

Legal Consequences of *Musyarakah* Agreements Made by Notaries Who Do Not Have A Shariah Certificate

Annisa Widyasti¹⁾ & Jawade Hafidz²⁾

¹⁾ Faculty of Law, Universitas Islam Sultan Agung, Semarang, Indonesia, E-mail: annisawidyasti1900@gmail.com

²⁾ Faculty of Law, Universitas Islam Sultan Agung, Semarang, Indonesia, E-mail: jawade@unissula.ac.id

Abstract. *The Musyarakah agreement made by a notary who does not yet have a sharia certificate is a question for the purpose of this study is to analyze: 1) The role of a notary in the process of making a Musyarakah agreement deed. 2) Legal consequences of Musyarakah agreements made by a notary who does not yet have a sharia certificate. This type of research includes normative or doctrinal legal research. Using the legislative approach method. The data source for the research comes from secondary data. The data collection method uses literature studies. The analysis in this study is perspective. The results of the study are: 1) The role and authority of a Notary in making financing agreements in Islamic banking is as a public official who is authorized to make authentic deeds, especially in Islamic banking. In carrying out the duties of his position, a Notary has the task of making authentic deeds for the community who need them, authentic deeds made by a Notary are perfect evidence that creates legal certainty if at any time there is a dispute between the parties who make or need the deed. The existence of a Notary deed as an authentic deed cannot be separated from the Notary himself, in the provisions of Article 1868 of the Civil Code it is stated that an authentic deed is a deed whose form is determined by law and made by or before a public official who has the authority to do so at the place where the deed is made. 2) Sharia certification for notaries is only limited to the policies of each management of Islamic banks, so that ensuring sharia compliance for Notaries is still a weakness and homework for Islamic banks. Until now, the legal basis used as the basis for implementing sharia certification is OJK Regulation Number 31/POJK.05/2014 concerning Sharia Financing Business Providers. However, if it turns out that the deed of agreement is made by a notary who does not have a certificate of a sharia financial institution, the deed remains authentic as long as it meets the pillars and requirements of the agreement, as well as the provisions for making a deed in UUJN. The error does not merely lower the degree of the deed or cancel the deed.*

Keywords: Certificate; Contract; Consequences; Musyarakah.

1. Introduction

This agreement is a written agreement between a sharia bank/creditor or Sharia Business Unit (UUS) and another party that contains the rights and obligations of each party in accordance with sharia principles. Sharia agreements are part of muamalah relationships using sharia principles as a basis. Sharia principles are Islamic legal principles in banking activities based on fatwas issued by institutions that have the authority to determine fatwas in the sharia field. Therefore, in sharia agreements in Indonesia, it is mandatory to pay attention to the fatwa from the National Sharia Council-Indonesian Ulema Council (DSN-MUI).¹

Musyarakah is a cooperation agreement between two or more parties for a particular business where each party contributes funds with the agreement that the profits and risks will be borne together according to the agreement that has been determined. According to the National Sharia Council, *Musyarakah* is sharia financing based on a cooperation agreement between two or more parties for a particular business, where each party contributes funds with the provision that the profits and risks will be borne together according to the agreement.²

Musyarakah is a sharia financial product based on partnership like *mudharabah*. However, both financial products have different characteristics and requirements. Another term used in this *Musyarakah* cooperation is *Sharikah* or *Syirkah*. *Musyarakah* is translated from English as partnership. The term is not very specific because *mudharabah* is also a partnership. In Islamic institutions, it is usually translated with the term "participation financing" in order to underline one aspect of *Musyarakah*.³

The *Musyarakah* contract is permitted in Islamic law and also *Fiqh* based on the Qur'an, Hadith and also *Ijma*. Related to the verse of the Qur'an which is the legal basis for the permissibility of *Musyarakah* is the Word of Allah SWT in Surah An-Nisa verse 12. This verse talks about heirs who are partners (*Bersyirkah*) in their share of the inheritance. In other words, *Syirkah* is permitted based on the method of dividing inheritance that has been regulated in detail by Allah SWT in the Qur'an. In the law of the permissibility of *Musyarakah* is also taken from the hadith of the Prophet Muhammad SAW. That Allah said: "I (Allah) am the third person between two people who are partners (*Musyarakah*) as long as one of them does not betray his friend and when someone has betrayed, then I (Allah) will leave between them" (HR. Abu Daud, which was validated by al Hakim, from Abu Hurairah). This Hadith Qudsi clearly permits the *Musyarakah* contract, even Allah

¹Try Widiyono, 2023, Legal Aspects of Sharia Financing Contracts: Legal Basis, Deed Making Techniques, and Examples in Banking Practice, PT Rajagrafindo Persada, Depok, p. 22.

