Proceeding of 1st Ahmad Dahlan International Conference on Law and Social Justice

ISBN: 2962-4460
pp. 1-8

The Drawbacks of Mudharabah Financing Contract on Sharia Banking

Wiwin Muchtar Wiyono[1*], Eti Mul Erowati[2], Iskatrinah[3]

1. *Faculty of Law, Universitas Wijayakusuma Purwokerto, Indonesia*
   Corresponding e-mail: wiwin.muchtar01@gmail.com
2. *Faculty of Law, Universitas Wijayakusuma Purwokerto, Indonesia*
   pujaestryana25@gmail.com
3. *Faculty of Law, Universitas Wijayakusuma Purwokerto, Indonesia*
   katriiskatrinah@gmail.com

ARTICLE INFO

Keywords
The Drawbacks; Mudharabah; Financing Contract; Sharia Banking

ABSTRACT

In classical *fiqh* studies, a *mudharabah* contract is an agreement based on the element of trust. The application of *mudharabah* financing there is no need for collateral or guarantees. In the *mudarabah* contract, the relationship between *shahibul* mal and *mudarib* is a trustworthy relationship. In addition, guarantees are deemed necessary in the *mudharabah* contract aimed at avoiding moral hazard (business actors), namely the occurrence of abuse or irregularities and negligence in the management of *mudharabah* funds. The objective of research is to analyses the drawbacks of *Mudarabah* financing contracts in Sharia Banking and its challenges. The research method is sourced from secondary data in the form of a Sharia Banking *mudharabah* financing contract and the qualitative analysis used in this research. This research found there are weaknesses in the content of the *mudharabah* financing contract indicating an imbalance between the *shahibul* mal and *mudharib* parties. For profit and loss, it has also not applied sharia principles and there are still elements of harmonious and unfulfilled contract conditions, unclear elements of help, for this an approach is needed so that a contract is valid, it must fulfill the harmonious and the terms and conditions contained in it

Introduction

Sharia Commercial Banks are Sharia Banks that provide payment traffic services, whereas Sharia Rural Banks do not provide payment traffic services. An Islamic bank is one that bases all of its operations on sharia principles. The difference between conventional and Islamic banks seems to be that conventional banks use an interest system, whereas Islamic banks use a profit-sharing system. Additionally, Islamic banks include a Sharia Supervisory Board (DPS) that supervises the bank's regular operations to ensure that users are always in compliance with sharia provisions, whereas conventional banks do not. Several revisions were made to Law No. 10 of 1998, which increased the potential for the growth of Islamic banking. This is in keeping with Indonesia's national development goals, which include developing an economic system based on the values of justice, togetherness, equity, and

advantages in accordance with sharia principles in order to create a just and prosperous society based on economic democracy (Nurhasanah, 2015).

It is clear from this regulation that Islamic banking was created with the following goals in mind (Dewi et al., 2005):

a. Providing banking services to persons who are unable to understand the concept of interest. With the adoption of a sharia banking system alongside the traditional system, public finances can be mobilized more extensively, particularly from groups that have not been impacted by the conventional banking system's interest-based system..
b. Creating finance alternatives for business growth based on the partnership principle. The concept used in this principle is a harmonious investor relationship (mutual investor relationship). Meanwhile, the debtor-creditor relationship is the idea used in traditional banks (debtor to creditor relationship).
c. providing the demand for banking products and services that offer a number of comparative advantages, such as eliminating continuous interest charges (perpetual interest effects), limiting unproductive speculation activities (unproductive speculation), and providing financing to businesses that prioritize moral factors.

The Act is a rule of agreement based on Islamic law between a bank and another party to save funds and (or) finance business activities, or other activities, as stated in Article 1 paragraph 13, the Act is a rule of agreement based on Islamic law between a bank and another party to save funds and (or) finance business activities, or other activities. which are declared sharia-compliant, such as financing based on the principle of profit sharing (*mudharabah*), financing based on the principle of equity participation (*musharakah*), the principle of buying and selling goods for a profit (*murabahah*), or financing of capital goods based on the principle of transfer of ownership of leased goods to the bank by another party (*ijarah wal iktina*) (Mardani, 2010). In the practice of distributing funds obtained through financing, several issues have arisen between the customer and the bank in the implementation of the contract, such as the customer's obligations not being met in accordance with the contract agreed upon between the customer and the bank, and the imbalance in the customer's and bank's positions. Customers and banks are both involved (Anwar, 2007).

