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Reconstruction of Law Guarantee in Akad Mudharabah: A Study of Takwil Interpretation

Wardah Yuspin[a*], Arinta Dewi Putri[b], [a,b]School of Law, Universitas Muhammadiyah Surakarta, Surakarta, Indonesia, Email: [a*]wy204@ums.ac.id, [b]arintadp6@gmail.com,

Mudharabah transactions are cooperation-based transactions. If this is applied in Islamic banking transactions, the transaction requires a guarantee, which is the basis for whether or not the *mudharabah* financing proposal is granted. Under these conditions, there are some discrepancies between existing practice and theory, wherein the theory states that *mudharabah* is a transaction based on cooperation and trust. Therefore, there should be no guarantee required. This article aims to find a solution for how the most appropriate guarantee and execution law should be applied in sharia-based financial transactions. This article was compiled using three methods; first was the search for normative data where the data was derived from literature data. The second step was empirical research, which carried out empirical tracing by conducting interviews with policymakers, namely Islamic Financial Institutions and lawyers handling confiscation cases on Islamic finance. The third step was the *Takwil* approach, which interprets the Qur'anic verses based on the reasoning used to reveal the meaning contained in a text in order to choose the right one. The finding in this article shows that it is necessary to improve the Sharia-based guarantee system in the case where guarantees are no longer based on material guarantees but based on the ability of customers to pay. The ability to pay does not always have to be proven by material security but can also be realised with insurance and management assistance from the bank as *shahibul mal* to *mudharib*.

Key words: *Mudharabah, Guarantees, Institutionalization of sharia guarantees, execution of guarantees, mudharabah disputes.*

Introduction

Mudharabah financing is regulated by the National Sharia Council Fatwa Number 07/DSN/MUI/IV/2000. *Mudharabah,* according to the Fatwa, is when finances are channelled by a Sharia Financial Institution to another party for a productive business. *Mudharabah* is a contract in which investors, such as banks, provide funds to entrepreneurs (companies) to invest in business ventures and to share profits and losses in agreed proportion (*nisbah*) (Hazan, 2010; Maftuhin, 2004; Muhaimin, 2018; Sapuan, 2016). *Mudharabah,* according to the fuqaha is a contract between two parties (people) bearing each other, one of the parties surrenders their assets to the other party to be traded on a predetermined portion of profits, such as half or a third with specified conditions (Suhendi, 2007; Antonio, 2001; Bacha, 1997; Shaharuddin, 2010; Zain, 2014; Amelia, 2017). *Mudharabah* financing is a product of Islamic Banking in which 100% of the capital is from the Islamic Banking and is considered *shahibul mal* while the client acts as a financial manager or *mudharib* (Afta, 2017; Iqbal et al.,1987).

The regulations on *mudharabah* in Indonesia can be found in the National Sharia Council - Indonesian Ulema Council (DSN MUI) 2000 fatwa. Although the fatwa is not contained in the arrangement of the rules and regulations (Usmani, 1999) according to Law No. 12 of 2011, the rules comprised in the fatwa containing the definition of *mudharabah* have been adopted in Article 1 (25a) of the Islamic Banking Law. In that article, it is stated that financing is the provision of funds or claims equivalent to that, in the form of profit-sharing transactions, in the form of *mudharabah* and *musyarakah.* Therefore, *mudaraba* is a form of financing based on profit sharing, according to the Law (UU No. 21/ 2018 tentang perbankan syariah).

Islamic banking, in general, uses the principle of Profit and Loss Sharing, which is defined as an agreement between two or more parties using profit and loss sharing. (Ayyub, 2007) Profit and Loss Sharing allows contractual parties to combine resources as capital in a project and return profit and loss sharing based on a predetermined ratio. (Dar & Presley, 2009) Islamic banks in Indonesia currently offer three forms of the Profit Loss Sharing contract. They are *mudaraba, musharaka,* and diminishing *musharaka*. (Rahman, 2014; Marandi & Mohammadi, 2017)

