

Building Sharia Guarantee Legal Construction In Mudharabah Financing Contracts

By

Zaenal Arifin

University of 17 Agustus 1945 Semarang arifinzaenal0139@gmail.com

Ahmad Rofiq

Walisongo State Islamic University

Yulies Tiena Masriani

University of 17 Agustus 1945 Semarang

Abstract

In Mudharabah financing contracts that occur in Indonesia, the customer is asked for a guarantee for the return of capital by signing a statement of obligation to return capital by the customer to the owner of the capital. This is contrary to the principle of the mudharabah contract, which is a cooperation agreement between the two parties, not a debt contract. This study aims to find and build the legal construction of sharia guarantees in Mudharabah financing contracts in Indonesia. This research uses the empirical juridical method. The results of this study indicate that the legal construction of sharia guarantees for mudharabah financing in the future is to include SKMHT into the legal substance and legal structure as regulated in Article 2 of the Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency Number 22 of 2017. Legally, the Sharia Supervisory Board prohibits placing mortgages in Mudharabah financing contracts. Culturally, it is customary law that the banking community uses credit rules in conventional banks.

Index Terms – Mudharabah, Sharia Guarantee, Mudharabah Financing Contract

Introduction

Sharia banks have a legal basis regulated in Law Number 21 of 2008 concerning Islamic Banking (UUPS). Article 1 of the UUPS explains the definition of Sharia Banking, namely everything related to Sharia Banks and Sharia Units, including business activity institutions and methods and processes in carrying out their business activities. With the enactment of this law, the position of Islamic banks has powerful legitimacy in the construction of positive law in Indonesia. Furthermore, the birth of the concept of Islamic banks is expected to contribute to the community's economic growth through the financing issued. Through this financing, Islamic banks can become partners with customers, so that bank relations with customers can no longer be creditors and debtors but become a partnership relationship [1].

Sharia Bank is currently carrying out operations offering a variety of products. First, buying and selling transactions are based on the principle of Murabahah, Istisha', Ijarah, Ba'i Salam, and other buying and selling. Second, development funding financing is based on the principle of mudharabah, musyarakah, and other profit-sharing. Third, another funding is based on the principle of hiwalah, rahn, qard, buying, selling, or guaranteeing on its own risk of third-party prices published based on actual transactions (underlying transaction) selling or hiwalah. Fourth, buying government securities and Bank Indonesia published under Sharia Principles [2].

Mudharabah Akad is a service provided by Islamic banking whose essence is a form of financing or cooperation between the Bank/Capital Owner (Shahibul Maal) and Capital Customer/Manager (Mudharib) [3].

Mudharabah Akad is a form of financing based on cooperation and is not a form of debt receivable, and then the contract does not require a guarantee. This is based on the second dictum of the special provisions in the MUI Fatwa No. 105/DSN-MUI/X/2016 concerning the guarantee of the return of mudharabah financing capital, Musyaraka, and wakalah bil Istismar which states that capital owners must not ask the manager to guarantee the return of capital. However, the fatwa was explained in the third dictum that Mudharib was allowed to ensure a return on capital of his own will without requests from capital owners.

The mudharib needs to make a certificate of no objection from the mudharib for the guarantee, the deed of regency rights (APHT) was installed when the Mudharib did default if the capital's return was in the form of land and building [4], if it is related to the agreement in the Mudharabah contract where the Mudharabah contract itself is a form of cooperation, then the installation of APHT on the guarantee submitted by the Mudharib can only be carried out/can be done when the Mudharib party is in breach of contract or default. This is because, in Mudharabah financing, the concept of debt and receivables arises when the Mudharib has committed a breach of contract, that the idea used was cooperation, not accounts payable, so that it was not permissible for the Mudharib guarantee to be attached to a mortgage right at the beginning of the Mudharabah financing contract [5].