Mudharabah is one type of Islamic banking funding. *Mudharabah* is derived from the Arabic word *dharb*, which meaning "to strike." Or, to put it another way, it's the act of someone stomping their feet in the course of doing business. *Mudharabah* is a technical term for a partnership arrangement in which one party (*shahib al-mal*) supplies all (100%) capital and the other becomes the manager. Abdurrahman Al Jaziri stated the same sentiment when he defined *mudharabah* as the act of transferring wealth from one person to another as business capital. However, if the gains are shared by both of them, and if the losses are carried by the capital owner, the earnings will be shared equally (Badrulzaman, n.d.).

The profits of *Mudharabah's* firm are distributed according to the contract's terms. If the loss is absorbed by the capital owner, as long as it is not due to the manager's fault. If the loss was caused by the manager's negligence or dishonesty (Mardani, 2012), the manager must

be held accountable. It's also known as profit sharing in the *mudharabah* contract, which is used to finance products.

According to the *Mudharabah* doctrine, humanity was created by Allah SWT with different benefits and drawbacks. There are people who have excess assets, people who don't have assets, people who have knowledge but lack the capital to carry out a job, and people who have capital but don't have time to look after some of their assets. The haves must support the less fortunate in an equitable manner for balance to be achieved (Anis, 2008). The profit-sharing principle differs from the fixed interest principle, which states that the bank will charge the recipient of the financing (customer) a constant amount of interest regardless of the profit created by the client, even if the customer loses money and an economic crisis arises. The rules of *mudharabah* funding, which are written in the form of a contract, must emphasize the idea of fairness, and it is not permissible to disregard sharia signals. The issue is that not all *shohibul mal* customers/capital managers/capital owners in *mudharabah* financing comprehend the provisions in the preparation of the contents of the *mudharabah* financing contract, which should be founded on sharia principles and differ from those in conventional banking. As a result, the author believes that the provisions of the mudharabah finance contract require renovation (Yustiady, 2003).

Results and Discussion

The Drawbacks of Mudharabah Financing Contracts in Sharia Banking.

The *mudharib* and the *shahibul mal* have a trustworthy connection in the *mudharabah* contract, which means the *mudharib* is someone that the *shahibul* mal trusts with his possessions. Because the LKS refers to the fatwa of the National Sharia Council (DSN) No. 7 DSN-MUI/IV/2000, which states that "in principle, there is no guarantee in *mudharabah* financing, but the bank can ask for guarantees from the *mudharib* or a third party to ensure that the *mudharib* does not make deviations," the *mudharabah* application at the National Sharia Financial Institution (LKS) requires the customer (*mudharib*) to include Furthermore, guarantees are deemed important in the *mudharabah* contract in order to minimize moral hazard (business actors), namely the possibility of *mudharabah* fund misuse or irregularities, as well as neglect in the management of *mudharabah* funds. Furthermore, the guarantee requirements serve as a binding agreement between the bank and the customer in order to safeguard the investor's cash (trust) (Satrio, 1998).

The *mudharabah* contract is contained in the *musammah* contract, which is a contract whose name has been mentioned by *syara'* along with its legal provisions and basic principles, and it applies the profit-sharing principle between the *mudharib* and *shahibul maal*, depending on the kind (Asyhadie, 2017). This contract was in existence during the time of the Prophet Muhammad, and it was even carried out by people before to the arrival of Islam (Anshori, 2006b). The *mudharabah* contract is permissible since it includes features of mutual assistance and complementarity between humans. In practice, the contract in Islamic financial institutions is oriented as a goal, such as a grant or waqf of a person to another person/party. The contract is intended for good, not for profit, as is the case with borrowing

or borrowing contracts. The goal is solely to help (kindness). If it is followed by seeking profit by increasing the amount of the payment, then the excess or addition becomes a prohibited addition. Maslahat according to Abdul Wahab Khalaf in Any Nugroho is a source of Islamic law and a form of ijtihad method. The existence of *maslahah mursalah* is related to the purpose of sharia, namely that the law aims to realize *maslahat* (goodness) and avoid *mafsadat* (damage).

The Principle of Balance in the Establishment and Implementation of Mudharabah Financing Contracts in Sharia Banking

One of the functions of the contract is to provide legal certainty for the parties, as well as regulate the rights and obligations of the parties as well as the resolution of disputes that arise between the two parties. The agreement is a form of offer and acceptance (*ijab qabul*) that forms the contract. *Ijab* is a statement of offer, which is a statement of will that first appears from a party to give birth to a legal action, the statement of will offers the creation of legal action which if the offer is accepted by the other party a contract will occur. While *qabul* is acceptance, namely a statement of the will that approves the consent, so that the contract is created (Hermanto, 2013).

