

Legal Problems In Implementation Deed Of *Murobahah* Agreement Execution Mortgage At Bank *Shariah* Mandiri

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Abstract. Bank of Shariah as a new financial institution that emerged much later than conventional banks, in its operations will face various problems it is a challenge for Islamic banks.

The purpose of this study was to determine the know: 1) the development of Islamic Agreement made in the form UUJN Deed in accordance with the terms of both form and substance; (2) The assurance certificate and the legal protection of the parties to the deed; (3) The obstacles in the execution of the security rights at Bank *Shariah* Mandiri.

The method used is a problem with juridical sociological approach, specification using descriptive analytical research, collecting data from field studies and literature, technical data analysis with qualitative descriptive.

The final conclusion is that: 1) In the Islamic banking, notary is authorized to make a warranty deed in *Murabahah* financing agreement, made in the form of the Deed of Acknowledgment of Debt with the Provision of Security and Authorization to Sell. Inside the deed in addition to providing power to sell the bank if the debtor defaults, the bank is also given the power to take care of the land certificate, if the certificate has been completed debtor authorizes the bank to install Deed Mortgage Encumbrances rights to the land. 2) Certainty *Murobahah* Deed and Legal protection against the parties in the government as the deed *Murobahah* is organizing institutions of governance, particularly the shade of a notary office is required to provide insight to improve contract-related notary *Shariah* in particular, through training contract manufacturing of *Shariah*, or seminars to improve Notary services to the community for the better and the maximum. 3) The resistance that occurs is the debtor convoluted in negotiations to resolve the security rights, the incompatibility of the price of the auction conducted by the debtor and the latter is the resistance efforts of the debtor law that pursue a lawsuit to the District Court.

Keywords : *Murobahah* Agreement; Execution Mortgage; Bank *Shariah* Mandiri.

1. Introduction

Murabahah is the most dominant scheme in the practice of Islamic banking, compared with other Islamic contract products. Because the products *Murabahah*, the bank as intermediary agencies should follow the principle of prudential bank (prudential) can be implemented effectively and efficiently so that the risk of loss can be minimized.

Al-Murabahah financing (buying and selling) in the banking practice in the banking system there is only formal judicial *Shariah*. Secara, where Islamic banks have been recognized in the law system of the Republic of Indonesia, including the presence of Islamic *Shariah* Financing Bank. In Article 1 point 3 and 4, of Act No. 10 of 1998 on the amendment of Act No. 7 of 1992 concerning Banking (hereinafter referred to as the Banking Act), stated that the law divided the banks into two kinds, ie commercial banks and bank *Shariah* Mandiri.³

This provision was reinforced by the release of Act No. 21 of 2008 concerning Islamic

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³Muhammad Syafi'i Antonio, 2001, *Bank Syariah dari Teori ke Praktik*, Gema Insani, Jakarta, p. 85.

Banking, which mentions "Islamic Bank is Bank running their business based on *Shariah* Principles and by type consisting of Islamic Banks and Islamic *Shariah* Financing Bank. This law also changed the term Bank *Shariah* Mandiri *Shariah* into *Shariah* Islamic Financing Bank." *Shariah* Islamic Financing Bank is the Islamic Banking activities do not provide services in payment traffic.⁴

Notary is one important element in any operational banking transactions, especially in the manufacture of the deed of guarantee credit / financing, letter of acknowledgment of debt, grosse deed, legalization and waarmeding, and other duties of a notary who has been governed by legislation. The government wants Notary as public officials, appointed and dismissed by the government (the Minister),⁵ and is authorized and regulated in liability legislation.⁶

In the development of today's society Notary also make the deed in the field of Islamic banking and it is a new thing, which also accommodates the interests of *Shariah* or religious value then there are things that are not normally that should be included which will possibly change some of the format that has been set in Article 38 UUJN-P, for example, there is a Notary include lafadz Bismillahhirrohmanirrohim⁷ at the beginning of the deed after deed number, but there is also a Notary include the Bismillahhirrohmanirrohim lafadz into Premise. It is a lot of debate among reap the Notary itself and society in general. In addition, there is also the essence of sync in the manufacture of *Shariah* Agreement which in this case but the customer calls for financing when the contract entered on the contents then turned into a debt recognition. Then this will make *Shariah* Agreement Notary vulnerable to lawsuits by parties who are not responsible.

