Legal Argument About the Imposition of Collateral within the Mudharabah Financing Contract Perspective of Law Number 21 of 2008 on Syariah Banking

Muhammad Yadi Harahap∗

1. Universitas Islam Negeri Sumatera Utara

∗E-mail: yadhimuhammad79@gmail.com

Abstract

The problematic collateral of classical jurisprudence developed by imams of the jurisprudence school is clear that in the case of mudaraba financing, shahibul maal cannot demand assurances from mudarib to restore invested capital. If the shahibul maal requires a guarantee of mudarib and makes the guarantee as a condition of a contract, then the contract of cooperation is null and void. The problem that arises in the world of syariah banking is not only about the question of whether or not to impose mudharabah financing contract guarantee, but concerning the problem that the variable is very complex. For that reason, it is necessary to conduct a research that underlies the rationale for the loading and binding of guarantee in the mudharabah financing contract. The legal issue that needs to be addressed is whether the rule of law embodied in the articles of shariah banking law has implemented the essence of sharia guarantee arrangements. This study uses the method of juridical-normative research to conduct an analysis of Law No. 21 of 2008 concerning sharia banking. The imposition of guarantees in mudharabah financing contracts in the perspective of shariah banking law is conducted to apply prudential principles and risk principles that are to avoid unlawful capital disbursement of contracts.

Keywords—collateral, contract, mudharabah financing, sharia bank, UU No. 21 of 2008 on Syariah banking

1. Background

Financing by a profit-sharing system can be done through a mudharabah contract with characteristics consisting of a first party as owner of capital called by shahibul maal, and a second party as a business manager called mudarib. In the mudharabah contract in syariah banking, known as the two-tier or two-stage mudaraba, shariah banking institutions are intermediaries or intermediaries as the basis for the collection of public funds to be channeled back to the community in various forms of financing and equity participation (Ali, 1992). The principle is a shariah bank is a bank whose main basis is the principle of profit sharing in all its forms of operations, both in the collection and distribution of funds. Collection of funds obtained from third parties through wadi’ah yad dhmanah, savings and mudharabah deposits and others. Then channeled through the form of financing with the principle of mudaraba, murabahan, isthis’na or salam (Asarya, 2005).

The statement confirms what in Islamic banking is known as the two sides of the role of Islamic banks, one side as a collector of funds from the community in this case the bank acts as a business manager through a mudharabah contract with the owner of savings and deposits of mudharabah as shahibul maal. On the other side, syariah bank acts as a channel of funds to the community, in this case the bank serves as a shahibul maal through which the customer as mudharib (Manzoor, 2006). When shariah banks act as owners of capital, of course there is a possibility of various risks that will be faced by shariah banks. Therefore, Islamic banks need to impose and bind the guarantee of mudharabah financing considering the capital owned by Islamic banks is not entirely owned by the bank. Another factor is the absence of standardized financing for different types of businesses that are different from the imposition of collateral. In addition, there is no institution that guides and supervises customers who act as mudharib (Iqbal & Mirakhor, 2011).

From the data obtained, the composition of financing distribution given to the community is dominated by murabahah financing, this is happening in all syariah banking in Indonesia (see Table 1).
Table 1. The composition of financing distribution from 2011-2015

<table>
<thead>
<tr>
<th>Type of Contract</th>
<th>2011</th>
<th>2012</th>
<th>2013</th>
<th>2014</th>
<th>2015</th>
</tr>
</thead>
<tbody>
<tr>
<td>Akad Mudharabah</td>
<td>10,229</td>
<td>12,023</td>
<td>13,625</td>
<td>14,354</td>
<td>14,906</td>
</tr>
<tr>
<td>Akad Musyarakah</td>
<td>18,960</td>
<td>27,667</td>
<td>39,874</td>
<td>49,387</td>
<td>54,033</td>
</tr>
<tr>
<td>Akad Murabahah</td>
<td>56,365</td>
<td>88,004</td>
<td>110,565</td>
<td>117,371</td>
<td>117,777</td>
</tr>
<tr>
<td>Akad Salam</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Akad Istishna</td>
<td>326</td>
<td>376</td>
<td>582</td>
<td>633</td>
<td>678</td>
</tr>
<tr>
<td>Akad Ijarah</td>
<td>3,839</td>
<td>7,345</td>
<td>10,481</td>
<td>11,620</td>
<td>11,561</td>
</tr>
<tr>
<td>Akad Qardh</td>
<td>12,937</td>
<td>12,090</td>
<td>8,995</td>
<td>5,965</td>
<td>4,938</td>
</tr>
<tr>
<td>Total</td>
<td>102,655</td>
<td>147,505</td>
<td>184,122</td>
<td>199,330</td>
<td>203,894</td>
</tr>
</tbody>
</table>

