



Binding of the Sea Ship as Hypotic Institution in Syariah Finance According to Indonesian Legal System (Case Study Decision 1221 / Pdt.G / 2009 / PA South Jakarta)

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<http://dx.doi.org/10.18415/ijmmu.v6i6.1267>

Abstract

The legal basis for ship mortgage guarantee institutions is contained in several statutory provisions namely the Civil Code, the Commercial Code, the International Convention on Maritime Receivables and Mortgage 1993 which has been ratified by the Indonesian government through Presidential Regulation No. 44 of 2005, Law No. 17 of 2008 concerning Shipping. Article 1162 of the Civil Code formulates the notion of a mortgage that is a material right over immovable property to take the compensation thereof for the settlement of an agreement. From the formulation of the definition of the ship mortgage, contained the meaning that in the ship mortgage inherent property rights, so the ship mortgage is a material guarantee. As a guarantee of materiality, it gives absolute rights to creditors on an object, can be defended against anyone, has inherent nature and always follows the object in the hands of whoever that object is (*droit de suite*). In one of the mortgage clauses, PT. Kartika Nusantara Riezkytama insuring Karunia Motor Ship in the company of PT. General Takaful Insurance, PT. Nusantara Riezky Tama insured the Motor Boat with the type of Total Loss Only insurance and claimed the insurance. PT. General Takaful Insurance is the first syariah general insurance company for all insurance needs in Indonesia that was established in 1995. Sharia insurance is insurance based on sharia principles with the effort to help and protect each other among the participants through the formation of a collection of funds managed according to sharia principles to face certain risks. This problem continues in the trial at the South Jakarta Religious Court between PT. Bank Muamalat Indonesia with insurance company PT. General Takaful Insurance with a breach of lawsuit for not carrying out the obligation to pay the claim for the loss of a motor boat resulting in losses of PT. Bank Muamalat Indonesia.

Keywords: *Binding; Hypotic Institution; Syariah Finance*

Introduction

In today's modern world, the role of banks in advancing a country's economy is huge. Almost all sectors related to various financial activities always require bank services. At present and in the future we cannot escape from the world of banking, if we want to carry out financial activities, both individuals and institutions, both social or corporate.

Once the importance of the banking world, so there is an assumption that banks are "lives" to move the wheels of a country's economy, as stated by Kasmir that "Banks as financial institutions whose business activities are collecting funds from the public and channeling these funds back to the community and providing services- other bank services."¹

Banks in Indonesia are divided into two groups namely Banks based on Conventional principles, the majority of banks that develop in Indonesia are banks that are oriented to conventional principles. Banks based on sharia principles, namely banks based on sharia principles that have not long been developed in Indonesia.

Islamic banks are financial institutions that carry out financial intermediaries from parties who have excess funds to those who need funds based on the principles of Islamic teachings, among those principles the most important is that banks are not permitted to request or provide interest to its customers Islamic banks or Islamic banks are business entities whose function is to collect funds from the public and channel funds to the public, the systems and mechanisms of business activities based on Islamic law as stipulated in the Qur'an and Al Hadith.²

To secure the interests of banks, guarantees must remain ideal, because in accordance with their functions, guarantees have the task of launching and securing credit, namely by giving rights and power to banks to obtain repayment of the collateral if the debtor defaults.³ The ideal guarantee according to Soebakti can be seen from.⁴

1. Can easily help credit acquisition by those who need it.
2. Does not weaken the potential of the credit recipient to continue his business.
3. Provide certainty to the creditor, in the sense that if necessary it is easy to set aside to pay off the debtor's debt.

The form of collateral known in the practice of binding collateral agreements in Indonesia is a mortgage guarantee for ships. ships are important facilities that are needed in exploiting the potential of fisheries and in sea transportation. Even more than that the ship as an object that has a high economic value, is very beneficial for the owner, especially since it has been recognized by law can be used as collateral in a credit agreement using the ship mortgage guarantee agency.⁵

From the formulation of the definition of the ship's mortgage, it implies that in the ship mortgage inherent property rights, so the ship mortgage is a material guarantee. As a guarantee, material property gives absolute rights to creditors on an object, can be defended against anyone, has inherent nature and always follows the object in the hands of whoever that object is (*droit de suite*).

