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Resolution of Tort Disputes in the Implementation of Akad Al-Qardh in Sharia Banking

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Abstract

This article focuses on Akad Qard as one of the Akad in sharia banking. At Qard, financing can be a possible occurrence of potential disputes between borrowers and the lending party. In terms of normative, dispute resolution arrangement, in case of default, is stipulated in Law No. 21 of 2008 on Sharia banking. Default dispute resolution mechanisms are multi-fascinated, depending on the right choice of the parties. Using normative research methods with of approach and conceptual approach is further analyzed descriptively analytical. The research results that, the settlement of default to the financing of Akad al-Qardh in customers who have since the beginning of good faith, is first a non-litigation solution by the principles of's Consultative and justice. Sharia banks make restructuring efforts based on the financing agreement agreed upon by the parties. If the restructuring efforts do not bring results, sharia banks can conduct a guarantee execution effort. In the Akad al-Qard with guarantees or without warranty, the default dispute carried out through the National Sharia Arbitration Board on a litigation basis, or it can be attempted by voluntary customers to submit collateral. In addition to the mandate of Article 55 paragraph (1) of the sharia banking LAW, which determines that it authorizes the impartial judiciary as a form of litigation dispute resolution for the completion of the first form, the new settlement of non-litigation.

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INTRODUCTION

Sharia banking is generally an intermediate financial institution (intermediary financial institution), i.e., the institution that conducts the activities of raising funds from the community in the form of deposits and channeling them to other communities in need a form of financing (Usanti & Shomad, 2013). Its existence in various aspects of the more comprehensive community effort has given a sign that Islamic principles are applicable in the modern business world. Sharia banking in Indonesia reflects the need for a banking system that can contribute to the stability of the national financial system. Sharia banking industry also reflects community demand requiring an alternative banking system that provides banking services that meet Sharia principles.

Sharia-based banking emerged as the dynamics of current bank developments. Such developments as a consequence of the government policy (Bank Indonesia) allow conventional banks to provide Islamic banking services, provided that these services must full-pledge Syariah branch level. One form of the dual banking system model. Several factors influence the growth of Sharia banking in Indonesia: First, the Bank's legal certainty is protecting it; Public awareness of the benefits of sharia banking and financial institutions; And third, political will support from the government (Pradja, 2015).

The existence of Sharia Bank has a juridical or statutory foundation in Indonesia. Since the inception of Islamic banking ideas, the invitation to be born is Law No. 7 of 1992 on banking accompanied by the birth of government regulation number 72 the year 1992 on the Bank based on the principle of yield. The law was amended by Law No. 10 of 1998 concerning banking, then governed by its legislation of law No. 21 of 2008 on Sharia banking. In addition to legislation, sharia banking also governed by the Bank Indonesia Regulation, a compilation of sharia economic law, and the fatwa of the National Sharia Council (Dewi, 2004).

Sharia banking is everything related to sharia banks and sharia business units encompassing institutional, business activities, and ways and processes in conducting its business activities. After the formal legal basis of the above, sharia banking is growing in Indonesia and starts offering a wide range of products, which can divide into three major parts, namely: the funding product, fund distribution products (financing), and service products (service) (Awaluddin, 2016).

According to article 1 paragraph (7) of Law No. 21 of 2008 on sharia banking, determining that the Bank is carrying out its business activities based on sharia principle and according to its type consists of sharia Bank and sharia people financing Bank. Provisions of Article 1 paragraph (12) Sharia banking LAW stated that the principle of Sharia banking institution is the principle of Islamic law based on fatwa issued by institutions that have authority in the determination of fatwa in sharia field. The principle is the economic democracy with the principles of prudence, as contained in the provisions of article 2 of Sharia banking ACT. Furthermore, article 3 Sharia banking LAW mentions that sharia banking objectives support the implementation of national development in order to increase fairness, togetherness, and equitable welfare of people.