The foregoing data shows that murabahah financing is the most dominant form of financing, comprised of one type of nonprofit sharing financing. In fact, the presence of the sharia banking principal mostly emphasizes the principle of a profit-sharing system, because murabahah financing is a financing pattern that reflects the spirit of sharia banking itself for the following reasons: First, murabahah financing can reduce the chances of economic recession and financial crisis. This is because a syariah bank is an asset-based financial institution, meaning that a sharia bank transacts based on real assets instead of relying on paper only and profit from interest impositions to investors. Secondly, investment will increase when accompanied by the opening of new jobs, consequently the level of unemployment will be reduced, and the income of the community will increase. Third, murabahah financing will encourage the growth of business or investors who dare to take risky business decisions. This form will lead to the development of innovation that can, in turn, improve competitiveness (Ascarya, 2004).

A proper financing scheme serving as an accelerating engine for the development of the economic well-being of the community is mudharabah financing when it is professionally carried out. The dominance of non-profit-sharing financing is clearly not an ideal condition, so sharia banking with the government and the Bank of Indonesia should prepare the system by finding the right solutions to improve mudharabah financing. Moreover, one of the visions and missions of sharia banking is to achieve a material and spiritual society that supports the real sector through profit-sharing activities and real transactions in order to promote economic growth (Bank Indonesia, 2006).

According to Dwi Agung, there are several factors that cause financing for unattractive results for Islamic banks, among others: First, the source of funds of sharia banks are mostly short term and thus cannot be used for financing results that are usually realized over the long-term. Secondly, entrepreneurs with high profit-level businesses tend to be reluctant to use the profit-sharing system, because entrepreneurs assume that credit by using the interest system is more profitable with a certain amount of calculation. Third, entrepreneurs with low-risk businesses are reluctant to ask for revenue sharing. Fourth, to convince banks that the project will provide high profits, entrepreneurs make business projections that are too optimistic. Fifth, many entrepreneurs who keep two sets of books, bookkeeping given to the bank shows little profit (Agung & Arianto, 2011).

The risk in the case of a mudharabah financing contract is the responsibility of the capital owner of the syariah bank, unless the risk is caused by negligence, manipulation, and violation of the agreement’s provisions, and it is necessary to verify whether the loss is purely due to mudharib factors or not. When the loss is caused by economic factors such as natural disasters, the losses are charged to sharia banks. But if the losses are caused by some negligence factor or manipulation, which violates the agreement, then the loss is charged to mudarib. Fifth, profit sharing is also an important element to be considered in mudharabah financing contracts, so there is no doubt about the differences between sharia banks and mudharib. Therefore, the revenue share must be stated as a ratio (Jonsson, 2006).

From the foregoing explanation, it may be concluded that the argument favoring the imposition of collateral in a mudharabah financing contract is based on an effort to manage the risk of loss caused by the negligence factor of mudarib. Risk-based losses involving dikamsudkan are those provided by the actions of mudarib. The Islamic banking context of mudharib is declared negligent in the mudharabah financing contract if it has been proven that malaksukan is one of three categories. First, mudharib is found not to follow the terms and conditions in the mudharabah financing contract. Secondly, Mudharib is proven to conduct business activities contrary to the norms and principles in mudharabah financing contracts. Thirdly, Mudharib has been proven to include committing malicious acts, such as manipulation, non-transparency in the management of mudharabah financing contracts, such as hiding profits or revenues, and so forth (Ayyub, 2009).

