

The Principle of Freedom of Contract in the Production of Musyarakah & Ijarah Deeds Made by the Notary at Bank Muamalat Kendari Branch

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Abstract. *The profit sharing portion is still regulated by Bank Muamalat Kendari Branch, even though in the provisions there is a profit and loss sharing or revenue sharing method is by mutual agreement. This is certainly contrary to the sharia principle, namely gharar which is uncertainty or not in accordance with the initial agreement. This results in carrying out business activities that are contrary to sharia principles being an act that is prohibited for Sharia Commercial Banks and Sharia Financing Banks. The formulation of the problem in this study is how is the application of the principle of freedom of contract in making musyarakah and ijarah at Bank Muamalat Kendari Branch? and how is the evidentiary power of musyarakah and ijarah deeds made before a Notary? The purpose of this study is to determine the application of the principle of freedom of contract in the profit sharing system in musyarakah and ijarah financing contracts at Bank Muamalat Kendari Branch and to determine and analyze the evidentiary power of musyarakah and ijarah deeds made before a Notary.*

Keywords: *Ijarah; Musyarakah; Principles.*

1. Introduction

So far, in carrying out daily activities or in doing business among humans, there are not a few that contain elements of usury which according to Islamic teachings are prohibited (haram), so that the best way is sought in carrying out daily activities or in doing business. The Muslim community in Indonesia has long hoped for a financial institution that refers to sharia principles. Based on the aspirations of the Muslim community, it was then enacted in Law Number 21 of 2008 concerning Sharia Banking (hereinafter abbreviated as the Sharia Banking Law).¹

¹Muhammad Alfian Thoriq, Reka Dewantara, Diah Aju Isnwardhani, "Evidence of Sharia Financing Deeds in the Form of Notarial Deeds Based on Sharia Principles", Journal of Law and Notary, Volume 5 Number 3, August, 2021.

The regulation of the Sharia Banking Law which is based on Islamic law is an effort to create order and peace for Indonesian society in living their lives or activities. The laws that are enforced must have the values of justice, benefit, balance and universality (rahmatan lil 'alamin) in the life of society. These values are applied in the regulation of Sharia Banking. The principles of Sharia Banking are part of Islamic teachings related to economics. One of the principles in Islamic economics is the prohibition of usury in its various forms, and uses a system including the principle of profit sharing. With the principle of profit sharing, Sharia Banks can create a healthy and fair investment climate because all parties can share both the profits and potential risks that arise so that it will create a balanced position between the bank and its customers. In the long term, this will encourage national economic equality because the profits are not only enjoyed by capital owners, but also by capital managers.²

In Islamic economics, especially Islamic banking, notaries make deeds in the form of contracts. The etymological definition of contract, among others, means a bond between two things, both real bonds and meaningful bonds, from one aspect or two aspects. Contract also means connection (al-uqudah) and promise (al-ahd).³ According to Ibn Abidin, a contract is an obligation that is determined by ijab and qabul based on sharia provisions that have an impact on its object.⁴ Meanwhile, the definition of a contract according to Law Number 21 of 2008 concerning Islamic Banking, Article 1 number (13) is that a contract is a written agreement between an Islamic bank or UUS (Islamic Business Unit) and a party that mutually accommodates the rights and obligations of each party in accordance with Islamic principles.

An agreement can be said to be realized if these elements have been fulfilled. And in making a contract there are conditions that must be met, namely the occurrence of the contract, the validity of the contract, the implementation of the contract, legal certainty, and the purpose of making the contract. The word of God regarding the contract:

يَا أَيُّهَا الَّذِينَ ءَامَنُوا أَوْفُوا بِالْعُقُودِ ۖ أُحِلَّتْ لَكُمْ بَهِيمَةُ ٱلْأَنْعَامِ ۖ إِلَّا مَا يُنْتَلَىٰ عَلَيْكُمْ غَيْرَ مُحْلَى ٱلصَّيِّدِ وَأَنْتُمْ حُرْمٌ ۗ

إِنَّ ٱللَّهَ يُحْكُمُ مَا يُرِيدُ

It means:

"O you who believe, fulfill these covenants, livestock is permitted to you, except for what will be recited to you (which is like that) hunting is not permitted while you are performing the Hajj. Indeed,

²Ibid.

³Rachmat Syafe'i, 2001, Fiqh Muamalah, Pustaka Setia, Bandung, p. 43.

⁴Mardani. 2015. Legal Aspects of Islamic Financial Institutions in Indonesia. PT Kharisma Putra Utama, Jakarta, p. 144.

