

THE REGULATION OF MURABAHAH FINANCING CONTRACT IN SAVING AND LOAN COOPERATIVE AND SYARIAH FINANCE IN LEGAL CERTAINTY PERSPECTIVE

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ABSTRACT

The murabaha financing contract in the saving and Loan Cooperative and Syariah Finance (KSPPS) are formulated in two ways; using under hand and notarial certificate. These two ways are valid based on their validity perspective. However, based on the Theory of Legal Certainty from Gustav Radburch, that legal certainty gives clear, permanent, consistent and consequent legal treatment where the implementation cannot be interrupted by any subjective condition. The legal correlation between KSPPS and its customer stated in the murabahah financing contract is formulated in the form of under hand certificate, whereas in the theory of legal certainty the Authentic Certificate should be the main choice because it fulfills all the elements. Besides as the perfect document based on the regulation Act 1868 of the Civil Code, the Authentic Certificate become the perfect evidence, that the judge must accept and consider the written content in the certificate truly correct and the judge cannot ask for adding another evidence.

Keywords: Regulation, murabahah contract, KSPPS, Legal Certainty.

INTRODUCTION

The legal correlation between the Saving and Loan Cooperative and *Syariah* Finance (KSPPS) and their customer refers to contractual correlation, that when a correlation made with the customer based on the Indonesian engagement, the engagement refers to agreement or contract.

Any financing agreement in KSPPS is made in written contract formulated between KSPPS and customer. Some contracts in KSPPS unknown in the Indonesian legal system and practice belong to development of contractual freedom principle.

The legal fundamental related to freedom to make contract refers to the law Act 1338 of the Civil Code, stating that any agreement legally formulated and apply as the regulation for those who have made it and cannot be withdrawn unless with agreement of the two parties or because of reasons stated in the law and must be implemented in good deed. Therefore, using the law means there is no obstacle for Muslim to arrange correlation among parties.

The substance of financing contract based on syariah in KSPPS in general the same as conventional cooperative, however, the difference appear in the loan purpose and specific clause that happen only in financing contract. The difference for each financing contract is the form for substituting credit interest in the conventional cooperative, between profit sharing ratio or profit *margin* in KSPPS.

Any trade must be arranged under regulation and Islamic ethic norm, as stated by syariah. The Islamic system forbids exploitation and injustice in any parts of the involved parties. In order to get the purpose, syariah require several prohibitions and recommended some ethics.

The study of Islamic finance basically refers to ethic system and it belongs to separate of the system that made difference Islamic to materialism that Islam does not separate economy and

ethic, as well as not separate science and morals, politic and war ethic, and family in Islamic life. Islam is message from Allah through His prophet to recover the human morals. The prophet saw said: “*Indeed, I was sent to accomplish good morals.*” Islam also differs from capital concept that separated between morals and economy.

The collaboration between ethic and business mean force religious norms to the business world, fix ethic code of business profession, revise the economic system and law, develop skill to fulfill ethic claims from outside parties to get save, and others. Ethic business refers to business with fair commitment in keeping social contract working. Social contract means promise to keep.¹

The business ethic arranges legal aspect of belongings, management and distribution of property. Thus, the syariah business ethic covers:²

- 1) Refuse monopoly
Monopoly is domination of product and/or distribution of certain goods and/or service by one businessman.³
- 2) Refuse exploitation
- 3) Refuse discrimination
- 4) Ask for balancing between right and duty
- 5) Avoid unhealthy competition.

Act 1 number 6 of the Law number 5 of 1999 on the Prohibition of Monopoly Practice and Unhealthy Competition, unhealthy competition mean competition between businessmen in doing production and/or distribution of goods and/or service conducted in unfair ways or against the law or inhibit business competition.

