

SHARIA BANKING DISPUTES SETTLEMENT: Analysis of Religious Court Decision in Indonesia

Nur Hidayah*, Abdul Azis, Tira Mutiara, Diah Larasati

Universitas Islam Negeri Syarif Hidayatullah Jakarta

Jl. Ir H. Juanda No.95, Ciputat, Kec. Ciputat Tim., Kota Tangerang Selatan, Banten 15412

*email: nurhidayah@uinjkt.ac.id

DOI: 10.30631/alrisalah.v23i1.1347

Submitted: April 01, 2023; Revised: May 30, 2023; Accepted: June 09, 2023

Abstract: This study aims to analyze Sharia banking disputes settlement in Religious Court regarding Sharia compliance and state regulations. The data were obtained from the Supreme Court of the Republic of Indonesia website on Profit Sharing (PLS) financing, *musyarakah*, and non-profit Sharing (non-PLS) financing, *murabahah*. This is a legal empirical study with a comparative approach. The results showed Sharia banking disputes occurred partly due to the existence of legal loopholes and the general nature of the existing rules, which lead to multiple interpretations. Disputes were mainly caused by default and unlawful acts. Furthermore, there were differences in the judge's decision between the two case studies concerning the fulfillment of legal principles, including benefits, justice, and legal certainty. Regarding the suitability of the contract, in *murabahah* case, the pillars and conditions have been fulfilled, but there are other factors that damage the contract. Therefore, there is an urgent need to strengthen regulations related to more detailed financing contracts. The regulators are expected to promote an Islamic banking regulatory framework that guarantees legal certainty for both customers and Islamic financial institutions, as well as provide a stronger legal basis for disputes settlement.

Keywords: Sharia Banking Disputes, PLS, *Musyarakah*, Non-PLS, *Murabahah*, Stakeholders

Abstrak: Penelitian ini bertujuan untuk menganalisis penyelesaian sengketa perbankan syariah di Pengadilan Agama terkait Syariah compliance dan peraturan negara. Data tersebut dikumpulkan dari website Mahkamah Agung Republik Indonesia tentang pembiayaan Bagi Hasil (PLS), *musyarakah*, dan pembiayaan nirlaba Bagi Hasil (non-PLS), *murabahah*. Penelitian ini merupakan penelitian empiris hukum dengan pendekatan komparatif. Hasil penelitian ini menunjukkan bahwa sengketa perbankan syariah terjadi antara lain karena masih adanya celah hukum karena aturan yang berlaku bersifat umum sehingga menimbulkan multitafsir. Perselisihan tersebut terutama disebabkan oleh wanprestasi dan perbuatan melawan hukum. Terdapat perbedaan putusan hakim pada kedua studi kasus tersebut terkait pemenuhan asas hukum berupa kemanfaatan, keadilan, dan

kepastian hukum dalam putusan yang dibuat. Mengenai kecocokan akad, dalam kasus *murabahah*, rukun dan syaratnya telah terpenuhi, namun ada hal-hal lain yang merusak akad tersebut. Ada kebutuhan mendesak untuk memperkuat peraturan terkait dengan kontrak pembiayaan yang lebih rinci. Regulator harus mempromosikan kerangka peraturan perbankan syariah yang menjamin kepastian hukum bagi kedua belah pihak, nasabah dan lembaga keuangan syariah, serta memberikan dasar hukum yang lebih kuat untuk penyelesaian sengketa.

Katakunci: Sengketa Perbankan Syariah, PLS, *Musyarakah*, non-PLS, *Murabahah*, Stakeholder

Introduction

Islamic banking has continuously experienced significant growth, with a market share of 7.03% as of July 2022, supported by 12 Sharia commercial banks, 21 Sharia business units, and 166 Sharia rural banks¹. This growth can be attributed to the expansion of various financing products, including profit and loss sharing (PLS), such as *mudharabah* and *musyarakah* financing, as well as non-profit and loss sharing financing (non-PLS), namely *murabahah* financing.

Despite PLS and non-PLS financing facilities provided by Islamic Banks, disputes and conflicts still arise among the parties involved. Such conflicts may be caused by one party engaging in unlawful acts that harm the other or refusing to honor the terms of the agreement. Sharia banking disputes can be resolved through litigation in Court or non-litigation methods, such as deliberation, mediation, and arbitration. However, most disputes are typically resolved through Court to achieve benefits, justice, and legal certainty from the results of decision.

According to Article 49 of Law No. 3 of 2006, which amends Law No. 7 of 1989,

Religious Court have the authority to examine and decide Sharia economic cases. The article elucidates Sharia economics as actions or business activities conducted in accordance with Sharia principles, including Islamic banks.² The authority of Religious Court is strengthened by the Supreme Court Decision No. 93/PUU-X/2012 concerning Explanation of Article 52 Paragraph (2) of Law No. 21 of 2008, clarifying that Religious Court are solely empowered to resolve Sharia banking disputes.³

In the resolution of Sharia banking disputes, Religious Court rely on various legal materials, including contracts (contract contents), Compilation of Sharia Economic Law (KHES) enforced as applied law through Supreme Court Regulation (PERMA) No. 2 of 2008,⁴ Jurisprudence, Fatwa of the National Sharia Council-Indonesian Ulema Council (DSN-MUI), and Fiqh, which is the doctrine and knowledge of Islamic law (Sharia). The source of formal law that applies in Religious Court to resolve Sharia banking disputes is procedural law, relevant in the General Court environment unless there are special rules.

¹ Otoritas Jasa Keuangan, "Statistik Perbankan Syariah Juli 2022" (Jakarta, 2022).

² "Undang-Undang Peradilan Agama, UU No.50 Tahun 2009 Jo. UU No.3 Tahun 2006 Jo. UU No.7 Tahun 1989, LN No.159 Tahun 2009 TLN NO. 5078 Jo. LN No.22 Tahun 2006 TLN No.4611 Jo. LN No.49 Tahun 1989 TLN No.3400." (2006).

³ Mahkamah Agung, "Putusan Mahkamah Agung No. 93/PUU-X/2012 Tentang Penjelasan Pasal 52 Ayat (2) Undang-Undang No. 21 Tahun 2008," 2012.

⁴ "Peraturan Mahkamah Agung Republik Indonesia No. 02 Tahun 2008 Tentang Kompilasi Hukum Ekonomi Syariah" (2008).

