

PRINCIPLES OF ISLAMIC AGREEMENT IN PREPARATION OF DEED

Dian Latifiani, Baidhowi
Faculty of Law, Semarang State University
K1 Building, Sekaran Campus, Gunung Pati Semarang
Central Java, Indonesia 50229
Email:dianlatifiani@gmail.com

ABSTRACT

The growing needs of the community to worship in *kaffah* include in *muamalah* field, making the businesses establish Islamic financial institutions. For example sharia banks, sharia insurance, sharia hotel, sharia pawn, capital markets. This was also followed by increasing business transactions in Islamic way and is required to carry out the agreement under the provisions of Islamic contract law. Islamic contract law that has been done in the sale and purchase transactions, financing Islamic banks, Islamic insurance, capital markets has resulted in a letter or deed of agreement. Deed successor agreement made by notaries as competent authority under the rules and regulations. Principles of Islamic law in a comprehensive agreement has not been regulated in legislation. While the notary as a clerk must know the principles of Islamic contract law. In a deed of Islamic agreement, notaries must understand the legal system of Islamic agreement that deed made in accordance with the provisions of Islamic contract law. The main reference notary as a scribe is Surah Al Baqorah verse 282 and 283 are arranged clearly and in detail about the Islamic contract law. An agreement or contract (transaction) is performed by two or more parties, should not be distorted and should be in line with the will of the shari'ah. Islamic contract law systems have different characteristic with western law, and therefore an Islamic agreement deed, before being published by a notary, must pay attention to the legal system of Islamic agreement that deed made illegal under Islamic law. The Government and the National Islamic Council of Indonesian Ulama Council should play an active role to issue regulations regarding the Islamic contract law.

Key word: islam agreement

Introduction

The growing needs of the community to worship in *kaffah* include in *muamalah* field, making the businesses establish Islamic financial institutions. For example sharia banks, sharia insurance, sharia hotel, sharia pawn, capital markets.

Sharia-based economy should be recognized has experienced rapid development and encouraging. Since the Bank Muamalat Indonesia (BMI) was established and began operations on 1st May 1992, the growth of Islamic banking increased sharply. From one Islamic banks and 78 of SRB in 1998 to three Islamic banks and 17 commercial banks are open sharia business unit with 163 branches, 85 sub-branches and 136 cash offices, and 90 BPRS at the end of 2005¹.

Contributions of Islamic financial industry is quiet small compared to conventional dominance. However, it is undeniable that the growth rate is very rapid, and proved that still exist despite the financial crisis is hitting, in a few years. From a research conducted by Karim Business Consulting, it is projected that the total assets of Islamic banks in Indonesia will grow by 2850% for 8 years, or an average growth of 356.25% annually². Something which quite encouraging, business diversity based Islamic economic was expanding. Not only the banking sector, but also spread to the insurance field, capital markets, stocks, pawnshops, and others.

Observe and diverse patterns of sharia economy based business, then the aspect of legal protection and the application of the principle agreement in the *akad* or contract in the Sharia Financial Institutions be important pursued in its implementation. In terms of implementation, the actors and users must run the Islamic economic activities based on sharia. Patterns of relationship based on a desire to enforce Islamic system is believed to be the pattern of the strong links between banks and customers. The pattern of relationships between the parties involved in Shari'a Financial Institutions is determined by the *akad* relationship. *Akad* relationship underlying the whole transaction which distinguishes Conventional Financial Institutions, because the *akad* which applied in shari'a banking and another non-bank shari'a financial institutions, worldly and hereafter have consequences for the *akad* which is based on Islamic law³.

In the application of the *akad* relationship there should not be deviations from the agreements that have been made by both parties because each aware of the responsibility of the *akad*. But in the corridors of the litigious society, it is hard to avoid an

*Lecture Faculty of Law Semarang State University Indonesia, email dianlatifiani@gmail.com

¹WahyuWiryono "Penyelesaian Sengketa Bank Syari'ah", makalah dalam Pelatihan Penyelesaian Sengketa Ekonomi Syari'ah di Pengadilan Agama, tanggal 8 Juli 2006, di Universitas Islam Indonesia Yogyakarta.

