

THE ELEMENT OF "INJUSTICE" IN THE PROCESS OF
EXECUTING THE AUCTION OF COLLATERAL ITEMS FROM
THE MURABAHA FINANCING CONTRACT AT SHARIAH
COMMERCIAL BANK

(Unsur "Kezaliman" pada Proses Eksekusi Lelang Barang Jaminan
dari Akad Pembiayaan *Murabahah* Di Bank Umum Syariah)

Cucu Solihah

Universitas Suryakencana, Indonesia
Email: cucusolihah2012@gmail.com

Dhody Ananta Rivandi Widjajaatmadja

Universitas Islam Bandung, Indonesia
Email: dhody_notary@yahoo.com

Uus Ahmad Husaeni

Universitas Suryakencana, Indonesia
Email: uusahmadhusaeni@unsur.ac.id

DOI: 10.21154/justicia.v16i2.1638

Received: 14 Jun 2019

Revised: 23 Sept 2019

Approved: 19 Nov 2019

Abstrak: Pemberian fasilitas yang diberikan bank syariah kepada nasabahnya secara praktik masih diterapkan barang jaminan, sebagai bentuk kepercayaan yang mengikat kedua belah pihak sampai suatu akad berakhir, namun dalam hal nasabah gagal bayar peluang untuk melaksanakan eksekusi atas barang jaminan mungkin saja dilakukan oleh pihak bank, sebagai solusi terakhir atas kewajiban nasabah yang tidak dapat ditunaikan dan pihak bank sebagai lembaga ekonomi pada dasarnya tidak mau mengalami kerugian. Tujuan dari penelitian ini yaitu untuk menganalisis unsur keadilan pada lelang barang jaminan akad *murabahah*. Metode penelitian menggunakan pendekatan yuridis normatif dengan analisis data deskriptif analitis. Temuan penelitian ini yaitu praktik proses eksekusi atas barang jaminan masih mengandung unsur kedholiman, hal ini terlihat dari barang jaminan yang akan di lelang sejak awal akad, nilainya lebih tinggi dari fasilitas yang diterima nasabah, dan dalam proses lelang terkadang tidak melibatkan pihak nasabah untuk menentukan harga jual atas barang jaminan, bahkan tidak jarang pihak pemilik barang jaminan tidak diberi tahu pelaksanaan proses eksekusi jaminan itu, sehingga pihak bank menjual barang jaminan dengan harga yang tidak sesuai dengan keinginan pihak nasabah.

Kata Kunci: Lelang, Barang Asuransi, Bank Syariah, Eksekusi

Abstract: *The provision of facilities provided by Islamic banks to their customers is practically still applied as collateral, as a form of trust that binds both parties until a contract ends, but in the event that the customer fails to pay the opportunity to carry out the collateral may be carried out by the bank as a solution the last is the obligation of customers that cannot be fulfilled and the bank as an economic institution basically does not want to suffer losses. The purpose of this study is to analyze the element of ignorance at the auction of murabaha contract items. The research method uses a normative juridical approach with analytical descriptive data analysis. The findings of this study are that the practice of the execution of collateral still contains the element of death, this can be seen from collateral items that will be auctioned from the beginning of the contract, the value is higher than the facility received by the customer, and sometimes does not involve the customer to determine prices selling collateral, it is not uncommon for the owner of the collateral not to be informed of the execution of the guarantee, so that the bank sells collateral at a price not in accordance with the wishes of the customer.*

Keywords: *Auction, Insurance Item, Islamic Bank, Execution.*

INTRODUCTION

The development process that takes place today in the economic sector is mainly triggered by the position of the Indonesian State, which is among the top 10 countries in the world in 2030, hoping to become a country whose economic growth rate can be stable and is expected to increase national industry competitiveness in the global arena. These expectations can be achieved by involving all the important elements in the process of economic growth, especially banking and also the ability of the business and the economy to be able to implement the demands of the Industrial 4.0 era.¹

The bank has a strategic role in increasing the rate of economic growth of the community, especially Indonesia is the country with the largest Muslim population in the world, which is as many as 213 million people or 87% of the total population.² Banking institutions are very close to the nation's economic activities, ranging from simple

¹ <https://www.liputan6.com/news/read/3551699/indonesia-siap-masuki-era-industri-40>, diakses pada 15 November 2018.

² Pusat Kajian Strategis-Badan Amil Zakat Nasional, *Departemen Ekonomi dan Keuangan Syariah-Bank Indonesia* (Jakarta: BAZNAS, 2018), V.

financial transactions to very complex financial traffic both at the domestic and international levels.

In connection with the rapid development of Islamic banking in Indonesia as well as one of the pillars of the economy, the growth of Islamic banking in Indonesia is faster than in other countries, especially Malaysia. Today, Indonesian Islamic banking has grown by 40% in the past 5 years. Bank Indonesia (BI) hopes that the market share of Islamic finance can penetrate the 30% figure in the long term, while as of August the financing of Islamic banks and Sharia Business Units (UUS) has only reached Rp193.98 trillion, and it is expected that in the long term banking or Islamic economics can reach 30% compared to existing financing. To support the expansion of public understanding of Islamic economics, as well as support from Bank Indonesia in assisting the development of Islamic finance in the Islamic monetary sector so that the management of funds in Islamic finance can be effective, thus banks can offer facilities with profit sharing, buying and selling or competitive rental systems.³

Financing in a Islamic Bank requires caution in its distribution, so that the bank must manage it using prudential principles.⁴ This is needed to ensure that investment funds from creditors are managed perfectly by the bank as an intermediary institution. One of the prudential principles in financial governance in the operations of the Bank is the collateral as a guarantee of the bank to ensure that the debtor performs the agreed-upon achievements in the contract.⁵

In the Islamic Banking Act No. 21 of 2008 in Article 1 (26) explained that "Collateral is an additional guarantee, either in the form of movable or immovable objects that are handed over by the owner of collateral to a Sharia Commercial Bank or Sharia Business Unit (UUS), in order to guarantee repayment of the obligations of the

³ Gubernur Bank Indonesia Agus Martowardojo disela-sela acara Indonesia Sharia Economic Festival (SEF) di Surabaya pada Rabu, 5 November 2014, *Harian Koran Sindo*, Kamis, 6 November 2014. 23.