In discussion, *mudharabah* cannot be separated from the influence of the existence of four major *madzab* (schools of thought) that are followed by each country. Various terms have been used for *mudarabah* (profit sharing). *Mudarabah,* is commonly used by Hanafi and Hambali scholars, and Maliki and Shafie scholars use *qirad*. *Mudarabah* (profit sharing) is also known as a 'quiet partnership', (Al-Zuhayli, 2007) this involves a provider of funds (*rabbul maal*), who provides a certain amount of capital and acts as an inactive or sleeping partner, and an entrepreneur (*mudarib*), who acts as a trustee or business agent. The legitimacy of *mudarabah* (profit sharing) has been established in the Koran, Hadith, and consensus of Muslim scholars

(Ijma'). The pessimist ability of the *mudarabah* contract (profit sharing) has been mentioned in the following verse of the Koran: ".... and others traveling throughout the land seeking [something] of the bounty of Allah" (Surah Al-Muzzammil: 20; Sapuan, 2016).

According to different grounds and reasoning, each *madzab* has some differences in addressing legal problems. This case concerns the existence of guarantees in the *mudharabah* contract. According to Madzab Hanafi, in the Mudharabah, the agreement is not needed, and there is no justification for any guarantees. (Sapuan, 2016) It is unethical for Islamic financial institutions to ask for collateral in terms of *mudharabah* cooperation agreements, bearing in mind that these are both equity investments. This is based on the understanding that *Mudharabah* transactions occur because there is a shared interest in partnering with a business based on mutual need and mutual trust, hence the occurrence of *Mudharabah* is when the capital owner feels trust and believes in the person who will manage the capital (Khaldi & Hamdouni, 2011). Therefore, the collateral charged to the capital manager is considered not to reflect the true value of *Mudharabah* (Hulam, 2010 & Saikh&Ahmed, 2011).

The function of the guarantee in the *Mudharabah* contract is to guarantee the implementation in accordance with the agreement made previously and to provide a guarantee if there is a failure in the agreement, which is a *mudharib* error (Bacha, 1997; Tag &Seif, 2008). Therefore, if *mudharib* suffers a genuine loss, not because of a mistake, negligence or breach of agreement, then the guarantee cannot be confiscated. The guarantee on the *Mudharabah* contract is, in essence, only to guarantee the *mudharib* so that it does not commit a deviation. It is in accordance with DSN MUI Fatwa No. 07/DSN-MUI/IV/2000 concerning *mudharabah* financing in number 7 (seven) section 1 (one) concerning Financing Provisions, which reads: 'in principle, in *mudharabah* financing there are no guarantees, but in order that mudharib does not deviate, LKS (*Lembaga Keuangan Syariah*/Sharia Financial Institutions) may request collateral from *mudarib* or third parties. It is also affirmed in Bank Indonesia Regulation Number: 7/46/PBI/2005 Article 6 letter (o), which states that 'Banks may request guarantee or collateral to anticipate risks if the customer cannot fulfil the obligations as contained in the contract due to negligence and/or cheating. This collateral can only be disbursed if *mudharib* is proven to have violated the matters agreed in the contract" (Muda&Ismail, 2010).

However, the rules regarding collateral cannot be immediately executed when the *mudarib* experiences a loss of business. It is regulated in the DSN-MUI fatwa 105/DSN-MUI/X/2016 concerning Guaranteed Return of Financing *Mudharabah, Musyarakah,* and *Wakalah Bil Istitsmar*, capital owners (*shohibul mal,* Islamic banks) may not ask managers to guarantee capital returns, except on their own volition. When experiencing a loss, the manager is also not obliged to return the business capital in full at the time of the loss, unless the loss is due to *ta'addi* (doing something that should not be done), *tafrith* (not doing something that should be done), or *mukhalafat al-shuruth* (violating the conditions agreed upon by the parties in the

agreement) (Yuspin, 2016). If there is a difference of opinion between the owner of capital and the manager of the loss, the manager must prove that the loss suffered was not due to *ta'addi, tafrith,* or *mukhalafat al-shuruth*. Thus, it becomes clear that guarantees will not be immediately executed when a loss occurs except with the will of the *mudarib* itself.

