

Implementation of Authentic Notarial Deed in Making Financing Contract in Islamic Banks

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ABSTRACT

Islamic banking is a financial institution that must comply with Islamic principles in carrying out its business activities. Islamic banking functions as an intermediary institution to mobilize funds from customers and redistribute the funds to customers in the form of financing. Notary as a public official is authorized to make authentic deeds, especially in creating financing contracts in Islamic banking. The method used in this study was normative juridical using secondary data. The results of the study indicated that the implementation of a contract on an Islamic bank made by a Notary must include a clause in accordance with Islamic Principles. A notary can conduct some deeds in Islamic banks, including certain legal actions, especially the *murabahah*, *musyarakah*, *mudharabah* and *ijarah* financing contracts. Concerning the fulfillment of sharia principles in the financing contract in the form of a notary deed, it has not been fully adhered to the sharia principle. Hence, it is potentially illegitimate based on the provisions of Islamic law. The notary in formulating the Islamic contract deed made by notary must be following the Act of Notary Position without leaving the Islamic principles and procedures for creating a notary deed.

Keywords: Notary, contract, Islamic bank

1. INTRODUCTION

The banking in Indonesia is based on Law Number 21 Year 2008, that concerns about Islamic banking, Islamic banks conduct their business based on the profit sharing principle. Sharia Banking is a financial institution that must comply with sharia principles in carrying out its business activities. Islamic banking functions as an intermediary institution to mobilize funds from customers and redistribute the funds to customers in the form of financing [1].

Notaries as public officials are authorized to make authentic deeds, especially in creating financing contracts in Islamic banking. A contract becomes something important in every transaction, including a contract or transaction in sharia business. For an agreement to have legal binding, it must be recorded before a notary. Therefore, every business, including sharia business always requires a notary, who as a public official makes an authentic deed per his/her duties, as stipulated in the Law of the Republic of Indonesia Number 30 of 2004, concerning Notary Position, which was amended by Law Number 2 of 2014 about the position of Notary.

The development of sharia banking in Indonesia has an effect on other instruments, such as notary institutions that have been involved in issuing legal statements regarding sharia business contracts. For an agreement to have legal force, it must be recorded before a notary. Therefore every sharia business needs a notary as

an official, who makes an authentic deed following his/her duties as stipulated in Law Number 2 of 2014.

The notary by the state is authorized to carry out part of the duties of the state in the field of private law. Regarding the implementation of sharia contracts, the notary is often asked to authenticate the legal relations of the parties. To guarantee the certainty, order and legal protection, we need authentic written evidence regarding acts, agreements, determinations and legal events made by or before a notary. The notary, who formulates the sharia financing contract, is expected to pay attention to the harmony and legality requirements of the contract, as determined by Islamic law. Based on the clauses listed in each article of the sharia contract, it can be seen whether the legal construction is in accordance with or not in accordance with sharia contract law [2].

The form of sharia contract that is made notarial so that it can be called an authentic deed that must meet the provisions of the applicable laws and regulations. Therefore, the notary in formulating the form of sharia contract is obliged to pay attention to the provisions of the Law of Notary Position. Specific regulations regarding the form of sharia deed or clause of sharia contract deed have not existed so far. In practice, the contract made between the bank and the customer still refers to positive law, as well as the financing agreement made by notary [3].

In practice, many notaries formulate and formalize sharia contracts while they do not understand sharia principles. This happens because the notaries are not

Muslims and accept orders from sharia banks who do not even know about the pillars and legal requirement of sharia-based contract.

In line with the condition previously mentioned, this study aimed to see the implementation of financing contract formulated in Islamic banks (sharia banks) based on an authentic deed made by a notary. The method used in this study was normative juridical using secondary data.

2. Formulation Of Notary Deed Of Sharia Contract In Accordance With The Law Of Notary Position

Notary is an official authorized to create an authentic deed as long as the certain authentic deed should not be made specifically by other public officials.

Authentic deed, as the strongest and most complete evidence, has an important role in every legal relationship in people's lives. The position of a notary in the community is still respected. A notary is usually considered as an official where a person can get advice, everything that is written and stipulated (a constituent) is true because the notary is a strong document maker in a legal process, so it requires intelligence, accuracy and caution in the process of making a deed so that errors do not occur that would potentially lead to disputes in the future [4].

The notary in formulating the sharia banking contract, must pay attention to and implement the requirement regulated in the Law of Notary Position and the importance of understanding in the field of sharia banking. In practice, the financing deed in Islamic banking can be made in two types, namely the deed made under the hand and the deed made by notary. In practice, the contract made between the bank and the customer is still based on positive law, as is the financing agreement made by a notary.

A financing contract made by a notary, called an authentic deed, if it meet the provisions of Article 1868 of the Civil Code, "an authentic deed is a deed made in the form prescribed by law by or in front of a public official authorized for that at the place the deed was made". The elements of the article above can be explained as follows. First, the deed is made in the form specified by the regulation. Second, in the presence of the general officer in charge of the place where the deed was made [5]. Notary deed of financing in Islamic banks must follow the form determined by the Act, in this case Law Number 2 of 2014, concerning the Amendments to Law Number 30 of 2004, concerning Notary Position. Article 38 explains that the notary or authentic deed must consist of the introduction, body, and closing of the deed.

A notary has the responsibility for an authentic deed of Islamic banking financing contract made before him. Regarding the contract, the Notary has full responsibility for the truth and accuracy of the contract so that both the subjective and objective conditions for the contract or agreement are fulfilled. Hence, the contract made before the notary is true and authentic. It becomes a

contract that has the strength as a perfect evidence. A notary formulates the deed of contract at the request of the parties based on the procedure or mechanism or procedure for making a notarial deed [6].

