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Reposition of Notaries in Guaranteing Sharia Compliance in Mudharabah Financing Deeds

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Abstract. *The repositioning of notaries in mudharabah financing deeds places them as strategic actors in ensuring Sharia compliance and legal certainty. This study aims to analyze the position and repositioning of notaries in the mudharabah deed creation process, the Sharia compliance monitoring mechanism, and the role of notaries in enhancing transparency and integrity in Islamic financial institutions. The research method uses a qualitative, normative-juridical approach, incorporating literature studies, DSN-MUI fatwas, relevant laws, and academic references and Sharia law journals. Data collection involves reviewing literature or secondary data, including primary, secondary, and tertiary legal materials. The research findings indicate that repositioning notaries encompasses not only the creation of authentic deeds, but also Sharia due diligence, collaboration with the Sharia Supervisory Board (SSB), education of relevant parties, and adaptation to innovative digital-based Sharia financing products. Notaries act as mediators between positive law and Sharia principles, ensuring that mudharabah deeds are legally valid and in accordance with Sharia principles. This research recommends improving notary competency through Sharia training, active collaboration with the SSB, and the implementation of internal governance standards for Sharia financial institutions to strengthen Sharia compliance and prevent legal disputes.*

***Keywords**: Compliance; Mudharabah; Notary; Repositioning.*

1. Introduction

As a public official authorized to draw up deeds, a notary is inextricably linked to the practices of Islamic banking transactions. This is because every financing transaction between a bank and its customers is implemented in the form of an agreement (akad), which can be drawn up either authentically or underhand. Therefore, the role of a notary is inseparable from Islamic banking activities as long as it relates to establishing and constituting agreements (akad) into authentic deeds, which is done to ensure the legal certainty of the agreements (akad) made.

The authority of a Notary to make an Authentic Deed is obtained from Law

Number 30 of 2004 concerning the Position of Notary as amended by Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary (UUJN), which explicitly regulates the duties of his position, based on Article 1 paragraph (7) of the UUJN, a deed made before or by a Notary is considered an Authentic deed.[1]

Furthermore, to carry out legal actions in the context of financing within the Islamic banking practice area, a thorough understanding of Islamic economics is required. A comprehensive understanding is essential when drafting agreements (akad) in Islamic banking, as the primary basis for drafting sharia deeds.

The implementation of Islamic Banking in Indonesia has begun since the enactment of Law Number 10 of 1998 concerning Banking, namely November 10, 1998. In Article 1 number 12 of the Law began to introduce financing according to Islamic principles. Provisions regarding Islamic Banking were further strengthened, when Law No. 21 of 2008 concerning Islamic Banking (UUPS) came into effect. The purpose of establishing Islamic banking as regulated in Article 3 of the UUPS is to increase justice, solidarity and equalize prosperity. This goal is in accordance with the Indonesian economic system regulated in Article 33 paragraph (4) of the 1945 Constitution, namely an economic system organized based on economic democracy with the principles of togetherness, fair efficiency, sustainability, environmental awareness, independence, Contracts in Islamic banking must use Islamic principles and agreements must be written.[2]

An agreement that contains a transaction is considered valid if it meets the requirements of Article 1320 of the Civil Code, both in the form of an authentic deed and in a private form. If the agreement concerns a sharia transaction between a sharia bank and a customer, then Article 1320 of the Civil Code which requires the validity of the agreement is considered insufficient, but the agreement must follow other requirements of Islamic law, in the sense that the agreement must fulfill its pillars and conditions and the agreement does not contain elements of usury, maisir, gharar, haram, and zalim as regulated in Law No. 21/2008.

Islamic bank financing to customers as a business activity of Islamic banks is a legal relationship between Islamic banks and customers that must be written down in a contract based on Article 1 Number 13 of Law No. 21/2008. Regarding the substance of the contract, it contains the rights and obligations of the parties that do not conflict with sharia principles. Therefore, if the parties who agree want the contract in the form of a notarial deed, the Notary needs to pay close attention so that the deed to be formalized does not deviate in substance from the law and/or

[1]Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary (UUJN)

[2]Ro'fah Setyowati, "Notary in Islamic Banking Disputes", Journal of Legal Issues, Volume 45 Number 2, 2016, Page 135

Islamic law.[3]

Banking activities based on sharia principles were previously regulated by Law Number 7 of 1992, which was later amended by Law Number 10 of 1998 concerning Banking. However, in the (conventional) Banking Law, sharia principles are still not specifically regulated and do not accommodate the operational characteristics of sharia banking. Likewise, the definition in the Sharia Banking Law differs from that in the (conventional) Banking Law. The Sharia Banking Law defines sharia principles as Islamic law in banking activities based on fatwas issued by institutions authorized to issue fatwas in the sharia field.

