

# Customer Protection in Mudharabah Musyarakah Contract Disputes in Default Cases in Religious Courts

Shofa Fathiyah<sup>1</sup>, Herman Bakir<sup>2</sup>  
{shofathiyah@gmail.com<sup>1</sup>, herman\_bakir@borobudur.ac.id<sup>2</sup>}

Universitas Borobudur<sup>1,2</sup>

**Abstract.** Dispute resolution in the context of *musyarakah mudharabah* contracts is an important thing in a Sharia economic system based on the values of justice, expediency, and legal certainty which aims to analyze the fatwa on *musyarakah mudharabah* contracts, Article 1 paragraph 1 articles 20 and 21 of Law Number 4 of 1996 and sharia auctions based on Minister of Finance Regulation Number 213/PMK.6/2020, will create sharia economic dispute resolution arrangements with protective value. The results of this research are that Sharia Financial Institutions must apply the principle of prudence by Law of the Republic of Indonesia Number 21 of 2008 concerning Sharia Banking article 2 and *Mudharib* has the right to obtain transparency in the adequacy of collateral, total debt, and compensation costs with the principle of transparency by Article 2 of the Power Guideline Monetary Administrations Number: 1/POJK.07/2013 concerning Purchaser Assurance in the Monetary Administrations Area in the *Mudharabah* Functional Principles Book and the OJK *Musyarakah* Functional Norms Book.

**Keywords:** Legal Protection, *Mudharabah Musyarakah* Agreement, Costumer, Contract Disputes

## 1 Introduction

The *mudhrabah musyarakah* agreement is an important instrument for regulating cooperation between *shahibul maal and mudharib*. This contract uses the principle of profit and loss sharing. Profit sharing is based on an initial agreement, while the risk of loss in practice often becomes a dispute. Compensation has been regulated in the Fatwa of the National Sharia Council Number 43/DSN-MUI/III/2004 concerning Compensation (Ta'widh). In *Mudharabah* and *Musyarakah* contracts, compensation may only be imposed by *shahibul mal* or one of the parties to the *Musyarakah* if their share of the profits it is clear but not paid.

Bank Indonesia Guideline Number 7/46/PBI/2005 Article 8 expresses that in reserve conveyance exercises as *musyarakah*-based funding, basically the accompanying prerequisites in the letter to apply, that the Bank can request certifications or security to expect chances in the event that the client can't satisfy the commitments as expressed. in the agreement because of carelessness and additionally extortion. The application of *musyarakah* and *musyarakah mutanaqishah* contracts on collateral needs to be harmonized.

Fatwa of the Public Sharia Board Indonesian Ulema Chamber Number 92of 2014 concerning financing accompanied by *Rahn (At-Tanwil al-Mautsuq bi al-Rahn)* the following provisions: In principle, in a trust agreement there must be no collateral (*mahrnun*) but so that

the trust holder does not commit deviations behavior (moral hazard) Sharia Financial Institutions may ask for collateral from the trust holder (al-amin including *sharik*, *mudharib*, and *musta'jir*) or third parties and the collateral (*marhun*) in the trust agreement can only be executed if the trust holder (al-amin including *sharik*, *mudharib* and *musta'jir*) or a third party committing moral hazard, namely: *ta'addi (ifrath)*, namely doing something that is not permitted or should not be done; *taqashir (tafrith)*, namely not doing something that can or should be done; and *mukhalafat al-syuruth*, namely violating provisions that do not conflict with sharia agreed upon by the contracting parties.[1]

The implementation of the guarantee execution of *Mudharabah Musyarakah* and *Musyarakah Mutanaqisah* contracts must pay attention to the principle of proportional justice for each interested party in the form of providing justice for the customer as the legal owner of the collateral object which by law has been given the authority and protection to take action to defend his or her assets. provide a result, including pouring his wealth according to his goals[2].

