Sharia Banking Rights and Obligations in Implementing Musyarakah Agreements Based on Indonesian Law

Faisal

Faculty of Law, Universitas Muhamadiyah Sumatera Utara, E-mail: faisal@umsu.ac.id

Abstract

Islam brings a view or way of life that regulates all aspects of human life, so there is no single aspect of human life apart from Islamic teachings, both from the legal aspect to the economic aspect. In this modern era, economic activity will not be perfect without the existence of a banking institution, this banking institution is also a must. This agreement gives birth to the engagement so that it can be called a contract. This research uses a type and research approach using normative legal research (normative juridical). Normative legal research is also called doctrinal legal research, where law is conceptualized as what is written in statutory regulations (law in books). Legal research aims to identify and describe the state of something regarding the existence of legal norms and the operation of legal norms in society. Based on the objectives of legal research, the tendency of the nature of the research used is descriptive. Based on Article 4 paragraph (3) letter a of Bank Indonesia Regulation Number 19/4 / PBI / 2017 concerning Sharia Short-Term Liquidity Financing for Sharia Commercial Banks, Financing Assets must meet the requirements, one of which is financing with a mudharabah contract, a musyarakah contract, and / or a contract. ijarah non service. That the rights and obligations (Bank and mudharib), among others, provide capital and work based on the agreement at the time the contract is made, gain profits based on the agreed ratio, bear losses in proportion to the capital, the first party (syarik) is obliged to promise to sell all hishshah gradually and the second party (syarik) is obliged to buy it; and after completion of sales settlement, all LKS hishshah switch to other syarik (customer).

Keywords:
Rights, obligations, Sharia Banking, Musyarakah Akad

How to cite:
faisal, (2020), “Sharia Banking Rights and Obligations in Implementing Musyarakah Agreements Based on Indonesian Law”, IJRS: International Journal Reglement Society Vol. 1 (2), Pages: 7-12.

A. Introduction

Islam brings a view or way of life that regulates all aspects of human life, so there is no single aspect of human life apart from Islamic teachings, both from the legal aspect to the economic aspect. And because in this modern era, economic activity will not be perfect without the existence of a banking institution, this banking institution is also a must. Thus, the link between Islam and banking must become clear. In Islam, the motive for economic activity is more directed at fulfilling basic needs (needs) which of course have limits, even though it is required to be dynamic according to the economic level of society at that time. However, in economic behavior itself Islam requires that to continue to believe in Islamic rules itself as a guide. in life and human life. Economics in Islam is nothing more than an activity of worship than a series of worship in every type of activity in human life. That is, when there is the term Islamic economics it can be interpreted as economic activity that uses Islamic rules and principles, which in human economic activity is a human worship in economics.. On the other hand, considering that Indonesia is the largest archipelagic country in the

1 Adiwarman A. Karim, Bank Islam: Analisis Fiqih dan Keuangan, Jakarta: PT RajaGrafindo Persada, (2016), p.14-15.
2 Ascarya, Akad & Produk Bank Syariah, Jakarta: PT RajaGrafindo Persada, (2012), p.5-7.
world which has various ethnic groups, languages and religions. Even though it is not an Islamic country, Indonesia is a country with the largest Muslim population in the world, thus causing a greater need for banking services in accordance with sharia principles. Thus, it is very important to know how the concept of agreement is regulated in Islamic law.

An agreement is a bond that creates a strong relationship between the two parties, resulting in a commitment or alliance and gives birth to rights and obligations. It was this agreement that gave birth to the alliance so that it could be called a contract. Usually if a person has a promise (promise) between one party to the other party then the agreement is called a unilateral agreement or wa’ad, which only binds one party that is the party who gives the obligation to fulfill his obligations, while the promised party does not bear any obligation- what against the other party. Whereas if there is a contract between the two parties where the two parties who agree with each other are called an agreement, where each party is bound to carry out their respective obligations that have been agreed in advance.

According to Article 25 of the Compilation of Sharia Economic Laws, the agreement made by both parties (contract) aims to meet the needs of life and business development of each party entering into the contract. Thus, both parties must remind each other about the actions that were carried out after the contract began to be effective. The contract will also be embodied in an ijab and qabul which shows as a statement and expression of mutual pleasure or willingness between the parties to the contract. It is also based on the Compilation of Sharia Economic Law in Article 26 which participates in showing that all alliances in an agreement entered into by both parties will not be considered valid if either of them is contrary to Islamic law or considered valid if it meets Islamic law. Through Ijab and qabul which are based on Islamic law, it has the aim of transferring ownership rights that lead to delivery and payment.

