DEFAULT/BREACH OF CONTRACT CHARACTERISTICS OF MUDHARABAHL FINANCING IN SHARIA BANKING

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Abstract
One of financings channeled by Sharia Bank is mudharabah. The contract of mudharabah is a mutual agreement between the first party (malik, shahibul maal, or Sharia Bank) which supports the whole capitals and the second party ('amil, mudharib, or Customer) which acts upon fund endowment by sharing the profit in accordance with the agreement stated in the contract, while the loss is fully covered by Sharia Bank unless the customer (mudharib) makes an intentional mistake, in negligence or violates the agreement. Mudharib in the contract of mudharabah acts upon amin (the trusted one). The capital given is a mandate being held by mudharib. Mudharib is as the representative. The position of mudharib as the representative is trusted by shahibul maal in running the business and Mudharib as a partner in earning the profit. Mudharib will get the share of the profit from the business run. Mudharabah financing is a financing that shares the profit and loss, therefore if mudharib in fund endowment finds failure not under his intention and his failure does not cause profit share in accordance with the profit share ascribed, thus mudharib cannot be sentenced as being default/breach of contract of mudharabah as it is characterized in default/breach of contract. The criteria of default/breach of contract is when the customer does not follow the agreement or he does based on the agreement yet not as well as it is agreed or he follows what is agreed yet overdue or does something prohibited in the agreement

Keywords: characteristics, default/breach of contract, mudharabah, sharia bank
INTRODUCTION

Syariah Bank as intermediary institution means collecting fund from people then channel it as financing. Syariah Bank collects fund in various way, such as saving and investment. Wadiah saving and wadiah current account are type of saving, meanwhile mudharabah saving and mudharabah deposit are type of investment. According to Article 1 (25) the Act of Islamic Banking, No. 21 of 2008, financing is providing fund in the form of:

a. Profit sharing basis (Mudharabah and Musyarakah)
b. Leaseor hire-purchase basis (Ijarah and Ijarah Muntahiyah Bit Tamlik)
c. Sale basis (Murabaha, Salam and Istishna)
d. Loan basis (Qardh)
e. Lease basis (Ijarah for multiservice)

Syariah bank and a customer agree to a contract in which the Syariah bank buy an item for a customer and the customer repay the fund to Syariah bank with a service charge (ujrah), profit sharing or without service charge.

One of the contract used by Syariah bank to collect and channel fund is mudharabah contract. In the explanation of Article 19 b and c the Act of Islamic Banking, there are two meanings in risk sharing for collecting fund in mudharabah contract and channeling fund in mudharabah contract, as explained below:

“The meaning of collecting fund in mudharabah contract is a coorperation between first party (malik, shahibul maal, or customer) as the owner of money and second party (‘amil, mudharib, or Syariah Bank) as the manager to share the profit based on agreement in the contract”.

Meanwhile channeling fund in mudharabah contract in the form of financing can be explained below:

“The meaning of mudharabah contract in financing is cooperation between first party (malik, shahibul maal, or Syariah Bank) as the owner of asset and second party (‘amil, mudharib, or Customer) as the manager to share the profit
Based on agreement in the contract, therefore Syariah Bank will suffer total loss unless second party defaulted consciously or broke the contract”.

Based on the Act of Islamic Banking, collecting fund in *mudharabah* contract is only for profit sharing, not risk sharing. In the other hand, channeling fund in *mudharabah* contract is for both profit and risk sharing.

**Muhammad Syafii Antonio** defined Al *Mudharabah* as a contract between two parties where first party (*shahibul maal*) provides total asset while second party (*mudharib*) manages the asset, profit will be shared in percentage (*nisbah*) according to the contract, the owner of asset will suffer total loss as long as manager does not default, if manager defaulted the business then manager will take responsibility for the loss.¹ According to the explanation before, *Mudharabah* contract is a contract between Syariah bank as asset owner and Customer as asset manager based on fiduciary principle. There are profit and loss in a business so when there is business losses, there is no profit to share with Syariah bank. Is that loss considered as default to the *Mudharabah* contract?