Until the end of 2022, there were 76 Sharia banking disputes cases in DKI Jakarta, comprising 18 cases at the first level, 13 at the appeal level, 7 at the cassation, and 1 case at the review level. The majority of these disputes shared similar causal factors, such as default, unlawful acts, and defective contracts. For instance, in the case of Number 1901/Pdt.G/2016/PA.JS, banking sector conducted auctions for collateral rights outside Court with different execution before the application and default cases were brought to Religious Court. This situation is related to Sharia Banking Product Standards of *Musyarakah* and *Musyarakah Mutanaqishah* in Authority Financial Services. According to the regulations, BUS/UUS/BPRS parties are not permitted to execute collateral and guarantees upon the occurrence of arrears or default, unless Court declares the customer's negligence and grants the right to execute collateral and guarantees⁵. This practice should adhere to Law Number 4 of 1996 concerning Mortgage Rights on Land and Objects Related to Land as well as the OJK *Musyarakah* Operational Standard Book.

Case Number 2860/Pdt.G/2013/PA.Mr related to non-PLs financing disputes, specifically *murabahah* contract, was considered invalid due to the discrepancy between the contract and DSN MUI Fatwa Number 4/DSN-MUI/IV/2000. Where should *murabahah* contract be formulated in terms of purchasing goods? In this particular contract, the loan was in the form of venture capital⁶. The study examined the factors influencing the judge's decision-making process. In addition to the contract's inconsistency, the judge also considered the

provision within the contract, stating that any disputes will be resolved at Sharia Arbitration Board, thereby denying religious Court the authority to adjudicate. Contracts are laws that apply to the contracting parties and can serve as a reference for disputes resolution.

Nur also studied settlement of *murabahah* contract disputes between Sharia Bank X and PT AS at the National Sharia Arbitration Board. In this case, Bank Syariah X was found to have breached a promise by defaulting on the termination of financing for PT AS, and its employees violated Standard Operating Procedures (SOP). The arbitrator made decision based on the contractual agreements and referred to relevant regulations, such as Sharia Banking Law, the DSN MUI Fatwa, the Arbitration Law, and the Civil Code. The study focused on understanding how the arbitrator considered the case when making decision.⁷

The increasing number of disputes indicated that the financing products offered by Sharia Banks had not reached the "ideal point." Therefore, the banks should exercise greater caution in implementing financing products and deepen their understanding of Sharia principles before applying them in the field to minimize future disputes. Although several studies have been conducted on Islamic banking disputes resolution, most of them only examined specific type of financing. The studies also failed to demonstrate the differences in disputes between PLS and non-PLS financing regarding contract schemes, causal factors, and loopholes.

⁵ Shofa Fathiyah and Nurhasanah, "Eksekusi Jaminan Hak Tanggungan Nasabah Wanprestasi Akad *Musyarakah* Dalam Perspektif Perlindungan Konsumen," *JHR (Jurnal Hukum Replik)* 7, no. 1 (March 2019): 78.

⁶ Afifi Titazahra, "Analisis Hukum Penyelesaian Sengketa *Murabahah* Di Pengadilan Agama (Studi Kasus Putusan Pengadilan Agama Mojokerto

Nomor 2860/Pdt.G/2013/PA.Mr)," *Jurnal Justisia Ekonomika* 2, no. 2 (2018): 10.

⁷ Mohamad Nur, "Analisis Penyelesaian Sengketa Akad *Murabahah* (Jual-Beli) Antara Bank Syariah – X Dengan PT AS Di Badan Arbitrase Syariah Nasional -Majelis Ulama Indonesia (BASYARNAS-MUI)," *Jurnal Ilmu Pendidikan Nonformal Aksara* 6, no. 2 (Mei 2020): 154.

The present study aims to analyze Islamic banking disputes decision on PLS (*musyarakah*) and non-PLS (*murabahah*) financing contracts in Religious Court and assess the conformity of both contracts in Islamic Banks with Sharia principles and regulations. It also aims to investigate the deficiencies in the performance of the contracts from various stakeholders, namely Islamic Banks, customers, and the Government. Disputes case study used included Jakarta PTA Decision No. 83/Pdt.G/2020/PTA.JK Jo. Central Jakarta PA Decision No. 950/Pdt.G/2019/PA.JP and decision of the Supreme Court of the Republic of Indonesia No. 401 K/Ag/2022 Jo PTA Jakarta Decision No. 162/Pdt.G/2019/PTA Jo. South Jakarta PA Decision No 1957/Pdt.G/2018/PA.JS. It is hoped that this study will have implications for Islamic Banks, guiding them to pay closer attention to the suitability of implementing PLS and non-PLS financing in accordance with Sharia principles to minimize the occurrence of disputes. It will also provide recommendations for stakeholders regarding the regulation and performance of both contracts.

Method

This is a type of empirical legal study through focusing on a phenomenon or situation of the object in detail by gathering the facts that occur and developing existing concepts. Secondary data obtained from Sharia banking disputes decision were used, particularly those related to disputes on PLS financing (*musyarakah*), such as Jakarta PTA Decision No. 83/Pdt.G/2020/PTA.JK Jo. Central Jakarta PA Decision No. 950/Pdt.G/2019/PA.JP and non-PLS financing (*murabahah*), namely Decision of the Supreme Court of the Republic of Indonesia No. 401 K/Ag/2022 Jo PTA Jakarta Decision No. 162/Pdt.G/2019/PTA Jo. South Jakarta

PA Decision No 1957/Pdt.G/2018/PA.JS. The data were collected from decision directory website of the Supreme Court of the Republic of Indonesia.

A comparative study approach was employed, which analyzed the suitability of contract implementation in PLS and non-PLS financing within Islamic Banks according to Sharia principles and regulations. Furthermore, stakeholders analysis method was utilized to analyze deficiencies in implementing the contracts from Islamic Banks, customers, and the Government, with the aim of providing policy recommendations for the future.

Results and Discussion

Case Study of Sharia Banking Disputes on PLS (*Musyarakah*) & Non-PLS (*Murabahah*) Financing Contracts

1. Decision of the Jakarta Religious High Court No. 83/Pdt.G/2020/PTA.JK Jo. Decision of the Central Jakarta Religious Court No. 950/Pdt.G/2019/PA.JP

The first disputes case study focused on *musyarakah* contract, wherein it was agreed that the amount of capital would be 16.65% from the customer and 83.35% or 649,050,000,000 IDR from Islamic banks, with collateral including land and buildings in four locations as well as office space at Plaza Asia with an area of 333 M2. The installments paid amounted to 20,042,941,665 IDR, with the most recent payment made in August 2018 (Table 1).