²Taufiqur Rahman, 2021, Contemporary Fiqh Muamalah Textbook, Academia Publication, Lamongan, p. 123-124.

³Ibid, p. 125.

SWT will be with the person who makes this contract. In addition, this Hadith strongly condemns the act of betrayal in the *Musyarakah* contract.⁴

This study aims to determine and analyze the legal consequences of *Musyarakah* agreements made by notaries who do not yet have a sharia certificate.

2. Research Methods

The research for this thesis uses normative or doctrinal legal research methodology, which is legal research which is basically an activity that examines the internal aspects of positive law.⁵The approach method used is the legislative approach method. The data source for the study comes from secondary data. The data collection method uses literature studies which include legal journals, legal books, and comments on court decisions. Using perspective analysis which in the nature of this analysis is intended to provide arguments for the results of the research that has been done.⁶

3. Results and Discussion

3.1. The role of a notary in the process of making a deed of *Musyarakah* agreement

An agreement can be considered legally valid if the requirements stated in Article 1320 of the Civil Code have been fulfilled. A deed can be said to be null and void if the deed cannot fulfill the objective requirements, namely the absence of a certain thing and the absence of a lawful cause of the agreement. In other words, the agreement contained in the deed is considered to have never existed and cannot bind the parties. A problem will arise if one party files an objection lawsuit by suing the other party.⁷

Notaries are authorized to make authentic deeds as long as the making of authentic deeds is not specifically for other public officials. The making of authentic deeds is required by laws and regulations in order to create certainty, order, and legal protection. Authentic deeds made by Notaries are not only required to be in accordance with laws and regulations but must also be desired by the interested parties. This is to ensure the rights and obligations of the parties

⁴Ibid. p. 125-126.

⁵Willa Wahyuni, Three Types of Methodology for Law Department Thesis Research, <https://www.hukumonline.com/berita/a/tiga-jenis-metodologi-untuk-penelitian-skripsi-jurusan-hukum-lt6458efc23524f/> accessed on November 25, 2024 at 21.44 WIB.

⁶Suyanto, 2022, Legal Research Methods Introduction to Normative, Empirical and Combined Research, Unigres Press, Gresik, p. 179.

⁷Hermin, 2024, Responsibilities and Roles of Notaries in Making Deeds of Statement of Decisions of General Meeting of Shareholders, Uwais Inspirasi Indonesia, Ponorogo Regency, p. 5.

for the sake of certainty, order and legal protection for the interested parties as well as for society as a whole.⁸

The notary himself has a very important role in the process of making a deed, especially in this Islamic banking agreement, because the notary himself has the task of making an authentic deed in accordance with the laws in force in Indonesia. In accordance with his authority as a notary in making a deed, the Notary has the right to make all deeds required by the parties who use his services as long as the authority to make the deed is not excluded from other parties.

Notaries have a very important position, role and authority in the life of the nation and state, because Notaries have the authority that has been determined in the laws and regulations. In carrying out the duties of his position, Notaries have the task of making authentic deeds for the community who need them, authentic deeds made by Notaries are perfect evidence that gives birth to legal certainty if at any time there is a dispute between the parties who make or need the deed.⁹

The provisions in Article 1868 of the Civil Code are the source of authority exercised by a Notary as a public official to make an authentic deed. Article 1868 of the Civil Code provides limitations on the elements of an authentic deed, namely one made by or before a public official, made in a form determined by law and the public official must have the authority to make the deed. So that in order to be classified as a deed, the letter must be signed as a characteristic to individualize a deed. The existence of a Notarial deed as an authentic deed cannot be separated from the Notary himself, in the provisions of Article 1868 of the Civil Code it is stated that an authentic deed is a deed whose form is determined by law and made by or before a public official who has the authority to do so in the place where the deed is made. A public official is a person who carries out part of the state's public functions, especially in the field of civil law. That in order to make an authentic deed, a person must have the position of a "public official". The authority held by a Notary can be constructed as: "The power granted by law to a Notary to make authentic deeds or other powers." The elements contained in the concept of Notary authority include: the existence of power, determined by law and the existence of an object.¹⁰