By creating a contract in consent and *qabul*, an agreement will be reached regarding the contents of the contract. The *mudharib* will accept the standard contract willingly and the *mudarib* can also refuse the contract. If the *mudharib* accepts the contract, then there has been conformity between the parties (Al Jaziri, 1994). This will determine the implementation of the contents of the contract. In the results of the study, it can be seen that there is a conformity of the will and willingness of the *mudharib* in accepting the standard contract, making this *mudharabah* financing agreement no different from the agreement that occurs in conventional banks, especially in the *mudharabah* financing contract which aims to provide benefits for both parties so that it is based on the principle of balance. which is the embodiment of the freedom to contract to carry out the cooperation contract, it becomes unbalanced, especially in the case that the profit-sharing clause has been determined in advance by the *Shahibul Mal* (Antonio, 2001).

Basically, a contract must fulfill the conditions for the validity of the contract as stated in Article 1320 of the Civil Code. The contract is made in writing so that it has legal force for the parties. As stated in Article 1338 of the Civil Code that all agreements made legally apply as law for those who make them. This means that in the formation of the contract by taking into account the type of contract as well as the pillars and conditions, namely the skills of the parties, agreement, a certain matter and a lawful cause, also taking into account the principles of the contract such as the principle of freedom of contract and good faith.

The principle of balance is the implementation of good faith and the principle of justice. Balance in the law requires a regulatory system that can protect parties who have an unfavorable position. The form of balance in an agreement must be understood that the parties must have a position and equality in rights and obligations in determining the content, intent and purpose of the contract/contract. So that the contents of the contract are not only dominantly made by one party, as conveyed by Dian Milasari, a BNI Syariah iB

Hasanah Purwokerto employee. or to the will of the parties but also with due regard to good faith and honesty.

Benefit theory states that justice is characterized by good relations between one another, by not prioritizing oneself but also other parties and the existence of similarities. This is what distinguishes it from sharia principles which share profits and losses together. Islamic banks in carrying out their business activities, both collecting funds and distributing funds, must comply with sharia principles, namely the principles of justice and balance (*'adl wa tawazun*), benefit, natural universalism) and do not contain *gharar, maysir, usury*, injustice and unlawful objects. The law was created to benefit humans. The results of the study indicate that the *mudharabah* financing contract does not meet the requirements that must be met in *mudharabah* financing, among others, the bank is required to conduct an analysis of the application for financing on the basis of the *mudharabah* contract from the customer which includes personal aspects in the form of character analysis and business aspects between others include analysis of business capacity (capacity), finance (Capital), and business prospects (Condition).

Weaknesses in making the contents of the contract can be seen that there is still an element of *gharar* or "uncertainty". In the content of the *mudharabah* financing contract, there are still unfair clauses, especially in the determination of profit sharing, even though it has been previously determined by the bank. In the case of uncertainty in the object of this tax, it results in harm to one of the parties in the *muamalah*. *Maysir* or *qimar* literally means gambling (speculation). Technically, *maysir* occurs in the formation of the contents of the contract in determining the loss, but it does not yet raise the responsibility of the *shahibul mal*/the owner of capital, this makes the contents of the contract unbalanced between the parties.

Riba in the contract still shows a weakness, namely the gap between the parties because, especially in determining the disproportionate profit sharing, it causes losses for *mudharib* when in managing business activities, profits decrease. The formation of the contract still shows weaknesses with the presence of unjust elements in terms of determining financing and use, period and installments, provisions for profit sharing ratios, determination of losses, *mudharib* obligations, determination of guarantees and determination of disputes so that it creates injustice in the content of the *mudharabah* financing contract. Not apart from the creation of the theory of benefit in the preparation of the financing contract, it also applies the theory of the legal system in Indonesia in seeing the weaknesses contained in the *mudharabah* financing contract. The author in terms of middle theory uses the legal system theory of Lawrence M. Friedman. Friedman argues that the legal system consists of components of structure, substance, and culture (Anshori, 2006a).

