

# Judicial Review against the Financing Agreement in the Islamic Bank in Indonesia Review of Act No. 30 of 2004 concerning Notary

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**Abstract.** The Contract which is made by a notary –whether it is for Islamic or conventional banking system– is an authentic deed. The provision of the contract made for Islamic banking system is same as for conventional banking system, as it stipulated in Law No. 30 of 2004 concerning Notary, but there are things that have to be dealt with in more detail that made the difference with a contract on a conventional bank. One of its particular prominent that has to be concerned is the notification of the word “*Bismilahirrohmanirohim*”. It is written at the beginning of the contract of several Islamic banks. However, it will cause the different impact of a derivation in ratings deed. This paper shows that there are still contract-financing agreements in some Islamic banks that are using other forms, other than those specified in the Notary Act.

**Keywords:** Notary, Contract, Authentic Deed, Underhand Deed.

## 1. Introduction

### 1.1. Background of Problem

Since the concept of *syariah* has been introduced in Indonesia at the beginning of 2000, its development is relatively slow. One of the cause of it is most of people have not understood for sure the advantage and the disadvantage of the concept. On the other hand, most of them assume that the concept of *syariah* is only belonged to Islamic Fiqh, so that the concept of *syariah* is only for Moslem; whereas, it is not totally right. In English, for instance, where most of its citizen is Christian, –whether it is protestant sect or catholic sect– the concept of *syariah* develops better than in Indonesia where most of its citizen is Moslem.

The principle of economic *syariah* comes from Islam which is ruled in *syariah* Islam. The economic *syariah* is one of parts of *muammalah*. In Islam, especially in Fiqh, there are two types of human’s relationship: *first*, the relationship vertically between human and Allah and *second*, the relationship horizontally between humans; this is also known as *muammalah*. One of the types of *muammalah* is trading system (*tijary*), it means that everything which is related with a trade is also ruled in Islam. The activity of this kind of *muammalah* (*tijary*), can be done by anyone as far as the rule is accomplished; it is very contrast with other Islamic religious service which can only be done by Moslem. Based on the point above, it is stated that everyone can have *muammalah*, whether they are the banking practitioner, the customers of the bank, the notary, or anyone who are interested to use the principle (Purnamasari and Suswinarno, 2011: 28).

Now day’s economic activities has developed rapidly. One of the factors that determine the development of economy is the financial capital which smoothly runs well. In this context, the importance of collaboration between the owner of the financial capital and the entrepreneur is inevitable; either individually or institutionally which is covered by intermediation institution such as bank. Therefore, the service of the notary as the general official who is in charge for creating authentic deed is very needed in banking systems; one of them is in creating the deed of credit banking agreement which involves the customer of the bank and the bank itself. The deed is aimed to guarantee the propriety of the deed, so that publically, the propriety of the deed is not doubted.

In Islamic concept, those kinds of cooperation is one of the parts of *muammalah* which is based on on the trust principle –*amanah*– (Rukmana, 2013: 7-8); however, although *amanah* is the main principle in this system, the operational strict system still used to protect every person that doing its system. Bank Indonesia

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as the central bank of Indonesia has given some rules in running this system, including giving the definition of *akad*, *ijab*, and *kabul* which is usually used in *muammalah* which is based on Islamic economic *syariah*. *Akad* is a written agreement which covers *ijab* –offer– and *kabul* –acceptance– between bank and another part which covers the right and the duty of each side based on the *syariah* principle. In *Ensiklopedia Hukum Islam*, *akad* is same as the agreement that produce a cooperation between bank and the customers whether its written agreement is created by bank or by a notary. In *Al-Baqarah* verse 282, Allah explains that if humans do some activities of *muammalah* and it is not done in cash, a record-keeping will be a must.

*“O you who believe! When you contract a debt for a fixed period, write it down. Let a scribe write it down in justice between you. Let not the scribe refuse to write as Allah has taught him, so let him write. Let him (the debtor) who incurs the liability dictate, and he must fear to Allah, his Lord, and diminish not anything of what he owes.....”*

In this verse, Allah explains that every loan transaction or buying and selling transaction –which is the parts of *muammalah* – should be recorded. Moreover, He also orders for those who believe to do each of His rules, including completing the evidence of every loan transaction or buying and selling transaction, so that if someday there is a disagreement, the evidence can be used to solve it. This evidence, in banking system, especially in Islamic banking system, is known as the deed of financing agreement which can only be created by a notary. (Naja, 2002: 12)

Islamic bank in Indonesia is pioneered by Bank Muamalat as the first Islamic bank in Indonesia. As the Islamic bank, the deed of financing agreement used is different with the deed of credit agreement of conventional bank. Beside there are the requirements and the pillars for the legality of the agreement and the content of the agreement, the first thing that differs the deed of Islamic bank and the deed of conventional bank is the word *bismillahirrohmanirrohiim* which is written at the beginning of the deed. The words also followed by some verses of *Al-Qur’an* as the foundation of the agreement based on the product of the financing. This rule, then, followed by some Islamic banks which start to stand alone in Indonesia.

