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# APPLICATION OF FINANCING BASED WARRANTY CONTRACT OF PRINCIPLES FOR SETTLEMENT WITH RESPECT TO THE RESULTS AND FINANCING PROBLEMS

**Zulfi Diane Zaini[1], Arifin[2], Lukmanul Hakim[3], Aprinisa[4]**

[1]Faculty of Law, Bandar Lampung University
JL. Zainal Abidin Pagar Alam NO. 26, Bandar Lampung, Lampung, 35142, Indonesia
Telp./Fax: +62-721-701463 Email: zdiane.zaini@yahoo.com

[2]Faculty of Law, Bandar Lampung University
JL. Zainal Abidin Pagar Alam NO. 26, Bandar Lampung, Lampung, 35142, Indonesia
Telp./Fax: +62-721-701463 Email: arfanifira@yahoo.com

[3]Faculty of Law, Bandar Lampung University
JL. Zainal Abidin Pagar Alam NO. 26, Bandar Lampung, Lampung, 35142, Indonesia
Telp./Fax: +62-721-701463 Email: lukman517422@gmail.com

[4]Faculty of Law, Bandar Lampung University
JL. Zainal Abidin Pagar Alam NO. 26, Bandar Lampung, Lampung, 35142, Indonesia
Telp./Fax: +62-721-701463 Email: riri_aprinisa@yahoo.com

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***Abstract***

*A collateral is prohibited in contract based on profit sharing, because this contract is trust-based agreements. But in order to avoid high credit/financing risk, shariah banking in practice implements it. In addition, the binding of collateral used ini shariah banking still uses conventional agreements. This research uses normative law approach(literature research). The result if this research is a collateral has an importen position in the contract based on profit sharing in shariah bank is accordance with the prudential banking principle and sharia compliance because a collateral is applied not as assurance effort of the financial capital, but to guarantee the orderly repayment/settlement of amount of the obligations and profit sharing ratio at the time in accordance with the agreed upon agreement and the disbursement after the customer's proven negligence, the binding of collateral using the conventional binding provided in the exixting positive law, it has not specialy accommodated the shariah principle and collateral has an urgent function as part of the settlement of financing problems and executed after the customer is declared negligent.*

***Keywords:*** *A Collalteral; Contract Based; Settlement; Profit Sharing Principle*

## INTRODUCTION

The application of collateral and collateral, in banking practices is needed to support its main function as an intermediary banking principle that moves funds from the community and redistributes these funds to the people who need them. The need for collateral is based on

the assumption that in the banking business, especially credit distribution, there is a very high degree of risk. Therefore, banks in channeling credit must based on the prudential principle and always pay attention to sound credit principles, given the funds channeled by the bank come from the public who entrust their money to the Bank.[1] In principle, credit disbursement by banks does not always have to be accompanied by conditions for collateral, because guarantees are considered to exist by looking at opportunities and bright business prospects of prospective debtors. With the availability of collateral, if the debtor (recipient of credit) breaks the promise (default, default) the creditor gets a replacement from the sale (auction) of the collateral.[2]

Within the scope of the financing agreement on Syariah Banking, in Article 23 of The Act Number 21 Year of 2008 concerning Sharia Banking. Sharia Banks and / or Sharia Business Units are required to have confidence in the willingness and ability of prospective recipients of the facility to pay off obligations on time, before the Syariah Bank and / or Sharia Business Unit distributes to the facility recipient customers by conducting a careful assessment of character, ability, capital, collateral, and business prospects of prospective Facility Recipient Customers.[3]

The provisions in the Sharia Banking Law do not explicitly regulate the subject matter of sharia-based guarantees, so that in fact the Commercial Banks that provide financing based on sharia and Syariah Banks that provide Islamic financing still apply conventional guarantees. Until now, the guarantee practice in financing Syariah Banking has not been supported by regulations that specifically regulate guarantee law in Syariah Banking, therefore, the implementation of collateral binding by Syariah Banks is by applying the existing conventional legislation concerning guarantee institutions.[4]

The application of conventional guarantees in Syariah Bank financing practices is considered problematic because the two banking systems have different characteristics. Banks based on sha-

[1] M. Khoidin, (2017), *Hukum Jaminan (Hak-Hak Jaminan, Hak Tanggungan, Eksekusi Hak Tanggungan;* ***(Collateral Laws (Collateral Rights, Mortgage, and Execution Of Mortgage)****)*, Laksbang Yustitia Surabaya, Surabaya, 2017, p. 4

[2] *Ibid*., p. 4-5

[3] Noor Hafidah, (2012), *Implementasi Konsep Jaminan Syariah dalam Tata Aturan UU Perbankan Syariah* ***(Implementation of the Sharia Collateral Concept in the Rules of Sharia Banking Law)*** dalam Arena Hukum Volume 6, Nomor 2, Agustus 2012, p. 123

[4] Fathurrahman Djamil, (2014), *Penyelesaian Pembiayaan Bermasalah di Bank Syariah*, ***(Settlement of Problematic Financing in Syariah Banks),*** Sinar Grafika, Jakarta, p. 41

ria principles or Syariah Banks or Syariah Banks, as well as conventional banks, function as intermediary institutions that move funds from the community and redistribute these funds to the people who need them in the form of financing facilities. The only difference is that Syariah Banks do their business activities not based interest (interest fee), but based on sharia principles, namely the principle of profit and loss sharing principle.[5]

Syariah Banks do not use the term "credit" which bases its return on interest, as conventional banks, but "financing" which bases its profits on profit sharing or other methods in accordance with the respective contracts of Islamic financing. In Syariah Banks the distribution of funds to customers (financing), is carried out using four main principles, namely the principle of buying and selling (murabahah, istisna, salam), the principle of profit sharing (mudharabah and musyarakah), the principle of rent (pure ijarah and ijarah muntahiyah bittamlik), and qardh.[6]

