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THE ASSIGNMENT OF CREDIT THROUGH BILLS OF EXCHANGE AND TRANSMISSION DOCUMENTS IN ANDALUSI LAW.

SUMMARY: 1. The assignment of credit (ḥawāla) through a document (ṣuftaḡa) in al-Andalus. – 1.1. Legal foundations of the ḥawāla in relation to other credit businesses. – 2. Content of the legal business ḥawāla. – 2.1. Justification for the terminological disparity regarding personal elements in Andalusi case law. – 2.2. Object of the contract and lawfulness of the debt: the Andalusis’ integrating criterion. – 2.3. Consent and its forms of expression among Andalusi traders in ḥawāla matters. – 3. Effects of the contract. – 3.1 Convergences of rights and obligations as far as credit contracts are concerned. – 3.2. Causes which limited the effectiveness of the ḥawāla.

Key words: assignment of credit, ḥawāla, ṣuftaḡa, exchange bills

During the last few years, legal historiography has repeatedly highlighted the scarcity of studies referred to the history of Muslim law in al-Andalus which can provide data about its influence on the evolution of Law in the territory of the peninsula as a whole. Mercantile law is one of the areas which awake the interest of the specialists in the different branches of law and, though López Ortiz outlined some aspects related to this field, many elements undoubtedly still remain unknown to us.

The exchange traffic was a practice that suited the modus vivendi of caravanners and traders in the Islamic world. The inclusion of the Iberian...
Peninsula into the most important commercial routes of Muslims – such as the silk route through the North Africa – provides a very solid reason to deepen in the study of the sources that have been preserved about the role that certain credit instruments, which represented an alternative to the coin, might have played in trade centres.

1. The assignment of credits (hawāla) through a document (suftağa) in al-Andalus

Muslim law does not a priori admit the use of exchange instruments in the field of business. Now then, the sources attest not only its use but also the generalisation of certain practices suited to the market demands along with

refers to the bill of exchange is suftağa, it is worth specifying that the term hawāla is most commonly used in the legal context and also that, in modern Arabic, it is translated as ‘funds transfer’. In Grasshoff’s words, the word hawāla is the verbal noun of hala, which means the transformation of a situation in which a person, or thing, are involved (op. cit. p. 37). Corriente singles out among the numerous meanings of the verbs that of ‘freeing’ or ‘exonerating’ (‘exempting’) when it is accompanied by the particle con (min); and the same root in damma (hulla) ‘become free, exempted from’ (CORRIENTE, Diccionario Árabe-Español, edit. Instituto Hispanoárabe de Cultura, Madrid, 1977, p. 172).

6 – Despite the reluctance to the admission of instruments that could entail for-profit loans, which were strictly forbidden by Islamic law; LÓPEZ ORTÍZ, Derecho musulmán, cit., p. 197-199. The inconveniences associated with the use of certain instruments are reported by the Spanish doctrine also within the Christian context, as can be verified in the Suma de tratos y contratos of Tomás de Mercado, who describes as audacity to re-exchange on a third person, an action that is regarded as unfair and tyrannical. The praxis consisted in issuing a bond in one town and, if no one to whom it corresponded was found, or if that someone was found but did not accept it, or if it was not paid in time after being accepted, it was re-exchanged, which caused damages and interests with respect to the place where it was sent. All these interests were forbidden for being usurious; see TOMAS DE MERCADO, Suma de tratos y contratos, edition and preliminary study by Nicolás Sánchez Albornoz, transcription by Graciel S.B. de Sánchez Albornoz, Madrid, 1977, vol. II, Chap. X, p. 430-446. In accordance with the edition and study of Restituto Sierra Bravo, the knowledge sources can be found in Roman and Canon law, Gracianus’ Decree and other collections; he even refers us back to Common law, and regarding exchanges in particular, to Pius V’s decretal of 1571; see TOMAS DE MERCADO, Suma de tratos y contratos, cit., p. 15. Notwithstanding that, the influence of Common law can be verified in many of the legal cases and situations where the author refers the reader to the Seville forum, amongst others, thus giving an idea of the exhaustive knowledge that he had about forum law. This is a current issue treated from the perspective of Law Schools, for which the readers interested can consult http://www.pmo.gov.my/WebNotesApp.

7 – F. MAILLO SALGADO, Diccionario de derecho islámico, Gijón, Ediciones Trea, s.l., 2005, p. 126.

8 – Hanafis and Shafi’is see the practice of suftağa as reprehensible because a debt must be paid with no profits for the fund provider, taking into account that the non-existence of cash transport implies an absence of risks. Hanbalis allow this practice as long as it does not entail a material profit in the form of a commission, whereas Malikis only authorise it in case of need,
the inconveniences derived from outside-the-town exchanges\(^9\). The bill of exchange has been widely discussed in Maliki law: forbidden (huṭṭān) for some, reprehensible (mākrūh) for another group, and licit (ṣaḥīḥ) for others in specific cases\(^9\). Ibn Salmān defended its usefulness for justified reasons\(^11\), and the classical doctrine referred to an exchange instrument called bālisah, bālisah in Egypt or bālisah in the Maghreb. However, it is not easy to attest, not even conceptually, the inclusion of this instrument in legal texts, at least during the first centuries of expansion of Andalusi law. The reason is simply the express prohibition by the Islamic legislation to favour the traffic of money between different towns or to compensate the exchange of products on which certain limitations were applied resorting to the delivery of this document\(^12\).


\(^10\) – The description of these acts coincides with the one assigned by the doctrine in the Hispanic-Christian context, in the times of Tomás de Mercado, who argues that, in the absence of the requirements which legitimate the changes – namely, nature of the change, without deceit or violence, and moderate and fair – these will considered unlawful, vitiated and reprehensible (Suma de tratos y contratos, cit., p. 448). However, it will later become visible that the Arabic terminology applied is not unanimously followed by all the authors whose work has been used for the development of this paper.

\(^11\) – This issue is dealt with in relation to different operations which have as their aim to obtain a negotiable credit in the works of the aforementioned author, the edition of which was the object of Prof. Cano Ávila’s Doctoral Thesis and which has been the study object in this paper too; the reader should consult the said work: P. Cano Ávila, Contratos conmutativos en la Granada nazarí (siglo XIV), según el Formulario notarial de Ibn Salmān (m. 767/1366), 2 vols., University of Granada, 1986 (Doctoral thesis in micro-fiche), and about the assignment of credit, the same aforementioned work, t. II, p. 482-485. For the preparation of this paper, we have consulted the article published for the Tribute to Prof. Jacinto Bosch Vila, “Sobre la subrogación de crédito (ḥawa‘la) en Córdoba y Granada (siglos X y XIV J.C.)”, in: Homenaje a Jacinto Bosch, Granada, 1991, 2 vols., p. 481-496; the chance made the topic chosen for that study, presented by the author of this paper, be also the same one chosen more than ten years later, with the objective of discussing this business modality in relation to the use of exchange bills or instruments, the legitimacy of which awoke conflicting views among the legal experts of the period comprised between Ibn al-ʿAbbār and Ibn Salmān. This topic appears as a current one if we take into account actions such as the recent remittance of funds from Pakistan to bank accounts located in Spain for trade purposes, which call into question the transfer of credits within a legal framework where the provisions that forbid any type of unjustified enrichment are a manifestation of the violation of the equity principle.

\(^12\) – In fact, the assignment of a credit shares the characteristics of businesses related to the custody or management of someone else’s goods (mandate and deposit); these are special cases similar to the contracts which provide a profit, the validity of which depends on how that profit is received and in what concept, always seeking to avoid committing usury. The group of free and charity businesses covers a wide spectrum and has as its basic principle not to obtain a return for the service rendered, providing only a profit for the other party. The donation is the standard-type contract and, by analogy, the mutuum (qarād) which in theory is always free in order not to contravene the prohibition of the ribā: this same nature
The doctrinal opposition and the conflicting opinions between the followers of the different schools – especially of the Maliki and Shafi’i schools – regarding the viability of a written document which could be used to carry out a payment, were the common trend, a posture that was justified by the risk of committing usury (riba)\textsuperscript{13}. The consideration as unlawful of exchange practices – when they included a time or change-of-place clause in the delivery of the item – was rethought by the aforementioned schools before the need to find a solution to the problems derived from the transport of securities and the dangers inherent in it. There were two reasons for concern: the insecurity to which were exposed the goods when they went through certain places and the depreciation in the value of an object due to the time elapsed between the formalisation of the agreement and its completion\textsuperscript{14}. In the light of the texts examined, this concern also affected the small traders (tiğara) in Andalusi souks\textsuperscript{15} as well as their Ifriki counterparts – known here by the name of al-fuqarah’. Their status as lower-scale traders allowed them or gave them a justification to resort to bills of exchange through which they could receive the equivalent of the sums that people owed to them and not the actual sum of money, which could generate usury according to the doctrine\textsuperscript{16}.

The technical-legal resource used to legitimise this type of transactions – in which the unlawful nature lay in the application of an added value to the object that was being exchanged because of the time elapsed between the celebration of the contract and the moment in which the object was taken

\textsuperscript{13} – An unjustified enrichment because it does not derive from man’s work – the only licit enrichment in Islam – explicitly forbidden in Kor. II, 275-278 and Kor. XXX, 39, El Corán, ed. Julio Cortés, Barcelona, 1986. The Hanafi doctrine defends the licit nature of credit sale on the basis of another Koranic precept which justifies the different modalities of the Koran precept, II, 282, op. cit.

\textsuperscript{14} – Santillana mentions: sale with the capacity of resolution, sale with a rescue agreement, cash sale and forward sale, the double purchase, the sale contract and mutuum and the commission contract. All these businesses have to do in some way or other with the topic examined, since the doctrine, via analogy, sometimes justifies permissiveness regarding certain practices or their prohibition taking as a reference the aforementioned businesses. See D. Santillana, Istituzioni di diritto musulmano malichita con riguardo anche al sistema sciafiita, Roma, 1938, v. II, lib. XII, p. 393-397.

\textsuperscript{15} – Halil ibn Ishāq, Il Muḥtasar o sommario del diritto malechita, trad. it. di D. Santillana, v. II (Diritto civile, penale e giudiziario), Milano, 1919, p. 282, note 13.

possession of or by the delivery in a different place – was the taqld, before the conclusion of the igthd. Through the former, and by means of a rigorous analysis of the requirements enforceable for the valid celebration of businesses, a wide range of variations were permitted for the private contract credit in comparison to other businesses such as the loan or mutuum, the transfer or delegation of credit or its sale. These modalities are known to us thanks to the references and models of certificates and deeds which, according to Andalusi legal experts, could be formally requested before the qaddi in a case of claim (istihqag) by the parties involved.17

But if we really had to highlight a special aspect about this business modality within the Andalusi context, it would definitely be the lack of uniformity regarding the etymological criteria adopted to refer to written documents which justified the assignment of a credit or the intervention of an exchange instrument, as could be the suftag. In most of the texts consulted, there are references to the bill of exchange through the use of the concept which defines the legal business which justifies it, i.e. the hawala. After all, the name hawala – that is the case in Egypt – is the one currently given to the ‘cambium trajecticum’ type of exchange from which it derives: the assignment of credit. Specialists in Islamic trade law claim that the hawala – insofar as it is a payment mandate or delegation – and the suftag – bill of exchange – are specific types of credit which have existed in the Islamic world from time immemorial, its function being fully justified in long-distance commercial transactions.18

Although the term often recognised at present to refer to the bill of exchange is saftag or bulisa, which consists in the application of the transfer – assignment of the debt –, its study in the historical sources forces us to define its elements and requirements from its characteristics, which are analogous to those of other contracts from which it is supposed to derive.19 Hence the difficulty to define this contract modality in a rigorous way. Indeed, for some authors – we could mention al-Gaziri or Ibn Salmun, for instance – there is a distinction between the purchase of a credit (bay al-dayn) and its subrogation (hawala). In the first case, we would find ourselves before an exchange contract (buya) commutative of raqabah (usefulness)

17 – The complexity of this casuistry is reflected in the scarce historiographical sources about Andalusi law; López Ortiz literally says: «the extremely complicated thorough analysis of which is very hard to do» (Derecho musulmán, op. cit., p. 195).
19 – The starting point is the absence of an overarching theory about contracts due to the fact that we find ourselves before a system that is mainly a ‘case-based’ or ‘ad-hoc’ one and hardly dogmatic. This one along with other issues regarding the adequacy of the contract model to the general principles of present-day law in countries with an Islamic tradition can be found in V. M. Donini, Il diritto del commercio internazionale nel Mediterraneo tra diritto islamico e Lex Mercatoria, Napoli, Edizioni Scientifiche Italiane, 2007, p. 113-169.
and manfa’ah (the right to make use of the item and to receive the profits from that use), which is only a consensus-based and truly effective sarf contract when it refers to precious metals – gold, silver –. However, another classification would be possible if we took into account the distinction between commutative contracts – the typology to which these contracts would belong according to Ibn Salmân – and non-exchange contracts, among which stands out the loan or mutuum (qard), the accommodatum, the deposit, the payment mandate20 (also known as ħawāla, suftaḡa or bill of exchange and ṣakāk or cheque), as well as the delegation or assignment of credit. This is an extremely complicated classification that is justified by the reluctance among Muslim jurists to abstract, systematise or codify Law, thus avoiding not only the generalisation, but also the definition as a way of limiting the great variety of cases21. All these are modalities where references are occasionally made to a document which would serve to facilitate and settle the debt22.

20 – About the basis for the definition of Ibn ‘Arafa, Cano Ávila establishes the link between ‘credit subrogation’ and ‘payment mandate’ because an order is given between the parties involved in the operation with an implicit obligation that forces them to comply with whatever has been commissioned. Hence the need to identify the aspects shared by both business modalities, which even permit their interchangeable use in the terminology to refer to one or the other case. CANO ÁVILA, “Sobre la subrogación de crédito (ḥawāla)”, cit., p. 481-482.


22 – S.v. «suftaḡa», F. CORRIENTE, Nuevo diccionario Español-Árabe, Madrid, 1988, p. 732. For the fiqh, the bill of exchange (haruf kamb˚alat) is dealt with in a separate book, as can be verified in the work of Al-Garn˚at, Al Fihri or Sahn˚an, amongst others. As for the modalities foreseen for the payment of debts, they are very diverse, as is described by Ibn Salm˚an in the chapter dedicated to the settlement of debts, although the references to a specific type of document are not visible in the text, except for the generic expression used for the document (waÅ…½iq), which includes the date of the agreement and the way in which the liberation from the debt will take place and which additionally acts as a proof (bayyina); CANO ÁVILA, Contratos comutativos, cit., chap. XVIII, p. 488-497 and chap. XIX, p. 508. Al-Garn˚at was a legal expert versed in the works of M˚lik, from whom he is said to have acquired his knowledge “in a single day”. He was taught by important Maghrebi jurists and achieved the appreciated ˚iz˚a or ‘venia docendi’ by correspondence. He excelled in the drawing-up of contracts and notary certificates (deeds) and was also considered a man of letters (ad˚ib). Q˚di of Granada suffered the effects derived from the fall of the Almoravid regime and had to emigrate toward the island of Majorca, where he was appointed judge by Ibn G˚niya. He is the author of several works among which stands out the one mentioned here al-waÅ…½iq al-mu˚ta¡ara, Rabat, 1983; S.v. «Ab˚ Is˚q Ibrahim b. Muh˚jir al-ß˚fiq˚ Al-Garn˚at», in: Enciclopedia Arabe, I, p. 217-219. And about this author’s relationship with ‘Is˚ Ibn Sahl b. ‘Abdullah al-Asadi, known as Ab˚ al-˚s˚ag, see R. H. AL-NU´AYMI, An edition of D˚w˚n al-A˚k˚m al-Kubr˚ by ‘Is˚ Ibn Sahl (d. 486 A.H./1093 A.D.), A thesis submitted to the Faculty of Arts, The University of St. Andrews, Scotland, for the Degree of Doctor of Philosophy, December 1978, 4 vols., vol. 1, p. 140/1. About the ħaw˚la, al-wa˚½iq al-mu˚ta¡ara, cit., p. 38.
Arabists commonly agree that the bill of exchange was used in the medieval Islamic world as a trade instrument which facilitated quick long-distance money transfers or speeded up the fulfilment of tax orders during a historical period in which transporting money entailed great risks due to the precarious security conditions.