This research examines and analyzes sharia economic dispute resolution that has not accommodated MUI DSN fatwas relating to *rahn*, laws or other positive laws and regulations, as well as sharia auctions that have not been accommodated in Minister of Finance Regulation Number 213/PMK.06/2020.[3] The problem that will arise is felt by customers is not getting legal certainty in determining the amount of costs incurred in the mortgage rights execution process, including execution costs, confiscation costs, auction costs, and security costs. In general, costs can arise due to correspondence costs to contact customers, whether by telephone, email, or correspondence; verification costs carried out directly by the bank and costs for using the services of other parties so that customers pay or settle their debts.[4]

Based on the background of this research, the author found the problem formulation: How is customer protection in *mudharabah musyarakah* contract disputes regarding the amount of fees and compensation? What is the procedure for disputes over *mudharabah musyarakah* contract guarantees in religious courts?

The aim and use of this research is to dig deeper into the extent of resolving sharia disputes with collateral objects in *musyarakah* contracts and execution with collateral objects of *musyarakah* contracts in the Religious Courts.

## 2 Research Methods

The examination technique utilized in this exploration is a standardizing strategy that is subjective in nature. Essential legitimate materials utilized for documentation of choices to be investigated for lawful contemplations and optional lawful materials utilized Fatwa of the Public Sharia Gathering Indonesian Ulema Chamber Number 92 of 2014 concerning supporting joined by *Rahn (At-Tanwil al-Mautsuq bi al-Rahn)* and Funding Arrangement *Musyarakah* depends on the MUI Public Sharia Board Fatwa Number. 08/DSN-MUI/IV/2000, the *mudharabah* supporting arrangement depends on the MUI Public Sharia Board Fatwa, Regulation Number 8 of 1999 concerning Buyer Security, Regulation Number 21 of 2008 concerning Sharia Banking and Accumulation of Sharia Financial Regulation. The data collection tools used to collect data in this research are as follows: Interviews and library research. After the data was collected, data analysis in this research was carried out using descriptive analysis by describing it so that it became systematic and answered the problems that had been formulated.

### 3 Results and Discussion

Sharia contracts have basic things that must be included, including type of contract; contract number and date; identity of the parties; object of agreement (capital, goods and/or services); financing objectives; object value (capital, goods and/or services); mechanism and method of payment and amount; currency exchange rate used, if necessary; time period; ratio, margin, and/or service fee (*ujrah*); collateral object (if any); details of costs (survey fees, insurance or guarantee fees; provision fees; and notary fees); dispute resolution mechanisms; provisions regarding the rights and obligations of the parties; and provisions regarding fines (*ta'jir*) and/or compensation (*ta'wid*).[5]

The contract used is *Mudharabah musyarakah*, which is a combination of the *Mudharabah* contract and the *Musyarakah* contract; LKS as *mudharib* includes capital or funds in investments with customers; LKS as the party that includes the funds (*musytarik*) receives a share of profits based on the portion of capital included; The profit portion after being taken by LKS as *musytarik* is divided between LKS as *mudharib* and the fund customer in accordance with the agreed ratio; If a loss occurs, LKS as *musytarik* will bear the loss according to the portion of capital included.[6]

Prohibition of usury to build an honest and just society. Justice in this context has two dimensions, namely the *mudharib* has the right to receive rewards, but they must be commensurate with the risk and effort required, and the rewards obtained are determined by the profits from the project he is investing in. So, the concept of *mudharabah* and *musyarakah*, known as profit and loss sharing, is the key to the answer. *Musyarakah* is an economic/partnership concept that will build equality and togetherness. [7]

During the implementation of the *musyarakah* contract financing, during the process, the capital manager experienced a disaster that had an impact on the business. Efforts to protect against defaulting customers include restructuring financing in Sharia banks include, among other things: changes to payment schedules; changes in installment amount; changes in period; changes in the ratio in *mudharabah* or *Musyarakah* financing; changes in profit sharing projections in *mudharabah* or *Musyarakah* financing; and giving discounts.

