

Observing Notarial Gross Deeds in Syariah banking: Can this be Done?

Habib Adjie^a, ^aLecturer of the Law Faculty of Narotama University (Unnar) Surabaya, Email: adjieku61@gmail.com

Article 1, Number 11 of the UUJN says that a gross deed is a copy of a deed for debt acknowledgement. The heading is 'PRO JUSTICE UNDER THE ONLY GOD', which has an executory power. It is strict and clear that a gross deed is only given to a bank or to a private person for debt acknowledgement. The term 'debt acknowledgement' only exists for conventional banking. Syariah banking does not recognise the term 'debt acknowledgement', it only acknowledges the term 'financing'. As it is unable to be interpreted differently, Syariah banking, in respect of financing, uses 'Murabahah Agreement (Akad Murabahah)'. In the event that such aforesaid financing is drawn up in a notarised deed, any other method shall not be given a gross deed. In article 244 of the HIR, a gross deed is only given as a promissory note. Thereby, there are 3 different terms, namely debt acknowledgement, financing and promissory note. Are they similar in meaning or do they have different meanings? If these terms have the same meaning, it only means that a gross deed may be given to anything that bears a characteristic of a debt. If they have different meanings, then a gross deed may not be given for a financing with Syariah banking because literally, financing is not a loan or debt.

Key words: *gross deed, conventional banking, Syariah banking, notarised deed.*

Introduction

Article 1, Number 11 of the UUJN firmly holds that a gross deed is a copy for a debt acknowledgement with a header reading 'FOR JUSTICE IN THE NAME OF THE ONLY GOD (in English: PRO JUSTICIA)', which has an executory power (Satrio, 1993a; Satrio, 1993b). It is specified in Article 244 of the HIR that:

A gross document of a mortgage deed and promissory note, made before a notary public in Indonesia, begins with the following wording: 'Pro Justicia, For Justice in the Name of the

Only God'. This has the same power as a judicial order. If such a letter is not amiably resolved, then an executory instruction is carried out with an order and instruction from the head of a district court. This is so as long as the debtor elects to be silent, stay or choose the domicile as provided in the above articles of this section. Physical forcedness may only be performed with a judicial order. Should such physical forcedness be carried out in whole or in part outside the jurisdiction of the district court, the heading of such forcedness' order is provided in Article 195, point 2. Subsequent points are applicable.

According to Satrio, (1993a; 1993b), a gross deed of a debt acknowledgement shall qualify the following requirements:

- 1) Containing an original confession.
- 2) Representing a unilateral statement.
- 3) Fixed debt (referring to Decree of the Supreme Court dated 29 July 1987, Number 3309/K/Pdt/1985 stating that "although the header of the debt acknowledgement reads 'Pro Justice under the Only God (Demi Keadilan Berdasarkan Ketuhanan Yang Maha Esa)', it should also qualify the requirements of Article 224 of HIR, the execution of which is to be done by a judge (of the district court)." The content of such a deed of debt acknowledgement is not a pure debt acknowledgement, it is a loan agreement.

Based on the understanding described above, the substance of Article 1, Number 11 and Article 244 of this HIR specifies that a gross deed shall only be issued for a debt acknowledgement. This understanding regarding a gross deed in a lot of literature often refers to a narrow comprehension limited to a debt acknowledgement only. The Decree of the Supreme Court of the Republic of Indonesia also implies the same aspect. Some law practitioners also give a wider interpretation. The interpretation is based on Article 1 and Article 38, points (1) and (2), as well as Article 41, point (1) of PJN.

Based on the substance of such Articles, it is interpreted that a gross may be given to all deeds. G.H.S. LumbanTobing expressly states that the authority of a notary public shall not be limited to give a gross to the deeds referred to by Article 224 of the HIR only, but he may give the gross of all the deeds made as a notarised-minutes (LumbanTobing). Wider interpretation states that a gross deed is not only for a debt acknowledgement. A gross deed may be made of each notarised deed which gives rights to be invoiced or paid. An example is an outstanding lease agreement unpaid by the Lessee (Mudofir, 1986). Article 1, Number 11 of the UUJN – P adheres to the narrow interpretation that a gross deed is only for a debt acknowledgement. This debt acknowledgement may be made by an individual person or a legal entity (company) and is often carried out by a banking system. In practice, a gross deed is usually provided in banking.

