Liability for the Destruction of Collateral Object of Fiduciary Guarantee in Uninsured Murabahah Bil Wakalah Financing

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Abstract. Murabahah bil wakalah financing allows customers to obtain insurance coverage for their obligations against all goods used as collateral for financing by transferring the risk of collateral through insurance mechanisms. The insurance is provided by an insurance company designated by the Bank, which appoints and establishes the Bank as the party entitled to receive payment of the insurance claim (BANKER'S CLAUSE BANK). This is certainly very risky for Islamic banks, as there is a possibility that financing recipients may not insure the financing object. Research using a legal regulation approach and a conceptual approach yields a conclusion: Dispute resolution, if the financing recipient defaults on the Murabahah bil waka lah financing and the uninsured fiduciary collateral object is destroyed, is pursued through a lawsuit in the District Court based on breach of contract. However, in Islamic financing, the resolution of problematic financing is based on the Fatwa DSN 47/DSN-MUI/II/2005 on the Resolution of Murabahah Receivables for Customers Unable to Pay. The destruction of the financed object burdened with insurance, where the financing recipient acts as the insured party, makes the Bank the financing provider liable. If the funded object is destroyed and the insurance claim does not cover the remaining payment, the financing recipient is still obligated to continue the insurance as the shortfall in payment persists.

Keywords: Liability; Destruction of Financing Collateral Object; Uninsured.

INTRODUCTION

The principles of Islamic financing are based on contracts, meaning agreements or contracts. In terms of terminology, a contract is defined as "the meeting of offer and acceptance as an expression of the will of two or more parties to create a legal consequence on its subject." In Arabic, a contract or agreement is called "Mu'ahadah Ittfa or Akad, also known as an Agreement" authors [1]. One of the business activities in Islamic banking is financing based on the Murabahah contract. According to the explanation of Article 19 § (1) letter d of Law No 21 of 2008, a Murabahah contract is a financing contract for a commodity by stating its purchase price to the buyer, and the buyer pays it at a higher price as an agreed-upon profit. The Murabahah contract is interpreted as mutually beneficial financing conducted by Sahib al-mal (capital provider) with the party in need through a buy-and-sell transaction, with the clarification that the procurement cost and selling price include added value, which constitutes profit for Shahib al-mal. Repayment is made in cash or instalments author [2]. The characteristic of Murabahah is that the seller must inform the buyer about the product's purchase price, stating the amount of profit added to that cost author [3]. According to DSN-MUI No 04/DSN-MUI/IV/2000 on Murabahah, it is mentioned that "If the bank intends to delegate to the customer to purchase goods from a third party, the Murabahah buy-and-sell contract must be executed after the goods, in principle, become the property of the bank."

They refer to Article 26 of the Regulation of the Financial Services Authority of the Republic of Indonesia No 35/POJK.05/2018 concerning the Implementation of the Financing Company Business (Per OJK No 35/POJK.05/2018), Financing Companies are required to mitigate financing risks. Financing risk mitigation can be done by:

a) Transferring financing risk through a credit insurance mechanism or credit guarantee by the provisions of laws and regulations;

b) Transferring the risk of collateral from financing activities through an insurance mechanism;

c) Imposing fiduciary guarantees, mortgages, or mortgages on collateral from financing activities.

In Murabahah financing, ensuring collateral objects is essential for mitigating risk. The Bank cannot resell the object if a movable object encumbered with fiduciary guarantees is destroyed due to natural disasters such as floods, earthquakes, accidents, or fires.

If insured collateral objects in Murabahah bil wakalah financing are destroyed or lost, then Islamic banks get compensation for losses in the amount of coverage. Regarding the obligation to insure collateral objects in Murabahah bil waka lah financing, it can be found in the Murabahah bil waka lah contract at PT Bank Bukopin Syariah, as stated in Article 14, that "the customer promises and at this moment binds himself to cover insurance at his expense for all goods that are collateral for financing based on this Agreement, with an insurance company appointed by BANK, by appointing and determining the bank as the party entitled to receive payment of the insurance claim (BANKER'S CLAUSE BANK)."

The Murabahah bil wakalah financing object has the risk of being transferred from a fiduciary guarantee to an insurance mechanism; it is the obligation of the financing recipient to insure it, this is of course, very risky for Islamic banks from the possibility of the financing recipient not insuring the financing object if an uncertain event occurs, one of which is that the financing object is destroyed due to natural disasters such as floods, earthquakes, accidents or fires; this is certainly very detrimental to Islamic banks as financiers if the recipient of the financing breaks the promise. In addition, the fiduciary guarantee is also erased due to the destruction of the object stipulated in Article 25 § 1 letter c of Law No 42 of 1999 concerning Fiduciary Guarantees.