Disputes occurred because Sharia Bank held a guarantee auction for state and private auction companies with letter No. S-1040/WKN.07/KNL. 02/2019 on April 15, 2019. Subsequently, on April 22, 2019, the customer attempted to offer a payment of 30,800,000,000 IDR to the Bank for the redemption of collateral assets. The customer felt disadvantaged over the execution of the auction conducted by the Bank because the

contract had not reached maturity. In addition, the Bank issued a subpoena on May 24, 2019, while the auction execution was submitted on April 15 and scheduled for July 9, 2019. The subpoena contained outstanding amounts of 647,216,245,819 IDR, principal arrears of 9,682,304,529 IDR, and profit sharing (PLS)/margin arrears of 2,431,509,562 IDR. In this case, the customer felt that the amount of debt had changed from 629,007,059,535 IDR after deducting the installments paid.

The auction was announced through a leaflet on June 10, 2019, as the initial auction announcement. It was also advertised in the newspaper "Berita Harian" on June 25, 2019, and through an online auction application. Before the auction, the Islamic Bank had sent letter no. 326/SRM-SRT/V/2019 on May 16, 2019. The auction took place on July 9, 2019, with no bids received, which was valid according to law, as indicated by the issuance of Minutes of Auction No. 381/26/2019 dated July 9, 2019. The contestants and the resisters entered into a joint venture with land and building collateral, as stated in *Musyarakah* No. 52, dated April 27, 2015. The customer did not make payments or installments from August 2018 to April 2019, causing the Bank to conduct an execution auction based on the provisions of Article 6 UUHT No. 4 of 1996, with the assistance of the auction agency.

The Panel of Judges considered that the execution of the auction violated Article 224 HIR because a forced order occurred when it was ordered by the head of the PA Central Jakarta and the head of Court, rendering the Mortgage certificate devoid of legal force. Since *musyarakah* contract had not matured, and the contrarian had defaulted, the execution of auctions without any bids led to no result or legal certainty. Circular Letter from the Agency for State Receivables and Auction Affairs (BUMN) No. SE-21/PN/1998, in conjunction with SE-23/PN/2000 regarding the implementation

guidelines for Article 6 of Law no. 4 of 1996 concerning Mortgages, states that Parate execution of Mortgage rights can be carried out directly without a fiat from Court. This can allow the Bank to conduct an auction in the event of debtor default. However, due to the implementation of different execution in the quo case, along with the underlying motive, the UUHT faced juridical constraints. This specifically includes the confusion or normal conflict between Article 6 of Law Number 4 of 1996 Concerning Mortgage Rights on Land and Objects Related to Land and Article 224 HIR. The Central Jakarta Religious Court declared the execution of the auction by Bank Syariah X as invalid.

The Panel of Judges at the appellate level accepted and agreed with decision at the first level. According to Article 1338 of the Criminal Code Jo. Article 44 PMA RI No. 2 of 2008 concerning KHES, all contracts made by parties should comply with the applicable law. The auction conducted by the Islamic Bank was declared invalid, null, and void because it was not determined by the Chairperson of the PA whose jurisdiction covered the dependent object in question. In the event of debtor default, the creditor can utilize and manage mortgage rights, followed by the issuance of SHT based on PA determination.

The occurrence of default serves as the fundamental factor leading to disputes. Therefore, the creditor still has the right to fulfill the contract, when feasible, and is entitled to compensation, either simultaneously with the fulfillment of the achievement or as an exchange for its completion. After default, the overmatch lacks the authority to release the debtor. In a contract established on reciprocal agreement, the default of the first party grants the other party the right to petition the judge for contract cancellation, thereby releasing the Plaintiff from their obligations.⁸

⁸ Gita Anggreina Kamagi, "Perbuatan Melawan Hukum (Onrechtmatige Daad) Menurut Pasal 1365 Kitab Undang-Undang Hukum Perdata Dan

Perkembangannya," *Lex Privatum* VI, no. 5 (July 2018): 62.

The study experts believed that decision of the Panel of Judges adhered to the principles of benefits, justice, and legal certainty. The emphasis on legal benefits can be observed through decision rendered in the form of an invalid auction conducted by a bank for an unmatured customer, even though a default occurs on the customer's part. It is crucial to execute auctions based on Court fiat. The principle of justice can be observed in decision to permit the execution of auctions conducted by the Bank on the due date. This decision aims to protect the Bank from losses due to customers' default. The principle of legal certainty can be seen from the judge's decision that action should be carried out in accordance with the existing decision. As a result, both the opposing and defending parties were obligated to comply with the judge's ruling.

2. Supreme Court Decision No. 401 K/Aug/2020 Jo. Jakarta High Court Decision No. 162/Pdt.G/2019/PTA Jo. South Jakarta Religious Court Decision 1957/Pdt.G/2018/PA.JS

The second disputes case study addressed *murabahah* contracts. The customer felt disadvantaged, alleging that Bank Syariah X changed the deed of *murabahah* financing from 47 vehicle units to 37, while the contract value remained unchanged at 30,000,000,000 IDR with a profit of 11,882,851,529.90 IDR. The customer claimed 10,500,000,000 IDR losses attributed to the decrease in vehicle unit prices, 10,800,000,000 IDR resulting from the non-utilization of ten vehicle units and heavy equipment for business purposes, as well as 1,000,000,000 IDR for immaterial losses (Table 2).

Islamic banks stated that the customer's guarantee had been transferred to another bank. The customer had failed to make any installment payments as per the contract since November 2016, and also agreed to modify the contents of the contract, reducing

the number of vehicles from 47 to 37 by purchasing the vehicle directly from the supplier. The reduction in vehicle units did not affect the amount of the financing facility as the customer acknowledged and accepted this change. The Bank withheld copies of the documents due to the customer's failure to pay an administrative fee of 330,000,000 IDR. The customer still had an outstanding debt of 36,068,062,187.21 IDR, and Islamic banks had incurred losses of 500,000,000 IDR. Therefore, in these disputes, the Bank demanded the payment of 10,000,000 IDR per day for the delay in carrying out the contents of decision and payment of all Court fees.