Land Deed Officials (PPAT) install APHT on the guarantees submitted by the Mudharib in the Mudharabah financing contract [6]. Based on the concept of APHT when it is associated with the agreement in the Mudharabah contract where the Mudharabah contract itself is a form of cooperation, then the installation of APHT on the guarantee submitted by the Mudharib can only be implemented/can be done when the Mudharib party is in breach of contract or default. In Mudharabah financing, the concept of accounts payable arises when the Mudharib party has committed a breach of contract. Before that, the idea used was cooperation, not accounts payable. It was not permissible for the Mudharib guarantee to be attached to a mortgage at the beginning of the Mudharabah financing contract.

Such a statement is also in line with what has been stipulated in the Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency Number 3 of 1996 concerning the Form of Power of Attorney for Imposing Mortgage Rights, Deed of Granting Mortgage Rights (APHT), Land Book of Mortgage Rights, and Mortgage Certificates, which based on these provisions, both SKMHT and APHT require data on the amount of debt that needs to be included in it. Considering that this Mudharabah financing is not a debt, installing APHT, which needs to have debt, is impossible because the nominal is not a debt but a capital investment for the business.

Such practice can not reflect the application of Islamic sharia in a kaffah and istiqamah manner. For this reason, this study will discuss why in a Mudharabah financing contract which has a direct cooperative nature, the installation of mortgage rights is carried out, the legal construction that regulates the implementation mechanism of making a sharia guarantee binding deed (land and or building) in a Mudharabah financing contract in Indonesia, finds and builds the construction of sharia guarantee law in Mudharabah financing contracts in Indonesia.

Research Methods

This study uses an empirical juridical research method that aims to provide an overview of the facts in the field by linking these facts with the applicable laws and regulations relating to the Mudharabah financing contract. The author also uses qualitative research involving interacting with the reality he is studying [7]. Operationalization is carried out following the constructivism paradigm.

Results And Discussions

The Installation of Mortgage Rights on Mudharabah Financing Contracts

Regarding the mudharabah financing contract, which is required to use mortgage rights with collateral charged to the mudharib as the fund manager, execution can be carried out when the mudharib violates the terms and conditions. As a result, the mudharib is obliged to return the mudharabah funds, and the shahibul maal can ask the mudharib to make a debt acknowledgment letter [8].

According to the Fatwa of DSN 07/DSN-MUI/IV/2000, the guarantee is not an absolute requirement. Basically, the mudharabah contract is trustworthy (yad al-amanah) unless it results from an intentional mistake, negligence, or agreement violation [9]. Islamic banks will deliberately apply guarantees to ensure that the capital lent to customers is expected to return to its original state following the initial provisions when the contract took place. Although in Islamic law, it is explained that the owner of the capital is not allowed to ask for collateral from the mudharib, Islamic banks still ask for various kinds of guarantees.

The guarantee is not intended to ensure the return of capital but to ensure that the mudharib implements all the contract's provisions [10]. Mudharib must make a report containing the development of his business every specific time regarding the general implementation of the mudharabah contract and the flow of payments received and maintained all records related to the contract. Banks can check, audit, and take inventory of all goods stored in their warehouses without any objections.

According to Fatwa 105/DSN-MUI/X/2016 explains that the Manager is not obliged to return the business capital in full when a loss occurs unless the loss comes from a loss ta'addi (doing an act that should not be done), tafrith (not doing something that should be done) or mukhalafat al-syuruth (violating the content and/or substance or conditions agreed in the contract). Capital owners may not ask managers to guarantee a return on capital. However, the return of capital can occur where the manager of his own free will without the request of the Capital Owner guarantees the return of the capital.

The stipulation of guarantees in mudharabah transactions is based on applying the ijtihad method, which is not meant to override the original law but is more based on using the istihsan method [11]. This method, in regulation, prioritizes the goal of realizing the benefit of rejecting the dangers in particular because of general arguments. Over time, there have been changes in the fatwas that have developed to benefit the people. The debate about the mudharabah guarantee is allowed or not as long as the fund manager concerned is consciously willing to provide guarantees for the capital provided, the mudharabah guarantee can be carried out.

