

APPLICATION OF FINANCING AGREEMENT ON SHARIA BANKING IN THE FORM OF NOTARY DEED

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Abstract- *Financing based on sharia principles is the provision of money or claims equivalent to that based on an agreement or agreement between the Bank and another party and requires the financed party to return the money or claim after a certain period of time with compensation or profit sharing. Through normative juridical research methods, it can be concluded that In practice, financing schemes at Islamic banks are generally made in the form of notarial deeds. Making sharia financing agreements in the form of notarial deeds all this time still refers to the Law of Notary Position, not yet specifically stipulated sharia contract documents (contracts) in the form of notary deeds, Islamic financing in Indonesia still uses conventional guarantee institutions such as dependents and fiduciary rights not yet based on on sharia guarantees, although sharia bank products are based on Islamic law, for agreements/ agreements it can be made by a notary who is not a Muslim, specifically the relationship with witnesses in making a notary deed in positive law in Indonesia is different from Islamic law In positive law in Indonesia, the position of male and female witnesses is the same, whereas testimony in an agreement according to Islamic law must pay attention to the provisions in Al Qur'an, Surat Al Baqarah verse 282 which states that two male witnesses should be witnessed, if there are no witnesses two men, the witness can do it with a man and two women.*

Keywords: *Sharia Financing Agreement, Sharia Banking, Notarial Deed*

Introduction

The rapid development of the business law sector has consequences for the need for the legal sector in this field to be reviewed, so that it remains up to date, in accordance with the times. Banking law regulating credit is known as credit law, of course, which regulates financial assistance through financial institutions is also known in the branch of business law whose name is financing law. Conventional institutions that are bank names, are apparently not effective enough to tackle various needs in the community. This is due to the limited scope of the bank's credit distribution, limited funding sources and the need to apply the principle of prudential nuances. Then look for forms of funders to help businesses or outside the business in the context of channeling funds (Nurhilmayah, 2019).

Islamic banking or Islamic banking is a banking system developed based on Islamic sharia (law). Efforts to establish this system are based on the prohibition in Islam to collect or borrow with interest or what is called usury as well as investment prohibition for businesses that are categorized as haram (for example: businesses related to the production of illicit food/drinks, un-Islamic media businesses and etc), where this cannot be guaranteed by the conventional banking system (Akhmad, 2016).

Today's society knows Islamic banking as a banking and financing service that provides services to customers with interest free. The issuance of Law Number 10 of 1998 concerning Amendment of Law Number 7 of 1992 concerning Banking and the issuance of a prohibited bank interest fatwa from the Indonesian Ulama Council (MUI) in 2003 caused many banks to implement sharia principles, both by converting the banking system from the conventional concept to syari'ah, or the opening of syari'ah branches by conventional banks.

In general, sharia banks are financial institutions whose principal business is providing financing and other services in the payment traffic and circulation of money operating in accordance with sharia principles (Osmad, 2012).

Financing based on sharia principles is the provision of money or claims equivalent to that based on an agreement or agreement between the Bank and another party and requires the financed party to return the money or claim after a certain period of time with compensation or profit sharing. The form of financing contained in Islamic banks has been determined in Article 1 number (25) of Law number 21 of 2008, which states that financing is the provision of funds or claims equivalent to that in the form of:

- (1) *profit-sharing transactions in the form of mudharabah and musyarakah;*
- (2) *lease transactions in the form of ijarah or lease purchases in the form of ijarah muntahiya bittamlik (IMBT);*
- (4) *sale and purchase transactions in the form of murabahah, salam and istishna receivables';*
- (5) *lending and borrowing transactions in the form of qardh receivables; and*
- (6) *service lease transactions in the form of ijarah for multi-service transactions based on agreements or agreements between Sharia Banks and / or Sharia Business Units (UUS) and other parties that require parties to be financed and / or given fund facilities to return the funds after the term certain time in exchange for ujarah, without reward, or profit sharing.*

The implementation of financing in Islamic banking is inseparable from the making of contracts with its customers or with agencies or institutions that work with it. The existence of a contract in the practice of Islamic banking financing indicates the need for legal certainty in order to protect the legal rights of the people and achieve a sense of justice.