Notarial Deed refers to Article 1 of Law No. 30 of 2004 concerning the Position of Notary, namely that Notaries are appointed as public officials, so that deeds made by and/or before Notaries in their construction obtain the characteristics of authentic deeds (authentic certificates). It is concluded that deeds made by and/or before Notaries have their own authenticity, other than because the Law decides in such a way, but the deed is made by and/or before officials in general, as stated

⁸Hermin, 2024, Responsibilities and Roles of Notaries in Making Deeds of Statement of Decisions of General Meeting of Shareholders, Uwais Inspirasi Indonesia, Ponorogo Regency, p. 5.

⁹Zuhirsyan, Muhammad et al., (2022), Revitalization of Islamic Banking Towards Industry 4.0, Medan: CV Merdeka Kreasi Group. p. 95.

¹⁰*Ibid.* p. 96.

in Article 1868 of the Civil Code. The following are some factors contained in Article 1868 of the Civil Code:¹¹

1. The deed is made and is valid and valid in accordance with the provisions of the law;
2. Deed made by and/or in the presence of a public official; And
3. The deed is made in the presence of an authorized official.

Therefore, the role of a Notary in terms of funding and making a deed of financing agreement in a sharia bank is a contract/agreement that must contain an integral/perfect clause in order to ensure legal certainty, thereby reducing the consequences for the sharia bank. According to formal jurisprudence, there are two types of agreements issued by sharia banks, namely a private sharia funding agreement and a notarial sharia financing agreement made by and/or before a Notary so that an agreement has perfect legal force. Therefore, when the business sector is included in it is a sharia business sector, it often requires a Notary as an official who makes authentic deeds in accordance with the duties stipulated in Law of the Republic of Indonesia Number 2 of 2014 concerning the Position of Notary.¹²

Making authentic deeds is the authority of a Notary as a public official in order to create certainty, discipline and order, as well as legal protection as long as the making of authentic deeds is not specifically for other public officials. Other authentic certificates issued by and/or before a Notary, are not only recommended by laws and regulations, but also carry out their rights and obligations to fulfill, maintain and ensure certainty, order and legal protection, because it is desired by the interested parties, but not only stakeholders but also the entire community. In practice, in carrying out his position as a maker of authentic deeds, a Notary is obliged to carry it out in accordance with the Notary Law. Notaries are obliged to be independent, act honestly, carefully and impartially and protect the needs of parties bound by legal proceedings, in accordance with Article 16 of the Notary Law.¹³

3.2. Legal consequences of *Musyarakah* agreements made by notaries who do not have a sharia certificate

¹¹Azka Azkiya & Pujiyono, 2024, "Sharia Principles in Notarial Deeds of Contract Agreements Financing of Musyarakah Mutanaqishah Ma'al Ijarah", NOTARIUS, Vol. 17 No. 1, p. 225-226. <https://ejournal.undip.ac.id/index.php/notarius/article/view/44094> accessed on July 18, 2024 at 12.16 WIB

¹²Azka Azkiya & Pujiyono, 2024, "Sharia Principles in Notarial Deeds of Contract Agreements Financing of Musyarakah Mutanaqishah Ma'al Ijarah", NOTARIUS, Vol. 17 No. 1, p. 225-226. <https://ejournal.undip.ac.id/index.php/notarius/article/view/44094> accessed on July 18, 2024 at 12.16 WIB

¹³Ibid. p. 225-226.