In the applicable law in Indonesia regarding the guarantee in the mudharabah financing contract, it must be bound following existing regulations [12]. However, there are no legal provisions at the level of the Act or other implementing regulations that specifically regulate the binding of guarantees in mudharabah financing contracts so that in practice, the bank and other related parties always attach mortgage rights to the collateral provided by the mudharib to shohibul mal in the mudharabah financing contract. The absence of explicit guarantees in Law Number 21 of 2008 concerning Islamic Banking (UUPS) creates a legal vacuum, so it is not surprising that Islamic banks use guarantee procedures and guarantee institutions in conventional banking, namely mortgages. This needs particular attention because Islamic banks do not implement sharia principles kaffah. On the one hand, Islamic banks apply Islamic financing, but on the other hand, they still use conventional guarantee systems to complete the rules regarding guarantees.

Islamic law, in the process, has an excellent opportunity to be included as one of the essential ingredients needed to foster national law. In addition to other legal materials such as those from Western law and customary law, in this connection, Islamic law wants to get a broader place in the life of national law in the future. It must be able to show its comparative advantages over various other laws. This provides an overview of the construction of Islamic law in Indonesia in the development of national law so that constitutional rights in religion are not interpreted as an abstract meaning but rather provide a definite sense through formal law that has material values as the basis for strengthening Islamic legal system in the development of national law.

The installation of mortgage rights in the financing of the mudharabah contract is also influenced by the trust factor of the capital owner to the capital manager. The Bank or Shahibul Mal expects profits from the mudharabah financing contract. However, it is undeniable that the possibility of losses in business management carried out by the mudharib itself can occur. If the loss is caused by the mudharib who breaches the contract or is negligent, which can be proven legally, the bank needs to take action to maintain the capital that has been given. The installation of Mortgage on Mudharib's guarantee is intended to guarantee a return of capital. When the Mudharib commits a breach of contract, the guarantee provided can be executed because the mortgage has the same executorial power as a court decision. In addition, the current practice of mudharabah financing is complicated for the shahibul maal to monitor the use of the funds issued so that the bank can ask for collateral installed with mortgage rights.

Indonesia does not adhere to a pure sharia law system, so the implementation of mudharabah financing and the guarantees provided need to be adjusted to the existing provisions and regulate the practice of mudharabah financing in Indonesia.

Legal Construction Regulating on the Mechanism for Making Sharia Guarantee Binding Deeds (Land or Buildings) in Mudharabah Financing Contracts in Indonesia

In the activity of raising funds, what is meant by a mudharabah contract is a cooperation agreement between the first party (malik, shahibul mal, or customer) as the owner of the funds and the second party ('amil, Mudharib, or Islamic Bank) acting as fund manager by dividing the business profits according to the agreement stated in the contract. Whereas in Financing activities, what is meant by Mudharabah contract is a business cooperation agreement between the first party (malik, Shahibul Maal, or Islamic Bank) that provides all the capital and the second party ('amil, Mudharib, or Customer) who acts as the fund manager by dividing the business profits following the agreement outlined in the contract, while the Islamic Bank fully bears the losses unless the second party commits an intentional mistake, is negligent or violates the agreement [13].

Article 19 has explicitly stated the Mudharabah contract. Still, the UUPS has not specifically regulated how the implementation of the mudharabah financing contract, one of which relates to the implementation of the withdrawal of guarantees in the mudharabah financing contract, so there needs to be an implementing regulation that specifically regulates how the implementation of the guarantee in the mudharabah financing contract, especially concerning the guarantee submitted by the mudharib to the shohibul mal.

One form of collateral in Islamic banking is collateral for land. In practice, collateral for land in Islamic banking to guarantee legal certainty for guarantees provided by customers who receive facilities to banks, Islamic banks do the same thing as conventional banking, namely encumbering Mortgage Rights on collateral for the land through authorized officials, namely in terms of this is the Land Deed Officer (PPAT).

This, according to the author, creates legal problems with existing regulations regarding mortgage itself if it is associated with the concept of sharia financing and problems with PPAT, as we know that Mortgage Rights before registration at the land office must first be made a Deed of Granting Mortgage Rights (APHT) by PPAT following applicable regulations [14]. It is possible that the PPAT can make a Power of Attorney for Imposing Mortgage Rights (SKMHT) if the Mortgage Provider is unable to appear before the PPAT as stated in Article 15 Paragraph (1) of Law Number 4 of 1996 concerning Mortgage on Land and Objects Relating to Land (UUHT).