The profit sharing system (profit and lost sharing) is a differentiator between Syariah Banks and conventional banks. In general, the distribution of funds with the principle of profit sharing can be done with four contracts, namely al-musyarakah, al-mudharabah, al-muzara'ah and al-muzaqah. In the banking world, the most widely used contract is al-musyarakah and al-mudharabah. Whereas al-muzaraah and al-muzaqah are usually in agriculture.[7]

Economists and Islamic jurists agree that mudaraba must be the main basis in lieu of a credit transaction that blooms in terms of providing funds to entrepreneurs. This agreement is considered appropriate for long-term financing for industrial projects. The Bank provides the total amount of capital needed to carry out investments proposed by a businessman who is a manager in the project.[8] In addition, Syariah Banks can also provide long-term financ-

[5] Sutan Remy Sjahdeini, (2005), *Perbankan Islam dan Kedudukannya dalam Tata Hukum Perbankan Indonesia*, (***Syariah Banking and its Position in Indonesian Banking Law),*** Pustaka Utama Grafiti, Jakarta, p. 1

[6] The types of contracts that are applied in the Syariah Banking business in Indonesia have been regulated in a number of the first and most important laws and regulations based on Law Number 10 of 1998 concerning Amendments to Act Number 7 of 1992 concerning Banking. The terms of the contract in the act, further explained in detail with Bank Indonesia Regulations Number 7/46 / PBI / 2005 and re-affirmed in Act Number 21 of 2008 concerning Sharia Banking. Along with the birth of the Financial Services Authority institution, various sharia banking products and activities have been dynamically regulated among others in the Financial Services Authority Circular Number 36 / SEOJK.3 / 2015 concerning sharia banking products and activities.

[7] Syafii Antonio, (2003), *Bank Syariah dari Teori ke Praktik* ***(Syariah Banks from Theory to Practice*****)**, Gema Insani, Jakarta, p. 90-93

[8] Elias G. Kazarian, *Islamic Versus Traditional Banking, Financial Innovation in Egypt* in Sutan Remi Sjahdeini, *Op.Cit.*, p. 112

ing for existing companies based on musyarakah (equity participation), by buying shares from the company where the bank becomes a partner of the customer in the investment project concerned.[9] Although profit sharing is considered an advantage of Syariah Banks, the weakness of Syariah Banks also lies in the profit sharing itself which is high risk and vulnerable to the possibility of moral hazard. This is because the system assumes that everyone is honest, so it takes extra effort to examine prospective customers and monitor carefully the customers who receive financing.[10]

The existence of high risk in financing based on the profit sharing principle, the prudential principle is required which is realized by the guarantee that gives sharia banks confidence in the feasibility of customers to obtain financing, but the application of collateral in the mudharabah and musyarakah financing agreements according to Islamic law, not allowed, because the two contracts are a trust contract (uqud al-amanah), not a debt agreement.[11] The problem is that if there is no guarantee in distributing financing based on profit sharing, Syariah Banks as shahibul mal will face financing risk when there is a default (default, default) from the recipient of the financing facility, so that it will affect the bank's function as an intermediary utilize public funds to be distributed in the form of financing. The absence of fulfilling the financing agreement will potentially lead to non-performing financing which is detrimental to banks and investors. Based on the background described above, there are several issues that will be studied in this study, namely:

a. How is the legal position of the collateral goods in the financing agreement with the principle of profit sharing in Syariah Banks?
b. How is the binding of collateral items in the financing agreement based on the principle of profit sharing in Syariah Banks?
c. What is the urgency of collateral goods in the completion of financing agreements based on the principle for problematic results on Syariah Banks?

[9] Ibid
[10] Akhmad Mujahidin, (2016), *Hukum Perbankan Syariah* ***(Sharia Banking Law)***, RajaGrafindo Persada, Jakarta, p. 49
[11] According to Sutan Remy Sjahdeini, there is no guarantee in the agreement or mudharabah agreement because it is not a loan agreement because it does not apply to the provisions of Article 1131 of the Civil Code regarding collateral debt guarantees. Because in the mudharabah financing transaction trust is the most important, the bank must not ask for any collateral from the mudarib. See Sutan Remy Sjahdeini, Op. Cit., P. 33

## RESEARCH METHODS

### Type of Research

This research is a form of normative juridical research, namely research focused on studying the norms or norms and rules in positive law relating to the issues to be discussed. Then, normative jurisprudence research includes the study of: principles of law; Legal systematics; and legal synchronization. The main characteristic of normative juridical legal research is that the main source is legal material rather than social data or facts. Approach The normative juridical legal research is intended to collect various laws and regulations, theories related to the Sharia Banking Institution Business Activities in Indonesia, among others as stipulated in: The Act Number 21 Year of 2008 concerning Sharia Banking; The Act Number 21 Year of 2011 concerning the Financial Services Authority (FSA); Financial Services Authority Regulation and other Sharia Banking Regulations.

### Research Approach

In this study, there are two main approaches used, namely: the statute approach, and the conceptual approach, namely:

a) The statute approach is used to examine the rules or legal provisions in accordance with the hierarchy or the level of everything related to the Business Activities of Syariah Banking Institutions in Indonesia, among others in the form of Islamic financing based on the Kehati Principles. be careful, and closely related to the issues to be discussed, especially those related to the legal position of collateral goods in the financing agreement with the principle of profit sharing in Syariah Banks; Binding of collateral goods to financing agreements based on the principle of profit sharing in Syariah Banks, as well as the urgency of collateral items in the settlement of financing agreements based on the principle of problematic results for Sharia Banks.

b) Concept Approach (Conseptual approach) is used to examine the legal concepts relating to the Business Activities of Syariah Banking Institutions in Indonesia, among others, in the form of legal status of collateral goods in financing agreements with the principle of profit sharing in Syariah Banks; Binding of collateral goods to financing agreements based on the principle of profit sharing for Sharia Banks, as well as the urgency of collateral items in the settlement of financing agreements based on the

principle of problematic returns on Sharia Banks whether expressed by experts or in the form of legal science or legal abstraction which is the ratio decidendi of a rules related to the Business Activities of Syariah Banking Institutions in Indonesia.