The panel of Judges relied on various legal sources, with the investment financing contract for transferring financing using *murabahah* principle no. 229 and wakalah contract No. 230 dated 31 July 2013 being the most significant. Article 1338 of the Criminal Code states that "All contracts made legally are applicable as law for those who make them." Article 22 KHES regarding the pillars of the contract, includes, the contracting parties, the object of the contract, the primary purpose of the contract, and the contract itself. Therefore, the Panel of Judges considered the contract between the customer and Bank null and void as it did not fulfill the contract's pillars, specifically the contract's object.

According to Article 36, Supreme Court Rules No. 02 of 2008 concerning KHES, "A party can be considered to have breached a promise, when, due to their mistakes, "fail to fulfill what they promised." Article 38 Perma No. 02 of 2008 concerning KHES states that "Parties who breach a contract may be subject to sanctions, including paying compensation, canceling the contract, transferring risk, fines, and paying Court fees." The Bank and Notary cannot be held responsible for immaterial losses, and the forced money is no longer valid since the contract was canceled.

MA Jurisprudence No. 2123/K/Pdt/1996 states that to assess a default, it is wrong to base the application of the law on factors outside the contents of the agreement, even when there is a contract the parties failed to implement. Since the investment financing contract for transferring financing using *murabahah* principle has been canceled, there are no more default parties. The customer cannot be burdened with the payment of the remaining margin debt or the bank losses, but only the principal debt of Rp. 21,243,190,172. The Bank cannot accept *dwangsom* money. The application for confiscation was rejected based on SEMA No. 3 of 1978.

The Panel Judge at the appeal level stated that the customer's claim at the first level could not be accepted unless evidence of P-11, namely the Deed of Transfer of Financing Investment Contract Using *Murabahah* principle No. 229 dated July 31, 2013, clarified whether the original agreement deed was still under investigation by the North Jakarta Police. The Jakarta Religious High Court decided to overturn decision of the South Jakarta Religious Court, rejected the exception of Bank Syariah X, declared the customer's claim unacceptable, imposed Court costs on the customer from the first instance, and allowed for an appeal.

The Indonesian Supreme Court Decision on Cassation Level emphasized the customer could not prove which deed was genuine or fake. Therefore, decision of the Panel of Judges at PA South Jakarta to grant the customer's claim, was wrong. The PTA Jakarta was also wrong as the defendant/appellant could not be declared to have committed an unlawful act. The judge cancelled the PTA Jakarta Decision, rejected the exception of Bank Syariah X & Ny. X, dismissed the customer's claim as

unacceptable, and imposed Court costs on the customer at all levels of Court.

A panel of Judges in the first level concluded that Islamic Bank X had committed an unlawful act by altering the contents of the Deed of Investment Financing Transfer Contract with *murabahah* principle. In Indonesia, PMH is regulated in Article 1365 of the Civil Code as "any act that violates the law and causes harm to other people by mistake, obliges the person who caused the loss to compensate for the loss." Unlawful acts not only violate written rules but also encompass any action infringing upon the rights of other people guaranteed by law. This includes actions contrary to the legal obligations of the perpetrator, decency (*goedzeden*); and the good attitudes in society or considers the interests of others.⁹

The study experts believed that Decision of the Panel of Judges at the first and appeal levels was wrong and failed to reflect the principles of benefits, justice, and legal certainty. This was because *murabahah* contract was declared invalid, without determining the authenticity of the deeds. Court's decision at the cassation level reflected justice by rejecting the customer's claim while awaiting the determination of the original and the fake deeds.

***Musyarakah* Financing Contract Conformity Analysis No. 52, dated April 27, 2015, and *Murabahah* Financing Agreement No. 229, dated July 31, 2013**

The implementation of PLS financing (*musyarakah*) and non-PLS financing (*murabahah*) followed Sharia principles. However, in *murabahah* case, the contract was compromised by the existence of a contract object. Based on analysis, Islamic Banks were less careful in implementing PLS & non-PLS financing due to the, unrelated financial

⁹ Gita Anggreina Kamagi, "Perbuatan Melawan Hukum (Onrechtmatige Daad) Menurut Pasal 1365

Kitab Undang-Undang Hukum Perdata Dan Perkembangannya," 59-60.

planning usually occurred when analyzing potential recipients of financing facilities. For example, in the context of *musyarakah* financing, the collateral object was often registered under an individual rather than in the name of the company proposing for the funding. In the case of *murabahah* financing, the Bank was negligence in making *murabahah* contract accompanied by a *bil wakalah* contract. This was quite risky because the purchase was directly made by the customer.

Musyarakah case relates to investment financing activities as stated in POJK Number 31/POJK.05/2014 concerning the Implementation of Sharia Financing Businesses.¹⁰ According to these regulations, every Sharia financing agreement should be documented in writing through a Deed of *Musyarakah* Financing. The deed of *musyarakah* financing already existed, and was documented in the Deed of *Musyarakah* Financing Agreement No. 52 dated April 27, 2015. The agreement outlined the mutual commitment to jointly operate a business venture with a distribution of 16.65%, for the customer and 83.35% for the Bank. The term of agreement spanned 60 (sixty) months, commencing from April 27, 2015, to April 27, 2020.

In accordance with Article 17 of POJK regulation Number 31/POJK.05/2014 concerning the Implementation of Sharia Financing Businesses, Sharia Companies were prohibited from executing goods that were objects of fiduciary guarantees unless the registration office issued a guarantee certificate and submitted it to Sharia Company. The execution these goods should comply with the terms and conditions stipulated in the law governing fiduciary guarantees and agreed upon by the parties in Sharia Financing Agreement. This

requirement was mandatory for Islamic banks engaging in Islamic financing, who were also expected to register with fiduciary guarantees as it helped to mitigate the risk of financing.

In POJK Number 10/POJK.05/2019 concerning Business Conduct of Sharia Financing Companies and Sharia Business Units of Financing Companies, Article 44 specifies that Sharia banks are required to issue a warning letter for billing purposes. This letter should be sent after the agreed-upon period of delay and should include details, such as the minimum number of days of delay, the balance significant earning assets, ratios, margins or fees, penalties, and compensation. Regarding the execution of guarantees, Article 67 mandates certain requirements should be met, including proving that the customer is in default, providing a warning letter to the customer, as well as ensuring the Islamic banks possess a certificate of fiduciary guarantee, certificate of mortgage right, and certificate of mortgage right. Banks are expected to explain the process of collateral execution as a mechanism for selling collateral. Article 48 stipulates that when the customer fails to fulfill their obligations within a specific timeframe after the execution of the collateral, Islamic banks can only sell the collateral through a public auction and recover settlement of the receivables. Banks also have the option to sell collateral privately based on an agreement and return excess proceeds from collateral sale.

