

Conference Paper

Mudharabah Financing Dispute Resolution in Sharia Banking

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Abstract.

Indonesia adopted the Sharia Law System. The implementation of the adoption of the Sharia Law System, the legal fact, has resulted in the development of Sharia banking business practices in Indonesia. In carrying out Sharia banking business practices, Sharia banks can distribute funds to customers receiving facilities in the form of mudharabah financing. In the implementation of the mudharabah contract, disputes can occur, which of course must be resolved. This research discusses mudharabah financing by Sharia banks to the customers who receive facilities, which in practice does not rule out the possibilities between Sharia banks and customers receiving facilities, which of course must be resolved. In this regard, this research is focused on examining the legal certainty of mudharabah financing dispute resolution in Sharia banking. This research type used is normative. The method used in this research is a normative juridical research method. This research is a descriptive analysis, using various types of data in legal research. The study's findings suggest that in the absence of a dispute resolution provision in the mudharabah contract, disputes were resolved in religious tribunals. If there is a clause, nonetheless, its application must not go against Shariah law. In the event of any non-compliance, the Central Bank of Indonesia (Bank Indonesia) will impose administrative sanctions on Shariah banks.

Keywords: dispute, financing, Sharia

1. INTRODUCTION


Law is an important part of human life.[1] Likewise in Indonesia, Indonesia is a legal state according to Article 1, Paragraph 3 of the 1945 Constitution of the Republic of Indonesia. In Indonesia, 1945 Constitution is the basic law in state legislation (state fundamental standard). This is confirmed based on the provisions of Article 3 paragraph (1) of Law Number 13 of 2022 Concerning the Formation of Legislation (Law Number 13 of 2022). The legal state of Indonesia is based on Pancasila, or the five Principles, in that Pancasila is the source of all sources of state law (basic standard).[2] This is confirmed based on the provisions of Article 2 of Law Number 13 of 2022.

The Indonesian legal state based on the five Principles and the 1945 Constitution takes the prismatic or integrative concept of 2 (two) legal state concepts recht staats

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(constitutional state) and the rule of law.[3] The choice of the prismatic concept is very reasonable, namely to combine the principle of legal certainty in the concept of constitutional state, and the principle of justice in the concept of the rule of law.[4]

As a rule of law country, Indonesia adopts various legal systems. According to Soedikno Mertokusumo: “The legal system is a unity consisting of elements that have interactions and work together to achieve the goals of the unity.”[5]

The Sharia Law System is one of the legal systems adopted by Indonesia. According to Tutik Nurul Janah: “The Sharia Law system is a legal system that places Sharia Law as the formal state law”.[6]

The Sharia Law System is the rules of Islamic religion, with 2 (two) main sources of law, the Al-Qur’an and the Hadith. It is reasonable to adopt the Sharia Law System because the majority of people in Indonesia follow Islam.

One of the legal facts related to the implementation of the adoption of the Sharia Law System in Indonesia is the existence of Sharia banking business practices. Islamic banking has expanded and flourished in Indonesia. Companies must, however, follow Indonesian competition rules, as outlined in Law Number 5 of 1999 about the Prohibition of Monopolistic Practices and Unfair Business Competition (Law Number 5 of 1999), as well as other related legislation.

Related to legal, in law, there are an essential and basic elements, namely the principle.[7] According to Mahadi: “The principle is the ratio legitimate of various laws. The position of principle in law is a state of mind which is the background in the formation of the different norms of law”.[8]

Sharia banks, which include Sharia commercial banks and Sharia people’s financing banks, oversee the expansion of the Sharia banking business in Indonesia. These banks operate in accordance with the established legal norms outlined in Article 2 of Sharia Banking Law Number 21 of 2008. These values include Sharia law, economic democracy, and prudence.

Through Sharia banking business practices, it is hoped that it can support the implementation of national development in the framework of increasing justice, togetherness, and equal distribution of people’s welfare. In this regard, Sharia banks can distribute funds to members of the public (customers receiving facilities) in the form of financing (profit sharing transactions in the form of mudharabah), while still based on the 3 (three) principles above. Distribution of funds to customers receiving facilities in the form of mudharabah financing, is carried out based on contracts made and agreed upon by Sharia banks and customers receiving facilities.

