

Problems and Legal Arguments for Imposing Guarantees in Sharia Banking Mudharabah Financing Contract

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ABSTRACT

Mudharabah contract is principally a cooperation contract in a business based on mutual trust and need each other between *shahibul mal* with *mudharib*, then in this contract in *fiqh* literature it is not guarantee is required. but deep development, mudharabah financing contracts on Islamic banking implements a guarantee for avoid fraudulent practices, so *mudharib* burdened with collateral in accordance with Bank Regulations Indonesia and DSN MUI Fatwa. This article aims to uncover problems and analyze arguments law of the imposition of guarantees in financing contracts mudharabah in sharia banking in a legal perspective Islam and positive law..

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1. INTRODUCTION

Islamic banking was born as an answer to the polemic about usury at banks conventional. Break away from the role of banks in growth and Community economic development is something very heavy. Bank reach every side of economic activity both micro and macro. Therefore, the presence of Islamic banks is a hope for Muslims to be a solution of a *riba*-free economic system. (The forerunner of modern sharia-based banks had emerged in the 1940s in Malaysia but not successful, in 1962 Malaysia established the Pilgrims Management Fund

to help pilgrims saving and taking profits, Sharia-based private banks were also born, such as Dubai Islamic, which was founded in 1975, in 1977 also founded the Faysal Islamic Bank in Egypt and Sudan. Idea the establishment of Islamic banks at the international level emerged at the conference of Islamic countries in the world in Kuala Lumpur Malaysia in 1969. The institution that pioneered the establishment of Islamic banks at the international level was Islamic Development Bank in Jeddah. Officially established in 1975. In Indonesia itself, Bank based on sharia was born in 1991 namely the establishment of Bank Muamalat). (Sjahdeini, 2018)

Noble ideals that are built to carry out economic activities based on sharia is not as easy as turning the palm of the hand. Islamic economics concept normatively not perpendicular to the social reality that occurs. Basic theories Islamic economics, which was compiled at a different time and place, became giddy when faced with contemporary realities due to changes in social conditions. The principles of Islamic Economics such as trust, spirit of cooperation, mutual help (*ta'awun*), and brotherhood (*ukhuwah*) that you want to instill in The Islamic banking system is difficult to implement due to shifts in moral values and morals, perspectives, lifestyles and so on.

To continue to exist in carrying out its economic activities, Islamic banking must make adjustments to the contract agreement. One adjustment What is done by Islamic banks is to apply guarantees or collaterals in *mudharabah* financing, although in fiqh literature it is not required there is a guarantee in the *mudharabah* contract. Implementation of financing in banking sharia must meet sharia aspects and economic aspects. Aspects of sharia mean in every realization of financing to customers, Islamic banks must remain guided by Islamic law. In addition to the economic aspect, the Bank also must take a financing analysis approach by paying attention to quantity and the quality of collateral held by the borrower. Collateral is used to anticipate risks if the customer is unable to fulfill obligations as contained in the contract due to negligence and/or fraud. This paper tries to analyze the problems of banking financing sharia and legal arguments for the imposition of guarantees in financing contracts Syariah banking.

2. GUARANTEES IN MUDHARABAH FINANCING CONTRACTS

A. Guarantee

Guarantees, namely guarantees for loans received (borg) or promises someone to bear the debt or the obligation is not fulfilled. There are two kinds of

guarantees, namely: First, material guarantees (materials), includes four forms of collateral, lien, mortgage, fiduciary guarantee and mortgage. Second, immaterial guarantees (individuals), which include this type of guarantee, namely borg (the guarantor is another person who can be billed), responsibility and warranty agreement. (Sofwan, 2001)

In the Islamic law studies, guarantees are known as *dhaman*. Came from the word *dhimmu* which means willing to be borne. etymologically, *dhaman* is guaranteeing or guaranteeing what is in someone's responsibility other. Whereas in the Dictionary of Fikih, *dhaman* is defined as collateral for debt or in other cases to bring a person or thing to a certain place for held liable or as collateral. (Majid, 2002)

Guarantees in a *dhaman* contract consist of two forms. Guarantee in the form of *rahn* and in the form of *kafalah*. *Rahn* literally means *tsubūt* (fixed) and *dawām* (sustainable). In terms of *rahn* is taking hostage a number of treasures given as collateral by right, but can be taken back as a ransom. (NH, 2005) In other words, *rahn* is something in the form of goods or objects that have value or price to be used as collateral for a debt, if the debt cannot be repaid then the item is in lieu of payment of debt. In economic transactions, *rahn* is usually called pawning.