⁴ Muhammad, *Sistem dan Prosedur Operasional Bank Syariah* (Yogyakarta: UII Press, 2000), 36-37.

⁵ Haryoso, Lukman. "Penerapan Prinsip Pembiayaan Syariah (*Murabahah*) Pada BMT Bina Usaha Di Kabupaten Semarang." *Journal Law and Justice*, vol. 2, no. 1 (2017). 79-89.

recipient customer".⁶ Based on this article, an important guarantee is to protect the interests of the Sharia Bank from the actions of debtor customers that might be detrimental to the bank. With the existence of collateral, the Islamic Bank can ensure its interests and the interests of the creditor customers can be well protected. The management of Sharia Commercial Banks can seize the collateral to cover all bills that the debtor should pay. In other words, the guarantee is used as a guideline for the bank to ensure that debtor customers carry out all their obligations and will be seized by the Bank if the customer conducts defaults or non-performing financing actions (bad credit).⁷ With collateral, the debtor customer will have a stronger commitment to carry out all of his obligations to the creditor, namely the Islamic Bank.

One of the contracts on Islamic banks with a high level of non performing financing (bad credit) with a risk of customer defaults at risk in the auction, namely murabaha contract, bad credit rate can be seen in table 1:

Table 1
Development of Financing in Sharia Commercial Banks (Billion)

No.	Financing Indicator	Year			
		2015	2016	2017	2018
1	<i>Mudharabah</i>	7.979	7.577	6.584	6.015
	<i>Non Performance Financing (NPF)</i>	179	197	207	146
2	<i>Musyarakah</i>	47.357	54.052	60.465	62.427
	<i>Non Performance Financing (NPF)</i>	2.748	2.376	3.335	3.166
3	<i>Murabaha</i>	93.642	110.063	114.458	115.786
	<i>Non Performance Financing (NPF)</i>	4.397	5.173	5.378	4.777
4	<i>Qardh</i>	3.308	3.883	5.476	6.053
	<i>Non Performance Financing (NPF)</i>	111	64	77	78
5	<i>Istishna</i>	120	25	18	16

⁶ Heykal, N. H, *Lembaga Keuangan Islam: Tinjauan Teoritis dan Praktis*(Jakarta: Kencana, 2010), h. 72.

⁷ Idroes, F, *Manajemen Risiko Perbankan*(Jakarta: Raja Grafindo Persada, 2008), h. 89.

	<i>Non Performance Financing (NPF)</i>	12	7	4	4
6	<i>Ijarah</i>	1.561	1.882	2.788	3.112
	<i>Non Performance Financing (NPF)</i>	10	17	29	83
7	<i>Salam</i>	0	0	0	0
	<i>Non Performance Financing (NPF)</i>	0	0	0	0
	Total Pembiayaan	153.968	177.482	189.789	193.408
	<i>Non Performance Financing (NPF)</i>	7.456	7.834	9.030	8.252

Source: Islamic Banking Statistics 2018 (Processed)

From table 1 above, it can be seen that Murabaha financing is the most dominant type of financing in Islamic Commercial Banks with total financing in 2015 reaching 93.6 trillion rupiahs, in 2016 it rose to 110 trillion rupiahs, in 2017 it reached 114.4 trillion rupiahs and continued to rise in 2018 with 115.7 trillion rupiah. Besides increasing the number of Murabaha contract financing, this contract was also followed by an increase in non-performing financing (bad credit) which reached 4.3 trillion rupiah in 2015, 5.1 trillion rupiah in 2016, 5.3 trillion in 2017 and a decrease in in 2018 with the value of non-performing financing (bad credit) reaching 4.7 trillion rupiah.

Even though it has tested the feasibility of distributing Murabaha financing to its debtor customers, at the practical level there are still problems with NPF (non-performing financing) carried out by debtor customers, causing various collectibility problems. Even though the Sharia Commercial Bank has resolved the reconditioning, restructuring and rescheduling steps, the debtor customer continues to default so that the Bank must carry out the seizure and execution of the collateral and sell it to cover the Bank's losses resulting from the agreed Murabaha agreement.⁸

The seizure and sale of collateral by a Sharia Commercial Bank is carried out as soon as the debtor customer does not respond to the

⁸ Yuspin, Wardah. "Penerapan Prinsip Syariah dalam Pelaksanaan Akad Murabahah." *Jurnal Ilmu Hukum* vol. 10, no.1 (2007). 1-12.

various restructuring measures set. Sales of collateral in the form of 8 fiduciary and 9 liability rights can be carried out by the KPKNL (State Wealth and Auction Service Office) as a state auction institution or by the management of the Sharia Commercial Bank through the AO (Account Officer). The auction of collateral for debtor customers must be conducted in accordance with the market mechanism so as not to harm the debtor's customers.

Research related to the process of executing collateral goods was carried out by Sulastri⁹ who stated that the emergence of debtor resistance was caused by a set of laws, in this case the UUHT turned out to contain a number of weaknesses, namely: the UUHT did not regulate the definition of broken contract promises, inconsistencies between Article 6 (the right to sell on own power) and Elucidation of Article 6 (the right to sell on their own power but on the basis of an agreement between the creditor and the debtor) giving rise to different interpretive opportunities and the Dualism of the Mortgage Rights Execution Auction: can the auction be conducted directly (as in the words of "For the sake of Justice Based on YME's Deity in the Mortgage Certificate) at the Auction Hall or must go through Fiat or Court Decision (as Article 224 HIR. Lestari¹⁰ states that the execution of the mortgage under Article 6 of the UUHT must be agreed in advance between the bank and d features. The promise was stated in the Deed of Granting Tangungan Right to Land Rights (APHT). If it has been agreed, the bank can propose the execution of mortgage rights to the KPKNL. Lutfi, Setyowati and Badriyah¹¹ stated that the execution of auctions through public auctions tend to be easier and less costly than executions with the help of judges because they do not require an order from the Chief Justice. However, in the case of

⁹ Sulastri, Lusia. "Konstruksi Perlindungan Hukum Debitur Dalam Penyelesaian Kredit Bermasalah Dengan Pelaksanaan Lelang Jaminan Hak Tanggungan." *Jurnal Pembaharuan Hukum* vol. II, no. 1 (2015). 86-101.