Nowadays, we know two different systems of banking regulations, namely conventional banking and Syariah banking. Article 1, Number 4 of Law Number 21 of 2008 Syariah

banking (*Perbankan Syariah*) states that: *'A conventional bank is a bank operating its business in a conventional manner, and based on their type, conventional banks are divided into conventional general banks and public credit banks.'* Article 1, Number 7 states that according to its principles and types, *Syariah banking 'consists of Syariah General Banks and Syariah Financing Banks.'*

The *Syariah banking* recognises financing as referred to in Article 1, Number 25 of *Syariah Banking Law*. Some terms are only used in conventional banking, such as creditor, debtor and credit in a banking system operating its activities in a conventional manner. Such terms are not known in a *Syariah Banking Agreement*. This is because it depends on whether the type of the agreement is made between the client and the *Syariah bank*. The *Syariah banking* recognizes the terms Customer and Financing.

It is mentioned in Article 1, Number 25 of *Syariah Banking Law (UU Perbankan Syariah)* that:

'Financing is the provision of funds or invoices of the same meaning which consists of

- a. common proceeds transactions in the form of mudharabah and musyarakah;*
- b. lease transactions in the form of ijarah or purchase lease in the form of ijarah muntahiyabittamlik;*
- c. sale and purchase transactions in the form of murabahah, salam and istishna loans;*
- d. loan transactions in the form of qardh loans; and*
- e. service lease transactions in the form of multi-service transactions based on the approval and agreement between the Syariah Bank and/or UUS and other party or parties that require(s) the financed party and/or the party to give the funding facility after a certain period of time with the ujah compensation, without any compensation, or shared proceeds.'*

Article 1, Number 12 of the *Law of Banking (UU Perbankan)* states that:

'Financing based on the Syariah principles is the provision of money or invoices used in the same manner as money upon the approval and agreement between the bank and other parties being financed that obliges the financed party to repay the money or invoices after a certain period of time as a form of compensation or shared proceeds.'

Syariah banking does not recognise debt acknowledgement as referred to in conventional banking, but it recognises the term financing. If notaries have made a *Syariah banking deed* for financing and the *Syariah Bank* in concern asks for the gross deed, will the notary public be able to give one?

On the other hand, the heading (*irah-irah*) is also used by other institutions. Should we review the various laws able to use the heading in their legal products? With many institutions being able to use the aforesaid *irah-irah*, does it not mean that we degrade the meaning of Justice under the only God? For an example, the Agrarian Office has issued a Right of Liability Certificate (SHT) bearing such a heading, but then such a matter is questioned by the parties whose names are stated in the deed. When the case is referred to the court, it is found that the court cancels it.

Issue formulation

1. Can a Syariah banking Financing Deed be given a gross deed?
2. Is it still necessary to use the heading (*irah-irah*) 'Based on the Only God' other than in a judicial order?

Gross deeds in Syariah banking

Different terms are used in conventional banking and Syariah banking. For example, the term loans or borrow and lend money and the term financing is used in Syariah banking. The word creditor in conventional banking is still called bank in Syariah banking and the word debtor is called customer in the Syariah banking. The different terms used bear different meanings too.

The term loan or debt in conventional banking and the term financing in Syariah banking have different meanings. The term loan or debt is given to any legal subject for business in conventional banking, so a profit or loss may become the main consideration. On the other hand, in Syariah banking, the word financing is defined as an effort to help, not only for business financing (commercial). The main point is to help the party (legal subject) given the financing not to suffer a loss and close the business. Thereby, if there is an act of confiscation of the goods used as a guarantee for the customer to repay, the financing shall be avoided. The purpose is that the financed party may re-operate its business.

If, in a loan agreement or debt acknowledgement in the conventional banking, the guarantor uses the SKMHT (*Surat Kuasa Membebaskan Hak Tanggungan*) and APHT (*Akta Pembebanan Hak Tanggungan*) media, the deed of debt acknowledgement may use a gross deed. This deed is regulated in Article 1, Number 11 of the UUJN, which stipulates that a gross deed is one of the copies of the deed. For debt acknowledgement of the deed, there is heading that reads 'PRO JUSTICIA (IN THE NAME OF JUSTICE BASED ON THE ONLY GOD)'.

In real practices of conventional banking, not many banks require a gross deed from a notary public because if the debtor fails to comply with its obligation (non-performance) and the guarantee has been registered at the local Agrarian Office, then the gross deed is already

provided/contained in the Deed of Right of Liability as regulated in Article 14, point (2) of the Law of Rights of Liability (UUHT).