Sharia financial institutions must consider providing rescheduling facilities or making new contracts and if the *mudharib* cannot fulfill its achievements due to Force Majeure (Overmacth) conditions, then the party cannot be subject to *ta'zir* and *ta'widh* and can even be released from obligations if the situation arises. forcing according to the principle of profit and loss sharing, so when things return to normal and the business is running again, the *mudharib* is required to fulfill its achievements again. Bank Indonesia Regulation Number 7/46/PBI/2004 regulates that compensation in *Mudharabah* and *Musyarakah* contracts may only be imposed by the Bank as *shahibul maal* if the clear portion of the Bank's profits is not paid by the customer as *mudharib*.

Remuneration (*ta'widh*) may just be forced on parties who deliberately or through carelessness accomplish something that strays from the conditions of the agreement and makes misfortunes the other party; Misfortunes that can be likely to *ta'widh* as planned in section 1 are genuine misfortunes that can be determined obviously; Genuine misfortunes as planned in passage 2 are genuine costs caused with regards to gathering privileges that ought to be paid; how much pay (*ta'widh*) is by the worth of the genuine misfortune (genuine misfortune) that is capable (fixed cost) in the exchange and not the misfortune that is supposed to happen (possible misfortune) because of botched open doors (opportunity misfortune or *al-furshah al-dha-i'ah*).[8]

Straightforwardness is directed in Article 2 Letter an of Monetary Administrations Authority Guideline Number 1/POJK.07/2013 concerning Purchaser Security in the Monetary

Administrations Area. What is meant by "transparency" in this letter is the provision of information regarding products and/or services to consumers, clearly, completely, in language that is easy to understand. The principle of prudence regarding the element of trust and clarity of agreements and preventing moral hazard. In practice, sharia financial institutions ask for collateral as collateral for *musyarakah* financing from customers. *Musyarakah* contracts actually cannot have collateral because the basis is cooperation, but for *shahibul maal's* caution, there is no guarantee of capital return and up to now there has been no mechanism for controlling *shahibul maal to mudharib* based on the principle of Profit and lost sharing. Therefore, the Fatwa of the National Sharia Council of the Indonesian Ulema Council allows guarantees.[9]

The *Musyarakah* and *Musyarakah Mutanaqishah* Sharia Banking Product Standards state that Sharia Financial Institutions may request collateral from *Mudharib* to authorize *Shahibul Maal* to carry out the imposition of Mortgage Rights, Pawn Rights, or Security Rights. This is based on the Fatwa of the National Sharia Council Number 8/DSN-MUI/IV/ 2000 Concerning *Musyarakah* Financing number 3 in principle, in *musyarakah* financing, there is no guarantee, however, to avoid irregularities, Sharia financial institutions can ask for guarantees.

However, in practice, *shahibul maal* auctions land which, according to the apparition or estimated selling price of the collateral, should be greater than the total financing as a risk mitigation for Sharia financial institutions in disbursing financing, but *Shahibul Maal* immediately auctions the land below the total amount of debt which of course results in perceived injustice for the *Mudharib* who should get transparency in the amount of collateral assessment according to the rules in light of the guideline of straightforwardness in view of article 2 of the Monetary Administrations Authority Guideline Number 1/POJK.07/2013 concerning Purchaser Security in the Monetary Administrations Area. This does not fulfill the principle of justice in the execution of guarantees, because the execution of guarantees is limited to looking at the interests of the investor, even though the execution of guarantees should also look at justice from the perspective of the *mudharib's* capabilities as well.[10]

The defaulting customer submits a request to determine the number of costs incurred in the mortgage rights execution process, including execution costs, confiscation costs, auction costs, security costs, total debt, and compensation costs in accordance with the *mudharabah musyarakah* contract rules using the principle of profit sharing (profit and lost sharing) *mudharib* feels the achievement of justice. Understanding that *Mudharib* has rights that are protected by law from the perspective of consumer protection which is comprehensive and applicable to society, especially sharia economic actors as regulated by Law Number 8 of 1999 concerning consumer protection and the Financial Services Authority which specifically regulates consumer and public protection[11].