Considering the above conditions, the research questions to be investigated are: First, what is the basis for thinking of the imposition of collateral in a mudharabah financing contract? Second, what are the legal arguments in terms of imposition of collateral in mudharabah financing contracts? To analyze the answers of the research questions raised, it is necessary
to use appropriate research methods to find a systematic and measurable answer. For that research method used in this research using normative juridical method (socio-legal research) with type of research being qualitative. The purpose of law is not only seen as law written in books but also in action. The approach used in this study uses a statutory approach, namely Law Number 21 (2008) about sharia banking. It aims to focus on the study of legal norms that are directly related to the legal issues studied—especially Islamic banking laws. Consequently, finding the answer to the research questions is found in the formulation of the problem. In addition, this approach aims to discover how law and legislation can be implemented properly in accordance with its function and role in solving legal problems in the community.


Article 15 of Law No. 10 (1998) states that in the case of banks providing credit or financing based on sharia principles, banks are required to have confidence based on a thorough-going analysis of the willingness and ability of borrowers to settle their debts or to refund the financing in accordance with the agreed upon terms (Triandaru & Santosó, 2007). Credit guarantees or financing assurances based on sharia principles are the last alternative sources of repayment of credit and financing in the case of credit and financing cannot be repaid by the debtor or customers from troubled businesses. An in-depth assessment of information and analysis was conducted by the bank to mudharib through the five Cs of credit concepts: character, capacity, capital, collateral, and the condition of economy. Character relates to the good faith of the recipient customer of the facility to repay the use of funds disbursed by sharia and/or UUS banks (Bahsan, 2008).

Assessment of character or personality of the prospective customer of the facility is based on the relationship between the syariah bank and/or the UUS and the respective customer or information obtained from another reliable party so that the syariah bank and/or UUS may conclude that the receiving customer of the facility concerned is honest, acting in good faith, and not complicate the sharia bank and/or the UUS in the future. Assessment of character is done to know the level of honesty, integrity, and willingness of mudharib candidate to fulfill obligation and run their business. This information can be obtained by a syariah bank through the life history of mudharib customers, business history, and information pertaining to similar efforts. Assessment of the capacity of the beneficiary customer, especially for the sharia bank, should examine the expertise of the beneficiary or customer in the field of business and his capability of managing the funds so that the sharia bank and/or UUS are confident that the business will be financed and managed by the right person. For mudharabah financing the bank must really consider legal aspects, marketing aspects, aspects of management and environmental impact analysis (Usman, 2001).

Assessment of the capital owned by the beneficiary customer, especially in the syariah bank and/or UUS must analyze its financial position as a whole, for both the past and for its forecast so that it can know the capital capabilities of the beneficiary or customer in supporting the project financing or business. Sharia banks must first conduct research on capital owned by the credit applicants based on sharia principles. The purpose of the investigation is not solely based on the amount of capital, but is even more focused on how the distribution of capital placement undertaken by the entrepreneur, so that all existing sources can be run effectively (Ansori, 2011).

Capacity is the ability of potential borrowers to manage their business activities and their abilities to see future perspectives, so that the business will be able to run well and provide benefits that ensure that mudharib customers are able to pay off their obligations in the amount and duration that has been determined (Subagya & Purnomo, 2009). Mudharib ability can be done with various approaches such as a material approach, i.e., by assessing the balance sheet, income statement, and cash flow statement over the last few years. Through this approach will be discovered the level of solvency, liquidity, and rentabilities business and the level of risk. In general, the assessment of the capacity of a mudharib customer is based on his experience in the business world associated with the education of the mudharib candidate, as well as the company’s ability and excellence in conducting a competitive business (Hermansyah, 2009).