The existence of Sharia Bank becomes the need of Indonesian people. Firstly, the majority of Indonesians are Muslims who need a bank that complies with Islamic principles of sharing profits and losses. Secondly, sharia banking practices for results are already part of the culture of Indonesian society in various economic activities, always implementing "Maro, Mertelu" in terms of trade, agriculture, marine and also livestock (Muttaqien, 2007). Thirdly, Sharia banking has become sine quanon being in Indonesia, because according to national culture and business activities run by the Indonesian nation. The development of Sharia banking law is the ideal fact that there is still weakness, especially in terms of achieving the objective of justice that is prestigious by the people of Indonesia in shaping Sharia banking institutions.

In Law No. 21 of 2008 on sharia banking, the bank also arranges the financing given by banks to customers. Financing is the provision of funds or bills likened to it in the form of (Lestari, 2008):

a. Transactions for the outcome in the form of Mudharabah and Musyarakah;
b. Lease transactions in the form of Ijarah or rent a purchase in the form of a bittamlic Muntahiya Ijarah;
c. Buy and sell transactions in the form of receivables, Greetings, and Istishma;
d. Borrowing loan transactions in the form of receivables Qardh;
e. Transaction tenancy services in the form of Ijarah for multiservice transactions.

Sharia banking financing is carried out with transactions free of riba or interest because there is always a substitute or balancing transaction (underlying transaction), which is a business or commercial transaction that legitimizes an addition of property fairly (Anshori, 2007). In the

Sharia banking law, there are times when disputes arise between the bank and the customer. This happens because of a contract/business agreement; sharia banking known as Akad. The contract is made with the purpose and hopes that the parties may perform the content voluntarily or in good faith (Nasikhin, 2010). However, in reality, it is often violated or ignored, resulting in disputes between the parties involved in the contract. Possible occurrence of banking disputes caused by tort (violate the agreements), actions against the law, and risk of business (indemnification) (Nasikhin, 2010).

In sociological aspects, sharia banking in Indonesia still has a problem of interpretation and pattern of understanding the norms, both on the norm of sharia banking, and in the rules of the law. It has an impact on implementation patterns and sharia banking operations. The issue strengthened, with a growing number of cases of sharia economic disputes handled by banking mediation agencies and religious courts of the rooms of sharia economic disputes that the Notabenenya is a transaction and sharia bank contract problematic. For example, there are four sharia economic disputes in NTB entering the Supreme Court. The dispute came to the level of appeal due to the dissatisfaction of the reported party or the reporter on the decision of the region. The Sharia economic dispute concerns the issue of lending a Murabaha by the bank to the consumer, the issue of mutanaqisah (sharing/planting of shared capital), the debt receivables (Qard).

Akad Qard as one of the Akad implemented in Sharia banking. Qardh interpreted by the provision of funds or bills that can liken to it based on the agreement or agreement between the borrower and the lender and the lending party who requires the borrower to settle the debt after a certain period (Kamil & Fauzan, 2010). In Qard, financing can be a possible occurrence of potential disputes between borrowers and parties that give loans caused by the presence of tort.

Regarding the potential disputes, Muhammad Abdul Kadir and Rilda Murniati, as quoted by Muh. Nasikhin states that (Kadir & Murniati, 2000):

Potential conflicts or disputes can be caused by differences in perception or interpretation of the obligations and rights they have to fulfill, the occurrence of such discrepancies can be caused by financial institutions want to achieve the goal of obtaining profit without considering the needs and capabilities of the user's funds and the term of use of funds. While the user of the fund wants to achieve the goal of obtaining a profit without supervision or control of the parties financial institutions of the fund provider, the rules of law that apply or the agreement that is the basis of the legal relationship of both parties is unclear, less complete, there has been no implementing rules or no arrangements at all. Both parties think and act according to their own will and their own, with no similarity of perception and an emergency (force Majeure) that anyone can not address, including both sides. Financial institutions claim the user's responsible funds, whereas the user's funds refuse responsibility because he/she feels innocent.