However, in the literature of Islamic law, the notion of selling as stipulated in the Civil Code, in the form of Islamic jurisprudence and the type is divided:⁸

- *Bai` Al-Murabahah* (Deferred Payment Sale), forms of buying and selling goods on the original price with the added advantage that is agreed upon.
- *Bai` As-Salam* (In Front Payment Sale), namely the purchase of the goods delivered in the future, while the payment is made in advance.
- *Bai` Al-Istishna* (Purchase By Order or Manufacture), which is a form of contract of sale between the buyer and the manufacturer of goods.

In the practice of the Islamic banking system issued by Bank Indonesia that is done is the largest financing *Murabahah*. According to some books of *fiqh*, *Murabahah* is one of the forms of trading that is trustworthy. *Murabahah* executed between the seller and the buyer based on the prices of goods, the original purchase price the seller known by the buyer and seller benefit was notified to the buyer.⁹ Based on this background was appointed entitled: "Legal Problems in the Implementation Deed of *Murobahah* Agreement Execution Mortgage Bank *Shariah* Mandiri.

This study sought to answer the problem of Agreement manufacture *Murobahah* made in the form of Deed is in conformity with UUJN in terms of both form and substance, the Deed of *Murobahah* Agreement certainty and legal protection of the parties in the Deed *Murobahah* and constraints and solutions in the execution of the security rights at Bank *Shariah* Mandiri.

⁴See Article 1 of Act No. 21 of 2008 concerning Islamic Banking.

⁵ Act No. 2 of 2014 on Amendment Act No. 30 of 2004 concerning Notary.

⁶ Ibid, Article 15 and Article 16

⁷Burhanuddin S., 2009, *Hukum Kontrak Syariah*, BPFE, Yogyakarta, p. 190.

⁸Muhammad Syafi'i Antonio, 2001, *Bank Syariah Dari Teori Ke Praktik*, Gema Insani, Jakarta, p. 85.

⁹<http://www.bi.go.id> accessed on January 4, 2011.

Research methods

The research is a normative research, whereas the approach the authors use juridical approach. Object of this research is legal certainty *Shariah* Agreement made in the form of Deed in terms of Act No. 2 of 2014 Amendment to Act No. 30 of 2004 regarding Notary Position. This research is a descriptive study. According Soerjono Soekanto¹⁰ Descriptive research is research that is intended to give the data as clear as possible about the people, circumstances or other symptoms.

2. Results and Discussion

3.1. *Murobahah* Agreement of manufacture made in the form of Deed in Bank *Shariah* Mandiri

Provision Article 1 Regulation Notary Stb. 1860 No. 3 and Article 15 of Act No. 30 of 2004 concerning Notary states that the notary is authorized to make an authentic deed regarding all actions, agreements and determination are required by any legislation and / or by the interest expressed in a desire for authentic deeds, ensure certainty the date, save the deed and give grosse, copies and excerpts, all along the deed was by a general rule not also be assigned or excluded to the officer or others that have been established by legislation.

In the banking world as well do the same thing. Notary authorized as a public official to make an authentic deed as required bank and its customers. In the People's Bank *Shariah* Financing, to finance *Murabahah*, upon request of the bank and the debtor, the notary makes the Deed of Sale and Purchase *Murabahah* Agreement. Additionally notary deed recognition also makes the debt. Certified against the land has not been used as collateral on loans granted *Murabahah* financing, notary a deed called Deed of Acknowledgment of Obligation, Warranty and Power Seller Giving between banks and debtors who have the power executorial if the debtor defaults. This is the power of attorney to sell the accessoir agreement that depend on an agreement in principal, The parties, init is the banks as lenders and borrowers as the debtor can request legal advice on the notary of the binding agreement or they would make and would diconstatir deed, either before, during, or after the notary deed is signed. In practice, in Islamic Bank, usually consult or ask for legal advice on the notary is the assurance given by the debtor in a financing request submitted to the bank, for example, regarding the validity of the letters submitted debtor, although not closed possibility to ask advice on notary on matters or other issues faced by the bank, particularly in relation to the law, such as those relating to inheritance, grants, and others.¹¹

In the process of binding warranty deed performed by a notary, usually only bank that consults a notary public, especially regarding the validity of the guarantee submitted by the debtor. This is because the debtor submitted all affairs relating to the financing request to the bank. Debtor is generally not concerned about the requirements of the proposed Islamic Bank as creditor because their main goal to obtain financing from the bank, so any requirements requested by the bank approved by the debtor and the submission submitted to the bank, including the maintenance of letter- necessary paperwork role in the financing agreement.