Assessment of collateral within the guarantee context applies to the principle that all forms of financing may be required for security except for mudaraba financing. Due to the risk of mudarabah financing, the advantages and disadvantages are clearly imposed on the shahibul mall and mudarib. Mudarabah financing practices are requested solely for the guidance of prudent principles. Assessment of warranties, sharia banks and UUSs shall assess the goods, projects or assignable rights financed by the mudarabah financing facility concerned. The security is not only a guarantee of principal, but it requires additional guarantees to avoid possible omissions and fraud. When mudharib makes a mistake and cannot recover its obligations, the duty assurance is made to cover the mudharabah financing provided by the collateral bank in the mudharabah financing contract, a form of anticipation of possible risks of mudharib waprestation, for example problematic mudharabah or misfire. To anticipate this, the guarantee is expected to pay off the remaining financing capital provided by the sharia bank both principal and profit sharing (Ansori, 2008).

Codition Economic conditions may be understood in terms of giving capital for mudharabah financing by syariah banks to mudharib, wherein the economic situation and business sector conditions pertaining to the applicant or mudharib need to be attended to by the bank to minimize possible risks caused by economic circumstances in the country. Assessment of
business prospects (a condition of the economy) is required for bank financing for the debtor, wherein the situation of the business sector will be managed by the debtor, in order to minimize the risks that may be caused by economic conditions. The conditions in question are the social, economic conditions that can affect the state of the economy and the smooth running of the mudarabah business. Article 8, paragraphs (1) and (2) of Law No. 10 (1998), concerning the foundation for banks to divert financing based on sharia principles, including mudarabah financing to prevent problematic Islamic banking by applying the guidance of 7P analysis formulas and 5C analysis formulas, and feasibility studies (Hermansyah, 2011).

P is referred to as personality, in this case the bank seeks to find complete data about a person’s credit or financing history based on sharia principles, among others: the applicant’s life history, the applicant’s experience in terms of trying, social associations, and other elements. It is necessary to determine the credit approval and financing based on sharia principles applied to the applicant. Purpose, in addition to the personal identification of the applicant, should seek to find out data for the purpose of using credit or financing based on sharia principles, in line with the business of the bank in question (Mustjari, 2012).

Prospecting, in this case the bank must conduct a thorough and in-depth analysis of the form of business to be performed by the applicant. As to whether the business carried out by the applicant has a prospect in the future in terms of economic aspects and needs of the community. Payment, that in lending or financing based on sharia principles the bank must know clearly about the ability of the applicant to repay the debt in the amount and time specified. Party, which classifies the customer mudarib based on capital, loyalty and character, so it can be known as far as managing the loyalty level and customer honesty. Profitability to analyze the ability of mudarib in seeking fortune. Protection, how to keep the financing can be protected by the guarantee of goods or personal guarantees (Rivai & Permata, 2008).

In connection with the principle of mudarabah financing in sharia banks, Islamic banks are guided by two principles: First, the principle of trust as introduced Law No. 21 (2008) on Islamic Banking, that the provision of capital for mudarabah financing by syaria bank to mudarib customers is always based on the principle of trust. Sharia banks must have confidence and belief that the capital given to mudarib nsabah will be useful in accordance with its allocation, especially Islamic banks believe that the mudarib customers concerned can malunasi capital provided through mudarabah financing and profit within a predetermined period. Secondly, the prudence principle, sharia banking in terms of running its business including mudarabah financing to mudarib customers must always be guided and apply the principles of prudence. The principle can be realized in the form of consistent consent on the basis of both the terms and regulations related to the provision of mudarabah financing by the sharia bank concerned (Hermansyah, 2011).


Syariah banking is an institution whose existence needs trust and confidence from the society of the capital entrusted to him through various products and financing of sharia banking. This requirement is because the spirit of sharia banking is a belief that if the trust of the community is lost then it can be ascertained that banking operations including sharia banking will stop, because the principle of funds owned by sharia banking is largely the funds owned by various customers. To maintain the trust of the banking community implement policies with optimal principles for good governance of banking (or good corporate governance). The governance in question is needed to implement good direction that includes the principles of transparency, accountability, responsibility, professionalism, honesty, fairness, and objectivity in running business activities (BNI Syariah, 2006).