Based on the concept of APHT, if it is related to the agreement in the mudharabah contract where the mudharabah contract itself is a form of cooperation, then the installation of APHT on the guarantee submitted by the mudharib can only be carried out/can be done when the Mudarib party is in breach of contract or default. This is because, in mudharabah financing, the concept of debt and receivables arises when the mudharib party has committed a breach of contract, the concept used was cooperation, not debt receivables, so the mudharib guarantee was not allowed to be attached to mortgages at the beginning of the mudharabah financing contract.

From what is contained in Article 10 of Law Number 4 of 1996 concerning Mortgage Rights on Land and Objects Related to Land, The Mortgage Law describes that mortgage is used to guarantee the repayment of a debt/credit, which has been known in the conventional banking system, while in Islamic banking there is no known debt or credit but financing. The existence of a Mortgage Institution for collateral for land in sharia financing also creates problems if the customer cannot fulfill his obligations.

Based on the DSN-MUI Fatwa No.07/DSN-MUI/IV/2000 Regarding Mudharabah Financing (Qiradh), it is explained that Mudharabah financing is financing that is distributed by Islamic Financial Institutions (LKS) to other parties for productive businesses. In the financing carried out, LKS as shahibul maal (owner of capital) fully finances the needs of a business, while the entrepreneur (customer) acts as Mudharib or business manager. The business period, procedures for refunding, and profit-sharing are determined based on the agreement of both parties (LKS and entrepreneur). Mudharib can carry out various businesses that have been mutually agreed upon and the following sharia, and LKS does not participate in company or project management but has the right to foster and supervise.

The practice of installing mortgage rights in mudharabah financing contracts becomes a dilemma when it comes to sharia principles. However, the mudharib has approved installing APHT for the collateral submitted, considering the concept of the mudharabah financing contract is a cooperation contract. The guarantee given should be placed on the mortgage after the mudharib has been proven to have broken a promise. This is also regulated in the MUI Fatwa No. 105/DSN-MUI/X/2016 which states that the mudharib has performed ta'addi, tafrith, or mukhalafat al-syuruth. So that the occurrence of debts and guarantees for the mudharib can be charged with mortgage rights when proof has been made about whether the Mudarib has done ta'addi, tafrith, or mukhalafat al-syuruth, based on this, it is necessary to create a sharia guarantee mechanism in Indonesia that can genuinely apply Islamic sharia principles kaffah and istiqomah in Islamic banking practices in Indonesia.

The Mudharabah Product Standard, which explains the concepts, provisions and sharia standards, operational standards, and agreement standards, is made based on the work program of the Sharia Banking Department of the Financial Services Authority in 2017, as the implementation of strategic initiatives that have been set out in the 2015-2019 Sharia Banking Roadmap. This standard was established to inventory sharia provisions and standards related to mudharabah-based products. Operational standards of sharia bank products are related to products based on mudharabah contracts, identified and analyzed problems and solutions related to sharia provisions and standards, as well as operational standards of products based on mudharabah contracts in sharia banking. Preparation of product standards based on the mudharabah contract is a minimum standard. Still, comprehensive and adequate agreed by the Islamic banking industry to become a standard that completes and completes the Sharia Banking Product Codification Book.

In general, the purpose of establishing the Mudharabah Product Standard is as a guideline for operational implementation related to products based on Mudharabah contracts in Islamic banking, both for consumption financing, production, and investment. The operational implementation must be ensured to run according to the corridor of compliance with sharia principles and provisions as contained in the Al-Quran and As-Sunnah, Ulama Opinions, DSN-MUI Fatwas, and International Sharia Standards.