Generally, the formal form of a deed of notary has been ruled strictly, so that a deed can be classified into authentic deed. The rule is written in the Act No. 30 of 2004 concerning notary. The different formal form of the deed then becomes the problem as the status of a deed is possibly change if its formal form is not regularly same with the regulated formal form one. Actually, this is a serious problem, so it is a need to be observed how the form of financing agreement is of several Islamic banks and how its strength is if it modified by certain word at the beginning of its deed, considered from the Act No. 30 of 2004 concerning notary. Actually, the aim of the modification is good, but in practically sometimes what is expected well can be worse if it is not in the same line with the rule. This matter is generally not understood by some practitioner, especially by notary who is obliged to create the deeds as the notary just creates the deed based on the draft which is determined by the bank.

## 1.2. Research Method

The research method used is juridical empiric. Juridical empiric is a procedure used to solve the problem of the research by observing the secondary data first; and then followed by observing the primary data on the ground: the form of financing agreement that will be examined by the rule used in Indonesia.

## 2. Literature Review

Allah Swt explains in *Al-Baqarah* verse 282-283 that “*O you who believe! When you contract a debt for a fixed period, write it down*”. At the other part of the verse Allah states that “*...but if the debtor is of poor understanding, or weak, or is unable himself to dictate, Then let his guardian dictate in justice...*”, and it is also stated that “*...get two witnesses out of your own men. And if there are not two men (available), then a man and two women, such as you agree for witnesses, so that if one of them (two women) errs, the other can remind her. And the witnesses should not refuse when they are called on (for evidence)...*” The substance of these verses are that if we have the activities of *muammalah*, we should write it down and we should have any witness who is able to write it down fairly in justice. The witness who is able to write fairly in justice should have some fine knowledge and abilities so that both of side who have the activities of *muammalah*

can be satisfied. Adjie explains that the service of writing is a combination of knowledge and skill –it is not only just the ability to write–; it means that the writer should be a professional.

Beside that, Allah rules that every loan transaction should be completed by the evidence. The evidence could be a written evidence or the witnesses. A written text should be written by a professional writer who writes the agreement which has been agreed by both sides. The professional writer also has to be a fair person and knows the Islamic law, specifically the law that is related to agreement and transaction so that the writers also can give some advice and guideline to the sides that have the agreement.

In banking system, the deed of notary is needed because it can be evidence and the evidence should be authentic deed. Islamic bank as a subsystem of conventional bank based on the act No. 10 of 1998 about the change of the act No. 7 of 1992 about banking, in doing a banking system through the society is also needed to make financial agreement

## 2.1. Agreement

Subekti (in Marhaeni, 2007: 1) states that agreement is an event in which a person promises to another person or in which both of the people promise each other to do something. From this event, a cooperation relationship is appearing. Meanwhile, according to Muhammad (in Vidyanwati, 2012), agreement is an approval in which two person or more make a relationship purposing to do something related to the opulence. He formulates the terminology based on Pasal 1313 KUH Perdata.

To validate the agreement and to make it have strength in law, an agreement should fulfill the requirement of agreement validity; it is an agreement which is ruled by acts. At this point, we may conclude that an agreement which fulfill the requirement of agreement validity –which is ruled by acts– will be admitted by the law and in the opposite, an agreement which does not fulfill the requirement of agreement validity will not be admitted by the law although it is admitted by people who have the agreement. That's why, as far as the people who have the agreement admit and obey to the agreement that they made, although it does not fulfill the requirement of agreement validity, the agreement is still valid for them. Someday, if there is one of them does not admit and obey to the agreement, the judge will void the agreement.

Based on Pasal 1320 KUH Perdata, some people who want to have a valid agreement should fulfil these points:

- Agreeing for those who have the agreement.
- Qualification of making cooperation.
- Something specific.
- Something which is caused by legal aspect.

## 2.2. Authentic Deed

The notary is the general official who is in charge for making authentic deeds as the notary has some authority in law; as it stated in the act no. 30 of 2004 concerning notary. Based on Pasal 1868 KUH Perdata it is stated:

*“An authentic deed is a deed which is created in a form that is ruled by act, by or in front of the general official in charge, in the place where the deed is made”*

The general official means here is a public official who has authority in making some agreements for the sake of the society in the civil case. The general official has the special authority because it is related to its duty. In concrete phenomena, the general official is the notary.

From a lots of the human's profession, notary get a special place and attention in Al-Qur'an. The role and the position of the notary which is very important for the society have been explicitly written in Al-Qur'an. It is written in Al-Baqarah verse 282. *Al-mudayanah* or *Ad-dayn* is the epithet for thie verse which means the transaction of debt contract. Abu Al-Arabi names this verse as *Ayat Al-Uzhma* –the greatest verse– which contains 52 laws. Allah SWT says, *"If you do muammalah, write it down!"* (Q.S. Al-Baqarah: 282). This decree is a comand for us to write down if we do *muammalah*. From this point, we may conclude

that the obligation to write down the transaction of *muammalah* does not come from human needs, but it comes from Allah SWT who has already known what we need through His *Grand Design*. Regarding authentic deed which is made by or in front of the notary, the act concerning notary distinctively states that notary is the officer in charge for making a deed:

*“The deed of notary is an authentic deed which is made by or in front of notary based on form and manner which is decided in the act.”*

Meanwhile, the form and the characteristic of the deed is decided in the chapter VII of article 38-41 of the act concerning notary which is completed by a treat that the deed will lose the authentic characteristic or a fine punishment to a notary who makes the deed.