According to Yasardin: "In a general sense, a contract is any obligation that arises in an agreement made by humans to be fulfilled, both as a comparison to other obligations (such as buying and selling and the like) or not as a comparison to these obligations (such as vows, divorces, and vows), whether the obligation is a religious obligation [such as fulfilling something that is fardhu (must be carried out) and obligatory], or a worldly obligation".[9]

Mudharabah Akad [Agreement/Contract] must be made in writing, which in Indonesia is commonly known as a "contract". According to Henry Campbell: "Contract is promissory agreement between 2 (two) or more parties that can create, modify, or eliminate legal relationship".[10]

Along with the development of science and technology, as to provide convenience in the the future, it would be appropriate for the Mudharabah Contract to be digitally arranged. Based on the Mudharabah Contract made and agreed upon by the Sharia bank and the customer receiving the facility, of course morally and legally, the customer receiving the facility must have good faith to pay off his legal obligations to Sharia banks, according to the agreed timeframe. In the implementation of Mudharabah Contract, it is possible for mudharabah financing disputes to occur, the legal facts of which are generally caused by default on the part of the customer receiving the facility.

Mudharabah financing disputes that occur between the Sharia bank and the customer receiving the facility, of course, must be resolved. Understanding legal certainty in the resolution of mudharabah financing conflicts in Sharia banking is critical because, according to Article 28 D paragraph (1) of the 1945 Constitution, every individual has the right to achieve (fair) legal certainty..

2. METHODOLOGY/ MATERIALS

This study is classified as normative research, and it applies a normative juridical research approach..[11] This research is a prescriptive analysis.

This study makes use of data that is typically utilized in legal research, such as primary data, secondary data, and tertiary data.[12] All data gathered will be thoroughly evaluated in order to address the issues identified in this study and reach a conclusion..

3. RESULTS AND DISCUSSIONS

The business world is a dynamic world and continues to experience development from time to time. The business world is busy being discussed in various forums,

both national and international. Much debate occurred when economic advancement became a key measure of a country's development, with global corporate activity serving as the cornerstone of this progress. [13]

The term "business" is derived from the English word "business," which denotes commercial operations. In a larger sense, "business" is typically defined as a comprehensive set of operations carried out by an individual or organisation on a regular and continuous basis. These operations entail providing commodities, services, or facilities for selling, exchanging, or leasing with the ultimate purpose of profit generation. [14]

According to Nindyo Pramono: "Regarding the scope of Business Law, based on the term itself, it has explained itself that Business Law is nothing but law relating to a business. In this case what is meant by the word business is a trading business, affairs and so on. So that business in general means a trading, industrial or financial activity".[15]

Business activities in people's lives are carried out by business actors with the aim of making a profit. Business activities are carried out in various scales and various forms of business activities, on a local, national and international scale.[16]

Until now, Sharia banking business practices have developed in Indonesia, whose development is inseparable from Lawrence Meir Friedman analyzes the Sharia Law System's application in Indonesia: "In the legal system there are rules that really work, because one of the functions of the legal system relates to controlling behavior, namely ordering people what to do and what not to do, and the legal system orders to uphold orders by force".[17]

Sharia banking business practices are carried out by Sharia banks based on legal principles, namely the principle of sharia, the principle of economic democracy, and the principle of prudence. The sharia principle means that sharia banking business practices must not contain elements of riba (usury), maisir (gambling), gharar (trading with elements of ambiguity and uncertainty) and zalim (unjust/despotic). The principle of economic democracy means that sharia banking business practices must contain the values of justice, togetherness, equity and benefit. The principle of prudence means that sharia banking business practices must adhere to bank management guidelines, To build a strong and efficient Sharia banking system that adheres to legal requirements.

In carrying out sharia banking business practices, sharia banks can distribute funds to customers receiving facilities in the form of financing. This financing can be in the form of:

1. Profit sharing transactions in the form of mudharabah (business cooperation agreements between fund providers and fund managers) and musyarawah (deliberation);
2. Lease transactions conducted via ijarah (lease) or as ijarah muntahiya bittamlik (hire-purchase);
3. Sale and purchase transactions in the form of receivables murabahah (purchase of goods by the bank customer with the added margin as a profit for the bank as the funder), salam (purchase of goods with payment in advance and delivery later), and istishna (Purchase Contract with order to manufacture);
4. Borrowing transactions are carried out in the form of qardh (interest-free loan arrangement);
5. Transactions leasing services in the form ijarah (pledge) for multi-service transactions.

Distribution of funds by Sharia banks to customers receiving facilities in the form of mudharabah financing, based on akad (contract/agreement) made and agreed upon by the Sharia bank with the customer receiving the facility. Akad made in writing, which in Indonesia is commonly known as a “contract”.