The guarantee provisions in positive Indonesian law cannot be applied to Islamic banking without reviewing and analysing Islamic legal provisions because Islamic banks still have to implement shariah compliance in their systems and operations (Zainol & Kassim, 2012). For *Mudharabah* financing, the concept of *muamalat's fiqh* does not recognise the necessity of inclusion of guarantees from the parties, and there is no opinion of scholars regarding the ability to ask for guarantees from joint venture participants. Also *mudarib*. *Akad Mudharabah* aims to collaborate investments to get profits, which should have been based on mutual trust from the partners and colleagues (Amelia & Hardini, 2017).

In contemporary fiqh, the Islamic banking party as an intermediary cannot sue the *mudarib* candidate to hand over collateral, because it is not a priority that must be considered in granting financing funds for *mudharabah* products (Farooq, 2007). Other things of more importance are needed to be assessed by the owner of the fund, namely the feasibility and business prospects financed by the financiers (Archer & Karim, 2007). However, the Islamic banks still have to protect the funds of customers in order for it to be impossible to provide financing if it is not accompanied by collateral (Maulana, 2014). Because in bank operations as an intermediary institution, in addition to channelling funds, banks also collect funds from the public. Therefore, guarantees are needed by Islamic banks to protect public funds mandated to them. When there is a risk on the financing side, Islamic banks can mitigate these risks by executing guarantees from *mudharabah* financing customers (Nursakti, 2018).

Within the concept of Islamic banking, collateral is a measure of the amount of wealth owned by debtor customers and provides a form of bank confidence. Within the guarantees of *mudharabah* financing, Islamic banks gain confidence in the debtors' financial capabilities. These are the ability of debtor customers to present collateral in the form of cash collateral and collateral, and also the form of fiduciary and mortgage rights (Rosylin, et.al, 2016; Alsayyed, 2010; Shofawati, 2014).

According to the Bank of Indonesia in the Sharia Banking Development Report from 2009-2018, judging from the type of contract, in general, the distribution of Islamic banking financing is still dominated by *murabahah* (buying and selling) contracts, while *mudharabah* contracts still show a small portion. In theory, financing with this profit-sharing system will increase, because basically this financing is considered the most appropriate for the spirit that exists in Islamic economics (Indrianawati et al., 2015). However, as we know that the concept

of finance in Islam is profit sharing, in this case, the concept of *Musyarakah* and *Mudharabah,* which is the manifestation of the concept of profit-sharing (Yuspin & Wardiono, 2017).

A *mudaraba* agreement or cooperation in Islam includes the concept of profit-lost sharing, which means that profits and losses are shared equally. It would be different if the agreement were in the form of debt; the debtor must repay the debt under any conditions. The *mudharabah* agreement means that an owner of capital surrenders his assets to the entrepreneur for trading at the agreed profit sharing, provided that losses are borne by the capital owner, while the entrepreneur/capital manager is not burdened with the slightest loss, except losses outside the material in the form of labor and time. *Mudharib* will be required to incur losses if they violate the agreement and commit negligence.

Imam Syafi'i and Malik said that if *Sahibul Mal*, in this case, the bank asked for a guarantee from *Mudharib*, the contract was not a *mudharabah* contract and the *mudharabah* contract would be damaged or cancelled. Here there is a guarantee that makes the *mudharabah* contract look more like a *rahn* (pawn) contract, where someone's possessions are mortgaged to be used as a loan if something fails, then the pawned item will be taken by the pawnshop. Hence, Islamic banks when implementing *mudharabah* contracts, should not require material guarantees as a condition of whether or not the financing is granted as has generally been applicable in Islamic banks in Indonesia (Sapuan, 2016).

The implementation of the *mudharabah* financing should be initiated with the concept of how the application of Islamic law in *kafaah* is included in *muamalah,* especially in the concept of *mudharabah* financing. This includes how *mudharabah* can be implemented without the use of material guarantees, as has been the case in Islamic financial institutions so that the concept of *mudharabah* as profit-sharing financing can be implemented properly according to sharia.

