūn* and before the registration is completed, the company would give the portion paid by the customer as down payment back to him, but the deposit for booking would not be returned. Likewise, if the application of obtaining loan is rejected, the company also would give the portion of down payment given by the customer back to him, but the deposit for booking would not be returned. According to Mr. Razim, during last three years four cases occurred where customers did not buy cars after the payment of booking fees and before the completion of registration. One of them paid RM 1,000 and three of them paid RM 500. RM. 500 was returned to the person who deposited 1,000. Likewise, RM 500 or full deposited amount was given back to another customer who paid RM 500. On the other hand, the company kept the full amount of RM 500 paid by each of the other two customers. The justification for keeping this amount, according to Mr. Rizam, is that the company has already done some efforts to book this car, which should be compensated. On the other hand, if a customer declines to buy his car after the registration is completed; the company would take a legal action or file a case against him in the court to compel him for accomplishing this deal. If the company is unable to deliver the car within the deadline, the customer has the right to cancel the deal. If this happens, the company would pay all amounts of booking fee and customer's down payment back to him. According to Mr. Rizam, this happened twice with two customers.

The researcher would like to evaluate the above company as follows:

1. This company has utilized both types of *'arabūn* for selling cars. For the first type where purchasing deal is completed, *'arabūn* is deducted from the price of a car. This is lawful according to the agreed opinion of all Muslim jurists.
2. For the second type of *'arabūn* where the seller is allowed to keep the whole or part of *'arabūn*, the deadline was not determined by this company because in all four cases mentioned above no registration was completed and no delivery order was issued. Without this order, deadline for handing the car over to the customer is not known, and without determining the deadline *'arabūn* is not allowed to be kept.
3. Additionally, there is no consistency in keeping the *'arabūn* because for the same type of incomplete transaction one of the four customers was given half of *'arabūn*, another one was paid full, while two of them were not paid back any amount, rather, full *'arabūn* was kept by the company. Hence, there is a doubt that the company has established justice in dealing with every customer in terms of keeping his *'arabūn* equally. Likewise, it is doubtful that keeping the whole *'arabūn* of RM 500 was legal and just because the compensation for the procedures done by the company could be less than this amount.
4. It may be remarked that this company is unable to implement all conditions of considering the second type of *'arabūn* as lawful. Although its business is going on, the researcher suggests that if this company wants to prosper and likes to survive as a successful company, it should be more customer friendly and lenient about handling *'arabūn*, and be just in deducting its compensation from paid *'arabūn*.³⁹

³⁹ This description and evaluation are based on an interview conducted by the researcher with Mr. Rizam bin Matsani, a director of "New and Second Car Dealer," a car company in Kuala Lumpur, dated 30-01-2005.

CONCLUSION

Non-refundable deposit or *'arabūn* in Islam could be made for selling, renting or leasing. After making this deposit if the transaction is accomplished, the deposited money is lawful to be counted as part of the price of the sold material, or portion of rent or lease without any dispute among Muslim jurists. However, if the transaction is not completed, jurists differ on the permissibility of *'arabūn*. The preferable opinion is that it is lawful for the seller, householder, or lessor to keep this money provided that a deadline for accomplishment of the transaction was fixed but the other party did not want to accomplish it, both party should have consents for keeping *'arabūn*, there must be financial loss to the seller or some justification for him to keep it, and the compensation should be measured based on the amount of loss. Nevertheless, it is recommended to return this *'arabūn* in the case of non-accomplishment of the transaction.

Among three companies that have been studied by the researcher, two companies, i.e., Penternakan Berjaya and Gombak Farming have been implementing all the conditions of *'arabūn* perfectly, while the third company, i.e., New and Second Car Dealer is unable to implement the conditions of *'arabūn* completely. The researcher maintains that the first two companies are considered to be successful in their businesses because of their reasonable and customer friendly policies including good policy regarding *'arabūn*. On the other hand, although the third company is continuing with its business, it should try to be more customer friendly and just in keeping the whole *'arabūn* or in deducting part of it, if it wants to establish itself as a successful company in future.