THE IMPLEMENTATION OF COLLATERAL IN THE CONTRACT OF MUDHARABAH FINANCING ACCORDING TO ACT NO. 21 OF 2008 ON SHARIA BANKING AND DSN-MUI’s FATWA

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Abstract
Contract of mudharabah financing is principally intended to meet the interests of businesses in terms of capital or additional capital to implement a productive business, between two or more parties. The problems of contract of mudharabah financing arises when owners of capital requires collateral to be met by businesses. Imposition guarantees in classical fiqh that developed by the mazhab of Imam in terms of mudharabah financing, capital owners cannot demand collateral from businesses to recoup the principal or capital plus profit. If the owners of capital require the provision of collateral from mudharib and make collateral as a condition of a contract then the cooperation contract is null and void according to Maliki and Shafi’i. According to the Hanbali, and Abu Hanifah, only the conditions were null and void, while contract itself remains valid. In general, according to Law No. 21 Year 2008 on sharia banking, collateral is termed by rahn and kafalah. This is in line with the DSN-MUI Fatwa formulating collateral consists of Rahn and kafalah. It should be understood that the contract of mudharabah financing is different from the concept of financing debts that require no collateral. When syariah banking is applying guarantee in the contract of mudharabah financing, it will lead to another problem that is interest to be discussed. This research applies a legal normative method by approach legislations and Fatwa DSN-MUI, this allows the researcher to find the answer about the problems that are considered correct.
Keywords: collateral, contract, mudharabah financing, shariah bank, fatwa DSN-MUI.
INTRODUCTION

According to the provisions of Act No. 21 of 2008 Article 19 concerning the sharia banking system, there are three financing schemes in sharia banking system, namely: First, fund collector based financing (equity financing), which is a form of financing product that consist of Mudharabah financing (trustee partnership) and Musyarakah financing (joint venture). Second, fund distribution based financing (debt financing), which is implemented in the form of Murabahah financing contract (mark-up sale), Ijarah (leasing), Salam (deferred delivery sale), Istishna (manufacture sale) and Qard (benevolent loan). Third, service-based financing (service financing), which consists of contract such as Wakalah (opening of letters of credit), Kafalah (letter of guarantee), Rahn and Hiwalah.

The instrument of sharia banking financing in Indonesia in the form of Mudharabah with guarantee agreement has been implemented in sharia banking, which consists of guarantee agreement in the form of Rahn or Kafalah. Mudharabah financing and guarantee or collateral is conducted through contractual agreement between two or more parties, in which the first party as capital owner/holder entrusted all of their investment or capital to be managed. The second party as the business actors is in liability to administer and managing the funds or capital by using their skill and capabilities. The profit from Mudharabah is halved according to the ratio that has been discussed in previous agreement. When the loss occurs, the condition must be burdened by the owner of capital, and the management or business executors will lose their business to make profits.

In terms of product of fund distribution in the form of financing, there is the principle that states that all forms of financing may be guaranteed by bank, except for Mudharabah and Musyarakah financing. According to fiqh, Mudharabah financing does not recognize guarantee, because the risk is borne by sharia bank as capital owner (shahibul mall) instead of customers as fund manager (mudharib). When the loss occurs, sharia bank must bear the risk of financial loss (financial risk), and the customers (mudharib) only bear the risk that they lost their business and profits. This rule only applies when the customers (mudharib) are in accordance with the agreement with full of good-faith effort. If the customers are proved that they violate the agreement, then the customers (mudharib) could be required to bear the risk of
Based on the principle of its operation, the assurance that provided by the business actors must be in accordance with Islamic sharia principles, and it is characterized by the agreement that legalize the guarantee that provided by business actors. Akad or agreement that is associated closely with the assurances given by the Islamic sharia banking to its customers is called rahn and kafalah agreement. The existence of kafalah and rahn is very important in sharia banking, and how about the implementation of collateral in the form of rahn and kafalah in Islamic sharia banking financial system, particularly in mudharabah financial system?

RESEARCH METHOD

This research used normative legal research method that based on secondary data analysis, which consisted of primary legal materials, secondary, and tertiary legal materials. The review analysis of collected secondary data was conducted by using data collection tools in literature study with legislation approach as perspectives: Act No. 21 of 2008 on Islamic sharia banking and DSN-MUI’s fatwa. The law of sharia banking system served as a perspective to analyze the issues relating to the collateral in the agreement of mudharabah financial system, which is presented in descriptive-analysis and constructive critical perspective. This allows the researcher to find the answer about the problems that are considered correct or true, instead of the meaning of right or just.