RESEARCH METHOD

This study focus on normative legal research, analyze legal substance that related to analysis normative method, and start from legal regulation having authority power as the primer legal material. The study applies statute approach and conceptual approach. The research material use primer and seconder legal materials. The primer legal material with authoritative characteristic means having authority. The primer legal material in this study cover:

1. Al- Qur’an
2. Al- Hadits
3. The Civil Code (*Burgerlijk Wetboek*). Translated by R. Subekti and R. Tjitrosudibyo.
4. The Law number 25 of 1992 on Cooperative (Paper of Indonesian Republic number 112)
5. The Law number. 42 of 1999 on Fiduciary (Paper of Indonesia Republic No. 168, Additional State Paper no. 3889. Issued on 30 September 1999)
6. The law Number 12 of 2011 on The Formulation of Regulation (State Paper of Indonesian Republic No. 82)
7. Perma No. 2 of 2008 on Compilation of Syariah Economy Law (KHES)

¹ Veithzal Rivai and Andi Bukhari, *Islamic Economic*, (Jakarta : Bumi Aksara, 2009), p. 234.

² Ahmad Hasan Ridwan, *Manajemen Baitul Mal wat Tamwil*, (Bandung : Pustaka Setia, cet. 1, 2013), p. 6.

³ See Article 1 number Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition.

8. The Minister regulation of Cooperative, and Small and Medium Business number: 19/Per/M. KUKM/XI/2008 on the Guide of Implementing Saving and Loan Business by Cooperative.
9. The Minister regulation of Cooperative, and Small and Medium Business number: 16/Per/M. KUKM/IX/2015 on the Implementation of Saving and Loan Business and Syariah Finance by Cooperative.
10. Fatwa DSN-MUI /II/2005 on Resolution of Murabahah Credit for the Customer Who Cannot Pay.

The analysis collection of research legal material is conducted with some steps as follow: First step is collecting the primer and seconder legal materials as long as the content relevant to the main problem of the study. Second step, conducting systemizes and interprets toward the primer legal material and following with analyzing qualitative judicially, the legal analysis based on legal reasoning and legal argumentation systematically. Third step is drawing conclusion in argumentative form to answer the Legal Issues. Fourth step, giving prescription (recipe/formula) based on argumentation constructed in the conclusion.

RESULTS AND DISCUSSION

The certificate is written statement signed and made by someone or more and the parties stated can use it as evidence in the legal process.⁴ This certificate refer to letter with signature, involving events as the fundamental of a right or agreement, made on purpose as proof to be categorized as certificate that the main requirement should be being signed, lined with the regulation act 1869 of the Civil Code.

This certificate divide into two forms, Authentic Certificate and Under Hand Certificate, whereas based on the maker, it divide into two forms, officer certificate (*ambtelijk acte*) and parties certificate (*partij acte*).

According to Act 1868 of the Civil Code, Authentic Certificate is certificate with form arranged by the law, made by and in front of general officer related where he certificate formulated. This certificate become perfect evidence, meaning that if the certificate proposing to the judge as an evidence, the judge must accept it and consider the content written in the certificate truly happen, and the judge must not order another proving.

The notarial certificate in legal country specially in Indonesia has crucial function, being approved as certificate that has perfect evidence power, the notarial certificate has place as the first and priority proof in the civil proving law, thus, it need to arrange the certificate in certain way that its power of notarial proofing would not be boomerang for those who made it.

The Act 15 of the Indonesian Republic Law number 2 of 2014 on the Changing on The Law number 30 of 2004 on Notarial Position, state:

(1) Notary public has authority to make authentic certificate on any deed, agreement, and decision being ordered by the law and/or being purposed by those who has interest to state in the authentic certificate, guaranty the certainty of date making, keep the certificate, give *grosse*, copy and quote of the certificate, all of those as long as the certificate making not giving or excepted to another officer or other person as stated in the law.

(2) Besides the authority as stated in verse (1), Notary public also has authority to:

⁴ R. Soeroso, *Perjanjian Di Bawah Tangan, Pedoman Praktis Pembuatan dan Aplikasi Hukum*, (Jakarta : Sinar Grafika,2011), hlm. 6

- a. Legitimate signature and state the certainty of date of under hand letter by registering it in special book;
- b. Record the under hand letter by registering it in special book;
- c. Make copy of original under hand letter in form of copy containing description as stated and described in the related letter;
- d. Do legitimation of copy compatibility with the original letter;
- e. Give legal explanation related to certificate formulation;
- f. Make certificate related to land; or
- g. Make certificate of minutes of auction.