The – often implicit – reference to this ‘trajecticium’ instrument by the Malikis is often found in the works of the medieval jurist Ḥālil b. Ishāq; Santillana, in the critical edition of the Muḥtaṣar justifies the importance of this instrument taking as a reference the arguments provided by the medieval jurist Muḥammad Ibn ‘Arafa [1316-1401], for whom its use became widespread because of the frequency with which the transmission of a debt and of the loan took place.

Nevertheless, it is generally when dealing with other businesses that one can find explicit references to this tool in the context of commerce – it is the case of the loan (qarḍ). The allusions to the bill of exchange or similar instruments are associated with the prohibition to obtain usurious profits derived from lending food products; it must be remembered in this respect that the use of a document which specified the date, quantity and quality of the products being given in loan prevented any unforeseeable modifications related to the product that was the object of the business (these alterations or modifications could take place due to the time elapsed between the celebration of the agreement and the actual reception of the good to which the agreement referred, or to the deterioration that those goods might suffer during the journey from the place of origin to the place where the addressee took possession of them. The doctrine even foresaw that this same business, carried out in the borrower’s interest – and which entailed a unilateral and personal obligation for him – should be executed by means of a written document; although the mention to the bill of exchange was not explicit, the truth is that the doctrine did use the generic term written document (kitāb). This ensured the availability of a movable object in a place other than the one in which the agreement was closed, on condition that the use of this...

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23 – F. MAÏLLO SALGADO, s.v. «suftaţa», Diccionario de derecho islámico, cit., p. 168. As well as the ḥawāla and the ṣākk in CORRIENTE, Nuevo diccionario Español-Árabe, cit., p. 371, ṣākk ← o ṣākk, شیخ.


25 – Tyan justifies the use of these instruments from new sources of Islamic law as a consequence of an evolution and of the indirect power granted to the community leader to formally enact legal provisions; E. Tyan, “Méthodologie et sources du droit en islam”, cit., p. 79-109; about this issue, p. 108.

instrument had as its aim to avoid the custody danger derived from carrying an amount of money in cash; it would be the case of the transport of cash for the payment of food products which were going to be consumed far away from the place where the agreement had taken place. The fixation in writing of the obligation contracted – both in quantity and in quality – prevented the achievement of a profit resulting from the transfer of debts through a simple written document. That is why, according to Ibn ‘Arafā\textsuperscript{27}, the bill of exchange (\textit{ mockMvc}) was seen as a lawful payment instrument by a part of the doctrine when it referred to movable goods that could be the object of forward exchanges with things of the same kind\textsuperscript{28}.

In the light of the above, and following the abovementioned Islamic law schools, the use of the bill of exchange was only viable when it fulfilled three requirements: that the negotiation was about a considerable amount of money; that this amount was difficult to transport – a difficulty which derived not only from its weight but also from the uncertainty associated with having to travel through dangerous places – and, finally, that a manifest danger should exist at the moment in which the exchange took place. Only under the consideration of circumstances – which would have a negative influence on the borrower’s interest – would the use of such an instrument be lawful.

The fixation of the moment when this or other document with an identical purpose came to form part of trade in Andalusī law is not easy, especially taking into account the scarcity of commercial documents from that period which have survived to the present day\textsuperscript{29}. There are explicit references to this type of documents in North Africa by the jurist al-Mazārī (453-536H/1061-1141), who provides news about the use of this legal instrument in Ifriqiya and uses the term \textit{howāla} to mean, precisely, the document which permits the delivery of money on account of a third party to pay a debt\textsuperscript{30} (this institution


\textsuperscript{29}– Thanks to the notary forms and the legal works left to us by the Andalusis, it is possible to make a relatively accurate description of credit assignment or credit sale contracts, as well as of the certificate models for specific cases – claim for hidden vices or faults in relation to the abovementioned businesses – where we can appreciate the most remote allusions. All of this makes it possible to offer the reader an approximate idea about the generalisation of this use from the influence of Maghrebi jurists, among whom, according to the sources consulted, the use was habitual and thus likely to spread to other contexts.

\textsuperscript{30}– However, it is risky to speak of widespread use in that geographical context, above all when we check that al-Qayrawānī in his \textit{Risāla}, and more precisely in the chapter on sales,
is thoroughly analysed by Saḥnūn in his Mudawwana, as is pointed out by the said author. Arabists questioned its use in Andalusi territory by virtue of the references to the term ʿawāla and ʿakka in the work of Ibn Quzmān.

makes no explicit references to this business modality, which is subsumed in the exchange practice that is typical of the sale. E. FAGNAN, Risala ou Traité abrégé du Droit malikite et moral musulmane, Paris, 1914 about the sale and other related commercial modalities, see p. 137-157.


— F. CORRIENTE, s.v. ḫwlm, in: A dictionary of Andalusi arabic, edit. Leiden-New York-Köl, Brill, 1997, p. 144. The identification of these terms in the text is by no means easy; thus, for example, one detects the presence of the term muḥawwav which García Gómez translates in zéjel (Hispano-Arabic poem) No. 7, 2 as “the clothes exchanged” in a text where he offers his services to the Cordovan qādi seeing his misfortune; that same term shows variants in the edition by Corriente, in whose opinion, the letter is a waw instead of a damma (u), which means that we would once again have in front of us a new meaning suited to the object of this study: “cash on delivery” (GARCÍA GÓMEZ, Todo Ben Quzman, Madrid, 1933, p. 31 and F. CORRIENTE, Gramática, métrica y texto del cancionero hispanoárabe de Aben Giczm, edit. Instituto Hispanoárabe de cultura, Madrid, 1980, p. 40). The same happens in zéjel 22, in which there is an offer of services and García Gómez translates the expression Lā ṣaula as “God be praised”; an expression for which he uses a term to which Corriente assigns the meaning “be transformed, change” amongst other possible acceptations of the root ʿāl (CORRIENTE, Diccionario Arabe-Español, cit., p. 191; CORRIENTE, Gramática, cit., p. 165). Also of interest is the reference to the “placeros” [town dealers] which appears in zéjel 24 where a reference is made to the conditions of the dealer in the auction; in stanza No. 7, the expression wa l-tiţār ʿaula wa-ʿaualu is translated as “the town dealers in their shops” and, although the term refers to a trader modality, it is not less true that Ibn Quzmān explicitly mentions that exchange nature which, sticking strictly to the term ʿauli, gives an idea of periodicity or of an activity subjected to certain time periods or cycles that were previously agreed or established as a customary practice (CORRIENTE, Diccionario Arabe-Español, cit., m p. 192 and CORRIENTE, Gramática, cit., p. 182; GARCÍA GÓMEZ, Todo Ben Quzman, cit., p. 135). The same term, ʿauli, can be found in zéjel 73,3, which praises the vizier of Granada Abū Ḥakam Ben Abi ṣAṣnān, and, in this case, García Gómez translates “And do not cry to me”, a translation that, taking into account the question mark, could also be translated as: “And will you change me?” Even running the risk of breaking the poetic meaning attributed by the eminent Arabist (CORRIENTE, Gramática, cit., p. 472), the term is used in the sense of “endorsement of a document”, which the translator identifies with a cheque; but these allusions raise some doubts for their acceptance in the light of the text, since the aforementioned work refers to the expression nahiḥ ʿala bnl niqa, for which the translation “I will deliver (your cheque) to” is offered. This translation, however, presents some difficulties according to the edition by Emilio García Gómez, who translates the expression wa-ʿiddī gāt-nī l-bītaqa/ fa-nahilt ʿalā l-wāmiqa as: “so that when it (the little death notice) reaches me, I can deceive the spouse” (GARCÍA GÓMEZ, Todo Ben Quzman, cit., p. 463, zéjel or panegyric-petition to the vizier Abū Wallīd Zaggāli 89, 3). Corriente explains that, in accordance with the Vocabulista in arabigo, the forms yahṭawl, aṭṭawl, ihtawāl are used to mean “be deviated” or “exchanged”, thus conveying the idea of replacing one thing for another. Among the numerous variants found in the text by Ibn Quzmān equally stands out the one which appears in zéjel 53, 6 or “Panegyric of a Ben Ḥazm”, in which the expression ṣāḥīni
who was also a contemporary of the Maghrebi jurist. Ibn Rušd examines the institution in the *Bidāya*. Al-Garnāṭi, Ibn ‘Aṣim, Ibn Šās, Al-Fihrī or Saḥnūn equally pay special attention to this issue dedicating a book to the *hawāla* or referring to the loans or similar businesses in which the assignment of debts al-*ahwāl* is translated as “being upright in everything”; the term *ahwāl* has various meanings according to Corriente’s dictionary which diverge from the one attributed to it in this poem, although it is well-known that the same term without the lengthening *alf* refers to terms closely linked with the aspects related to time periods and modalities in the endorsement of a bill of exchange, all of them derived from the root mentioned above (GARCÍA GÓMEZ, *Todo Ben Quzman*, cit., p. 273 and F. CORRIENTE, *Gramática, métrica y texto del cancionero hispanoárabe de Aben Guzmán*, edit. Instituto Hispanoárabe de cultura, Madrid, 1980, p. 353, and by the same author *Diccionario Árabe-Español*, op. cit., p. 191-2). The use of the terms *hawāla* and *hawlā* is also detected in *zéjeles* 127,4 and 142,2 with meanings that go beyond this analysis even though they are acceptations derived from the root *hawlā* (GARCÍA GÓMEZ, *Todo Ben Quzman*, cit., p. 639 and CORRIENTE, *Gramática*, cit., p. 891). As for the term ‘cheque’, although it cannot be found literally in the stanzas of this panegyric, it does appear in *zéjel* 91, stanza 7, of the edition by García Gómez. In this case, the word, vocalised with *fatha* (a) is translated as “and there is no doubt in what I say”; like on the previous occasion, it is a petition for *aguinaldo* [tip, money] through some verses for the celebration of a party, there not being a strict correspondence between the translation of the poem and the literal sense that Corriente attributes to the term ‘skk’ used to mean money circulation according to the text of Ibn Quzmān, which follows the *Vocabulario en arabigo* of Pedro de Alcalá from 1505 (GARCÍA GÓMEZ, *Todo Ben Quzman*, cit., p. 474 and F. CORRIENTE, *Gramática*, cit., p. 613 and CORRIENTE, s.v. «skk», in: *A dictionary*, cit., p. 256).

33 – Muḥammad ibn Quzmān. (Abū Bakr Muḥammad ibn Quzmān), called Abenguzmān and Ben Guzmán or Quzmán; Córdova, approx. 1086-1160) was an Hispano-Arabic poet born within a family belonging to the low aristocracy. His fame derives from a collection or *dīvān* of 193 *zéjeles*, poems structured in stanzas of a dialectal nature typical of al-Andalus, and became known in the East through the preserved manuscript that has been studied by Emilio García Gómez (*Todo Ben Quzman*, cit., p. XI-XIII). A text, *quzmāno* in which scholars have identified the use of Vulgar Arabic, along with the use of Romance elements that are difficult to transcribe – as has been pointed out by the Arabists who have analysed the edition of the text. For a long time, this author was mistaken for an uncle on his father’s side with whom he shared his job (although he is considered a second-class poet today) and his name, who was a vizier (so was his uncle, which made it even more difficult to distinguish them) of King Mutawakkil of Badajoz and died in 1114. Scholars now refer to the latter as “the Old”, whereas his uncle is known as “the Young”. From his own testimony, we know that he was born after the Sagrajas battle and that he died, with all certainty, on October 2nd 1160, exactly when Ben Mardānix had besieged Córdoba; so, Muḥammad ibn Quzmān had to live through nearly the whole of Almoravid hegemony and even witnessed the beginning of the Almohad period. What is known to us about his life mostly comes from allusions contained in his poems; in any case, this is a source of information which has to be used very cautiously, since Muḥammad ibn Quzmān was a great writer of fables who liked to play at his own sweet will saying things half joking, half serious. It has been checked that he travelled throughout Andalusia and that, perhaps, he got to Morocco, and more precisely to the beautiful city of Fez. S.v. «Ibn Quzmān Al-Asgār Abū Bakr», in: *Biblioteca de Al-Andalus*, Almería, 2006, direction and edition by Jorge Lirola Delgado, *Enciclopedia de la cultura andalusí*, vol. 1.
is regulated\(^{34}\). The succinct allusions do not prevent us from having proof of its use as it becomes explicitly or implicitly obvious in the Andalusí fatwas of *yāmān* collected by the Mīʾyar of al-Wanšarīsī about the responsibility of the artisan, of the dealer, of the commission agent materialised in writing in documents which guarantee the payment of debts under various circumstances\(^{35}\).

1.1. Legal foundations of the ḥawāla in relation to other credit businesses

Mālik treated the aspects related to the transfer of debts in a generic way, with no explicit references to exchange instruments that facilitated the cambium *trajecticium* practice\(^{36}\). Despite that, the terminological coincidences or equivalences in the allusions to this contract modality provide a sufficiently solid reason to justify the frequent references to contracts which,

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\(^{35}\) – In this case, we are not in front of a guarantee bond, as a sector of Spanish Arabism has interpreted. In fact, these are actually means which guarantee the fulfilment of the obligations derived from a commercial transaction in which payment is deferred to a different place. In this respect, concomitances have been sought for the Christian territory between the documents mentioned above and some chapters of the *Leyes de Moros* [Moors’ Laws] given to make possible a better understanding and administration of justice by the members of the decimated community of Muslim origin; the chapters devoted to this issue are CCXXV “De las deudas et de las fiadoras” and CCXXVI “De los que fían la faz de otro et non lo troxieron”, p. 184-185. *LEYES DE MOROS del siglo XIV*, ed. P. Gayangos, en Memoria Histórico Español, Madrid, 1853, p. 11-246; in relation with this Chapter see p. 184-185.

being similar to the assignment of credit, have their own identity within the same thematic section in Islamic law.  

The importance achieved by these *trajecticum* practices has allowed Arabists to question the extent to which this payment modality – in which are present a series of peculiar characteristics such as the change of parties obliged by the debt and the liberation from the obligations initially contracted by the *muhil*, amongst others, becomes naturalised with a defined identity into Maliki law. It certainly does if we consider that it is a type of business which, according to Santillana’s explanations, is legally regulated through rules or norms of Pre-islamic origin which had regulated, from time immemorial, the forward delivery of food for a fixed price (*salam*) and the loan (*qar…*)*. At the time, these legal figures were regarded as being derived from the same business, which did not stop them being treated individually in the list of commerce-related businesses.