**Collection of Legal Materials**

The collection of legal materials is done using a card system and electronic system, while the legal material used includes primary legal materials, secondary legal materials and tertiary legal materials sourced from:

1. Primary Legal Material consists of Legislation and other Regulations relating to the problems studied, including:
   a) 1945 Constitution of the Republic of Indonesia;
   b) The Civil Code (KUH Perdata);
   c) The Act Number 7 of 1992 juncto Act Number 10 of 1998 concerning Banking;
   d) The Act Number 23 of 1999 juncto Act Number 3 of 2004 juncto Act Number 6 of 2009 concerning Bank Indonesia;
   e) The Act Number 21 of 2008 concerning Sharia Banking;
   f) The Act Number 21 of 2011 concerning the Financial Services Authority;
   g) Bank Indonesia Regulation Number: 14/15 / PBI / 2012 concerning Asset Quality Rating for Commercial Banks;
   h) and several other related Regulations.

2. Secondary Legal Materials, namely: Legal Material that can provide an explanation of primary legal materials obtained from various literatures related to the subject matter, scientific journals in the form of research results in the field of legal science, opinions and research results from Experts / Experts in the field Legal studies, as well as the results of the symposium carried out by related parties relating to the issues under study, particularly regarding the Business Activities of Syariah Banking Institutions in Indonesia, among others, in the form of bank lending based on the Prudential Principles, and closely related to the issues to be discussed , in particular the legal position of collateral goods on financing agreements with the principle of profit sharing in Syariah Banks; Binding of collateral goods to financing agreements based on the principle of profit sharing for Sharia Banks, as well as the urgency of collateral items in the settlement of fi-

nancing agreements based on the principle of problematic returns on Sharia Banks, whether expressed by experts or in the form of legal science or legal abstraction which is the ratio decidendi of a rule relating to the Business Activities of Syariah Banking Institutions in Indonesia, among others, in the form of legal status of collateral goods in financing agreements with the principle of profit sharing in Syariah Banks; Binding of collateral goods to financing agreements based on the principle of profit sharing for Sharia Banks, as well as the urgency of collateral items in the settlement of financing agreements based on the principle of problematic returns on Sharia Banks whether expressed by experts or in the form of legal science or legal abstraction which is the ratio decidendi of a rules related to the Business Activities of Syariah Banking Institutions in Indonesia.

3. Tertiary Legal Materials, namely: Legal Material that can provide meaningful explanations or explanations for primary legal materials and secondary legal materials such as legal dictionaries, Indonesian and English dictionaries, Newspaper articles, Legal encyclopedias, supporting materials from Internet sources, and others.

**Data Analysis**

The legal material collected is analyzed by steps including inventorying, systematizing, interpreting and explaining. Descriptions include "content and positive legal structure",[12] while the systematization step is carried out to describe is and structure or hierarchical relationships between legal rules. In this systematization activity, a correlation analysis of the related legal rules is carried out in order to be understood properly.[13] At this stage the rationalization and simplification of the legal system is also carried out by "constructing general rules and general notions so that legal material becomes better organized, more reasonable and logically becomes clearer and more appropriately understood. At the explanatory stage an explanation and analysis is carried out on the meaning contained in the rule of law in relation to legal issues in this research so that the whole forms a unified logically. Legal analysis is an open system, which means that "the rule of law and de-

[12] Philipus M. Hadjon, (1994), *Pengkajian Ilmu Hukum Dogmatik (Normatif)**(Study of Dogmatic Law (Normative)*, dalam Yuridika Nomor 6 Tahun IX, November – Desember, p. 6

[13] Bernard Arief Sidharta, (1999), *Refleksi Tentang Struktur Ilmu Hukum **(Reflection on the Structure of Law)***, Cetakan Pertama, Mandar Maju, Bandung, p. 150

cisions must be considered in a relationship and also legal norms are based on legal principles and behind legal principles can be systematized by other legal symptoms.[14] With this pattern of legal material analysis, it will be easy to observe or analyze the Business Activities of Banking Institutions in Indonesia, among others, as stipulated in Act Number 21 Year of 2008 concerning Sharia Banking.

## ANALYSIS and DISCUSSION

### Position of Guaranteed Goods in Financing Contract Based on Profit Sharing Principles

As previously stated, what is meant by profit sharing based financing agreement is the mudharabah financing agreement and musyarakah financing agreement. It can be understood that the meaning of mudharabah financing agreement is a contract between the Sharia Bank as the owner of the capital (shahibul mal) and the Customer (mudharib) in which the Bank provides a ceiling or ceiling of funds used as capital for customers to run their business. The concept of the Musharaka contract is used as a term of financing agreement based on the musyarakah principle. In the agreement document, what is meant by musyarakah principle is the principle of cooperation or an effort between a bank and a customer to finance a particular project that each party provides funds in accordance with the agreement provided that profits will be divided according to their respective profit sharing ratio and losses borne according to the percentage of each fund's participation.

Article 23 of Act Number 21 Year of 2008 concerning Sharia Banking requires Sharia Banks and / or UUS to have confidence in the willingness and ability of prospective recipient of the Facility to repay the obligation in time, before the Islamic bank and / or UUS distribute to the recipient customers by doing careful assessment of character, ability, capital, collateral, and business prospects of prospective Facility Recipient Customers.

Referring to these provisions, what is meant by credit guarantees or financing is the confidence in the ability and ability of the debtor Customer to repay their obligations as agreed. In a broad sense, credit guarantees or financing include the character, ability, capital, collateral and business prospects of the debtor or known as Principle 5 C (Character, Capital, Capacity, Collateral and condition of economic). Where as in the narrow sense what is meant by collateral is collateral / collateral or collateral.

[14] Philipus M. Hadjon, *Loc Cit*

According to the Big Indonesian Dictionary, the word "guarantee" comes from the word "guarantee" which means to bear. A guarantee is a liability for the loan received (borg) or the guarantee or promise of someone to bear the debt or the obligation is not fulfilled. The word "guarantee" is a translation from the Dutch language, namely zakerheid or cautie. Both terms include in general the ways the creditor guarantees the fulfillment of the invoice, in addition to the debtor's general liability for the goods.