In the Mudharabah Product Standard, it is explained in the DSN-MUI Fatwa Number: 92/DSN-MUI/IV/2014 Regarding Financing Accompanied by Rahn, explaining the provisions related to collateral goods, namely collateral goods (marhun) must be in the form of valuable assets (maal) both movable and immovable objects that may and can be traded, including financial assets in the form of sukuk, sharia securities or other securities, in the case of collateral (marhun) is musya' (shared jointly) then musya' pawned must be following the portion of ownership, and collateral (marhub) may be insured following the applicable laws and/or agreements.

Based on the regulations relating to the mudharabah financing contract, as the author has explained, it can be seen that there is no single rule governing the binding of sharia guarantees in the mudharabah financing contract. The most prominent provision and has weaknesses that result in the guarantee of the mudharib party in the mudharabah financing contract being directly attached to the mortgage is Law Number 21 of 2008 concerning Sharia Banking where the Act has a weakness that is it does not regulate the concept of sharia guarantee in the mudharabah financing contract. Furthermore, the provisions that have a disadvantage are the Regulations of the Head of BPN. The BPN regulations do not regulate the SKMHT time limit specified in the mudharabah financing contract.

The Legal Construction of Sharia Guarantees in Mudharabah Financing Contracts

The development of Islamic banking in Indonesia affects other instruments, such as Notary institutions and PPAT, which have issued legal certificates regarding sharia business contracts [15]. For an agreement to have legal force, it must be registered before a notary because every sharia business, including sharia business, always requires PPAT as an official who does authentic deeds following their duties as regulated in Law Number 2 of 2014.

Understanding the law in a legal construction requires a theory as an analytical knife to analyze it. The theory that is often used is the theory of Lawrence M. Friedman, who talks about the legal system. According to Lawrence M. Friedman, the concept of law as a system, according to Lawrence M. Friedman, consists of a sub-system of legal substance, legal structure, and legal culture [16]. Law is also a tool that can make social change [17].

This study finds a reality that the entry into force of the Mudharabah contract in an agreement that is made creates a gap, namely that there is no explicit regulation governing the binding of the mudharib party guarantee in the mudharabah financing contract. In practice, the guarantee of the mudharib in the mudharabah contract is attached to a mortgage. This fact is very contradictory to the principles of Islamic sharia, considering that the concept of installing mortgage rights is shown for debt and receivable contracts, not in mudharabah financing contracts.

In the Mudharabah contract, the legal substance can be found in formal legal sources. MUI Fatwa No. 105/DSN-MUI/X/2016 concerning Guaranteed Refund of Mudharabah, Musyarakah, and Wakalah bil Istismar financing allows the bank to withdraw collateral for the financing capital provided. However, there needs to be sincerity or approval from the Mudharib as evidenced by the form of a statement letter of no objection to providing a guaranteed return of capital. The mudharib needs to make a statement of no complaint from the mudharib for the guarantee that APHT is installed when the mudharib defaults if the guarantee for the return of capital is in the form of land and buildings [18].

The statement regarding the obligation is to pay back the capital as referred to. A statement from the Mudharib states that the Mudharib is willing to be charged with the mortgage for the guarantee submitted by the Mudharib. Such a fact that ultimately has consequences for the guaranteed return of capital provided by the Mudharib will be fitted with APHT at the beginning of implementing the Mudharabah contract.

This fact raises a problem, considering that this Mudharabah financing is a cooperation financing, so it is impossible to determine the amount of debt that can be determined at the beginning at the time of making the APHT. Indeed, the making of APHT which includes the nominal debt needs to be stated when the Mudharib has committed a breach of contract or default on what has been agreed, for that if the installation of APHT at the beginning of the Mudharabah contract is not appropriate.

Law Number 21 of 2008 concerning Sharia Banking which also requires additional collateral goods or objects, it turns out that the guarantee still uses the Mortgage Law (UUHT), Power of Attorney for Imposing Mortgage Rights (SKMHT), and the Deed of Granting Mortgage (APHT) which is not sharia and there is also no sharia auction. For example, in SKMHT and UUHT, there are sentences for debt repayment, debt agreements, creditors, debtors, and credit in banking institutions that carry out conventional activities. These words are not known in Islamic banking contracts because they depend on the contract between the customer and the Islamic bank.