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37 Another modality is the exchange order (*ḥawāla*) – with an accompanying order (*ḥūkon*) from the sultan – for the payment of sums of money to defray expenses at the expense of the Royal Treasury. This practice was replaced in the 17th century by the intervention of money changers (*ṣarrāf*) who had settled down in the main towns and cities, and the aforementioned bills of exchange disappeared through the abolition of the reforms in 1839 (*tanzimār*). It was a document which specified when, to whom and in which way the payment had to be made. This *ḥawāla* could consist in orders issued directly in favour of the applicants – used for the payment of subsidies, pensions for the military staff in provinces (*sāliyān, ‘ulūfā, mawāqīb*), or in allocations made available to a *āmin* to cover the expenses related to public works or those associated with the palace; *s.v.* «*ḥawāla*», in: *The Encyclopaedia of Islam. New edition* (hereinafter *EI*2), vol. III, Leiden-London, 1986, p. 283-285.

38 – *GRASSHOFF*, *Das Wechselrecht der Araber*, cit., p. 60.

39 – Selling with an anticipation of the price, which implies the effective payment at the moment in which the contract is closed and the delivery of the sold item at a later moment, but which does not form part of the initial contract-signing session. The lawfulness of this business modality is subordinated to the determination of the delivery date, the amount and the quality of the goods to which the contract refers at the moment in which the latter is closed; *s.v.* «*salam*» in: *EI*2, vol. VIII, Leiden, 1995, p. 914-915.

40 – The loan is another of the legal businesses which is limited by diverse circumstances. Regarding food products, the doctrine stipulated that they had to be ready to be consumed and in perfect condition, qualities that try to avoid not only the sale of defective or faulty products but also unjust/unlawful enrichment. *CANO ÁVILA*, *Contratos conmutativos*, cit., chap. XVI, p. 476-481.

41 – A confusion that is solved in Islam time through the provision of a definition of the institution in the Koranic text itself as «the delivery of a patrimonial value to return it after some time – not immediate – by means of an equivalent of the same kind, this being a personal obligation with the aim of providing a benefit. So, one party transmits to another, for free, the ownership of certain patrimonial values which the recipient is forced to return within an established term with items of the same kind. The conditions are important to decide the lawfulness of the business, but its purpose is even more important, as the objective is the benefit of the borrower without any advantage with respect to what is given in loan to settle the debt, i.e., without interest (*rib…*). Hence its relationship with the bill of
The ḥāwāla is not seen as a mere assignment. The ḥāwāla, on the one hand, frees someone from a debt and, on the other hand, permits to solve the contract by means of a transmission of a credit (dayn) against the assignee, for the benefit of the person to whom has been recognised the right to have his debt paid, the creditor\textsuperscript{42}. In accordance with this definition, one cannot establish a perfect equivalence with respect to the suflaγa\textsuperscript{43}, the basis of which is a transaction by means of a document, without the need for the exchange and the assignment of credit in a different town, due to the variation of this quantity and quality; SANTILLANA, Istituzioni, cit. t. II, p. 384-397.

\footnote{42}{M. TALBI, “Operations bancaires en Ifriqiya a l’époque de al-Mazar†”, cit., p. 423 and 426.}

\footnote{43}{The suflaγa is defined as the economic term referred to a negotiable instrument in the form of a written credit cheque – like an invoice or credit – similar to the modern cheque. This term along with ḥāwālā and šakk were used in medieval Islam to facilitate the rapid transfer of money between long distances or to permit the exploitation of what had been raised by various taxes. Etymologically, the term comes from the Persian sufta “piece” due to the fact that the financial document was fragmented, and a cord was put through it and tied to it, after which the document was stamped. The suflaγa consequently made it possible to have money available instantaneously, in its destination place, generally different from the place where the agreement had been signed, which is why it acted as a bill of credit. The operation was performed as follows: a dealer or agent (A) provided an invoice to a second person (B) with the aim of collecting his money, though the money was not delivered by B but by a third person (C) who was in a different place and who additionally was A’s agent. The suflaγa differs from the ḥāwālā in the fact that the former only refers to money transfers, whereas the ḥāwālā covers the transfer not only of money, but also of all sorts of objects. On the other hand, according to Islamic law, the suflaγa is a loan modality, although the form and the purpose of this institution do not coincide in some respects. Whereas the object of a loan is the acquisition of money – for any licit purpose – the suflaγa seeks to avoid risks for money associated with transport. In Schacht’s opinion, the difference between both institutions lies in what he called the “creation” of obligation, i.e. the reason justifying the obligation. The obligation in the case of the suflaγa is linked with the purpose, whereas in the case of the ḥāwālā that obligation is “supposed to be already existent”. This approach raised criticism about the non-existence of the debt between the first creditor (A) and his agent (C) because some people think the latter is a mere extension of the former. This case would be identical to that of banks and their branches, which permit to obtain money in a place other than the one in which a bank account is domiciled. This whole approach cannot be criticised except when the creditor who seeks to collect his money and receive it in a place other than that where the contract was celebrated checks the reduction of the amount to be perceived by the borrower, as an unlawful profit is collected. Thus, the Hanafis and Shafi‘is consider the practice of suflaγa reprehensible because a debt should be settled without any benefit for the owner, thus avoiding risk. The Malikis only allow it in case of need, while the Hanbalis permit its practice as long as it does not imply material gains, like commissions that increased the profit resulting from the debt owed. However, not all the doctrine is unanimous, as Ibn Taymiyya and Ibn Qudāma support it with a number of prior requirements and conditions. At present, it is frequent to use the term ḥāwālā mašrafiya (payment order) instead of suflaγa; and this, as is well explained by the Arabists, despite the difference between the order and the suflaγa; s.v. «suflaγa», by M. Y. IZZI DIEN, in: EI\textsuperscript{f}, vol. IX, Leiden, Brill, 1997, p. 769-770.}
intervention of the assignee or the debtor (muḥāl ‘alayhi), but with the inescapable conclusion of the contract between the creditor who delegates his right (al-muḥāl) and the delegate-debtor who receives the commission of performing certain actions to verify the execution of the contract (al-
muḥātal).

By virtue of the transaction nature that corresponds to this business, it has been regarded as a special form of ḥawāla in which the only difference lies in the intervention of a written document which, although its designation is not uniform, it is indeed considered a written obligation (dhukr ḥaq).

One of the most controversial issues for the reader interested in these commercial aspects is to determine the scope that the concept ḥawāla has as a credit modality, especially if we bear in mind that the term is present in operations such as the transfer of debt, the assignment of payments, the delegation of credit, the loan, the mandate and even the mu’tum, which are all seen as corollaries of the sale and in which the remission to an exchange order or documented bill of exchange (suftaqā) is influenced by specific circumstances related to time and space.

In the Cordova of the caliphate the ḥawāla was the business in which the transfer of a debt was carried out, for which it was necessary to have the consent of the party obliged to the payment, muḥār. This agreement had as its effect to free the assignor from the obligations incurred with respect to the assignee (mustaḥāl). It is a case in which it is specified that the requirements for the transaction regarding price take as a documentary basis the suftaqā and the witnesses undersigned on the document testifying to the veracity of the operation, all of it pursuant to the dictates of Maliki case-law.

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44 – GRASSHOFF, Das Wechselrecht der Araber, cit., p. 64.
46 – These are not the five requirements or conditions established by the doctrine in accordance with the dictates of Abū Ishāq al-Garnāṭī but one of the elements of the contract. AL-GARNĀṬĪ, al-waṭā‘iq al-muḥtasara, cit., p. 38. SANTILLANA, Istituzioni, cit., v.II, p. 347 and CANO ÁVILA translates it as ‘patrimony, estate’, note 1, chap. XX, p. 509.
47 – This acceptance is not compulsory following the Maliki case-law; sensu contrario, according to Dadoud, the assignee is forced to accept the transmission and has no right to reject it. The Hanafi and Shafi‘i doctrine must be admitted with no objections, although in another opinion, the same Abū Ḥanifa argues that if the assignee is an enemy of the debtor who assigns the debt to him, the latter is not obliged to accept the transmission. This opinion is challenged by the imām Shafi‘i El-Istakhari, his opinion being based on the idea that the first creditor performs a modality of loan in the transfer act and the debtor is free to accept it or reject it as he pleases. N. PERRON, Balance de la loi musulmane au esprit de la legislation islamique et divergences de ses quatre rites jurisprudentiels par le cheick el-Charani, Alger, 1898, p. 320-321.
Another business in which one can clearly check the reference to the bill of exchange is the loan (qard). In this case, the suftaṣa is the means which, unlike the ḥawāla⁴⁹, makes possible a money transfer and avoids the risks typical of the transfer, without the need to carry the amount owed in cash⁵⁰. In fact, it is precisely this credit modality and the intervention of the bill of exchange as a payment document that the fiqh emphasises the most; in fact, in the opinion of Abu Iṣḥaq al-Garnāṭī, the case of the loan is the one where there is a greater likelihood for the intervention of an interest or surcharge in the commercial transaction with respect to the muḥāl ʿalāyhi⁵¹.

The historiography has also covered the relationship with the loan, considering the common object and regulations by which the ḥawāla is ruled, especially for the case where there is a document which accredits the transfer of the debt⁵², the value of which is regarded as essential if the contract is broken by either of the parties⁵³. The delivery of the document to an intermediary (the issuer or the agent wakīl) so that he can make it reach the interested party, its potential loss requiring an oath (yamīn) about the purpose for which the aforementioned exchange document is delivered⁵⁴. On the other hand, the doctrine recognises that there are similarities between the ḥawāla and the loan but also disparities, above all regarding the purpose of the latter and the way to constitute both institutions. Indeed, the loan has as its aim to acquire funds and the ḥawāla is essentially a particular type of credit, the peculiarity of which lies in the fact that all the details related to it are specified in a written document (suftaṣa). In this sense, the doctrine shows a

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⁴⁹ – The assignment of credit (ḥawāla) refers to all sorts of credit, in cash or in kind.
⁵⁰ – Maillé Salgado, s.v. «suftaṣa», cit., p. 168.
⁵¹ – It is the fifth and last one of the conditions for its validity. Cfr. Al-Garnāṭī, al-watā‘iq al-muḥāṣara, cit., p. 38.
⁵² – In this respect, Santillana claims that the object of the loan is generally the money and explains that for the Malikis and Shafis it can also be any commercial item likely to be subjected to salam – that is, anticipation on a future delivery – such as food, movable objects and animals, with the exception of properties. In general terms, food, movable objects and animals constitute a generic obligation (which is why they are excluded from the loan and the forward sale, salam) which implies the return of an amount or an equivalent item whereas only the immovable assets (real estate) – res certa and individualised – can be identically returned. Outside the loan also remains the female slave before the risk that the borrower could take advantage of her – unless she is a relative in a forbidden degree, or if the borrower is a woman, a prepubescent boy or an elderly man of an advanced age – by the detriment that she can suffer with respect to her value in the market; and if this situation should take place, it would be necessary to return the value of the female slave (calculated on the day of the consignment). Santillana, Istituzioni, cit. t. II, p. 386. Malik, al-Muwatta‘, cit., 31.41, p. 305.
⁵³ – This situation is foreseen in relation to the assignment of credits through contracts in which are involved members of the same family or in the case of businesses linked with the domestic staff.
⁵⁴ – The translated text of Ibn Salmān does not specify the modality of the instrument to which that oath refers (Cano Ávila, Contratos commutativos, cit., p. 508).
unanimous view about the explicit prohibition of using any assignment modality which generates an advantage or profit for the person who assigns the credit (as demanded in the mutuum contract); in the past, when an amount in cash or other values which were difficult to transport were given in loan for the same amount or volume, stipulating the return elsewhere. This justifies the need to specify explicitly in the bill of exchange the amount owed and payable, as is pointed out by Al-Garnāṭī.

As for the debt (dīnān) Al-Garnāṭī follows the prevailing Maliki doctrine establishing as the third requirement that it has to be lawful and payable, a lawfulness that, in tune with the public opinion, refers to the fact that it has to be settled within the stipulated term. The debt is one of the two services which constitute the object of the contract. In Muslim law, the object of each contract is the generation of reciprocal obligations which obviously have a purpose and which, regarding the topic that we are discussing here, has to do with the personal type of obligation that in turn demands responsibilities (dimma) from the parties involved. The assumption of those responsibilities seeks the fulfilment of the obligations that correspond to the intervening parties according to what is established in the law.

Islamic law stipulates that the item is sold for the price and the price is sold for the item, in accordance with this maxim, the vendor is forced to consign the sold item and guarantee it and, thus, to make it possible for the purchaser to take possession of the item with no hindrances whatsoever. In any case, the term dimma has different meanings within this commercial context. For some authors, dimma refers to the responsibility assumed by the parties as a result of the signature of the contract; for others, this term describes the obligation derived from the agreement, which will consist in giving something, doing or not doing. Thus, for example, Al-Garnāṭī, a well-known checker of certificates, included among the requirements for the hawāla that the obligation (dimma) did not cover food products on which was imposed the salam sale prohibition; on other occasions, the meaning given to the term is that of ‘obligation’ – generally to do and/or give – and in the notary form of Ibn al-Āṭār, the term is translated as responsibility.

55 – Sahnūn, Mudawwana, cit., vol. IV, Bk. IX, p. 134 and 141.
56 – Al-Garnāṭī, al-waṭā‘ī q al-muṭāsara, cit., p. 38.
57 – Al-Garnāṭī, al-waṭā‘ī q al-muṭāsara, cit., p. 38.
58 – The term ‘debt’ is often expressed by the concept dimma, and they even speak about ‘credit’ instead of ‘debt’, as can be verified in the notary forms or doctrinal works consulted.
60 – Santillana, Istituzioni, cit., v. II, p. 114.
61 – The term has been related to taxes in the context of agriculture from time immemorial, with a special significance in the Ottoman Empire and in the centralised Egyptian regime of the 19th century: s.v. «iltizām», in: EI vol. III, Leiden-London, 1986, p. 1154-1155.
understood as the demand for the debtor to comply with everything that he is obliged to do regarding the commitment assumed by the assignor with respect to the assignee. This terminological plurality requires extreme precaution when it comes to dealing with each one of the operations in which the assignment intervenes, with or without the presence of a written document.

Ibn Rušd expresses the unanimous opinion of the doctrine against the compensation of debts in his book about the general theory on contracts and obligations. This is based on the digest of Ibn al-Qāsim, whose posture is opposed to the payment of debt against debt in the case of ripe products, the rent of a house or the payment of a female slave during the observance period, the payment being only permissible with respect to perishable products, such as fruit, on condition that the totality of what was agreed is accepted; this possibility is forbidden for wheat or similar products.

In the cases of loan or mutuum where the order-related document (saffaṭa) intervenes, the latter represents a change regarding the person obliged to the payment of the debt; a document in which the mutuary (borrower) or moneylender tells his representative to pay the bearer elsewhere a sum or amount equal to the one that he has taken in loan. However, insofar as the representative obtains a profit in the exercise of his commission, the business would become unlawful. The unlawfulness derives from the surcharge with which the value of the object is gradually increased, as this leads to commit usury, ribā.