In the legislation can be found in Article 1131 of the Civil Code and the Elucidation of Article 8 of the Banking Law, but in both regulations it is not explained what is meant by collateral.

In addition to the term collateral, the term collateral is also known. The term collateral can be read in article 1 Number 23 of Act Number 10 Year of 1998 concerning Amendments to Act Number 7 Year of 1992 concerning Banking. The term collateral can also be found in Act Number 21 Year of 2008 concerning Sharia Banking. Collateral is an additional guarantee, whether in the form of movable objects or immovable objects which are handed over by the collateral owner to the Sharia Bank, in order to guarantee the repayment of the obligations of the Facility Recipient Customer.

From this definition, it can be understood that collateral is a form of agreement between creditors and debtors in an agreement where the debtor or third party promises a number of assets for the purpose of repayment of debt or financing according to the provisions of the existing legislation.

In the Sharia Banking Law, the term "collateral" is used to refer to collateral items. Collateral is an additional guarantee, whether in the form of movable objects or immovable objects, which are submitted by the Collateral owner to Sharia Banks and / or Sharia Business Units, in order to guarantee the repayment of the obligations of the Facility Recipient Customer.

The guarantee in general serves as a guarantee of repayment of credit / financing. Guarantee in the form of character, capability, capital and business procedures owned by the debtor is an immaterial guarantee that functions as a first way out. With this immaterial guarantee, it is expected that the debtor can manage his company well so as to obtain business revenue in order to pay off the credit / financing as agreed. While the credit / financing guarantee in the form of material

/ material collateral serves as a second way out. As a second way out, the execution of sales / execution of collateral is only carried out if the debtor fails to fulfill its obligations through first way out.

The financing / credit agreements are made based on the provisions regarding the guarantee binding institution. In the perspective of positive law, according to the development of the guarantee law in Indonesia, at present the material guarantee institution is not only limited to mortgage and mortgage as stipulated in the Book II of the Civil Code. Due to the enactment of the Basic Agrarian Law, the right to land if it is presented as a collateral object, the institution used is the Underwriting Right whose rules are contained in Act Number 4 Year of 1996 concerning Morgage Rights. In addition, the emergence of a Fiduciary material guarantee body as stated in Act Number 42 Year of 1999 concerning Fiduciary Guarantees.

In modern banking practices, the mudharabah contract does not only apply between two parties directly, namely shahib al-maal directly dealing with mudarib. This scheme is a standard scheme that can be found in the classic books of Islamic jurisprudence. And this is actually the practice of mudaraba done by the Prophet and his companions and Muslims afterwards. In this case, what happens is direct investment between shahib al-mal (as a surplus unit) and mudarib (as a deficit unit). In direct financing like this, the role of banks as intermediary institutions does not exist.Classical mudharabah like this has special characteristics, namely that usually the relationship between shahib al-maal and mudharib is a personal and direct relationship and is based on mutual trust (amanah). Shahib al-maal only wants to hand over his capital to someone he knows well his professionalism and character.

Contemporary scholars have innovated new mudaraba schemes, namely mudaraba involving three parties. This additional one party is played by Islamic banks as an intermediary institution that brings together shahib al-maal and mudarib. So there is an evolution from the concept of direct financing to indirect financingIn sharia banking contracts, mudharabah is placed on the side of funding and financing. On the fund raising side, mudharabah is placed on: time savings; ordinary deposits and special (special investment) deposits. Whereas on the financing side, mudharabah is applied to: working capital financing and special investment.Whereas Musyarakah, which is financing based on a cooperation agree-

ment between two or more parties for a particular business, in which each party contributes funds provided that the benefits and risks will be borne jointly in accordance with the agreement;

If in the musharaka the loss is borne by the bank and the customer in accordance with the percentage of their respective participation, then in the mudharabah contract the loss arising from the execution of the contract will be borne by the bank, except if the loss occurs due to dishonesty and / or negligence and or violation of the customer. In relation to profit sharing ratio, the mudharabah financing agreement for profit sharing ratio is calculated based on Expected Return Bank for each batch of disbursement, while in the musyarakah agreement the profit sharing ratio for each is determined by percentage.The reason why mudharabah customers almost all have a legal entity / business entity is because the mudharabah contract is a trust contract that gives one hundred percent of the financing to its customers because it must be done carefully and there is certainty of returning customer financing. Every the Legal entity has a Articles of Association and / or by laws, so that it has a clear legal standing with clear business activities which are also contained in the articles of association.

The financing agreement model based on the principle of profit sharing in the form of mudharabah and musyarakah agreement used is a standard agreement, meaning that the contract has been prepared in advance by the bank. However, in its implementation, banks still provide opportunities for customers to choose or determine clauses that do not burden the customer, for example in terms of the contract or the ratio amount.

In the Mudharabah financing agreement and the Musyarakah Financing Agreement Deed between the Sharia Bank and the Customer there is a clause in the guarantee, both in the form of individual guarantees and material guarantees in the form of collateral, collateral. The guarantee agreement is an accessoir of the principal agreement as outlined in the guarantee agreement deed which is made separately from the principal agreement. With the existence of collateral or collateral as accessoir in the financing agreement based on profit sharing principles such as mudharabah and musyarakah is to anticipate the moral hazard or moral hazard of the customer that is not consistent with the agreed contractual contents. In addition, the guarantee is intended to encourage customers to comply with the financing agreement, especially regarding repay-

ment in accordance with the agreed terms, so that the customer (investor) does not lose the wealth that has been used by the bank. For the Bank, public trust is very important in increasing the competition of Syariah Banks that are still far behind in terms of market share compared to conventional banks.