3.2. Deed certainty *Murobahah* and Legal Protection of the Parties to the

¹⁰Soerjono Soekanto, 2010, *Pengantar Penelitian Hukum*, UI Press, Jakarta, p. 21.

¹¹ Results of interviews with Notary Bachruddin Hardigaluh, SH, on January 3, 2011.

Murobahah Deed Agreement.

2.2.1. Agreement mismatches due Deed format

One form of potential exploration from the community's contribution to the national economy is the development of an economic system based on the Islamic (*Shariah*) by lifting its principles into the national law system. Islamic principles based on the values of fairness, expediency, balance and universality (*rahmatan lil 'alamin*). These values are applied in banking regulation that is based on *Shariah* principles called *Shariah* banking.¹²

Deed authentic Notary either the command of the legislation nor the will of the parties, a Notary in deed should stick to UUJN-P, in particular on Article 38, as follows:

- Notary deed consists of:
 - Early deed or deed head;
 - Agency deed; and
 - End or closing the deed.
- Early deed or deed head load;
 - Title deed;
 - Deed number;
 - Hour, day, date, month and year; and
 - Full name and domicile of the Notary.
- Loading Deed Agency:
 - Full name, place and date of birth, nationality, occupation, position, position, place of residence the applicant, and / or the people they represent;
 - Information about the position of acting applicant;
 - The contents of the deed which is the will and desire of the interested parties; and
 - Full name, place and date of each witness identification.
- End or closing the deed contain:
 - A description of the reading of the deed referred to in Article 16 paragraph (1) letter m or Article 16 (7);
 - The description of the signing and the signing of the deed or translator if any;
 - Full name, place and date of birth, occupation, position, status, and place of residence of each witness deed; and
 - The description of the absence of changes that can be an addition, deletion, or replacement and the number of amendments.

Article 38 UUJN-P has set out clear format that should be followed and implemented by a Notary in deed authentic, whether the contract *Shariah* or deed that is not based on *Shariah*, but in practice there are still cases of a Notary in making the contract *Shariah* does not correspond to what that already mandated by Article 38 UUJN-P, there are contract *Shariah* before the title has carried an article Bismillahhirrohmanirrohim with, and their meaning are written in Arabic, namely *Murabahah* No. 07, it is already clear certainly violate the rules UUJN-P notably Article 38. However, there are also notaries who do not have the words Bismillahhirrohmanrrihim, and there is also included into the premise, it is legitimate because it does not violate the rules UUJN-P.

Loading Lafadh Bismillahhirrohmanirrohim into *Shariah* contract no law that set it either in Islamic law and positive law, so should the Notary may choose not to include lafadh Bismillahhirrohmanirrohim into *Shariah* contract to comply with the provisions of Article 38 UUJN-P. In the absence of regulations governing such cases, the Notary can

¹² Explanation Chapter preamble Act No. 21 of 2008 concerning Islamic Banking.

homogenize the contract form of *Shariah* and *Shariah* agree that the contract still be made in accordance with the rules contained in UUJN-P in particular in Article 38. Inconsistency or difference in the contract manufacture of *Shariah* in particular the laying of *lafadh Bismillahirrohmanirrohim* into this deed makes no legal certainty for the parties to make *Shariah* contract which included *lafadh Bismillahirrohmanirrohim* on notary, so that the deed made no longer an authentic deed. So that this can all be used by elements who are not responsible, which elements from the beginning has been to know the weakness of *Shariah* contract that outlines the *lafadh Bismillahirrohmanirrohim*, this is very detrimental to the Notary itself and the parties to make the *Shariah* contract.