Apart from *rahn*, collateral can also be in the form of *kafalah*. *kafalah* literally means *ḍamina* or *ḍaman*, (Manzur, 1119) *hamalah* (burden), *za'amah* (dependant), (Salus, 1987)

Syafi'iyah interprets it with *iltizam* (obligation/commitment). Hanafiyya and Hanabilah defines *kafalah* as *al-ḍammu* (merger). (Zuhaili, 1986) In Terms, Malikiyah, Syafi'iyah and Hanbaliyah define *kafalah* as a guarantee given by one person to another who has responsibility exercise the right to pay debts. Hence the payment of debt be borne by the guarantor. (Zuhaili, 1986)

In the Compilation of Sharia Economic Law, *kafalah* is defined as "Guarantee or warranty given by the guarantor to a third party / giver loan to fulfill the obligations of the second party/borrower. (Kompilasi Hukum Ekonomi Syariah, Edisi Revisi Tahun , 2011)

B. Mudharabah Financing

Mudharabah is also known as *qiradh*. Hijaz people call *mudharabah* with *qiradh*, while the people of Iraq call it *mudharabah*. Because every contract actor (owner of capital and manager) gets a share (*dharb as-sahm*) from the benefits of *mudharabah*, and because *amil* requires travel, in travel in Arabic is also known as *dharb fil ardh*. (Zuhaili & Kattani, 2011)

Mudharabah is a contract in which the capital owner provides capital (treasure) on 'amil (manager) to manage it, and the profits become joint property in accordance with what they agreed. As for the losses only be the responsibility of the capital owner. Amil does not bear any loss except for business and work. (Zuhaili & Kattani, 2011)

Mudharabah in KHES is defined as cooperation between fund owners or investors with capital managers to carry out certain businesses with profit sharing based on a ratio. (Kompilasi Hukum Ekonomi Syariah, Edisi Revisi Tahun , 2011)

Technically, *mudharabah* is a business cooperation contract between two parties, where the first party (*ṣāhib al-māl*) provides one hundred percent of the capital, while the other party becomes the manager (*mudharib*). *Mudharabah* business profits divided according to the agreement set forth in the contract, if it occurs loss that is not caused by the negligence of the manager, then the loss borne by the owner of the capital, but if the loss is due to negligence and management fraud, then the manager is responsible for the loss. (Antonio, 1999)

In the Qur'an, *mudharabah* which comes from the word *dharb*, is mentioned fifty eight times. However, no specific provisions were found about *mudharabah*. Verses of the Koran that may have something to do with *mudharabah*, indicating the meaning of "travel" (al-Muzammil: 20), or "travel for trade purposes." (Al-Baqarah: 273)

In the books of Hadith, there are also no clues from Rasulullah based on the *ṣāhiḥ* narrations about *mudharabah*. In terms of this Ibn Hazm said "Each chapter in fiqh has a basis in the Qur'an and The sunnah except for *mudharabah*, we don't find any basis for it.

However, there is valid argument for *ijma*, and we believe that at the time The Messenger of Allah had a *qiradh* problem, then the Messenger of Allah found out about it and set it. If it weren't for that, *qiradh* would definitely not be allowed..." (Saeed, 2004)

Although *mudharabah* is not directly mentioned in the Qur'an or Sunnah, but it is a custom that is recognized and practiced by the Ummah Islam as a trading instrument, namely buying and selling long distances (outside the city) as well as local trade. (Saeed, 2004) All scholars agree on the permissibility of buying and selling transactions done with a *mudharabah* contract.

In general, *mudharabah* consists of two forms: First, *Mudharabah Muṭlaqah*, namely a form of cooperation that has a broad scope, not limited by specification of type of business, time and area of business. Second, *Mudharabah Muqayyadah*.

Also called specified *mudharabah* or restricted *mudharabah*. In this form, *mudharib* is limited by the type of business, time or area of business. (Antonio, 1999)

3. Problems of Assigning Guarantees in Mudharabah Financing

In principle, *mudharabah* is *muamalah* in the form of *syirkah* or *syirkah* cooperation between two or more people in the form of business or buying and selling. No debt transactions. *Mudharabah* capital may not be in the form of a debt loaned by the *mudharib* at the time the contract was made. (Saeed, 2004)

So in a *mudharabah* contract, there is no need for collateral like accounts payable. Investors cannot claim any guarantee from *mudharib* to return capital or capital with profits. According to Malik and Syafi'i if investors require guarantees from *mudharib* and states this in the terms of the contract then their *mudharabah* contract does not legitimate. (Rusyd, n.d.)