Based on the above background, the problems discussed in this thesis are:

1) Dispute settlement if the financing recipient breaks the promise of Murabahah bil wakalah financing and the uninsured fiduciary guarantee object is destroyed.

2) Dispute settlement if the financing recipient breaks the promise of Murabahah bil wakalah financing and the uninsured fiduciary collateral object is destroyed

Akad Wakalah is a contract of delegation of power by one party (muwakkil) to another party (representative) in matters that can be represented or represented between the two parties (Bank and Customer) where the Bank authorizes the Customer to describe it in carrying out specific jobs or services. Then, the contract used is the Murabahah bil wakalah financing contract authors [4]. The recipient of Murabahah financing is entitled to a purchase payment and must pay the purchase price in large instalments according to the agreed contract. Payment of the cost of goods in instalments means that the finance company bears the risk of the possibility that the recipient of the financing cannot pay the instalments or default.

METHOD

This research is legal research and normative. The discussion material is about the Murabahah bil wakalah contract with insurance collateral. The approaches used are the statute approach and the conceptual approach.

RESULTS AND DISCUSSION

Dispute Resolution If the Financing Recipient Breaches the Promise of Murabahah bil waka lah Financing and the Uninsured Fiduciary Guaranteed Object is Destroyed. The Sharia foundation relating to guarantees in Surah Al Baqarah (2): 283 "If you are on a journey (and you do business/buying and selling not in cash), while you do not have a writer, then let the debtor hold a collateral...". Narrated by Aisha R.A., the Prophet Muhammad once bought food from a Jew in debt and gave his armour as collateral (Bukhari, Muslim, Abu Dawud, Tirmidhi, Nasa'i, Ibn Majah). Abu Hurairah RA that the Prophet said, "Whoever is bankrupt (muftis), then the Murabahah contract gets his goods to the muftis, then the Murabahah contract is more entitled to withdraw the

goods than anyone else" (Bukhari, Muslim, Abu Dawud, Tirmidhi, Nasa'i, Ibn Majah)

1) Settlement through the National Sharia Arbitration Board. Based on PBI, the forum for resolving Islamic banking disputes is regulated in stages, starting with settlement through deliberation and then through mediation, including banking mediation. Suppose the deliberations do not reach an agreement. In that case, it can be continued through sharia arbitration or Islamic justice institutions if dispute resolution through banking mediation does not reach an agreement. Settlement by referring to the DSN fatwa, that if there is a dispute between an Islamic financial institution and its customers, the settlement is carried out through deliberation, unless the parties do not reach an agreement, then the settlement is carried out through BASYARNAS. Decisions made by BASYARNAS have binding force for the parties. The arbitration decision is final and binding, which means it has permanent and binding legal force; there is no appeal, cassation, or review. Therefore, the parties must voluntarily implement the National Sharia Arbitration Board's decision [4].

2) Settlement Through Litigation. Law No 21 of 2008 reaffirms that Sharia banking disputes, including Sharia economic disputes, are one of the authorities of courts within the religious judicial system by referring to Article 55 § 1 of Law No 21/2008, namely: "Settlement of sharia banking disputes shall be conducted by courts within the religious judicial system." Article 55 § 2 of Law No 21/2008 states, "If the parties have agreed on dispute resolution other than Article 55 § l of Law No 21/2008, dispute resolution shall be conducted by the contents of the Akad (agreement)". The explanation of Article 55 § 2 of Law No 21/2008 states that what is meant by dispute resolution by the contents of the contract is efforts by deliberation, banking mediation, national sharia arbitration bodies or other arbitration institutions, as well as through courts within the general judicial environment.

Dispute Resolution If the Financing Recipient Breaches the Promise of Murabahah bil waka lah Financing and the Uninsured Fiduciary Guarantee Object is Destroyed. Financing Companies reduce the risk of the possibility of the party receiving the financing defaulting, taking methods known as mitigation, which is a series of efforts to reduce risk, as Article 18 Per OJK No Per OJK No 35/Pojk.05/2018 jo No 7/POJK.05/2022 Financing Companies must mitigate financing risks. Mitigation of financing risk can be done by:

a) transferring the risk of financing or guaranteeing financing loans;

b) transferring the risk of goods financed or goods that become collateral from financing activities through an insurance mechanism;

c) making a guarantee on the loan with a fiduciary guarantee on the goods financed or goods that become collateral from the financing activity.