Banks, as financial institutions, utilize notary legal services for all business agreements, such as financing agreements and credit agreements, including supplementary agreements regarding collateral binding. Conventional banks generally involve notaries more often than Islamic banks in drafting agreements/bindings. [4]

From the things that the author has described above, the author is interested in further studying, discussing and raising research entitled: "NOTARY REPOSITION IN GUARANTEING SHARIA COMPLIANCE IN MUDHARABAH FINANCING DEEDS"

2. Research Methods

This research uses a normative juridical research method, namely research that focuses on the study of applicable legal norms related to the Repositioning of Notaries in Guaranteeing Sharia Compliance in Mudharabah Financing Deeds. The approach used includes a statutory approach by examining the provisions in Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notaries, Legal Products related to Islamic banking & fatwas/provisions of the National Sharia Council (DSN). MUI) and related laws and regulations, as well as a conceptual approach to analyze the validity of a deed in the Indonesian legal system. The legal materials used consist of primary legal materials, namely relevant laws and court decisions, secondary legal materials, in the form of legal textbooks, scientific journals, and opinions of notary experts, as well as tertiary legal materials that function as supporting materials. The legal material collection technique is carried out through literature studies, while the analysis of legal materials is carried out qualitatively with descriptive-analytical methods, namely by describing, interpreting, and drawing conclusions regarding the problems studied.

[3]Habib Adjie & Muhammad Hafidh, Notarial Deed for Islamic Banking, (Bandung: PT. Citra Aditya Bakti, 2017), Page 55

[4]Deni K Yusup, “The Role of Notaries in Business Agreement Practices in Islamic Banking (A Review from the Perspective of Islamic Economic Law" in Al-ADALAH Volume XII. No. 4, December 2015.

3. Results And Discussion

3.1. The Position of Notaries in Guaranteeing Sharia Compliance in Mudharabah Financing Deeds

Sharia financing has become a crucial instrument in the modern financial system, designed to accommodate the principles of Islamic law, including the prohibition of usury (riba), gharar (gharar), and maysir (gambling). One of its primary products is mudharabah, a partnership agreement between a capital owner (shahibul mal) and a business manager (mudharib). In this context, the capital owner provides capital to be managed by the manager, and profits are shared according to agreement, while losses are borne by the capital owner unless caused by the manager's negligence. In this context, the role of a notary is highly strategic, as a public official authorized to draw up authentic deeds, which serve as a strong legal basis for dispute resolution and simultaneously guarantee Sharia compliance.[5]

A mudharabah financing deed drawn up by a notary must ensure that all contract provisions are clear and in accordance with the fatwa of the National Sharia Council of the Indonesian Ulema Council (DSN-MUI), particularly DSN-MUI Fatwa No. 07/DSN-MUI/IV/2000 concerning mudharabah, which regulates the principles of the contract, the manager's obligations, and the profit-sharing mechanism. In practice, sharia compliance in a mudharabah deed encompasses several key aspects, namely capital transparency, clarity of the parties' rights and obligations, a prohibition on the application of interest or usury, and a proportional profit-sharing mechanism according to the agreement. A notary, as a public official, is obliged to ensure that these clauses are clearly reflected in the deed to avoid giving rise to gharar or legal uncertainty.[6]

In carrying out their functions, notaries must verify the identity and legal capacity of the parties involved, including ensuring that the business manager has the competence and authority to manage capital. Furthermore, notaries need to ensure that the source and amount of capital are clearly recorded, and that profit-sharing and risk-sharing mechanisms have been agreed upon in accordance with sharia principles. For example, in a mudharabah deed, the notary must state the proportional distribution of profits and stipulate that losses are borne by the capital owner, unless caused by the manager's negligence, in accordance with the provisions of the DSN-MUI Fatwa. Notaries are also responsible for incorporating monthly reporting mechanisms, audits, and oversight of capital management to ensure that the deed reflects both sharia principles and positive law simultaneously.

Furthermore, notaries also act as a liaison between national regulations and Sharia fatwas. In Sharia financing practices, some clauses that are valid under Indonesian

[5]Al-Bahuti, F. Fiqh Muamalat, Jakarta: Islamic Library, 2017.

[6]National Sharia Council – MUI. DSN-MUI Fatwa No. 07/DSN-MUI/IV/2000 concerning Mudharabah, Jakarta, 2000

civil law may conflict with Sharia principles. For example, determining liability for losses or disproportionate profit-sharing flexibility. This is where the notary's role becomes crucial, as they must ensure the deed complies with positive law while maintaining Sharia compliance through careful clause drafting, consultation with the Sharia Supervisory Board, and suggesting adjustments to clauses that potentially violate Islamic principles.