A contract is an agreement that is realized by the parties in the form of a written agreement (containing the identities of the parties/subjects, objects, rights, obligations, and various clauses), this creates a legally binding relationship and serves as a governing framework for the parties involved, necessitating their moral and legal commitment. Contracts entered into between parties should be in accordance with applicable laws and regulations, public order, and the standards of decency, appropriateness, thoroughness, and prudence.[18]

Referring to the Civil Code, in accordance with the provisions of Article 1320, the terms conditions for a valid contract are:

1. Agreement;
2. Proficiency;
3. A certain thing;
4. A lawful (permitted) cause.

The terms above can be divided into:

1. Subjective terms;

2. Objective terms.

Subjective terms, where the terms regarding the subject of the contract, which must be met by the parties (subject), that is regarding the agreement to make a contract and have been able to make a contract. If 2 (two) requirements are not met, the contract can be cancelled (*vernietigbaar/ voidable*). The conditions governing the contract's aim, which comprises a specified item and a legal cause, are referred to as objective terms. If neither of these conditions is met, the contract is declared null and void (*nietig/null and void/void ab initio/fraus omnia corrumpit*).[19]

According to Ningrum Natasya Sirait: "The 4 (four) conditions are the basic requirements for every contract based on Contract Law in Indonesia. This means that each agreement must fulfill the 4 (four) conditions in order to be valid and binding on the person making the agreement".[20]

Concerning the Sharia Law System's Contract Validity:

1. Does not violate the agreed Sharia Law (*al-muttafaq alayh*);
2. Mutually happy and willing (*an taradhin*), and there is an option to continue or to cancel (*khiyar*);
3. Must be clear and obvious.[21]

Civil Code Law is derived from the Continental European Legal System, juridical consequences of legally contracts:

1. The provisions of the contract bind the parties (in accordance with Articles 1338, 1339, and 1340 of the Civil Code);
2. The parties are bound by appropriateness principles, customary practices, and legal provisions (as specified in Civil Code Articles 1338, 1339, and 1340);
3. The parties are expected to fulfill the contract with honesty and good faith (as stated in Civil Code Article 1338 paragraph 3).[22]

Under the Sharia Law System, the juridical consequences of legally concluded contracts:

1. The contract must be carried out by the parties voluntarily and in good faith;
2. Contracts that are neglected by one of the parties, then he will be subject to sanctions from Allah in the hereafter.[23]

Regarding the application of the precautionary principle, before Sharia banks distributing funds to prospective customers who receive facilities in the form of mudharabah financing, Sharia banks must obtain confidence. The confidence in question is in the form of the belief of the Sharia bank that the prospective customer receiving the mudharabah financing facility will have good faith and be able to pay off his legal obligations to the Sharia bank, in accordance with the agreed timeframe.

Sharia banks are required to perform a thorough investigation of the character, aptitude, capital, collateral, and business possibilities of potential customers seeking financial services in order to develop confidence. This evaluation is conducted on prospective customers in accordance with the provisions of Article 23 paragraph (2) of Law Number 21 of 2008. Furthermore, it is consistent with the 5 C's idea (Character, Capacity, Capital, Collateral, and Condition).[24]

After obtaining confidence based on the assessment carried out, in order to channel the funds to the prospective customer receiving the facility in the form of mudharabah financing, a mudharabah contract is made by the Sharia bank with the prospective customer receiving the facility, with the development and technology, for the sake of practicality and conveniences, it is hoped there would be an ordinance to

regulate Mudharabah Contract digitally

Based on the mudharabah contract made and agreed upon by the Sharia bank and the customer receiving the facility (whose making the mudharabah contract has juridical consequences, especially based on the Sharia Law System), of course morally and legally the customer receiving the facility must have good faith to pay off his legal obligations to the bank sharia, in accordance with the agreed timeframe.

In the implementation of mudharabah contracts, it is possible for mudharabah financing disputes to occur, the legal facts of which are generally caused by default on the part of the customer receiving the facility. Mudharabah financing disputes that occur, of course, must be resolved. Every individual has the right to legal certainty, as stated in Article 28 D paragraph (1) of the 1945 Constitution. As a result, it is critical to undertake a study on the legal certainty of the agreements.

One of the goals of law is to provide legal clarity.[25] Other legal purposes are justice and expediency. According to Gustav Radbruch: "Legal certainty to realize legal order sebagai the existence of a legal orders is more important than it's justice and expediency, which constitute the second great task of law, while the first, equally approved by all, is legal certainty, that is order or peace".[26]

Furthermore according to Gustav Radbruch: " Legal certainty not only requires the validity of legal rules laid down by power, it also makes demands on their contents,

it demands that the law be capable of being administered with certainty, that is practicable”.[27]

Legal certainty guarantees that the law is followed, offering rights to those who are entitled to them and making decision-making easier. It protects individuals from arbitrary actions by ensuring that they can legally claim what is expected in specific situations. The law’s core objective is to create order in society, and legal certainty is an essential component of this process, particularly for written legal norms. Without the value of legal certainty, the law loses its importance as a guiding principle for all activity.[28]

The clarity and precision of standards that allow them to function as instructions for those subject to regulations is referred to as legal certainty. It can also refer to specific issues that can be determined definitively by the law. [30]