Based on the above descriptions, if we refer to the broader opinion that a gross deed may be given to all notarised deeds for the mere obligation to repay/amortise an amount of money, a gross deed may also give to a Syariah bankinga financing deed upon the request of the attendants. However, if we refer to the narrower opinion stating that a gross deed is only for a debt acknowledgement in conventional banking, then normatively a gross deed may only be issued for a debt acknowledgement in conventional banking. In the Syariah banking, however, it is not given for an a det acknowledgement but a for financing. Therefore, a gross deed cannot be issued in a financing agreement in Syariah banking.

In banking practices for debt acknowledgements or loans, material security or guarantees as regulated under Law Number 4 of 1996 (Undang-undang Nomor 4 tahun 1996) on 'Rights of Liability of Land and other Objects related to Land ' (UUHT), it is seldom the case that after the deed of debt acknowledgement is made, the creditor requires its gross deed. Such a debt acknowledgement or loan agreement has been equipped with the Right of Liability. The Certificate of the Right of Liability already has executory power¹⁴ for Syariah banking to guarantee the repayment or financing from the customer to its guarantor using the Law of Right of Liability UUHT.

So, if we refer to the grammatically narrow interpretation, a notarised Syariah banking deed cannot be given a gross deed by the notary public. A gross deed may be given by a notary public only for a debt acknowledgement.

'Pro Justicia (Pro Justice in The Name of The Only God)' For Purposes Other than a Judicial Order.'

There are a Number of Laws which require some institutions to affix the heading 'Pro Justice in the name of the Only God (*Demi Keadilan Berdasarkan Ketuhanan Yang Maha Esa*)' for all their legal products. These Laws include:

1. Article 197 point 1 of sub a, the Law of the Republic of Indonesia Number 8 of 1981 on Criminal Laws which also holds 'the heading of a judicial order that reads 'PRO JUSTICIA' in English or (*DEMI KEADILAN BERDASARKAN KETUHANAN YANG MAHA ESA*)'. It is also stated in Article 2, point 1 of the Law of the Republic of Indonesia Number 48 of 2009 on the Judiciary Authority that also mentions that justice is 'PRO JUSTICE IN THE NAME OF THE ONLY GOD (*DEMI KEADILAN BERDASARKAN KETUHANAN YANG MAHA ESA*)'. The sentence constitutes the spirits or by-product of Article 29 of the Republic of Indonesia Constitution of 1945 (UUD 1945).

In its explanatory descriptions, it is affirmed that the heading (*irah-irah*) means that all the judgments issued by judges shall give a sense of justice under the name of the only

God in the public. Therefore, the phrase ‘for the justice in the name of the Only God’ has wide meaning and is very important. It is not concerned with justice seekers only, but it is also connected with the only God, the Creator of life. It does not only cover the responsibility of judges and justice seekers but it also covers the responsibility to the only God spiritually. In this case, the heading of all Judicial Orders shall use the phrase contained in the heading. It should be noted that Article 197, point (2) states that in the event of failure to meet the provisions (1) shall make a Judicial Order to be Null and Void. If that really happens, then the existence of such a judicial order will not be recognised.

2. In Article 14 of Law Number 4 of 1996 on the Right of Liability of Land and All the Objects Related to Land (UUHT) it is mentioned that:

(1) As evidence of the existence of Right of Liability, the Agrarian Office issues deeds of Right of Liability in accordance with the applicable statutory regulations.

(3) The Deed of Right of Liability, as referred to in point (1), shall contain the heading containing the phrase ‘FOR JUSTICE IN THE NAME OF THE ONLY GOD /DEMI KEADILAN BERDASARKAN KETUHANANYANG MAHA ESA’.

(4) The Deed of Right of Liability, as referred to in point (2), bears the same executory power as a judicial order becoming final and is applicable as a substitute for a gross deed in judiciary cases in respect of the right of land.

(5) Unless otherwise agreed, a land certificate already affixed with a note of encumbrance of Right of Liability, as referred to in Article 13, point (3), shall be submitted to the right holder of the land in concern.

(6) The deed of Right of Liability shall be submitted to the holder of the Right of Liability.

A deed of Right of Liability (SHT) is a certificate issued by the Agrarian Office as evidence of the existence of Right of Liability. A deed granting Right of Liability is a deed issued by a land deed official (PPAT). It contains the grant of Right of Liability to a certain creditor as a security for the repayment of his or her fund. The right of liability itself becomes the right of liability encumbered upon the right of land as referred to in Law Number 5 of 1960 on the Principal Regulations on Agrarian Main Points (UUPA), including and not including the appurtenances thereof. These represent an inseparable part of the land used to amortise a certain loan in favour of certain creditors in comparison to other creditors.