Allah establishes laws according to what He wishes." (Al- Mai'dah [5] : 1)

Regarding contracts in Islamic banking, one of them is the existence of musyarakah and ijarah contracts. According to Article 19 paragraph 1 letter c of Law Number 21 of 2008 concerning Islamic Banking, it explains that what is meant by "musyarakah contract" is a cooperation contract between two or more parties for a certain business where each party provides a portion of funds in the provision that the profit will be divided according to the agreement, while the loss is borne according to the portion of each fund. While Ijarah is a rental procedure in Islam. Terminologically, Ijarah is a rental fee given to someone who has done a job in return for his work.⁵The purpose of this rental is to introduce Islamic values and ethics in terms of renting goods. In general, Ijārah means the transfer of benefits from an item. Looking at the transaction pattern, Ijārah resembles buying and selling, except that in buying and selling the object of the transaction is goods while Ijārah is services.

Discussing financing agreements with the sharia banking system cannot be separated from the principle of freedom of contract which is an important principle of contract law. According to Sutan Remy Sjahdeini, even though the principle of freedom of contract recognized by the Civil Code is essentially limited by the Civil Code itself, its working capacity is still very loose, giving rise to inequalities and injustice if the parties making an agreement are not equally strong or do not have a bargaining position. the same one.⁶According to KRMT Tirtodiningrat, an agreement is a legal act based on an agreement between two or more people to give rise to legal consequences that can be enforced by law.⁷

The principle of freedom of contract in contract law states that every individual is free to make a contract/agreement according to his/her intentions and desires as long as it does not conflict with the valid conditions of an agreement and does not conflict with applicable laws and regulations. The provisions of contract law regarding the valid conditions of an agreement are regulated in Article 1320 of the Civil Code, which states that: For an agreement to be valid, four conditions are required, namely:

- 1) There is an agreement from those who bind themselves;
- 2) Having the capacity to make a contract;
- 3) There is something certain, and
- 4) There is a legal and halal reason.

⁵Musthafa Dib. al Bugha. 2009. Smart Book of Sharia Transactions, Establishing Business Cooperation and Resolving Disputes Based on Islamic Guidelines, Hikmah, Jakarta, p. 145.

⁶Sutan Remy Sjahdeini, 2009, Freedom of Contract and Balanced Protection for Parties in Bank Credit Agreements in Indonesia, Cet. I; PT Pustaka Utama Grafiti, Jakarta, p. 55.

⁷Agus Yudha Hernoko, 2008, Contract Law, Principle of Proportionality in Commercial Contracts, Laksbang Mediatama, Yogyakarta, p. 43.

Based on the principle of freedom of contract, the parties making a contract have the freedom to regulate and determine the contents of a contractual agreement that they will make as long as it does not conflict with the terms of the validity of the agreement as intended in Article 1320 of the Civil Code. Furthermore, in Article 1338, paragraph (1) it is stated that: All agreements made legally apply as law for those who make them.

At the beginning of the development of Islamic banking, it offered interest-free banking products, namely mudharabah and musyarakah, two products that are assumed to be based on a profit-sharing system, or better known as profit and loss sharing. With these two products, banks do not operate with bank interest, but share the results with customers.

In relation to the financing provided by Islamic banks to their customers, there is a contractual relationship carried out with a financing agreement whose agreement can be made privately or made authentically by a Notary. From here the importance of the role of Notaries in public services for the community, state and nation in general. Specifically, authentic evidence is very much needed in the economic sector, including trade, banking, companies and so on.⁸Based on the moral and ethical values of Notaries, the development of the Notary position is a service to the community (clients) independently and impartially in the field of notarial affairs, the development of which is experienced as a life calling based on the spirit of devotion to fellow human beings for the public interest and rooted in respect for human dignity in general and the dignity of Notaries in particular.⁹

A notary is a scribe who is skilled at writing based on the law. If there is an inability to comply with the law, he is responsible for all losses that may be suffered by a person.¹⁰The main task of a Notary is to make writings with the function of having legal evidence for and at the request of interested parties. According to Asser-Anema, writing (*geschrift*), is a carrier of punctuation marks that contain meaning and benefits to describe a thought.¹¹

Contract financing carried out by banks with their customers is made in a notarial manner, so that it will get the power of a financing agreement as very strong and definite formal evidence, this is what is interesting to do a study and analysis of the above, because there are still many banks that adhere to sharia principles in making their financing agreements, the agreements are still made underhand and whether sharia banks have implemented sharia principles in implementing financing to the community.