Shariah contract arrangements contained in the Islamic Banking Act Article 1 paragraph 13, which reads:¹³

"Agreement is a written agreement between *Shariah* Bank or *Shariah* and others that contain the rights and obligations of each party in accordance with Islamic principles"

While *Shariah* itself is described in Article 1 paragraph 12, which reads:

"*Shariah* is Islamic law principles in banking activities by the *fatwa* issued by the institution that has the authority in setting the *fatwa* in the field of sharia".

With the explanation of Islamic Banking Act regarding the contract and *Shariah* principles, there is no explanation or *Shariah* provisions of that agreement made in the form of notarial deed should contain or be preceded *lafadh Bismillahirrohmanirrohim* before the beginning of the deed. Conditions *Fatwa* also none that regulations that *lafadh Bismillahirrohmanirrohim* placed before the beginning of the deed.

2.2.2. Agreement Deed mismatches due to substance addition in terms of the format that must be considered in making

In contract *Shariah* is made in the form of notarial deed is *Murabahah*, in substance there unmatch with the provisions of Islamic principles, because the premise of the parties has willed their facilities *Murabahah* financing, but when the contract has been entered into the content contained chapter entitled "recognition debt and Goods Delivery Guarantee", as we know that the premise mengehndaki facility *Murabahah* financing, but go into the contents into a debt acknowledgment, it is clearly contrary to the National *Shariah* Board *Fatwa* No. 04 / DSN-MUI / IV / 2000 on *Murabahah*, because of the *Fatwa* section of the general provisions of the fourth section describes:

- In principle, the debt settlement clients in *Murabahah* transactions not related to other transactions conducted by a third-party customers on the goods. If the customer resells the goods with gains or losses, he remains obliged to settle its debt to the bank;
- If customer sells the goods before mas installment ends, he is not obliged to immediately pay the entire his credit;
- If the sale of goods are causing harm, the customer still must settle the debt according to the agreement early. He should not slow the installment payment or ask for damages is taken into account "

Based on the explanation National *Shariah* Board *Fatwa* mentioned above, that the provisions of the *fatwa* section of the general provisions of the fourth part of the debt in the *Murabahah* is not a recognition of the debt set forth in the financing *Murabahah* Agreement, it must be stated in the contract of its own as stipulated in the *fatwa* cited above in chapter general provisions the first section number 8 (eight), namely: to

¹³ See Article 1 point 13 of Act No. 21 of 2008 concerning Islamic Banking.

prevent tampering or damage to the contract, the bank may enter into a special agreement.

So Notary if making such contract shall make two certificates, the first agreement purchase goods *Murabahah*, a second agreement to repay debts to the bank purchases. The consideration, it would not hurt for *asabah*, notary or banking, if *Murabahah* made in two certificates, the first contract is *Murabahah*, *Murabahah* it as a clause, as the basis for legalizing debts in *Shariah* Bank through *Murabahah*, such as *Murabahah* financing, customers ask for financing to the banks of the cars, and the bank approves the customer demand with the price of the car is Rp. 100,000,000 (one hundred million), and the bank took advantage Rp. 20,000,000 (twenty million rupiahs), therefore the customer pays one unit at a price of Rp. 120,000,000 (one hundred and twenty million rupiah) so *Murabahah* finished, and the second is to make the deed of covenant debts, debts here had nothing to do with *Murabahah*, where the contents of the agreement in debts apply for a loan for the purchase of a car for the price of the car to be purchased, this is more save and not deceptive. And if *Murabahah* Notary is contrary to the DSN then the contract is contrary to the principles of the *Shariah* as MUI give a *fatwa*, that the products of Islamic banks is justified and *Shariah* compliance is such as *Murabahah* and Islamic banking must pay attention DSN on *Murabahah*, where the content of the agreement which debts apply for a loan for the purchase of one unit for the price of car to buy, it is more save and not deceptive. And if *Murabahah* Notary is contrary to the DSN then the contract is contrary to the principles of the *Shariah* as MUI give a *fatwa*, that the products of Islamic banks is justified and *Shariah* compliance is such as *Murabahah* and Islamic banking must pay attention DSN on *Murabahah*, where the content of the agreement which debts apply for a loan for the purchase of one unit for the price of car to buy, it is more save and not deceptive. And if *Murabahah* agreement in Notary is contrary to the DSN then the contract is contrary to the principles of the *Shariah* as MUI give a *fatwa*, that the products of Islamic banks is justified and *Shariah* compliance is such as *Murabahah* and Islamic banking must pay attention DSN on *Murabahah* agreement.