The *mudharib* is the party that suffers losses because the business risks of the financing agreement are not the responsibility of both parties. Because of these things, *musyarakah* financing carried out in Sharia Banking contains an element of usury in the practice of *musyarakah*. The cause of the dispute can come from the *shahibul mal*. In principle, the *mudharib* should not be given responsibility for mistakes made by the *shahibul mal*, it can also come from the *mudharib*, so mistakes and negligence made by the *mudharib* should not be delegated to the *shahibul mal*. Therefore, *Shahibul Mal* is more selective in assessing and selecting *mudharib* applicants for *musyarakah* contracts in terms of goals and efforts to avoid disputes because it is based on the Sharing Liability principle.

The author's analysis is that judges can further explore Sharia economic matters in order to achieve justice using Article 178 paragraph 1 of the HIR which states that judges, ex-officio, are obliged to include all legal reasons that are not put forward by the parties involved in the

case as input in the preparation and formation of the Great Court Circular, which regulates sharia economic dispute resolution, determines the amount of collateral sales and the total remaining liabilities in accordance with the principle of profit and loss sharing.

Actually, with respect to *musyarakah* supporting, it basically expresses that banks are obliged to execute sharia standards and prudential standards in completing their business exercises which incorporate directing assets through the rule of benefit sharing in light of *musyarakah* contracts.[12] The prudent rule is a bank the executives rule that should be complied with to make, major areas of strength for sound, proficient banking as per legal arrangements.[13] The standard of reasonability is likewise contained in Article 2 and Article 23 sections 1 and 2 of Regulation Number 21 of 2008 concerning Sharia Banking. Article 2 peruses: "Sharia banking in completing its business exercises depends on sharia standards, monetary majority rule government and the guideline of judiciousness".

Law Number 21 of 2008 concerning Sharia Banking regulates collateral known as *rahn* to be used as a complementary product as collateral or as a separate product. Seeing that the use of *rahn* in *musyarakah* contracts must be in accordance with the Fatwa of the National Sharia Council Number: 92/DSN-MUI/IV/2014 concerning Financing accompanied by *Rahn* (at-tamwil al-mautsuq bi al-*rahn*) in cases where the *rahn* belongs to someone else, its use is not as stated in the contract, it is not in accordance with its initial purpose because the mechanism does not comply with sharia and the purpose of the *musyarakah* is suppressed in bad faith. Sharia Financial Institutions must apply the principle of prudence in looking at *Mudharib's* business prospects and abilities, most importantly the ability to pay.

Material collateral in the form of a Deed of Granting Mortgage Rights in *mudharabah* and *musyarakah* financing in Sharia banking is not in accordance with Islamic law because there are several authorities in the Mortgage Rights deed that are not in accordance with the provisions of Islamic law.[14] For example, there are still sentences regarding debt repayment, debt agreement, creditor, debtor, and credit, even though these words are not known in sharia financial institutions. Sharia Financial Institutions remain as providers of capital with financing schemes, the legal consequences and position of *Mudharib* are ultimately similar to schemes providing financing with certainty. The weak legal position of Sharia financial institutions is that they cannot use a letter of acknowledgment of debt, or place a Deed Granting Mortgage Rights on the transfer of ownership.[15]

The court cannot immediately carry out the execution of vacating problematic auction objects auctioned by the State Property and Auction Services Office. This happened because the Court considered that the auction objects sold by the State Property and Auction Service Office did not have a confiscation (*beslag*) placed by the Court. Meanwhile, the legal procedure for carrying out the vacating execution requires that a confiscation order be made first by the Court, then on that basis, the vacating execution can be carried out in accordance with Article 200 paragraph (11) HIR / Article 218 paragraph (2) RBg.