Risk mitigation with insurance options is a legal relationship based on approval. In Article 18 of OJK Regulation No 35/Pojk.05/2018 jo No 7/POJK.05/2022 that Financing Companies must mitigate financing risks by transferring the risk of goods financed or goods that become collateral from financing activities through an insurance mechanism. Article 246 of the KUHD defines insurance as an agreement in which the insurer commits to compensating the insured party for loss, damage, or loss of desired profit that the insured party may incur due to an uncertain event. Author [5] calls insurance "an agreement by which the insurer binds himself to the insured party by receiving a premium, to submit compensation to him for suffering loss, damage, or loss of things that have been calculated in advance that are desired which he may suffer as a result of a hazard." Author [6] states that "insurance in legal terminology is an agreement; therefore, the parties must study the agreement to understand insurance agreements. In addition, because the main reference of insurance approval remains on the basic understanding of approval", noting the definition of insurance as mentioned above, insurance contains the following elements:

a) The party's existence covered (the party whose urgency is insured).

b) The existence of the party who bears (the insurance company that guarantees to pay compensation for suffering losses).

c) An insurance agreement exists (between the insurer and the insured party).

d) The payment of insurance premiums (by the covered party to the insurer).

e) The existence of a party who suffers loss, damage to goods, or loss of things calculated beforehand (sustained by the insured party).

f) The existence of an event that is not certain to occur [7].

The parties involved in insurance are the insurer and the insured, who bind themselves to each other in the insurance agreement. Still, the KUHD does not define the deal, referring to the provisions of Article 1 of the KUHD, which stipulates that "As long as in this KUHD against BW no special deviation is made, BW shall also apply to matters discussed in the KUHD," which means that if the KUHD does not regulate the agreement, the rules used are the rules as in Book III of BW concerning the obligation.

The legal basis of the obligation is Article 1233 BW, which mentions the occurrence of the obligation and states that the obligation arises from consent or Law [8]. According to the author [9], approval is a concrete form of engagement while engagement is an abstract form of approval; this can be interpreted as a legal relationship between more than one party whose contents are rights and obligations, a right to demand something, and conversely, a duty to fulfil these demands. Insurance is an agreement included in a contract that exists because of approval; this means the parties are bound in a legal relationship based on insurance consent. Legal relations bind more than one legal subject or more regarding rights and obligations on one side, dealing with rights and obligations on the other side. The parties bound in the insurance agreement are the parties who bear with the parties covered.

Relationships regulated by Law. Relationships between fellow legal subjects can occur between a person and another person, between a person and a recognized legal subject, and between a recognized legal subject and a recognized legal subject author [10]. The Law regulates legal relations, including private and public legal relations. Legal relations created by the parties regarding an object within the scope of family and property are personal relations. Legal relations in insurance agreements are included in private legal relations. Meanwhile, legal relations within the scope of family law can only occur between legal subjects who are sentient beings and are recognized as legal subjects, both recognized as private legal subjects and recognized as public legal subjects. Public legal relations are relations between the government and individuals bound by political, social, and administrative relations, which enter into several public legal relations.

An agreement is an act in which one or more people bind themselves to another or more. Article 1313 BW author [9] defines approval as an event in which one person agrees with another or two people to perform an achievement. Two or more people bind themselves to each other to accomplish achievements. The two parties bound in the insurance agreement are the party who ensures the insurance company that guarantees to pay compensation for suffering losses with the party who is covered as the party whose urgency is insured. The insurance agreement for motorized vehicles has three parties: the party covered, the financing institution, the insurance company as the insuring party, and the party receiving the financing (consumer).

Insurance as an agreement, for the contract to bind the two parties, it must be made to fulfil the conditions for the validity of the agreement as Article 1320 BW, as follows:

The agreement of those who bind themselves means that "the parties who agree have agreed or there is an alignment of will or mutual consent to each other's will, which is realized by the parties without coercion, error or fraud" author [11]. So, it is said that there is an agreement for those who agree if there is free will in the sense that the deal is made without coercion, fraud, or oversight.

The capacity to make an agreement, which is desired by the parties who agree, is capable, according to Article 1329 BW, which states, "Every person has the authority to agree unless he is declared incapable of doing so."

For an agreement to be valid, there must be a specific object that the parties have agreed upon to be delivered or created. The object of the agreement made in the agreement, according to Article 1333 BW, at least must be confident and determined in type, while the amount does not need to be defined as long as it can be determined or calculated in the future. Meanwhile, according to Article 1334 BW, goods that will only exist in the future can be confident in the agreement. According to [12], the non-existent goods that are made a sure thing in the agreement can be in an absolute sense (absolute) and can be in a relative sense (relative). An obligation whose object does not fulfil Article 1333 is void. However, based on Article 1334, goods that will only exist in the future can become specific in the agreement unless expressly prohibited by Law [13].