THE REGULATION OF COLLATERAL ACCORDING TO ACT NO. 21 OF 2008 CONCERNING SHARIA BANKING SYSTEM IN INDONESIA

According to Article 1 Paragraph (26) in Act Number 21 of 2008 concerning the sharia banking system, the guarantee is called collateral, which means additional guarantee, either in the form moveable assets or in the form of immoveable assets that submitted by the debtor to the Islamic bank and/ or sharia business unit in order to ensure the repayment of obligation of the client that receives facility.
the description of the article, it is understood that the guarantee is one of the most important safety instrument to deal with the possibility of potential risks. The legal argument of this issue is given the fact that bank is merely a financial institution that must uphold the principle of prudence. One of the forms of implementation of the precautionary principle is manifested in the form of application of guarantee in mudharabah financial system.

Besides, the Law of Sharia/ Islamic Banking System No. 21 of 2008 Article 23 defines the terms Guarantee as “assurance of good faith and customers ability and willingness to settle all of their obligations or to restore the finance, which is in accordance with the agreement. In order to obtain the assurance as referred to in Article 23 Paragraph (1), sharia bank should conduct a careful assessment of the character, capacity, capital, collateral, and the prospects of a prospective customers that receive the facilities. In terms of the imposition of a guarantee of mudharabah financial system, a sharia bank should conduct the assessment of information and analyzing the capabilities and capacities of the debtor to fulfill its obligations on time. According to Article 23 of Act No. 21 of 2008, before the debtor receive the fund, bank as shahibul maal should conduct research and careful analysis in order to be adhered with the concept of five Cs of credit: Character, Capacity, Capital, Collateral, and Condition of Economy.

The assessment of character is related with the good faith of the customers who receive the facility to settle the funds that lend by sharia bank and/ sharia business unit. The assessment of character of prospective customers who receive the facility must be based on the relationship between sharia bank and relevant customer, and sharia bank should obtain information from other parties that state that the potential customers should be trustworthy, honest, and will not complicate the relationship between the bank and the customers. The assessment of capacity should be conducted on the basis of the ability of potential customers in the management of their business, and therefore the sharia banks will be ensured that the business are conducted by proper parties or individuals.

Assessment of Capital is the assessment of the capital owned by the customer who receive facilities, and sharia bank and/ sharia business unit should conduct
the analysis about the general history or future financial position of customers, and therefore the bank will be able to comprehend the capital ability of customers who receive the facility in conducting the project of business. First, sharia bank should conduct research about the capital position of mudharib. In the assessment of Collateral, sharia bank/ sharia business unit must assess the objects, project, or right to claim that funded by financial facility, and other objects, securities, or risk guarantee, which written as additional collateral, whether it has been sufficient or not, and therefore the collateral could be utilized when the customers are unable to settle the obligation, and this collateral could be used to cover the repayment of financing from the relevant sharia bank and/ or sharia business unit.

Assessment of the Condition of Economy. Assessment of the business project of potential customers who receive the facilities must be conducted, and sharia bank should conduct the analysis about the situation of market, both in domestic and foreign level. Sharia bank also should analyze the history as well as the future of market condition, and therefore the sharia bank will comprehend the prospect of marketing and business of potential customers. Prior to the funding process, sharia bank should analyze the condition of debitur’s business sector in order to minimize the risk of unpredictable condition of economy.

THE ARRANGEMENT OF RAHN AND KAFALAH ACCORDING TO THE FATWA OF NATIONAL BOARD OF SHARIA – INDONESIA ULEMA COUNCIL (DSN-MUI)

According to the provision of fatwa from National Board of Sharia of Indonesian Ulema Council (DSN-MUI) No. 25/DSN-MUI/III/2002, rahn is withholding the goods or assets as collateral for the debt. According to fatwa from DSN-MUI, rahn can be applied under the following conditions: (1). Murtahin is the person who receives the guarantee to possesses the right to hold the marhun (collateral) until all debts could be repaid by rahn (who handed the collateral). 2). In principle, marhun and its benefits remain the property of rahn, and therefore it should not be used by murtahin except with permission of rahn, and murtahin does not have to reduce the value of marhun, and its utilization is only a substitute for the cost of maintenance of. 3). The maintenance and storage of marhun is the responsibility of rahn, but it
can also be conducted by *murtahin*. The cost and maintenance of storage must be conducted by *rahin*. 4). Usually, the cost of maintenance and storage of *marhun* should not be determined by the amount of loan. 5). The selling of *marhun* may be conducted in the time of maturity, and *murtahin* should warn *rahin* to immediately settle their obligations.