¹⁰ Lestari, Chadijah Rizki. "Penyelesaian Kredit Macet Bank Melalui Parate Eksekusi." *Kanun Jurnal Ilmu Hukum*, vol. 19, no. 1 (2017). 81-96.

¹¹ Luthfi, A Hashfi., Setyowati, Ro'fah., Badriyah, Siti Malikatun. "Akibat Hukum Terhadap Eksekusi Lelang Dengan Tanpa Adanya Putusan Pengadilan (Studi di Pengadilan Agama Semarang)." *Jurnal Law Reform* vol. 12, no. 2 (2016). 168-185.

debtor resistance, the private auction hall or KPKNL does not have the authority to carry out emptying of the auction objects that have been purchased by the bidders. This happened because the Court considered that the Auction Objects sold by the Private Auction Hall did not place confiscation (beslag) by the Judiciary. While the legal procedure for carrying out the discharge requires that a seizure be required in advance by the Court. The obstacle faced by the Semarang Religious Court in conducting the execution of the Mortgage Rights auction is because there was resistance from the executing party who tried to obstruct the auction process by means of thuggery and there was resistance from the third party. Whereas in this study the author will discuss the process of auction execution of collateral goods from murabahah financing contracts at Islamic banks which are rarely conducted by other researchers.

The type of research in this study is qualitative research which is a study of descriptive research and tends to use descriptive analysis.¹² The process and meaning (subject perspective) are more highlighted in this study. The theoretical foundation is used as a guide so that the focus of the research is in accordance with the facts. The research approach in this study is a normative juridical approach,¹³ by analyzing the element of injustice at the auction for collateral for murabaha contracts in Islamic Commercial Banks.

DISCUSSIONS

Existence of Islamic Banking in Cross Economy

Islamic economic thought and activity in late 20th century Indonesia was more oriented towards the establishment of Islamic financial and banking institutions.¹⁴The development of the Islamic banking system within the framework of the Dual Banking System provides another alternative in banking that is increasingly complete for the people of Indonesia, this is because Islamic banking is a

¹² Beni Ahmad Saebani, *Metode Penelitian* (Bandung: Pustaka Setia, 2008), 102.

¹³ Soerjono Soekanto, *Pengantar Penelitian Hukum* (Jakarta: UI Press, 2006), 15.

¹⁴ Baharudin Ahmad, *Eksistensi dan Implementasi Hukum Islam di Indonesia* (Yogyakarta: Pustaka Pelajar, 2014), 410.

banking system that provides a mutually beneficial concept for both parties, supported by a variety of transparent products so that fair to both parties.¹⁵

The choice of the community to work in Islamic banks shows a very positive thing for the development and growth of Islamic economics in Indonesia, and in the regulation of the existence of the Law of the Republic of Indonesia No. 21 of 2008 concerning Islamic Banking has become the law of implementing Islamic law, especially in the field of Islamic economics. Islamic banking is expected to be the spearhead of the implementation of sharia principles in the transaction or contract process, including in terms of guarantees and auction processes in the event of a problem, the customer fails to pay.¹⁶

The concept of sharia economy in it accumulates values, principles, theories and principles of Islamic economics which in the future will be applied in various forms of Islamic-based economic institutions.¹⁷ The introduction of the sharia system in Islamic banking by the Indonesian people is because Islamic banks are like conventional commercial banks that can also serve all banking activities as generally, namely intermediary finance where they collect and channel public funds.¹⁸ However, Islamic banks in the process of financial transactions carry out one of the sharia principles, namely the principle of profit sharing or *mudharabah*. The application of the principle of profit sharing to the owners of capital (*Shohibul Maal*) can be done in two ways, namely the principle of profit or profit sharing and the principle of profit sharing or the sharing of benefits.¹⁹

¹⁵ Neni Sri Imaniyati, *Aplikasi Sistem Bagi Hasil Dalam Simpanan Nasabah Pada Bank Syariah, Hukum Untuk Manusia, Kado (tak) Istimewa dari Fakultas Hukum Unisba Untuk Indonesia*(Bandung, 2012), 59.

¹⁶ Lathif, A. A. "Konsep Dan Aplikasi akad murabahah pada Perbankan Syariah Di Indonesia." *Alkham*, vol. 12, no. 2 (2012). 69-78.

¹⁷ Atang Abdul Hakim, *Fiqh Perbankan Syariah Transformasi Fiqh Muamalah Kedalam Peraturan Perundang-Undangan* (Bandung: Refika Aditama, 2011), 40.

¹⁸ Neni Sri Imaniyati, *Perbankan Syariah dalam Prespektif Hukum Ekonomi* (Bandung: Mandar Maju, 2013), 61.

¹⁹ Neni Sri Imaniyati, 60.

This is confirmed by the provisions of Article 1 paragraph (1) of the Law of the Republic of Indonesia No. 21 of 2008 concerning Sharia Banking, which explains that sharia banking is everything that concerns Sharia Banks and Sharia Business Units, including their institutions, business activities and methods and processes in carrying out their business activities.