Differences can be observed in *Musyarakah* Financing Agreement No. 52 dated 27 April 2015, based on POJK Number 31/POJK.05/2014 and POJK Number 10/POJK.05/2019, both of which pertain to the Implementation of Sharia Financing Businesses of Sharia Financing Companies

¹⁰ "Peraturan Otoritas Jasa Keuangan Nomor 31/POJK.05/2014 Tentang Penyelenggaraan Usaha Pembiayaan Syariah." (2014), 31.

and Sharia Business Units of Financing Companies. These differences became apparent due to the existence of violations in the execution of auctions conducted by the Bank before the due date.

The practice of *musyarakah* in Islamic Banks differs from *musyarakah* contract outlined in DSN MUI Fatwa No. 105/DSN-MUI/X/2016 concerning Guaranteed Refunds for Mudharabah, *Musyarakah* and Wakalah Bil Istitsmar Financing. According to this fatwa, when a business incurs losses and the capital owners hold different opinions regarding the cause of the loss, the management should prove the losses suffered are not a result of taaddi, tafrith or mukhalafat al-syruth or any actions violating the agreed upon terms at the time of the contract. When proven, the losses become the responsibility of the capital owners, which in this case, is the Islamic banks. Fatwa No. 08/DSN-MUI/IV/2000 concerning *Musyarakah* Financing also supports the notion that losses should be shared proportionally among the partners based on their respective shares in the capital. Similarly, KHES article 558 affirms the Islamic financial institution should bear the loss according to its portion in the included capital.

In fatwa No. 129/DSN-MUI/VII/2019 concerning Real Costs As Ta'widh Due to Default (At-Takalif Al-Fi'liyyah An-Nasyi'ah 'An An-Nukul), default is defined to encompass various scenarios, namely failure to pay obligations altogether, paying obligations on time but with a less agreed amount, paying debts with the agreed amount but beyond the agreed time, and obligation to pay beyond the agreed time with an amount less than what was agreed. Others include the non-fulfillment of obligations related to debts (*al-dain*), *ujrah*, realization of PLS on business profits which are the rights of LKS, and losses due to non-compliance with contracts, preceded by orders (*wa'd*) to purchase goods.

Musyarakah Financing Contract Case No. 52, dated 27 April 2015, explicitly indicates the presence of challenges in carrying out business activities. From August 2018 to April 2019, there was an unforeseen situation in the coal sector, beyond market expectations, affecting the customer's business. The market was in an idle state due to an incompatible national situation in the political industry as at that time. Therefore, when referring to the fatwa, it is important to note that default is not necessarily attributed to the customer, considering several factors regarding bankruptcy.

In the case of *murabahah*, after a review by a first-instance judge, the financing contract was considered null and void due to the failure to fulfill the fundamental requirements of the contract, specifically the object of the contract. The bank provided facilities in the form of non-goods funds (*murabahah bil wakalah* contract). Although customer's purchase of goods was permissible, it posed risks for Islamic banks. *Murabahah* contract should be ideally executed when the item, in principle, belongs to the Bank. The price in *murabahah* sale and purchase contract needs to be stated clearly at the time of the contract, whether through bidding, auction, or tender. Islamic banks faced a significant reduction in margins from *murabahah* financing activities due to decision of the first-level panel of judges, which only required payment of the principal debt caused by the change in the contract from *Murabahah* to *Qard*.

Regarding defaults committed by customers, based on fatwa provisions No.49/DSN-MUI/II/2005 concerning Conversion of *Murabahah* Contracts, it is permissible to convert *murabahah* contract into a new contract. The new contracts can involve *Ijarah Muntakit Bit Tamlik*, *Mudharabah*, and *Musyarakah* contracts.¹¹ Another relevant fatwa, No. 134/DSN-MUI/II/2020 concerning Real Costs Due to

¹¹ "Fatwa DSN MUI Nomor 49/DSN-MUI/II/2005 Tentang Konversi Akad *Murabahah*."

Bill Rescheduling, states that bill payments can be rescheduled, as long as additional debt amounts are not allowed to be added as costs. Banks are only permitted to charge actual fees incurred as a result of bill rescheduling.¹² Fines (*Ta'widh*) are imposed on parties who deliberately or negligently deviate from the contract terms, causing harm to the other party, as stipulated in fatwa No. 43/DSN-MUI/VIII/2004 concerning Compensation (*Ta'widh*). The amount of compensation corresponds to the actual loss incurred in the transaction, and this compensation is applicable only to debt contracts, such as *salam*, *istishna*, *murabahah*, and *ijarah*.¹³

While guarantees are regulated in fatwa No.74/DSN-MUI/I/2009 concerning Sharia Guarantees, collateral is allowed on the basis that the customer is capable of fulfilling payment obligations. Collateral serves the purpose of guaranteeing customers to pay off their debts. In the event of default, the customer may be subject to late fees and *ta'widh* or reimbursement of costs incurred by the guarantee recipient due to the insured party's delayed payment of obligations. However, adding additional guarantee for extended payment time is not in accordance with the existing MUI DSN fatwa.¹⁴ Parties can consider entering into a new separate agreement or establish a new payment schedule through an addendum to the old agreement. Scheduling new payments increases the risk, and may prompt the bank to request additional collateral in the new agreement, separate from the previous contract.¹⁵ The restructuring of Sharia financing is also explained in POJK Number 12/POJK.03/2015 concerning Prudential Provisions in the Context of National

Economic Stimulus for Sharia Commercial Banks and Sharia Business Units. This regulation outlines the quality of financing for customers that can be restructured by providing a responsible period for the payment of principal financing.