In this connection, if the agreement is not carried out by one of the partners (party) due to reasons outside the agreement, in this case there is no longer one of the parties, in other words the party dies, then indirectly the relationship between the representatives is also not there. (cancel). This is based on the rules for ending the musyarakhah contract if one of the parties terminates the contract, dies, loses his mind and the musyarakhah capital is lost or exhausted. In the practice of sharia bank financing, the death of one of the parties does not invalidate the agreement made by both parties, but the bank (creditor) must still carry out what he promised by asking the heirs from the customer (mudharib) to continue the agreement agreed by the customer before die.

Based on the description above, the focus of the problem can be how the legal arrangements regarding Sharia Banking and Musyarakhah Akad in Indonesia and how the rights and obligations of Sharia Banking in the implementation of the Musyarakhah Akad in Indonesia. This research uses a type and research approach using normative legal research (normative juridical). Normative legal research is also called doctrinal legal research, where law is conceptualized as what is written in statutory regulations (law in books). Legal research aims to identify and describe the state of something regarding the existence of legal norms and the operation of legal norms in society. Based on the objectives of legal research, the tendency of the nature of the research used is descriptive. Data analysis is an activity of focusing, abstracting, organizing data systematically and rationally to provide material answers to problems. This study used a qualitative analysis, namely analysis with a non-quantitative approach to numbers.

B. Discussion

1. Legal Regulations concerning Sharia Banking and Musyarakhah Contracts in Indonesia

Based on Act Number 21 of 2008 concerning Sharia Banking, to be precise, the general provisions state that Sharia Banking is everything concerning Sharia Banks and Sharia Business Units, including institutions, business activities, as well as methods and processes for carrying out their business

---

3 Akhmad Mujahidin, Hukum Perbankan Syariah, Depok: Rajawali Pers, (2017), p.4.
4 Adiwarna A. Karim, Op.Cit., p.65.
5 Akhmad Mujahidin, Op.Cit., p.9.
6 Hery, Akuntansi Syariah, Jakarta: PT Grasindo (2018), p.26.
7 Akhmad Mujahidin, Loc Cit.
8 Akhmad Mujahidin, Ibid., p.5.
9 Hery, Op. Cit., p.27.
activities. Meanwhile, an Akad is a written agreement between a Sharia (Islamic) Bank or UUS and other parties that contains rights and obligations for each party in accordance with the Sharia Principles.

Based on Article 4 paragraph (3) letter a of Bank Indonesia Regulation Number 19/4 / PBI / 2017 concerning Sharia Short-Term Liquidity Financing for Sharia Commercial Banks; Financing assets must meet the following requirements:
1) is financing with mudharabah contract, musyarakah contract, and / or non-service ijarah contract;
2) collectibility is classified as smooth for the last 12 (twelve) consecutive months;
3) is not a consumption financing except for home ownership financing;
4) secured by land and building and / or land collateral with a value of at least 110% (one hundred and ten percent) of the financing ceiling;
5) is not a financing to related parties of the Bank;
6) has never been restructured in the last 3 (three) years;
7) the remaining maturity of the financing is at least 9 (nine) months from the signing date of the grant agreement PLJPS;
8) the principal balance of financing does not exceed the maximum limit for distribution of funds at the time it is granted and does not exceed the financing ceiling;
9) has a legal force financing contract and collateral binding;
10) has been the object or sample of examination or audit by a public accounting firm against the Bank for a maximum period of 1 (one) year;
11) the financing agreement between the Bank and the customer contains a clause stating that the financing can be transferred to another party; andl. have been included in the latest Financing Asset list report which is submitted periodically to Bank Indonesia.