¹ Kasmir, *Banking Management*, Jakarta, Rajawali Press, 2008, p .11.

² Darsono et al, *Syariah Banking in Indonesia*, Jakarta, Rajawali Press, 2016, p. 17

³ Muhammad Djumhana, *Banking Law in Indonesia*, Bandung, Citra Aditya Bakti, 1996, p.247.

⁴ R. Subekti, *Guarantees of Granting Credit According to Indonesian Law*, Bandung, Bandung Alumni, 1992, p. 98

⁵ Rachmadi Usman, *Civil Security Law*, Jakarta, Sinar Grafika, 2009 p. 244.

The procedure for loading of ships as collateral takes precedence with a credit agreement with ships as collateral using a mortgage guarantee institution that is weighing above 7 GT (Grosse Tonnage) so it must be registered in the vessel register and included in the category of immovable objects if it has a weight of 20 m³ to the top and vessels used as collateral must be imposed on the object which is used as collateral, namely by making a Deed of Loading the Ship as an attempt to bind the object of collateral by the creditor (Bank), based on that creditor may demand the disbursement of the goods used as collateral for PT. Bank Muamalat Indonesia is the first commercial bank in Indonesia to implement Islamic sharia principles in carrying out its operations. Initiated by the Indonesian Ulema Council (MUI) and the Indonesian Government.

Bank Muamalat provides facilities such as sharia-based credit to PT. Kartika Nusantara Riezkytama on a motor boat of 10,000,000,000 (ten billion rupiah) through PT. Bank Muamalat Indonesia, located in Batam with a guarantee of one motor boat in accordance with financing agreement No. 253 dated February 15, 2005. Based on the financing agreement of PT. Bank Muamalat received a power of attorney to install a ship's mortgage on a motor boat dated February 15, 2005 No.254 made by a Notary in Batam. After installing the ship's mortgage power of attorney, then dated June 20, 2005 which was registered with the Registrar and Registrar of Ship Names.

Based on pre-research, there has been a bad financing of PT. Kartika Nusantara Riezkytama was unable to pay for the financing. Banks as creditors in dealing with non-performing loans will provide restructuring in advance, namely extending the loan, rescheduling the credit, restructuring the loan amount, and the last way is the execution of collateral objects. In May 2007, when PT. Bank Muamalat will execute the ship against motor boats which are mortgages. It is known that the motorboat has disappeared and does not know its whereabouts.

In one of the mortgage clauses, PT. Kartika Nusantara Riezkytama insuring Karunia Motor Ship in the company of PT. General Takaful Insurance, PT. Nusantara RiezkyTama insured the Motor Boat with the type of Total Loss Only insurance and claimed the insurance. PT. General Takaful Insurance is the first sharia general insurance company for all insurance needs in Indonesia that was established in 1995. Sharia insurance is insurance based on sharia principles with the effort to help and protect each other among the participants through the formation of a collection of funds managed according to sharia principles to face certain risks.

In disputed cases between PT. Bank Muamalat Indonesia with PT. General Takaful Insurance in this case the litigants are Islamic financial institutions that should use sharia principles. So when PT. Bank Muamalat Indonesia submitted to the South Jakarta Religious Court as recommended in the Act. But in the process the case was decided by not accepting the case.

In the case of a dispute between PT. General Takaful with PT. Bank Muamalat mentioned above is about the TLO coverage agreement (Total Loss Only) above makes the problem and this is very basic, because it raises the question whether the competence of the Religious Court follows the legal subject, or follows the contract. Then the problems mentioned above then become a problem, which is related to the losses suffered by PT. Bank Muamalat Indonesia, that as a result of not implementing the achievements of PT. General Takaful Insurance, then who should bear the losses suffered by PT. The Muamalat Bank, while the panel of judges stated that the Plaintiff's lawsuit was not acceptable (Niet Onvankelijk Verklaard). Whereas the Court is a hope and solution of the parties to obtain justice, not least in this case the South Jakarta Religious Court.