The principle that is very important in order to maintain public confidence in Islamic banks is the prudence principle. This principle is set forth in Article 35 paragraph (1) of Law No. 8 (2008) concerning sharia banking, given to ensure the implementation of decision making in the management of sharia banks in accordance with the prudence principle by applying internal care. Similarly, in Article 8 paragraph (1) and paragraph (2) of Banking Act No. 10 (1998). The same may be said of Article 35 of sharia banking law concerning prudent principles, affirms the obligations of sharia and UUS banks to apply the prudence principle in conducting the business of a syariah bank. Prudence principles in question are guidelines for the management of sharia banks and UUS in order to realize a healthy sharia banking, strong, and efficient in accordance with the provisions of legislation. In addition to Article 35 paragraph (1), Article 2 of Law No. 21 (2008) on sharia banking stipulates that banks in conducting their business shall apply sharia principles and prudent principles based on established signs.

Furthermore, in order to implement prudent principles in distributing mudarabah financing and conducting other business activities, Islamic banks and UUS shall pursue ways that are not detrimental to sharia and / or UUS banks and the kepentingan customers who entrusted their funds. Furthermore, Article 37 of sharia banking law stipulates that the Bank of Indonesia shall stipulate provisions concerning the maximum limit of fund disbursements based on sharia principles, the granting of guarantees, the placement of sharia-based securities investments, or other similar matters, and
may be performed by a sharia bank and/or UUS to the recipient customer of the facility which is related. Including companies within the same group as the sharia bank and UUS concerned. The maximum limit in question shall not exceed thirty percent of sharia bank capital in accordance with the provisions stipulated by the Indonesian bank in question.

The important meaning that can be concluded from the precautionary principle above is, that sharia banking in terms of channeling Islamic banking financing—including mudharabah financing contracts—must be managed properly, covering the principles of transparency, accountability, responsibility, independence, and fairness in running its business activities based on sharia banking law. Financing should be based on economic considerations and professionalism, not based on other considerations outside the economic interests. In connection with the management of sharia banking based on the principle of transparency, accountability, responsibility, professional, and fairness in carrying out its business activities have heavier risk, because the perpetrators will be held responsible during the afterlife (Hasan, 2009).

The notion of transparency in question is being open to disclose material and relevant information in executing the decision-making process. Accountability is the clarity of functions, execution and financial accountability so that the management of the company runs effectively. Accountability is the conformity of the management of the main entity and the financial services institution with legislation and sound management principles. Independence is the management of financial conglomerates in a professional manner without the influence or pressure of any party. Fairness is justice and equality in fulfilling the rights of stakeholders arising under the agreement and the laws and regulations.

The aim of the prudence principle to keep Islamic banks solvent and always in a healthy condition, so that public confidence in banking is high and people will not hesitate to keep their funds in sharia banks. The principle of prudence applied by sharia banking is not only because it is connected with the bank’s obligation not to harm customers who entrust their funds to sharia banks, but also concerns the interests of the general public and banking in particular for the bank to run its business properly and correctly by complying consistently in compliance with the provisions and legal norms prevailing in banking (Sjahdeini, 1993).

It can be concluded that the principle of prudence is a very important principle in mudharabah financing contracts, because the prudent principle in the distribution of mudharabah financing contracts is a necessity for banks in managing public funds to succeed optimally and be able to provide benefits to customers. Considering the relationship between the owner of capital and mudharib in the mudarabah financing contract is a contractual relationship that is commensurate with the principle of prudence. Implementation of that principle will certainly raise the level of public confidence in Islamic banks, if done consistently in accordance with applicable legislation. The explanation of sharia banking law concludes that the principle of prudence in terms of Islamic banking finance—especially mudharabah financing—must be consistently held to avoid loss of public confidence with entrusted funds (Ansori, 2011).

Applying the kahtai-hatian principle in bank management, sharia banking is obliged not to do any kind of harm to sharia banking and customers who have entrusted their funds in conducting their business activities. This policy is in line with the provisions of Article 36 of the sharia banking laws. Basically, the provisions in Article 36 of sharia law are in line with the provisions of Article 29 paragraph (3) of Law No. 7 (1992) as amended by Act No. 10 (1998), explaining that sharia banking is required to indemnify the interests of customers and banks from all acts that can cause losses when the bank does not apply methods of prudence and soundness of sharia banks in conducting financing activities. The regulation on prudential principles in Islamic banks is done because the customer is not in a position to assess and know the safety and health of the sharia bank itself (Rahman & Naja, 2005).