**DISCUSSION AND ANALYSIS**

Validation of *Mudharabah* contract is determined by contract’s rukun and requirement. *Rukun* is factor that needs to be fulfilled for certain occasion. Meanwhile requirement is factor that needs to be there for certain occasion.² Important things in rukun and requirement for *mudharabah* financing are:

1. Asset owner (*shahibul maal*) and asset manager (*mudharib*) must be legally capable
2. *Ijab* and *kabul* statement must be done to show their will in making a contract with regard to:

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² Abdul Ghofur Anshori, *Perbankan Syariah Di Indonesia*, (Gadjah Mada University Press, Yogyakarta, 2007), hlm.51
³ Fatwa DSN Nomor 07/DSN-MUI/IV/2000 tentang pembiayaan *Mudharabah* (Qiradh)
a. Offering and acceptance must show the intention of a contract.
b. Accepting the offer must be done within the contract and contract must be written, through correspondence or modern way of communication.
c. Asset is amount of money or other things that given by Syariah bank to mudharib in order to help with the business with following reasons:
   - Asset must be countable
   - Asset must be valuable in a form of money or other thing
   - Asset can not be in the form of credit and must be paid to mudharib, in installment or not according to contract.
d. Profit is the excess that obtained from asset. Profit sharing between shahibul maal and mudharib must meet following reasons:
   - Profit must be shared between two parties
   - Profit must be shared proportionally between two parties based on percentage in the contract or nisbah (changing the percentage must be based on contract)
   - Asset owner will suffer total loss as long as asset manager does not default the contract

The implications of mudharabah contract will be explained below:

1. Mudharib as amin (trusted person). A mudharib will be amin to receive the asset. Asset in this case is a mandate that must be protected by mudharib.
2. Mudharib as assistant. Mudharib as assistant means he is the right hand (trusted person) of shahibul maal in order to manage the business.
3. Mudharib as profit partnership. Mudharib will get some of the profit from business, because mudharabah itself means gaining profit together.

Mudharabah contract is applied to both collecting and channeling fund, for collecting fund it is common to use Mudharabah Muthlaqah contract, that is a cooperation between shahibul maal and mudharib that can cover everything despite type of business, time and area of business. In order to give freedom to the Syariah bank to manage the asset from Customer, it is not recommended to use Mudharabah

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Muqayyadah contract. Meanwhile channeling fund uses Mudharabah Muqayyadah contract (restricted mudharabah/spesified mudharabah), mudharib is restricted by type of business, time and area of business. It is because fund that is used by Syariah bank is customer’s fund so Syariah bank must be careful to channel the fund, by giving restrictions in financing that is stated in the contract.

Beside gaining profit, it is possible for Syariah bank to suffer losses. For example, there is contract default because various reasons, such as side streaming in managing fund by mudharib. Decreasing the possibility of risk is very important so Syariah bank needs to determine the restrictions before channeling fund to mudharib. Basically in mudharabah, shahibul maal does not need to determine the restrictions to mudharib. However if it is needed, shahibul maal can set few restrictions in order to secure the asset from losses. If mudharib defaulted the contract then mudharib must take responsibility of the losses.

Adiwarman Karim defined the restrictions as Incentive Complatible Contraints. There are four components in Incentive Compatible Constraints:

1. Determine kovenan for the availability of collateral (for higher stake in net worth and/or collateral)
2. Determine kovenan so mudharib can manage business with minimum risk (lower operating cost)
3. Determine kovenan so mudharib can manage business transparently (lower fraction of unobservable cash flow)
4. Determine kovenan so mudharib can manage business with low controlling cost (lower fraction of non-controller costs)

Determining the restrictions and requirements by Syariah bank is for the purpose of hoping Syariah bank will provide prudential financing to the Customer, losses will be minimize and Customer will manage the asset carefully. Mudharabah

7 Ibid., hlm.214
contract can be signed when Syariah bank has determined the restrictions and Customer agreed with the regulations. However if Customer managed to default the contract it means Customer must be responsible with the losses. As stipulated in Pasal 36 KHES, party who defaulted the contract must take responsibility if party did following actions:
1. Disobeyed
2. Executed the contract inappropriately
3. Executed the contract after decided period of time
4. Performed something that can default the contract

These acts can be seen in examples of clause about default in Mudharabah contract in one of the Syariah bank:

“Bank has a right to collect all the obligation from Customer based on contract, in full payment, without notification letter, if these acts happened:
1. Customer neglected the payment before due date in contract or;
2. Customer did not pay the obligation for two consecutive months or neglected the payment in contract or;
3. Documents submitted to the Bank were not valid or fake
4. Customer violated the rules in contract
5. Customer suffered bankruptcy
6. Customer or third party asked for bankruptcy statement from a court
7. Invalidated security agreement because of certain reasons
8. Customer getting involved in crime
9. Customer or the representative of Customer became heavy drinker, gambler, or other things that can violate the regulations
10. Guarantor was passed away or lost the right of its ownership
11. Customer registered in Central Bank’s black list

Customer defaulted the contract means Customer did not pay the obligation, that is return capital fund before the due date. Therefore if Customer did not pay the obligation after two consecutive months because losses, not from Customer conscious negligance, Customer did not default the contract.”.
Another example of defaulted *Mudharabah* contract because of Customer negligence.

“Customer proven to default the contract if Customer did these following acts:

1. Using fund from Bank for other purpose outside the plan stated in contract
2. Converted the business to other type of business, including consolidation, acquisitions or other alliance with other party
3. Business performance did not follow the technical provisions stated in contract
4. Asked for bankruptcy statement from a court
5. Neglected the obligation from Bank
6. Refused to be supervised and controlled by Bank, like stated in Pasal 14 AKAD
7. Customer violated syari’ah principles

In summary, contract can be defaulted by various acts that already explained above.

According to Clause before, using fund provided by Bank to manage business outside the contract can default the contract itself. So, if negligence by Customer can cause losses, those losses will be taken under *mudharib* responsibility.

In *mudharabah* contract, both parties should share profit and risk. It is logical consequence to share risk between two parties because *mudharabah* contract is based on partnerships. Risk sharing is based on percentage of asset ownership, not on *nisbah* percentage. So in this case, financial losses will be suffered by *shahibul maal*, meanwhile *mudharib* will lose works, efforts and time spent for the business. However, if *mudharib* neglected the business consciously then *mudharib* will take responsibility of the losses. This kind of losses happened because *mudharib* betrayed the trust from other party. 

The criteria for defaulted loan financing in *Qardh* contract is different from defaulted loan financing in *Mudharabah* contract. Based on the explanation in Article 19 (1) e the Act of Islamic Banking, in *Qardh* contract Customer will receive...

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8 *Ibid*, hlm. 209
loan from Bank and Customer has to return the loan on a date stated in the contract. *Qardh* contract priority is to help to each other without looking for profit, or known as *Tabarru* contract. According to Fatwa DSN-MUI Number 19/DSN-MUI/IV/2001, *Al Qardh* is loan given to Customer (*muqtaridh*) who needs it. Customer of *al-Qardh* must return the loan on a date stated in the contract. Customer has to pay administration fee. LKS can ask for a collateral if its needed. Customer *al-Qardh* can donate to LKS willingly as long as it is not stated in the contract. According to the Act of Islamic Banking and Fatwa DSN-MUI, *Al Qardh* is a loan transaction that must be fulfilled on a period of time based on the contract. If Customer (*muqtaridh*) can not return the loan on time then it means Customer defaulted the contract. Here is the example of defaulted Al Qardh contract in one of Syariah bank.

“Bank has a right to collect all the obligation from Customer based on contract, in full payment, without notification letter, if these acts happened:

- Customer did not pay the obligation on time so Customer has to pay for overdue fee
- Documents submitted to Bank were invalid
- According to regulations or upcoming regulations, Customer is not entitled to be Customer
- Customer was bankrupt
- Customer asked for a bankruptcy statement from third party
- Because of certain reason, some or all collateral is defaulted based on court judgement or arbitraton body
- Representative of Customer became heavy drinker, gambler or punished based on court judgement so Customer will be arrested or under detention

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CONCLUSION

The criteria of defaulted Mudharabah contract is when Customer as mudharib violated the restrictions given by Syariah Bank as shahibul maal. Customer can default the contract if Customer used fund provided by Syariah Bank to manage a business with different purpose outside the contract, then Customer must take responsibility of the possible losses. However, if Customer can not share profit and did not neglect the business, then it is not categorized as default.
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