Research Method

The research method in this study used empirical juridical methods with three stages. The first stage used the normative search with a literature search on *mudharabah* concepts. The second stage was carried out by conducting interviews in the field empirically to obtain data on the implementation of *mudharabah* in Islamic banks. Interviews were conducted at BNI Syariah Bank and the Afta and Brother Office, where it was hoped that the results of the interviews would provide enlightenment towards the existing problems. The final stage was to carry out legal reconstruction regarding the concept of *mudharabah*-based financing agreements using the *Takwil* approach. *Takwil* is shifting its' meaning from the doubtful or confusing one to the meaning that is convincing and reassuring. Stage *takwil* method was to solve problems by studying the verses of the Qur'an and the deepening of meaning (Faris, 2018).

a. The Urgency of Institutional Material Guarantee of Mudharabah Contract Reviewed from Law Guarantee and Sharia Economics

In Syafii's Madzab, as widely held by most Muslims in Indonesia, it is stated that the concept of *mudharabah* is a cooperation-based contract, therefore, it is not obliged to provide guarantees in the *Akad* (contract), so that if there are collateral conditions for the granting of the funding, the contract becomes legally flawed (Alzuhayli, 2007).

In terms of capital protection, all classical scholars collectively agreed to the prohibition of the guarantee scheme for *mudarabah* (profit sharing) because it was not relevant to the *mudarabah* business (cooperation). Because *mudarabah* operates under a profit-sharing scheme and not a loan, collateral and guarantee are not needed. The idea of providing guarantees to *mudarabah* contracts (profit sharing) deviates from the underlying philosophy of profit, profit sharing, namely *al-ghorm bil ghonm* (there is no reward without risk) (Rosly, 2005).

In practice Sharia guarantees are divided into two forms. The first is *al-rahn* which is material security, and the second is *al-kafalah,* which is an individual guarantee. *Al-rahn* is not absolutely necessary here, but instead refers to helpful things. Mutual help is a characteristic of the concept of *Al-rahn* or pawn. Islamic law is very concerned to preserve the importance of *shahibul mal* in *mudharabah* financing, do not let it be harmed. Therefore, *Shahibul Maal* is allowed to request goods as collateral for *mudharabah* so that if *mudharib* is unable to repay the debt, the collateral can be sold by *Shahibul Maal* to settle the obligations of the financing. This concept in Islamic jurisprudence is called collateral or *al-rahn* (Hafidah, 2017; Rahman, 2009).

A cooperation agreement in Islam has the concept of profit-lost sharing, which means that profits and losses are shared equally. It would be different if the agreement were in the form of debt; the debtor must repay the debt under any conditions (Sapuan, 2016). The *mudharabah* agreement means that an owner of capital surrenders his assets to the entrepreneur for trading at the agreed profit sharing, provided that losses are borne by the capital owner, while the entrepreneur/capital manager is not burdened with the slightest loss, except losses outside the material as in the form of labor and time. *Mudharib* will be required to incur losses if they violate the agreement and commit negligence.

Moreover, the standard rules are absent in determining whether the loss is negligence coming from *mudharib* or not. It is very clear, no human is wanting to see failure for all the efforts that have been made, everyone is earnest and will try hard, but only the spirit will fluctuate (Zainol & Kassim, 2012). There is a concern that any business loss will be named a *mudharib* negligence in managing funds. If this occurs, *mudharib* will be the most disadvantaged despite the time and energy poured in and also loses the assets pledged as a form of the ability to return

mudharabah funds (Adnan & Muhamad, 2007). Thus, there is no difference found between the Islamic economic system and the capitalist economy, in which individuals with large capital l continue to grow, in other words, the rich will get richer, and the poor will get poorer.

Collateral has been an obstacle issue in Islamic banking milieu in relation to the consistent application of sharia principles, which are the source of references for all activities. The mandatory collateral is found in every funding agreement, either applying *mudharabah*, or *musyarakah*, or *murabahah*, or using pawn (*rahn*). Collateral is required almost in every financing agreement of Islamic banks (Ghoni, 2018).