According to the fatwa of the National Syari’ah Council of the Indonesian Ulema Council No. 73 of 2008, the existence of a contract descended from musyarakah, namely the contract of musyarakah mutanaqishah. Musyarakah mutanaqishah known as MMQ is a form of cooperation between two or more parties for the ownership of an item or asset. Where this cooperation will reduce the ownership rights of one party while the other party increases its ownership rights. This transfer of ownership through the mechanism of payment on other ownership rights. This form of cooperation ends with the transfer of rights of one party to the other. The implementation of an agreement between the two parties should be based on voluntary (ikhtiyari), keeping promises (trust), caution (ikhtiyati), unchanged (luzum), mutual benefit, equality (taswiyah), transparency, ability, convenience (taisir ), good faith and halal reasons. As for the pillars of the covenant include: “aqid, ma’ qued alahidan sighat “. Aqid is a person who makes a contract, both in terms of the bank and the customer. Ma’qudalaih is something that is planned. And sighat is ijab and qabul. Ijab is a speech from the person who handed over the goods while qabul is a speech from the person who received the goods. Sharia contract basically also embraces the principle of freedom of contract as well as contract on positive law. However, in the sharia agreement there is a limit that the agreement made should not violate Islamic law, rules and regulations, public order and morality.10

Islamic banking contracts can be classified into tijarah (commercial contracts) and 'akadabarru' (benevolence contracts). A tijarah contract is a commercial contract which is allowed to take advantage of existing transactions. As for what is classified in this contract, namely: buying and selling, profit sharing and leasing. The banking products included in the sale and purchase contract are murobahah, istishina 'and salam. What is included in the profit sharing contract is mudarabah and musyarakah. What is included in the lease agreement is ijarah and ijarah gagna bittamlilik.11

The word asy-syirikah or al-musyarakah means alliance, union, comes from the word syarika which means ally, colleague, friend or partner. According to Nasrun Haroen, etymologically asy-syirikah means mixing between one thing and another, so it is difficult to distinguish. According to the terminology put forward by Maliki scholars, al-musyarakah is defined as permission to act legally for two people who work together. Meanwhile, according to Ulama Hanfiyah al-musyarakah, it is defined as an agreement made by people who work together in capital and profit. From these three definitions

10 Putri Kamilatur Rohmi, “Implementasi Akad Musyarakah Mutanaqishah Pada Pembiayaan Keperluan Rumah di Bank Muamalat Lumajang“ Jurnal Iqtishoduna 5, No. 1, (2015): p.7.
11 Putri Kamilatur Rohmi, Ibid., p.8.
it can be concluded that al-musyarakah is a contract that gives rise to equal rights between those united to act lawfully for work and profit.12

Musyarakah is generally an agreement that goes on as long as the jointly funded business continues to operate. However, the musyarakah agreement can be terminated with or without closing the business. When the business is closed and liquidated, then each business partner gets the result of liquidation of the asset setai his participation ratio. If the business continues, then the business partner who wants to terminate the agreement can sell his shares to other business partners at a mutually agreed price.13

Law No. 21 of 2008 concerning Sharia Banking, defines musyarakah as a cooperation agreement between two or more parties for a certain business, each party providing a portion of the funds provided that the profits will be shared according to the agreement, while the losses are borne according to each portion of the funds. Al-Musharaka consists of two types, namely musyarakah milk (non-contractual in nature) which means ownership of musyarakah due to inheritance or will or other conditions, and musyarakah 'uqud (contractual in nature) which means due to an agreement. According to Nasrun Haroen, dividing musyarakah (syirkah) 'uqud into five, namely:
1) Syirkah Inan, namely an association of capital whose amount does not have to be the same between those who are affiliated with the same profit sharing.
2) Syirkah Al-Mufawadahah, which is an association of the same capital, the amount must be the same and the work between allies with the same profit sharing.
3) Syirkah W Tujuh, namely an association for purchasing goods by credit and selling them again with the same profit sharing.
4) Syirkah Adnan, which is a union for work between allies with the same reward distribution.
5) Syirkah Mudharabah, which is an association between the owner of the capital and the capital manager (workers) with profit sharing in accordance with the agreement.14

Ensuring the compliance of sharia with the practice of musyarakah transactions by the Bank, SSB conducts periodic sharia supervision. This supervision is based on the guidelines set by Bank Indonesia for:
1) Examining whether the provision of complete information has been submitted by the Bank to the customer, both in writing and orally regarding the terms of musyarakah financing,
2) Test whether the calculation of profit sharing has been carried out in accordance with sharia principles,
3) Ensure the agreement of the parties in the musyarakah financing agreement,
4) Ensuring the fulfillment of the pillars and conditions of the musharaka,
5) Ensuring that the operational costs have been charged to the joint capital of the musyarakah, and
6) Ensuring that the investment activities that are being financed are not included in the types of business activities that are contrary to shariah.