Although in fiqh it is not permissible to request guarantees from a partner, because he is a trusted person, but some banks Islam requires its partners to provide guarantees for securing the bank's interest in *musyarakah*. (Saeed, 2004)

Provisions regarding guarantees or collateral charged by the bank to customers contained in Bank Indonesia Regulation number 7/46/PBI/2005 article 6 letter (o) which states that "Banks may request guarantees or collateral for anticipating risks if the customer does not fulfill the obligations as contained in the contract due to negligence and or fraud.

In addition, the DSN MUI also allows guarantees in financing *mudharabah*. In fatwa number 07/DSN-MUI/IV/2000 regarding financing *mudharabah*, stated that in principle in *mudharabah* financing there is no guarantee, but so that the *mudharib* does not deviate from the Institution Islamic finance can ask for guarantees from *mudharib* or third parties.

There has been a legal shift or legal renewal of the contract *mudharabah* financing on fiqh studies that do not allow collateral in *mudharabah*, and new *ijtihad* on the DSN MUI fatwa that allows it guarantee.

Changes in law can occur due to many factors that surround it. Both social factors, places, conditions of society, differences in time and so on.

تغير الفتوى بتغير الزمان والمكان والاحوال والعادة

"The fatwa changes due to changes in time, place, circumstances (intentions) and customs habit ."

Likewise with changes to the fatwa regarding the imposition of internal guarantees *mudharabah* financing. *Mudharabah* financing in the study of fiqh and its practice held in two directions, namely between the owner of the property

(*ṣahibul māl*) and the manager business (*mudharib*) who already know each other know the two of them as they have practiced by the Prophet Muhammad saw. friends and Muslims afterwards. This concept is known as direct investment (direct financing) between *ṣahibul māl* as a surplus unit with *mudharib* as a deficit unit . Meanwhile for currently, the concept of direct *mudhārabah* financing between *ṣahibul māl* and *mudharib* is no longer efficient and is unlikely to be implemented by Islamic Bank.(Harahap, 2017)

The previous *mudhārabah* financing contract only involved the two parties directly, on the concepts applied by Islamic Banking experiencing changes. *mudhārabah* applied to Islamic banking involves a third party or what is known as a two-level *mudhārabah* or parallel *mudhārabah* financing, namely through Islamic bank intermediaries as *mudhārabah* institution, resulting in an evolution from the concept of direct financing to indirect financing, meaning capital provided by Islamic banks to actors The business is not fully owned by Islamic banks but is owned by various parties customers who deposit their funds with various contracts. (Harahap, 2017)

Changes in the form of the *mudhārabah* scheme require adjustments and innovation new financing contracts with various considerations, including:

1. the working system mechanism applied to Islamic banking is group investment, where the parties establish ties businesses don't know each other, so the relationship is direct in person will not happen.
2. The variety of investments developed by business people requires large amount of capital, so it is also needed by the donors large amount of funds (*ṣahibul māl*) to finance one particular project.
3. Sharia banking will have difficulty getting to know the character and responsibility of each *mudharib*, due to the many *mudharibs* apply for a financing contract *mudharabah* .
4. As a step to anticipate moral hazard from *mudhārib*, the bank is necessary apply guarantees to protect capital assets belonging to third parties given to *mudharib*. (Is, 2015)

With the various problems that occur, the form of financing *mudharabah* in fiqh which was previously practiced in the *yad al-amanah* contract (trust contract), shifted to *yad adh-dhamanah* (contract liability) that require warranties, controls, tests and determining the conditions for securing capital from various risks Generated. Concept changes and various modifications can be adjusted to the current reality of Islamic banking. (Ali, 2008)

4. Legal Arguments Concerning the Imposition of Guarantees in Contracts Mudharabah Financing

Guarantee Imposition in mudharabah financing contracts on banks Sharia is more based on benefit. This is in accordance with the rule states "*ainama wujidat al-mashlahatu fa tsamma hukmullah*" where it is found benefit, then there is the law of God.

Besides that, the imposition of guarantees applied by banks Sharia is an effort to prevent the occurrence of risks or dangers that arise arising from *mudharabah* transactions. The social reality of the people who experience it changes have implications for changes in law.

Formerly a contract transaction *mudharabah* does not require collateral on the agreed contract, because First, the business partner relationship is carried out in two directions between the capital owner and business manager. Second, subjects who carry out muamalah transactions have morals who are good, are still submissive and obedient to Islamic teachings well, so tendency to commit crimes or fraud is very small, because contrary to Islamic teachings In the development of modern *mudharabah* transactions, the level of crime risk and fraud is very high, therefore it needs to be anticipated and watched out for the crime didn't happen. Guarantee imposition on *mudharabah* financing based on the application of the prudential principle to preventing fraudulent practices and maintaining public trust against Islamic banks.