Based on the description above, it can be understood that it is necessary to collect data to determine the extent to which the implementation of financing

⁸Sugeng Budiman and Widhi Handoko, 2020, *Legal Policy Towards Notaries as Witnesses and Evidence of Authentic Deeds Based on Justice Values*, Unissula Press, Semarang, p. 130.

⁹Herlien Budiono, 2007, *Notaries and their Code of Ethics*, Upgrading and Refreshing Course National Indonesian Notary Association, Medan, p. 3.

¹⁰Muhammad Adam, 1985, *Origins and History of Notarial Deeds*, Sinar Baru, Bandung, p. 17.

¹¹Tan Thong Kie, 1987, *All About Notary Practice*, Alumni, Bandung, p. 9.

agreements with the Islamic banking system is in accordance with the actual Islamic principles or the same as the principles of other conventional banks, where the actual implementation in Islamic banking is the principle of profit sharing which is contrary to Islamic principles as is the case at Bank Muamalat, Kendari Branch. Furthermore, it is made in the form of a Thesis with the title: "APPLICATION OF THE PRINCIPLE OF FREEDOM OF CONTRACT IN THE MAKING OF MUSYARAKAH AND IJARAH DEEDS MADE BY A NOTARY AT BANK MUAMALAT, KENDARI BRANCH".

2. Research Methods

The research used in this study is empirical legal research. Empirical legal research is research that conceptualizes law as a social phenomenon that is influenced by other social variables and is also a determinant that influences individual or group behavior towards more desirable behavior.¹²

The approach used in this study is an interdisciplinary approach. An interdisciplinary approach is an approach to a problem by using a review of various relevant related scientific perspectives in an integrated manner. This approach aims to examine an issue/topic where communication, collaboration and integration occur starting from definition, objectives, process, data collection to analysis and conclusions.¹³ Data sources come from primary data, namely data obtained or collected by researchers directly from data sources and secondary data, namely data sourced from library materials.¹⁴ Data collection methods include interviews, Document Studies or Library Materials. The data is then analyzed interpretively using theories or positive laws that have been outlined and then inductively conclusions are drawn to answer the existing problems.¹⁵

3. Results And Discussion

3.1. Application of the Principle of Freedom of Contract in Musyarakah and Ijarah Financing Agreements at Bank Muamalat Kendari Branch.

The application of the principle of freedom of contract in the profit sharing system in the musyarakah and ijarah financing agreements at Bank Muamalat Kendari Branch does not use a profit sharing system, but uses a system called syirkah or division of portions borne by both parties. The portion of the syirkah itself has been determined by Bank Muamalat, but customers can still request a reduction in the syirkah and if approved by the head office, then that portion will be used in determining the installments of the musyarakah and ijarah financing agreements. The determination of the profit sharing portion is explained in detail by the bank from the entire portion of the syirkah, how much is for the customer and how much is for the bank, as well as all the completeness of the customer's

¹²Irwansyah, 2021, Legal Research; Choice of Methods and Writing of Articles, Mirra Buana Medika, Yogyakarta, p. 176.

¹³Ibid., pp. 208-209.

¹⁴Zainudin Ali, 2010, Legal Research Methods, Sinar Grafika, Jakarta, p. 23.

¹⁵Soerjono Soekanto, 1986, Introduction to Legal Research, University of Indonesia Press, Jakarta, p. 112.

documents, the bank also helps direct what and how so that customers do not feel so difficult.

Basically, the principle of profit sharing is widely implemented depending on the role of the customer in managing the musyarakah business project, capital contributions are given by both parties, namely the customer and the bank. The portion of profit given to the customer is based on considerations of the musyarakah business management depending on the quality of his work and the level of expertise he has. The higher the quality of work and the level of expertise possessed by the customer, the higher the percentage of profit that will be received by the customer. If at the end of the musyarakah contract there is a loss, which is not caused by negligence, mismanagement or violation of the terms of the contract by the customer, then the loss is divided between the two parties according to the percentage of capital included in the contract. On the other hand, if the loss is due to negligence, mismanagement, or violation of the terms of the contract by the customer, the legal agreement provides the widest possible freedom for the community to enter into an agreement containing anything as long as it does not violate public order and morality. This means that the parties to the agreement are allowed to make their own provisions that deviate from the articles of the law of the agreement and they are allowed to regulate their own interests in the agreement they enter into. This is in accordance with the principle of freedom of contract which is concluded from article 1338 of the Civil Code which states "all agreements made legally are valid as law for those who make them". From the word "all" it can be interpreted that every legal subject can make an agreement with any content, for this reason there is freedom for legal subjects to determine the form of agreement or make an agreement. Freedom of contract has been recognized and embraced as a principle in the world at large. So that the principle of freedom of contract becomes a universal legal principle.