The elaboration of Article 14, point (2) and (3) of the Law of Right of Liability (UUHT) stipulates that the heading (*irah-irah*), provided on a Certificate of Right of Liability in the provision of this point, is aimed at confirming the existence of executory power on Right of Liability. If the debtor is in breach of his or her promise or agreement, the same may be executed as a judicial final order. This order may be carried out via the relevant procedures

that use a private execution institution as per the Code of Civil Laws. The Right of Liability (SHT), as a product of the Agrarian Office, shall use the heading.

3. Article 15 of Law Number 42 of 1999 on Fiduciary Security (UUJF) states that:

(1) *“In a Fiduciary Guarantee Certificate, as referred to in Article 14 point (1), the phrase*

‘PRO JUSTICE UNDER THE ONLY GOD/DEMI KEADILAN BERDASARKAN KETUHANAN YANG MAHA ESA’ is provided.’”

(2) *‘The Fiduciary Guarantee Certificate, as referred to in point (1), bears the same executionary power as does a final judicial order.’*

(3) *‘Should the debtor be in breach of its promise, the Fiduciary Recipient shall be entitled to sell all the Goods being the object of the Fiduciary Guarantee in his own power.’*

A Fiduciary Guarantee Certificate (SJF) is issued by the Ministry of Law and Human Rights of the Republic of Indonesia.

4. At present, the grant of some guarantees, in the form of a fiduciary right to a ship, are still subject to the provisions provided in Article 314, point 3 of the Indonesian Code of Commercial Laws (KUHD) and the International Convention on Maritime Liens and Mortgage of 1993. This was set forth in the Presidential Regulation of the Republic of Indonesia Number 44 of 2005 on the Approval of International Convention on Maritime Liens and Mortgages, 1993. In particular, the regulations concern the change of the owner, registration, submission and subrogation, forced sales and temporary flag change. The three regulations are used to protect the holder of the Right of Fiduciary of the ship (particularly for those who sail internationally under the Law of Sailing Number 17 of 2008, it is mentioned in Article 60):

5. *‘The ship that has been registered in the List of Indonesian Ships may be used as a guarantee of a loan by applying the mortgage of the ship.’*

(1) *‘The mortgage encumbrance of the ship is made with a mortgage fiduciary/deed by the Registrar and Registration Official of Ship Name Re-registration in the place where the ship is registered in the Ledger of Ship Registration.’*

(2) *‘For each mortgage deed, 1 gross deed is issued and given to the recipient of such a mortgage deed.’*

(3) *‘The Mortgage’s gross deed, as referred to in point (3), has the same executory power as a judicial order becoming final.’*

(4) *‘In the event that the Mortgage gross deed is missing, a substitute for such a gross deed may be issued by a court order.’*

The points of the provisions of Article 60 are clarified only in point (4). The reference to power is the 'Executory Power' of the fiduciary holder. They may use a gross deed of the fiduciary to conduct the execution without a process of litigation in the court. In Article 62, it is stated that: 'The transfer of a fiduciary/mortgage from the other recipient may be done by issuing a fiduciary transfer deed by the Registrar and Registration Official of Ship Name Re-registration in the place where the ship is registered in the Ledger of Ships (*Daftar Induk Pendaftaran Kapal.*)'

The Registrar and Registration Official of Ship Name Re-registration is confirmed in the article of the Decree of the Minister of Transportation and Communication of the Republic of Indonesia Number PM 13 of 2012 on the ship registration and nationality:

(1) *'Registration includes*

a. registration of right of ownership,

b. fiduciary encumbrance, and

c. registration of other items of the ship.'

(2) *'The registration, as referred to in point (1), is carried out by the Registrar and Registration Official of Ship Re-registration, assisting the Assisting Registrar of Ship Re-registration.'*

(3) *'The Registrar and Registration Official of Ship Re-registration and his or her assistant, as referred to in point (2), are appointed by the Director General.'*

The Sea Ship Fiduciary Certificate is equipped with the heading that is issued by the Registrar and Registration Official of Ship Re-registration, who is usually the Port Master of the local Port Master and Authority Office.

5. Regulation of the Minister of Finance Number 27 / PMK.06 / 2016 Regarding the Auctions Implementation Guidelines emphasizes that Auctions Officers (Class I and Class II) Article 1, Number 36 holds that an Auction Gross Summary is an original copy of the Auction Summary that bears the heading: 'Pro Justice under the Only God (Indonesian: *Demi Keadilan Berdasarkan Ketuhanan Yang Maha Esa*).'
6. Article 1, Number 11 of the UJUN also states that a Gross Deed is a deed of debt acknowledgement with the heading: 'PRO JUSTICE UNDER THE ONLY GOD (*DEMI KEADILAN BERDASARKAN KETUHANAN YANG MAHA ESA*)'. It bears executory power. This gross deed is made by a notary public.