In practice, Mudharabah financing is usually followed by the process of imposing mortgage rights on land rights that customers guarantee to Islamic banks, which are then poured into the form of a Mortgage Granting Deed (APHT), as mentioned and regulated by Law Number 4 of 1996 (UUHT) which made in front of and before the Land Deed Official (PPAT). Land Deed Officials (PPAT), according to Article 1 of PP Number 37 of 1998, are public officials who are given the authority to do authentic deeds regarding specific legal actions regarding land rights or Ownership Rights to Apartment Units [19].

In the case of making APHT on a Mudharabah contract by PPAT, the APHT can be null and void due to non-fulfillment of the conditions required by law, as explained in the General Explanation section of UUHT number (8) that “Because Mortgage by its nature is a follow-up or accessory to a certain receivable, which is based on a debt agreement or other agreement, its birth and existence is determined by the existence of a receivable whose repayment is guaranteed.” This, of course, has legal consequences for the bank to be unable to execute collateral in the form of land rights if the debtor, in this case, Mudharib, cannot fulfill his achievements or obligations according to the contents of the agreement in the contract or is termed in the law of engagement with default.

Guarantees in Mudharabah transactions are also contained in the Fatwa of the National Sharia Council Number: 07/DSN-MUI/IV/2000 concerning Mudharabah Financing, which states that in principle, in Mudharabah financing, there is no guarantee, however, so that Mudharib does not deviate from Sharia Financial Institutions, they can ask for guarantees from Mudharib or a third party. The stipulation of guarantees in Mudharabah transactions is based on applying the *ijtihad* method, which is not intended to override the original law but rather is based on the principle of using the *istihsan* method. This method, in principle, prioritizes the goal of realizing the benefit of rejecting the dangers in particular because the general argument requires that the threat be prevented [20].

The *ikhtisan* theory is the legal determination of a *mujtahid* on a problem that deviates from the legal provisions applied to similar issues for a more substantial reason that requires the deviation. *Ikhtisan* theory in writing this dissertation by the author is used as a theory that underlies and justifies the need for installing APHT in financing contracts in Islamic banks that are good and truly in accordance with sharia principles the development of life in society at this time.

This theory, based on the explanation above, is used as a basis for stating that the making of APHT in Islamic banking, which still refers to the Mortgage Law (conventional), needs to be corrected for later changes in society at this time, who wants the implementation of binding in Islamic banking financing to be applied *kaffah* and *istiqomah*.

Changes regarding the binding of collateral in the Mudharabah financing contract, the binding of the guarantee on the Mudharabah financing contract at this time, is still carried out by installing mortgage rights, which were previously carried out by providing a power of attorney to impose mortgage rights so that the application of Islamic sharia principles can be reflected in the binding of collateral in Mudharabah financing contract, so in this study, the author will provide a breakthrough, in which the Mudharabah financing contract, which is currently installed with mortgage rights, is changed to only SKMHT installed. However, now, the implementation of the SKMHT is limited in time during the expiration of the main agreement as stipulated in the Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency of the Republic of Indonesia Number 22 of 2017 Article 2 which initially reads:

A power of attorney to impose mortgage to guarantee the repayment of credit/financing/loans is valid until the expiration of the main agreement, which is as follows:

- a. Credit/Financing/Loans granted to Micro and Small Business customers, within the scope of the definition of productive business owned by individuals and/or individual business entities.
- b. Credit/Financing/Loan intended for housing procurement, namely:
 - (1) Ownership or repair of core houses, simple houses or apartments with a maximum land area of 200 m² (two hundred square meters) and a building area of not more than 70 m² (seventy square meters); and
 - (2) Ownership or repair of a Ready-to-Build Lot (KSB) with a land area of 54 m² (fifty-four square meters) to 72 m² (seventy-two square meters) and credit granted to finance the building.
- c. Credit/Financing/Other productive loans with a ceiling of up to IDR 200,000,000.00 (two hundred million rupiahs).