In addition, the principle of freedom of contract as a manifestation of the recognition of human rights. The word freedom itself has a dynamic development that runs continuously in the long history of mankind. Freedom plus the prefix ke and the suffix an contains the meaning of a state in which there are no barriers or limitations, coercion or obstacles, burdens or obligations. According to Frans Magnis-Suseno, freedom is divided into two types, namely existential freedom and social freedom. What is meant by the two types. Existential freedom is freedom in the sense of human ability to determine their own actions. Meanwhile, social freedom is freedom received from others. For that, these two freedoms are a complete unity of the freedom that humans have. The two freedoms cannot negate each other.

The mechanism of freedom of contract in making a contract (akad) to carry out financing in Islamic financial institutions or Islamic banking is still not very clear. Usually, freedom of contract tends to be for customers with high bargaining position, while for customers with low bargaining position, financial institutions

tend to use standard contracts that have been made in advance by the financial institution (standard contracts).¹⁶

The musyarakah and ijarah contracts at Bank Muamalat Kendari Branch are in accordance where the musyarakah contract contains ijab qabul, the subject of the contract is the bank and the customer, and the object of the contract is the capital mixed between the customer's capital plus the capital from the bank to conduct business, which is recorded in the contract to avoid disputes. If fraud occurs in the implementation of musyarakah or there is an element of ghara, then the musyarakah that is carried out is void. The musyarakah contract is carried out based on clear terms and conditions. Among them are regarding the portion of the bank's capital along with the expected business results in the contract given by the customer to the bank according to the specified period. Or a number of requirements that indicate a prohibition for customers to violate these requirements in managing the musyarakah business. The customer provides musyarakah goods under joint supervision (bank and customer) and no goods may be sold until the selling price is stated in the musyarakah provisions. The customer manages the musyarakah contract and sells goods based on the best considerations. Goods sold are based on the price agreement between the bank and the customer as determined in the contract section.¹⁷

According to the author's analysis, the application of the principle of freedom of contract in musyarakah and ijarah contracts at Bank Muamalat Kendari Branch is basically freedom of contract has been recognized and embraced as a principle in the world in general. So that the principle of freedom of contract becomes a universal legal principle. In addition, the principle of freedom of contract is an embodiment of the recognition of human rights. The word freedom itself has a dynamic development that runs continuously throughout human history. Freedom plus the prefix to and the suffix an implies a situation where there are no barriers or limitations, coercion or obstacles, burdens or obligations.¹⁸

Freedom of contractor commonly referred to as the principle of freedom of contract means that everyone can freely make contracts about anything, anytime and anywhere. However, free there does not mean completely free, the freedom in question is freedom that is still limited by law. This means that everyone who makes a contract must still meet the requirements for the validity of the agreement and not violate the law, morality and public order. Everyone is free to make any agreement other than those regulated by law, so it is possible for the parties to make agreements that are not regulated by law.

The mechanism of freedom of contract in making a contract (akad) to carry out financing in Islamic financial institutions or Islamic banking is still not very clear. Usually, freedom of contract tends to be for customers with high bargaining position, while for customers with low bargaining position, financial institutions

¹⁶Setiawan, R, 1979, Principles of Engagement Law, Bina Cipta, Bandung, p. 10-11.

¹⁷Ascarya, 2007, Islamic Banking Contracts and Products, PT Grafindo, Jakarta, p. 110.

¹⁸Kamil, A. 2012, Philosophy of Judicial Freedom, Kencana Prenada Media, Jakarta, pp. 147-149.

tend to use standard contracts that have been made in advance by the financial institution (standard contracts). According to positive law in force in Indonesia, standard contracts or standard contracts containing the principle of freedom of contract are permitted as long as they do not violate mandatory laws, public order and morality and the fulfillment of the conditions required for the validity of an agreement in accordance with Article 1320 of the Civil Code with each other. Both are two corners of human freedom.