63 – IBN AL-‘ATTĀR, Formulario notarial Hispano-árabe, cit., doc. 52, p. 296.
65 – An opinion which is not shared by Ašhab, and by al-Šafi‘i and Ab™ ðanifa, as is expressed by Ibn Rušd, on analogy-based grounds. Ibidem.
66 – Despite these clarifications Mālik’s followers –as is clearly demonstrated in the Mudawwana– were prone to this business modality, subordinating the completion of the contract –and, therefore, the settlement of the debt– to the moment in which the debtors had cash available, a moment which did not coincide with the one in which the contract of sale was celebrated. Ibidem. SANTILLANA, Istituzioni, cit., v. II, p. 348 and ff. At this point, the author refers to the said institution in accordance with the provisions of the Digest, establishing a analogy relationship with the treatment that Roman Law gave to the institution; it is not necessary to analyse this aspect in the present study, as it refers to the Andalusi period and is consequently outside the chronological period examined here; readers interested in these issues from the perspective of comparative law should see W. AREÁVALO CABALLERO, “Evolución de la cesión de créditos desde el derecho clásico al derecho justiniano”, Revista general del Derecho Romano, http://www.iustel.com No. 9 (2007), 22 p.
Another of the operations closely linked with the *hawāla* is the mandate, since both of them are modalities of the same credit typology. The reason why the doctrine establishes an affinity relationship between the assignment of payment, *hawāla*, and the mandate, *wakāla*, lies in the fact that the assignment generates a payment mandate between the *muhil* and the *muhāl lahlu*, so that the latter can manage someone else’s goods with the aim of settling a debt with a third party\(^69\). In this case, there is additionally a delegation of credit by virtue of which the delegatee (*muḥāl*) is a debtor of the person to which he delegates (*muḥāl ‘alayhi*) and the payment is only incumbent on the latter, as the creditor renounced to the debt owed in his favour. The fact that the agent or principal, *muwākkil*, confers the representation faculty upon someone else – always with a generic character unless something to the contrary is specified – justifies this link between both businesses\(^70\). In the case of money exchange, the representative (*wakāl*) acts on behalf of the person that he is representing and the same rights and duties are recognised to him. From a technical-legal point of view, his role is that of a middleman, although in certain cases – for instance, when a claim is abandoned – he is given the right of ownership over the goods transferred directly, in which case he acts as a dealer-agent, intermediary or commission agent, *simṣār*\(^71\). However, it is worth highlighting that in the mandate to pay, the delegated party owes nothing to the delegator, even though the former accepts the delegation for the purpose of carrying out a liberalisation.

In the case of the mandate, it finishes with the death of the agent and the principal and persists if the deceased agent has been replaced by a third person in his operations according to the doctrine of Ibn ʿĀṣim\(^72\). This posture regarding delegation generated some discrepancies between the different schools\(^73\).


\(^70\) – S.v. MAÍLLO SALGADO, *Diccionario de derecho islámico*, cit., p. 266.

\(^71\) – S.v. MAÍLLO SALGADO, *Diccionario de derecho islámico*, cit., p. 362-363.


\(^73\) – Mālik argued that the death of the delegated person or his insolvency did not entitle the delegatee to start an action against the delegator, unless the latter had acted following an evil motive. But according to Sahnūn and the African school to which Ibn ʿĀṣim belonged, the delegated person’s death or insolvency made the delegation ineffective when the delegatee had not received the credit and, if that was the case, the delegatee could start an action against the delegator. If the delegated person had paid following a mandate, he will have a return action against the principal for the sum spent, which is regarded as a loan that he has made to the principal. And in this case, he will only be entitled to claim the sum corresponding to the payment order in constant; and should it be a slave or movable items, the equivalence in cash would have to be made. SANTILLANA, *Istituzioni*, cit., v. II, p. 352.
2. Content of the legal business ḥawāla.

2.1 Justification of the terminological disparity in relation to personal elements in Andalusi case law.

At the moment in which credit contracts are closed, there is a convergence of a series of requirements to which the Maliki school alludes unanimously⁷⁴, seen by the doctrine as essential, obligatory and necessary, lāzīm. Firstly, the personal element appears in credit-based contracts, the same as in practically all the contracts; after all, full legal – and therefore contractual (ṭaklīf) – capacity is a fundamental requirement to be obliged in the civil context as a result of the explicit manifestation of the commitment and willingness in that respect. And regarding the number of individuals, the fiqh works fix as a previous requirement – to validate the assignment – the intervention of a transferor and a creditor who must close the contract⁷⁵.

Ibn al-ʿAlī-ṣṭār is more explicit when he refers to the identification of the personal elements intervening in the debt transfer deed ḥawāla⁷⁶. In the case of a loan associated with a transfer of debt, he lists three personal elements: the main party (muḥāl) who transfer the cashing of a debt contracted with the debtor or ḍarām to a third person, muḥāl ʿalayhi. The delegate-debtor is also seen as a creditor, as the main author calls him. For the case of acceptance of the assignment, the Cordovan jurist demanded the presence (muḥādara) of the muḥāl ʿalayhi, as the contract could be considered vitiated if the latter was absent. This same author equally mentions the delegate-creditor using the term al-mustaḥāl to refer to him.

Al-Ṭūlāyṭūṭlī uses the same terminology when he discusses the transfer of a debt and identifies among the main requirements for it to produce legal effects the need to achieve an agreement between the muḥāl, the debtor

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⁷⁴ – Halil lists the essential requirements that determine the validity of the business, which are the reflection of what the Andalusi doctrine had been demanding for centuries. SANTILLANA, Istituzioni, cit., v. II, p. 203-205.

⁷⁵ – In the Spanish context, Tomás de Mercado specifies the following requirements in exchange matters: firstly, that the exchange has that nature, secondly, that no deceit or violence is present; and thirdly, that the exchange is moderate and fair and specifies even more, pious, human, not increased or measured in relation to the other party’s needs. In other words, if any of these requirements is not fulfilled, the exchange is considered unlawful, vitiated and reprehensible. (MERCADO, Suma de tratos y contratos, cit., p. 448).

In Muslim law, the acts performed through deceit, without an honest or upright intention (niyya), have no effects whatsoever and if they are not celebrated in a free, independent and healthy way or if they are affected by any restrictions, the consent will be vitiated (fāṣīd) and thus the agreement can be annulled or terminated. (DONINI, Il diritto del commercio internazionale nel Mediterraneo, cit., p. 227 and ff.).

This author uses the terms ḡarīm and muḥāl ‘alayhi interchangeably to refer to the debtor, without apparent reasons that can explain the use of one word or the other. This conceptual plurality becomes visible in the work of Al-Garnāṭi who enumerates the muḥāl, the muḥāl ‘alayhi, and the muḥāl among the personal elements intervening in the ḥawāla, reserving the expression muḥāl bihi to the amount or object of the transaction between the parties in the contract. Two clarifications need to be made at this stage; the first one is that the terms are not used in a widespread or homogeneous way; for example, in notary forms, the allusions to the muḥāl bihi as an element alien to the obligation between the debtor, the creditor and the delegator are implicit and even non-existent, which does not prevent the scholar from understanding that this is a delegation of credit in which it is not necessary to resort to someone else’s guaranteed estate or patrimony. Hence the term muḥīl or creditor who delegates his obligation; the muḥāl or creditor linked with the previous one by virtue of the credit that he owes to him and that he must pay off at his request; the muḥāl ‘alayhi or debtor to which the delegation is carried out; and the muḥāl bihi or debt that is extinguished by means of the delegation. And the second clarification has to do with the greater complexity that the legal business acquires as time goes by, a complexity that permits to check the intervention of individuals who guarantee the transfer and facilitate the agreement between absent people.

The lack of terminological homogeneity regarding this business becomes evident in the texts of Maliki jurists; in the time of al-Māzarī the personal references are elementary: al-muḥīl and the al-muḥāl are the delegated party and the beneficiary respectively. Also Ḥālîl mentions these same terms (muḥīl and muḥāl) as personal and main elements of the business, the agreement on which suffices to consider it valid. The Maliki jurist does not use the personal pronoun (‘alayhi) which makes it possible to differentiate the creditor from the debtor; and regarding the latter, quite a few authors resort to the generic form ḡarīm, person subjected and obliged to

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77 – For the Shafi‘is and Malikis, the ḡarīm may be of two kinds: those whose debts are incurred for their own benefit and those contracted for someone else’s benefit.
78 – There are other main requirements which have to appear in the acceptance deed for the said transfer: the stipulation of the credit on which the transfer is applied, the explicit acceptance of the assignment and the recognition of the debt; AHMAD B. MUGŠI AL-TULAYTULI, Al-Muqni f Ilm al-šurūt, introd. and critical ed. by F. J. AGUIRRE SÁDABA, Madrid, 1994, doc. 23, p. 310.
79 – For Ibn Salmān this modality is a credit subrogation because someone else’s debt is accepted; CANO ÁVILA, Contratos conmutativos, cit., chap. XX, p. 503-521.
80 – LÓPEZ ORTÍZ, Derecho musulmán, cit. p. 96.
the payment. Ibn ʿĀsim, in the chapter dedicated to the hawāla, lays special emphasis on the limitations and requirements needed for its celebration and hardly ever mentions the personal elements; he only refers to the figure of the muḥāl or delegated person when he justifies that his consent and knowledge of the legal act that is going to take place is not obligatory.

During the Nazari period, Ibn Salmūn distinguishes three personal elements in the chapter dedicated to subrogation: the creditor (muḥāl), the delegated debtor (muḥāl ʿalay-hi) and the delegated creditor (muḥāl). It is not possible to use in this case the double name of ‘delegated debtor’ or simply ‘debtor’ as is considered by other authors. For this reason he avoids the term garim, which is replaced by the one that refers to the contract modality of ḥal, as it implies change or novation (substitution). The creditor assumes the new credit without the need for the intervention and acquiescence of the new delegated debtor, pursuant to the opinion of the ulemas and of the Ḥalīl himself.

In his book about about the hawāla, Sahnūn mentions the figure of the assignee or endorsee, muḥāl ʿalayhi, along with the muḥīl, endorser or assigner of a credit (dayn); as well as to the debtor or the assignor or endorser (garim al-muḥīl).

On the other hand, since a sector of the Maliki doctrine sees the hawāla as a modality of the mutuum, one can check the allusion to conceptual terms typical of this business in order to identify the individuals who intervene in the assignment of credit. The parties intervening in the contractual modality of ḥāla—receive names such as muqrīd—mutuant (lender) – or muqtarid – mutuary (borrower). The consensus or agreement on the operation carried out between them will consist in the giving by one of the parties of an item as a loan and the reception of that item by the other party in the same conditions. And it is worth highlighting that the doctrine demands the identification of the person who performs the commercial transaction, as any doubt about his identity would make it possible for the other party to annul the loan. The

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83 – IBN ʿĀSIM, Tuḥfat, cit., p. 421, v. 796.
84 – See that in the works of Ibn Salmūn, the debt incurred that is extinguished by means of the subrogation is called muḥāl fīhi; CANO ÁVILA, Contratos conmutativos, cit., chap. “De la compraventa”, p. 484-485.
85 – CANO ÁVILA, Contratos conmutativos, cit., see chap. “De la subrogación (hawāla) de crédito”, p. 504.
86 – It is worth highlighting that there is a conceptual distinction between the subrogation of the credit and the transaction or exchange of products by means of a written document, which Salmūn identifies with the sufūgu, a written document of paramount importance in the context of the loan and, particularly, for the case of food loans; see respectively SAḤNŪN, Mudawwana, cit., t. V, Bk., p. 288-289 and t. IV, Bk. p. 136-142.
reason lies in the fact that the obligation affects another person and the new creditor has replaced the old one without one of the parties knowing about it.

As for the capacity of the individuals taking part in this contract modality, they must be sensible, mature and, therefore, legally of age (rašid); these being attributes which enable them to give and receive. Because these are bilateral credit businesses, the individuals must have the quality of discernment (tamyiz) and, furthermore, all the faculties needed to decide and choose in a logical and agreed way (ridda) between the different options contained in the agreement. The term used to describe those faculties in most of the works consulted is ṭādī, and it implies the explicit assent regarding the conditions of the business operation.

The fact that according to a sector of the doctrine the ḥāwāla confers an order or mandate explains why, in this type of businesses, it is also necessary to demand the responsibility of the individual to answer for and assume the consequences derived from the loss of the contract object. This is a requirement which appears explicitly in most of the forms consulted as well as in the case law digests. Once the fulfilment of these requirements is accredited, the intervening parties will have full capacity (taʿlīf) for the celebration of onerous acts which will only require a ratification (iǧāza) in certain cases.

For another sector of the doctrine, the demand for the fulfilment of these same requirements is justified by the fact that the ḥāwāla is an alienation contract. Hence the capacity that the parties must inescapably accredit to alienate, taking into account that this is a payment modality. Consequently, the subrogation of credit carried out by an insane person, a prepubescent boy or anyone who does not have a full legal and contractual capacity (taklīf) – corollary of capacities such as willingness and discernment (tamyiz) about what is most convenient and subordinated to the individual’s physical and psychical maturity – will be considered null and void.

The demand to fulfil these requirements is justified in relation to the contract modality on which this paper focuses. This is so because the personal elements must have full capacity to celebrate acts of an onerous nature and also to assume the responsibilities derived from the credit assignment: assumption of obligations between the creditor, the delegated party, the delegatee or debtor which has as its reference axes the consensus between the parties and the expression of consent in the cases specified by the doctrine.

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91 – It is not always an essential requirement for the completion of the contract, as is pointed out by Halil in whose opinion the intervention of the delegated debtor is not necessary. The delegation is completed with the consensus between the delegator and the
2.2. Object of the contract and legality of the debt:
the Andalusis’ integrating criterion

The existence of a debt is the second element (arkān) which can be demanded at the moment in which the hawāla contract is closed. The debt of the muḥāl has to be lawful, i.e. it cannot correspond to objects outside commerce⁹². The debt will entail the existence of an obligatory credit between the person who carries out the delegation and the person to whom the delegation is made, and in turn, between the delegatee and the first party⁹³. The lawfulness of the debt stems both from quantitative values and from qualitative ones; when the debt is overdue and payable, and if the amount is equal to the sum transferred – or even higher according to the quality determined in the coin factory of the place in question, at the moment of fixation of the deadline for the delivery – the payment will have to be made at once. However, when the debt is not out of date, there will be an inescapable obligation to fix a deadline in order to avoid the consideration of the business as illegal. These are all premises followed by Ibn al-ʿAtṭār⁹⁴ and Al-Garnāṭi⁹⁵.

Following the Šarīʿa, any legal act will be the object of this contract modality; in this sense, the hawāla will not cover the products forbidden for any Muslim: pork, alcoholic drinks or those others deriving from games of chance or from onerous contracts entailing money loans with an interest (ribā⁹⁶). In order to permit the transfer of debt, they follow the so-called delegatee, even if the delegated debtor has not given its consent. ḤALİL IBN IṢḤĀQ, Muḥāṣṣar, Arab ed., cit., p. 174.

⁹⁴ – In relation to payment terms, Tomás de Mercado points out that the time period allowed in the re-exchange of payable debts was usually three months – with respect to principal gentlemen – although the debt could extended up to a year – knowingly, according to the said author – (Suma de tratos y contratos, cit., p. 431) [Note that in the same chapter it is found: as I said, [the debt] having been done for a period of four months, they are not paid in fourteen months, which does not coincide with the term assigned between p. 435 and 437, all of it persecuted by the apostolic seat with strong punishments/sentences, pursuant to Pius V’s decreal, op. cit., p. 454 and ff.]. In any case, anticipating the difficulties for the payment, they negotiated and agree to re-exchange it every three months to its factor, who in turn pledged to send it re-exchanged, as if it were some third of taxes or rents (Ibidem). Tomás de Mercado suggests as a reasonable option to avoid abuses and unnecessary and unlawful interests that, once the bill of exchange has arrived, it should be settled instantly and diligently, considering that after fifteen or twenty days an order is issued urging its execution, both the merchants and his partners being subjected to its cashing. And if the person specified in the bill of exchange is not present or does not accept it, the factor cannot re-exchange it, the most convenient alternative procedure being to return it to the person who sent it, and it would be him who cashes it according to this doctrine, cashing entirely the exchange when it was made, should it not be paid at the place where it is issued (Suma de tratos y contratos, cit., p. 435/6).
general rule of lawfulness, determination and determinability of the quantity and the quality of the object, so that this type of legal businesses can be considered valid\textsuperscript{96}. Because the contract object in the ḥawālā is usually money, and even anything which can be the object of salam – i.e. on which is contracted the sale of a tangible item (miili) –, Malikis and Shi’īs demand that it be counted or that its estimated weight (wazni), or its specified measure (kaily/makil) be calculated. This criterion is confirmed by Ibn ʿAšîm, except for the case of food products owed to both as a result of a loan. In that case, the assignment of credit on food, movable objects and animals will be unlawful with the exception of real estate (immovable goods). This unlawfulness is equally extended to the female slave considering the risk of the borrower taking advantage of her, a case that would permit to classify the business as unlawful (fāsid) and would make it possible for it to be terminated or annulled, the master being obliged to pay the value of the slave on the date when her price was fixed\textsuperscript{97}.