If the parties consider that there is a problem with the deed and suffer losses as a direct result of the deed, the said party must sue the notary and must prove whether the notary deed does not fulfill the physical, formal or material aspects, and prove the loss. The notary must be fully responsible for the formulation of the deed of the contract. Thus, if there is a dispute on the deed that is deemed invalid and / or null and void by law, which refers to the mechanism of making the deed, the notary must necessarily be responsible for it, even when the judge then decides to pay damages suffered by the subjects as a direct result of the formulation of the deed made by a notary. Therefore, the notary needs to pay attention closely to the form of the contract, which is made before him so that it is suitable and does not violate the provisions stipulated in the Law of the Notary Position. Deed of financing at Islamic banks notarized must follow the form determined by the Law, in this case Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning Notary Position.

At the level of practice, there is a notary that includes the sentence "*Bismillahirrahmanirrahim*" at the beginning of the deed and "*Alhamdulillahirabbilalamin*" at the end of the deed in the contract of sharia financing. One of the reasons is to distinguish that the deed s/he made is the Sharia financing deed, and actually for a Muslim. The use of the sentence as mentioned above in every activity is normal, because Muslims are accustomed in saying "*Bismillah*" before activities to show the pure intention of doing something because of Allah, similar case for adding "*Alhamdulillahirabbilalamin*" at the end of the deed.

In practice, the bank has prepared its own formulation in creating the financing agreement, then submitted to the notary accompanied by an order letter to be made into a notarial deed. Even though the bank has prepared its own draft of the contract, the notary still draws up the deed framework. This is a form of carefulness and prudence of the notary in making the deed.

In formulating financing contracts of Islamic banks, many still refer to the format of credit agreements of conventional banks. However, adjustments are also made to the articles so as not to conflict with the Islamic principles. Adjustments made are guided by applicable Islamic law, and also refer to the positive legal provisions of Indonesia. The following need to be noted in making the contract of financing in Islamic banks, including the Law on Sharia Banking, the Law of Limited Liability Companies, the Law of Notary Position, the Decree of the Board of Directors of Bank Indonesia, as well as the Fatwa of the National Sharia Board on financing products in *Sharia* banks [7].

Notaries in carrying out their duties follow the provisions of applicable law. In the practice of Islamic banking business, there are no specific regulations regarding the contract of Islamic financing, no provision

that limit the financing clauses. Therefore, notary is not required to add or change the provisions and habits that have been practiced all this time. To date, the notary has complied with the provisions of the Law of Notary Position and general provisions regarding Islamic banking. Although the clauses in the contract refers to a legal basis, they are acceptable to Islamic law, as long as they do not conflict the sharia and are beneficial. Any form of contract is valid if there is no provision prohibiting it, because the essence of the agreement itself is according to the real intention, not according to *lafadz*, the form and composition of the words or its text [8].

3. The Role Of Notary In Making Deed Of Financing Agreement In Islamic Banks

A notary is not only authorized to make an authentic deed both by and in front of him, but also can take the following actions.

1. Acting as legal advisors, especially those concerning civil law issues in a broad sense (private);
2. Performs registration (*waarmerking*) of the deeds or letters under the hand and documents.
3. Legalizing the signature;
4. Showing and certify the copies of various documents (*copy collationee*).

The Notary and Islamic banks cooperates in creating the deed of financing contract that is based on sharia principles. The financing contract normally handled by the notary in principle consists of: [9]

- a. Financing of *musyarakah* that is, financing between two parties to carry out a particular business and the business profits will be divided according to the agreement.
- b. Financing of *Mudharabah*, namely financing in which one party is the manager, while the other party is the provider of capital. The principal repayment is adjusted to the customer's cash flow, so that it will not burden the customer.
- c. Financing with the principle of *ijarah* or leasing.
- d. Financing of *Murabahah*.

A notary plays a role in formulating a financing contract in an Islamic bank as financing always requires a contract with a complete clause to guarantee legal certainty in the hope of minimizing the risk by the Islamic bank. In legal juridical form, there are two types of contracts made by Islamic banks, namely Islamic financing contracts under the hand or deed and Islamic financing agreements made by and before a notary or authentic deed.

Notaries who become partners of Islamic banks or who make deeds at Islamic banks must have special criteria or conditions for the notary who will become their partners, one of which is that the notary who becomes a partner of the bank already has a certification of Islamic finance training. Legal actions undertaken by Islamic banks and customers in the context of financing, especially in creating the deeds in Islamic banks requires a deep

understanding of Islamic economics. The matters that need to be considered about the contract must be studied and understood as an absolute basis in making Islamic certificates or deed. Therefore, it is better if the notary is a Muslim because s/he is more likely to have a good understanding of sharia principles. So that, in providing services to the community, such as sharia contracts in sharia banking, s/he will truly refer to sharia principles or truly sharia concepts instead of just the name (Islamic contract and Islamic banking).

4. Conclusion

Notary in formulating a notarial deed of sharia contract must adhere to the Law of Notary Position without leaving the principles of Sharia and the mechanism or procedure for making a notary deed. The notary who formalizes the sharia contract must understand well the sharia principles, so it is ideal if a notary who formalizes the sharia deed is a Muslim. The financing agreement in an Islamic bank that can be made by a notary consists of a *musyarakah* financing agreement, *Mudharabah* financing, financing based on *ijarah* or leasing principles and *Murabahah* financing.

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