The object of the agreement must be permissible, which is desired not to be prohibited by Law, public order, or decency; this means that in the agreement made, it may occur:

1) consent with no cause;

2) consent with a cause that is not true or prohibited, and

3) consent with a cause that is permitted [14].

The insurance premium payment to the insurer, an obligation of the insured, is defined as a specific payment determined as the cost of transferring risk from the policyholder to the insurance provider. Insurance premiums are a sum of money that every registered Customer must pay to the Insurance company as the party assuming the risk. The function of insurance premiums is to provide financial compensation to the registered Customer for any losses suffered in the future. In motor vehicle insurance, the entity paying the insurance premium is the financing institution, which pays the insurance premium to the insurer.

Suffering a loss, damage, or the loss of something previously calculated (experienced by the insured). In motor vehicle insurance, such as at (for example, Asuransi Central Asia) (ACA), losses or damages to the insured vehicle can be classified as Total Loss Only (TLO), which ensures compensation for the insured vehicle's loss due to theft or damage with a maximum coverage of 75% of the loan. So, if there is a loss in the motor vehicle, the Bank submits the insurance as a risk transfer, as well as in the case of suffering a loss due to damage to the motor vehicle.

The occurrence of an uncertain event, known as the principle of Indemnity through the insurer's agreement, protects against the possibility of economic loss suffered by the insured. The insurer protects the form of a commitment to compensate for losses sustained by the insured due to uncertain events (resulting from dangers). The principle of Indemnity limits the insurance agreement (i.e., insurance for losses) as an agreement intended to compensate for losses, damages, or losses that the insured may suffer due to an unforeseeable event when the deal is concluded.

The legal relationship in insurance concerning motorized vehicles used as collateral for loans with fiduciary guarantees and insurance for loan guarantees lies in the hands of the buyer. In terms of damage to the motorized vehicle in the event of an accident, the buyer of the motorized vehicle, financed by the Financing Company, incurs losses due to the damage to the car. Even though it is made in instalments and received by the financing institution, payment for the motorized vehicle means damage occurs. The party receiving the financing can still pay the instalments, but only when damage occurs. A financing request is made to the Financing Company without proceeding with a claim to the insurance company that provides coverage; the financing institution also suffers losses. Therefore, as the insured party with the authority to file a claim, the Financing Company assists the buyer in instalments to obtain their rights over the motorized vehicle.

In the insurance agreement, the legal relationship between the parties directly involved with the insurance company, in the insurance company that is the subject of insurance, the party directly involved is not the party underlying the insurance object, but the Financing Company as stipulated in Article 18 of the Financial Services Authority Regulation No 35/POJK.05/2018 jo No 7/POJK.05/2022, as a risk reduction for the financing institution.

Related to the obligation to insure collateral objects in Murabahah bil wakalah financing can be found in the Murabahah bil wakalah contract at Bukopin Syariah, as mentioned in Article 14, which states that "the customer promises and at this moment binds themselves to take out insurance for their obligations on all goods that are collateral for financing based on this Agreement, at the insurance company appointed by the BANK, by appointing and designating the Bank as the party entitled to receive payment of the insurance claim (Banker's Clause Bank)."

The legal relationship between Bukopin Syariah, the Bank providing financing, and the financing recipient or debtor is based on the financing agreement. According to Article 1 number 13 of the Shariah Banking Law, the agreement is a written agreement between Shariah Banks or Islamic Business Units (UUS) and other parties that contains rights and obligations for each party by Shariah principles. When the financing is approved, the lender issues a Financing Approval Letter stipulating that the borrower must ensure the collateral object. The Bank collaborates with an insurance company, or the Customer chooses their own insurance company. If the Customer already has or chooses their own insurance com-

pany, the Bank must request the Customer to include the BANKER CLAUSE in the insurance policy. The Bank is entitled to a claim through the Banker clause in an uncertain event involving the collateral object. The Bank can make a claim if there is an uncertain event regarding the collateral object.

As a financing institution in the financing agreement, the Bank bears the risk of the financing recipient's default or the destruction or loss of the financing object. Therefore, the financing object is insured; this is in line with the provision of Article 14, where the Customer promises and, at this moment, binds themselves to take out insurance for their obligations on all goods that are collateral for financing based on this agreement at the insurance company appointed by the BANK. By assigning and designating the Bank as the party entitled to receive payment of the insurance claim (Banker's Clause Bank), the Bank ensures that the financing object is insured; this is by the precautionary principle the Bank applies as the financing provider.