In normative terms, the dispute resolution arrangement in case of default stipulated in Law No. 21 of 2008 on Sharia banking. However, the existence of article 55 paragraph (1) of the sharia banking LAW determines that it provides the authority of the judicial justice as a form of litigation dispute resolution for the settlement of the first Bentu, the new then non-litigation settlement. In fact, in settlement of disputes that should do first is a non-litigation settlement by the principles of's Consultative and justice. The form of litigation as the mandate of Article 55 paragraph (1) of Sharia banking LAW should only be done after a non-litigation completion form.

Similarly, the provisions of Article 55 paragraph (2) of Sharia banking LAW, researchers view the norm is unclear. This is because the provisions of Article 55 paragraph (2) shall provide an alternative option to the disputed party. The choice of a dispute is through deliberation; Mediation of banking, National Sharia arbitration agency, or other arbitral institution. The difference in interpretation in the implementation of the dispute resolution often creates injustice for the parties. Thus, it is necessary to view the problems of banking dispute resolution that is socially equitable.

RESEARCH METHODS

This research includes normative legal research, a type of legal research that analyzes and examines the regulations relating to sharia banking. The research uses an approach and conceptual approach. "The type of data source used in the research is comprised of primary data and secondary data. Primary Data is obtained directly from the first source in the field. Secondary Data obtained through literature research, from official documents, books, research results, reports, diaries, etc (Soerjono, Soekanto & Mamudji, 1998).

RESULT AND DISCUSSION

Contract Management in Sharia Banking Financing of Akad Al-Qardh

Based on Bank Indonesia Regulation No. 13/9/PBI/2011 concerning an amendment to Bank Indonesia Regulation Number 10/PBI/2008 concerning financing restructuring for sharia banks and sharia business units, financing restructuring is a Bank's effort to help customers to complete their obligations through scheduling, return requirements and reordering. Sharia banks can only make restructuring financing to customers who meet the following criteria; 1) The customer has decreased payment capability, and 2) Customers have good business prospects and can fulfill obligations after restructuring. Restructuring for consumptive financing can only be done for customers with the criteria that the customer has decreased payment capability, and there is a definite source of installment payment from the customer and able to fulfill the obligation after restructuring. Financing restructuring supported by adequate analysis and evidence and well documented.

Also, sharia banks will make a rescue of problematic financing with a restructuring effort. The customer still has good faith in the sense that still want to invited to cooperate in the rescue effort of the problem financing, but if the customer has not good faith in the sense can not be invited to the assistance in the rescue efforts of the problem financing, sharia banks will make efforts to settle the problem.

Financing in the form of receivables, namely Murabaha and Istishna, can also be restructured with 3 (three) ways of the rescheduling (rescheduling), reconditioning requirements, and re-arrangement (restructuring). Rescheduling (rescheduling) carried out by extending the maturity period of the financing without changing the remaining liabilities of the customer to be paid to the bank. It was reconditioning done by re-establishing the financing terms, such as the change of payment schedule, several installments, term or deduction as long as it does not add to the customer's remaining liabilities paid to the bank (Fatwa DSN, 2005).

The restructuring by conducting a Murabaha receivables conversion or Receivables Istishna. For the remainder of the customer's obligation to be Ijarah Bittamlik Muntahiyah or Mudharabah or Musyarakah. Based on the fatwa of the National Sharia board the conversion of receivables is done in the following manner (Fatwa DSN, 2005): If the account is Murabahah then stopped in a way; 1) Murabahah objects sold by the customer to the LKS at market price; 2) customer pays off the remaining debts to the LKS from the proceeds of the sale; 3) If the proceeds exceed the remaining debts then the excess can be used as a cash advance for the contract or the capital of Mudharabah and Musyarakah; 4) If the sales result is smaller than the remaining debt then the remaining debt remains the customer's debt which means the repayment agreed between the LKS and the customer.