Judging from the prudential banking perspective, there is a guarantee in the mudharabah and musyarakah financing agreement in accordance with the precautionary principle stipulated in Article 23 of Act Number 21 Year of 2008 concerning Sharia Banking which emphasizes the importance of a careful assessment of character, capability, capital, collateral, and business prospects of prospective Facility Recipient Customers. The precautionary principle is important, as said by Akhmad Mujahidin that the risks that occur in banking business in general are the risk of non-performing financing or Non-Performing Loans (NPLs) or Non-Performing Financings (NPFs).

Factors contributing to the risk of bad credit include the use of credit, poor credit usage management, and economic conditions that affect the domestic business climate. When viewed from sharia compliance (Sharia Compliance), whether the application of collateral in the mudharabah and musyarakah agreement is in accordance with the provisions of sharia. Jurisprudence scholars argue that there is no guarantee of guarantee in the mudaraba contract. The reason for the prohibition is because the contract is a mandate contract, besides that the scheme applies between two parties directly, namely shahib al-maal directly dealing with mudharib. This scheme is a standard scheme that can be found in the classic books of Islamic jurisprudence. Mudharabah practices carried out by the Prophet and his companions and Muslims afterwards. In this case, what happens is direct investment between shahib al-mal (as a surplus unit) and mudarib (as a deficit unit). In direct financing like this, the role of banks as intermediary institutions does not exist.

Classical mudharabah like this has special characteristics, namely that usually the relationship between shahib al-maal and mudharib is a personal and direct relationship and is based on mutual trust (amanah). While the relationship between the mudharabah contract currently involves three parties. This additional one party is played by Syariah Banks as an intermediary institution that brings together shahib al-maal and mudarib. So there is

an evolution from the concept of direct financing to indirect financing.

The principle of compliance with sharia principles (sharia compliance) related to sharia banking practices is the obligation of submission (compliance) of Syariah Banking in its business activities to the values of sharia (Islamic law) which is regulated by the authorized institution.[15] The implementation of the principle of compliance with sharia is also contained in Article 26 of the Sharia Banking Act which stipulates that various forms of sharia banking business must submit to the fatwa of sharia principles stipulated by the Indonesian Ulema Council. The article was re-stated in the Regulation issued by Bank Indonesia. In addition, the implementation of the Sharia compliance principle is also contained in Article 32 of Act the Sharia Banking which stipulates that every Syariah Bank and conventional commercial bank that has a Sharia Business Unit must have a Sharia Supervisory Board appointed by the General Meeting of Shareholders or a recommendation from the Ulema Council Indonesia. Through this article the Sharia Supervisory Board is given the task of giving advice and advice to the directors and supervising the activities of the bank to comply with the Sharia Principles.[16]

The Indonesian Ulema Council Authority to establish sharia principles is in line with the definition of Shariah Compliance according to Adrian Sutedi, that operational sharia compliance is compliance with the National Sharia Council Fatwa because the Fatwa of the National Sharia Board is a realization of sharia principles and rules that must be adhered to in Syariah Banking.

In the matter of collateral in the mudharabah and musyarakah agreement, the Indonesian Ulema Council as the authority for the stipulation of fatwa in the field of sharia which is the reference of Syariah Banking, in the fatwa of the National Sharia Council of the Indonesian Ulema Council Number 07 / DSN-MUI / IV / 2000 states that in principle, in financing Mudharabah has no guarantee, but for mudharib not to make a deviation, the bank can ask for guarantees from mudarib or third parties. This guarantee can only be disbursed if the mudarib is proven to have violated the things agreed

[15] Muh. Nasikhin, Rekonstruksi Pengaturan dan Pengawasan Perbankan Syariah dalam Sistem Hukum Perbankan Nasional **(*Reconstruction of Regulation and Supervision of Sharia Banking in the National Banking Legal System*)**, Fatawa Publishing, Semarang, 2017, p. 101

[16] Adrian Sutedi, *Perbankan Syariah Tinjauan dan Beberapa Segi Hukum* ***(Sharia Banking, Review and Some Legal Aspects)***, Ghalia, Jakarta, 2009, p. 145

upon in the contract. Similarly, in the National Sharia Council Fatwa of the Indonesian Ulema Council Number 08 / DSN-MUI / 2000 stated in principle, in musyarakah financing there is no guarantee, but to avoid occurrence of irregularities, the bank can request collateral.

Based on these provisions, the principle of the availability of guarantees is to avoid Customer's irregularities in matters that have been agreed upon. When viewed in the terms of the Financing Agreement Act mudaraba and Deed of Musyarakah Financing Agreement the existence of collateral or collateral is not intended to guarantee capital but to guarantee customer order in making payments / repayments. Disbursement of collateral or collateral items at a Sharia Bank is usually carried out if the Customer has broken a contract, including side streaming of capital usage that is not in accordance with the financing objectives approved by the Bank.

Associated with the disbursement of collateral items, as added by the speaker Firmansyah, that the disbursement or execution of collateral goods is carried out as the last alternative if the Customer can no longer cooperate to resolve financing problems. So as long as there is a guarantee to avoid any irregularities in the Customer and is disbursed after the customer is declared to have actually committed a deviation (default, default), the guarantee in the mudharabah and musyarakah financing agreement that has been applied by the Sharia Bank in general is in accordance with the principles of sharia compliance, as stated by the National Sharia Council of the Indonesian Ulema Council above.

In addition, seen from the problemah theory stated by Imam Asy-Syatibi that the most important benefit (al-maslahah ad-daruriyyah) is intended to guarantee basic human rights which include:

1) Rights and freedom of religion (hifz ad-din);
2) Physical or mental salvation (hifz an-nafs);
3) Family safety or descent (hifz an-nasl);
4) Safety of property or private property (hifz al-mal) and
5) Safety of reason or freedom of thought (hifz al-‘aql).[17]

With the guarantee as an effort to avoid irregularities from customers who use financing facilities that result in loss investor investor customers is a form of

[17] Lihat As-Syatibi, *Al-Muwafaqat fi Usu al-Ahkam* , Dar al-Fikr, Beirut, 1341 H, II:3, p. 4.

the realization of assets or personal property (hifz al-mal) and in terms of contract theory, a guarantee in order to prevent such deviations, then in accordance with the principle of ihtiyat or caution. Whereas in the contract theory perspective it is stated that a contract has a principle or principle that must be its basis. As mentioned in the Compilation of Sharia Economic Law, it is stated that there is a principle of jurisprudence / prudence, which is intended so that each contract is carried out with careful consideration and carried out appropriately and carefully.

