Analysis of Wa’d in Sharia Banking Transaction from the Perspective of Indonesian Contract Law

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Abstract: The objective of this research is to identify and analyze the concept of wa’d (agreement) from the perspective of Indonesian contract law, which specifically focus on the type of wa’d, that will create obligations for wa’id (a party who agreed) to fulfill his own agreement, and any legal protection to ma’ud (a party who take the agreement) as well. This is a juridical normative research which focuses on analyzing secondary data. Data will be analyzed and presented descriptively. This research finds that wa’d from the perspective of Indonesian contract law can be defined as a person’s statement to do, to give, or not to do something to someone else. Not every agreement will bind a person who agreed. As mentioned in Fatwa of DSN Number 85/DSN-MUI/XII/2012 concerning wa’d, that depend on certain conditions. The only agreement that will bind a person is an agreement that has legal implications. It is a right for the receiver of agreement (ma’ud) and it creates an obligation to a person who made that agreement (wa’id), specifically if that agreement has been received by ma’ud and he met all the requested requirements from wa’id. Legal protection for ma’ud after he met all requested requirements from wa’id may be given both preventively or repressively. Preventively, legal protection has been regulated in Fatwa of DSN and in the agreement itself. While repressively, legal protection is conducted through litigations and non-litigations process on the basis of default or breach of contract.

Keyword: wa’d, agreement, contract law, sharia banking

1. Introduction

Akad and wa’d are two different things in the context of fiqih muamalah, even though both of them are the same type of agreement. Akad is an agreement between two parties or more that can be done in verbal, gesture, or even on script that has a law-binding implication to implement it. Meanwhile, wa’d is a promise between one party to the other. The one who got promised does not have any obligation towards other parties. Wa’d does not have any detailed or specific form and condition to be set on. If the one who give the promise did not fulfill the vow, the consequence given to that party will only be in form of moral consequence. On the other hand, akad has a law-binding agreement on the both side of the parties that they have to fulfill their own obligations which they have already agreed on before. In akad, its form and conditions are already detailed and specified. If one or both of the parties bound to the contract did not fulfill their obligations, they would get the penalty on what they already committed in the contract. This is what makes wa’d distinguished from akad.[1]. Dewan Syariah Nasional MUI (MUI National Sharia Council), in some of their fatwa, has defined wa’d as a statement from one party to another of their capability to do or not to do some specific act in the future, whereas akad is defined as a bond between an offer (ijab) and acceptance (qobul) according to sharia procedure that influences the object (Fatwa Sharia National Council Number 55/DSN-MUI/V/2007).

Term of wa’d is often used in sharia banking transactions. It is because the Fatwa of Sharia National Council stated the term of wa’d in several group of akad or even fund distributions at sharia banking. When Sharia Banking Legislation or regulations of Otoritas Jasa Keuangan (Financial Service Authority) determine that the sharia principle, which becomes the basis operational of sharia financial institutions, is a principle in the Fatwa of National Sharia Council, therefore the components
that are regulated by the Fatwa are worth to be considered. It should be noticed in some of the regulations stated about wa’d in Fatwa of National Sharia Council about business activities includes sharia financial institutions as well.

Other than on what have been defined from the Al-Quran and hadith, the rule used in those fatwa which mentions wa’d is a rule which stated that basically muwa’adah (promise) can be done by both side of the parties is bonded religiously and not bonded by law [2]. Furthermore, in 2012, National Sharia Council issued a special fatwa about Wa’d called Fatwa Number 85/DSN-MUI/XII/2012 about Wa’d in financial transaction and sharia business. One of the law basis that has been used by the Sharia National Council from the fatwa is a principle stating that “a promise with terms and law-binding”. The fatwa firmly suggested that a promise in financial transaction and sharia business are included in the contract, but it is only binding if the terms or obligations that are given to the other party are fulfilled. Related to the sharia banking’s akad or contract, other than the obligation to obey the sharia principle in the Fatwa of Sharia National Council, it also have to follows the terms from Indonesia’s legal agreement. According to the freedom of contract principle in article 1338 KUHPerdata, the parties included in the contract have the freedom for making the agreement, whatever the content or the form in it. However, the freedom of contract principle still has to follow its legal requirements in KUHPerdata, and that is: agreement on all of the parties, the proficiencies of all the parties, about specific matters, and legality. (Article 1320 to 1337 KUHPerdata).