In addition, the mudharabah financing contract is actually never separated from the risk that at any time can cause losses for Islamic banks. It could happen because in sharia banking operational practices there is always a tradeoff between service and risk, so it will experience default risk. Sharia banking needs to pay attention to the application of the 3K element in mudharabah financing contracts, i.e., trust, openness, and caution. Trust is necessary because sharia banking is a business that performs its function as a financial intermediary that brings the surplus units of funds with a deficit unit. Thus, with the existence of trust, openness is required as a form of accountability in the mudharabah financing contract (Silvanita, 2009).

The legal argument that can be conveyed that the financing distribution be based on sharia principles by sharia banks and/or UUS contains the risk of failure or congestion in settlement, so it can affect the health of sharia and/or UUS banks. Given that the channeling of funds in question is sourced from public funds deposited in Islamic banks and UUS, the risks faced by sharia banks and UUSs can also affect the security of public funds. To maintain its health and to bear in mind its durability, banks are required to spread risks by administering the distribution of financing based on sharia principles, the provision of guarantees, or other facilities in such a way that they are not centered on the debtor’s customers, or certain groups of borrowers.
Elements of trust and openness inherent in sharia banking business especially in mudharabah financing contract, then every Islamic banking finance transaction should be accompanied by attitudes of caution. This is indeed the principle of prudence is a consequence of the element of trust and openness in addition to the fact that sharia pebankan law also requires it. Of the three elements in practice, in the mudharabah financing contract is always faced with a tradeoff between risks, because tradeoffs are unlikely to be practically avoided by the management of the banking system that is trying to do the ideal combination of risk and service, resulting in the imposition of collateral (Wijaya, 2000). One of the efforts that can be done by Islamic banks is to minimize risks, hence very strict mudharabah financing requirements, because if sharia banks do not apply strict requirements in terms of financing mudharabah will be faced with risks such as non-performing loans. The risk in mudharabah financing contracts arises when a sharia bank cannot recover a bill of capital given to mudharib. Possible causes of the risk, due to inadequate attenuation of various business risks that are financed (Muhammad, 2014.)

To For mengantisipasi mudharabah financing, even problematic sharia banking laws have provided arrangements on risk management set forth in articles 38 to 40. Article 38 explains that sharia banks and UUS must apply risk management, the principle of knowing their customers, and protection of customers, technically has been regulated by Bank Indonesia regulation. The risk management in question is a set of procedures and methodologies used by pegangkan to identify, measure, monitor, and control risks arising from the activities of sharia bank. Know-your-customer principles are those that should be applied by the banking system at least covering the activities of receipt and identification of customers as well as monitoring of customer transaction activities, including reporting of suspicious transactions.

In relation to risk management, it is further stipulated in PBI No. 7 / 25 / PBI / 2005 on risk management for Bank of Indonesia officials and PBI No. 8 / 9 / PBI / 2006 concerning amendment to PBI No. 7 / 25 / PBI / 2005 concerning risk management for the management and officials of the Bank of Indonesia, namely conventional commercial banks and commercial banks conducting business based on sharia principles. Whereas in the event that banks are required to apply risk management principles effectively, banks with human resources must possess competencies and expertise in risk management. Assessment of the customer’s ability to return the financing provided through mudharabah financing includes assessment of the following components: (a) accuracy of principal payments, profit sharing, and or fees, (b) availability and accuracy of financial information of mudharabah beneficiary customers, (c) completeness of mudharabah financing documentation, (d) compliance with mudharabah financing agreements, and (e) the suitability of the user of the funds, and the reasonableness of the source of the obligation’s payer.