Sharia agreements made between banks (Sharia Commercial Banks, Sharia Business Units and Sharia People Financing Banks) and customers may not contain terms and conditions that conflict with sharia principles. Besides that, in accordance with the principle of the treaty law, as stated in the Civil Code, an agreement must not conflict with the law. If the contents of an agreement are contrary to the law, the agreement is null and void. If an agreement or provision in the agreement

becomes null and void, the legal consequences are that the agreement or provision that contradicts the law is considered to never exist (Sutan, 2014).

Research Methods

This type of research used in this paper is library research. Library research means research that uses written documents as data, and data sources used in this study include primary and secondary legal materials. Primary legal material is legal material that is binding or that makes people obey the law, including legal products that are subject to study and legal products as a tool of criticism. Secondary legal materials include explanations of primary legal materials in the form of experts' doctrines found in books, journals, and websites (Rahmat, 2017).

Understanding Of The Contract

The language of the word comes from the Arabic contract that is *al-'aqdu* which is a jama 'from *al-'uqud*, which means binding or binding (*ar-rabth*). *Al-'aqdu is Ar-rabthu wa al-ikhaam wa at-taqwiyah* (binding, establishing, strengthening) in the Misbaah al-Muniir dictionary stated '*Aqadtu al-habla' aqd (an) fa (i) n 'aqada* (I bind rope with one bond so that it becomes bound). *Al-Uqdah* is what is bound and strengthened. So '*Aqdu* means *al-istiisyaq* (binding beliefs) and *As-syadd* (strengthening). (Salman) According to Wahbah Zuhaili, "*the language agreement comes from" al-aqdu "which means the bond (al-rabth) between the two ends, both real and meaningful."* (Wahbah, 2017).

From this understanding, it is then absorbed into the Indonesian language, so that the word *akad* has a synonym with the engagement, agreement and *pemufakatan*. According to the understanding of the term, the contract means: Agreement of consent (statement of binding) with *qabul* (statement of acceptance of the bond), in accordance with the will of the Shariah implication (law) on the object of the engagement (Tengku, 1997).

Ijab and *qabul* are intended to show that there is a mutual desire and willingness of the parties involved in the contract. Therefore, *Ijab* and *qabul* give rise to the rights and obligations of each party reciprocally. The inclusion of the word "*according to the will of sharia*" in the above definition, is not considered valid if it is not in accordance with the will or regulations set by the syar'ī (Allah and His Messenger), such as usury transactions (Fathurahman, 2003).

In *al-Mu'jam al-Wasith*, the word *al-'Aqdu* is a synonym of the word *al-'Ahdu* meaning agreement and *al-Ittifaq*, namely an agreement that occurs between two parties which both are required to do according to the agreement, such as a sale agreement buy and marriage (Ibrahim). It is said that the bond (*al-rabth*) means to gather or gather two ropes of rope and tie one of them to the other until they are joined together and become like a string (Gufraon, 2002).

The word *al-'aqdu* is explained by Allah in surah *al-Maidah* verse 1 which reads:

يَا أَيُّهَا الَّذِينَ آمَنُوا أَوْفُوا بِالْعُقُودِ ۖ أُحِلَّتْ لَكُمْ بَهِيمَةُ الْأَنْعَامِ إِلَّا مَا يُتْلَى عَلَيْكُمْ ۗ غَيْرَ مُجْلَى الصَّيِّدِ وَأَنْتُمْ حُرْمٌ ۗ إِنَّ اللَّهَ يَحْكُمُ مَا يُرِيدُ

“O You who believe! fulfill (your) obligations. lawful to You (for food) are All the beasts of cattle except that which will be announced to You (herein), game (also) being unlawful when You assume Ihrâm for Hajj or 'Umrah (pilgrimage). Verily, Allâh commands that which He wills”.

Muamalah fiqh distinguishes between *wa'ad* and akad. *Wa'ad* is a promise between one party to another party, while a akad is a contract between two parties. *Wa'ad* only binds one party, the party that promises to have the obligation to carry out its obligations. While the party given the promise does not bear any obligations to other parties. In *wa'ad*, the terms and conditions have not been specified in detail and specifically (well defined not yet). If the party who promises to not be able to fulfill their promises, the sanctions they receive are more moral sanctions. On the other hand, akad binds both parties who mutually agree, that is, each party is bound to carry out their respective obligations that have been agreed upon in advance. In the contract, if one or both parties bound in the contract cannot fulfill their obligations, then he/they receive sanctions as agreed in the contract (Novinawati, 2014).