If *rahin* is unable to settle the debt, which has been stipulated in the agreement by both *murtahin* and *rahin*, then *murtahin* should warn the *rahin* and *marhun* can be forcibly sold by auction, which is in accordance with sharia. Proceeds from the sale may be used for settle the debt plus the cost of maintenance and storage of unpaid as well as the cost of sales. The profit from the sale of *marhun* will be possessed by *rahin*, and *rahin* is also responsible for the deficit. In the event of a dispute, then Sharia Arbitration Board could solve the dispute when the agreement by consensus could not solve the dispute.

The DSN-MUI’s fatwa No. 11 /DSN-MUI/IV/2000 concerning *kafalah* stated that *kafalah* is a contract of guarantee that given by the insurer (kafil) to third party in order to meet the obligations of second party (makful ‘anhu, Aashil). In general, the arrangement of *kafalah* is based on the fatwa from DSN-MUI: First, the insurer should at least reach the age of puberty (adults) and able to think logically. The insurer also has right to take legal action in the affairs of his property and willingly to take responsibility on amenability of *kafalah*. Second, the debtor should willingly to give his or her claim to the insurer. Third, the creditors should provide their identity and willing to be in presence at the time of akad/ declaration of agreement, and the creditors must be sensible. Fourth, the collateral with conditions. (a). The debtor must be responsible for the collateral, and it could be the form of money, goods/ object, or work. (b). It could be carried out by the borrower or debtor. (c). It is a claim of debt that strongly binds, which could only be resolved after the settlement or exemption, (d). Its type, value, quantity and specifications do not contradict the principle of Islam. If one party does not fulfill the obligations or if there is a dispute between the parties, and when there isn’t agreement that reached by consensus, then the settlement should be solved by Arbitration Board of Sharia.
The mechanism of kafalah contract in sharia banking system can be implemented in two forms, which consists of Bank Guarantee and Letter of Credit. Bank Guarantee is a letter of guarantee that issued by bank to ensure the third party at the request of customers in relating to the transaction or contract that has been agreed, which includes tender guarantee, guarantee of the implementation of employment, the guarantee of advance payment and performance bonds with a minimum deposit of 10% of the collateral that desired by the customer. Bank guarantee is implemented by the bank as kafil, which issue bond to the project or business owner at the request of customers in accordance with the transaction that has been agreed between the bank, the customer, and the project owner. If the undesirable event occurs such as risk beyond the intent or negligence, which has been stipulated on bond that issued by bank as kafil, then the third party or project owner can file a claim to the issuer of the bank guarantee.

In this context, the provision of a guarantee by the bank is a routine business, the bank will get a provision which is calculated from a certain percentage of the amount that is warranted, and bank will get resources of fee-based income. When the bank will provide a bank guarantee, bank would require some sort of payment from the debtor that has been guaranteed to the bank in the form of payment, which is called a counter guarantee. The payment of counter guarantee does not have to be in the form of cash, but it can be in the form of credit transfer, deposits, securities, and other forms, which is considered safe by bank. Based on this fact, a bank guarantee is identical to the concept of kafalah in terms of fiqh, it is because kafalah is technically the guarantee that given by the insurer (kafil) to third parties in order to meet obligations that incurred (makful ‘anhu), if the responsible parties conduct the breaching of contract. Therefore, the provision of kafalah will bring the certainty and security for the third parties to implement the agreement that has been agreed upon without any sense of worriness about any event that could be happened to the customer.

While the implementation of kafalah on sharia banking system in the form
of Letter of credit is an unilateral agreement from issuing bank to the correspondent bank or other banks that have been determined by correspondent banks, for example if the exporter has to send the goods to the importer, then the issuing bank will pay proceeds from the Letter of Credit to the beneficiary. Letter of Credit that issued by sharia banks, is a means to facilitate export-import trade transactions between countries and as a bridge and expropriation risks for each party concerned, and therefore they will be ensured about the transaction. Sharia banks will issue a letter of credit at the request of the buyer (importer) through the sales contract that has been agreed by the importer and exporter. In this regard, the position of sharia bank does not represent the importers, instead, it is aimed to guarantee importers’ business continuity.