(3) Other than authority as stated in the verses (1) and (2), Notary public has other authority arranged in the legislation. The purpose of other authority provision arranged in the law Act 15 verse (3) of the Indonesian Republic Law number 2 of 2014 on the Changing of the Law number 30 of 2004 on the Notary Position refer to PPAT position (Land Titles Registrar), The Second Class Titles Registrar, notary as the Officer of Cooperative Certificate Maker (NPAK), and Notary of Capital Market and other Authority arranged in the legislation.

In line with concept of legal certainty theory from Gustav Radburch, legal certainty refer to a regulation made and issued clearly, certain, and logically; clear mean there is no vague of norm or doubt, logic mean become a system of norm with other norms that there would be no crash or result in conflict of norm. The legal certainty give legal treatment that clear, permanent, consistent, and consequent, where the implementation cannot be interrupted by any subjective condition. The legal correlation between KSPPS and customer stated in the murabahah financing contract is made in the form of under hand contract, while in the theory of legal certainty, the authentic certificate become the main priority, because the certificate cover all the elements. Besides as the perfect certificate as stated in Act 1868 of the Civil Code, Authentic Certificate give clear, permanent, consistent, and consequent legal treatment where in the implementation there cannot be influenced by any subjective condition. This authentic certificate become perfect evidence meaning that when it giving to the judge as a proof, the judge must accept it and consider that the content written truly happened, and the judge cannot ask for another proof.

According to Gustav Radburch, as the pioneer of theory of *Rechtsidee*, the legal purpose generally to obtain justice (*grechmategheid*), beneficiary (*rechtmategheit*), and certainty (*doelmatigheit*), the three of them become the main purposes from the beginning of formulation, implementation, and upholding the legal rule. Without any legal purpose, rule being made become useless, the legal purpose become parameter with regulative and constructive characteristics, that without any purpose then the legal product will lose its meaning.⁵

Murabahah contract formulated in front of Notary may give legal certainty as well as show equal duty between KSPPS and the customer, and enable to make agreed restrictions as long as not contradictory to the law as the fundamental of the agreement. The existence of murabahah contract made in front of Notary also become Notary Protocol that is state document that the availability of the agreement can be documented and kept well as the legal certainty fundamental to guaranty right and duty of the parties in the contract.

According to the theory of Legal Certainty from Gustav Radburch, the notary contract will give fundamental contribution toward legal certainty and of the agreement between KSPPS and the customer because the condition of a regulation is made and issued clearly,

⁵ Esmi Warassih, *Op. cit.*, p. 217

permanent and logical, where clear mean there is no vague of norms, or doubt and logical mean becoming a norm system with other therefore there is no crash or result in conflict of norm.

The legal certainty will be obtained with the availability of murabahah contract made in front of the notary for the two parties, and other parties related, because the murabahah contract able to give legal implementation that is clear, permanent, consequent, and consistent, in which its implementation cannot be influenced by any subjective condition.

Other legal purposes refers to obtain beneficiary not only for the parties or one or two person, but also for wide society. KSPPS shows that in the implementation of financing activity have used careful principle based on Act of Permenkop 16 of 2015 one of them to make murabahah contract in front of notary. Because the contract made in front of the notary, the parties agree to fulfill their duty publicly not merely for the related parties. For, the murabahah contract made in front of the notary has become state document, and made by public officer.

The murabahah contract made under hand still happen, however according to the writer, at least there are some consideration why murabahah contract in KSPPS must be formulated written way with notarial contract, starting point from theory of Gustav Radburch, to get First legal certainty, in line with the Al-Qur'an Surah Al-Baqarah verse 282 :

Meaning:

“O ye who believe! When ye deal with each other, in transaction involving future obligation in a fixed period of time, reduce them to writing. Let a scribe write down faithfully as between the parties: let not the scribe refuse to write: as Allah has taught him, so let him write”.