In KHES, the contract should adhere to several principles namely voluntary agreement without coercion, ensuring implementable promises, employing a precautionary principle with careful consideration, maintaining consistency to uphold a clear purpose, promoting mutual benefits for both parties, establishing equality where parties occupy the same position, fostering transparency, responsibility and openness, considering the ability of the parties in contract, facilitating ease of implementation of the agreement, demonstrating good faith, providing lawful reasons that align with the law, upholding freedom of contract, and documenting the agreement in writing.¹⁶ In the second case mentioned, the contract in question is a facade contract that can be voided. This is because while the pillars and conditions may have been fulfilled, other factors, such as changes in the number of vehicle units, undermine the contract based on considerations of benefit.

A gap still exists between the regulation and implementation of financing in Islamic banks. Studies in certain cases may benefit the winning party while offering losses to the losing party, providing solutions that are perceived as lacking the principle of justice for the disputing parties. Norms utilized by judges in case decision should align with the development of existing regulations. Islamic

¹² "Fatwa DSN MUI Nomor. 134/DSN-MUI/II/2020 Tentang Biaya Riil Sebagai Akibat Penjadwalan Kembali Tagihan."

¹³ "Fatwa DSN MUI Nomor. 43/DSN-MUI/VIII/2004 Tentang Ganti Rugi (*Ta'widh*)."

¹⁴ "Fatwa DSN MUI Nomor. 74/DSN-MUI/I/2009 Tentang Penjaminan Syariah".

¹⁵ Otoritas Jasa Keuangan, *Standar Produk Perbankan Syariah Murabahah*, 35.

¹⁶ Bab II, Mahkamah Agung, *Kompilasi Hukum Ekonomi Syari'ah* (Jakarta: Direktorat Jenderal Badan Peradilan Agama, 2011) Pasal 21.

banking regulations have not fully accommodated the operational activities of Islamic banks due to variations in operational implementation compared to conventional banks. In terms of systems and ecosystems, Islamic banking lags behind the conventional banking industry, as evident from the dominance of *murabahah* contracts in financing. From the internal factor, *murabahah* financing in Islamic banks appears to be more expensive than in conventional banks. Externally, these discrepancies are influenced by national and even world economic conditions experiencing turmoil.

Stakeholders Analysis

The Islamic banking industry in Indonesia coexists with conventional banks, as Indonesia practices a dual banking system that promotes financing in the national sector. The Islamic banking system is characterized by PLS principle, providing an alternative banking system that benefits both the public and the banks. It emphasizes fairness in transactions, ethical investment, prioritizes unity and brotherhood in production, and avoids speculative activities in finance. The development of Sharia banking is directed at benefiting society and contributing to the national economy. Therefore, the development of national Islamic banking aligns with other strategic plans, such as the Indonesian Banking Architecture (API), Indonesian Financial System Architecture (ASKI), the National Medium-Term Development Plan (RPJMN), and the National Long-Term Development Plan (RPJPN).

Sharia banking is regulated by Law Number 21 of 2008 which holds *lex specialis* legal status in relation to Banking Law. This Sharia Banking Law specifically governs Islamic banking, while Banking Law applies to banking in general, including both Islamic and conventional banking. According to the principle of *lex specialis*, *derogate lex*

generalis means that special laws override general laws. To establish the law, Sharia banking products need to comply with the 2008 Sharia Banking Law, Financial Services Authority Regulations, Fatwa of the National Sharia Council, and Compilation of Islamic Economic Law. This guideline has long been issued by the regulator. On the other hand, Indonesia follows a civil law system, which requires adherence to existing rules. There are instances where cases in the field differs from what is stipulated in the regulations, necessitating the judge to explore existing legal sources, including jurisprudence. This tensions between existing legal developments and implementation in the field, particularly in the Islamic banking industry, creates opportunities for LKS to exploit these gaps.

From the customer's perspective, disputes sometimes arise due to hasty financing decision without considering the ability to repay in installments. Customers should have sufficient knowledge of financing contract agreements, possess legal literacy skills, and assess their future business prospects, to avoid being harmed by financing. Lack of understanding regarding the financing agreement can create legal loopholes in the contractual agreements, benefiting the bank when the customer defaults or commits other violations.

On the government side, encompassing the legislature, executive and judiciary, there are also shortcomings that create legal loopholes exploitable by irresponsible parties. In terms of legislation, both Sharia banking law and laws governing disputes resolution need strengthening, as they serve as operational guidelines for Sharia banking and a legal basis for judges in deciding cases at Religious Court. From a juridical perspective, the existing legal basis can be reformed in line with legal developments in banking industry, particularly in guiding judges on decision regarding Sharia banking disputes.

The executive/government, represented by the Financial Services Authority and Bank Indonesia, is required to establish a regulatory framework for Sharia banking. This framework should guarantee legal certainty and provide detailed technical instructions to close legal loopholes exploitable by stakeholders, particularly those who tend to be manipulative and seek profit.

Conclusion

In conclusion, this study showed that Sharia banking disputes occurred partly due to the existence of legal loopholes and the general nature of the existing rules, leading to multiple interpretations. These disputes were primarily caused by default and unlawful acts. Regarding the suitability of contract in *murabahah* case, although the pillars and conditions were fulfilled, the contract could be nullified due to considerations of benefit. Religious Court Judges utilized various legal sources, including the Compilation of Sharia Economic Law, DSN Fatwa, Jurisprudence, Civil Code, and Herziene Indonesich Reglement, to make the best decision. In *musyarakah* cases, decision was made in accordance with the principles of benefits, justice, and legal certainty, as the auction was conducted before the maturity date, and not based on an order from the head of Court. However, in *murabahah* cases, decision of the panel of judges at first and appeal levels were wrong, as they did not reflect these principles. This decision highlighted the invalidity of *murabahah* contract, despite the absence of a definitive determination regarding the authenticity of the respective deeds. Court's decision at the cassation level demonstrated justice by not accepting the customer's lawsuit while awaiting the determination of the original and fake actions.

From the customer's point of view, financing disputes sometimes occurred due

to hasty decision without considering the ability to make installments. It is essential for customers to be aware of their capacity to repay financing installments to Islamic banks. These banks are expected to carry out financing activities based on Sharia principles, have a better understanding of regulations, and ignore the desire to gain significant profits. Moreover, they should exercise patience when determining the eligibility of customers for financing facilities and resolve problematic financing by considering the best solutions with maturity. The executive/government and legislative/regulatory are expected to issue Islamic banking regulations that guarantee legal certainty and provide more detailed technical regulations to close existing legal loopholes in the Islamic banking industry. From a juridical perspective, it is crucial to update existing legal sources to stay abreast of the legal developments in banking industry.