From the customer side, sharia bank will obtain fee in fixed rate, which has been agreed at the initiation of the transaction. Even sharia bank could require the guarantee in the form of cash as collateral or other collateral on the loan value. Sharia bank should provide bailout funds as financing tool that based on *alqardh*, which must be conducted by the customer, if the customer is unable to meet the obligations to third parties. All agreements of transaction of guarantee provision that based on *kafalah* between the parties and the customer is manifested in the form of a written agreement that has binding legal effect. *Kafalah* contract is implemented in the form of Credit Letter that applied in the form contract of *kafalah bil ujrah*, and it means that *makful lahu* provide earning to the *kafil*, and this is the scheme of the contract of *kafalah bil ujrah*. The formulation that has been previously explained shows that the sharia bank plays as guarantor, which has the position of *kafil*. *Makful bihi* that provided by *kafil* is in the form of Letter of Credit. Correspondent bank has a role of *makful ‘anhu*, while the exporters or importers have a role as *makful lahu*. The implementation of the contract of *kafalah bil ujrah*, *makful lahu* (exporters or importers) have an obligation to pay *ujrah* (fees) to *kafil* (sharia bank).

In sharia financing system, the contextuality of collateral or guarantee in the form of Rahn has been applied in a variety of sharia financing system in Indonesia, which includes sharia banking, sharia pawnshop, and sharia financing institution. Sharia banks have been applying the *Rahn* as the operational principle when they are offering their financial products, especially in mudharabah financial system. Even at its application, in sharia financial institution, *Rahn* has certain specifications, how-
ever in its principle, Rahn can be used as collateral. In Sharia banking system, rahn has a role of supporting instrument, while in sharia lawnshop institution, rahn plays as the main instrument.

The implementation of rahn in sharia banking could be conducted in two forms of application: rahn as a separate product and as a complementary product. As a separate product, rahn can be applied in the form of saving and loan system. While as a complementary product in sharia banking, rahn can be applied through mura-baha and mudarabah financing products. Bank could hold or controlling customers assets that serve as collateral, and as a consequence of mudharabah. The concept of rahn as supplementary agreement or contract is intended to require the trust of collateral or as guarantee when the rahn is unable to pay or violating the agreement, and rahn is not intended to obtain profit. This system is conducted by sharia bank in order to minimize the risk of customers’ negligence, manipulation, fraud, moral hazard, and contract breaching.

According to the fatwa from DSN-MUI No. 57/DSN-MUI/V/2002 concerning the Letter of Credit, the letter of credit is applied with contract of kafalah bil ujrah, which is export-import trade transactions that uses kafalah contract based-service of Sharia Financial Institution, and sharia financial institution has right to obtain fee from the provided service. DSN-MUI’s fatwa stated that the guarantees issued by banks in the form of Letter of Credit that is in accordance with Islamic principles can be applied by using sharia contracts: wakalah bil ujrah, wakalah bil ujrah and qardh, murabaha, salam, and istisnaa. If the agreement or contract is implemented, while the customers do not have money in the bank, the bank can provide bailout funds in advance for customers (importers) for the purposes of payment of the exported goods by using al-Qardh contract. The general provisions of the letter of credit is under the contract of mudharabah financing, then all conditions applicable to mudharabah also apply to sharia letter of credit of import, and these provisions include: (a). Bank acts as shahibul maal should provide the amount of capital to the importers, and the importers act as mudharib to conduct import activities. (b). The profits that obtained by the importer from the selling is mutually divided according to the mutual agreement.
CONCLUSION

According to Act No. 8 of 2008 concerning Sharia Islamic Banking System and DSN-MUI’s concerning the application of the collateral in the contract of mudharabah financing, the application of guarantee can be conducted in two forms namely *rahn* and *kafalah*. The implementation of *rahn* in sharia banking system can be conducted in two forms, rahn as a separate product and *rahn* as as a complementary product. *Rahn* as a separate product can be applied in the form of cash saving and loan. While *rahn* as a complementary product or as an additional agreement in sharia banking can be applied through *murabaha* and *mudaraba* financing products.

The collateral in the form of *kafalah* can be applied in the form of bank guarantee and letters of credit. The mechanism of sharia banking provides assurance to customers with respect to the contracts, which agreed between customers and third party. Therefore, the implementation of *kafalah* will provide certainty and security for third parties to implement the agreement that has been agreed upon without any sense of worry if any undesirable event happens to the customer. While the application of *kafalah* in the form of Letter of credit is carried out by sharia banks, which issues a letter of credit at the request of the buyer (importer) through the sales contract that has been agreed both by the importer and exporter. The position of sharia banks in this regard does not represent the importers, instead, it guarantees the business continuity of importer.
REFERENCES


BIOGRAPHY

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