Based on Article 20 number (1) of the Compilation of Sharia Economic Law (KHES), akad is an agreement in an agreement between two or more parties to do or not do certain legal actions. Meanwhile according to Article 1 number (13) of Law number 21 of 2008, a contract is a written agreement between a sharia bank or a Sharia Business Unit (UUS) and another party that contains the rights and obligations for each party in accordance with sharia principles.

If seen from the two terms of the contract above, the definition of the contract in the formulation of Article 20 number (1) KHES is still general in nature and has not yet determined the contract to be made in written or oral form, while the definition of the contract in the formulation of Article 1 number (13) of Law Number 21 of 2008 has firmly determined that the form of the contract must be made in writing.

The terms of agreement in the Sharia Economic Law Compilation (KHES) are regulated in Chapter III Part One Article 22 concerning the terms and conditions of the contract. The terms of agreement according to the KHES itself consist of:

1. Contracting parties; where the conditions of the parties themselves are regulated in Article 23. First, the parties to the agreement are individuals, groups of people, partnerships, or business entities; and secondly, people who have the intention to be capable of law, understanding and tamyiz.
2. Contract object; for the terms of the contract object regulated in the KHES consists of two conditions both of which are regulated in article 24. First, the contract object is the legal guardian or service that is required by each party; and secondly, the object of the contract must be sacred, beneficial, perfect possession, and transferable.

3. The main purpose of the contract; and for the purpose of the contract itself is to meet the needs of life and business development of each party that entered into the contract. This is based on the conditions governing it in KHES article 25.
 4. Deal; agreement here is often known as consent and kabul or sighat contract. This requirement is also regulated in KHES article 25 where the sighat agreement can be done clearly, both verbally, in writing and/or deeds.
- A contract is held to guarantee legal certainty. Legal certainty here includes certainty of objects, certainty of rights, and certainty of subjects in order to obtain and or provide legal protection (Faisal, 2018).

SHARIA FINANCING

Financing or financing is funding provided by one party to another party to support a planned investment, whether done alone or in an institution. In other words, financing is funding spent to support a planned investment. In a banking system with sharia principles the term credit changes to financing terms, this can be seen in Article 1 number 12 of Law Number 10 of 1998 concerning banking which states: Financing based on Sharia Principles is the provision of money or bills equivalent to that based on approval or an agreement between a bank and another party that requires the financed party to return the money or bill after a certain period of time in return or profit sharing.

Sharia financing is financing based on sharia principles, namely the provision of money or claims equivalent to that based on an agreement or agreement between the Bank and another party and requires the financed party to return the money or the bill after a certain period of time with compensation or profit sharing.

The form of financing contained in an Islamic bank has been determined in Article 1 number (25) of Law number 21 of 2008, which states that financing is the provision of funds or claims equivalent to that in the form of:

a. Profit sharing transactions in the form of mudharabah and musyarakah.

1) *Mudharabah is a collaboration between a fund owner or an investor with a capital manager to conduct certain businesses with profit sharing based on the ratio.*

2) *Musyarakah is cooperation between two or more people in terms of capital, skills, or trust in a particular business with profit sharing based on the ratio agreed upon by the parties in association.*

b. Leasing transactions in the form of ijarah or leasing in the form of ijarah muntahiya bittamlik (IMBT) is a lease agreement between the owner of the leased object (sharia bank) and the lessee (customer) to get compensation for the leased object object with the option to transfer ownership. rental object at a certain time in accordance with the agreement agreed at the beginning.

c. Buying and selling transactions in the form of murabahah, salam, and istishna receivables.

1) *Murabahah is a mutually beneficial financing carried out by shahib al-mal with a party in need through a sale and purchase transaction with the explanation that the procurement price of goods and selling prices have more value which is a profit or profit for shahib almal and the return is made in cash or installments.*

2) Salam is a contract of buying and selling ordered goods with advance payment according to certain conditions, or buying and selling an item to be delivered later with payment at the beginning.