Guidelines for implementing financing contracts in Islamic banking have been issued by the government and MUI, including Bank Indonesia Regulation No. 9/19/PBI/2007 Concerning the Implementation of Sharia Principles in Activities of Fundraising and Funds Distribution and Sharia Bank Services, Fatwa of the National Sharia Council No. 04/DSN-MUI/IV/2000 Concerning Murabaha, Fatwa of the National Sharia Council No. 07/DSN-MUI/IV/2000 concerning Financing of Mudharabah (Qiradh), Fatwa of National Sharia Council No. 08/DSN-MUI/IV/2000 concerning Musyarakah Financing, and Fatwa of National Sharia Council No. 45/DSN-MUI/II/2005 concerning Line Facility (*At-Tashilat As-Saqfiyah*).²⁰

The existence of regulations related to sharia banking with all its legal provisions is inseparable from the paradigm of 3 (three) dimensions of national law development, namely the first dimension is the maintenance dimension, namely efforts to maintain the existing legal order in order to prevent legal vacuum and is a logical consequence of article II 1945 which is oriented towards common interests.

The second dimension is the dimension of renewal, namely the effort to further enhance and improve the development of national law through policies in addition to the formation of new legislative regulations which will endeavor to improve existing legislation so that with new needs in the relevant fields and the third dimension is

²⁰ Hanjani, Andreani., Haryati, Dita Arie. "Mekanisme Pembiayaan Murabahah Pada Nasabah di Baitul Maal Wa Tamwil Universitas Muhammadiyah Yogyakarta." *Jati: Jurnal Akuntansi Terapan Indonesia* vol. 1, no. 1 (2018). 46-51.

the dimensions of creation are dimensions of dynamics and creativity with the creation of a new law, which previously did not exist.²¹

Pillars and Terms of Murabaha Financing Agreement

Talking about harmony and terms on a contract is very important because it will affect the validity of a contract or transaction. In connection with this matter, the Islamic banks have a very strategic role to ensure the implementation of harmony and the terms of a contract are realized in a contract between the customer and the Islamic bank running harmoniously and in good terms.²²

Certainty in a contract between the customer and the bank in the implementation of the pillars and the terms of the contract is an attempt to avoid things that are prohibited in a contract that can result in violations of sharia principles. The sharia principles in question are elements of maisir, gharar, usury, and vanity.²³

Next, it will be stated that the pillars of the contract are in accordance with the provisions of Article 22 Compilation of Sharia Economic Law consisting of: parties who are mindful; contract object; the objectives of the contract; and agreement. And in broad outline harmonious and conditions in a contract consisting of: Parties, Declaration of intention, Contract object and Causal contract. While in detail, harmony and contract terms are as follows:

- a. Skills (Theory About Experts)
- b. Different parties (Parties)

²¹ Ali Ahmad, *Dimensi Hukum Islam dalam Sistem Hukum Nasional* (Jakarta: Gema Insani Press, 1996), h. 45.

²² Hendi Suhendi, *Fiqh Muamalat* (Jakarta: Raja Grafindo Persada, 2005), h. 36.

²³ Maisir or Gambling means betting, either with money or things. The word Maisir in Arabic means literally getting something very easily without working hard or making a profit without working. Also commonly called gambling, Al Gharar is "uncertainty". The purpose of uncertainty in muamalah transactions is "there is something that one side wants to hide and may only cause a sense of injustice and persecution to the other party." RIBA means ziyadah (additional) language. In another sense, linguistically, usury means growing and growing. According to Abu Hanifah, usury is an excess of assets in a transaction without substitutes or rewards. That is, additions to goods or money arising from a debt transaction that must be given by the party owed to the party who owes at the time of fall. BATIL (al-Bathil), comes from the word bathala, yabthulu which means broken, wrong, false, tidak syah, do not fulfill the conditions and get along well, out of the truth, forbidden or forbidden according to the provisions of religion.

- c. Meeting/compliance and qabul
- d. Unity of the majlis (Statement of will)
- e. There or can be held
- f. Specific or can be determined (Object contract)
- g. Can be transacted (mutaqawwim wa mamluk)
- h. Do not conflict with syara '(Power of contract)²⁴

These are prerequisites before a contract is implemented, and Islamic banks are expected to become a financial institution that implements the principles and pillars of sharia so that the practices of transactions and financing are in accordance with the principles of a contract and pillars of sharia.²⁵

Referring to DSN Fatwa No.04/DSN-MUI/IV/2000, murabaha is selling an item by confirming its purchase price to the buyer and the buyer pays it at a price that is more as profit.²⁶Meanwhile, the implementation of a murabaha contract in a Sharia Commercial Bank can be illustrated in the following scheme:



Figure 1: Murabaha Contract Scheme in Sharia Commercial Bank

²⁴ Syekh Abdurrahman as-Sa'di, *Fiqh Jual-Beli Panduan Praktis Bisnis Syariah* (Jakarta: Senayan Publishing, 2008), 138-139.

²⁵ Shaikh, M. A. "Contemporary Islamic Banking: The Issue of Murabahah." *Islamic Studies* 25, no. 3 (2011), 435-448.

²⁶ Tim Penulis Dewan Syariah Nasional Majelis Ulama Indonesia, *Himpunan Fatwa Dewan Syariah Nasional* (Jakarta: Intermedia, 2003), 76.

In figure 1 above, number 1 shows that the Customer submits a request for financing to buy goods (Cars) to a Islamic Bank by bringing all the required files. Then the Islamic Bank carries out the financing analysis process. Number 2, the Islamic Bank has approved the application for financing the purchase of a Car for the customer, then the Islamic Bank purchases the Car requested by the customer to PT. Amanah (Seller/Supplier of Cars) of Rp200 million. Number 3, Islamic Banks and Customers carry out a Financing Agreement based on the Murabaha Principle for 10 months to purchase a Car worth 250 million (including a profit of Rp50 million). Number 4, the Islamic Bank coordinates the delivery of the Car along with ownership documents to the Customer. Number 5, the Customer receives the Car along with ownership documents. Number 6, the Customer starts making the first installment payment of Rp25 million/month to the Islamic Bank for the next nine months.²⁷

Guarantees in the Islamic and Banking Law Perspective

Basically, collateral is not a pillar or a condition that is absolutely fulfilled in a shari'ah aqad, but guarantees are intended to keep the buyer from playing with orders. The buyer (financing provider/bank) can ask the buyer (applicant/customer) a guarantee (rahn) to hold it. In its operational technicality, ordered goods can be one of the guarantees that can be accepted for debt repayment.²⁸

If we pay attention to the provisions of Law No. 10 of 1998 concerning Amendment to Law No. 7 of 1992 concerning Banking has no mention of the definition of guarantee. But, in the Explanation of Article 8 point 1 states: "Credit or Financing based on Sharia Principles provided by banks contains risks, so that in the implementation of the bank must pay attention to the principles of credit or financing based on sound sharia principles. To reduce the risk, the guarantee of granting credit or financing based on sharia principles in the sense of confidence in the ability and ability of

²⁷ Hendi Suhendi, *Fiqh Muamalat* (Jakarta: Raja Grafindo Persada, 2005), 36.