Based on the consideration (c), it reads that *Islamic banking has specificity compared to conventional banking* and several items in the general explanation of the Islamic Banking Law. Islamic Bank is a Bank that conducts business activities based on Sharia Principles and consists of Islamic Commercial Banks and Islamic Community Banks. There is no doubt about the specificity of Islamic banking, which is sharia financing, must be regulated in the Islamic Banking Law. Problems arise when sharia collaterals, which are important in sharia financing, are not regulated. The failure to regulate collateral in Islamic Banking Law causes a legal vacuum, so it is not surprising that Islamic banks use guarantee procedures and guarantee institutions in conventional banking, such as mortgage rights and fiduciary guarantees. Attention to this this issue in necessary because Islamic banks do not fully implement Islamic principles (*kafaah*). On one side Islamic banks apply sharia finance but use conventional guarantee systems on another way to supplement the rules regarding collateral.

The importance of establishing the institution of sharia guarantees is urged because the existing collateral is not in accordance with the sharia agreement, for instance, the mortgage in which the standard form still contains credit and debt clause. Meanwhile, credit and debt are unknown in sharia but financing. Hence, the contrasting concepts and implications are found. Furthermore, the mortgage is unfit for *mudharabah* agreement. The problem arises when the mortgage is placed in *mudharabah* agreement. So, the guarantee system is conventional, while the agreement is sharia, and this is unequal. Collateral in *mudharabah* contract should be made based on sharia, but in practice, the sharia institutionalisation lies on the regulator authorised to change it (Thalis Noor Cahyadi, wawancara, 09 Maret 2019).

A mortgage is granted to guarantee repayment of debts to the creditor; therefore, the mortgage is an accesoire (accessory) agreement coming from the legal relationship of credit and debt as the principal agreement. The transfer automatically determines creation, existence, transfer, execution, termination, and the elimination of mortgage rights and the write off of receivables guaranteed for repayment. Without a certain debt that is guaranteed repayment, according to the law there will be no mortgage (Rustam, 2017).

b. The concept of Institutionalising Guarantees in Mudharabah Contract

The position of material security in *Mudharabah* contract is additional collateral. The principal collateral is in the form of credit. In the material security law, it is prohibited to transfer rights over the object of collateral to the creditor. Collateral can only be executed if *mudharib* is proven to have violated or misappropriated the matters agreed upon in the contract (Khalil et al., 2002).

Al-rahn ensures security to *marhunbih* (capital owner) and or guarantees the security of capital. (Fahim, 2003) In addition, another important element that emerges from *al-Rahn* is the existence of a debt and credit agreement that preceded it. Sharia guarantee in practice is divided into two forms, first is *al-rahn* (as an institution), which is a material guarantee and second is *al-kafalah,* which is an individual guarantee.

In the concept of agreement law in the Civil Code in Indonesia, *al-rahn*/sharia collateral can be defined as an 'accesoire' agreement or additional agreement. As a concept of guarantee law, *al-rahn* can be defined as a guarantee institution, like other conventional guarantee institutions, which are also an 'accesoire' agreement, namely mortgage, fiduciary, and mortgage (Hafidah, 2018).

Sharia agreement and sharia guarantee are 2 (two) inseparable legal entities. The existence of sharia guarantees only arises after sharia agreement. In the concept of Civil Code, sharia guarantee is an accessory, while sharia agreement is the main agreement. It means that the legal principle that underlies the sharia agreement, in terms of mutatis mutandis, can also be applied as the principle of sharia guarantee law (Hafidah, 2018).

Mudharabah (profit sharing) is also known as a 'silent partner', (Al-Zuhayli, 2007) which involves a capital owner (*rabbulmal*) who provides a certain amount of capital and acts as a passive partner and an entrepreneur (*mudarib*), who acts as a trustee or business agent. *Mudharib* acts to utilise and manage prudent capital and adequate ways to produce optimal returns for *mudharabah* (profit sharing) investments while applying Sharia laws (Khan & Bhatti, 2008). *Mudharib* does not invest in any property in business ventures except for the purpose of knowledge and skills. *Mudharib* also has no right to claim any wages for conducting business. *Mudharabah* (profit sharing) is one of the oldest forms of business used by ancient Arabs for trading activities. Lexically, the word *mudharabah* (profit sharing) comes from the phrase "*al-darbfi al-ard*" which means to travel (ISRA, 2011). The literal meaning of this partnership is that in the past the contract required the parties involved to travel in order to run their business (Sapuan, 2016).