Determining the quality of financing is done by analyzing the valuation factors by considering the components of the assessment of business prospects, customer performance, and ability to pay. The determination of the quality of mudharabah financing shall be made by considering the significance and materiality of each valuation factor and component, as well as the relevance of the valuation and component factors to the respective customer. Assessment of the quality of mudharabah financing made by means of ability to pay refers to the determination of principal repayment and/or achievement of the ratio between the income reality and projected income. The calculation of revenue realizations and projected revenues for assessment of the quality of mudharabah financing is calculated based on the accumulated average during the current mudharabah financing period.

The income projection is calculated based on business feasibility analysis and the customer’s cash inflows during the mudharabah financing period. The bank may change the projected income based on its agreement with the customer in the event of any change in the economic conditions affecting the business of the customer, the bank shall include the projected income and the change of projected income in the mudaraba agreement between the bank and the customer and shall be fully documented. The principal installment of mudharabah financing can be made during the financing period in accordance with the agreement between the syariah bank and the customer. If the mudharabah financing period is more than one year, the principal installment payment shall be paid periodically in accordance with the projection of the cash inflow of the customer’s business. The payment of principal installments shall be included in the mudharabah agreement between the bank and the customer and shall be fully documented.

Sharia banks and UUS banks shall explain the possibility of risk of loss to customers, related to customer transactions conducted through the sharia bank and/or UUS.

The explanation is given to the customer about the possibility of the risk of loss of the intended customer to ensure the transparency of bank products and services. If such information has been provided, the bank shall be deemed to have carried out this provision. If the beneficiary customer fails to comply with its obligations, the sharia bank and UUS may purchase part or all of the collateral, either through or outside the auction, on the basis of voluntary submission by the owner of the collateral or under authorization to sell from the collateral owner, provided that the collateral is purchased shall be liquidated within a period of one year. The purchase of collateral by the bank through the auction is intended to assist the bank in order to accelerate the settlement of the obligations of the beneficiary customer.
When the bank as the buyer of collateral for the recipient of the facility, the bank’s status is the same as the other non-bank buyers. Banks are allowed to purchase collateral outside the auction intended to accelerate the settlement of the obligations of the beneficiary customer. Collateral that can be bought by a bank is collateral whose financing has been categorized as loss for a certain period of time. The *sharia* and UUS banks shall consider the purchase price of collateral as referred to in paragraph (1) with the customer's liabilities to the *sharia* bank and/or UUS concerned. In the event that the purchase price of collateral as referred to in paragraph (1) exceeds the total liabilities of the customer to the *sharia* bank and/or UUS, the excess amount shall be returned to the customer after deducting the auction fee and other costs directly related to the collateral purchase process.

Further provisions concerning the purchase of collateral as referred to in paragraph (1), paragraph (2) and paragraph (3) shall be regulated by the Bank of Indonesia. The principal provisions which are further stipulated by the Bank of Indonesia’s regulations contain among other elements: (a) collateral that can be purchased by *sharia* banks and/or UUSs is collateral whose financing has been categorized as loss for some time, and (b) the period of disbursement of collateral purchased. Urgency of risk management is done in order to minimize the tradeoff between service and risk as specified in the legislation. Risk management is also a banking endeavor to prevent problematic financing.

4. Conclusion

After the imposition of collateral in mudharabah financing contracts in principle to protect and maintain the assets of third parties that have entrust their capital to Islamic banks, since the capital given to mudharib is not entirely ilik bank. Moreover, the idea of imposing a guarantee in a mudharabah financing contract to avoid the mudharib's behavior from moral hazard means that the owners of capital are concerned that mudharib might misappropriate the provided capital and breach the agreement. Perspective of Law No. 21 (2008) concerning *sharia* banking, that legal arguments about guarantee loading should be conducted to apply the prudence and risk principles. The distribution of mudharabah financing by *sharia* banks carries the risk of failure or congestion in settlement, so it can affect the health of *sharia* banks. Given that the channeling of funds in question is sourced from public funds deposited in Islamic banks, the risks faced by *sharia* banks and can affect the security of public funds. To maintain the security and health of banks, Islamic banks are required to spread risk by administering the distribution of financing based on *sharia* principles with the requirements of collateral.

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References