²⁸ Muhammad, *Manajemen Pembiayaan Bank Syariah* (Yogyakarta: UPP AMP YKPN, 2003), 19.

debtor customers to pay off their obligations in accordance with the agreed upon is an important factor that must be considered by the bank".²⁹

Based on this, the guarantee factor is a very important factor that cannot be separated from the factors that will support the smooth process of a contract between the customer and the bank, the guarantee factor becomes a consideration in determining the financing facilities. Guarantees are provided as preventive measures to ensure that channeled capital or money borrowed by the bank will be fulfilled by those who are capitalized or given loans (customers).

According to Sri Soedewi Masjchoen Sofwan, material guarantees are: "Guarantees in the form of absolute rights on an object, which have the characteristics of having a direct relationship to a certain object, can be maintained against anyone, always follow the object and can be transferred".³⁰

According to the provisions of Article 2 Paragraph 1 Decree of Bank Indonesia Directors No. 23/69/KEP/DIR dated February 28, 1991 concerning Guarantee of Credit Provision that what is meant by guarantee is a bank's belief in the ability of the debtor to repay the loan as agreed.³¹

The object of collateral in the murabaha financing agreement on Islamic banks applies to all financing facilities, the object of guarantee that applies to home ownership financing facilities, working capital as well as facility lines is intended to ensure collateral to pay off customer debts to banks based on contracts and causes others at the time and according to established regulations.³²

Hartono Hadisoeparto argues that collateral is something that is given to creditors to give rise to confidence that the debtor will fulfill obligations that can be assessed with money arising from an

²⁹ Yenti, Afrida. "Analisis Pembiayaan Murabahah di Perbankan Syariah." *Jurnal Ekonomi dan Bisnis Islam* vol. 1, no. 2 (2016). 155-166.

³⁰ Salim H.S, *Perkembangan Hukum Jaminan di Indonesia*(Jakarta: Raja Grafindo Persada, 2004), 24.

³¹ Hermansyah, *Hukum Perbankan Nasional Indonesia* (Jakarta: Kencana, 2006), 68.

³² Husaeni, Uus Ahmad. "The Variables Effects of Murābahah in Islamic Commercial Banks." *International Journal of Nusantara Islam*, vol. 4, no. 2 (2016). 1-16.

engagement. According to M.Bahsan, collateral is Everything that a creditor receives and is handed over by a debtor to guarantee a debt in the community.³³

In the position of the Bank as the lender, it requires a guarantee to obtain legal certainty that the financing provided to the customer will be accepted again. The existence of these guarantees is a way to minimize the risk of banks in channeling loans. Guarantees according to Law Number 10 of 1998 concerning banking can be given the meaning "confidence in good faith and the ability and ability of debtor customers to pay off their debts or return the intended financing in accordance promised".³⁴

The existence of a guarantee is recognized in Law No. 4 of 1996 concerning the Underwriting Right of Article 1 (1) of the Underwriting Rights Act of the law providing the definition of Underwriting Rights as follows: "Underwriting Rights are collateral rights imposed on land rights as referred to in Law Number 5 of 1960 concerning Basic Agrarian Principles, the following or not the following other objects which constitute a unit with that land, for repayment of certain debts which gives a position that is given priority to certain creditors towards other creditors".

This definition implies that mortgages are identical to collateral rights, which when imposed on land owned by ownership, land use rights for land for use of business rights provide a main position to certain creditors who will shift other creditors in terms of the debtor defaults or defaults on the payment of his debt, with another statement, it can be said that the holder of the first mortgage is more Preferent to the other creditors. This is further emphasized in Article 6 of the Underwriting Rights Act, which says "if the debtor is liable to default (default), the first holder of the right has the right to sell the object of his own right through public auction, and to take the proceeds of the object to repay the debt".

³³ Salim H.S. 22.

³⁴ Rachmadi Usman, 2001.

In general, the concept of collateral or collateral is regulated in the Provisions of Article 2 Paragraph 1 of Decree of the Board of Managing Directors of Bank Indonesia Number 23/69/KEP/DIR dated February 28, 1991 concerning Guarantees of Credit that guarantees a bank's ability to repay loans in accordance agreed.³⁵

Furthermore, Islamic banking applies the principle of prudence in its business activities that are applied in a concept of justice, such as the existence of collateral or collateral from customers who obtain financing from Islamic banking. The distribution of bank funds adheres to the precautionary principle as stated in Article 8 paragraph (1) of Law No. 10 of 1998 concerning Banking: "In providing credit or financing based on Sharia Principles, Commercial Banks must have confidence based on in-depth analysis or good faith and the ability and ability of the Debtor Customer to repay the debt or return the intended financing as agreed".³⁶

One application of the precautionary principle of Islamic banks is to equalize collateral in contractual transactions between creditors and debtors in financing contracts. Islamic banks as banks that adhere to a positive legal system while implementing the principle of Sharia by positioning guarantees in the principle of prudence, which is an anticipation of defaulting or negligent debtors.³⁷

The practice of implementing Islamic banking transactions is almost the same as conventional banks, which differ only in the use of terms and guarantees based on Islamic law are not something that absolutely must exist, but only an addition given by debtor customers for certainty in payment.