This premise is the exception to the Islamic principle according to which a credit cannot be sold by means of another credit. Some doctrinal interpretations justify its viability on the grounds of the reciprocal benefit that it is likely to bring to the parties\textsuperscript{98}. The explicit prohibition, therefore, can by no means be considered absolute, since it is possible to modify certain conditions given in the contract so that it can produce legal effects\textsuperscript{99}.

Insofar as the ḥawālā is considered a credit assignment by means of delegation (for the purpose of extinguishing a debt of the person who carries out that delegation) it is advisable to distinguish the elements that are


\textsuperscript{97} – The risk of abuse would not exist if the borrower were a relative of the female slave in forbidden degree. IBN ʿAŠÎM, Tuhfat, cit., v. 799, p. 423.

\textsuperscript{98} – SAḤNŪN, Mudawwana, cit., t. IV, Lib. XIII, p. 288. The issues related to the constitution and transmission of credits in the Islamic medieval period are analysed by W. RAYMON, Medieval Trade in Mediterranean Area, New York, 1955; A. UDOWITCH, “Credit as a means of investment in medieval Trade”, Journal of Arab and oriental Studies, 1967, p. 260-264; and by the same author “Reflection on the Institutions of Credits and Banking in the Medieval Islamic Near East”, Studia islámica, 1975, p. 5-21. This same opinion is shared by Cano Ávila when he states that the subrogation represents an exception to the Muslim principle that forbids selling a credit by another credit, because it is regarded as a modality of charity contract (“Sobre la subrogación de crédito (ḥawālā)”, p. 484).

\textsuperscript{99} – The study and translation of the chapter about the subrogation carried out by Cano Ávila raises questions, as the opinions of Ibn al-Qāsim, or the Egyptian Alfaki disciple of of Mālik and disseminator of his doctrine, of Aḥāb (d. 225/840) and of Averroes’ grandfather, Ibn Rūḍ (d. 520/1126), admit solutions which consist in equalising the object of the contract in quantity and quality. This solution is also treated by Ibn ʿAšîm, Halîl Ibn Ishâq or Ibn ʿArafā. CANO ÁVILA, “Sobre la subrogación de crédito (ḥawālā)”, cit., p. 492-493; IBN ʿAŠÎM, Tuhfat, cit., v. 797, p. 421; HALÎL IBN ISHÂQ, Muḥtaṣar, Arab ed., cit., p. 173-4 and SANTILLANA, Istituzioni, cit., t. II, p. 384-397.
characteristic of one business and the other. Although the definition contains an implicit equivalence between credit delegation, assignment or sale, the Andalusi doctrine treats both institutions in separate, individual chapters. Thus, for example, two requirements must be fulfilled for the sale of a credit to be considered licit: the first one is the presence of the debtor or of the person upon whom the right falls, and the second one, the recognition of the debt. The agreement (‘aqd) will be viable if these two conditions are fulfilled. And many businesses require a recognition and acceptance of the agreement, ratified by means of a testimony that can be invoked by the three parties intervening in this business: purchaser, vendor and assignee.

The delegation of a credit implies the existence of two credits: one between the person who carries out the delegation and his creditor, and the other between the delegated person and the first debtor. The credit delegated, and the debt, are extinguished by virtue of the aforementioned legal business. The credits must be out of date (muqta‘a) – in the opinion of Ibn ‘Āṣim payable and enforceable, even if they result from a rescue contract (kitābā); and, furthermore, they must be equivalent so that the compensation can be verified or, according to Ibn ‘Āṣim, equal for the ḥawāla so that it can produce its effects. That is why the lawfulness of the business needs the

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100 – Not in vain does IBN AL-‘ΑΤΤΑΡ explain that Andalusi traders used the same term ḥawāla for all sorts of credit transfers and assignments, which means that the regulations and the requirements that needed to be fulfilled were the same; IBN AL-‘ΑΤΤΑΡ, Formulario notarial Hispano-arabe, cit., doc. 52. This opinion is supported by Ibn Mugit and al-Gazārī in accordance with what is foreseen in the certificate of assignment for the payment of a debt (op. cit., p. 329). See the opinion of Ibn Salmān, in CANO ÁVILA, Contratos commutativos, cit., the chapter about the sale of a credit (bay al-dayn), p. 482-487 and the chapter about the subrogation (ḥawāla) of credit (p. 503-511) draws a clear terminological distinction which makes it possible to identify the characteristics which are typical of each one of these businesses. ALI B. YAHIYA AL-ḠAZIRĪ (m. 585/1189), Al-Maqṣad al-mahmūd fi talḥis al-‘uqūd, study and critical edition by Asunción Ferreras, Madrid, 1998, p. 328.


103 – The compensation of debts is analysed by Ibn Salmān, see CANO ÁVILA, Contratos commutativos, cit., chapter XIX, p. 498-501.

104 – IBN ‘ĀṢIM, Tulḥat, cit., v. 797, p. 421. And about the compensation of debts related to spices, movable objects and food products, v. 783, p. 413; «Quand les créances ont pour objet des espèces, il n’y a pas lieu a distinguer de quelle cause elles proviennent: qu’elles soient nées d’une vente ou d’un prêt, les règles sont les mêmes. Ces règles diffèrent, au contraire, en raison de la quotité des sommes dues, de la nature des espèces et suivant que l’échéance es tour non arrivée. Quand les sommes dues sont inégales en quotité, la compensation est interdite, que les créances soient ou non exigibles. Si les sommes sont égales et que les espèces dues soient de même nature, c’est-a-dire que les deux parties
debts to be quantitatively and qualitatively identical\(^{105}\), as is established by the Andalusi doctrine in case law texts up to the actual Moors’ Laws\(^{106}\). However, the most striking difference is that, in principle, it cannot be carried out with goods the delivery of which is governed by the general selling rules, i.e. which require immediate delivery because they are overdue credits, which explains why emphasis is laid on the time aspect, on the terms which must be respected in these operations\(^{107}\).

Regarding the first requirement, overdue, payable and enforceable, according to what is stipulated in Andalusi forms, it is the period of time elapsed between the agreement and the delivery of the price that determines the contract modality before which the parties find themselves\(^{108}\). This can be seen when one checks that in the cases of credit sale or payment by compensation, there is a specific and precise \textit{margin of time} between the purchase and the delivery which justifies the caution of legal experts seeking to avoid the aleya (\textit{garar}) and, consequently, unlawful enrichment\(^{109}\). The stance of the doctrine does not seem to be unanimous in relation to this criterion, above all if we take into account what is said in the definition of the business by Al-Garnâ\(\text{\textsuperscript{2}}\)\(^{110}\) and the justification given on the basis of the different value which may derive from the money exchange in distant places\(^{111}\).

The time regarded as licit by the doctrine for the delivery of the object and, therefore, for the completion of the contract in this matter finds its origin

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\(^{105}\) Sahnûn, \textit{Mudawwana}, cit., t. V, Bk. XV, p. 81.

\(^{106}\) Of those who buy goods paid by others (\textit{LEYES DE MOROS}, cit., Tit. CXXVII, p. 98-99.

\(^{107}\) Cano Ávila, \textit{Contratos comutativos}, cit., p. 499. See \textit{Kor. IV}, 114,127.

\(^{108}\) The period of time elapsed between the agreement and the delivery of the price will determine if we are in front of a credit sale or before a case of compensation. The recognition and acceptance of the business is ratified by means of a testimony that can be invoked by the three parties intervening in this business. Cano Ávila, \textit{Contratos comutativos}, cit., p. 482.

\(^{109}\) In accordance with what is stipulated in \textit{Kor. IV}, 114,127.

\(^{110}\) However, the Spanish doctrine states that the exchange will be considered lawful if the payment term is not extended too much considering the value of the item at present. And regarding money exchanges, they will only take into account \textit{how the currency value is estimated in the places from where it comes and where it is sent} and with \textit{the imbalance} existing between those two places, something that is easy to understand by the exchanges \textit{made in both places}; and, therefore, it is licit for a person who gave one hundred ducats in Medina to receive ninety-eight in Seville as a result of the higher value of money in Seville than in Medina (by 2\% or 3\% at the most). And if this percentage increased considerably it was due to the delay in the delivery, reaching up to 14\%, an excessively high interest regarded as usurious (\textit{Suma de tratos y contratos}, cit., p. 445). Al-Garnâ\(\text{\textsuperscript{2}}\), \textit{al-Wa\(\text{\textsuperscript{2}}\)iq al-Mu\(\text{\textsuperscript{2}}\)ta\(\text{\textsuperscript{2}}\)ara}, cit., p. 38.

\(^{111}\) Santillana, \textit{Istituzioni}, cit., v. II, Delegación (\textit{havala}), p. 345-348.
in the salam sale. The term of fifteen days is considered the minimum period for the delivery if the distance between the place in which the agreement on the contract is reached, mağlis al ‘aqd, and the place where the delivery has to be performed exceeds one day. If the distance between both places is less than one day, the delivery can be delayed up to a maximum of 3 or 4 days, always depending on the reference market. In any case, it is mandatory to fix the term for the delivery, because otherwise the business is unlawful and can thus be revoked, ḥalīl. Ibn Salmūn manifests the lawfulness of the business as there is not a shadow of a doubt about the date on which the payment of the debt must be made, and so is also expressed in the Moors’ Laws. Even despite the difficulty to fix a unanimous criterion – as people very often resorts to the usual practice of the place where the contract is celebrated, and even to popular custom – it is worth highlighting that in the 16th century, and within the Christian territory, this period is also suggested as reasonable with the aim of avoiding abuses as well as unnecessary and unlawful interests for the cashing of the bill of exchange, which will be done diligently, its execution in time and form obliging both the merchants and their partners.

An important aspect which deserves special attention is the object upon which the debt delegation contract or agreement falls. The commonly admitted criterion says that the delegation of credits cannot consist in food products which have as their aim a salam sale according to the opinion of Sahān, because it is considered unlawful to sell a food product before taking possession (qabū) of it – since a random clause is introduced which is considered unlawful and which consequently invalidates the contract. The truth, though, is that the Maliki doctrine foresees a certain degree of permissiveness for situations in which certain requirements are fulfilled.

The prohibition does not prevent, just the opposite, the possibility – through the modification of the contract object – for the assignment to be carried out as a loan and not as a sale with the anticipation of the price.

112 – Note that the term is analogous to another used by the doctrine with an identical meaning in contractual matters and referring to acts which can be annulled or terminated, fāṣid.
113 – CANO ÁVILA, Contratos conmutativos, cit., p. 503.
114 – «Tu que me des diez paños de tal manera á tal tiempo por tanta contia. Et qel que toviere debda sobre otro omen á plazo, non se pierde porque se aluengue el tiempo».
LEYES DE MOROS, op. cit., Tit. CXXIV., p. 96.
115 – TOMAS DE MERCADO, Suma de tratos y contratos, cit., p. 435/6.
116 – And so has been permanently justified by the scholars specialised in this field. Cfr. SANTILLANA, Istituzioni, cit., v. II, Delegación (ḥawāla), p. 345-348.
117 – Personal guarantee (dimma), known amount, specified quality, fixation of the term, prior delivery of a portion, licit capital and immediacy in the effective possession of the capital. See the opinion of Ibn Salmūn, in CANO ÁVILA, Contratos conmutativos, cit. p. 461.
118 – It is the case of the qard (already treated); that is the opinion of Ibn Salmūn, in CANO ÁVILA, Contratos conmutativos, cit., p. 483.
This sort of modifications must have the explicit consent of the parties, which is in turn an essential requirement for a valid celebration. That is why the credit owed by a slave who has incurred that debt without his master’s authorisation, by a prepubescent boy or a pubescent boy unable to manage his assets cannot be transferred. A similar reasoning is offered by Ibn ‘Ašim, for whom the assignment of products which are the object of a different type of commerce is only feasible if it is done immediately, with no time going by and in the same place\textsuperscript{119}. According to Sahnun\textsuperscript{120} the ḥawāla, as an act through which one party transmits to the creditor a credit that he has with respect to someone else seeking to free himself from the debt shows elements which reflect an analogy with the loan (qard); a similarity which is additionally related to the same conceptual definition\textsuperscript{121}. In effect, the verb ḥāla, the meaning of which has been treated earlier, shares that meaning with the one assigned to the term qarada: ‘cut’ or ‘resect’. The fact that the mutuary (borrower) or person who receives the loan separates a certain amount from his estate is something that happens in the assignment of credit too. By virtue of this alienation, the payment obligation changes its addressee, and a new creditor replaces the old one. This justifies the definition of Ibn ‘Arafa as well as the intervention of the elements which are characteristic of this contract modality: firstly, the transmission of the ownership of the credit delegated; secondly, by means of a price constituted in the credit for which the delegator transfers the ownership of all that is owed to him.

In any case, it is the free transmission of the ownership of certain patrimonial values through a credit from one party to another. According to Ibn al-‘Aṭṭār, insofar as it shows some analogies with the loan (qard) and demands the same requirements, the mutuum must be considered lawful, unless the object upon which it falls is female slaves – in that case, the prohibition stems from the mere possibility of an unlawful traffic of human beings, which is forbidden in Islam —, the dust of goldsmiths or silversmiths and the mineral from the mines. Hence the unlawfulness attributed by the Andalusi doctrine to the transfer of credit by rent between two individuals because it would entail transferring the right of use which, in principle, is considered non-transferable. The only option that would make this transaction viable would arise if the credit was redeemable immediately, if that had been stipulated through the inclusion of a clause (ṣarṭ) in the contract or agreement, or if it were a local custom (‘āda)\textsuperscript{122}. In this way, we would find ourselves before the immediate resolution of the contract and, through novation (substitution), the creditor (muhāl) would assume the new

\textsuperscript{119} – IBN ‘AŠIM, Tuḥfat, cit., v. 798, p. 423.
\textsuperscript{120} – SAHNUN, Mudawana al-Kubra, cit., v. 4, Bk. XI, p. 132-141.
\textsuperscript{121} – In accordance with the definition given by Ibn al-Ḥāǧib. Cfr. SANTILLANA, Istituzioni, cit., v. II, p. 200-207.
\textsuperscript{122} – CANO ÁVILA, Contratos comutativos, cit., p. 503.
credit. The so often questioned presence of the delegated debtor (muḫāl ‘alayhi) is, according to Ibn Salmān, mandatory in credit subrogation operations. The delegated debtor will additionally consent to the business and give testimony at that same place and moment.

The payment in a term agreed in the ḥawāla business is the fact that forces the doctrine to refer to the premises of forward sale (salam) seeking to establish uniform criteria regarding the observance of the terms. In the case of the sale with a purchase option, it is prolonged three days, followed by an explicit consent showing acceptance. Now then, depending on the characteristics of the object, it will be possible to demand the return of the price before three days or a week have elapsed, if there has been an oath by the vendor about the non-existence of inherent vices, the term will range from ten to fifteen days.