a. Structural components. From the results of the study, it can be seen that in the preparation of the contents of the mudharabah financing contract there is still a standard standard that has been previously determined by the bank, resulting in the absence of balance, equality and justice, not even different from the principles applied in conventional banks, with the application of standard standards. This causes a lot of excessive losses for the manager. From the results of interviews with employee informants at Bank Muamalat Purbalingga sub-branches, it was said that

the bank did not implement mudharabah financing because if it applied it had to be escorted by the Sharia Supervisory Board, there was a product concept making up in practice, the bank considered it too complicated and detailed, besides that it was also required to have the existence of honesty and trust between shaohibul mal and mudharib, this shows a weakness in the implementation of mudharabah financing because it does not involve the Sharia Supervisory Board which has the duties and responsibilities of providing advice and advice to the Board of Directors as well as supervising the Bank's activities in accordance with sharia principles, assessing and ensuring compliance with sharia principles. sharia on operational guidelines and products issued by banks, overseeing the process of developing new bank products.

b. Substance component. From the results of the study, it can be seen that there are many weaknesses in the content of the mudharabah financing contract that must be corrected, including those weaknesses seen in the article that determines the financing and use, the article that determines the period and installments, the article on administrative costs, the article that determines the ratio results, articles on determining losses, articles determining guarantees and articles determining in the event of a dispute. The purpose of improving the weaknesses of the contents of the contract is so that there are tangible results in the form of inconcreto, or individual legal norms that develop in society, laws that live in society (living law), as well as inabstracto law, or general legal norms contained in the law (law in books).
c. Cultural components Legal culture can be seen in the results of the study that on average the parties do not understand sharia principles, so that Sharia principles which should be based on the values of justice, expediency, balance, and universality (*rahmatan lil 'alamin*) have not been fulfilled in the preparation of the contents of the contract. *mudharabah* financing. In the *mudharabah* financing contract, the parties who carry out activities are predominantly Muslim, in this case there is no prohibition on non-Islamic religions to also carry out *muamalah* activities at Islamic banks, but the emphasis in Islamic banking is the use of sharia principles with the aim of realizing the principles of justice, benefit. , balance and *rahmatan lil alamin*.

The sharia agreement theory as a middle theory adheres to the principles or principles in a contract agreement in order to affect the validity of the contract. Because this contract is what determines whether the contract is valid or not. And this means that if a contract does not meet the existing principles, then the contract is not considered valid. So that in the preparation of the contents of the *mudharabah* financing contract, it is truly based on balance and equity, it must meet the following principles (Ali, 2007). *Al-Hurriyah* (Freedom), In the results of the study there is still a gap between the owners of capital and managers. The contract made is already a standard contract made by the bank and the customer agrees on what is contained in the contract. Thus, there will be many losses in the future when there is a decrease in the management activities entrusted to the manager/*mudharib*. Sharia principles are finally neglected in practice as if they are no different from conventional principles.

Al-Musawah (Equality or Equality), In practice the position is not the same because the bank has determined the contract that should be made and agreed upon by both parties, what is felt is in the provisions for the distribution of the profit-sharing ratio, the percentage is much higher. on the bank and the customer, the percentage is much smaller with a much higher level of risk.

Al-Ada (Justice). From the results of the study, with the existence of a standardized contract and the determination of the clauses already listed in the financing contract, there is no value of justice and even sharia principles are lost. *Al-Rida* (Willingness). The legal basis for the principle of willingness in making an agreement can be read in the Qur'an Surah An-Nisa verse 29, which means that with the word consensual, it indicates that the making of a contract in the field of commerce must always be based on the principle of willingness or agreement of the parties freely. . The principle of voluntary or in other words consensual consent has not been seen with the existence of a contract made with a clause that causes losses.

Ash-Shidq (Truth and Honesty). That in Islam everyone is prohibited from lying and deceiving, because the existence of fraud or lies greatly affects the validity of the agreement/contract. The Sub-Branch *Muamalat* in Purbalingga did not even apply *mudharabah* financing on the grounds that it was too complicated and detailed and difficult because in this *mudharabah* financing an element of honesty was needed. Based on the results of interviews with informants, Arif, an employee of Bank Muamalat, the sub-treasury branch in Purbalingga, *mudharabah* financing is not implemented because if you apply this financing, the Sharia Supervisory Board must be escorted from the initial concept of financing products to practice. *Al-kitabah* (Written). That every agreement should be made in writing, it is more related for the sake of proof if there is a dispute in the future. In the Qur'an, Surah Al-Baqaroh verses 282-283 indicates that the contract made is truly in the good of all parties. So that in making a contract, there is a need for responsibility.