Judging from the legal function as a means of renewal in community development, despite the provisions in Act Number 21 of 2008 concerning Sharia Banking, it has not specifically regulated the law of material security in accordance with the characteristics of each contract / financing product, but in general the requirements for for banks to have specific beliefs including the need for collateral goods or collateral can be used as regulative instruments that regulate and direct the activities of Syariah Banking as one of the important development factors.

In the practice of Sharia Banking, even though all arrangements regarding guarantee agreements in the Contract of Funding based on the profit sharing principle have been determined through the National Sharia Council Fatwa of the Indonesian Ulema Council, however in the context of the rule of law where legislation has a very large role, the position of the Fatwa of the National Sharia Council is related to the ability to apply collateral in the mudharabah and musyarakah financing agreements that have been absorbed into the Bank Indonesia Regulation as described above, thus having binding legal force can be guided at least by the Bank and the Customer in banking transactions. Thus the existence of the Fatwa of the Indonesian Ulema Council which has been confirmed by the Bank Indonesia Regulation, in terms of the theory of legal certainty, has constructive value for the stability and trust of the public in the banking business.

**Binding of Guaranteed Goods in Financing Based on Profit Sharing Principles on Syariah Banking**

The guarantee agreement is an additional or follow-up agreement. This means that the existence of a guarantee agreement cannot be separated from the principal agreement. The principal agreement that precedes the birth of a guarantee agreement is generally in the form of a credit agreement, loan-borrowing agree-

ment or debt-receivable or financing agreement. In the Mudharabah financing agreement deed, there is a clause in the guarantee, both individual guarantees and material guarantees or collateral. In mudharabah agreement, collateral or collateral in the form of:

a) Personal guarantee (personal guarantee);
b) Customer Receivables;
c) Deposits and
d) Land and Buildings above it.

In the Deed of Agreement on Musyarakah Financing in general it is stated that: Guaranteed Goods are: Land and objects above the land. Categorically, the guarantee in the contract consists of two types, namely individual guarantees (persoonlijke zekerheid) and material guarantees (zakerlijke zekerheid). With the existence of individual guarantees, for example: between the management of the Baitul Maal wat Tanwil Cooperative as a Customer and the Bank in the Mudharabah Financing Agreement it will create individual rights and create a special legal relationship between the Creditors and the person who guarantees the repayment of Debtor debts. Whereas material security is an absolute right of a certain object as part of the debtor's assets so that it gives power to the creditor in a preferred position.

The material guarantee which is an accessoir agreement in the mudharabah and musyarakah financing agreement has been bound by the guarantee binding institution in the form of a pawn for deposits, fiduciary guarantee for customer receivables, mortgage for collateral in the form of land and objects on it. Guarantee binding institutions have provided protection and legal protection to Shahibul Mal or the Bank because the guarantee binding institution has the characteristics or characteristics: droit de suite, droit de preference and cannot be divided, thus providing a guarantee of returning financing from the Customer when financing problems occur.

Each guarantee and collateral item is stated in written form and made before a Notary / Land Land Titles Registrar in the form of an Authentic Deed. Each guarantee or collateral item is bound in accordance with the provisions of the legislation. Therefore, in terms of the precautionary principle, the application of this special material guarantee provides a greater sense of security to the creditor or bank, so that when the customer defaults, the Bank receives a replacement from the sale (auction) of the collateral.

From the entire guarantee agreement in the financing agreement based on the principle of profit sharing, the collateral binding institution is provided by positive legal provisions. Guarantee binding institutions such as Rahn and Kafalah are explicitly not used as a legal basis for guaranteeing the collateral in the mudharabah and musyarakah agreement, even though substantially there is an equality between the guarantee agreement which is introduced by the provisions of Islamic law and the existing collateral guarantee institutions.

`Some scholars from the Maliki doctrine also allow third parties to provide guarantees for mudaraba. This guarantee is called kafalah Related to Kafalah,[18] the National Sharia Council of the Indonesian Ulema Council has issued Fatwa Number 11 / DSN-MUI / IV / 2000, that: In order to run its business, a person often requires guarantees from other parties through a kafalah contract, which is a guarantee given by the guarantor (kafiil) to a third party to fulfill the obligations of the second party or that is borne (makfuul 'anhu, ashil);

Related to the binding of material guarantees, the National Sharia Council Fatwa of the Indonesian Ulema Council on March 6, 2008 concerning rahn tasjili. Rahn tasjili expressly provides the concept of collateral which is a guarantee in the form of goods on debt, but the collateral item (marhun) remains in the control (utilization) of rahn and the proof of ownership is submitted to murtahin. This practice is more like fiduciary. In addition to rahn tasjili, according to Rahn hiyazi, it is very similar to the concept of pawning in both customary law and positive law.

The use of existing collateral binding institutions is because there are no rules that specifically regulate the binding of sharia guarantees specifically. In addition there is a requirement from the Notary / Land Titles Registrar who becomes a partner of the Sharia Bank, ie must have attended training / courses on Islamic economics. This statement is in line with the proposal of Gatoto Supramono, that for the interests of Syariah Banks it is necessary to support the existence of Sharia Notaries whose work is to make Sharia Deeds whose Actual contents relate to Sharia Principles, in order to be in line with the bank's principles.[19]

The principles of sharia in the guarantee agreement, especially those relating to financing agreements based on profit sharing principles, require special knowledge, accuracy and even separate

[18] Muhammad Syafii Antonio, *Op. Cit.*, p. 177

[19] Gatot Supramono, *Op. Cit.*, p. 137

regulations because the conventional guarantee binding institutions used as binding guarantees are not specific to the aspects of guarantee in mudharabah and musyarakah financing, but on financing. credit or debts, because mudharabah is not a Debt Agreement, it cannot be bound by Article 1131 Code of Civil law.