²Adiwarman Karim, *Bank Islam Analisis Fiqh Dan Keuangan*, (The International Institute of Islamic Thought Indonesia, 2006) 29

³Afzalur Rahman, "Economic Doctrines of Islam". (Lahore: Islamic Publication, 1990), dalam Muhammad Syafii Antonio, *Bank Syari'ah Dari Teori ke Praktik*. (Gema Insani Press, 2001) 29

action to claim on each other. So that the quantity and complexity of the case judge actions primarily business case will be extremely high and varied. In this case the contract is also called *akad* or agreement that meets the consent (*ijab*) given by one party to *kabul* given by the other party is legally entitled to *syar'i* and consequences on the subject and object⁴.

In the field of sharia insurance, its development in Indonesia started since 1994 are marked with the establishment of Takaful Indonesia Insurance Inc. After that, insurance services are managed based on sharia principles began to be developed either by the full sharia insurance agency or insurance companies that develop sharia division.

The existence of sharia insurance is encouraged by the suggestion that efforts be made towards the future planning of the protection system known in the insurance mechanism and beliefs of some people that the management of insurance must be in line with the rules and principles of sharia in particular with regard to financial management that is free of *riba*, *maisir* and *gharar*. According to the Bapepam-LK Insurance Bureau in 2010 there have been 45 sharia insurance institutions which consist of 42 sharia insurance companies and 3 sharia reinsurance companies.

While the sharia pawnshop, its development in Indonesia has entered the 8th year in this year, since it was launched in January 2003 also show a progression which is striking. Sharia pawnshop loan amount, until the end of February 2009, reached Rp 1.6 trillion, with the number of customers got up to 600 thousand and the number of branches by 120 pieces⁵.

Encouraging developments also occurred in the capital market. Based on the Decree No. Kep-523 / BL / 2010 on the list of sharia effect, has been settled name corresponding effect with sharia totaled 209 consisting of SBSN, stock, Sharia debenture, and Sharia mutual funds. It means there are more effects which can be chosen by people to invest in the Sharia stock market.

Currently, the Indonesian government has also issued *sukuk* as an instrument of government financing, the global *sukuk*, corporate, and retail *sukuk*. Inaugural *sukuk* issued by the Indonesian government, publishing fixed rate of return of 8.8 per cent with a tenor of 5 (five) years, while the retail *sukuk* tenor of 3 years with a fixed remuneration of 12 percent. The main factors underlying *sukuk* issuance in this country, namely as an instrument of diversification of financing the government budget deficit and the economic acceleration of Sharia in Indonesia⁶.

In terms of Sharia finance institutions, its development is also very fast in Indonesia. It can be seen from the emergence of various finance companies that offer Sharia financial services such as FIF Sharia, al-Ijarah Indonesia Finance, and others. There was also the business of real sector of both goods and services that applies the principles of Sharia like Sofyan Hotel, Ahad-Net International, and others.

In addition, the Islamic public finance sector has also grown in bona fide institutions and established by the government such as BWI (Badan Wakaf Indonesia) and BAZNAS (Badan Amil Zakat Nasional) and derivatives as the embodiment of the government regulations enacted⁷. Based on that, developments and the growth of Islamic economic practice in Indonesia has a significant moving. Beside the increasing of public awareness in the practice of religion *kaffah* in economics, also due to lack of government support has been manifested in various regulatory and political will increasingly apparent support of development of Islamic economics

Increased business transactions in Islamic way and is required to carry out the agreement under the provisions of Islamic contract law. Islamic contract law that has been done in the sale and purchase transactions, financing Sharia banks, Sharia insurance, capital markets has resulted in a letter or deed of agreement. Deed of agreement was made by notaries as competent authority under the rules and regulations. Principles of Islamic law in a comprehensive agreement has not been regulated in legislation. While the notary as a clerk must know the principles of Islamic contract law. In a deed of Islam agreement, the notary must understand the legal system of Islamic agreement so the deed which they made in accordance with the provisions of Islamic contract law. The writer focuses on the agreement within the scope of Sharia banking. How Islamic contract law principle that deed made in accordance with the provisions of Islamic law agreement?