A musyarakah contract can be said to end if: 1). One of the partners (party) terminates the contract; 2). One of the partners died or lost his mind; 3). In this case, the partner who dies or has lost his mind can be replaced by one of his heirs who is legally capable, mature and sensible with the consent of all other heirs and other partners; 4) Musharaka capital is lost or exhausted.

2. Rights and Obligations of Sharia Banking in implementing Musyarakah Contracts in Indonesia

Rights and obligations, which in English is called right and obligation, while in Dutch it is called rechten en plichten, are things that must be done by both parties. In the Fatwa of the National Syariah Council No. 73 / DSN-MUI / XI / 2008 on musyarakah mutanaqisah has been determined the rights and obligations of the parties. Those rights and obligations (Bank and mudharib), among them: 1). Provide capital and work based on agreement at the time of making the contract; 2). Make a profit based on the ratio he agrees with; 3). Incur losses in proportion to capital; 4). The first party (company) must promise to sell all hishah gradually and the second party (company) must buy it;

12 Akhmad Mujahidin. Op. Cit., p.82.
13 Ascarya. Op. Cit., p. 52.
14 Akhmad mujahidin. Op. Cit., p.83.
and 5). Upon completion of the payment settlement, the entire hishshah of the Shari’ah Financial Institutions turned to other companies (customers).

Meanwhile, in Article 5 paragraph (2) of the Mutanaqishah Musyarakah Financing Contract, the rights of the customer towards the object of financing have been determined. These rights can be divided into two types, which include: customer rights and bank rights. There are three customer rights, which include: 1). Occupying the object of musyarakah mutanaqishah financing and being able to pay off all bank hishshah at any time; 2). Will occupy, build, and / or use the object of musyarakah mutanaqishah financing; and 3). Cannot sell or transfer part or all of the customer’s ownership portion of the musyarakah mutanaqishah object.

If the customer wants to sell the musyarakah mutanaqishah object to a third party, the customer is required to redeem all the bank’s hishshah. Meanwhile, the rights of the bank have been stipulated in Article 5 paragraph (3) of the Musyarakah mutanaqishah Financing Agreement. Bank rights include:

1. Entering the musyarakah mutanaqishah financing object for inspection purposes after submitting notification to the customer;
2. Not obliged to pay or finance an increase in the price / value of the musyarakah mutanaqishah object or an increase in the portion that the customer is entitled to;
3. Requesting from customers, among others: (a). Take over all hishshah banks; (b). Emptying the musyarakah mutanaqishah object; and / or (c). Pay compensation for all costs incurred by the bank due to customer default; and / or (d). The customer violates the terms agreed in this contract. The rights listed in point 3 above are alternative, this depends on the condition of the customer. For example, if a customer is in default, he is asked to pay compensation for costs incurred by the bank. 15

If the mudarib wants to do a musyarakah mutanaqishah financing contract, it must meet the normative requirements in doing so. The normative requirements according to the Product Codification and Standard Activities of Islamic Commercial Banks, namely:

1) Business capital of parties or banks and customers must be stated in the form of hishshah.
2) The business capital that has been stated in the hishshahters cannot be reduced as long as the contract is effective.
3) The bank promises to sell the entire hishshah gradually and the customer is obliged to buy it.
4) The bank transfers the hishshah unit after the sale is settled.
5) The financing period is determined based on the agreement between the Bank and the customer.
6) Financing is given in the form:
   a. Money, and / or
   b. Item
      In the event that the financing is provided in the form of money, the amount must be clearly stated. In the event that financing is provided in the form of goods, it must be assessed on the basis of market prices and the amount clearly stated.
7) The goods being financed must be tangible and readily available or ready to use (ready stock).
8) The customer acts as a business manager and / or lessee and the Bank as a business partner can participate in business management in accordance with the agreed authorities and duties.
9) The distribution of business results from fund management shall be stated in the agreed ratio.
10) The agreed profit sharing ratio cannot be changed throughout the financing period, except on the basis of an agreement of the parties.
11) The bank and the customer bear the losses proportionately according to their respective capital.
12) The Bank analyzes the application for financing from customers, which includes, among others: personal aspects, in the form of character analysis and / or business aspects including, among others:
      (a). Business capacity analysis,
      (b). Financial analysis, and
      (c). Business prospect.
13) The financing agreement is set forth in a written agreement or other equivalent.
14) The Bank implements product information transparency and customer protection in accordance with applicable regulations.
15) The Bank has policies and procedures for risk mitigation.