This problem continues in the trial at the South Jakarta Religious Court between PT. Bank Muamalat Indonesia with insurance company PT. General Takaful Insurance with a breach of lawsuit for not carrying out the obligation to pay the claim for the loss of a motor boat resulting in losses of PT. Bank Muamalat Indonesia entitled: BINDING OF SEA SHIP AS A HYPOTIC INSTITUTION IN SHARIA FINANCE (Case Study of Decision 1221 / Pdt.G / 2009 / PA.Jakarta Selatan). In this research there are

two question will be answered as following 1. How is the binding of ships as collateral mortgages in Syariah financing? 2. How is the judge's consideration in terms of legal certainty for the guarantor and the insured?

Research Method

The method is a framework for carrying out an action or a framework of thinking, arranging ideas that are orderly, directed and contextual, which is appropriate and relevant to the aims and objectives.⁶ The method used in this study is a normative juridical approach, which is legal research conducted by examining library materials or secondary data as a basic material to be investigated by conducting a search of regulations and literature relating to the problem under study.⁷

The Binding Of Ships As Collateral Mortgages in Syariah Financing

1. The Ship Binding Process as A Mortgage Guarantee.

Registration and manufacture of ship deeds, there are several things that must be considered in the implementation of ship mortgages, including ships which are mortgaged must be clearly listed in the deed of mortgages. As explained above, the ship that has been registered must already be listed in the mortgage deed. Then, there must be a creditor agreement with the debtor indicated by a credit agreement (which is a condition of making a mortgage deed). The things that must be considered in the implementation of a ship's mortgage is.⁸

- a. Mortgage-laden vessels must be clearly stated in the mortgage deed
- b. The agreement between the creditor and the debtor is indicated by the credit agreement (which is a condition of making a mortgage deed).
- c. Credit value which is the total value received based on the items guaranteed (for example land, house, ship)
- d. Mortgage value is specified in the value of the ship (at the bank carried out by appresor).
- e. Installation of mortgages in accordance with the value of the ship and can be done in any currency in accordance with applicable laws and regulations.

The thing that must be known by the owner of the ship (prospective debtor) is the classification of the ship as regulated in Law No. 17 of 2008 concerning Shipping. Explanation of ship classification is regulated in Article 4 of Law No.17 of 2008:

1. A ship driven by the wind is a sailing ship.
2. Vessels that are driven by mechanical power are ships that have engine drive equipment, for example motor boats, steam ships, ships with solar power, and nuclear ships.
3. A pulled ship is a ship that moves by using another vessel's propulsion.

After knowing the ship's classification, the author will then quote the explanation of Article 510 of the Civil Code which states the ship is a movable object, stated in that article which reads "Ships, boats, mining boats, rolling mills, and bathing places installed boat or stand apart and similar objects are movable objects. In contrast to the explanation of Article 314 Paragraph 1 of

⁶ Komarudin, Thesis and Thesis Research Methods, Bandung, Citra Graphic, 1974, pp. 27-29.

⁷ Ronny Hatnijo Soemitro, Legal and Jurimetry Research Methods, Jakarta, Ghalia Indonesia, 1990, p. 39.

⁸ Dr.Chandra Motik Yusuf, SH., MSc, Legal Aspects of Ship Execution, Ciputra Hotel, Jakarta, Wednesday, March 21, 2018

the Indonesian Criminal Code which states that ships can be registered as immovable objects, article 314 Paragraph 1 explains as follows "Ships of at least 20 m³ of gross contents can be registered and will be determined in a separate Act". From the two articles above, it can be concluded about the legal status of ships having two positions, namely as movable and immovable objects.