Based on the above descriptions, there are 6 institutions who, in their legal products, shall use the heading ‘PRO JUSTICE UNDER THE ONLY GOD (*DEMI KEADILAN BERDASARKAN KETUHANAN YANG MAHA ESA*)’. These institutions are:

- a. courts,
- b. The Agrarian Office,
- c. The Ministry of Law and Human Rights of the Republic of Indonesia,
- d. aRegistrar of Ship Re-registration,
- e. Auction Officials (Class I and Class II), and
- f. notaries.

In general, it is understood that institutions issuing the legal products with such a heading shall state that such legal products shall have executory power. With more than one institution issuing such legal products, is it possible that the name of ‘God’ is always brought to every human product and plays with humans? This legal product becomes more elaborate because, other than the court, it may be commenced or presented to the court. Does this not mean ‘oranges eat oranges’? Even outside the justice system, does is legal product bearing such a heading is cancelled by the court with a judicial order bearing the same heading? If such a cancellation takes place, is the heading provided in the judicial order of a higher level a heading which is not issued by the court?

The provision of the heading are, for judges, a form of responsibility to God. This is because a judicial order is issued by judges. It concerns human fate, so judges shall always rely on God in adjudging cases. When a heading is used by any official other than a judge, it does not bear the same meaning as a judicial order. It is only meant to have executory power.¹⁶

Such ambiguity should no longer exist because the institution is obliged to provide and use such heading is only the court. Therefore, the only institution authorised to provide and use the heading in its legal products, in the form of judicial orders, is the court.

Conclusion

1. Normatively, a notary public issues a gross deed only for debt acknowledgement. Outside debt acknowledgment, a gross deed may not be given. This includes a Syariah financing deed, although the deed is drawn up before a notary public because debt or loan and financing have different definitions.
2. With more than one institution in which legal products with the heading: ‘Berdasarkan Ketuhanan Yang Maha Esa’ is provided and used, it has become



overlapping. This is because the legal products of institutions other than the court can be cancelled by the court. Therefore, the heading should not be provided or used in documents other than judicial orders.



REFERENCES

- Anis, I. (1995). *Procedures for Fiduciary Mortgage of Sea Ships*. Bandung: Alumni.
- Burhan, S.(2019). *Auction Execution of Right of Liability, Making it Possible to Cerate Protecton of the Parties*. Jakarta: Papas Sinar Sinanti.
- Habib, A. (2008). *Indonesian Notary Law: Thematic Interpretation on Law No. 30 of 2004 on the Title of Notary*. Bandung: Refika Aditama.
- Habib, A. (2017). *Notarial Deeds for Syariah Banking*. Bandung: Citra Aditya Bakti.
- Habib, A. (2018). *Relating the Encumbrance of Right of Liablity and the Execution of Right Of Liability*. Semarang: Duta Nusindo.
- Habib, A. (2018). *Right of Liability as the Guaranting Institution (Revised Edition)*. Bandung: Mandar Maju.
- Hadi, Mudofir. (1986). Grosse Deeds. *Varia Peradilan Aticle of Year I , Number 11*.
- Kausarian, H., Sri Sumantyo, J. T., Kuze, H., Aminuddin, J., & Waqar, M. M. (2017). Analysis of polarimetric decomposition, backscattering coefficient, and sample properties for identification and layer thickness estimation of silica sand distribution using L-band synthetic aperture radar. *Canadian Journal of Remote Sensing*, 43(2), 95-108.
- Kausarian, H., Sumantyo, J. T. S., Kuze, H., Karya, D., &Panggabean, G. F. (2016). Silica Sand Identification using ALOS PALSAR Full Polarimetry on The Northern Coastline of Rupert Island, Indonesia. *International Journal on Advanced Science, Engineering and Information Technology*, 6(5), 568-573.
- Kausarian, H., Lei, S., Goh, T. L., & Cui, Y. (2019). A new geological map for formation distribution on southern part of south China sea: West Kalimantan, Indonesia. *International Journal of GEOMATE*, 17(63), 249-254.
- Satrio, J. (1993). *Guarantee Laws, Rights of Material Guarantees*. Bandung: Citra Aditya Bakti.
- Satrio, J. (1993). *Parate Execution as a Means to Overcome Non-performing Credits*. Bandung: Citra Aditya Bakti.
- Tobing, Lumban G.H.S. (1983). *Regulations of Notaries*. Surabaya: Erlangga.