3.2. The Power of Evidence of Musyarakah and Ijarah Deeds Made Before a Notary.

Authentic deeds referred to as the authority of a Notary made before or made by a Notary are useful for the public who need deeds such as deeds of establishment of a Limited Liability Company, wills, powers of attorney, and so on. The presence of a Notary as a public official is the answer to the public's need for legal certainty for every obligation they carry out, especially obligations related to trade and daily life. Written agreements made by or before a Notary are called deeds. According to Article 1 number 7 of the UUJNP, it is stated that: "A Notarial Deed is an authentic deed made by or before a Notary according to the form and procedures stipulated in this law."

The power inherent in an authentic deed is perfect (volledig bewijskracht) and Binding (bindende bewijskracht), which means that if the evidence of the Authentic Deed submitted meets the formal and material requirements and the opposing evidence presented by the defendant does not reduce its existence, it is simultaneously attached to the power of perfect and binding proof (volledig en bindende bewijskracht), thus the truth of the contents and statements contained therein become perfect and binding to the parties regarding what is stated in the deed. Perfect and binding to the judge so that the judge must make it a perfect and sufficient factual basis for making a decision on the settlement of the disputed case.¹⁹

Thus, the contents of the notarial deed have certainty as valid evidence for/between the parties and their recipients. If you want to prove the material aspect of the deed, then reverse evidence must be carried out to deny the material aspect of the notarial deed. In this study, legal certainty arises for the parties who make musyarakah and ijarah deeds before a Notary for the existence of musyarakah and ijarah financing at Bank Muamalat Kendari Branch.

The existence of legal certainty, the author analyzes using Gustav Radbruch's theory of legal certainty. Certainty is a characteristic that cannot be separated from law, especially for written legal norms. Law without certainty value will lose its meaning because it can no longer be used as a guideline for behavior for everyone. Certainty itself is called one of the objectives of law. According to Gustav Radbruch, it can be said as a basic legal value, namely Legal Certainty.

¹⁹Christin Sasauw, "Legal Review of the Binding Power of a Notarial Deed", Jurnal Lex Privatum, Vol. III/No. 1, 2015, p. 100.

The principle of legal certainty in this article tries to understand how it correlates with the reasoning of Legal Positivism. This article is expected to be able to explain the relationship between the principle of legal certainty and the reasoning of legal positivism.

Gustav Radbruch also stated that there are four things that form the basis of the meaning of legal certainty, including:²⁰

- a. Positive law, namely statutes;
- b. Law is based on established facts or laws;
- c. Facts must be formulated clearly, so as to avoid misunderstandings and be easy to implement;
- d. Positive law cannot be easily changed.

Basically, the granting of evidentiary power to the deeds they make legally has three evidentiary powers, namely:

- a. The power of external/outward proof;
- b. Formal evidentiary force;
- c. The power of material evidence.

The author concludes that the notary's authority in making bank musyarakah and ijarah deeds is the same as the authority in making deeds in general. Therefore, the legal force of evidence of musyarakah and ijarah deeds made before a notary is the same as all deeds made before a notary, is legally valid for the actors in the agreement and can be valid and strong evidence in court.

An authentic deed made by or before a Notary can be used as evidence in a legal dispute that is used as evidence to recall events that have occurred, so that it can be used for evidentiary purposes. Article 1866 of the Civil Code states that written evidence is one of the written evidence. Likewise, Article 1867 of the Civil Code stipulates that: "Written evidence is carried out with authentic writings or with private writings."

Therefore, the role of a notary in making a deed of financing agreement in a sharia bank is that in terms of financing, it always requires an agreement containing complete clauses to ensure legal certainty in order to minimize the risk by the sharia bank. In formal legal terms, there are 2 (two) types of agreements made by sharia banks, namely: Sharia financing agreement under hand or deed under hand and Sharia financing agreement made by and before a notary (notary) or authentic deed.

4. Conclusion

The application of the principle of freedom of contract in the profit sharing system in the musyarakah and ijarah financing agreements at Bank Muamalat Kendari Branch does not use a profit sharing system, but uses a system called syirkah or division of portions borne by both parties. The portion of the syirkah

²⁰Gustav Radbruch, Op.cit., p. 36

itself has been determined by Bank Muamalat, but customers can still request a reduction in the syirkah and if approved by the head office, then that portion will be used in determining the installments of the musyarakah and ijarah financing agreements. The evidentiary power of the musyarakah and ijarah deeds made before a notary is the same as all deeds made before a notary, are legally valid for the parties to the agreement and can be valid and strong evidence in court. If at any time there is a dispute or breach of contract between the parties to the agreement, the notary will assist the parties who feel aggrieved in accordance with the laws in force in Indonesia and is ready to provide evidence of the agreement according to the court's request.

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