To find out who are the one that is in charge of making the authentic deed, we may take a look at article 1 point 7 of the act concerning notary:

*“Notary is the general official who is in charge for making authentic deed and has some authority as it pointed in this act.”*

Meanwhile the authority of notary for making an authentic deed is ruled strictly in article 15 of the act concerning notary:

*“Notary has authorities to make authentic deed regarding every deed, agreement, and decision which is obliged by the rule of the act and/or which is willed by those who have the importance to be pronounced in authentic deed, certifying the certainty of date of deed making, keeping the deed, giving grosse, copy, and citation of the deed, all of it is as far as the activity of making the deed is not assigned to another officer or another person which is directly pointed by the act.”*

There are four authority of notary which should be fulfilled so that a deed has its own authenticity (Tobing, 1983 42-43):

1. Related to the deed that he/she made.
2. Related to someone for whose importance of the deed is made.
3. Related to place where the deed is made.
4. Related to time when the deed is made.

If one of the requirements is not fulfilled, the deed will be not authentic or it will lose its authenticity. It means that the deed will become under hand deed as far as the deed is signed by people who have the importance of it.

### **2.3. Underhand Deed**

Under hand deed is a deed which is deliberately made by some people to prove something without any interfere of the general officer who has authority to make a deed. On the other word, under hand deed is a deed which is aimed to be evidence which is made individually. A deed which is made by or in front of the general officer can also become an under hand deed if the general officer is not in charge for making the deed or there is a defect form of the deed, as it stated in article 1869 KUH Perdata above. Under hand deed is not ruled in HIR, but it is ruled in Rbg, article 286 to 305, in KUH Perdata article 1874 to 1880, and in Stb. 1867 No. 29.

The role of notary in making the deed of financial agreement in Islamic bank is to give authentic characteristic through a deed of the Islamic bank. A deed will have an authentic stamp as it exist in the deed of notary if it fulfills the requirement which is stated in article 1868 KUH Perdata. Even though the products of the Islamic bank are based on the Islamic law, the products are not only aimed to Muslim, but also to non-Muslim. Whereas, the agreement of the Islamic bank can also be made by non-Muslim as far as the agreement made is based on Islamic law; because the act does not rule the differentiation of the notary based

on the belief. The responsibility of notary in making the financial agreement in Islamic bank is limited to what is written in the draft, as basically, the notary administratively only writes what is wanted by people who make the deed.

Even so, as it ruled in the act of notary that the deed of notary is considered as authentic deed which has strength as perfect evidence if it is made by or in front of the notary based on the form and the manner which is ruled by the act of notary. Based on article 38 of the act of the notary, there is no any written word in the beginning of the deed beside the title of the deed and the number of the deed. So, based on this act, the deed with a modification which is used by those banks can be considered as a defect deed because of its form.

Actually, a notary has a responsibility to create the authenticity of the deed, and the authenticity can only happen if the formal requirement and the form requirement –*Gebruik in de vorm*– which has been ruled in the act of the notary completely fulfilled (Manunggal, 2009:5). Later on, Hadi states that the authenticity of authentic deed is not void but the content or the deed of the law is void if the deed does not contain juridical defect. The thing that voids it is only the deeds of law or the events of law which is authentic. The void of the deed of notary can give some cause which is variable to people which is related to it, there are: *first*, the authenticity of the deed will disappear –the deed of notary is also void– and the deeds of the law which is written inside it is also void; *second*, the authenticity of the deed will disappear –the deed of notary is not void– or the deeds of the law which is written inside it is also not void; and *third*, the deed still has its authenticity –the deed of notary is void– or the deed of the law which is written inside it is void–. (Hadi, 1991: 142)

To make the authenticity of the deed of notary is still, every rule related to the deed of notary should stay fulfilled for every deed which is made by or in front of the notary. The article 38 UUJN does not give any exception through some deeds, because UUJN is a unification of law admission of notary in Indonesia. (Adjie, 2013: 47)

### 3. Conclusion

The act No. 30 of 2004 concerning notary is the only organic act which decides the notary as the general officer who has some authorities to make an authentic deed and rules the form of the deed of notary. Based on the act, a notary is responsible and obliged to fulfil every formal form of the deed of notary, there are: introduction of the deed, content of the deed –the substance of the will of the sides–, and closing of the deed as it explained in the article 1869 KUH Perdata Juncto of the act concerning notary. Therefore, if the formal form of the authentic deed of notary is not fulfilled, an authentic deed will possibly become underhand deed, as far as the deed is signed by both sides.

### 4. Discussion

This paper is expected to be a kind of introduction of further research regarding the formal form of a deed which can be used authentically by Islamic Bank in Indonesia. Therefore, every practitioners who are related to this matter should be proactive.

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