Sharia agreements and sharia guarantees are two legal entities that cannot be separated. The existence of sharia guarantees only arises after the sharia agreement. This is if analogous to the concept of civil law, the sharia agreement is a follow-up agreement (accessoir), while the sharia agreement is the principal agreement. This means that the principle of law that underlies the sharia agreement, mutatis mutandis can also be treated as a Principle of sharia guarantee law.[20]

From the precautionary principle with the use of existing guarantee institutions, it can provide certainty regarding the acquisition of refinancing from customers to banks because the guarantee institution specifically binds objects specifically to the related execution institutions. Nonetheless, from the aspect of sharia compliance, various provisions in the guarantee regulation have not accommodated sharia principles. From the aspect of legal theory of development, in order to utilize the law as an instrument of economic development, more specific arrangements are needed regarding the application of a material guarantee agreement law that accommodates sharia principles as accommodated in the Principal Agreement.

According to the Shariah complience Fatwa, the Indonesian Ulema Council on guarantees does not discuss the arrangement of its binding institutions as a whole, as well as the Syariah Banking Act, specifically does not regulate the guarantee binding institutions on Islamic finance. Although some of the ulama's opinions related to individual guarantees and material guarantees enable the binding of guarantees that are conceptually the same as guarantee institutions in positive law, so too the Indonesian Ulema Council has issued a fatwa regarding rahn collateral binding institutions that are conceptually the same as pawning and fiduciary, but the issue of collateral also involves various institutions, procedures and technical implementation of collateral execution, so that utilizing the various collateral binding institutions is rational and pro-

[20] Noor Hafidzah, *Kajian Prinsip Hukum Jaminan Syariah dalam Kerangka Sistem Hukum syariah* ***(Study Of Sharia Collateral Law Principle in The System Sharia Law)***, download. Portalgaruda.org akses 6 September 2017

vides a safer shield for banks in resolving credit risk or financing risk due to default by the Customer. Because the guarantee binding institution is specifically not indicated in the sharia agreement, but for the debt-receivable agreement in the general context of the creditor-debtor relationship, the sharia contract has different forms and principles where the parties to the transaction are partners with each other , then the use of the binding institution is entirely in accordance with the principle of compliance with sharia (sharia compliance). In the paradigm of development law, it is necessary to establish a guarantee legal regulation as an inseparable part of the sharia agreement or contract so that the role and role of Syariah Banking as a pillar of economic development can maximally realize the prosperity of the people as aspired.

**3. Urgency of collateral in the settlement of financing agreements based on the Principle for Problematic results in Syariah Banking**

Referring to the deed of Mudharabah and Musyarakah financing agreements, anticipation of the problematic financing has been carried out by binding guarantees and collateral in both contracts. However, the disbursement or execution of collateral is the last step taken by the Bank if the financing restructuring efforts carried out by the Bank are unsuccessful.Basically steps that can be taken to save non-performing financing in the form of Financing Restructuring are based on Bank Indonesia Regulation Number 10/18 / PBI / 2008 concerning Financing Restructuring for Sharia Banks and Sharia Business Units through rescheduling, re-requirements ( reconditioning) and restructuring.

Non-performing financing is financing that has a quality that is classified as substandard, doubtful and loss. Based on the provisions of Article 9 of Bank Indonesia Regulation Number 8/21 / PBI / 2006 concerning the quality of assets of commercial banks conducting business activities based on Sharia principles as amended by Bank Indonesia Regulation Number 9/9 / PBI / 2007 and Bank Indonesia Regulation Number 10/24 PBI / 2008, payment quality is assessed based on aspects:

a) Business prospect;
b) Customer performance;
c) Ability to pay / ability to submit ordered items.

On the basis of the 3 (three) aspects mentioned above, the quality of Financing

in practice is determined to be 5 (five) groups, namely:

a) Current, also called Group I (one);
b) In Special Attention, also called Group II (two);
c) Substandard, also called Group III (three);
d) Doubtful, also called Group IV (four), and
e) Loss, also called group V (five)

The criteria for the components of the aspect of determining Financing Quality classification are set out in Appendix I of Bank Indonesia Circular Number: 8/22 / DPBS dated October 18, 2006 concerning Assessment of Product Assets of Commercial Banks conducting business based on Sharia Principles as amended by Bank Indonesia Circular Number 10/36 / DPbS dated October 22, 2008 (Bank Indonesia Circular Number: 8/22 / DPBS). Explained in Appendix I of the Bank Indonesia Circular, there is a different arrangement regarding classification of financing quality based on the classification of financing products, as follows:

a) Classification of Mudharabah and Musyarakah quality ("MM")
b) Classification of quality of Murabahah, Istisna, Qardh and Multi-purpose Transactions "MIQAT"
c) Classification of Quality of Ijarah or Ijarah Muntahiyah bi Tamlik
d) Salam Quality Classification

Mudharabah and Musyarakah financing criteria are as follows:

a) Current: Payment of principal installments on time, and or IDR equal to or more than 80%;
b) In Special Caution : There are arrears in principal installments of up to 90 days and / or IDR equal to or more than 80%;
c) Substandard : There are arrears in financing principal installments that have exceeded 90 days and or IDR above 30% PP up to 80% PP (30% PP <RP <80% PP);
d) Doubtful: there are arrears in financing principal installments that have exceeded 120 days to 180 days; and / or IDR <30% PP up to 3 payment periods;
e) Loss : There are arrears in financing principal installments that have exceeded 180 days and or IDR <30% of PP over 3 payment periods.