The procedure for resolving disputes over *mudharabah musyarakah* contracts in the execution of collateral must be through a decision of the Religious Court if the debtor is in default. Sharia Financial Institutions are not permitted to execute collateral and guarantees directly immediately after arrears or defaults occur before there is a decision from the court stating that the customer is negligent and giving the Sharia Financial Institution the right to execute collateral and guarantees and also Sharia Financial Institutions are not permitted to write a clause in the contract that allows Sharia Financial Institutions to execute collateral directly.[16]

In carrying out executions, several problems are often encountered, including the fact that the mortgage object is controlled by a third party. The debtor is not cooperative, there are

differences in the limits of the objects of mortgage rights, the second, third, and so on mortgage rights holders put up resistance, resistance from third parties on the basis of ownership. In the absence of land to store the executed objects, the Financial Institution's Objects must be controlled by the *mudharib*. So, the ownership of the collateral must be owned by oneself and the proof of ownership must be original and the *rahn* must be in the *mudharib's* power and the *rahn* must be real and exist.[15]

Letter guarantee (*al-rahn al-tasjili*) is a form of guarantee known in Islam or in this case material guarantee of mortgage rights which has similarities to a fiduciary guarantee. In *musyarakah* financing there are no debts and receivables, in principle, the application of mortgage, fiduciary, and Mortgages are actually less compatible with the *musyarakah* financing model because financing in sharia financial institutions is entirely based on debts and receivables, but some are also based on working capital and services. The *musyarakah* contract financing model is an agreement between two parties regarding the principal of capital and profits. Profits are divided based on capital portion using the principle of profit and lost sharing.[17]

Sharia Banking Product Standards *Musyarakah* and *Musyarakah Mutanaqishah* Financial Services Authority states that Sharia Financial Institutions are not permitted to execute collateral and guarantees directly immediately after the arrears occur before there is a default decision from the religious court which states that *Mudharib* has been negligent and gives *Shahibul Maal* the right to do so. execution of collateral and guarantees.

Minister of Finance Regulation Number 213/PMK.06/2020 does not specifically accommodate auctions with Sharia principles. The author's analysis is that before holding a collateral auction, ideally there should be a determination of the collateral confiscation to the panel of judges followed by a request for execution of the collateral confiscation to the head of the religious court, this is because *Rahn* does not have a transfer of ownership of the collateral object as long as the obligation has not been paid, the collateral object can only be executed when the *Mudharib* does not able to pay.

The principle of legal certainty (*pacta sunt servanda*), namely that the parties believe that what has been promised in the agreement is guaranteed in its implementation by the theory of legal certainty expressed by Peter Mahmud Marzuki that legal certainty makes individuals know what actions they may or may not carry out, hence legal certainty. in the application of *rahn* to *mudharabah musyarakah* contracts. If there is excess from the sale of collateral that has been sold by the auction body, the court will act as an intermediary to return it to the Defendant. *Mudharib* has the right to receive the difference in the sale price of the collateral after deducting the total liability[18].

## 4 Conclusion

Protection for customers in collateral in *mudharabah musyarakah* contracts in the form of principles in Law Number 8 of 1999 concerning Consumer Protection based on benefits, justice, balance, security, and safety as well as legal certainty, *Mudharib* has the right to obtain transparency in the adequacy of collateral, total debt and replacement costs losses with the principle of transparency in accordance with Article 2 of the Financial Services Authority Regulation Number: 1/POJK.07/2013 concerning Consumer Protection in the Financial Services Sector in the *Musyarakah* Operational Standards Book of the Financial Services Authority, Sharia Financial Institutions must apply the precautionary principle in accordance

with the Law of the Republic of Indonesia Number 21 of 2008 concerning Sharia Banking article 2 and the use of guarantees or collateral are additional elements

The implementation of dispute resolution in Sharia Financial Institutions in *musyarakah* ease agreements is not permitted to carry out direct execution. The Sharia Financial Institution submitted a request for execution first to the Religious Court stating that the customer was negligent and then the Religious Court followed up as appropriate. The execution of a decision that has legal force remains a form of customer protection.

## 5 Suggestions

This research recommends that bank and non-bank Islamic financial institutions in channeling financing with *Musyarakah* contracts apply the principle of prudence in applying collateral to avoid *mudharib* breaking promises regarding information transparency, applying the principles of agreements and the principle of profit and lost sharing.

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