Discussion

The main reference notary as a clerk is Surah Al Baqorah verse 282 and 283 are arranged clearly and in detail about the contract law of Islam. An agreement or *akad* (transaction) is performed by two or more parties, should not be distorted and should be in line with the will of the sharia. Islamic contract law systems have different characteristic with western law, and therefore Islam agreement deed before a notary must pay attention to the legal system of Islamic agreement so the deed which made is legal in Islamic law.

⁴ Ahmad Abu Al Fath (1913), *Kitab al- M' amalat fi asy-Syari'ah al-Islamiyyah wa al-Qawanin al-Misriyyah*. (Mesir: Matba'ah al-Busfur), lihat juga Asy-Syaukani (1964). Fath al-Qadir. (Mesir: Mustafa al-Babi al-Halabi), hlm. 4.

⁵ Zainuddin Ali, *Hukum Ekonomi Syariah*, (Sinar Grafika, 2008) 59

⁶ Abdul Ghofur Anshori, *Penerapan Prinsip Syariah Dalam Lembaga Keuangan: Lembaga Pembiayaan dan Perusahaan Pembiayaan*, (Pustaka Pelajar, 2008) 112-114.

⁷ Nur Kholis, *Potret Politik Ekonomi Potret Politik Islam Di Indonesia Era Reformasi*, dalam www.uin-ac.id, diakses tanggal 10 Desember 2011.

Contract Law in Kompilasi Hukum Ekonomi Syariah (KHES)

According to Ahmad Fauzi⁸, treaty in Arabic commonly called *akad*. In Article 20 number 1 KHES formulated that the contract is an agreement in an agreement between two or more parties to do or not do certain legal actions. In Article 22 mentioned the *akad* pillars consist of: parties to *aakad*, the object of the *akad*, the principal purpose of the *akad*, and the deal. Parties who doing also called legal subjects. In Article 1 number 2 legal subject is a natural person, partnership or a legal entity or non-legal entity who has the legal capacity to support rights and obligations. Skill categories in article 2, paragraph 1 is explained that the person is deemed competent if it has been aged at least 18 years or never married. In the event that a child has not attained the age of 18 can apply for the recognition of legal capacity with the court. If proven in the hearing the applicant does not meet the criteria of good men of law, according to Article 4 should get custody. In addition to those who are still minors, article in KHES also determine about guardianship to adults who are considered incompetent. This is similar to the provisions of BW against people who were under guardianship (*curatele*). However in KHES there is no terms about what kind of person who can be placed under guardianship.

Article 6 in KHES determine the court's discretion in relation to guardianship. Paragraph 1, the court is authorized to determine guardianship for people who deemed can't do legal acts. Paragraph 2, the court is authorized to determine the person who act as trustee, as referred to in paragraph 1. Later in the article 7 mentioned that the court may specify the person who owed are in custody based on the request of a person who indebted. The words of the court in the above provisions should be read in the Religious Court / Sharia Court.

KHES uses *Muwalla* as a term to refer to people who are not able doing legal acts and specified in the trust. Furthermore, Article 9 explained that *muwalla* can take legal actions that benefit themselves, although it did not get permission of a guardian; can not perform a legal act which is detrimental to him, despite get the permission of a guardian; the validity of legal acts on *muwalla*'s rights of material that unclear which will benefit or harm themselves depending on permissions guardian; any disputes between *muwalla* with the guardian, *muwalla* can apply to the court to set that the person has ability to take legal action.

The second pillar of the *akad* is the object of the *akad*. Article 24 in KHES mentions that the object of the *akad* is *Amwal* or services is permitted and required by each party. Understanding *Amwal* in Article 1 number 9 is an object that can be owned, controlled, arranged and transferred either tangible or abstract objects, both registered and unregistered objects, movable or immovable objects, and the rights which have economic value. In that sense it can be argued a wide discrepancy among other things;

1. Tangible objects and intangible

- a. Tangible objects are objects which can be sensed (Article 1 number 10).
- b. Intangible objects are all things that can not be sensed (Article 1 number 11).

2. Movable and immovable objects

- a. Moving object is anything which can be moved from one place to another (Article 1 number 12).
- b. Immovable is anything which can not be moved from one place to another, which determined by the law according to its character (Article 1 number 13).