Beyond legal and sharia aspects, notaries also contribute to strengthening public trust in Islamic financial institutions. Authentic deeds prepared with Sharia compliance in mind provide customers with assurance that their transactions are legitimate, protected, and in accordance with Islamic principles. This trust is crucial for the development of the Islamic economy, as notarial deeds serve as formal evidence that can support the transparency, credibility, and reputation of Islamic financial institutions. In the long term, the role of notaries contributes to the stability and growth of the Islamic financial sector in Indonesia.[7]

Another aspect that requires attention is the role of notaries in documenting and reporting deeds. Complete and structured documentation facilitates internal oversight by financial institutions and regulators such as the Financial Services Authority (OJK). Notaries can recommend mechanisms for periodic audits, capital utilization reports, and business results reporting, so that deeds serve not only as formal documents but also as control instruments that minimize the risk of capital misuse and ensure all business activities remain compliant with Sharia principles. In this regard, notaries serve as a reinforcement of Sharia-based corporate governance (good governance).[8]

Furthermore, notaries also face challenges related to the development of innovative Islamic financing products, such as multi-party mudharabah, digital mudharabah, or integration with Islamic fintech. These innovations require notaries to understand the characteristics of new products, technological risks, and legal and sharia implications, ensuring that their deeds remain valid and compliant with Sharia principles. This emphasizes that the role of notaries is not static, but rather dynamic, requiring increased competency and adaptation to developments in the Islamic finance industry.

In the context of dispute resolution, notarial deeds play a crucial role as a preventative measure. By clearly stating rights and obligations, establishing dispute resolution mechanisms, and complying with DSN-MUI fatwas, notaries help minimize potential conflicts between capital owners and managers. An authentic deed prepared by a notary serves as strong evidence in court and demonstrates that the parties have agreed to the contract in accordance with positive law and Sharia law, thus facilitating legal proceedings in the event of a

[7]Bank Indonesia, Sharia Accounting Standards, Jakarta, 2018.
[8]Financial Services Authority, Guidelines for Supervision of Islamic Financial Institutions, Jakarta, 2021

dispute. [9]

From this description, it is clear that the role of a notary in mudharabah financing extends beyond document preparation, encompassing professional responsibility, strengthening contract integrity, mitigating legal risks, overseeing sharia compliance, and strengthening public trust. This role is increasingly important with the growth of the sharia financial industry in Indonesia and the increasing complexity of financing products. Notaries are key actors in bridging positive law and sharia principles, ensuring that mudharabah deeds are not only legally valid but also meet the sharia compliance expectations of all parties involved.

3.2. Repositioning Notaries to Strengthen Their Role as Guarantor of Sharia Compliance in Mudharabah Financing Deeds

The repositioning of notaries in the context of Islamic financing, particularly mudharabah deeds, places notaries in a strategic position as guardians of sharia compliance and guarantors of legal certainty. Mudharabah is an investment contract in which the capital owner (shahibul mal) hands over capital to a business manager (mudharib) to manage, and profits are shared according to agreement, while losses are borne by the capital owner unless caused by the manager's negligence. An authentic mudharabah deed is a crucial instrument for supporting transparency, accountability, and legal certainty for all parties. With the increasing complexity of Islamic financial products and the demand for integrity of sharia principles, the notary's role has been repositioned from merely being a deed maker to an active guarantor of sharia compliance. This repositioning requires notaries to have a thorough understanding of Indonesian civil law, including the Civil Code (KUHPerdata), and regulations regarding the notary position as stipulated in Law Number 30 of 2004 concerning the Position of Notary. Furthermore, notaries must also understand relevant Islamic legal principles, particularly those contained in the Fatwa of the National Sharia Council – Indonesian Ulema Council (DSN-MUI), such as Fatwa No. 07/DSN-MUI/IV/2000 concerning mudharabah. With this capability, notaries not only formalize contracts but also ensure that all clauses in the deed comply with sharia principles, free from usury, gharar, and maysir.[10]

The repositioning of notaries also includes the responsibility to conduct Sharia due diligence before deed issuance. This due diligence includes verifying the background of the manager, the legal capacity of the parties involved, risk analysis of the project to be financed, and compliance of the capital source and investment objectives with Sharia principles. Notaries must ensure that the invested capital is not used for activities prohibited by Islam, such as gambling or the trade in illicit goods. Thus, the notary's role has shifted to a more proactive one: not merely recording transactions but also assessing Sharia compliance risks and providing

[9]National Sharia Council – MUI, DSN-MUI Fatwa No. 07 concerning Mudharabah, Jakarta, 2000.
[10]Law Number 30 of 2004 concerning the Position of Notary.