Human behavior is inextricably linked to the question of legal certainty regarding the application of the law. The certainty of the rule or the regulatory aspect itself is referred to as legal certainty. However, it can only be handled from a normative standpoint, not from a sociological one.[32]

According to C.S.T. Kansil: “Normative legal certainty is when a regulation is made and promulgated with certainty because it regulates clearly and logically. Clear in the sense of not causing doubts and logical. It is also clear in the sense of being a system of norms with other norms so that they do not clash or cause a conflict of norms. Legal certainty refers to the application of a clear, permanent, consistent and consistent law whose implementation cannot be influenced by subjective circumstances. Certainty and justice are not just moral demands, but factually characterize law. A law that is uncertain and does not want to be fair is not just a bad law”.[33]

In relation to the legal system put forward by Lawrence Meir Friedman, legal certainty is not only limited to substance, but also to its structure within the framework of law enforcement, so as to create a culture of legal certainty in society..[34]

It is emphasized in numerous explanations of legal certainty that legal certainty is a fundamental right of every individual, and its knowledge and resolution are restricted to the normative component. Thus, regarding legal certainty regarding the settlement of mudharabah financing disputes between Sharia banks and the customer receiving the facility, of course, this must also be reviewed normatively.

The norm referred to specifically is Law Number 21 of 2008. This is confirmed based on one of the principles of the application of laws and regulations, namely the principle of special norms overrides the application of general norms. (*lex specialist derogat legi generalis*).

In Article 55 of Law Number 21 of 2008, it is determined that:

1. "Settlement of sharia banking disputes is carried out by courts within the Religious Courts;
2. In the event that the parties have agreed to settle a dispute other than as referred to in paragraph (1), the settlement of the dispute is carried out in accordance with the contents of the contract;
3. Dispute resolution as referred to in paragraph (2) may not conflict with sharia principles".

According to Article 55 of the aforementioned Law Number 21 of 2008, the resolution of mudharabah financing disputes between Sharia banks and customers availing of facilities is handled through religious courts, as specified in Law Number 50 of 2009 concerning Religious Courts (Law Number 50 of 2009).

In the event that the Sharia bank and the customer receiving the facility have agreed in the mudharabah contract made regarding the method of resolving mudharabah financing disputes, generally it has been determined as a legal clause in the mudharabah contract that the settlement of mudharabah financing disputes is carried out first by way of deliberation to reach consensus (non-litigation), which if an agreement is not reached, is carried out through a religious court (litigation).

The inclusion of a legal phrase in the mudharabah contract for the resolution of mudharabah finance issues represents the notion of contract freedom. Furthermore, once the mudharabah contract is made and mutually agreed upon, it becomes legally binding (realizing the principle of *pacta sunt servanda*) for both the Sharia bank and the consumer using the facility, specifically for the resolution of mudharabah funding disputes.

Freedom of contract is an integral part of the terms of the validity of a contract.[35] According to Asjmuni A. Rahman: "The basic principle of freedom of contract in the Sharia Law System:

1. QS. Al-Maidah [5]: 1: 'O you who believe, fulfill the promises';
2. The words of the Prophet SAW: 'The Moslems were always faithful to their conditions (promises)';
3. The words of the Prophet SAW: 'Whoever sells date palms that have been mated, then the fruit is for the seller (not included to be sold), unless the buyer stipulates otherwise';

4. Rules of Sharia Law: 'In principle, the contract is an agreement between the parties and the legal consequences are what they determine for themselves through promises".[36]

Dispute resolution (either non-litigation or litigation) based on legal stipulations in mudharabah contracts relating to mudharabah finance should adhere to Sharia standards. If the resolution defies Sharia principles, the Bank of Indonesia (BI) may apply administrative sanctions against Sharia banks under Article 56 of Law Number 21 of 2008.

4. CONCLUSION

It is conceivable for a dispute to occur between the Sharia bank and the customer receiving the finance during the implementation of a mudharabah contract. Legal certainty is a fundamental right for every individual, according to Article 28 D paragraph (1) of the 1945 Constitution. As a result, it is critical to establish legal certainty in the resolution of mudharabah finance conflicts. If the mudharabah contract does not include a special language addressing the resolution of mudharabah finance concerns, the disagreement will be resolved in a religious court, pursuant to Article 55 paragraph (1) of Law Number 21 of 2008. However, if the mudharabah contract includes a section defining the resolution of mudharabah funding problems, the disagreement will be addressed in accordance with the terms provided in the mudharabah contract, as stated in Article 55 paragraph (2) of Law Number 21 of 2008.

Following the dispute resolution clause provided in the mudharabah contract, the handling of mudharabah finance problems must adhere to Sharia principles. If there is a conflict with Sharia principles, the Bank of Indonesia may apply administrative sanctions against Sharia banks under Article 56 of Law Number 21 of 2008.

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