3. Registered and unregistered objects

- a. Registered object is anything which the ownership was determined based on the letter issued by the competent authorities (Article 1 number 14).
- b. The object is not registered is everything which the ownership was determined by the exchange or transfer of evidence between the parties (Article 1 number 15).

Beside, in Article 1 number 9 also mentioned that *Amwal* is the right that has economic value. Money and obligation bond included in this category. But money is not as commodities, but as legal tender.

Third pillars of the *akad* is the principal purpose of the *akad*. Special provisions on this point mentioned in article 25 KHES which explain that the *akad* aims to meet the needs of life and business development of each party who do *akad*. But not all the goals is justified because the purpose which justified only for legitimate *akad*. Article 28 paragraph (1) explain that a valid *akad* is an agreement which fulfill the pillars and conditions. Illegitimate *akad* when it conflicts with Islamic law, legislation, public order, morality (Article 26 KHES).

Articles 27 and 28 of the contract mentioned that the law is divided into 3 categories;

1. A legal *akad* is an *akad* which fulfill the pillars and conditions;

⁸ Ahmad Fauzi, urgensi Hukum Perikatan Islam dalam Penyelesaian Sengketa Ekonomi Syariah La Ri Ba Jurnal Ekonomi Islam vol III, No. 1, Juli, 2009
<http://journal.uin.ac.id/index.php/jei/article/view/2555/2343>

2. *Afasadakat* is an *akad* which fulfill the pillars and the conditions, but there are another things that destroy the *akad* because of the benefit;

3. A canceled *akad* is an *akad* which less filling terms and rukunnya.

The fourth pillars of *akad* is an agreement. In KHES is not found the rules of the agreement itself, governed only the blemish of a deal, that is, if the *akad* contains an element of *ghalat* (mistake), *ikrah* (coercion), *taghrir* (hoax), and *gubhn* (disguise). Based on this, there are four things that caused an imperfection agreement;

1. *Ghalath* or mistake

Article 30 explains that oversight does not impact in the cancellation of an *akad* unless the mistake occurred regarding the essence of the agreement;

2. *Ikrah* or coercion

Article 31 states coercion encourage someone to do something which not based on his freedom and article 32 states that coercion may lead to cancellation of the *akad* if the coercive able to carry it out, the parties who forced will have a strong prejudice that the enforcer will implement what they warns if it does not comply with the command of coercion soon, the threate really pressed the mind whom threatened, the threat will be carried out immediately, coercion is against the law.

3. *Taghrirat* or hoax

In Article 33 KHES mentioned that fraud is the formation of an *akad* through trickery. On the pretext for the benefit, but in fact is to satisfy their own interests. Article 34 mentioned that fraud is the reason for the cancellation of an *akad*.

4. *Gubhn* or disguise

Article 35 KHES confirms the disguise as a condition that is not a draw between achievements with rewards achievements in an *akad*. Abdul Kadir Muhammad explain that factors which influence the effectiveness of the agreement is in error, fraudulent, inappropriate influences, and inability to make an appointment.

Another important thing to note is that with regard to the principle of the *akad*.

Article 21 mentioned that the contract is done based on 11 principles:

- a. Voluntary / *ikhtiyari* (each *akad* is based on the will of the parties and not because *keterpaksaan*);
- b. Keeping promises / *amanah* (each *akad* must be implemented by the parties);
- c. Precautionary / *ikhtiyati* (each *akad* is done with careful consideration);
- d. Unchanged (each *akad* has clear objectives and avoid speculation);
- e. Mutual benefit (each *akad* is carried out to meet the interests of the parties, so avoid manipulation);
- f. Equality / *taswiyah* (the parties who implement the *akad* have an equal footing, have a draw rights and obligations);
- g. Transparency (*akad* is done openly accountable the parties);
- h. Capability (*akad* is carried out according to the ability of the parties);
- i. Ease / *Taisir* (*akad* provides convenience for each party to implement);
- j. The good faith (*akad* executed in order to enforce the benefit);
- k. Cause of halal (*akad* does not conflict with the law).