LKS and the customers of the ex-Murabaha can create a new contract with the Agreement:

1. A Bittamlik Muntahiyah of the goods above by referring to the Fatwa DSN No. 27/DSN-MUI/III/2002 about Al Ijarah Muntahiyah Bit Tamlik
2. Mudharabah by referring to the Fatwa DSN No. 7/DSN-MUI/IV/2000 on Mudharabah financing
3. Musyarakah by referring to the Fatwa DSN-MUI No. 8/DSN-Mui/IV/2000 on the financing of the Musyarakah

Mudharabah and Mutanaqisah financing done restructuring process with rescheduling, reconditioning requirements, rearrangement (restructuring). Rescheduling by extending the maturity period without changing the customer's remaining liabilities to be paid to the Bank. Reconditioning requirements, which by reassigning financing terms, include changes in the payment schedule, several installments, term or deduction, restructuring with the Bank's addition of funds the customer so that the customer's business activities can be resumed.

Reordering (restructuring) by converting into temporary capital inclusion is carried out as follows:

1. Temporary investment of capital can only be made to the customer who is a legal entity in the form of a limited liability company.
2. The Bank terminates the contract of financing in the form of Mudharabah or Musyarakah.
3. The Bank creates a Mutanaqisah agreement with the customer for the temporary inclusion of capital as agreed with the customer on the business.
4. The Bank shall carry out temporary capital participation of the remaining customer obligations.

The remainder of the customer's obligation to restructure the Mudharabah and Mutanaqisah financing contract is a principal amount unpaid by the customer at the time of restructuring. Qard financing can be the restructuring process with the rescheduling done by extending the maturity

period without changing the remaining obligations of the customer to be paid to the Bank and reconditioning done by reassigning the conditions of financing, such as changes in the payment schedule, number of installments, term and.

In the Fatwa of National Sharia Council No: 19/DSN-MUI/IV/2001 on al-qardh. Suppose the customer is unable to return any part or all of its obligations at the agreed time. LKS has ensured its inability.LKS may extend the term of return or remove (write off) part of its obligations. LKS may sanction to the customer if the customer does not show the desire to return a part. The sanctions imposed on the customer, as stated in point 1, can be and not limited to the sale of the goods. If the collateral is insufficient, the customer shall continue to fulfill its obligations in full (Fatwa DSN, 2008).

Financing Ijarah and Ijarah Muntahitah Bittamlik can be restructuring with the rescheduling done by extending the maturity period. The bank can reassign the Ujrah that must be paid by the customer with the most extended renewal period up to the industrial age of assets. Then reconditioning is done by reassigning the terms of financing, including the number of installments, timeframes, payment schedules, awarding, or other deductions. After re-requirement, then it can be re-arrangement (restructuring) by converting Akad Ijarah or a Muntahiyah Bittamlik to be Mudharabah or Musyarakah. Sharia Bank restructures to become a new financing agreement considering the condition of customers, which includes: 1) customer's collectibility; 2) type of business; 3) The ability to pay (cash flow) customers. Reordering (restructuring) by converting into temporary capital inclusion can apply only to the customer who is a business entity in the form of a limited liability company.

The Bank has stopped the contract of financing in the form of Ijarah Muntahiyah or Bittamlik by taking into account the fair value of assets Ijarah. The Bank creates a Mutanaqisah agreement with the customer for temporary investment following the customer's agreement on the business. The Bank conducts the inclusion of capital during the fair value of assets Ijarah. The restructured financing monitored continuously and timely monitoring with the analysis of the completion progress and take the necessary preventive measures when found a potential new problem by giving the customer instructions and referrals to improve its financial situation promptly.