3) Istishna 'is the sale of goods or services in the form of an order with certain criteria and conditions agreed between the customer and the seller.

d. Borrowing and lending transactions in the form of qardh receivables is the provision of funds or bills between Islamic financial institutions and the borrower which requires the borrower to make payments in cash or installments within a certain period.

e. Service lease transactions in the form of ijarah for multi-service transactions. based on an agreement or agreement between a Sharia Bank and/or UUS and other parties that require the party to be funded and/or given fund facilities to return the funds after a certain period in exchange for ujah, without compensation, or profit sharing.

Financing Agreement On Sharia Banking In The Form Of Notary Deed

In legal juridical terms, sharia financing contracts at sharia banks must be made in written form between sharia banks and customers and not verbally confirmed. These provisions are concluded from Article 1 number (13) of Law number 21 of 2008, which states that a contract is a written agreement between a Sharia Bank or UUS and other parties that contain rights and obligations for each party in accordance with Sharia Principles. This article only requires that contracts in Islamic banking must be written, but do not require certain forms. The order to make the Islamic financing agreement in Islamic banks in writing is in accordance with Q.S: Al-Baqarah paragraph 282 which states:

يَا أَيُّهَا الَّذِينَ آمَنُوا إِذَا تَدَايَنْتُمْ بِدَيْنٍ إِلَىٰ أَجَلٍ مُّسَمًّى فَاكْتُبُوهُ ۚ وَلْيَكْتُب بَيْنَكُمْ كَاتِبٌ بِالْعَدْلِ وَلَا يَأْبَ كَاتِبٌ أَنْ يَكْتُبَ كَمَا عَلَّمَهُ اللَّهُ فَلْيَكْتُبْ وَلْيُمْلِلِ الَّذِي عَلَيْهِ الْحَقُّ وَلْيَتَّقِ اللَّهَ رَبَّهُ وَلَا بِيحْسٍ مِنْهُ شَيْئًا فَإِنْ كَانَ الَّذِي عَلَيْهِ الْحَقُّ سَفِيهًا أَوْ ضَعِيفًا أَوْ لَا يَسْتَطِيعُ أَنْ يُمْلِعَ هُوَ فَلْيُمْلِلْ وَلِيُّهُ بِالْعَدْلِ ۚ وَاسْتَشْهِدُوا شَهِيدَيْنِ مِنْ رِجَالِكُمْ فَإِنْ لَمْ يَكُونَا رَجُلَيْنِ فَرَجُلٌ وَامْرَأَتَانِ مِمَّنْ تَرْضَوْنَ مِنَ الشُّهَدَاءِ أَنْ تَضِلَّ إِحْدَاهُمَا فَتُذَكِّرَ إِحْدَاهُمَا الْأُخْرَىٰ وَلَا يَأْبَ الشُّهَدَاءُ إِذَا مَا دُعُوا ۗ وَلَا تَسْمُوا أَنْ تَكْتُبُوهُ صَغِيرًا أَوْ كَبِيرًا إِلَىٰ أَجَلٍ ۚ ذَلِكُمْ أَقْسَطُ عِنْدَ اللَّهِ وَأَقْوَمٌ لِلشَّهَادَةِ وَأَدْنَىٰ أَلَّا تَرْتَابُوا ۗ إِلَّا أَنْ تَكُونَ تِجَارَةً حَاضِرَةً تُدِيرُونَهَا بَيْنَكُمْ فَلَيْسَ عَلَيْكُمْ جُنَاحٌ أَلَّا تَكْتُبُوهَا ۗ وَأَشْهِدُوا إِذَا تَبَايَعْتُمْ ۗ وَلَا يُضَارَّ كَاتِبٌ وَلَا شَهِيدٌ ۗ وَإِنْ تَعَلُّوا فَإِنَّهُ فُسُوقٌ بِكُمْ ۗ وَاتَّقُوا اللَّهَ ۗ وَيُعَلِّمُكُمُ اللَّهُ ۗ وَاللَّهُ بِكُلِّ شَيْءٍ عَلِيمٌ