In the case of salam, the three-day term regarded as ‘short term’ is maintained according to Ibn ʿĀşim in the light of the fact that the object may be outside the purchaser’s view, with the possibility of providing a guarantee when slaves are sold; once the agreed period has elapsed, there is an immediate obligation of transaction of the object which makes possible the completion of the contract\(^{123}\). But these terms are extended in time in the case of forward sale, as the time needed for the rectification of the contract due to the nature either of the contract or of the object upon which the obligation falls is fixed in fifteen days according to Andalusi case law\(^{124}\). However, the precision is more punctual when we are talking about debts with a different origin concerning the same legal business; Ibn ʿĀşim establishes that in this case – two debts with a different origin, one associated with the salam sale over food products, and the other linked with a loan, qarḍ – only the effective reception or possession (qabda) in due time will make the business licit\(^{125}\). The debt will be settled if the payment is carried out in the place agreed if it is with cash. Otherwise it can be received anywhere following what is stipulated in the contract or in an attached document (ṣuftaṣa)\(^{126}\).

But the Andalusis not always explicitly mentioned this type of instruments to verify the payment of debt by delegation\(^{127}\). After all, the case law justifies this sort of transfers in a habitual way, seeking protection in the ʿamal among Cordovan qadis, as the normal way for a merchant to transfer

\(^{123}\) – IBN ʿĀşim, Ṵuḥfat, cit., p. 33-35.

\(^{124}\) – About these time-related issues see IBN AL-ʿAṬṬĀR, Ḥamnṣūl返乡, cit., doc. 11, p. 131-136.

\(^{125}\) – IBN ʿĀşim, Ṵuḥfat, cit., v. 800, p. 423. The grounds of the immediate possession have to do with the consideration of unlawfulness attributed to the sales of forbidden products or objects in which the passing of time provokes a variation in their quality and quantity IBN RUSH, ʿAṬAL, Livre des échanges, cit., p. 46.


\(^{127}\) – LÓPEZ ORTÍZ, Derecho musulmán, cit., p. 195-197.
his debts on his debtor, without the need to mention the term *ḥawāla* explicitly. The respect for the general conditions in the sale and loan businesses and, consequently, in debt transmission operations – the person transmitting the debt must agree with the assignee on the type, manner and conditions of payment – observed by the Andalusis favoured lawfulness and its legal effects, a practice which was identified as solidarity toward the mutuary.

Even though the Andalusis accepted this modality to settle debts, without specifically mentioning this type of documents, there are news of payments using securities with value, either in relation to the loan, *qard*; or related to the assignment itself, as is explained by Al-Ḥazrī with regard to the document in which the amount owed has to be specified and on which the person guaranteeing the payment must sign. Neither is there unity of criteria regarding the explicit intervention of exchange guarantees which could reinforce a credit, their relevance being deduced from the treatment of other legal businesses.

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128 – Chalmeta-Mañgán add the guarantee as the corollary of the assignment of credit; in fact, the term derives from *ḥawāla*, although the guarantee implies the intervention of a third party who guarantees the payment with his estate. This case is not contemplated as such in the certificates or deeds consulted for Andalusian law. About this case and others of *ʿamal* see P. Chalmeta Gendrón, “Acerca del *ʿamal en al-andalus*”, in: Anuario de Historia del Derecho Español, t. LVII, Madrid, 1987, p. 339-364. And regarding the payment of debts in its various modalities, see what is foreseen in the works of Ibn Salmān, Cano Ávila, Contratos coomutativos, cit., chap. XVIII, p. 488-498.

129 – In the Spanish context, Tomás de Mercado identifies the following requirements in exchange matters: firstly, that the exchange has that nature, secondly, that no deceit and violence are present, and thirdly, that the change is moderate and fair, and he specifies even more, pious, human, not increased or measures to someone else’s needs. If any of these requirements is not fulfilled, the exchange will be unlawful, vitiates and reprehensible (Suma de tratos y contratos, cit., p. 448).


131 – Sahnūn, Mudawwana, cit., vol. IV, Bk. IX, p. 141-143.

132 – Al-Ḥazrī, Al-Maqṣad al-maḥmūd, cit., p. 326.

133 – Operations like the endorsement or the guarantee have their equivalents in other modalities contemplated by Islamic law such as the *ḥamāla* (or *himāla*), *yamān* and *kāfala*; see Ahmad Al-Wansarī, al-Miṣrī yār al-muʿrīb wa l-ṣāmiʿ al-mughrib *ʿan fātāwā ahl Ifrīqyā wa-l-Andalus wa-l-Maghrib*, ed. M. Ḥajji et al., Rabat-Beirut, 1981-83, t. VIII, p. 124 and t. II, p. 233-242; Payment guarantee and guarantee substitution in Al-Ḥazrī, Al-Maqṣad al-maḥmūd, cit., p. 326-7; Ibn ʿAṣim, Taḥfat, cit., Chap. LXXVI Du forfait (*ḥamāla*), p. 589-591. According to Santillana, this modality consists in the assumption of a debt by a person other than the initially obliged one (*ḥamāl*) this replacing the true debtor; this modality is different from the ordinary fideiusiones (*ḥamālah*) because, in this case, the guarantor accepts someone else’s debt and obliges himself to pay it while the debtor does not fulfil his duty. The *ḥamāl* which Santillana identifies with the *constitutum debiti alieni of Roman law* must be immediate, consequently declared through the word in question or in
As for the second requirement, that the credits are equivalent or equal, according to Ibn ‘Asim, the doctrine offers several options to achieve the full effectiveness of the ḥawāla\textsuperscript{134}.

One of the most common ḥawāla businesses was the one which had as its aim the assignment of slaves. In this case, the lawfulness of the business was subordinated to the conditions required for their exchange (mubādalā, mu‘āwāyā), since the value of the debt was replaced with individuals who had to have analogous physical characteristics for the business to be considered licit and valid\textsuperscript{135}.

The equality of debts is subjected to regulation by practically all the Andalusi jurists, both in relation to money and regarding other objects of a different kind, an obligation existing in this case to compensate the debts\textsuperscript{136} if they are have to do with spices, movable items or food products. It is essential for that purpose to bear in mind the fixed term of delivery. This compensation had to be carried out through the business modality hulū\textsuperscript{137}, and only in the case of total equivalence could it be regarded as completed (ṣaḥīḥ). This proposal was not supported by all the schools. Ibn ‘Asim advocated the lawfulness in the compensation of debts when the operation referred to spices, movable items and food products\textsuperscript{138}. Thus, if the object

\textsuperscript{134} – Ibn ‘Asim, Ṭuḥfat, cit., v. 797, p. 421. And about the compensation of debts related to spices, movable items and food products, v. 783, p. 413; and about the same issue, v. 787, p. 415.

\textsuperscript{135} – Ibn al-‘Aṭār, Formulario notarial Hispano-arabe, cit., doc. No. 52, p. 150 and ff; Al-Ǧazārī, Al-Maqṣad al-mahmūd, cit., p. 327-8.

\textsuperscript{136} – So is expressed by Ibn Rušd, for whom the Shafi‘is disagreed with this opinion, followed by Hanafis and Malikis, tying the effectiveness of the operation to the due date of the debts and, therefore, to the immediate demand for payment; Ibn Rušd, Livre des échanges, cit., p. 146-147.

\textsuperscript{137} – And about the compensation of debts related to spices, movable objects and food products, Ibn ‘Asim, Ṭuḥfat, cit., v. 783-785, p. 413. Only if the terms were different for the items of the same kind did the doctrine forbid compensation (op. cit., v. 786, p. 413). And for the case in which the food products were of a different kind (for example, wheat for broad beans), the compensation between the two debts will only be possible when one of the credits is due because, if one of them is not due, they would be carrying out a forward sale of food, a possibility that is not allowed by the doctrine (op. cit., v. 789-790, p. 417).

\textsuperscript{138} – This issue in Ibn ‘Asim, Ṭuḥfat, cit., it is regulated in the chapter dedicated to credit sales (écheances) and compensation (dīn, muḥāṣa), chap. LIV, vv. 774-794, p. 407-419; and about completion when the objects compensated are equal v. 779, p. 411 and Al-Ǧazārī, Al-Maqṣad al-mahmūd, cit., p. 327; LEYES DE MOROS, Tit. CXXVII De los que compran mercadoría á pagamiento de otry’.
was of a different kind, it was necessary to specify their equality or different nature and, in the latter case, the term date fixed in the contract, as is foreseen by Al-Ğazîrî and other later texts\textsuperscript{139}.

The explicit prohibition by the Andalusi doctrine to subrogate credits based on forward sale contracts, salâm, is due to the fact that it would turn into a sale of food products before they are taken possession of\textsuperscript{140}, a business which is considered unlawful regardless of the date on which the said credits were due. The demand for a term to fulfil the obligation derived from the contract is necessary and cannot be questioned; in sale matters, the obligations contracted can be enforceable immediately if they have not established a term (aḡal)\textsuperscript{141}. If a time period or term is fixed, the contract cannot be executed before the date. Only if no terms have been established for the execution, and considering the nature of the obligation, will the judge be able to fix the moment for its execution. However, it is also true that Islamic law foresees that if the debtor becomes insolvent or does not provide enough guarantees about the payment of the debt, the creditor will be able to demand from him to settle the debt immediately\textsuperscript{142}. Only in the case of death of the debtor will all the obligations be extinguished, even those subjected to a term that is still not overdue. This is the opinion of Saḥnûn\textsuperscript{143} which is followed by the Andalusis Ibn Rušd and Ibn Salmân, but it is not free from controversy, since other authors argue that, if certain conditions are fulfilled — equality of capitals — the object of the contract would change, as it would no longer be a subrogation of credits but an assignment for the same price (tawliya); or, in the event that two contracts should exist, in which one corresponds to a loan and the other to a forward sale, salâm, the validity of the subrogation would depend on whether or not the businesses are of the same kind\textsuperscript{144}.

Nevertheless, the doctrine allowed the subrogation to a person who did not have a credit on another because, in this case, the legal business was regarded as a simple security (ḥamâla)\textsuperscript{145} or a guarantee offered by an individual to ensure the compliance of a pre-existent obligation. Ibn al-Attar describes the business and the possible circumstances that can interfere in its development and, taking into consideration the context in which these

\textsuperscript{139} – AL-ĞAZÎRÎ, Al-Maqṣad al-maḥmûd, cit., p. 328 and C. BARCELÓ, LLibre de la Çuna e Xara, Cordoba, 1989, p. 74.
\textsuperscript{140} – A different case arises in the possible event that the debtor anticipated the time for the settlement of the pecuniary obligation derived from the agreement between the parties CHEHATA, Théorie générale de l’obligation, cit., p. 88.
\textsuperscript{141} – SANTILLANA, Istituzioni, cit., v. II, p. 92.
\textsuperscript{142} – DONINI, Il diritto del commercio internazionale nel Mediterraneo, cit., p. 267-270.
\textsuperscript{143} – AL-ĞAZÎRÎ, Al-Maqṣad al-maḥmûd, cit., p. 327.
\textsuperscript{144} – SAḤNÛN, Mudawwana, cit., v. 5 Bk. XV, p. 82.
\textsuperscript{145} – CANO ÁVILA, Contratos conmutativos, cit., p. 504.
relationships developed, the bond or guarantee between traders (tiğāra) would be justified by the frequency with which this modality of deals occurred. Nevertheless, one can hardly find any references in the written documentation to the way in which the payment could be ensured by a third party. This is so because, after all, the hamāla – at least according to the case law – is a modality to guarantee the payment and fulfill the obligation assumed, whereas the documentary resource that justifies the premises of the business is considered only occasionally and never in a generalised way.  

2.3. Consent and its forms of expression among Andalusi traders in ḥawāla matters

The agreement (raḥa) between the delegator and the delegatee is commonly admitted by the Andalusi doctrine and appears as the first condition for the lawfulness of this legal business. This is so determined by Al-Garnāṭī and Ibn ʿĀṣim who additionally ratifies that, should the previous condition be fulfilled, the business is not hindered even if the muhāl (ʿalayhi) is not aware of this consent. Therefore, the Andalusis followed the Maliki doctrine in this respect, as is later confirmed in the compilation of Ḥalīl.

In order to be effective, the agreement between the person who delegates the credit and the delegatee requires their willingness to oblige themselves (niyya), explicitly formulated and assumed by the contracting parties. After all, the acts carried out by means of deceit and lacking the niyya – an upright intention to oblige oneself explicitly formulated – generate vice (fāsid) of consent and, in this case, the act would be considered null and void (bāṭil) or could be rescinded. Furthermore, the contractual capacity is required

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146 – There are no allusions whatsoever to the demand for a documentary or an analogous proof in a written document where the facts are described, at least in the work of Ibn al-ʿĀṭār (op. cit., p. Ed. Árabe, p. 151). The Andalusi jurist uses the term hamāla, the meaning of which, from the technical-legal point of view differs from the guarantee in both form and content; however, the guarantee –as a figure that ensures the fulfillment of a pecuniary obligation with its funds, is the one to which the Andalusian doctrine resorts when there is a written document (ṣufla);  

147 – Al-GARNĀṬÍ, al-watāʾiq al-muṭaṣara, cit., p. 38.  

148 – Ibn ʿĀṣim, Ṭulḥaf, cit., v. 796, p. 421. The same opinion is expressed by Ibn Salmān, in CANO ÁVILA, Contratos conmutativos, cit., p. 504. There is, however, a clarification as to whether or not all the ulemas support this view, through there seems to be a favourable trend indeed toward the avoidance of imposed conditions that might inhibit or prevent the presence or knowledge of the delegated debtor.  


151 – Thus, any limitation for this capacity in relation to credit subrogation as an alienation contract entails, in the case where a loan forms part of the legal business, that this loan cannot be granted, and if it were, the act would be declared null and void and non-existent due to a formal vice (fāsid).  

152 – DONINI, Il diritto del commercio internazionale nel Mediterraneo, cit., p. 231.
both to accept the mandate inherent in the subrogation business and to perform the transmission. The doctrine stipulates that insofar as one of the intervening parties lacks full legal and contractual capacity and, more precisely, the capacity needed to give validity to the contract – the capacity to understand and want and the discernment that would be demanded for any legal act – or the capacity derived from coming of age, the business will not be obligatory, though it will be valid, until the tutor or guardian intervenes to ratify the act. This situation arises in relation to a minor and to a slave who contracts without his master’s consent. Now then, the minor’s father cannot give in loan or lend the son’s capital to someone else when the operation to be carried out is the hawāla, unless he has been explicitly granted the power to alienate these assets.

In this respect, Muhammad b. ‘Iyād (m. 575/1179) proposes in his work – taking as a reference the postulates of Mālik and his followers – that in the case of a prodigal person, and when it is possible to clearly demonstrate the legal incapacity (al-safah) which prevents that person from performing legal businesses which entail an alienation of goods, under the premise of the achievement of that capacity (taršād), he will be able to perform acts during the period of lucidity. If the loss of his capacity should take place again, only the businesses concerning the transfer of credits (hawāla-hu) celebrated before his manifest negligence will escape the possibility of being declared null and void or revoked.