Resolution of Default Disputes in Sharia Banking

Bank Indonesia Regulation Number 10/PBI/2008 concerning financing restructuring for sharia banks and Sharia business units is the collateral taken over (AYDA). AYDA is an asset acquired by the Bank, both through auction and outside the auction based on voluntary surrender by the collateral owner and also based on the power to sell outside the auction of the collateral owner because the customer does not fulfill its obligations to the Bank. Settlement of problematic financing through the voluntary submission mechanism (OFFSET). Customers ' criteria offset, have a business prospect is not right, or the ability to pay no longer exists. The customer's character is not good, it does not want to pay installments, and the quality of financing with collectibility is less smooth, doubtful, and stuck.

The purpose of the foreclosed collateral is carried out if the restructuring or billing attempts are unsuccessful and painful. The implementation is through the approach to the customer or the collateral owner to be willing to pay off its obligations. The settlement effort is made more intensively to the customer or collateral owner through a notification letter or warning letter. The objective is that the customer is willing to pay or settle its obligations on sharia banks. The sale of the financing collateral/other assets of the customer, so that the sales result can be used as repayment or payment of its obligations on sharia banks. Collateral sales can be made to other parties (which is not related to the legal relationship with sharia banks)—carried out by the customer or the owner of the collateral, or with the assistance of Sharia banks, and their capacity as an intermediary for the sale of goods.

The collateral sale can also be done to the sharia Bank or purchased by Sharia bank through an officer/employee designated for it. Direct purchase by Sharia bank, known as Offset collateral as stipulated in article 40 ACT No. 21/2008. The terms, the collateral purchased must be disbursed at the latest within 1 (one) year. When the collateral's purchase price exceeds the number of customer obligations to the sharia bank and UUS, the difference in excess amount must be returned to the customer after deducting the cost of auction and other costs directly related to the purchase of collateral.

The sale of the collateral to a third party or other party is executed concerning the following matters: 1) Bank position as a party that helps find potential buyers. It helps to smooth buy and sell

transactions. Not directly involved in the execution of buying and selling between the owner and prospective buyers; 2) Bank position provides approval, meaning the bank as the creditor of the guarantee holder (UUD, 1996) ; 3) Bank position only arranges the money of the sales of the object, so as not to fall into the hands of the owner, but immediately deposited to the bank as the repayment of the debt.

Collateral sales to the Bank or the designated apparatus in banking are known as offsetting. Offsetting is implemented about the following matters (UUD, 2008): 1) offset is only one form of settlement of problematic financing conducted with the sale of the collateral to the Bank or the appointed official as the buyer. 2) offset is intended to settle the customer's obligations to the Bank; 3) Implement a compulsory buying and selling law. The collateral's purchase implemented after the relaxation of collateral, and the value of the purchase of a collateral maximum of the market value after the Bank is completed.

Settlement through guarantee is done by Sharia bank, based on a reevaluation of financing, that customer's business prospects do not exist. The customer is not cooperative in completing the financing, or the rescue effort by restructuring does not bring results, namely to re-launch the financing. Then the problem of settlement financing problems carried out by means of execution of assurance objects by sharia banks. Note that the object of the warranty is burdened by the assurance institution in accordance with the procedures prescribed by the law.

The Bank will take the settlement by litigation if the customer is not in good faith. No good-faith is not showing the willingness to fulfill its obligations, while the customer still has a wealth that is not ruled by the Bank, or deliberately conceals. Customers have other resources to complete their credit.

According to the provisions of article 49 of law No. 3 of 2006 on religious justice (LAW No. 3/2006), the authority of Sharia banking dispute resolution also becomes its absolute competence. The authority covers other fields of Sharia economics outside the sharia banking sector. Explanation of Article 49 UU No. 3/2006, that all customers of financial institutions and Sharia financing institutions, and conventional banks that open Sharia business units, are tied to the sharia economic provisions, both in the implementation of the contract and in the resolution of disputes.

In LAW No. 21/2008 is emphasized that the Sharia banking dispute is one of the authority of the courts in the religious judicial environment as stipulated in article 55 paragraph (1) LAW No. 21/2008, namely: "Courts conduct sharia banking dispute settlement in the religious judicial environment."