Bibliography

Journals

- Afrida, Yenti. "Analisis Pembiayaan *Murabahah* Di Perbankan Syariah." *EBI (Jurnal Ekonomi Dan Bisnis Islam)* 1, no. 2 (July 2016): 155-66. <http://dx.doi.org/10.15548/jebi.v1i2.32>.
- Ahmad, Rashid. "A Critical Analysis of *Murabahah* Transaction in the Banking Sector of Pakistan." *Tahdhib al Afkār* 2, no. 1 (2015): 17-28.
- Fathiyah, Shofa and Nurhasanah. "Eksekusi Jaminan Hak Tanggungan Nasabah Wanprestasi Akad *Musyarakah* Dalam Perspektif Perlindungan Konsumen." *JHR (Jurnal Hukum Replik)* 7, no. 1 (March 2019): 71-90. <http://dx.doi.org/10.31000/jhr.v7i1.2544>.
- Ichfan, Hoirul and Umrotul Hasanah. "Aplikasi Pembiayaan Akad *Musyarakah* Pada Perbankan Syariah." *Jurnal Akutansi*

- Dan Keuangan Islam* 2, no. 1 (June 2021): 1-8.
<https://doi.org/10.54471/muhasabatuna.v3i1.1085>.
- Kamagi, Gita Anggreina. "Perbuatan Melawan Hukum (Onrechtmatige Daad) Menurut Pasal 1365 Kitab Undang-Undang Hukum Perdata Dan Perkembangannya." *Lex Privatum* VI, no. 5 (July 2018): 57-65.
- Lathif, Ah. Azharuddin. "Konsep Dan Aplikasi Akad Murabahah Pada Perbankan Syariah di Indonesia." *Jurnal Ahkam* XII, no. 2 (June 2012): 69-78. <https://doi.org/10.15408/ajis.v12i2.967>.
- Maggalatung, A Salman. "Hubungan Antara Fakta Norma, Moral, Dan Doktrin Hukum Dalam Pertimbangan Putusan Hakim." *Jurnal Cita Hukum* 2, no. 2 (2014): 185-92. <https://doi.org/10.15408/jch.v1i2.1462>.
- Nur, Mohamad. "Analisis Penyelesaian Sengketa Akad Murabahah (Jual-Beli) Antara Bank Syariah X Dengan PT AS Di Badan Arbitrase Syariah Nasional -Majelis Ulama Indonesia (BASYARNAS-MUI)." *Jurnal Ilmu Pendidikan Nonformal Aksara* 6, no. 2 (Mei 2020): 149-58. <http://dx.doi.org/10.37905/aksara.6.2.149-158.2020>.
- Rahayu, Rani. "Teori Dan Konsep Akad Musyarakah Dan Penerapannya Dalam Perbankan Syariah." *Jurnal Keislaman*, 5, no. 1 (September 2022): 176-85. <https://doi.org/10.54298/jk.v5i2.3436>.
- Saripudin, Udin. "Syirkah Dan Aplikasinya Dalam Lembaga Keuangan Syariah, Vol. 4 No. 1 (April 2016), 74-75. *Jurnal Ekonomi Dan Bisnis* 4, no. 1 (April 2016): 63-79. <https://doi.org/10.34308/eqien.v3i2.28>.
- Titazahra, Afifi. "Analisis Hukum Penyelesaian Sengketa Murabahah Di Pengadilan Agama (Studi Kasus Putusan Pengadilan Agama Mojokerto Nomor 2860/Pdt.G/2013/PA.Mr)." *Jurnal Justisia Ekonomika* 2, no. 2 (2018): 1-12. <http://dx.doi.org/10.30651/justeko.v2i2.2476>
- Books**
- Ilyas, Amir. *Kumpulan Asas-Asas Hukum*. Jakarta: Rajawali, 2016.
- Latif, Ah. Azharudin. *Fiqih Muamalat*, (Jakarta: UIN Jakarta, 2005), 119-120. Jakarta: UIN Jakarta, 2005.
- Mahkamah Agung. *Kompilasi Hukum Ekonomi Syariah*. Jakarta: Direktorat Jenderal Badan Peradilan Agama, 2011.
- Muhammad. *Model-Model Akad Pembiayaan Di Bank Sharia*. Yogyakarta: UII Pres, 2009.
- — —. *Standar Produk Perbankan Syariah Murabahah*. Jakarta: Departemen Perbankan Syariah, 2016.
- — —. "Statistik Perbankan Syariah Juli 2022." Jakarta, 2022.
- Ramli, Hasbi. *Teori Dasar Akuntansi Syariah*. Jakarta: Renaisan, 2005.
- Suadi, Amran. *Penyelesaian Sengketa Ekonomi Syariah: Teori Dan Praktek*. Jakarta: Kencana, 2017.
- Laws**
- DSN MUI Fatwa Number 04/DSN-MUI/IV/2000 concerning Murabahah (2000).
- DSN MUI Fatwa No. 43/DSN-MUI/VIII/2004 concerning Compensation (Ta'widh).
- DSN MUI Fatwa Number 49/DSN-MUI/II/2005 concerning Conversion of Murabaha Contracts.
- DSN MUI Fatwa No. 74/DSN-MUI/I/2009 concerning Sharia Guarantee.
- DSN MUI Fatwa No. 134/DSN-MUI/II/2020 concerning Real Costs as a Result of Bill Rescheduling.

Supreme Court. "Supreme Court Decision No. 93/PUU-X/2012 Regarding Explanation of Article 52 Paragraph (2) of Law No. 21 of 2008." 2012.

Republic of Indonesia Supreme Court Regulation No. 02 of 2008 concerning Compilation of Sharia Economic Law (2008).

Financial Services Authority Regulation Number 10/POJK.05/2019 concerning Business Conduct of Sharia Financing Companies and Sharia Business Units of Financing Companies. (2019).

Financial Services Authority Regulation Number 31/POJK.05/2014 concerning Implementation of Sharia Financing Businesses. (2014).

South Jakarta Religious Court Decision No 1957/Pdt.G/2018/PA.JS Jo. Decision of

the Jakarta Religious High Court No. 162/Pdt.G/2019/PTA Jo. No. 401 K/Ag/2020, 2020.