recommendations for adjusting contract clauses if necessary.[11] Furthermore, the repositioning of notaries also emphasizes the importance of their oversight role in the implementation of contracts. Notarial deeds should include reporting mechanisms, periodic audits, and capital usage oversight, ensuring managers adhere to Sharia principles and capital owners maintain control over their investments. Complete documentation not only serves as an internal control tool for financial institutions but also facilitates oversight by regulators such as the Financial Services Authority (OJK) and Bank Indonesia, and serves as strong evidence in court in the event of a dispute.[12]

This repositioning also has implications for adjusting the professional responsibilities of notaries. In the context of Islamic financing, notaries must ensure that all parties understand the legal and sharia-compliant consequences of the agreement. This includes understanding profit sharing, the risk of loss, and the rights and obligations of each party. Notaries must include clear clauses on the agreed profit sharing mechanism, liability for losses, and the audit and reporting rights that are the manager's responsibility. Thus, the deed becomes not only a formal document but also an instrument for strengthening the integrity of Islamic transactions. The repositioning of notaries also impacts dispute prevention. Deeds containing clear rights and obligations, dispute resolution mechanisms, and compliance with DSN-MUI fatwas help minimize conflicts between capital owners and managers. Authentic deeds prepared by notaries serve as valid evidence in court and demonstrate that the parties have agreed to the contract in accordance with positive law and Sharia principles, thus making the legal process more effective in the event of a dispute.

The repositioning of notaries also emphasizes the need for Sharia training and certification for notaries. Given the complexity of Sharia financial products and the demands of compliance with DSN-MUI fatwas, notaries should obtain basic Sharia certification or undergo specialized training related to Islamic law and Sharia deeds. This will strengthen notaries' ability to ensure Sharia compliance in every deed they draft, while also enhancing their professionalism and credibility in the public eye. With this repositioning, notaries become key actors in the integration of positive and sharia law, bridging formal legal certainty and sharia principles. Notaries are no longer merely transaction recorders, but guarantors of integrity, transparency, and sharia compliance. This is crucial for the growth of the sharia financing industry in Indonesia, as it ensures that all transactions are not only legally valid but also halal and in accordance with Islamic principles. This position also emphasizes the social responsibility of notaries, whose professionalism contributes to the stability of the sharia economy and public trust.[13]

Repositioning notaries to strengthen their role as guarantors of Sharia compliance

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[11] Firmansyah, T., Sharia Financing: Theory and Practice in Indonesia, Yogyakarta: UII Press, 2020.
[12] Munawar, A., The Role of Notaries in Sharia Transactions, Bandung: Refika Aditama, 2019
[13] Rahayu, S., Notarial Deeds and Sharia Compliance, Jakarta: Prenadamedia, 2021.

in mudharabah financing deeds requires a combination of legal competence, an understanding of Sharia principles, and professional vigilance. Notaries who can effectively fulfill this role will improve the quality of deeds, strengthen protection for capital owners and managers, and become strategic instruments in the development of the Islamic financial system in Indonesia. Therefore, the repositioning of notaries is not simply a formal role change, but a strategic transformation that ensures Sharia compliance and legal certainty go hand in hand.

This repositioning also emphasizes the importance of active collaboration between notaries and the Sharia Supervisory Board (SSB) of financial institutions. In modern financing practices, some mudharabah products have complex structures, requiring notaries to consult with the SSB to ensure that the deed's clauses comply with fatwas and Sharia standards. This consultation not only strengthens Sharia compliance but also strengthens the notary's position as a professionally responsible party for the integrity of the deed and the legal legitimacy of the transaction.[14]

4. Conclusion

The notary's position in mudharabah financing is highly strategic, serving as a guarantor of sharia compliance and as an instrument of legal certainty. Notaries ensure that all clauses in the deed comply with the DSN-MUI fatwa, the Civil Code, and notary regulations, including clarity regarding capital, profit sharing, liability for losses, and the oversight mechanism for capital management. This role not only protects the rights of capital owners and business managers but also increases the transparency, credibility, and integrity of Islamic financial institutions, while minimizing the potential for legal disputes and violations of sharia principles. The repositioning of notaries emphasizes the transformation of their role from mere deed makers to strategic actors actively ensuring sharia compliance. In addition to creating authentic deeds, notaries are responsible for conducting sharia due diligence, collaborating with the Sharia Supervisory Board, supporting the financial institution's internal governance, and adapting deeds to innovations in sharia financing products. This repositioning strengthens the notary's position as a guarantor of integrity, a sharia compliance educator, and a liaison between positive law and sharia principles, ensuring that mudharabah deeds are not only legally valid but also sustainably compliant with sharia principles.

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