In practice, financing contracts or agreements in Islamic banking institutions require a notary who understands the concept of Islamic contracts and their application in Islamic banks. Understanding business contracts from various Islamic banking products is an absolute must for Islamic banking notaries, such as *murabahah*, *mudharabah*, *Musyarakah*, *ijarah muntahiya bit tamlik (IMBT)*, *Musyarakah mutanaqishah (MMQ)*, *hawalah bil ujah*, and various other types of contracts. The requirement for notaries to have competence in preparing Islamic financing contract deeds is a recommendation from the National Sharia Council of the Indonesian Ulema Council (DSN-MUI) at the Annual Meeting in December 2014 in Jakarta. However, in practice, the results of the DSN-MUI recommendations have not been crystallized into a positive law in Indonesia that is standard and binding for Islamic banking institutions that wish to use the services of a notary of their choice. So it is possible that notaries who partner with Islamic banking institutions in making Islamic bank agreements do not understand the basic principles of Islamic economic law (*ushul fiqh* and *fiqh muamalah*) in overseeing the process of validating Islamic financing products.¹⁴

The cooperation between notaries and Islamic banks in making deeds based on Islamic principles can be implemented in various financing product contracts, including financing for trustworthy sales and purchases (*murabahah*), financing for joint ventures (*Musyarakah*), financing for providing working capital (*mudharabah*), and financing based on the principle of renting (*ijarah*). In principle, the deed of financing agreement made by a notary must contain complete clauses in order to guarantee legal certainty in order to minimize legal certainty in order to avoid risks, both from the Islamic bank and the financing customer. Therefore, notaries who are partners of Islamic banks must have several special criteria, including Islamic Financing Certification. In fact, several Islamic banks have set special criteria or requirements for notaries who are their partners, one of which is that the notary must be Muslim.¹⁵

In accordance with UUJNP, notaries are authorized to make deeds as long as the parties wish and comply with the rules of law, especially for sharia financing contracts following the provisions of sharia principles. Notaries are also required to understand sharia contracts, so that there are no errors and omissions in making sharia financing contract deeds. Financing contracts in sharia financial institutions are the same as deeds in the Civil Code (KUHP). Therefore, notaries must pay attention to the regulations related to agreements both in the KUHP and in the Compilation of Islamic Economic Law (KHES). KHES, especially in the second book on contracts, discusses in more depth the contracts applied in

¹⁴Ivan Setiawan & Wahyu Mustajab, 2022, "The Urgency of Sharia Certification for Notaries in Making Financing Contract Deeds in Sharia Banks", *Mimbar Keadilan*, Vol. 15, No. 2, p. 270. <https://core.ac.uk/download/pdf/542663136.pdf> accessed on August 1, 2024 at 11.27 WIB

¹⁵Ivan Setiawan & Wahyu Mustajab, 2022, "The Urgency of Sharia Certification for Notaries in Making Financing Agreement Deeds in Sharia Banks", *Mimbar Keadilan*, Vol. 15, No. 2, p. 275. <https://core.ac.uk/download/pdf/542663136.pdf> accessed on August 1, 2024 at 11.27 WIB.

Indonesia. In addition, notaries must be guided by the fatwa of the National Sharia Council of the Indonesian Ulema Council in making their deeds. Notaries must also continue to pay attention to the conformity of the deed with the provisions of UUUJNP, and ensure that the contents of the deed they make are free from rights prohibited by Islamic law.¹⁶

However, sharia certification training for notaries is only limited to the policies of each sharia bank management, so that ensuring sharia compliance for notaries is still a weakness and homework for sharia banks. Until now, the legal basis used as the basis for implementing sharia certification is OJK Regulation Number 31/POJK.05/2014 concerning Sharia Financing Business Organizers. In Article 44 of the POJK, it is stated that employees of sharia companies who occupy managerial positions are required to have basic sharia certification in the field of sharia financing from a recognized Certification Institution. It can be concluded that only the management of sharia banks is required to have sharia certification, not notaries. In fact, in practice, a notary who is a partner of a sharia bank has an important role in the sharia banking industry.¹⁷

Notaries who have competence based on the ability to understand sharia law, then they have the understanding, skills, abilities, capability, and skills to make sharia banking deed. Therefore, it is important for notaries who want to be involved in making sharia banking contracts to have sharia certification. This certification is to prove that the notary is not blind to sharia contracts. Notaries are accustomed to conducting their own *ijtihad* (legal opinions), because this is the same as legal counseling. When a client comes to see a notary, they provide legal counseling and opinions on what the client wants to then be stated in the deed. If the notary does not understand sharia contracts, then he is unable to provide his opinion in making the sharia contract. Based on this, the notary must:

1. Subject to applicable regulations to fulfill the sharia elements in the contract. Some regulations include the Sharia Banking Law, DSN-MUI Fatwa, KHES, Bank Indonesia Regulations related to sharia financing, and others. In this case, notaries must always update their knowledge.
2. Must understand the sharia contract. So that the notary pays attention to the pillars and conditions in the implementation of the contract, also regarding things that can damage and cancel the contract.¹⁸

¹⁶Annisaa, Alifia & Rusyad Nurdin, Aad, "Several Legal Aspects Relating to Sharia Certification of Notaries".