15 Salim dan Muhaimin, Teknik Pembuatan Akta Akad Pembiayaan Syariah (Materi Kuliah TPA Dua), Depok: Rajawali Pers, (2018), p.153-154.
16) The Bank has an adequate system for recording and administering accounts.

Of the sixteen conditions, the parties must pay attention to the requirements that oblige Banks and customers to make an agreement as outlined in a written agreement. The terms stated in the deed of the musyarakah mutanaqishah financing agreement have a very important meaning for the parties, because they contain things that must be done and heeded by the parties, both before the deed is signed and after the deed is signed. If the deed has been signed, since then it will give rise to the rights and obligations of the parties.

C. Conclusion

Based on Article 4 paragraph (3) letter a of Bank Indonesia Regulation Number 19/4 / PBI / 2017 on Shariah Short Term Liquidity Financing for Shariah Public Banks Asset Financing must meet the requirements one of which is financing with mudharabah contract, musyarakah contract, and / or contract ijarah non jasa. The word asy-syarikah or al-musyarakah means alliance, union, comes from the word syarika which means ally, colleague, friend or partner. According to Nasrun Haroen, etymologically asy-syirakah means mixing between one thing and another, so it is difficult to distinguish. According to the terminology put forward by Maliki scholars, al-musyarakah is defined as permission to act legally for two people working together. Scholars Syafi’iyah and Hanbilah also submit al-musyarakah as the right to act legally for two or more people on something agreed. Meanwhile, according to Ulama Hanfiyah al-musyarakah is defined as an agreement made by people who work together in capital and profit.

From these three definitions it can be concluded that al-musyarakah is a contract that gives rise to equal rights between those united to act lawfully for work and profit. Musyarakah is generally an agreement that goes on as long as the jointly funded business continues to operate. However, the musyarakah agreement can be terminated with or without closing the business. When the business is closed and liquidated, then each business partner gets the result of liquidation of the asset assetai his participation ratio. If the business continues, then the business partner who wants to terminate the agreement can sell his shares to other business partners at a mutually agreed price.

Those rights and obligations (Bank and mudharib), among them: 1). Provide capital and work based on agreement at the time of making the contract; 2). Make a profit based on the ratio he agrees with; 3). Incur losses in proportion to capital; 4). The first party (company) must promise to sell all hishshah gradually and the second party (company) must buy it; and 5). Upon completion of the payment settlement, the entire hishshah of the Shari’ah Financial Institutions turned to other companies (customers).

Based on the results of the discussion and analysis above, it can be seen that the regulation regarding the musharaka contract is still lacking, therefore it is hoped that the regulators in force in Indonesia can issue or add rules regarding the musyarakah contract. Regarding the rights and obligations of Islamic banks are good and are expected to run even better in the future.

References
Ascarya. (2012). Akad & Produk Bank Syariah. Jakarta: PT RajaGrafindo Persada.
Hery. (2018). Akuntansi Syariah. Jakarta: PT Grasindo.
Karim, Adiwarman A. (2016). Bank Islam: Analisis Fiqih dan Keuangan. Jakarta: PT RajaGrafindo Persada,
Mujahidin, Akhmad. (2017). Hukum Perbankan Syariah. Depok: Rajawali Pers, (2017).
Republik Indonesia, Undang-Undang Nomor 21 Tahun 2008 Tentang Perbankan Syariah.
------. Peraturan Bank Indonesia Nomor 19/4/PBI/2017 Tentang Pembiayaan Likuiditas Jangka Pendek Syariah Bagi Bank Umum Syariah
------. Fatwa Dewan Syariah Nasional Majelis Ulama Indonesia No. 73/DSN-MUI/XI/2008 tentang musyarakah mutanaqishah
Rohmi, Putri Kamalatur. (2015). “Implementasi Akad Musyarakah Mutanaqishah Pada Pembiayaan Kepemilikan Rumah di Bank Muamalat Lumajang” Jurnal Iqtishoduna 5, No. 1.
Salim dan Muhaimin. (2018). Teknik Pembuatan Akta Akad Pembiayaan Syariah (Materi Kuliah TPA Dua), Depok: Rajawali Pers.