Agreements were not implemented in good faith is often called as tort or break a promise. In Article 36 KHES was explained that the party considered did break a promise if it does not do what it promised to do, carry out what is promised but not as promised, does what it promises, but too late, to do something not allowed under the agreement. Those who break their promises pursuant to Article 38 of KHES can either be sanctioned compensation payments, *akad* cancellation, intermediate risk, fines and payment of court fees. Specifically about payment of compensation, article 39 of KHES stated that compensation payments can be imposed if the party in tort after being broken promises still did break a promise, something that must be given or made may only be given or made within the time limit has been passed by, parties do break their promises can not prove that the action broken his promise not under duress.

Pillars and Conditions of *Akad*

Device of treaty law in Islam is the fulfillment of the pillars and the terms of the *akad*. Pillars is an essential element that absolutely must be there in the *akad* or *transaksi*. While the terms are elements that must exist to complete pillars⁹.

If the pillars are not met then the *akad* is not valid and irrevocable. In the case of non-fulfillment pillars about the object of *akad*, which is the object of the *akad* goods is forbidden by Islamic law, then the contract null and void. Whereas in the case of the other pillars and the conditions are not met, then the contract is not null and void, but it is not valid and may be requested cancellation.

Pillars of the contract according to the scholars are¹⁰:

⁹Faturrahman Djamil, *Penerapan Hukum Perjanjian dalam Transaksi di Lembaga Keuangan Syariah*, (Sinar Grafika, 2012) 27

1. Agreement to bind themselves (*sighat al aqd*)
2. The parties of *akad* (*al-muta, aqidain / al-aqidain*)
3. Object of the *akad* (*al-ma'qudalaih / mahal al-aqd*)
4. The purpose of the *akad* (*maudhu al-aqd*)

While the terms of the *akad*, namely: (1) the terms of the *akad* (*syuruth al-in'iqad*) everything that is required for the corresponding *akad* under *syara'*, (2) the terms of the valid *akad* (*syuruth al-shihhah*) everything that is required by *syara'* to ensure the validity of the *akad* impact (*litartibiatsarilaqdi*), (3) requirements for the implementation of the *akad* (*syuruth an-nafadz*), there are two requirements in the *akad* implementation that ownership and control / ownership (4) the requirements of legal certainty (*syuruth-an-nafadz*)

In a national working meeting of the Supreme Court in 2009 in Palembang agreed that doing Sharia economy business must observe the principles of Islamic finance which include; (1) prohibition of *riba* (*prohibition of riba*), (2) avoidance of *gharar* in the agreement (*avoidance of gharar or ambiguity in contractual agreements*), (3) the prohibition of business chance or gambling (*prohibition meisir*), (4) the practice of buying and selling or trade (*application of al bay, trade a commerce*), (5) the prohibition of illicit commodities trading (*prohibition from conducting business involving prohibited commodities*)¹¹.

Notary must notice to Sharia principles in deed covering the pillars, the terms of the deed, the economic principles of sharia and sharia principles of engagement. According Mardani¹² Sharia principle of engagement include; (A) the principle of *Ilahiyyah* (deity), every human acts are under the provisions of God and everything belongs to God, (b) the principle of *fnubuwwah* (prophetic), the Prophet Muhammad as a role model for his people in all aspects of life including the *muamalah* and in sharia contracting, (c) the principle of worship that do sharia contract intended as worship to Allah SWT, (d) the principle of *fbahah* (may) that the general principle of Islamic law in the field of Muamalat in general, (e) the principle of *huriyyah* (freedom), meaning the parties who doing sharia contract should have the freedom of contract, there is no compulsion and full awareness, (f) the principle of *musawwah* (similarity / equality), the principle of similarity or equality of the who doing an *akad* / sharia contract, (g) the principle of *'Adalah* (fairness), the parties to the contract may not have the *terdzalimi*, (h) the principle of *kitabah* (written) is a contract or engagement let be in writing or notarized, (i) the principle of *Shiddiqah* (honesty), the parties who doing a sharia contract shall be honest, there is no fraud and manipulation, (j) the principle of *Ar-Ridha'iyah* (willingness or konsensualisme), (k) the principles of *halal*, meaning that the object of the contract goods which contracted in sharia is lawful goods, (l) the principle of *Amanah* (trust), meaning the parties who doing a sharia contract must uphold the trust and not betray (defaults).