³⁵ Putra, Yulsandi Pramana. "Pelaksanaan Lelang Eksekusi pada PT. Bank Danamon Indonesia TBK DSP Cluster Pekanbaru melalui KPKNL (Kantor Pelayanan Kekayaan Negara dan Lelang)." *JOM Fakultas Hukum* vol. IV, no. 1 (2017). 1-14.

³⁶ Rejeki, Fanny Yunita Sri. "Akad Pembiayaan Murabahah Dan Praktiknya Pada PT Bank Syariah Mandiri Cabang Manado." *Lex Privatum* vol. I, no.2 (2013). 19-31

³⁷ Wahbah Zuhaili dalam Adiwarmar Karim, *Bank Islam Analisis Fiqih dan Keuangan* (Depok: PT. Raja Grafindo Persada, 2006), h. 208. said "... the jurists argued that in principle it was not necessary and should not require collateral as collateral, as in other syirkah contracts". However, Adiwarmar A Karim, argued "... to avoid any moral hazard from the negligent mudharib or violating this contract, then Shahibul Mall is allowed to ask for certain guarantees to Mudarib".

Study of Islamic Economic Ethics Against Auction Execution Guarantees from Customers Failing to Pay/Injury Promises on Murabaha Financing Contracts

The consequences of the rule of law concept are that everything must be regulated by law, as well as banking practices in Indonesia including Islamic banks with sharia principles in fund raising activities and fund distribution and Islamic bank services are no exception with rules related to the auction execution mechanism for customers default on murabaha financing contract must be subject to and in accordance with applicable regulations.

Minister of Finance Regulation Number 27 / PMK.06 / 2016 of 2016 concerning auction implementation instructions stating that the auction to be executed can only be canceled at the seller's request or based on the determination or decision of the judicial institution³⁸. The procedure for Execution Execution has provisions as follows:

a. Pre Auction

- 1) Submitting a written request regarding execution to the Head of the State Wealth and Auction Service Office (KPKNL) which is a government agency under the Directorate General of State Assets at the Ministry of Finance;
- 2) The KPKNL/Private Auction Center will conduct a complete examination of auction documents, including but not limited to Credit Agreements, Mortgage Rights Certificates, Proof of debt details, debtors, proof of default on debtors, proof of ownership rights, notification of tender to debtors;
- 3) After the document above is considered complete, KPKNL will issue a written auction schedule to the Bank;
- 4) The Bank conducts Auction Announcement.

The announcement of the auction is a notification to the community about the existence of an auction with the intention to collect auction enthusiasts and notices to interested parties. Provisions concerning auction provisions Article 51 of the Minister of

³⁸ Suhardi, Gunarto. "Resiko Dalam Pemberian Kredit Perbankan." *Jurnal Hukum Pro Justisia* vol. 24, no. 1 (2006). 1-14.

Finance Regulation Number 27/PMK.06/2016 concerning instructions for conducting the auction mentioning:

- a) The auction must be preceded by an auction announcement made by the seller;
- b) The seller must submit proof of auction announcement according to the conditions to the auction official.

Furthermore Article 54 determines:

(1) Auction Announcement for Execution Auction on immovable property or immovable property sold together with movable goods, carried out under the following conditions:

- a. Announcements are made 2 (two) times, the period of the first Auction Announcement to the second Auction Announcement intermittent 15 (fifteen) calendar days and arranged in such a way that the Announcement of the second Auction does not fall on holidays or public holidays;
- b. The first announcement can be made through leaflets, patches that are easily read by the public, and/or through electronic media including the internet, however, in the case desired by the Seller, it can be done through a daily newspaper; and the second announcement must be made through a daily newspaper and carried out at least 14 (fourteen) calendar days prior to the auction.³⁹

In practice, the provision of murabaha financing facilities also applies a guarantee system with collateral in the form of land and buildings and usually a higher guarantee value is estimated to be 125% of the transaction value. This is in order to provide comfort in the transaction between the bank as the provider of capital and customers who get financing for working capital.

³⁹ Setiono, Gentur Cahyo. "Penyelesaian Kredit Bermasalah dalam Perbankan," *Jurnal Ilmu Hukum Yuris* 2, no. 1 (2013). 21-36.

In the event that the debtor experiences broken promises or defaults, gives birth to the rights of the bank or creditor to sell the customer's collateral which is used as collateral for the customer's debt to the bank, based on the executorial power of the grosse debt agreement agreement between the debtor and the bank.

Other provisions are binding on customers and/or third parties as guarantor by giving power to banks to sell/execute guarantees by means of under the hands or through the establishment of a Religious Court, if the customer does not fulfill his obligations in accordance with the agreement of the parties, and customers and/or parties thirdly, as a Guarantor, it is prohibited to rent, transfer the collateralized goods without written permission from the bank.

The practice as mentioned above, although there is an element of agreement and qabul conformity between the customer and the bank as a capital provider, but opens opportunities where the bank determines the auction selling price of collateral goods unilaterally only to fulfill the rights (amount of money that the customer accounts for) while the object price the guarantee will experience an increase in the value of the investment, especially when the customer has previously paid his debt obligations to the bank

Based on the legal basis as the Qur'an, Surat an-Nisa verse 79, which means: "O ye who believe, do not eat each other (take away) your neighbor's treasures by the path of the heart, except by the way of commerce that voluntarily applies to you".

The verse emphasizes that Allah SWT forbids Muslims to eat other people's assets in a nutshell, including conducting usury-based transactions (interest-bearing interest), transactions that are permanent (speculative, gambling) or transactions that contain gharar (uncertainty in transactions), especially in matters of risk, as well as other things that can be equated with it, and also mentioned the willingness of all parties in the transaction, such as willingness between sellers and buyers.⁴⁰

⁴⁰ Tafsir Ibnu Katsir, jilid I, h. 723.