Synonymous to Indonesia, Egypt also applies collateral to *mudharabah* financing. Although *fiqh* does not permit capital owners/investors to demand guarantees from *mudharib*, in reality, Islamic banks generally ask for various forms of collateral, both from *mudharib* and third parties. However, they stress that guarantees are not made to ensure the return of capital, but to ensure that *mudharib* performance is in accordance with the terms of the contract. The International Islamic Bank for Investment and Development, for instance, requires *mudharabah* funding applicants to state the type of collateral they can provide to banks. Likewise, one of the clauses in the *mudharabah* contract at the Faisal Islamic Bank of Egypt states that 'if *mudharib* is proven to misuse or fail to protect goods or funds, or act contrary to the conditions of the investors, *mudharib* must bear losses, (Archer&Karim, 2009) and must provide collateral as compensation for the loss.' (Saeed, 2004:86)

Based on the phenomenon above, it is clear that there is a difference between the concept of *mudharabah* in classical *fiqh*, and its application in sharia banking. In regards to the issue of collateral *mudharib* must consign to *shahibul mall*, that is sharia bank.

Qur'an firmly never elaborates about *mudharabah*, nevertheless the use of the word '*dharaba*', of which '*mudharabah*' is a root word. Qur'an does not mention *mudharaba* clearly in the form of *mudharabah as a* word. Qur'an mentions *dharaba* 58 times (Nidaussalam, 2016), amongst them: The Word of Allah in the Surah Al-Baqarah (2), verse 273:

"[Charity is] for the poor who have been restricted for the cause of Allah, unable to move about in the land. An ignorant [person] would think them self-sufficient because of their restraint...". (Departemen Agama RI, 1979)

By using the *takwil* (interpretation) method from the paragraph above, *mudharabah* is a form of a cooperation agreement that prioritises trust. Thus, if two or more individuals commit a transaction in which both parties include capital and mutual trust, then no guarantee is needed. Since the *mudharabah* agreement is a collaboration agreement, the principle of trust is automatically contained in the transaction. In the verse above, it says that humans are ordered to try. The form of business recommended by Qur'an according to the verse is a form of *mudharabah* or partnership (Sundarajan & Errico, 2002). By using *takwil* method, that is, searching for the intrinsic meaning of a verse, it can be concluded that the verse implies that *mudharaba* is a venture effort with a partnership system, and in partnership, it is inappropriate to require material security.

Conventional banks have adopted the existence of material guarantees as one of the main conditions for the issuance of credit. However, the concept of Islamic banking should have reduced the portion of the concept of material collateral, because fundamentally, the use of material collateral will be appropriate when used as a loan agreement. Whereas the discussion

is a collaboration-based agreement based on trust in its partners. It would be very inappropriate to demand material security as one of the main conditions for financing when the contract is a collaboration.

Therefore, it is necessary to reconstruct the existing guarantee law specifically for *mudharabah* contracts, in which two non-material collateral constructions can be applied with all the advantages and disadvantages. First, the introduction of collateral in the form of insurance to enable the guarantee of the return of the capital, with the enlarged payment of insurance financing and the reduced and tied portion of material collateral to insurance, the existence of the material security is not taken into account as one of the conditions for obtaining financing.

The advantage of this concept is that *mudharib* candidates with feasible cooperation proposals will be able to submit *mudharabah* financing offers without any material guarantee. In terms of Islamic banks, the risk of this financing will not be too impactful because the insurance company will bear any risk that may arise in the future, and it is relatively safe for Islamic banks. However, the negative aspect of this concept is that insurance payments become very high, and this will burden the customer in returning the financing. Thus, *mudharabah* products can be very expensive and will not be able to compete with other credit products at conventional banks (Zakaria & Ismail, 2008).

The insurance guarantee has been applied in Islamic banks in Malaysia since 2005 when Bank Negara Malaysia (BNM) approved the Credit Guarantee Corporation Berhad (CGC) as a third-party guarantor for business ventures by implementing the Direct Access Guarantee Scheme of Islamic (DAGS-i). Under this scheme, the guarantor will charge fees for collateral services that are provided exclusively for Islamic financing products offered by Islamic financial institutions to their customers (BNM, 2008) (Sapuan, 2016).