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154 – These issues are dealt with in the overall study about the regime of contracts in relation to incapable individuals, minors or those not allowed for reasons of faith; see G. M. PICCINELLI, Le società di persone nei Paesi arabi, cit., p. 41-42.
155 – Rules of actions which also affect the testamentary tutor, the guardian and the administrator of pious foundations; see ḤALIL IBN ISHĀQ, Il Muhaṣṣar, Italian translation by GUIDI – SANTILLANA, cit., v. II, p. 384-385.
156 – The author shows the opinion of the different legal experts within the Maliki school; from the posture of Malik continued by his disciple Sahnūn (d. 240/855), both of them in favour of giving validity to the acts performed even in a state of negligence, with the possibility to revoke them when manifest prodigality is incurred again, up to Ibn al-Qāsim (d. 191/806) – outstanding disciple of Mālik – and Muṭarrīf b. ‘Abd Allāh from Medina (d. 220/835) – whose work became well-known in Spain through the Alphaki from Granada Ibn Ḥabīb (d. 238/853) – who did not share this opinion at all. There is an integrating current that supports the combination of both postures which ‘Iyād attributes to ‘Abd al-Azīz b. Abī Salama. ‘Iyād claims to support the Malikis who advocate permissiveness for the acts until the declaration of incapacity, an incapacity due to prodigality which presents a number of difficulties in the opinion of Aṣbāq, who drew a distinction between the evident incapacity and the incapacity which remains hidden. MUHAMMAD B. ‘IYĀD, Maḏāhib al-hukām fi nawāzil al-ahkam, (The action of judges in legal processes) translation and study Delfina Serrano, edit. Consejo Superior de Investigaciones Científicas, Madrid, 1998, [X.-7-b] p. 291-292. An obligatory reference for Andalusī Malikism is the study of Professor Alfonso CARMONA, “The introduction of Māli‘s teachings in al-Andalus”, in: The Islamic School of law. Evolution, Devolution, and
In Islamic law, it is commonly accepted that the external manifestation of any business (ṣīgah) refers to a specific event, word, gesture or behaviour which highlights the will of the parties, a will that is guided by the principle of upright intention, niyya, a fundamental requirement in the contract. The principle of upright intention is strengthened by the ḥādīth, who justifies that “acts are [defined] according to the intentions”157. Bearing in mind that all those legal businesses which include a reciprocal exchange of consensus or agreement (consent) do not need to fulfil any formal requirements according to Islamic law, one can understand the scarce relevance that the documentary form or practice has in this sort of relationships. On the other hand, the Islamic legal doctrine maintains that an agreement materialised in writing (ṣākīk) lacks intrinsic evidential value, this being due to the fact that this evidential value is provided through the confirmation of witnesses; a requirement that is demanded in all the contracts and certificates about subrogation and assignment of debt that have been consulted158.

Even though there are not overall criteria about the form of this contract modality, the Andalusian case law demonstrates that for cases when a party claims a previous right (istiṣḥāq) recognised by a final judgment beyond appeal, the document issued before the judge and countersigned by suitable witnesses has full evidential effectiveness159. In this case, the declaration of will is expressed verbally with an allusion to the verb ḥāla, or any other equivalent form which expresses the willingness to transfer the credit160. Therefore, as the business is based on consensus, the completion of this contract will take place as soon as the parties reach an agreement about the

157 – This justifies the unnecessary nature of the written form, although on some occasions the intention is materialised in this way using the habitual means or procedures, and with free formulas. This criterion has sometimes given rise to contradictory interpretations based on opinions which were rather local or typical of a specific territorial context; it is the case of the allusions gathered by Cano Ávila from Ibn al-‘Aṭṭār e Ibn Salmān regarding the documentation for the business, which by no means can be regarded as an essential requirement for the valid celebration of the contract. CANO ÁVILA, “Sobre la subrogación de crédito (ḥawālā),” cit., p. 484.

158 – About these issues, see PICCINELLI, Le società di persone nei Paesi arabi, cit., p. 39-40.

159 – P. CHALMETA – M. MARUGÁN, Formulario notarial y judicial andalusí, estudio y traducción, Edit. Fundación Matritense del Notariado, Madrid, 2000, p. 114-117, mod. 10 Claim certificate by the purchaser for a defect in the slave (acquired). (In the final transaction), vendor and purchaser (partially) ‘cede’ and it is another purchaser who acquires it with a discount.

granting and the reception by means of a loan, a criterion that is not unanimous, since some authors make an explicit reference to the form, sigah, paradoxically without any specifications.\footnote{161}

A number of authors justify this formal ‘indetermination’ on the grounds of the link existing between the delegation of credit and the mandate: Indeed, since the delegation of credit implies the obligation to do, it becomes a mandate for the creditor, the express or tacit acceptance by the agent entailing the completion of the business\footnote{162}. And here arises a ‘break’ between the dictates of the Maliki school and the Andalusi case law since, for the Malikis in the peninsula, in accordance with the ‘amal –, it was not obligatory to have the consent (radā) of the creditor in order to verify the validity of the delegation; a criterion which diverges from the mainstream posture that demands as the first requirement the mutual consent between the mūhil and the mūhār.\footnote{163} Once again, the agreement on this premise eliminates any payment that is not established in the agreement or any added value for reasons alien to the will of the contracting parties, this being an approach that has been respected by the doctrine over time\footnote{164}.

Nevertheless, the reference to deeds and contracts or agreements between parties is not arbitrary. López Ortíz deals with this issue within the obligations law and although some inescapable obligations exist between debtor and creditor, it is necessary to underline that these obligations stem from a previous contract or agreement on the assignment or sale of any good. This is an ‘obligational’ type of relationship which acquires a new dimension with the intervention of the delegated person who will optionally document the agreement. In effect, from an essentially contractual point of view, the allusion to the term ‘aqd’uqūd, agreement, commitment or pact\footnote{165} by Al-Garnāṭ, Ibn Hišām, Al-Ḡazrī, Ibn ‘Āşim, Ibn Salmūn, and even the Moors’ Laws, allows us to explain the value that this modality has within the

\footnote{161} – The Maliki author speaks about kitābah al-mukatib; SAḤNŪN, Mudawwana, cit., v. 5, Bk. XIII, 292.


\footnote{163} – HALIL IBN ISHAQ, Muḥtaṣar, Arab ed., cit., p. 173.

\footnote{164} – In relation to consent in re-exchanges, Tomás de Mercado argues that the act of consenting by the person who received an amount lent and payable on a term and did not made it officially explicit at the time does not legitimise the payment of interests to the person who takes the debt, since despite the presence of consent, it is still usury. This consent, in Mercado’s words, prevents the re-exchanges from being so violent and involuntary, which does not stop the possibility of considering them unjust and null and void in those cases where malice is visible. (Suma de tratos y contratos, cit., p. 436).

\footnote{165} – A term which comes from the root ‘tie’ (‘aqada) and which, in this context, means ‘agreement of will’ (tarāḍ). It is an agreement which binds whoever expresses it in these terms to all the obligations deriving from that link. A. D’EMILIA, Scritti di Diritto islamico, ed. by Francesco CASTRO, Roma, 1976, p. 31-32. About the current meaning of the term according to the modern legislation in countries with an Islamic tradition, see M. PAPA, “La definizione di contratto e l’autonomia contrattuale in diritto musulmano: dai principi della shari’a alle legislazioni contemporanea”, Roma e America, VII (1999), p. 285.
framework of commercial businesses. ‘Aqd is a kind of agreement where validity depends on the observance of certain specific requirements and conditions, to which the parties will have to stick for the ultimate completion of the agreement of wills, always pursuant to the dictates of the Andalusi Maliki doctrine.

Instead, the doctrine uses the term waṣṣiq to identify the ex post facto circumstances that might affect the lawfulness of the business agreed between the parties. This concept is widely used in the works of Ibn al-‘Atfār, al-Tūlaytūlī, of the Valencian jurist and notary public al-Fīri, and of Abnaxas al-Chodani. The deed implies acceptance and commitment, premises which are reflected on this contract modality, especially in cases of assignment of debts associated with the purchase of slaves, with the additional need to negotiate prices and specify the possible defects observed and reported in the document, knowing their range and extent.

3. Effects of the contract.
3.1 Convergence of rights and obligations in the area of credit contracts.

The ḥawāla is a contract based on the mutual trust between the (contracting) parties (‘aqd al-amāna) and generates a series of reciprocal obligations of a personal nature which imply the assumption of responsibilities (dimma) by the muḥīl and the muḥāl. Its purpose is no other than the fulfilment of those obligations within the framework of the legality of Islamic law.

Attention has also been paid to the payment mandate or delegation, in which the person who receives it assumes, on the basis of the purpose of the contract, the commitment to achieve that purpose as well as the benefit derived for the parties involved, muḥīl and the muḥāl lahu; so that the agent will assume responsibilities with respect to someone else’s goods with the aim of settling a debt with a third party. A mandate which, in this legal business, consists in favouring the actions required for the payment; a mandate which has not got an unlimited character and, instead, has to observe

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166 – Al-Garnāṭī, dedicates a section, under the title of “‘aqd ḥawāla”, to define the conditions and requirements that could be demanded in this contract modality, in which all the details about the suṭṭa should be specified (al-watā’iq al-muṭṭasira, cit., p. 38).
167 – Described by López Ortiz as an «extremely essential element in the Muslim contract theory» (Derecho musulmán, cit., p. 196).
168 – See note 159.
171 – About the basis for the definition of Ibn ‘Arafa, Cano Ávila establishes the relationship between the subrogation of the credit and the mandate of payment because the relationship between the parties also includes an order with an obligation of being made implicit, which urges the compliance of whatever has been commissioned. Hence the need to identify the aspects shared by both business modalities, which even permit to justify their interchangeable use in the terminology to refer to one case or the other. Cano Ávila, “Sobre la subrogación de crédito (ḥawāla)”, cit., p. 481-482.
certain time and space circumstances defined in the agreement and contained, should the case arise, in the exchange order or documented bill of exchange (ṣuṭaṣa).

Insofar as the business is executed by means of a written document, ṣuṭaṣa, the business will provide an interest for the borrower and will mean for him the birth of a unilateral and personal obligation. The intervention of a written document (ṣuṭaṣa) offers the possibility of having available the object of the sale or exchange in a place different from that in which the agreement is reached, thus avoiding the risks inherent in the traffic of certain movable goods which may compromise the commercial transaction.

As for the ḥawāli contract, the obligations deriving from it – for the parties – are the consequence of an agreement that can consist in the action of giving, doing or not doing. Any action oriented to the achievement of the business purpose will be licit with the only limitation of those mentioned generically in the Islamic obligational law and which, in relation to the sale, refer to the prohibition of forward sale, salam. Thus, for example, the debtor was obliged to comply with the payment and, once the assignment is agreed, to respect the commitment assumed by the assignor with respect to the assignee. By virtue of the mandate or transferable payment order, the assignee had to respond and assume the consequences derived from the loss of the contract object limited, though, to the amount of time during which the object is under his custody.

In the assignment of credit, the muḥil is the debtor who delegates his obligation, whereas the muḥāl, as the creditor, is committed toward the first debtor (muḥil) by virtue of the initial business or contract to pay the credit when that is required from him; the muḥāl ʿalayhi or delegated debtor assumes a new obligation –which is why they also speak about novation or substitution of the debt– changing his status for that of ‘new debtor of the debt’, muḥāl bihi.

The assignment of credit, identified in Islamic law as ‘non-exchange contract’, presents – as has already been seen in relation to other aspects, coincidences with respect to the requirements that have to be fulfilled in the accommodatum, the payment mandate, the deposit and the loan or

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173 – SEIGNETTE, Code Musulman par Khalil (statut reel), cit., p. 106 and HALIL IBN ISHLAQ, Muḥtasar, Arab. ed., cit., p. 162. About these issues, SĀḤĪNĪ, Mudawwana, cit., v. IV, Bk. IX, p. 136-141. However, the term does not appear explicitly in the treatment of the loan.
175 – IBN AL-ʿATTĪR, Formulario notarial Hispano-árabe, cit., doc. 52, p. 296.
176 – For Ibn Salmān this modality is a subrogation of credit because someone else’s debt is accepted; CANO ÁVILA, Contratos comunitativos, cit., chap. XX, p. 503-521.
mutuum. Thus, for example, the doctrine imposes for this type of businesses that the debt subrogated is of the same sort that the debt which is extinguished, a demand which forces the mutuary to return a quantity and quality of fungibles that is equal to what was received or that has an equivalent value. The obligation is also extended to the date on which that restitution must be carried out, respecting what has been signed in the contract and, failing that, attending to the custom; with no obligation to carry it out before the term is overdue. Similarly, as a general principle, the restitution will be done in the same place where the assignment of the loan took place. However, the possibility exists for the debt to be settled elsewhere if they are dealing with coins (currency) and consequently run the risk of loss due to the insecurity in the transit ways. That is why the creditor, attending to common sense, should not reject the payment in a place other than the one agreed.

In the case of credit assignment with the intervention of a loan, the mutuary will be obliged to restore exactly all that he has received in order not to commit unjust enrichment, and his creditor will not be able to demand more than what is owed to him for the same reason, since the fact that the loan is essentially free implies the explicit prohibition to obtain gains (profit), *ribā*. After all, the assignment of credit is ruled by the same limitations concerning usury.

3.2. Causes which limit the effectiveness of the ḥawāla.

According to the Maliki school, when a loan intervenes in the assignment of credit – with or without a written document – the mutated values go to the mutuary’s estate; even before the effective tradition. Consequently, the mutuary will be able to have at his disposal the values taken in loan even before they are received by the mutuant and will be equally able to delegate the debt consisting in cash to his creditor, even prior to its reception by the mutant. All of these operations can be carried out using a written document.

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178 – GUIDI – SANTILLANA, Il Muṭṭasār, cit., v. II, p. 388. s.v. «ribā» (in: EP, vol. VIII, Leiden, Brill, 1995, p. 491-493) J. SCHACHT defined as transactions with a fixed term (deadline) and the payment of interest, as well as the speculation (ġurar), constituted as an essential element in the developed exchange system applied in Mecca; (Kor. III, 130 and XXX, 39 and II, 282 about credit sale). Ownership transfer is only allowed with items of the same kind and with the same quantity. Hence the prohibition of loans with the requirement of delivering a greater value with respect to the value on which the business is focused. Any element introduced into this sort of contract turns it null and void, although only in the case of the *ṣafqa*, repeatedly forbidden by the Shafi‘is, the vendor, who is a creditor, can benefit from the price related to the cost of transport (op. cit. p. 492/3).

179 – However, this criterion is not unanimously supported among the different Law schools. SANTILLANA, Istituzioni, cit., v. II, p. 386, note 41.
suftaḡa, which contains all the requirements for the completion of the contract.  

In the case of credit assignments, the first effect derived from the validly celebrated agreement is that the ownership over the delegated credit is transferred to the estate of the delegatee, who exercises the right of the delegator, when the power to demand the credit from the latter is recognised to him. On the other hand, the debt that the delegator had with the delegatee is extinguished since the moment of acceptance, and the delegator is freed as if the payment had been made. The reason is evident: the acceptance has an identical value to the payment and produces a new effect, which is the relinquishment – implicit to the business – by the delegatee of the credit that he had against the delegating person.