Law on Religious Courts, Law No. 50 of 2009 Jo. Law No. 3 of 2006 Jo. Law No.7 of 1989, LN No.159 of 2009 TLN NO. 5078 Jo. LN No. 22 of 2006 TLN No. 4611 Jo. LN No. 49 of 1989 TLN No. 3400. (2006).

Websites

Otoritas Jasa Keuangan. "Bank Syariah." Accessed March 26, 2023. <https://www.ojk.go.id/id/kanal/syariah/Pages/Perbankan-Syariah.aspx>.

Table 1. Judges Decisions in Settlement of Sharia Banking Disputes

	Decision of the Central Jakarta Religious Court 950/Pdt.G/2019/PA.JP	Decision of the Jakarta Religious High Court No. 83/Pdt.G/2020/PTA.JK
Agreement	<i>Musyarakah</i> No. 52 dated 27 April 2015	
Disputing parties	PT. X (opposed) against Sharia Bank X (opposed); Head of Auction Service Office X (Co-Defendant I); PT X Private Auction Center (Co-Defendant II); Mrs. X, SH Notary (Co-Defendant III)	Sharia Bank X (Comparator) against the Head of Auction Service Office X (Appeal I); PT. X (Appeal II); Private Auction Center PT X (Competent I); Mrs. X, SH Notary (Co-Defendant II)
Case	Bank Syariah X conducted auction executions on land and buildings serving as collateral in <i>musyarakah</i> agreements because the customer defaulted (non-payment of installments). The customer was dissatisfied with this situation as the debt was still outstanding even after the execution of the auction. The Central Jakarta Religious Court was requested to cancel the auction conducted by Bank Syariah X, the Deed of Mortgage granting was declared null and void, and all defendants were ordered to pay Court fees.	
Source of law used	Article 165 HIR jo. Article 1870 Civil Code; Article 224 HIR; Article 1338 paragraphs 1 and 2 of the Civil Code; SE Agency for State Receivables and Auctions (BUMN) No. SE-21/PN/1998 in conjunction with SE-23/PN/2000 concerning the implementation guidelines for Article 6 of Law no. 4 of 1996 regarding Mortgage Rights	Article 1338 of the Criminal Code Jo. Article 44 PMA RI No. 2 of 2008 Article 20
Decision	Granted the resistance; Declared the Opponent true; Declared that the implementation of auction execution conducted by Bank Syariah X was invalid; Instructed Bank Syariah X, Head of Auction Service Office X; Private Auction Center PT X, NY. X to submit and comply with decision; Ordered the opponents to pay Court costs as punishment	Strengthening Central Jakarta PA Decision No. 950/Pdt.G/2019/PA.JP; Granted the resistance; Declared the Opponent true; Declared the execution of the auction conducted by Bank Syariah X was invalid, null, void and did not have binding legal force; Instructed Bank Syariah X, Head of Auction Service Office X; Private Auction Center PT X, NY. X to submit and comply with decision; Ordered the defendants to pay Court costs at the first level; Ordered the appellant to pay the case at the appellate level
The winning side	Customer	Customer

Table 2. Disputes Settlement at the First, Appeals and Cassation Levels

	South Jakarta Religious Court Decision No 1957/Pdt.G/2018/PA.JS	Decision of the Jakarta Religious High Court No. 162/Pdt.G/2019/PTA	Decision of the Supreme Court of the Republic of Indonesia at Cassation Level No 401 K/Ag/2020
Agreement	<i>Murabahah</i> No. 229 and wakalah agreement No. 230 dated 31 July 2013		
Disputing parties	PT. X (Plaintiff) against Sharia Bank X (Defendant I) & Ny. X Notary (Co-Defendant II)	Sharia Bank X (comparison) against PT. X (Appeal I) & Mrs. X Notary (Appellant II)	PT. X (Cassation Petitioner) against Sharia Bank X & Ny. X Notary (Cassation Respondents)
Case	The customer felt disadvantaged because they believed that Bank Syariah X had changed <i>murabahah</i> financing deed from 47 vehicles to 37, despite the contract value remaining unchanged. The customer demanded Bank Syariah X compensate for the loss; pay dwangsom money; return additional collateral in the form of a certificate of land ownership, requested the judge to declare the Plaintiff no longer had any obligation to make installment payments to the Bank; ordered Sharia Bank X and Ny. X to issue an apology, to be announced in the Kompas daily newspaper media (1 full page for three consecutive days); and to cover all Court costs.		
Source of law used	MARI's Decision No. 67 k/Sip/1975; Articles 1320, 1321, 1365, and 1338 paragraph (3) of the Civil Code; Article 1365 Civil Code; Article 22 KHES regarding pillars of contract; Article 36 Perma No. 02 of 2008 jo. Article 38 Perma No. 02 of 2008 concerning KHES; MA Jurisprudence No. 2123/K/Pdt/1996; SEMA No. 3 of 1978	Evidence P-11, there was no clear confirmation of the original agreement deed, which was still under investigation by the North Jakarta Police; Article 181 paragraph (1) HIR	Law No. 48 of 2009 concerning Judicial Power; Law No. 3 of 2009 concerning the Supreme Court; Law No. 50 of 2009 concerning Religious Court

Decision	Sharia Bank X committed an unlawful act because it changed the contents of the Deed of Investment Financing Transfer Contract based on the principle of <i>murabahah</i>; Addendum to <i>murabahah</i> agreement No. 285B/ADD-MRB/BVIS-KPO/X/2015 and Fiducia Guarantee Addendum No. 285A/ADD-FDC/BVIS-KPO/X/2015 were legally disabled, null and void; Plaintiff was no longer obligated to make installment payments to Bank Syariah X; The customer was only required to pay the principal debt to Bank Syariah X; customer, Bank Syariah X & Ny. X paid Court fee jointly and severally	Canceled decision of the South Jakarta Religious Court No. 1957/Pdt.G/2018/PA.JS; Rejected the exception of Bank Syariah X; Declared the customer's claim unacceptable; Ordered the customer to pay Court fees at the first level and case costs at the appeal level as punishment	Granted the customer's cassation request; Cancelled decision of the Jakarta Religious High Court No. 162/Pdt.G/2019/PTA.JK; Rejected the Defendants' exceptions (Sharia Bank X & Mrs. X); Rejected the customer's claim; Declared the claim unacceptable; Ordered the customer to pay Court costs at all levels of Court as punishment
The winning side	There was no winner or loser	Islamic Bank	Islamic Bank