Changes were made to a Power of Attorney to impose mortgage to guarantee repayment of credit/financing/loans valid until the expiration of the main agreement, which is as follows:

- a. Credit/Financing/Loans granted to Micro and Small Business customers, within the scope of the definition of productive business owned by individuals and/or individual business entities.
- b. Credit/Financing/Loan intended for housing procurement, namely:
 - (1) Ownership or repair of core houses, simple houses or apartments with a maximum land area of 200 m² (two hundred square meters) and a building area of not more than 70 m² (seventy square meters); and
 - (2) Ownership or repair of Ready to Build Land (KSB) with a land area of 54 m² (fifty-four square meters) to 72 m² (seventy-two square meters) and credit granted to finance the building.
- c. Credit/Financing/Other productive loans with a ceiling of up to IDR 200,000,000.00 (two hundred million rupiahs).
- d. For financing/loans in an easy-to-rabah contract, the time period will be determined based on when the customer makes a breach of contract.

In principle, for the SKMHT format itself, adjustments need to be made between the SKMHT commonly used in Conventional Banks, and the SKMHT applied to Islamic Banks. Things that need to be adjusted are the substance that regulates the estimated time in which the validity period of the SKMHT needs to be extended until there is a court decision that stipulates that the mudharib has broken its promise. Other things that need to be adjusted are those related to the editorial of the sentence, which mentions that debts and receivables are converted into the concept of financing or the concept of cooperation.

Conclusions

The causes or factors for the direct Mudharabah financing contract to install mortgage rights include: (1) Juridical Factors, The lack of explicit guarantees in the Sharia Banking Law creates a legal vacuum, so it is not surprising that Islamic banks use guarantee procedures and guarantee institutions in conventional banking, namely mortgages. (2) This belief factor is based on the second dictum regarding special provisions in the MUI Fatwa No. 105/DSN-

MUI/X/2016 concerning Guaranteed Return on Mudharabah Financing, which states that the Capital Owner may not ask the Manager to guarantee a return on capital. However, to avoid moral hazards in the form of irregularities by the fund manager, the fund owner can ask for a guarantee from the fund manager or a third party.

Mudharabah financing contracts, when viewed from positive law in Indonesia, in their implementation are related and regulated in several statutory provisions such as in the 1945 Constitution of the Republic of Indonesia Article 33, which regulates the national economic system, Law Number 4 of 1996 concerning Mortgage Rights, Law Number 21 of 2008 concerning Sharia banking, Government Regulation Number 24 of 1997 concerning land registration, Fatwa of DSN-MUI No. 07/DSN-MUI/IV/2000 concerning Mudharabah Financing, DSN-MUI Fatwa No. 105/DSN-MUI/X/2016 concerning Guaranteed Return on Mudharabah Financing. However, of the many provisions of the legislation mentioned, it does not explicitly regulate the binding of the mudharib party guarantee in the mudharabah financing contract. In practice, the guarantee of the mudharib in the mudharabah contract is attached to a mortgage. This fact is very contradictory to the principles of Islamic sharia considering that the concept of installing mortgage rights is shown for debt and credit contracts, not in mudharabah financing contracts.

The legal construction of sharia guarantees in future mudharabah financing contracts is to include SKMHT into the legal substance and legal structure as regulated in the Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency of the Republic of Indonesia Number 22 of 2017 concerning Stipulation of Deadline for Use of Power of Attorney to Charge Mortgage Rights for Guaranteeing the Repayment of Certain Loans. Legally, the Sharia Supervisory Board prohibits placing mortgages in the Mudharabah financing contract. It is customary law culture that the banking community uses credit rules in conventional banks. In the future, the mandate of the Sharia Banking Law is to implement Sharia consistently and comprehensively in Mudharabah contract transactions, especially in binding sharia guarantees for Mudharabah contracts.

Acknowledgment

The author would give his gratitude to for University of 17 Agustus 1945 Semarang for supporting this research.