3.3. Obstacles and Solutions in Implementation of Execution Mortgage Bank *Shariah* Mandiri

The obstacles that arise in the execution of mortgage, according to the author is a legal constraint that has predictable previous by the bank as a creditor, given these constraints constitute a legal event that has never happened before in a process of mortgage execution, so that according to the author of the banks as creditors should have been able to take steps in anticipation that this problem can be minimized likely to occur. The bottleneck is the debtor convoluted in negotiations to resolve the security rights, the incompatibility of the price of the auction conducted by the debtor and the latter is the resistance efforts of the debtor law that pursue a lawsuit to the District Court.

The solution to overcome this is to prepare everything related to the binding credit carefully, thorough and complete as banking procedures and comply with the legislation in force, thus making the credit agreement which was followed by the imposition of a guarantee with mortgage does not deform the law so can form the strong evidence. In addition to the tub must also be careful to carry out an assessment of the amount of the guarantee is borne by the security rights, in order to process the petition filed civ amount of debt to be executed is not a legal problem in the future that can be used as a reason to fight. Other solutions in the implementation of

auctions, should assessment of collateral object made objectively by an independent agency and professional appraiser in accordance with the market price, so it is not detrimental to the debtor. The auction should be open, free of collusion, corruption and nepotism.

The creditor or bank receiving an assurance an immovable such as land should first undertake a careful assessment. In the sense of whether the object of the guarantee has an economic value and the sale value, so that if executed could attract public interest to be bidders, given the assurance that the object does not have a sale value would be difficult to be auctioned corruption and nepotism. The creditor or bank receiving an assurance an immovable such as land should first undertake a careful assessment. in the sense of whether the object of the guarantee has an economic value and the sale value, so that if executed could attract public interest to be bidders, given the assurance that the object does not have a sale value would be difficult to be auctioned. corruption and nepotism. The creditor or bank receiving an assurance an immovable such as land should first undertake a careful assessment. In the sense of whether the object of the guarantee has an economic value and the sale value, so that if executed could attract public interest to be bidders, given the assurance that the object does not have a sale value would be difficult to be auctioned.

3. Closing

3.1. Conclusion

- Manufacture *Murobahah* Agreement on Notary at Bank *Shariah* Mandiri In accordance with its authority to make authentic deeds, notaries authorized to make a warranty deed in the financing *Murabahah* Agreement, which is made in the form of the Deed of Acknowledgment of Debt with the Provision of Security and Authorization to Sell, in accordance with the agreement made by the parties pursuant to Article 1320 and Article 1338 of the Civil Code. Inside the deed in addition to providing power to sell the bank if the debtor defaults, the bank is also given the power to take care of the land certificate, if the certificate has been completed debtor authorizes the bank to install Deed Mortgage Encumbrances rights to the land.
- *Murobahah* Deed certainty and protection of the Law on parties in the government as the deed *Murobahah* is organizing institutions of governance, particularly the shade of a notary office is required to increase gives understanding to the relevant notarial contract shari'a in particular, through training contract manufacturing of *Shariah*, or seminars to improve Notary services to the community for the better and the maximum. And if necessary, the government formed other than the Notary office specialized in contract manufacturing of *Shariah*, the Islamic Agreement Officer (PPAS).
- Obstacles and solutions in the execution of Mortgage Bank *Shariah* Mandiri is happening in the completion Execution Mortgage at Bank *Shariah* Mandiri is a debtor convoluted in negotiations to resolve the security rights, the incompatibility of the price of the auction conducted by the debtor and the latter is their resistance efforts of the debtor law that pursue a lawsuit to the District Court. Solutions that can be done is to be no object field Security checks, as well as a letter of agreement emptying made encumbrance place early agreement.

3.2. Suggestions

- for Notary
Should a notary in carrying out his duties as an authorized officer to make an authentic deed, the notary must always uphold the principle of prudence in issuing each aktanya.
- for the Community
Should be more careful and critical Notary deed made, particularly the contract manufacturing of *Shariah*, should really pay attention to the content of the contract is made.
- For the Parties,
That the parties when melakukan perjanjian to more thoroughly and carefully prior to signing the agreement.

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