Article 55 paragraph (2) LAW No. 21/2008 mentioning "if the parties have promised the settlement of a dispute other than as referred to in Article 55 paragraph (l) of LAW No. 21/2008, settlement of disputes is conducted in accordance with the content of Akad". Explanation of Article 55 paragraph (2) UU No. 21/2008 mentions that the settlement of disputes in accordance with the content of the agreement is an effort deliberation, banking mediation, national Sharia arbitration body, or other arbitral institutions as well as through the courts in the public judicial environment.

Under the law of the Agreement, the provisions of Article 55 paragraph (2) of LAW No. 21/2008 are born because of the principle of freedom of contract. Islam gives the parties the freedom to make an alliance. The form and content of the Alliance are determined by the parties. If the form and content have been agreed upon, then the Alliance shall bind the parties who have agreed and carried out all rights and obligations. However, this freedom is not absolute, as long as it does not contradict Islamic sharia, then the Alliance can be implemented (Dewi, et al, 2005).

Selection of the Forum (Choice of the forum), in settlement of Sharia banking disputes according to Article 55 paragraph (2) of LAW No. 21/2008. There is an inconsistency of the legislator in formulating the rule of law. Article 49 of LAW No. 3/2006 provides competence to the courts of religion to prosecute sharia economic disputes, including sharia banking, as an absolute competency. Provisions of Article 55 paragraph (2) of LAW No. 21/2008 and his explanation has been tested the material by the Constitutional Court in its verdict No. 93/PUU-X/2012 on 29 August 2013 that: 1) Explanation of Article 55 paragraph (2) UU No. 21/2008 on Sharia Banking (State Gazette of the Republic of Indonesia year 2008 number 94, the addition of State Gazette of the Republic of Indonesia number 4867 2) Explanation of Article 55 paragraph (2) LAW No. 21/2008 on Sharia Banking (State Gazette of the Republic of Indonesia year 2008 number 94, the addition of State Gazette of the Republic of Indonesia No. 4867) has no binding force of law.

The Constitutional Court argued that there was a choice of forum to settle the Sharia banking dispute as mentioned in article 55 paragraph (2) of LAW No. 21/2008 a quo will eventually cause an overlap of authority to prosecute because there are

two courts given the authority to settle sharia banking disputes whereas in other laws (the judicial Justice ACT). Expressly stated that the religious judiciary had given the authority to settle sharia banking disputes as well as sharia economic disputes.

According to the Court, it is the right of the customer and the Sharia business unit to obtain legal certainty as specified in article 28, D paragraph (1) CONSTITUTION 1945. The Court assesses the provisions of Article 55 paragraph (2) of LAW No. 21/2008 a quo giving no legal certainty. Based on such a fact, although the Court did not prosecute particular matters, it has been sufficient evidence that the provisions of the Aquo article explanation have caused fair legal uncertainty and loss of constitutional rights of customers to obtain legal certainty in settlement of Sharia banking disputes caused it to contradict the principles of the Constitution.

CONCLUSION

Arrangement of dispute Resolution in the event of default shall be stipulated in Law No. 21 of 2008 on Sharia banking. The existence of Article 55 paragraph (1) of the sharia banking LAW, which determines that it provides the authority of judicial justice as a form of litigation dispute resolution for the completion of the first form, the new settlement of non-litigation. In fact, in settlement of disputes that should be done first is a non-litigation solution in accordance with the principles of's Consultative and justice. Settlement of default with the financing of Akad al-Qardh on customers who, from the beginning of good faith, sharia banks make a restructuring effort based on financing agreement, and if the restructuring efforts do not bring the results, sharia banks can make a guarantee execution effort. The case of tort on the contract of financing without warranty or with a guarantee then resolved the dispute through the National Shariah Arbitration Board or the court. The choice of forum is the mandate of law. However, the stage of the selected forum often does not go according to the steps that are supposed to be based on the mandate of the law, causing uncertainties.

That suits their preferences and recognizes their religious values and beliefs.

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