Because these real contracts were done at all risks, from the moment of completion of the contract, the risks of the mutated or delegated item will be assumed by the mutuary or delegatee, but he will not have the obligation to answer for the object or cash which perish or become deteriorated fortuitously (by accident) or by a third party. Similarly, the delegator of the credit does not guarantee the events successive to the assignment of the credit. Only if the delegated credit were non-existent or had been rescinded due to nullity (buṭlān) will the delegatee be able to exert a return action, istihqāq against the delegator. In this case, the debtor might allege, using

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180 - The truth is that the doctrine assigns special importance to the expression ‘delegation or assignment of credit’ – Seignette & Bousquet, Zeys, Houdas & Martel, France de Torsant translate the term ḥawāla as delegation, and Perrón as credit assignment, in a generic sense, as this is the business around which the institution of the loan is structured. The delegation is the business defined by ḤALIL IBN ISḤAQ in the Il Muḥtaṣar, by virtue of which the right of the delegatee passes on to the delegated party as long as some validity conditions are met: Firstly, consent of the delegator party and the delegatee; secondly, the existence of a legally binding credit; thirdly, a “forma”, i.e., a clear declaration to renounce the primitive debt; fourthly that the debt is due on the delegator, even if it is a manumission contract, but the delegated debt does not necessarily be out of date. And fifthly, the identity of both debts, in quality as well as in quantity, controversy arising if the delegation has as its object an item of lower quality and, finally, the fact that these two credits are not performed on food that has as its origin a sale. Once these requirements have been fulfilled, the delegatee’s right comes to prevail on the delegated person, even if he finds itself in a state of insolvency, or if the debt is denied, except when the delegator was aware of the insolvency. Should discrepancy arise, the delegator will have to give an oath about the negation of the knowledge about this situation. What is more, if the vendor had carried out a delegation to a purchaser for the buying price of the contract, the delegation is not annulled, according to al-Qāsim, as cancellation for reasons of vice and claim is possible, a case in which there is discrepancy and an aspect about which the doctrine shows divergences. AL-ḠAZĪRI, Al-Maqṣad al-mahmīd, cit., p. 327, ḤALIL IBN ISḤAQ, Abregé de la loi musulmane selon le rite de l’imām Mālekī, trad. nouv. par G.-H. BOUSQUET, Algiers-Paris, 1962, p. 69-70.

181 – CANO ÁVILA, Contratos conmutativos, cit., p. 506; AL-HUṢĀNĪ, ABŪ MUḤammad IBN ḤARIQ AL-HUṢĀNĪ, Ta’rīj quḍāt Qurṭuba. Orígenes del justicia de Aragón, edición y traducción a cargo de J. RIBERA TARRAGO, Zaragoza, 1897, p. 199.
the legal means available to him, when it is appropriate, to demonstrate either that he had paid in advance or that he was insolvent when the delegation or assignment of credit took place. The legal presumption in these cases is that the delegated credit existed and was valid when the delegation was made, a presumption which requires an oath (yamin) by the delegator.

In the case of security or bond, which acts as a guarantee (‘uhda) to ensure the payment, it will have an accessory nature and will not be transmitted with the credit. Instead, it will require an explicit document or pact in which the conditions which ensure that payment are specified.

Certainly, Andalusi law foresaw various circumstances and causes of different kinds which limited the effectiveness of the credit assignment contract, although it is worth highlighting the unlawfulness of the pact or agreement to which the contract referred as a result of the death or insolvency of the delegated debtor.

We cannot forget another circumstance that becomes very influential in relation to the effectiveness of this sort of businesses: non-compliance with the term or time period established in the contract. The transfer of debt, ḥawāla, makes necessary the explicit remission to the time period agreed or the immediate enforceability, especially in the case of a loan. This is also collected in later legislation, which establishes that the sale of debt by debt will not produce any effects even if there is a document in which a business is agreed on a specific object and term, unless they are equivalent and there is no doubt whatsoever about the time in which the payment of the debt has to be carried out. In this case, it will suffice with the settlement of the debts by means of compensation, hulūl.

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183 – Although the same author believes that the doctrine is not unanimous about the maximum time limit to consider this type of business valid. The validity of the immediate or postponed tradition is subordinated to the hadīt and takes into account the verbal form used in the delivery, by means of a verb in the present (takes and takes); Ibn RUŠD, *Livre des échanges*, cit., p. 142-143 and 156. And the foundation of which is the explicit prohibition by Mālik to buy objects before taking possession of them, above all in the case of food products or when there is danger in relation to the capital. A different matter is the way in which the consent is given, since there is no unitary notion about this in Islamic law. See about this issue D’EMILIA, *Scritti di diritto islamico*, cit., p. 211-231.

184 – IBN AL-‘ATTĀR, *Formulario notarial Hispano-árabe*, cit., doc. No. 52, p. 296 and ff. This model was translated by CANO ÁVILA, “Sobre la subrogación de crédito (ḥawāla)”, cit., p. 481-496.

185 – See note 94.

186 – IBN RUŠD, *Livre des échanges*, cit., p. 146; *LEYES DE MOROS*, cit. p. 96. Tit. CXXIV Que non pasa que venda omen debda por debda. And the same criterion is followed in Nazari Spain by Ibn Salmān, CANO AVILA, *Contratos commutativos*, cit., p. 503.

187 – And about the compensation of debts related to spices, movable objects and food products, IBN ‘AŚĪM, *Tuhfat*, cit., v. 783-785, p. 413. Only if the terms were different for
Also the defect or vice related to the object entails the annulment of the subrogation. In the same way, if there is deceit in the subrogation of the sale price of an item which had been sold beforehand and it was claimed by a third person (istiḥqāq), the only option would be the cancellation of the initial sale. In this case, it is possible to return the object upon which falls the legal business, with the obligation for the party who acted unlawfully to pay what he received and for the party who acted in good faith to receive what he delivered plus the value of what he lost in the transaction, a case that the doctrine treats in relation to the sale of slaves in Andalusi souks.

The insolvency of the delegated debtor caused the inefficacy of the contract. This case could actually occur before the coming into force of the term for the subrogation of the credit. The mere suspicion of insolvency of the delegated debtor (muḥāl ʿalayhi) granted the creditor the right to demand the immediate execution of the contract. The reason is that, otherwise, the contract might become a payment of a debt by dayn. The enforceability of the payment could also take place before another circumstance, namely, not having fixed a term (date) for the execution of the payment when the nature of the obligation required it. The only case which exempted from such responsibilities was the debtor’s death.

the items of the same kind did the doctrine forbid compensation (op. cit., v. 786, p. 413). And for the case in which the food products were of a different kind (for example, wheat for broad beans), the compensation between the two debts will only be possible when one of the credits is due because, if one of them is not due, they would be carrying out a forward sale of food, a possibility that is not allowed by the doctrine (op. cit., v. 789-790, p. 417). C. BARCELÓ, LLibre de la Çuna y la Xara, p. 74: “Que nengun deute no és prescriyt sinó pasta(s) (sic) vint anys”.

188 – In accordance with the opinion of Ašhab. Cfr. The opinion of Ibn Salmān, in CANOVÁILAVILA, Contratos conmutativos, cit., p. 505.

189 – If he knew them and had hidden them, if they are discovered by the purchaser, he will have to answer for them, but their pre-existence or not will give rise to a redhibitory action. SANTILLANA, Istituzioni, cit., v. II, p.140-154. Hidden vices will give rise to the cancellation of the sale or to the proportional reduction of the price after the valuation of the item for the day on which the contract was closed, and a discount of the price equivalent to the defect, or even to the totality of that price if it corresponded; see note 159; AL-ḠAZĪRĪ, Al-Maqṣad al-ma|m™d, cit., p. 327; CANOVÁILAVILA, Contratos conmutativos, cit., p. 319-320. About these issues and the terms for their exercise, López Ortíz highlights the enormous variety of cases that makes it impossible to deal with this matter in a precise way. (Derecho musulmán, op. cit., p. 205).

190 – CANOVÁILAVILA, Contratos conmutativos, cit., p. 506.

191 – For which there was a special model of claim certificate for the purchaser by defect of the slave acquired, following the proposal of Ibn al-ʿAṭūr; P. CHALMETA – M. MARUGÁN, Formulario notarial y judicial andalusí, estudio y traducción, cit., mod. 10, p. 114-117.

192 – CANOVÁILAVILA, Contratos conmutativos, cit., p. 463.

193 – Observing all the prohibitions related to food products outside commerce. LEYES DE MOROS, cit. Tit. CXXXIII. “De las mercadorías que non pasan”; op. cit., p. 102.

194 – A case of return regarding the delegated credit has as its origin the hul, a redemption price that the wife promises to pay the husband to obtain the divorce: if the redemption is...
Should the creditor (muhāl) not know the financial situation of the delegated debtor, it was possible to claim before the creditor who had carried the delegation (muhīl). However, the knowledge by the creditor of this insolvency and its concealment would mean that he acted in bad faith at the moment in which the contract was closed — against the niyya or upright intention which prevails as a general principle in these matters — losing all rights to claim for losses or damages suffered\textsuperscript{195}. Thus, for example, Ibn al-‘Atūrī explains that no claim whatsoever by the muhāl over the muhīl was feasible if both had agreed it and foreseen it both verbally and in writing, in accordance with the fīqh\textsuperscript{196}

Insofar as this contract modality is regarded as a debt assignment contract, the assignor will be obliged to assign it when the debt is payable and overdue, but the doctrine also deals with the overdue but non-payable assignments\textsuperscript{197}. If the delegated debtor, muhāl ʻalayhi, happened to be insolvent and the assignee did not know it, the latter would have the right to claim before the person who transferred the debt to him and assumed the commission to confer it upon a third party\textsuperscript{198}. It is consequently presumed, in

\textsuperscript{195} \begin{flushright} CANO ÁVILA, Contratos conmutativos, cit., p. 505. \end{flushright}

\textsuperscript{196} \begin{flushright} A case that the said author mentions as a tradition (al-ātūr) among the Andalusis, thus justifying the deep-rootedness of certain practices which shape the ʻamal in the territory of the Peninsula throughout this long historical period; IBN AL-ʻĀTṬĀR, Formulario notarial Hispano-árabe, cit., p. 296-297 (ed. Arab. p. 151) and Al-ĠāzĪRĪ, Al-Maṣqād al-maḥmūd, cit., p. 326-328. \end{flushright}

\textsuperscript{197} \begin{flushright} In effect, if dinars were given in loan, they could not be sold in return for another currency with a different value, for instance dirhemes, unless the term of the loan is overdue and that money is received at once, i.e. with no time going by between their perception and their separation. This does not exclude the possibility to sell for a good that can be paid in advance, in which case it will all depend on the nature of the object upon which the agreement falls, as was said above; and that, even if the term established for the loan is not overdue yet. However, Mālik points out that if the vendor does not have the goods available on the date previously agreed, the purchaser is not obliged to accept them. MĀLIK, al-Muwaṭṭa’, cit., 31.40, p. 304. \end{flushright}

\textsuperscript{198} \begin{flushright} According to Šafi‘ī and Ahmad, the assignee who is mistaken about the business that he is carrying out because he did not know that the debtor was insolvent or that he had denied his debt, or that he was simply wrong, was not entitled to exert any return action not paid, the husband can always exert a return action against the wife in order to obtain the payment while she is alive. Should the wife die without having paid, the husband could not demand the payment by the heirs since, according to the Maliki school, the credit is extinguished because it does not represent what corresponds to the value (‘iwad) given to the husband, but does represent the price of the consent given to the divorce, a consent or agreement which does not constitute an estate delivery at all. That is why, in the absence of an agreement, there is no commutative contract and the redemption is extinguished after the wife’s death. However, if the husband has delegated the redemption and the wide dies before the delegatee has received the credit, the latter could not exert a return action against the heirs of the deceased wife, though he could do so against the delegating husband; SANTILLANA, Istituzioni, vol. II, cit., p. 345 and ff. The premises for the death of a debtor in DONINI, Il diritto del commercio internazionale nel Mediterraneo, cit., p. 269-270. \end{flushright}
case of doubt, that the delegated debt existed and was valid at the moment in which the delegation took place, and that the delegator was freed from it. He would not be tied by that assignment and could pass his debt on the debtor, a possibility which only arises in the case of verified insolvency and lack of liquidity.

There are various circumstances in which it becomes necessary to give an oath or to have witnesses who give proof of the operation and thus strengthen it. We have already referred to the value of the delegator’s oath before cases of lack of liquidity or manifest error. And even in the case of having made the payment previously, Al-Garnāṭī assigns special significance to the oath on identical cases and, in relation to the assignment of credit between the muḥil and the muḥāl, he concludes that this practice intervened as a singular element in the business, pursuant to the Andalusi practice regarding the time and the moment.

Not in vain, the intervention of witnesses in this type of contracts was habitual in the Andalusi context, as it has also been expressed above in relation to the lawfulness of the debt and the object of the contract, on the basis of what is foreseen by Al-Ḡazīrī who, following the Maliki school, demands the presence of three people at the oath-giving ceremony against the person who transmitted the debt to him: good faith prevails once again as the fundamental principle in favour of the person to whom is granted the benefit of the doubt. This posture, though, is not supported by all the doctrine, which even foresees the right to appeal. The first posture is supported on the assumption that it is the assignee’s obligation to take an interest in knowing the financial situation of his debtor, who is the person that transmits the debt to him. Instead, the second posture stems from the difficulty to know the debtor’s financial state, which would oblige to accept the debt with the explicit commitment to its settlement; M. PERRON, Balance de la loi musulman ou Ésprit de la législation islamique et divergences de ses quatre rites jurisprudentiels, Algiers, 1898 (édité par le Gouvernement général de l’Algérie), p. 321.

201 – Although the allegation of the delegator does not give proof when he claims having wanted to make a mandate or a loan to the delegatee in the form of a delegation; the delegatee’s allegation -who state, being tied to an oath, that he has received a delegation in payment for a credit (of his)- is considered true: In the opinion of Ibn al-Qāsīm, this practice presents discrepancies associated with the statement and the oath of the delegator, in case of doubt, about the nature of the contract that he wanted to celebrate (mutuum); SANTILLANA, Istituzioni, cit., v. II, Delegazione (ḥawāla), p. 345-348.
202 – C. BARCELÓ, Llibre de la Çuna y la Xara, cit., p. 72: «Si lo vendor provarà lo preu a ell ésser degut per lo comprador».
203 – AL-GARNAṬI, al-watīṭ iq al-muṭṭasara, cit., p. 38. See the opinion and in an analogous way what is foreseen by AL-ḠAZĪRĪ, Al-Maqsad al-maḥmūd, cit., p. 328; and similarly Ibn Salmān, CANO ÁVILA, Contratos conmutativos, cit., chap. XVII “Bay” al-dayn”, p. 482-487.
According to the Andalusis, and following the opinion of Ibn Salmūn too, this testimony was mandatory for credit subrogation – and equally in the case of credit sale or assignment\textsuperscript{205} – as opposed to the questionable presence of the delegated debtor (muhāl 'alayhi); the latter, apart from agreeing on all the terms and requirements of the business, saw his position ratified by means of the testimony given by suitable witnesses at that place and moment\textsuperscript{206}. This was an intervention which, according to the Maliki school, made the return action unviable, and the business was declared null and void (bājīl) if the object of the assignment was a slave and the delegated debtor had intervened and consented to the delegation\textsuperscript{207}.

\textsuperscript{205} CANO ÁVILA, Contratos conmutativos, cit., p. 482 and 504. AL-ǦĀZĪRĪ, Al-Maqṣad al-mahmūd, cit., p. 328 and C. BARCELÓ, LLibre de la Çuna y la Xara, cit., p. 72: «Si algún vendrá alguna cosa e algunos creheror».

\textsuperscript{206} CANO ÁVILA, Contratos conmutativos, cit., p. 504. Faith-worthy testimony, which implies the explicit recognition of the qualities of suitable witnesses (‘adl). This demand was based on the Sunna, in accordance with what was stipulated in the current legislation of the peninsular Levant (East); C. BARCELÓ, LLibre de la Çuna y la Xara, cit., p. 69-70.

\textsuperscript{207} SANTILLANA, Istituzioni, cit., v. II Delegación (ḥawāla), p. 345-348.