Ship registration is considered as proof of ownership for the ship owner, now regarding civil registration, here the legal status of the ship will affect the stipulation of civil law rules that control the ship, or in other terms, ships which are by nature movable objects, with their books in the registration book will obtain a position as immovable property that can be subject to mortgage collateral. The registration of the ship also aims to ensure that the ship owner obtains nationality documents, including seas and passports required for sea transportation, registration also allows the imposition of mortgages needed for guarantees of obtaining funding or credit for financing the procurement of the ship. The legal status of a ship can be determined after going through the process mentioned in Article 154 of the Shipping Law, namely: -a measurement of ships, registration of ships, and determination of ship nationality.

Regarding the measurement of ships according to Article 155 of the Shipping Law, measurements can be made using 3 (three) methods, namely:

1. Domestic measurements (vessels less than 24 meters long)
2. International measurements (vessels over 24 meters long)
3. Certain or special measurements Marine vessels not only function as means of sea transportation, ships can also be used as collateral for debt.

Ships that can be used as collateral are:

- 1 Ship that has been registered
2. Done by making a mortgage deed at the place where the ship was originally registered.
Requirements for ship owners (guarantors / not debtors) and creditors are:
3. Deed of power of attorney to install mortgages
4. Grosse deed registration / reverse name
3. Credit agreement.

2. The Binding Of Ships As Collateral Mortgages in Syariah Financing

PT. Bank Muamalat has provided Islamic financing facilities to PT. Kartika Nusantara Riezkytama for 1 (one) unit named "KARUNIA 1903" Motor Boat in the amount of Rp.10,000,000,000.00 (ten billion rupiah) as stipulated in the financing agreement for Al-Murabahah Financing Agreement No. 253 dated February 15, 2005. Murabahah is one of the business activities in the form of financing of sale and purchase transactions regulated in the Sharia Banking Act Article 19. Bank Muamalat, in this case, adds financing facilities that include financing of the "KARUNIA 1983" Motorboats that have been placed under Mortgage Rights and against 13 (three) twelve) land and building units that have been placed Under Mortgage Rights with an additional financing of Rp.900,000,000.00 (nine hundred million rupiah) as stated in the Al-Mubarabahah Financing Agreement No.280 dated 25 January 2006. For this financing, Bank Muamalah has received a power of attorney from PT. Kartika Nusantara Riezkytama is acting to install mortgages on one (1) unit of the "KARUNIA 1903" motor boat as stipulated in a power of attorney to impose mortgage No.254 dated February 15, 2005 made before Yondri Darto, Bachelor of Notary Law in Batam.1903 gift motorboats that have been placed Mortgage Rights in accordance with the measurement letters are as follows:

1. Length: 58.90 (fifty eight point ninety) meters
2. Width: 14.45 (fourteen point forty five) meters
3. Within: 4.30 (four point thirty) meters

Criteria for a 1903 Motorcycle Ship with the measurement letter had met the minimum requirement of 20 m³ (twenty square meters) to become a guarantee of a ship's mortgages. Based on the legal relationship, a legal event is created which gives rise to legal consequences in the form of rights and obligations. The mortgages themselves are regulated in chapter III of Article 1162 to 1232 of the Civil Code. In Article 1162 of the Civil Code, a Mortgage is a material right over immovable objects, to take compensation from it for the payment of an agreement.

Based on research, PT. Bank Muamalat with PT. Nusantara Riezkytama used the Murabahah Financing Agreement No. 250 dated January 25, 2006. In Act Number 21 of 2008 concerning Sharia Banking basically does not use the term credit as used in Act Number 10 of 1998, but uses the term financing in the system of Islamic financial institutions. Financing is defined in Article 1 Number 25 of Law Number 21 Year 2008 concerning Sharia Banking. Financing is the provision of funds or bills which are equal in the form.⁹

1. Profit sharing transactions in the form of mudharabah and musyarakah
2. Leasing transactions in the form of ijarah or leasing in the form of ijarah muntahiya bittamilk;
3. Buying and selling transactions in the form of murabahah, salam, and istishna loans
4. Lending and borrowing transactions in the form of qardh receivables.
5. Service leases in the form of ijarah in the form of multi-service transactions based on an agreement or agreement between a Sharia Bank and / or Sharia Law and other parties requiring the party financed and given fund facilities to return the funds after a certain period of time in exchange for ujah, without compensation, or profit sharing.