This precautionary principle is stated in article 2 of Law Number 21 2008 concerning Sharia Banking which mentions Sharia Banking in carry out its business activities based on Sharia Principles, economic democracy, and precautionary principle.

To emphasize this precautionary principle, in article 35 paragraph (1) stated that Islamic Banks and UUS in carrying out their business activities must apply the precautionary principle.

Furthermore, to implement this precautionary principle, in Article 37 of the Law Islamic banking regulates the maximum limit for channeling funds stipulated by Bank Indonesia shall not be more than 30%. Indonesian Bank too stipulate the provision of guarantees, investment placement based on securities sharia, or other similar matters, which can be carried out by sharia banks and UUS to customers receiving related facilities. Including internal companies the same group as the sharia bank and UUS concerned.

The precautionary principle for sharia financing is also regulated in Article 8 paragraph (1) and paragraph (2) of Law No. 10 of 1998 concerning Banking. that deep provide credit or financing based on sharia principles, obligatory

commercial banks have confidence based on an in-depth analysis of intentions and the ability and ability of the debtor customer to pay off his debt or return the said financing in accordance with the agreement.

The imposition of collateral applied by this bank is a form of assurance Islamic banks and *mudharib* intentions of the capital that has been given. It cannot be denied that *mudharabah* financing is carried out by banks Sharia contains risks. Therefore, to reduce this risk, a guarantee for the ability and ability of the debtor customer to pay off obligations in accordance with what was agreed is an important factor that must be considered by the bank, so that in its implementation the bank must pay attention to the principles of financing based on sound sharia principles. this matter n line with the Elucidation of article 23 of Law no. 21 of 2008 and article 8 of Law no. 10 1998.

In article 38 of Law no. 21 of 2008 also explains the obligation risk management that must be carried out by Islamic Banks by implementing risk management, know your customer principles, and customer protection. It is this in accordance with the rules of fiqh which reads "*al-dhararu yuzālu*" all kinds of forms imminent hazard or risk must be eliminated.

Another argument about the need for guarantees in *mudharabah* contracts is that when it is proven that *mudharib* has committed fraud, violated the agreement, and commit moral hazard. Islamic banks as *shahibul māl* have the right to sell goods as collateral and take the proceeds from the sale of the goods as sources of repayment of *mudharabah* financing. 26(Harahap, 2017) This is as a consequence not fulfillment of the agreed contract. In QS al-Maidah 5: 1 Allah says

يَا أَيُّهَا الَّذِينَ آمَنُوا أَوْفُوا بِالْعُقُودِ...

"O you who believe! Fulfill promises..."

The precautionary principle and the risk principle are very important principles important in *mudharabah* financing contracts. Bank as fund manager the customer is responsible for providing benefits to the customer. Loading guarantee besides aiming to avoid moral hazard from business partners *mudharabah*, guarantees are also needed as one of the risk mitigation, remember Funds managed by the bank come from customer funds that are available at any time This can be withdrawn by the customer. Then the bank needs to take care liquidity to increase customer confidence. This is in line with fiqh rules which state "*al-dhararu yudfa u bi qadri al-inkān*" all forms harm and harm should be avoided as much as possible.

4. CONCLUSION

Mudharabah is a form of *muamalah* transaction based on help help and mutual trust between the owner of capital (*shahibul mal*) and the manager effort to provide mutual benefit in a business or business.

In principle, contracts on *mudharabah* financing do not requires collateral, because the contract is different from the debt contract. The imposition of guarantees in *mudharabah* financing contracts is a form legal reform carried out by Islamic banking based on fatwa of the MUI National Sharia Council number 07/DSN-MUI/IV/2000 concerning *mudharabah* financing.

Legal arguments from the imposition of guarantees on financing contracts *mudharabah* refers to the prudential principle as stated in article 35 paragraph (1) of Law no. 21 of 2008 concerning Syariah banking. in addition to the precautionary principle, the imposition of guarantees is for apply the principle of risk in carrying out Islamic banking activities as set forth in article 38 of Law no. 21 of 2008.

In the point of view of Islamic law, the application of prudential principles and principles the risk is justified to avoid the harm and harm that occurs as a result fraud from *mudharabah* financing in the context of enforcing benefit, as long as it does not contain elements of entrapment and harm either party

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