Terjemahan

“O You who believe! when You contract a debt for a fixed period, write it down. let a scribe write it down In justice between you. let not the scribe refuse to write as Allâh has taught him, so let Him write. let Him (the debtor) who incurs the liability

dictate, and He must fear Allâh, his Lord, and diminish not anything of what He owes. but if the debtor is of poor understanding, or weak, or is unable himself to dictate, Then let his guardian dictate In justice. and get two witnesses out of Your own men. and if there are not two men (available), Then a man and two women, such as You agree for witnesses, so that if one of them (two women) errs, the other can remind her. and the witnesses should not refuse when they are called on (for evidence). You should not become weary to write it (your contract), whether it be small or big, for its fixed term, that is more just with Allâh; more solid as evidence, and more convenient to prevent doubts among yourselves, save when it is a present trade which You carry out on the spot among yourselves, Then there is no sin on You if You do not write it down. but take witnesses whenever You make a commercial contract. let neither scribe nor witness suffer any harm, but if You do (such harm), it would be wickedness In you. so be afraid of Allâh; and Allâh teaches you. and Allâh is the All-Knower of each and everything.”

The written form of the Islamic financing agreement in this Islamic bank can be made in the form of a notarial deed or a deed under the hand. Notary deed is a deed made by a public official, in this case the authorized notary public that contains or describes authentically an action taken or a condition that is seen or witnessed by the public official making the deed. An underhand deed is a deed drawn up and signed by the parties without being made before an authorized official or notary.

In practice, Islamic finance contracts in Islamic banks are generally made in the form of notary deeds, the purpose of which is to provide legal certainty and legal protection for the legal relationships created between Islamic banks and their customers. This notarial deed also functions as evidence about a legal event. In connection with the foregoing, the deed making must be such that what is desired to be proven can be known easily from the deed that has been made.

Notarial deed is an authentic deed which was originally deliberately formally made by a Notary for proof. From the beginning it deliberately meant that from the very beginning the letter was intended for proof in the future if a dispute occurred. Officially said because it was not made under the hand. Whereas dogmatically according to Article 1868 of the Civil Code (Civil Code) an authentic deed is a deed in the form determined by the law (*welke in de wettelijke*) and made by or in the presence of public officials (officials) (*door of ten*) *overstaan van openbare ambtenaren*) in power (*daartoe bevoegd*) at the place where the deed was made.

Notary Public is a public official whose duties and authority are regulated in the Law of the Republic of Indonesia Number 30 of 2004 concerning Notary Position in conjunction with Law Number 2 of 2014 concerning Amendment to Law Number 30 of 2004 concerning Notary Position (Law Number 2 of 2014). Based on the provisions of the legislation, a notary is a public official authorized to make an authentic deed to the extent that the making of a particular authentic deed is not specific to other public officials. Making an authentic deed is required by legislation in order to create certainty, order and legal protection. In addition, authentic deed made by or before a notary, not only because it is required by legislation, but also because it is desired by the parties concerned to ensure the

rights and obligations of the parties for the sake of certainty, order and legal protection for the parties concerned at the same time for society as a whole.

The practice of making sharia financing contracts in the form of notarial deeds has so far been based on positive law, namely the Law of Notary Position, because there are no specific regulations governing the form and content of sharia deeds or sharia deed (contract) clauses made in the form of deeds. Notary Public (Pandam, 2018). In addition, related to the issue of guarantees and guarantee institutions, sharia financing in Indonesia is not or has not been based on sharia principles. The use of conventional collateral institutions such as mortgage and fiduciary rights is still an option for Islamic banks.

Bearing in mind that sharia guarantees are not regulated in Law Number 10 of 1998 Concerning Amendments to Law Number 7 of 1992 Concerning Banking (Act No. 10 of 1998), Law Number 21 of 2008, Bank Indonesia Regulations (PBI), and Bank Indonesia Circular Letters (SBI), in fact commercial banks (through UUS) that provide financing based on sharia and Islamic banks that provide syariah financing continue to apply conventional guarantees. In legal jurisdiction, financing activities based on sharia do not conflict with the law, but if analyzed further raises problems in the context of sharia itself. In the context of sharia, sharia financing (which is a contract and is part of the sharia agreement) must be linked to sharia collateral. Accordingly, financing based on sharia in sharia banking but not applying sharia guarantees is an action that is contrary to sharia principles. This issue needs to be immediately resolved (noor, 2012).