The fundamental difference between credit and financing is that if the return, credit through interest, then the return of financing is done in other ways determined in accordance with the contract of each Islamic financing (based on the principle of profit sharing, buying or leasing), whereas in the relationship of customers and Islamic banks in the form of a partnership relationship, not the relationship of the debtor of the creditor as in a conventional bank, such as profit sharing in a murabahah contract. In Islamic banks, the contract that is carried out has worldly and ukhrawi consequences because the contract is based on Islamic law. Any product produced by all banks, including Islamic banking, will not be separated from the transaction process which in term of fiqh muamalah is called aqad. In this writing is a contract element that uses the murabaha contract. One of the muamalah fiqh concepts that is widely practiced by Islamic banking is the murabaha sale and purchase agreement. This contract is much in demand by Islamic banks due to security factors and the lack of risk for Islamic banks compared to mudlarabah and musyarakah contracts.

The mechanism for granting credit with a guarantee for a ship is carried out by holding the principle of prudence, giving credit with a guarantee for this ship is more to the factor of trust, reliability and prospects of the debtor's business activities. In Islam, trade and commerce are always associated with moral values, so that all business transactions that are contrary to virtue are not Islamic. For example, each seller must state to the buyer that the item or object is suitable for use and that there are no defects. Or if there is a defect then that too must be clearly disclosed. The Hadith also said "the buyer and seller are entitled to cancel their agreement as long as they are not separate.

⁹ Hartono Hadisoeparto, Principles of engagement law and guarantee law, Yogyakarta, Liberty, 1984, p .78.

If they speak the truth and carry it out, then the transaction will be blessed, but if they hide each other and lie, then the blessing on their transaction will disappear. "(Bukhari). stated in the hadith: "actually the sale and purchase must be done like and like" (HR Al-Baihaqi and Ibn Majah). If the buyer does not like the goods to be purchased, and the buyer declares cancel before the contract is approved, the sale and purchase is not valid and must be accepted gracefully by each party.

Sharia guarantees are guarantees that are based on Islamic legal principles. The main characteristic of sharia guarantees is that in the concept of sharia guarantees there is no known guarantee interest which is an additional cost that must be paid by the guarantor to the recipient of the guarantee. Sharia guarantee is essentially a legal system.

The Judge's Consideration In Terms Of Legal Certainty for The Guarantor And The Insured Case Study Decision 1221 / Pdt.G / 2009 / PA South Jakarta

1. Considering, that of the 7 (seven) types of contracts mentioned above, there are 6 (six) types of contracts made on the basis of mutual understanding and agreement of both parties. While one type of contract is an agreement or insurance coverage not made on the basis of mutual understanding and agreement between the two parties but rather is made on the basis of a policy of sale and purchase agreement between PT.As general Takaful Insurance as the policy seller and PT. Bank Muamalat Indonesia as the buyer of the policy. Considering, that the 7 types of contracts made on the basis of understanding and agreement by the two parties do not conflict with the principle of the contract determined by the provisions of Islamic law as stated in Chapter II Article 21 compilation of sharia economic law.
2. Whereas 1 type of contract is an agreement or insurance coverage between PT. Bank Muamalat Indonesia with PT. General Takaful Insurance with insurance policy Number: 1.902.06.400.000002 built on the basis of buying and selling on the basis of non-Islamic law (English law), this is listed in the insurance policy clause issued by PT. General Takaful Insurance which reads "this insurance is subject to English Law and Practice" which means that this insurance is subject to English law and practice. Considering whereas based on the provisions of the National Sharia Council Fatwa (DSN Fatwa) No. 52 of 2006 jo. Article 548 Compilation of Sharia Economic Law, it is stated that the contract used in sharia insurance (Ta'min and I'ahah Ta'min) is a wakalah contract bil ujah or mudarabah agreement, or tabarru contract. Whereas the sharia economic provisions as mentioned above are not used (not used as a legal basis) in the insurance agreement or coverage held between PT. General Takaful Insurance with PT. Bank Muamalat Indonesia, therefore, the contract is not in accordance with Islamic economic principles.