In addition, if viewed from the principle of Islamic civil law, there is a provision of principles of freedom and volunteerism.⁴¹This principle derives from the Qur'an of Surat An-Nisa verse 29. The teachings of Islam provide a value and direction of the transaction process in consolidation of freedom and volunteerism, freedom is defined by a contract made by both parties (banks and customers) in accordance with interests and needs as well as sincerity from both parties to jointly implement their rights and obligations, including in terms of resolving a problem in the transaction process as well as a default event caused by a failure to pay the customer.

If defaults in the process of working capital facilities occur then in accordance with the applicable laws and regulations the bank has the right to sell the collateral object either directly or by auction in public and take the proceeds of the sale to repay all customer obligations along with costs incurred, so that lead to the implementation of the bank's preferential rights for reasons of disability.

The reason for the bank to sell through the auction of collateral is based on the selling power in the contract of murabaha financing agreement which is always used to sell collateral belonging to the customer if there is a case of bad credit or the condition of being unable to pay from the customer. This sale is carried out without going through sales in the state auction office and also without going through court decisions.

Basically what is done is a consequence of an injury committed by the debtor on the loan agreement made with the bank. This is because customers who obtain financing from banks cannot all return it properly at the time agreed.

When looking at the provisions of Article 1243 of the Civil Code, it can be understood that a person is said to be injured in a promise, if he neglects to fulfill his agreement, and still neglects to

⁴¹ Mohammad Daud Ali, *Hukum Islam Pengantar Ilmu Hukum dan Tata Hukum Islam Di Indonesia* (Depok: PT. RajaGrafindo Persada, 2014), h.133.

pay even though he has been warned or ordered to pay.⁴² Based on these things, it can be seen that, the role of the bank as the provider of funds in murabaha financing is more appropriately referred to as financing and not the seller of goods, because the bank does not hold the goods, nor does it take risks.

Basically, the position of Islamic banks has been trapped by regulations that require the execution of collateral to be carried out in anticipation of losses, but in other positions the sale of collateral is owned by the customer, so in principle the customer has the right to determine the sale value of collateral execution or auction by the bank, and in this practice the element of ignorance is unavoidable, where the customer's position is not directly involved in the execution process of the auction of his collateral.

While QS. Al-Baqarah verse 28. Which means: "And if the people in debt are in trouble, then give a grace period until he gets spaciousness. And if you offer it, it is better for you, if you know. "Gives guidance on business ethics in Islam.

CONCLUSION

Based on the discussion above, the conclusions in this study, namely: Guarantees in a transaction aim to bind both parties (customers and providers of capital/banks) to equally fulfill their rights and obligations, as well as in Islamic banks, guarantees are also applied to implement the principle of prudence to anticipate; The auction practice of collateral goods is valid if it is ensured that the customer cannot carry out his obligations to the bank, in accordance with the regulations that apply in the auction process mechanism, but still opens opportunities for incompatibility, harmony and terms of contract syara; There is still the possibility of collateral in the guarantee and implementation of the collateral auction, namely in the event that the value of collateral is higher than the value of the facility the customer receives, and in the auction process the collateral does

⁴² Yessica. Evalina. "Karakteristik dan Kaitan antara Perbuatan Melawan Hukum dan Wanprestasi," *Jurnal Repertorium*, 1, no. 2 (2014), 47-59.

not involve the owner of the goods in determining the price of the collateral so that it can be identified as a conflict with syara (causal contract) and it can be said that the price determination in the auction execution is only one party, namely the bank, while the collateral owner is not involved in the transaction, so it does not fulfill the element (*mutaqawwim wa mamluk*). In order to avoid and minimize the practice of ignorance in the process of executing the auction of collateral from the Murabaha financing contract in Islamic commercial banks, it can be reached through voluntary selling power, where the bank can pre-execute negotiations beforehand by requesting an agreement from the owner of the collateral to release the price collateral according to the price desired by the customer, so that the obligation to the bank is fulfilled and the customer is willing to give up the collateral.

REFERENCES

Journal article

- Hanjani, Andreani., Haryati, Dita Arie. "Mekanisme Pembiayaan Murabahah Pada Nasabah di Baitul Maal Wa Tamwil Universitas Muhammadiyah Yogyakarta." *Jati: Jurnal Akuntansi Terapan Indonesia*, vol. 1, no. 1 (2018). 46-51.
- Haryoso, Lukman. "Penerapan Prinsip Pembiayaan Syariah (Murabahah) Pada BMT Bina Usaha Di Kabupaten Semarang." *Journal Law and Justice*, vol. 2, no. 1 (2017). 79-89.
- Husaeni, Uus Ahmad. "The Variables Effects of Murābahah in Islamic Commercial Banks." *International Journal of Nusantara Islam*, vol. 4, no. 2 (2016). 1-16.
- Lathif, A. A. "Konsep Dan Aplikasi akad murabahah pada Perbankan Syariah Di Indonesia." *Ahkam*, vol. 12, no. 2 (2012). 69-78.
- Lestari, Chadijah Rizki. "Penyelesaian Kredit Macet Bank Melalui Parate Eksekusi." *Kanun Jurnal Ilmu Hukum*, vol. 19, no. 1 (2017). 81-96.
- Luthfi, A Hashfi., Setyowati, Ro'fah., Badriyah, Siti Malikatun. "Akibat Hukum Terhadap Eksekusi Lelang Dengan Tanpa