Al-Qur'an Surah Al-Baqarah verse 282 above give priority stating justice than stating knowledge taught by Allah SWT, because justice besides claim for knowledge that fair implemented , it also because a justice one who does not know, his justice will push him to study. Unlike those who know but do injustice, in that moment his knowledge will be used to cover his injustice. He will find legal way to correct his abuse and avoid the sanction.

Second, in Act 1 verse (1) the Law of Indonesian Republic number 2 of 2014 on the Changing of Law number 30 of 2004 on Notary Position states:

Meaning:

“Notary refers to public officer who authorize to make authentic certificate and have other authority as stated in the Law or based on other laws.”

In Act 15 verse (1) the Law of Republic Indonesia number 2 of 2014 on the Changing of the Law number 30 of 2004 on Notary position, state:

Notary has authority to make authentic certificate relate to any deed, agreement, and issuing required by legislation and/or purposed by those who interest to state in the Authentic certificate, to guaranty date certainty of formulating the certificate, keep the certificate, give grosse, copy and quote of the certificate, all of them as long as the certificate formulation does not distributed or exception to other officer or other person who stated in the law.

Third, according to Habib Adjie⁶ based on the Legislation Act 8 verse (1) the law number 12 of 2011 o Formulation of Legislation stated or decided that an agreement or legal that a deed or legal action must be made in form of notary certificate, that made and issues by:

⁶Habib Adjie, *Penafsiran Tematik Hukum Notaris Indonesia*, (Bandung : PT. Refika Aditama, 2015), p. 11-12

- (1) Consultative assembly;
- (2) House of Representative;
- (3) Regional Representative Council;
- (4) Supreme Court;
- (5) Constitution Court;
- (6) Financial Audit Body;
- (7) Judicial Commission;
- (8) Bank of Indonesia
- (9) Ministers;
- (10) Body, institution, or commission in the same level and formulated based on the law or government by order the law;
- (11) Regional Legislator in Regency/City, Head of Regency/City;
- (12) The Head of Village or in the same level.

According to Habib Adjie above, the legislation Act 8 verse (1) the Law number 12 of 2011 on Formulation Legislation Points (9), considering Saving and Loan Cooperative and Syariah Financial based on the Regulation of the Minister of Cooperative and Small and Medium Business of Indonesian Republic number 16/Per/M.KUKM/IX/ 2015 on the Implementation of Saving and Loan Business Activity and Syariah Finance by Cooperative Act 1 verse (1):

Cooperative is business board with members of person or cooperative legal board based on cooperative principle at a time as the movement of people economy in line with family principle as stated in the legislation of cooperative.

According to the Regulation of the Minister of Cooperative and Small and Medium Business of Indonesian Republic number 16/Per/M.KUKM/IX/ 2015 on the Implementation of Loan and Saving Business Activity and Syariah Finance by cooperative KSPPS refers to legal board made based on the Minister regulation, thus, any deed or legal action must be constructed in form of notary certificate, therefore, the murabahah financing contract made by KSPPS, should be made in form of notary certificate to get legal certainty.

CONCLUSION

The Legal Certainty give legal treatment in clear, permanent, consistent, and consequent ways in which its implementation cannot be influenced by any subjective condition. The legal correlation between KSPPS and Member/candidate of member stated in the contract of murabahah financing is formulated in form of under hand contract. Meanwhile, in the legal certainty theory automatically the Authentic Certificate become main choice, because it fulfill the elements. Beside as the perfect certificate based on the regulation Act 1868 of the civil code, the Authentic Certificate gives legal implementation that is clear, permanent, consistent and consequent, in which its implementation cannot be interrupted by any subjective condition. The Authentic certificate become perfect legal evidence, meaning that if the certificate hand in to the judges evidence, the judge must accept it and consider the written content in the certificate truly correct, and the judge cannot order another additional evidence.

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