A wa’d included in the contract and bonded with the terms that applies which have to be fulfilled by the promisor, which is worthy to be considered, especially when it is related to legality and pactasunservanda principle implementation. If it is related to legality, then the clarification about wa’d that bonding or causing an obligation toward wa’id (the person who pledge) and wa’d that is not bonding, have to strongly suggested to give a law clearance for all the parties. Furthermore, if the wa’d are bonded and mau’ud (the party whom is given the pledge) already done their obligations, it have to be considered when wa’id did not doing wa’d obligations and not fulfill his/her promise that had already been written in the contract. Therefore, to give a law clearance and law protection between both parties in sharia banking contract that contains wa’d, the researcher intend to bring this case to the research entitled “Analysis of Wa’din Sharia Banking Transaction from the Perspective of Indonesia Contract Law”

2. Findings

2.1. Wa’d Concept Observed from Legal Agreement in Indonesia

Perjanjian (agreement) came from a word “janji” (a promise/a pledge). However, in law studies, especially agreement studies, a promise has a different meaning with an agreement. A promise is a unilateral statement from a person that has the ability to do, to give, or to act something. Meanwhile, agreement is a legal relationship between 2 (two) parties that has a purpose to create a law impact in a form of fulfilling achievement that can be done by giving something, doing something, or not doing something. According to the article 1234 KUHPerdata, it is mentioned that:”Every engagement is to give something, to do something or not to do something”. Article 1313 KUHPerdata arranges the agreement definition authentically. Even though there is a flaw and deficiency when it comes to defining an agreement, the authentic agreement interpretation in article 1313 KUHPerdata is still being used as guidance, and then it is perfected by the opinions from some law experts. In Dutch language, “promisoir” have the meaning of promising, contains promise/pledge (Termorshuizen, 2002:322). Meanwhile, a word “promise” as a noun according to Black Law Dictionary has one of the definition as “The manifestation of an intention to act or refrain from acting in a specified manner, conveyed in such a way that another is justified in understanding that a commitment has been made; a person assurance that the person will or will not do something” (A Garner, 2009).
A promise in KUHPerdata also comes in many forms, yet it tends to have a law implication because it often follows or included in the agreement. A few of the promises in the KUHPerdata such as in article 1494 KUHPerdata stated “Even though the seller is promised to not have to bear anything at all, he/she still has a responsibility on what going to be the outcome of his/her actions; the agreement will be canceled if the promise was broken”. This article is related to the promise which is not allowed in KUHPerdata because it is contradicts the main responsibility from the seller to take care their commodity before they submitted. If it is related to the consumer protection, this matter is also aligned with which already regulated in Article 18 paragraph (1) point a Act Number 8 of 1999 on Consumer Protection, which stated that the businessmen who are offering items and/or services that going to be marketed are not allowed to make or included a basic clause in every document and/or contract that contains a diverting act of businessmen responsibility. Still in trading agreement, article 1519 KUHPerdata regulates the buyback claim on the item that already been sold by the seller. This promise is allowed and have the legal cause. This article controls :” The authority to buy back the item that already been sold is publish from a promise, where as the seller are given the rights to take back the sold item by buying it with the same price from the first buyer with the replacement in exchange, which is mentioned in article 1532”.

From all the definitions that have been mentions, it can be concluded that a promise which is a capability statement from someone to act something, to give something or not doing something have a legal cause or not, depends on the content, characteristics, or behavior of the person who promised or even the person who got promised on. When the Fatwa of Sharia National Council emphasizes that a promise (wa’d) in a financial transaction and sharia business is a mulzim/binding and must be fulfilled by wa’id (a person or party who stated the pledge) with the requirement of: [3]

1) Wa’d have to be legally written in the agreement certificate/contract;
2) Wa’d has to be related to some terms that have to be fulfilled or held by mau’ud(a party who take the agreement)
3) Mau’ud that already fulfilled or held the terms

There have to be boundaries about the law-binding wa’d towards the parties in the financing agreement/contract at sharia banking, that can be seen at the terms above. If we observe it, then wa’d, on what have been mentioned in fatwa DSN above, is a wa’d that depends on terms. Therefore, it is only bonded if the terms are fulfilled. The desire terms are determined by the one who promised. Wa’d, which has been mentioned in fatwa DSN, is a “dependent promise”, which is a promise that depends at the terms, the party who make a law-binding promise/pledge to fulfill their promise when the other party/mau’ud did or fulfilled the terms that are given.

2.2. Type of Wa’d in a Sharia Banking Contract Creating Obligations for the Wa’id to Implement It

Based on the definition of promise in the earlier discussion, it can be concluded that not all promises can create a binding action to the one who promised. On the contrary, even if it is not firmly suggested to make a promise in a form of promises of one party to another. If it is natural to think for someone to fulfill the promise they held, then it has to be fulfilled. It is often already set by the Act or based on a few valid principles in the agreement.

Based on the secondary data conducted by the researcher, it is discovered that a few group of promises are based on the outcome of the legal cause, which are: Promises that do not cause law implication and Promises that have law implication. A promise in the form of someone statement for doing something or not doing something, does not cause a law implication if: the promise contradicts with the legal obligation from a person; the promise contradicts with the valid terms or the valid Act; the promise contradicts with the proper principle, morality and public order; the promise will take another agreement to take.
The second group is a statement promise from a person for doing something, act something, or not doing something that will cause law implication. A promise will have a law implication if: the promise is in the naturalia agreement category; the promise that according to the characteristic of it is required in that agreement; the promise that firmly suggests that it contractually is a few component in the obligations; the promise that has already been specifically formulated so it creates an obligation for the promised party to fulfill it.