Conclusion

Weaknesses in the content of the current mudharabah financing contract indicate an imbalance between the shahibul mal and mudharib parties, the profit and loss sharing elements also have not implemented sharia principles and there are still elements of pillars and contract requirements that have not been fulfilled, the element of help is also unclear. In order for a contract to be valid, it must meet the pillars and conditions as well as the provisions contained in the contents of the contract. If the pillars and conditions are not met, then the contract becomes invalid, in the sense that the contract does not meet the requirements of the formation of the contract, the validity of the contract and has no legal consequences for both parties and is not binding so that the contract can be canceled. The contract must meet the conditions for the validity of the contract as stated in Article 1320 of the Civil Code. The contract is made in writing so that it has legal force for the parties. In addition to fulfilling the elements and conditions, the provisions of the articles contained in the contract must be in a contract law system that provides a balance for the contractual relationship of the parties. Placing the rights and obligations of the parties in proportion will provide a fair contract. As stated in Article 1338 of the Civil Code that all agreements made

legally apply as law for those who make them. This means that in the formation of the contract by taking into account the type of contract and its pillars and conditions, namely the skills of the parties, agreement, a certain matter and lawful causes, also taking into account the principles of the contract such as the principle of freedom of contract and good faith The principle of balance is the implementation of good faith and the principle of justice. Balance in the law requires a regulatory system that can protect parties who have an unfavorable position. The form of balance in an agreement must be understood that the parties must have a position and equality in rights and obligations in determining the content, intent and purpose of the contract/contract. So that the content of the contract is not only dominantly made by one party. The contents of the contract are based on the principles of rationality and propriety and affect the implementation of the contract, so that the meaning and interpretation of the contract is not only based on what was clearly agreed upon or on the will of the parties but also with regard to good faith and honesty. Benefit theory, legal system theory covering structure, substance and culture as well as sharia agreement theory adheres to principles or principles in a contract agreement in order to affect the validity of the contract. Because this contract is what determines whether the contract is valid or not. And this means that if a contract does not meet the existing principles, then the contract is not considered valid. So that in the preparation of the contents of the mudharabah financing contract, it is truly based on balance and equality, it must fulfill the principles of the agreement, namely Al-Hurriyah (freedom), Al-Musawah (equality or equality), Al-Ada (justice), Al-Ridha (willingness), Ash-Shidq (truth and honesty), and Al-Kitabah (written)

References

Al Jaziri, A. A.-R. (1994). *Tanpa Tahun, Al Fiqh Ala Al-Muzhabib Al-Arba'ah, Mesir : At-Tijarah Al-Kubra*.

Ali, Z. (2007). *Hukum Perbankan Syariah*. Sinar Grafika.

Anis, I. (2008). *Legislasi Dalam Perspektif Demokrasi : Analisa Interaksi Politik dan Hukum dalam Proses Pembentukan Peraturan Daerah di Jawa Timur*. Universitaas Diponogoro.

Anshori, A. G. (2006a). *Perbankan Syariah di Indonesia*. Gadjah Mada University Press.

Anshori, A. G. (2006b). *Pokok-pokok Hukum Perjanjian Islam di Indonesia*. Citra Media.

Antonio. (2001). *Produk-Produk Syariah dan Kemungkinan Penerapannya Dalam Sistem Perbankan Islam*. ICMI.

Anwar, S. (2007). *Hukum Perjanjian Syariah (Studi Tentang Teori Akad dalam Fiqh Muamalah)*. Rajawali Pers.

Asyhadie, Z. (2017). *Hukum Keperdataan (Dalam Perspektif Hukum Nasional, KUH Perdata (BW), Hukum Islam dan Hukum Adat)*. Raja Grafindo Persada.

Badrulzaman, M. D. (n.d.). Kompilasi Hukum Perikatan. In *2001*. Citra Aditya Bakti.

Dewi, G., Wirdyaningsih, & Barlinti, Y. S. (2005). *Hukum Perikatan Islam Di Indonesia*. Kencana Prenada Media Group.

Hermanto, B. (2013). *Hukum Perbankan Syariah*. Kaukaba Dipantara.

Mardani. (2010). *Hukum Ekonomi Syariah di Indonesia*. Refika Aditama.

Mardani. (2012). *Fiqh Ekonomi Syariah*. Kencana.

Nurhasanah, N. (2015). *Mudharabah dalam Teori dan Praktik*. Refika Aditama.

Satrio, J. (1998). *Hukum Jaminan, Hak Jaminan Kebendaan, Hak Tanggungan*. Alumni.

Yustiady, D. (2003). *Penjelasan Perbankan Syariah Secara Umum*.