In the explanation of Article 8 of Act Number 7 Year of 1992 juncto Act Number 10 Year of 1998 concerning Banking and in the Explanation of Article 37 of Act Number 21 Year of 2008 con-

cerning Sharia Banking, among others, states that credit or financing based on Sharia Principles provided by the Bank contains risks, so that in its implementation the bank must pay attention to the principles credit or financing based on sound sharia principles. If the bank does not pay attention to the principles of sound financing in distributing its financing, there will be various risks that must be borne by the bank, among others in the form of:

a) Debt / Principal liability for financing is not paid;
b) Margin / Profit sharing / Fees are not paid;
c) Swollen costs incurred; and
d) Financing health loss (Finance Soundness).[21]

The three steps or options as mentioned above are through rescheduling, reconditioning and restructuring, in the event of a problematic financing, if the Bank's customers still have the ability to pay and the business is still running. If the customer is already in the condition of collectability V (five) or in the category of bad financing, then the execution of the collateral item will be held. However, execution is the last option if the step or option can no longer be done. In addition, the execution of guarantees is also carried out in the event that the customer is not cooperative or runs away, then the step taken by the bank is the execution through the execution parate or fiat execution in accordance with the existing court lines.

In essence, handling non-performing financing refers to provisions that specifically regulate Sharia Banks, in this case Bank Indonesia Regulation Number 10/18 / PBI / 2008 concerning Financing Restructuring for Syariah Banks and Sharia Business Units. In addition, the application of collateral is carried out or executed after it is proven that the Customer does not fulfill the performance as agreed in the contract. Therefore, the completion of problematic financing has been carried out accordingly with the principle of sharia compliance as regulated by the Financial Services Authority and the Indonesian Ulema Council as the sharia compliance authority.

Apart from the controversial guarantee law in the financing agreement based on the principle of profit sharing, but with the existence of customer deviations from the agreed contract that actually occurs in the financing agreement based on the principle of profit sharing, making collateral has an urgent position, especially if

[21] Ibid

associated with the bank's function as intermediary institution.

In practice at a Sharia Bank, execution through the Court line is greatly avoided or the last alternative when settlement through internal banks, voluntary sales and execution parates can no longer be carried out. The execution of the guarantee as stated in the entire guarantee agreement is the District Court. Based on this, the court that can be requested to execute the guarantee when referring to Article 224 of the HIR is to the Chairperson of the District Court, but because the guarantee agreement is an accessor following the principal agreement, the settlement follows the settlement of the principal agreement. If the principal agreement is decided by the general court environment, the accessor is also the authority of the general court. On the other hand, if the principal agreement is decided by the religious justice environment, the agreement of accession is also the authority of the Religious Courts.

In its principal agreement, Sharia Banking generally chooses a District Court. However, in terms of legal certainty, the matter will be problematic, because the principal agreement of the Financing Agreement in Syariah Banking is the authority of the Religious Court. Since the enactment of Act Number 3 Year of 2006 concerning Amendment to Act Number 7 of Year 1989 concerning Religious Courts, a dispute settlement option appears (Article 49 letter (i) of this Act provides the task and authority for dispute resolution Islamic economics including Syariah Banking to courts in the Religious Courts.

Absolute authority (absolute competence) Religious Courts handle Sharia Economic disputes have also been strengthened by the enactment of Law Number 21 of 2008 concerning Sharia Banking specifically contained in Article 55 paragraph (1) of The Act Number 21 of 2008 concerning Sharia Banking, which affirms that the Sharia Banking Dispute Settlement is carried out by the Court within the Religious Courts. In its development, the absolute authority of the religious court to deal with Sharia Acts was confirmed by the Constitutional Court Decision Number 93 / PUU-X / 2012 August 29, 2012.

Based on the Constitutional Court Decision Number 93 / PUU-X / 2012 On August 29, 2012, the Religious Courts Agency is the institution authorized to conduct the bidding process on collateral rights for sharia contracts. So on the basis of this rationale the Republic of Indonesia

Supreme Court Circular Number 4 of 2016 Dated December 9, 2016 The Religious Room Law Formulation on page 9 point 3 stipulates that: "Underwriting rights and other debt guarantees in the sharia economic contract can still be executed if default occurs even though not yet repayment due in accordance with the agreement after being given a warning in accordance with the applicable law.

In addition, in Article 13 of the Supreme Court Regulation Number 14 of 2016 concerning Procedures for Sharia Economic Dispute Settlement, it is stated that: Implementation of Sharia Economic Decisions, Underwriting Rights and Fiduciary Rights are based on Sharia Contracts conducted by Courts within the Religious Courts. The existence of increasingly robust regulations regarding the authority of the Religious Courts in adjudicating the principal agreement and its accessoir, shows that there is a relatively good support for the existence of sharia practices so that in every business activity until the dispute resolution obtains legal certainty regarding the purity of sharia principles applied. In contract theory accommodated the principle of freedom of contract between the parties who bind themselves, naman at the same time also regulated that an agreed contract must not violate the provisions of the law. Therefore, the choice of the settlement of the disputes on the sharia financing agreement or the execution of collateral that is not in accordance with the provisions of the law will result in legal uncertainty.

## CONCLUSION

From the description above, conclusions can be drawn as follows:

a. The guaranteed goods have an important position in the financing agreement based on the principle of profit sharing at Bank Syariah Mandiri in accordance with the prudential banking principle and the principle of compliance with sharia (sharia compliance) because collateral is applied not as a financing guarantee, but to guarantee the orderly repayment / repayment of the total liabilities and the Profit Sharing Ratio at the right time in accordance with the agreed contract and the disbursement after it is proven that the Customer has negligent.
b. The binding of collateral goods is carried out in an accessoir guarantee agreement that is separate from the agreement or principal contract by utilizing the binding institution that has been provided in the legislation or

existing positive law, this is considered to fulfill the principle of prudence and certainty in disbursement or execution of collateral items. However, in terms of sharia compliance, the guarantee agreement used does not specifically accommodate sharia principles, especially financing agreements based on the principle of profit sharing (mudaraba and musyarakah).

c. The guaranteed goods have an urgent function as part of the settlement of non-performing financing and the execution of the execution is carried out after the Customer is declared negligent, but the execution of collateral is the last option when the effort to save financing through restructuring is unsuccessful.

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