[http://download.garuda.kemdikbud.go.id/article.php?article=2984164&val=26769&title=Implementation%20of%20Notary%20Certified%20Sharia%20Job%20Accessed on November 26, 2024 at 9:46 WIB](http://download.garuda.kemdikbud.go.id/article.php?article=2984164&val=26769&title=Implementation%20of%20Notary%20Certified%20Sharia%20Job%20Accessed%20on%20November%2026%202024%20at%209:46%20WIB)

¹⁷Ibid. p. 276.

¹⁸Windi Audya Harahap, Agus Nurdin & Budi Santoso, 2020, Notary Competence In Making Sharia Agreements (A Review from the Perspective of Sharia Economic Law), Notarius, Vol. 13, No. 1, p. 117.

Certification is a process of providing certificates in the industry for human resources (HR) through competency tests so that they have qualifications according to their standards. So that competency certification for Islamic financial institutions is a necessity. This certification is not limited to Islamic banking alone, but also applies to Islamic financial institutions as a whole. In this case, it is expected that HR for Islamic financial institutions have expertise and attitudes that are in accordance with Islamic principles. One of the HR intended for this certification is a supporting profession that provides its services in Islamic banking activities, including notaries, accountants, and appraisers. This certification is a necessity, both for the OJK as an institution that regulates the certification, for Islamic banking in terms of requiring direction from supporting professions who must understand the Islamic principles. In addition to the reasons for the need for the OJK and Islamic banking, this certification is also a necessity for Notaries, because in addition to notaries having to understand the terms, principles, and Islamic contracts, notaries must also be able to explain the Islamic principles to clients. In the implementation of the professional certification, the National Professional Certification Agency (BNSP) is inseparable. Because BNSP is an independent body that has the authority as an individual certification authority and is tasked with implementing professional competency certification for workers. BNSP must first appoint a Professional Certification Institution (LSP) to hold the certification. BNSP must also determine the Indonesian National Work Competency Standards (SKKNI) as a work capability standard that includes knowledge and skills for the specified profession. The certification process is quite difficult and requires a long and complicated process. Meanwhile, Islamic banking is still relatively new in society, so it can complicate the development of sharia.¹⁹

Notaries who make Islamic banking contracts, especially *Musyarakah* contracts, must be able to fulfill the specified sharia compliance, namely obeying the sharia principles based on the Qur'an, Hadith, Ijma' and Ijtihad. From this discussion, it can be seen that there are actually no laws and regulations that regulate and bind in detail and also firmly regarding the fact that notaries must have a sharia certificate if they are going to make a deed of agreement in Islamic banking, especially in making a deed of *Musyarakah* agreement.

The existence of sharia certification training and the requirement to have sharia certification for notaries who will make this sharia banking deed is only limited to the policies of each sharia bank management, so that to be able to guarantee sharia compliance for Notaries is still a weakness and homework for sharia banks and the government. Until now, the legal basis used as the legal basis for the implementation of sharia certification is OJK Regulation Number 31/POJK.05/2014 concerning Sharia Financing Business Organizers. However, if it turns out that the

<https://ejournal.undip.ac.id/index.php/notarius/article/view/29171> accessed on July 17, 2024

¹⁹Ivan Setiawan & Wahyu Mustajab, 2022, "The Urgency of Sharia Certification for Notaries in Making Financing Agreement Deeds at Sharia Banks", *Mimbar Keadilan*, Vol. 15, No. 2, p. 265.

<https://core.ac.uk/download/pdf/542663136.pdf> accessed on August 1, 2024 at 11.27 WIB

making of the deed of agreement is carried out by a notary who does not or has not had a sharia certificate for a sharia financial institution, the deed remains authentic as long as it meets the pillars and requirements of the agreement, as well as the provisions for making deeds in the UUJN. This error cannot simply lower the degree of the deed or cancel the deed into an inauthentic deed.