- Adanya Putusan Pengadilan (Studi di Pengadilan Agama Semarang)." *Jurnal Law Reform*, vol. 12, no. 2 (2016). 168-185.
- Putra, Yulsandi Pramana. "Pelaksanaan Lelang Eksekusi pada PT. Bank Danamon Indonesia TBK DSP Cluster Pekanbaru melalui KPKNL (Kantor Pelayanan Kekayaan Negara dan Lelang)." *JOM Fakultas Hukum*, vol. IV, no. 1 (2017). 1-14.
- Rejeki, Fanny Yunita Sri. "Akad Pembiayaan Murabahah Dan Praktiknya Pada PT Bank Syariah Mandiri Cabang Manado." *Lex Privatum*, vol. I, no.2 (2013). 19-31.
- Setiono, Gentur Cahyo. "Penyelesaian Kredit Bermasalah dalam Perbankan," *Jurnal Ilmu Hukum Yuris*, vol. 2, no. 1 (2013). 21-36.
- Shaikh, M. A. "Contemporary Islamic Banking: The Issue of Murābahah." *Islamic Studies*, vol. 25, no. 3 (2011). 435-448.
- Suhardi, Gunarto. "Resiko Dalam Pemberian Kredit Perbankan." *Jurnal Hukum Pro Justisia*, vol. 24, no. 1 (2006). 1-14.
- Sulastris, Lusya. "Konstruksi Perlindungan Hukum Debitur Dalam Penyelesaian Kredit Bermasalah Dengan Pelaksanaan Lelang Jaminan Hak Tanggungan." *Jurnal Pembaharuan Hukum*, vol. II, no. 1 (2015). 86-101.
- Yenti, Afrida. "Analisis Pembiayaan Murabahah di Perbankan Syariah." *Jurnal Ekonomi dan Bisnis Islam* vol. 1, no. 2 (2016). 155-166.
- Yessica. Evalina. "Karakteristik dan Kaitan antara Perbuatan Melawan Hukum dan Wanprestasi," *Jurnal Repertorium*, vol. 1, no. 2 (2014), 47-59.
- Yuspin, Wardah. "Penerapan Prinsip Syariah dalam Pelaksanaan Akad Murabahah." *Jurnal Ilmu Hukum*, vol. 10, no.1 (2007). 1-12.

Books

- Ahmad, A. *Dimensi Hukum Islam dalam Sistem Hukum Nasional*. Jakarta: Gema Insani Press, 1996.

- Ahmad, Baharudin. *Eksistensi dan Implementasi Hukum Islam di Indonesia*. Yogyakarta, Pustaka Pelajar, 2015.
- Ali, Mohammad Daud. *Hukum Islam Pengantar Ilmu Hukum dan Tata Hukum Islam Di Indonesia*. Depok: PT. RajaGrafindo Persada, 2014.
- As-Sa'di, Syekh Abdurrahman. *Fiqh Jual-Beli Panduan Praktis Bisnis Syariah*. Jakarta: Senayan Publishing, 2008.
- Hakim, Atang Abdul. *Fiqh Perbankan Syariah Transformasi Fiqh Muamalah Kedalam Peraturan Perundang-Undangan*. Bandung: Refika Aditama, 2011.
- Hermansyah. *Hukum Perbankan Nasional Indonesia*. Jakarta: Kencana, 2006.
- Heykal, N. H. *Lembaga Keuangan Islam: Tinjauan Teoritis dan Praktis*. Jakarta: Kencana, 2010.
- Idroes, F. *Manajemen Risiko Perbankan*. Jakarta: Raja Grafindo Persada, 2008.
- Imaniyati, Neni Sri. *Aplikasi Sistem Bagi Hasil Dalam Simpanan Nasabah Pada Bank Syariah, Hukum Untuk Manusia, Kado (tak) Istimewa dari Fakultas Hukum Unisba Untuk Indonesia*. Bandung, 2012.
- Imaniyati, Neni Sri. *Perbankan Syariah dalam Perspektif Hukum Ekonomi*. Bandung: Mandar Maju, 2013.
- Karim, Adiwarmanto A. *Bank Islam Analisis Fiqh dan Keuangan*. Depok: PT. Raja GrafindoPersada, 2006.
- Muhammad. *Manajemen Pembiayaan Bank Syariah*. Yogyakarta: UPP AMP YKPN, 2003.
- Muhammad. *Sistem dan Prosedur Operasional Bank Syariah*. Yogyakarta: UII Press, 2000.
- Salim H.S. *Perkembangan Hukum Jaminan di Indonesia*. Depok: Raja Grafindo Persada, 2004.
- Saebani, Beni Ahmad. *Metode Penelitian*. Bandung: Pustaka Setia, 2008.
- Sjahdeini, Sutan Remy. *Perbankan Syariah Produk-Produk dan Aspek-Aspek Hukumnya*. Jakarta: Kencana, 2014.

Soekanto, Soerjono. Pengantar Penelitian Hukum. Jakarta: UI Press, 2006.

Suhendi, Hendi. *Fiqh Muamalat*. Jakarta: Raja Grafindo Persada, 2005.

Tim Penulis Dewan Syariah Nasional Majelis Ulama Indonesia. *Himpunan Fatwa Dewan Syariah Nasional*. Jakarta: Intermedia, 2003.

Laws

Undang - Undangn Dasar 1945

Kitab Undang-Undang Hukum Perdata

Undang-Undang No. 10 Tahun 1998 Tentang Perubahan Atas Undang-Undang No. 7 Tahun 1992 Tentang Perbankan

Undang-Undang No. 4 Tahun 1996 Tentang Hak Tanggungan

Undang-Undang Republik Indonesia No. 21 Tahun 2008 Tentang Perbankan Syariah

Peraturan Menteri Keuangan Nomor 27/PMK.06/2016 Tahun 2016 tentang petunjuk pelaksanaan lelang

Peraturan Mahkamah Agung Republik Indonesia No. 02 Tahun 2008 tentang Kompilasi Hukum Ekonomi Syariah (KHES)

Surat Keputusan Direksi Bank Indonesia Nomor 23/69/KEP/DIR tanggal 28 Februari 1991 tentang Jaminan Pemberian Kredit

Another Source

Gubernur Bank Indonesia Agus Martowardojo disela-sela acara Indonesia Sharia Economic Festival (ISEF) di Surabaya pada Rabu, 5 November 2014, *Harian Koran Sindo*, Kamis, 6 November 2014.

<https://www.liputan6.com/news/read/3551699/indonesia-siap-masuki-era-industri-40>,

Pusat kajian strategis - Badan Amil Zakat Nasional Departemen Ekonomi dan keuangan syariah- Bank Indonesia, BAZNAS, Jakarta, 2018.