Through the study towards Fatwa DSN about the funding of a product in sharia banking, the researcher have found that wa’d is used in ijarahmunthaiya bi tamlik (IMBT) contract. One of the terms is item order in the funding agreement murabah, take over funding and line facility. According to the researcher, the law-binding wa’d in the sharia banking transaction occurred in the murabahah contract, IMBT, and take over funding. In the transactions, this wa’d is included in the freedom of promise which is related to the specific terms until Wa’id (the party who promise) is bonded to fulfill it. In the IMBT contract, sharia bank makes a promise to sell or hand over the rent object after the customer finished the rent period. In the murabahah transaction, the customer essentially promises to purchase an item through murabahah funding after sharia bank purchased the items from the order. In the take over funding, the customer promises to sell the item to pay of the qardh funding after the sharia bank paid of the costumer debt at the conventional bank. The type of wa’d that is not bonded is aligned with facility transaction.

2.3. Law Coverage for Mau’ud if They Already Fulfilled Their Obligations

One of the promises that causes a law implication for all parties is the conditional promise where the terms which are proposed by the promisor are fulfilled by the promisee. The fulfillment of the terms or the execution by the promise receiver can be meant as an offer approval done by the person who promised. The theory in the law of agreement, there will be an agreement if the offering come together with approval. This agreement will create the rights and the obligation to each parties to follows on what the already agreed on.

An agreement creates an engagement. In an engagement, there is one party that has the rights, which is called the creditor, and another party who owns the obligations, which is called the debtor. The party who get the promise fulfilled from the promisor will have a position as the creditor, which is a person who has the right to contractually achieve a full achievement. A creditor in the rights fulfillment is clearly getting a warranty from the Act that is appropriate with the type of agreement. If the agreement is included in the statutory agreement, other than the agreement itself, there are specific terms to protect all of the main parties including the promisee as a creditor. The creditor can maintain his rights based on the promises that have been agreed. The promises that are given to the creditor can be in the form of giving something, doing something, or not doing something. The rights violation owned by the creditor can lead to what is called the breach of contract. The party who cannot fulfill his achievement can be said to be a breach of contract. For that reason, the party whose rights are violated can place charges for refunds based on the breach of contract. According to those articles, it can be concluded that the material that can be compensated from the debtor is the real losses and the expected profits, which both parties are the direct cause from the failure of fulfilling the engagement. Therefore, even if the creditor has the right to ask for compensation, the lawmakers will protect the debtor, so the compensation is equal with its responsibilities.

In the sharia banking, there is an agreement of products related with credits like qardh, murabahah, ijarah, salam, and istishna(Article 1 digit 25 Act Number 21 Year 2008), so it needs a further analysis about whether or not that wa’d exist in those contracts. On the other hand, the interest for one of the compensations that can be charged at is not in the sharia banking transaction. Similar with the law agreement concept by KUHPerdata, based on the Fatwa, compensation (ta’widh) can only be charged to the party that intentionally or because of failing of doing something, deviate from the terms of the contract and cause a loss to another party, the wa’d (the who give the promise) that intentionally or because of fails to fulfill the wa’d in the contract and mau’ud (the one who received
the promise) have already fulfilled the terms in the contract, can ask for compensation because wa’d cannot be done. However it is different with KUHPerdata, the fatwa will determine that compensations are not allowed for opportunity loss of the expected profit. Corresponding with the sharia principle, compensations can only be charged for the sharia banking product in which are using murabahah, qardh, ijarah, istishna, and salam contracts. Meanwhile, for mudharabah and musyarakah contracts, the compensations are only for a profit sharing, which is not been paid in real. The projections for the profit sharing that is often stated in the contract cannot be the reference or charges to be paid, because it is an expected profit.

Preventive coverage, beside it is included in the sharia principle, Fatwa of Sharia National Council are also included in the sharia banking contract, especially the murabahah funding contract and hawalah wal murabahah contract in the take over funding. In the contract clause it is mentioned that the bonded customer to fulfill the pledge to buy the ordered item with the murabahah funding contract or the bonded customer to pay off their qardh funding debts by selling an items to sharia bank, so the price of the item that they agreed to are similar with the qard funding. If the wa’id did not want to give a compensation that was paid in real cost by mau’ud, then a repressive legal protection can be done by making a proposal to Basyarnas or Religious Court as a rightful justice court of solving the sharia banking dispute.

3. Conclusion

This research finds that Wa’d (agreement) from the perspective of Indonesia Contract Law can be defined as a person’s statement to do, to give, or not to do something to someone else. Not every agreement will bind a person who agreed. As mentioned in Fatwa of DSN Number 85/DSN-MUI/XII/2012 concerning Wa’d, included as Wa’d are any syariah financial and business transactions that depend on certain conditions. The only agreement binding a person is an agreement that has legal implications, which is a right to the receiver of agreement (ma’ud) and creates an obligation to a person who made that agreement (wa’id), specifically if that agreement has been received by ma’ud and he met all the requested requirements from wa’id. Legal protection for Ma’ud after he met all requested requirements from wa’id may be given both preventively or repressively. Preventively, legal protection has been regulated in Fatwa of DSN and in the agreement itself. While repressively, legal protection is conducted through litigations and non-litigations process on the basis of default or breach of contract.

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