However, the issue arises when the insurance claim may not cover the entire debt from the Murabahah. For example, if the Murabahah debt is still 100 million, and in the event of an uncertain event involving the collateral object or its destruction, it is valued at only 50 million, the claim is only Rp 50,000,000, meaning there is a shortfall of Rp 50,000,000. This shortfall is then imposed on the financing recipient, who must continue the remaining payment as a deficiency to the Bank as the financier.

The above aspects can be explained as follows: the financing recipient still bears the responsibility as a liability for the destruction of the collateral object, and they must pay the deficiency not covered by the insurance claim received by the financing company. If the insurance claim does not cover all remaining Murabahah debts, the Customer remains indebted. In essence, insurance is a means to transfer risk as a form of risk mitigation for both the Bank and the Customer, as the Customer does not have to bear the burden if the event is insured.

Based on the discussion above, the Bank can secure the financing object from risks by either burdening it with a fiduciary guarantee or insuring it. PT Bank Bukopin opts to secure the financing object by insuring it. As stated in Article 14, the Bank can collaborate with an insurance company or leave it to the financing recipient to insure the financing object themselves. The Bank acts as the insured party if the financing recipient insures it.

Risk mitigation is a step taken by the Bank as a financier to secure the financing provided to the financing recipient. If left to the financing recipient to insure and it turns out that the debtor or financing recipient does not insure, the Bank is not applying the principle of caution and must bear the risk and cannot file an insurance claim if the debtor does not insure the financing object.

Legally, the Bank still has to pay the principal obligation from the Customer, but the position of the Islamic Bank becomes only a concurrent creditor. If the financing recipient does not pay, pays late, pays not as promised, or defaults, the legal effort of the Bank as a financing company is to file a lawsuit. In dispute resolution, if the financing recipient breaks the promise of Murabahah bil wakalah financing and the object of financing collateral not insured by the financing recipient is destroyed, the Bank bears the risk as a finance company.

The Bank's legal efforts then continue to pay the principal obligations of the Customer. Still, the position of the Islamic Bank is only a concurrent creditor; if the recipient of the financing does not pay or pay but is late or pays not as promised or defaults, the Bank's legal efforts as a finance company file a lawsuit. In dispute resolution, if the financing recipient breaks the promise of Murabahah bil wakalah financing and the recipient of the funding does not ensure the object of the financing guarantee is destroyed, the Bank bears the risk as the financing company. The Bank applies the prudential principle to reduce financing risk as a financing company. To minimize or mitigate risk, the Bank, as a finance company, chooses to insure the object of financing from the destruction of goods due to unexpected events, as the insured gets compensation for the destruction. Related to the insuring party, the Bank, as the financier, provides the opportunity to choose its own insurance company with the provision that the insured is the Bank.

CONCLUSIONS

Dispute resolution if the recipient of the financing breaks the promise of Murabahah bil wakalah financing and the uninsured fiduciary guarantee object is destroyed, that if the recipient of the financing defaults, problematic funding occurs.

The Islamic Bank has the right to sue the recipient of the financing based on default in the form of reimbursement of costs, losses, and other benefits that he should have received. The resolution of problematic financing issues can be pursued through legal action in the State Court based on default. However, in Islamic financing, the resolution of problematic funding is based on the Fatwa DSN 47/DSN-MUI/II/2005 on the Settlement of Murabahah Receivables for Customers Unable to Pay.

The destruction of the financing object covered by insurance, whether insuring the Bank as the financing company or the financing recipient, where the Bank acts as the insured party. If the financing object is destroyed, and the insurance claim does not cover the remaining payment, the financing recipient is still obligated to continue the insurance as required to cover the shortfall in payment.

Suggestion. Several vital suggestions are for optimizing the Murabahah bil wakalah financing process and reducing risks. Firstly, customers must be educated about the importance of insuring collateral objects in Murabahah bil wakalah financing. This can be done through educational initiatives or mate-rials explaining the contract's insurance obligations. Streamlining insurance processes and collaborating with insurance companies can make obtaining coverage easier. It is also essential to guide customers in selecting reputable insurance providers and including the Banker's Clause in policies to simplify the claims process. The Bank should conduct regular risk assessments to identify potential challenges. In addition to insurance, comprehensive risk mitigation strategies, such as evaluating fiduciary guarantees and exploring other risk transfer mechanisms, are essential. The Bank should prioritize legal clarity and compliance by explicitly outlining insurance obligations in contractual agreements. Regular reviews and updates of agreements are necessary to ensure legal soundness. Establishing a dedicated customer support system can help financing recipients navigate insurance requirements and provide assistance during claims. Continuous monitoring and evaluation of insurance coverage effectiveness is crucial.

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