References

- S. B. Wilardjo, "Peran dan Perkembangan Bank Syariah," *Value Added*, vol. 53, no. 9, 2019.
- W. Sumitro, "Asas-Asas Perbankan Islam Dan Lembaga-Lembaga Terkait," in *Jurnal*, vol. 119, no. Jakarta : PT Grafindo Persada, 2004.
- D. A. Maulida and A. M. Thabrani, "Meminimalisir Resiko Moral Hazard Pada Pembiayaan Mudharabah Di Koperasi Syariah Nuri Jawa Timur (Ksn Jatim) Plakpak Kecamatan Pegantenan Pamekasan," *IQTISHADIA J. Ekon. Perbank. Syariah*, vol. 2, no. 2, 2015.
- Y. Oktaviani and A. Khisni, "Roles and Responsibilities Relating Land Agreement Official of Liability Provision of Rights With Mudharabah in Islamic Bank," *J. Akta*, vol. 5, no. 3, 2018.
- Maghfur Wahid, "Analisis Hukum Islam Terhadap Jaminan Pada Akad Pembiayaan Mudharabah Bismillah Sukorejo Kendal)," *Fak. Syariah, Univ. Islam Negeri Walisongo, Semarang*, no. 07, 2015.

- R. Nurhidayati, "Peran Dan Tanggung Jawab Pejabat Pembuat Akta Tanah Terkait Akta Pemberian Hak Tanggungan Dalam Akad Mudharabah Pada Bank Syariah," *J. Lex Renaiss.*, vol. 1, no. 2, 2016.
- G. R. Somantri, "Memahami Metode Kualitatif," *Makara Hum. Behav. Stud. Asia*, vol. 9, no. 2, 2005.
- M. M. M. S. Triyono, "Penerapan Beban Jaminan Akad Mudharabah Di Perbankan Syariah," *Diponegoro Priv. Law Rev.*, no. Vol 1, No 1 (2017), 2017.
- OJK, "Standar Produk Mudharabah," 21 Februari 2019, 2017.
- S. Hajrah, Susianto, and A. K. Hutagalung, "Implementasi Jaminan Mudharib Terhadap Risiko Pembiayaan Mudharabah di Bank Syariah Mandiri KC Medan Aksara," *J. FEB*, vol. Vol. 1, no. No. 1, 2018.
- T. Hulam, "Jaminan dalam transaksi," *Jaminan Dalam Transaksi Akad Mudharabah Pada Perbank. Syariah*, vol. 1, no. 1, 1998.
- D. E. SAPUTRI, "Analisis Yuridis Pembiayaan Mudharabah Dengan Jaminan Kebendaan Pada Perbankan Syariah Menurut Hukum Islam (Studi Pada Bank Syariah Mandiri Cabang Kota Lhokseumawe)," *PREMISE LAW J.*, no. Vol 19 (2016): VOLUME XIX TAHUN 2016, 2016.
- Ascarya, "Akad dan Produk Bank Syariah," *Rajawali Pers*, 2013.
- A. K. Sari, D. Uripno, and M. H. Asrori, "Perlindungan Hukum Terhadap Kreditur Pemegang Hak Tanggungan Yang Tidak Didaftarkan Di Kantor Pertanahan," *Repertorium*, 2015.
- P. Nurwulan, "Akad Perbankan Syariah Dan Penerapannya Dalam Akta Notaris Menurut Undang-Undang Jabatan Notaris," *J. Huk. Ius Quia Iustum*, vol. 25, no. 3, 2018.
- J. H. Watts and C. Roberson, *Law and Society: An introduction*. 2013.
- Ishaq, *Dasar-Dasar Ilmu Hukum*. 2018.
- M. A. Yhu'nanda, "Analisis Unsur Kesalahan Dan Kelalain Mudharib Dalam Akad Pembiayaan Mudharabah Bermasaah Sebagai Dasar Eksekusi Jaminan," *Kumpul. J. Mhs. Fak. Huk.*, no. Sarjana Ilmu Hukum, Juli 2014, 2014.
- K. C. S. Wibawa, "Menakar Kewenangan Dan Tanggung Jawab Pejabat Pembuat Akta Tanah (Ppat) Dalam Perspektif Bestuurs Bevoegdheid," *CREPIDO*, vol. 1, no. 1, 2019.
- Syarifuddin, "Istihsan dan Pembaharuan Hukum Islam," *Tahkim*, vol. 10, no. 2, 2014.