Another thing is also about the notary who made the Islamic financing contract. According to the Law, even though Sharia Bank products are based on Islamic law, the agreement / contract can be made by a notary who is not Muslim. So it needs to be investigated how the validity of the contract according to Islamic law.

In Islamic law, although not specifically explained about the provisions of the position of Notary, but there are verses in the Koran that are general as the basis of Islamic law regarding the role of the Notary. The verse is contained in QS Al-Baqarah verse: 282, which states "*and let a writer among you write it fairly*" that verse is implemented as a Notary's authority in making an authentic deed related to an agreement involving two parties.

In the Islamic world, Abu Hanifa and his students were the first to develop the notarial field. Islam first came to know the term notary, shari'ah notary originated in the Al-Qur'an and Al-Hadith in addition to the fatwas and ijthihad of the scholars, in contrast to the notary that exists now, the source of the law is from the West (Linggar, 2017). In addition, the ability of a notary who is not a Muslim in the making of an Islamic financing contract is questionable. Because the Notary who formulates the Sharia financing contract must pay attention to the harmony and legal terms of the contract, as determined in Islamic Sharia. The notary must also pay attention to the clauses listed in each article of the sharia contract to ensure whether or not it is in accordance with sharia contract law.

Furthermore, specifically related to witnesses in making the deed, the notary requires witnesses in the deeds he made. The regulation of witnesses in positive law in Indonesia is different from Islamic law. Testimony in positive law in Indonesia only regulates technical matters, the number of witnesses is at least two people and

the rights of anyone who can be a witness and the obligation to be a witness but is not specifically regulated regarding the position of witnesses between men and women. While the testimony in the agreement according to Islamic law must pay attention to the provisions in Al Quran Surat Al Baqarah verse 282 which states that two male witnesses must be witnessed, if there are no witnesses of two men, then the witness can be with a man and two woman.

Conclusion

From some of the descriptions that the author has described above it can be seen that:

- a. The form of financing contained in an Islamic bank is the provision of funds or claims equivalent to that of: (1) profit-sharing transactions in the form of mudharabah and musyarakah; (2) lease transactions in the form of ijarah or lease purchases in the form of ijarah muntahiya bittamlik (IMBT); (4) sale and purchase transactions in the form of murabahah, salam and istishna receivables'; (5) lending and borrowing transactions in the form of qardh receivables; and (6) service lease transactions in the form of ijarah for multi-service transactions based on agreements or agreements between Sharia Banks and / or UUS and other parties that require the parties to be financed and/or given fund facilities to return the funds after a certain period of time in return ujah, without reward, or profit sharing.
- b. In practice, Islamic finance contracts in Islamic banks are generally made in the form of notary deeds, the purpose of which is to provide legal certainty and legal protection for the legal relationships created between Islamic banks and their customers. This notarial deed also functions as evidence about a legal event.
- c. The practice of making sharia financing contracts in the form of notarial deeds has so far been based on positive law, namely the Law of Notary Position, because there are no specific regulations governing the form and content of sharia deeds or sharia deed (contract) clauses made in the form of deeds. notary, related to the issue of guarantees and guarantee institutions, in sharia financing in Indonesia still uses conventional guarantee institutions such as mortgage and fiduciary rights not yet based on sharia guarantees, even though Islamic Bank products are based on Islamic law, but for agreements/contracts it can be made by a notary who is not a Muslim so it needs to be examined how the validity of the contract according to Islamic law, specifically the relationship with witnesses in making a notarial deed in positive law in Indonesia is different from Islamic law, testimony in positive law in Indonesia only regulates the technical matters, the number of witnesses at least two people and h the rights of anyone who may be a witness and the obligation to be a witness but it is not specifically regulated regarding the position of male and female witnesses, whereas testimony in an agreement according to Islamic law must pay attention to the provisions in Al Quran Surat Al Baqarah verse 282 which states that *“let witnessed by two male witnesses, if there are no witnesses of two male witnesses, then the witness can be with a male and two female witnesses”*.

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