Referring to article 49 of Law Number 3 of 2006, the researcher concludes that the execution of mortgage rights based on sharia agreements is the absolute authority of the religious court. The key is because the business is run based on sharia. Even so the mechanism for requesting the execution of the mortgage is still using the procedural law in force in the general court. The argument is based on Article 54 of the Religious Courts Act which expressly states that the procedural law in force in the general court is used within the judiciary unless specifically stipulated in the Religious Courts Act. Most of the legal umbrella for the execution of mortgage rights is still based on the law used in general courts.

The fact of the execution of the court's determination of the object of security of mortgage often raises objections or resistance to the confiscation placed against the object of security of mortgage often raises objections or resistance to the foreclosure of the object of collateral. The causes include the large amount of debt, the unclear legal status of ownership of collateral objects, and the possibility of third

party rights on collateral objects. In this case the role of the judge of the religious court determines. Judges are advised to order incidental hearings. For example, a bailiff comes to the shahbandar to ensure that the collateral object is actually registered in the debtor's name.

The request for execution is not free, there are call costs, execution notification fees, auction announcement fees, auction fees and execution fees. Especially for requests for execution of mortgage rights, there is a registration table that must be visited by bringing the complete file. Costs must also be prepared. The court issued a warning (*aanmaning*). If not successful, the execution is carried out.

The verdict *niet ontvankelijke verklaard* or which is referred to as the NO decision is a decision stating that the *guatan* is not acceptable because it contains formal defects.¹⁰ Various kinds of formal defects that may be attached to the suit include:

1. A lawsuit signed by a power of attorney is based on a power of attorney that does not meet the conditions outlined in article 123 paragraph (1) HIR;
2. The lawsuit has no legal basis;
3. Lawsuit for errors in persona in the form of disqualification;
4. The claim violates absolute or relative jurisdiction (competence);

The basis for granting NO verdict (unacceptable) can be seen in the Supreme Court Jurisdiction of the Republic of Indonesia No.1149 / K / Sip / 1975 dated 17 April 1975 Jo The Decision of the Supreme Court RI No.565 / K / Sip / 1973 dated 21 August 1973, Jo The Decision of the Indonesian Supreme Court No.1149 / K / Sip / 1979 dated April 7, 1979 which stated that the object of the lawsuit was unclear, the lawsuit could not be accepted.

Conclusion

1. The binding of ships as collateral for mortgages in sharia financing uses *al-murabahah* financing agreements, which means that financing is in the form of a bailout of funds needed by the customer to purchase an item with the obligation to return the bailout fund all of which is added to the bank's profit margin at maturity. The bank acts as the seller, while the customer is the buyer. The selling price is the purchase price of the Bank from the supplier plus profit, both parties must agree on the selling price and payment term. The selling price is stated in the sale and purchase agreement and if agreed upon, it cannot take the form of the contract's validity.
2. Judge's consideration in terms of legal certainty of the insured and the guarantor. In this decision does not meet the principle of legal certainty. Not fulfilling certainty in the law itself. Not having done an *autorotif* solution means giving a way to create stability, giving a sense of order, a safe society, and providing legal protection and justice for the parties concerned.

Suggestion

1. We recommend that an insurance company before issuing a sharia-based product ensure that an insurance product is part of the sharia concept. It is better not to mix the concept and implementation of conventional insurance with shari'ah insurance and the Shari'ah Supervisory

¹⁰ . Yahya Harahap, *Civil Procedure Law*, Jakarta, Sinar Grafika, 2005, p. 811.

Board should pay more attention and oversee shari'ah institutions that issue products and brands to remain consistent and adhere to sharia principles.

2. To law enforcement officials, especially Judges in the Civil Court environment to continue to produce quality decision products and meet Legal Certainty. Although in practice it is very difficult but it must still be carried out in a balanced and proportional manner.

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