Format / Composition Of Sharia Banking Agreement Deed According Mardani, format / composition deed of agreement was made with the following composition¹³:

1. Title of the contract or agreement (Heading)

Title Funding Musharaka Contract eg.

2. The opening section (opening)

It starts with the words "Bismillahirrahmaanirrahiim" and included also the cornerstone of sharia on paragraph containing Surah in Quran / Hadith related to the title of the contract. For example Surah Al-Maidah (5): 1, which means "O you who believe, fulfill the obligation".

3. Introduction, typically include: (a) time and place when the preparation of contract is done, (b) a comparison section that contains the identity of the parties who doing contract, (c) the preamble, carried on the statement of the intent and purpose of each of the parties be taken into consideration to hold contract drafting

4. Content or material contract or agreement. Content / material contracts / agreements usually a general provision which contains definitions of important terms used in the contract.

5. The contents of the agreement. In this part, the parties put down all points or substance of the clause is deemed necessary as their willing. In these clauses are listed in detail about the object of the agreement, the rights and obligations of the parties, the full description of the achievement, supervision, insurance and dispute resolution.

6. Cover (closures). In this section, usually contains about; this agreement was made of two pieces, and both have the same legal force, the agreement is made with sufficient stamp duty.

7. Signing (attestation), the agreement signed by the parties and two witnesses.

¹⁰ Ibid, hal 28

¹¹ Ahmad Mujahidin, *Prosedur Penyelesaian Sengketa Ekonomi Syariah di Indonesia*, (Ghalia, 2010) 40

¹² Mardani, *Hukum Perikatan Syariah di Indonesia*, (Sinar Grafika, 2013) 20

¹³ Ibid, hal 76

Conclusion

Notary as a clerk guided by Surah Al Baqorah verse 282 and 283 of the Islamic contract law. An agreement or contract (transaction) is performed by two or more parties, should not be distorted and should be in line with the will of the shari'ah. The pillars of *akad* that must be fulfilled include: Agreement to bind themselves, the parties doing *akad*, object of *akad*, and purpose of *akad*. While the terms of *akad*, specifically: (1) necessary for *anakad* that is everything required for the contract appropriate by *syara'*, (2) requirements for a valid *akad* that is everything required of *syara'* to ensure the validity of the impact of the agreement, (3) requirements for the implementation of the *akad*, there are two in the implementation of the *akad*, ownership and control / ownership (4) the requirements of legal certainty.

References

- Karim, Adiwarman, *Bank Islam Analisis Fiqh Dan Keuangan*. (The International, Institute of Islamic Thought Indonesia, 2003)
- Antonio, Muhammad Syafii, *Bank Syari'ah Dari Teori ke Praktik*, (Gema Insani Press, 2001)
- Ali, Zainuddin, *Hukum Ekonomi Syariah*, (Sinar Grafika, 2008)
- Anshori, Abdul Ghofur, *Penerapan Prinsip Syariah Dalam Lembaga Keuangan: Lembaga Pembiayaan dan perusahaan Pembiayaan*, (Pustaka Pelajar, 2008)
- NurKholis, Potret Politik Ekonomi Potret Politik Ekonomi Islam Di Indonesia Era Reformasi, dalam www.uui-ac.id, accessed on February 10th, 2015.
- Djamil, Faturrahman, *Penerapan Hukum Perjanjian dalam Transaksi di Lembaga Keuangan Syariah*, (Sinar Grafika, 2012)
- Mujahidin, Ahmad, *Prosedur Penyelesaian Sengketa Ekonomi Syariah di Indonesia*, (Ghalia, 2010)
- Mardani, *Hukum Perikatan Syariah di Indonesia*, (Sinar Grafika, 2013)
- Wiryono, Wahyu (2006). Penyelesaian Sengketa Bank Syari'ah, makalah dalam Pelatihan Penyelesaian Sengketa Ekonomi Syari'ah di Pengadilan Agama, on July 8th, 2006, Islamic Indonesia University Yogyakarta.
- Ahmad Fauzi, Urgensi Hukum Perikatan Islam dalam Penyelesaian Sengketa Ekonomi Syariah La Ri Ba Jurnal Ekonomi Islam vol III, No. 1, July, 2009