In addition, the second is to use concepts such as venture capital based financing in which banks have the same role as venture capital companies and *mudharib* or customers function as the business partner companies (Bacha, 1997). In addition, to provide capital in funds for *mudharib*, the bank also assists *mudharib*.

If the precautionary factor is the reason, the principle of mutual trust in the *mudharabah* agreement has been broken with the requirement of a guarantee. To carry out the precautionary principle, both conventional and Islamic Financial Institutions must have preventive and repressive efforts to minimise risks. For instance, the selection for financing approval can be completed by reviewing the track record of *mudharib* and also the prospects of the business proposal of mudharib (Rosly & Zaini, 2008).

If the submission of *mudharabah* financing has been approved and the business is running, the bank shall conduct regular control to oversee and provide input to *mudharib*. in regards to economic issues occurring, banks generallly have more accurate information than any other individuals. Thus, error fund manager during decision making in *mudharib* can be minimised. If business practice goes off track, banks can find out the problem quickly and respond with providing the right solutions.

If all procedures are carried out thoroughly and in sequence, then the loss possibility will be smaller. *Mudharib* will not be burdened with fears of losing assets as collateral. Therefore, if the loss is unavoidable and the business of *Mudharib* is declared bankrupt, banks may conclude that the loss occurred was not due to the negligence of the *Mudharib*.

The advantage of this concept is that all forms of irregularities or unwanted business development will not occur so that the goal of venture capital financing, such as the establishment of partnership-based cooperation will be achieved. However, this second form also has shortcomings in the form of venture capital, so the funds included in the partnership must be in the form of equity participation. Whereas in banking, funds are included in cash funds. Also, banks have limitations in the personnel who will be positioned to oversee the business processes of *Mudharib*.

Conclusion

Mudharabah occurs when the capital owner (*shahibul maal*) has trust and believes in the person who will manage the capital (*mudharib*). However, based on the results of research all Islamic banks in Indonesia still require guarantees in the agreement of financing, including *mudharabah* financing. Therefore it is necessary to have a concept of sharia-based guarantee because it would not be appropriate if the financing transaction is sharia-based while the collateral as the additional agreement is based on conventional guarantees.

The *mudharabah* guarantee concept can be formulated by using two options. The first option is to use collateral in the form of insurance, in which fixed assets are the only collateral additions to the main guarantee. The advantage of this concept is that the fixed assets are not a principal guarantee because the principal guarantee is insurance; thus, prospective customers with no fixed assets are still able to use this contract for their businesses. The drawback is that the profit-sharing installments that must be given to the banks become very high because the cost of insurance will be more expensive, so this financing is incomparable to credit agreements of conventional banks.

The second option is to use a partnership approach in which Islamic banks as *shahibul maal,* in addition to providing funds, also provide management assistance for *mudharib,* so every

effort will be taken to monitor *mudharib* to avoid any possible harm to business. The advantage of this form is that there is no material security required because there is a management team to monitor the *mudharib* business. Nevertheless, the drawback is that if the concept adopted is more likely to be venture capital, then the funds channelled must be in the form of equity participation. However, Islamic banks still lack the personnel to be able to provide this service.

In addition, the personal approach needs to be administered in accordance with the concept of *taawun* or to cooperate in righteousness. Based on this concept, financing and the application of collateral to *mudharabah* financing can be enforced even though the guarantee cannot be executed. Apart from that, included in every financing, is always the possibility of default. The breach of contract that often happens in conventional credit systems is to seize collateral as a last resort if the customers cannot fulfil the agreed performance. However, in the concept of sharia guarantees, the concept of *taawun* needs to be prioritised, and also the concept of a personal approach with consumers needs to be emphasised to solve any problems that arise in the financing. This personal approach can be used when there are signs that the customer is facing payment difficulty. Banks need to be actively engaged in how to to personally approach cutomers when trying to find a solution for their difficulties. Eventually, the concept of the institutionalisation of sharia guarantees is more comprehensive than conventional guarantees.

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