So that until now, Islamic banks only require notaries who want to become partners with Islamic banks to have a certificate of Islamic financial training. Although the certificate is only a formality, in fact, the existence of the certificate shows that the notary has attended Islamic financial training, which means that the notary at least understands the fundamental basis of Islamic contracts. So that when the contract occurs, the notary knows the process of the contract, because it is not uncommon for the Bank to ask for a notary's opinion regarding the contract that will be carried out. And with the ownership of the Islamic certificate, it can increase the level of trust of clients who will use the services of the notary and be calm and not anxious because they already have experience in their field.

4. Conclusion

The provisions of Article 1868 of the Civil Code are the source of authority exercised by a Notary as a public official to make an authentic deed. Article 1868 of the Civil Code provides limitations on the elements of an authentic deed, namely one made by or before a public official, made in a form determined by law and the public official must have the authority to make the deed.

That there is no law that is firm and detailed about the existence of sharia notaries, whereas in terms of its object all business agreement practices in sharia banks have laws and regulations. This certainly has an impact on the existence of sharia notaries which is still unclear.

5. References

Journals:

Alifia Annisaa dan Aad Rusyad Nurdin, "Beberapa Aspek Hukum Berkaitan Dengan Sertifikasi Syariah Terhadap Notaris". <http://download.garuda.kemdikbud.go.id/article.php?article=2984164&val=2669&title=Pelaksanaan%20Jabatan%20Notaris%20Bersertifikasi%20Syariah> accessed on 26 November 2024 at 9.46 WIB

Azkiya, Azka & Pujiyono, 2024, "Prinsip Syariah Dalam Akta Notaris Perjanjian Pembiayaan *Musyarakah* Mutanaqishah Ma'al Ijarah". NOTARIUS, Vol. 17 No. 1, <https://ejournal.undip.ac.id/index.php/notarius/article/view/44094> accessed on 18 July 2024 at 12.16 WIB

Harahap, Windi Audya, Nurdin, Agus & Santoso, Budi. (2020). "Kompetensi Notaris Dalam Pembuatan Perjanjian Syariah (Tinjauan Dari Perspektif Hukum

Ekonomi Syariah)", Notarius, Vol. 13, No. 1.
<https://ejournal.undip.ac.id/index.php/notarius/article/view/29171>,
accessed on 17 Juli 2024

Setiawan, Ivan & Wahyu Mustajab. (2022). "Urgensi Sertifikasi Syariah Bagi Notaris dalam Pembuatan Akta Akad Pembiayaan di Bank Syariah", Mimbar Keadilan, Vol. 15, No. 2, hal. 275.
<https://core.ac.uk/download/pdf/542663136.pdf>, accessed on 1 August 2024 at 11.27 WIB.

Wahyuni, Willa. "Tiga Jenis Metodologi untuk Penelitian Skripsi Jurusan Hukum".
<https://www.hukumonline.com/berita/a/tiga-jenis-metodologi-untuk-penelitian-skripsi-jurusan-hukum-lt6458efc23524f/> accessed on 25 November 2024 at 21.44 WIB.

Books:

Akta Pernyataan Keputusan Rapat Umum Pemegang Saham. Kab. Ponorogo: Uwais Inspirasi Indonesia.

Dasar Hukum, Teknik Pembuatan Akta, dan Contoh dalam Praktik Perbankan. Depok: PT Rajagrafindo Persada.

Hermin. (2024). *Tanggung Jawab Dan Peran Notaris Dalam Pembuatan*
Lamongan: Academia Publication.

Menyongsong Industri 4.0. Medan: CV Merdeka Kreasi Group.

Normatif, Empiris dan Gabungan. Gresik: Unigres Press.

Rahman, Taufiqur. (2021). *Buku Ajar Fiqih Muamalah Kontemporer*.

Suyanto. (2022). *Metode Penelitian Hukum Pengantar Penelitian*

Widiyono, Try, (2023). *Aspek Hukum Akad-Akad Pembiayaan Syariah:*

Zuhirsyan, Muhammad et al., (2022). *Revitalisasi Perbankan Syariah*