



<https://doi.org/10.61292/eljbn.264>

Sharia Compliance In The Implementation Of Auction Execution Of Mortgage Rights In Islamic Banking

Eriza 'Izzati Rahayu *

Soegih Rasyad Sriwidyandiyo

Master of Notary, Airlangga University, Surabaya East Java, 60286, Indonesia

* Corresponding author: erizarahayu@gmail.com

Abstract

This study aims to determine (1) the Implementation of Mortgage Execution Auctions in Islamic Banking; (2) Sharia Compliance Auctions for Mortgage Execution in Sharia Banking. In this legal research, 2 approaches to the problem will be used: the statute approach and the conceptual approach. The primary legal materials used in this study are Law Number 21 of 2008 concerning Islamic Banking, Law Number 5 of 1960 concerning Basic Agrarian Regulations, and Regulation of the Minister of Finance Number 213/PMK.06/2020 concerning Implementation Guidelines Auctions and laws and regulations related to auctions for the execution of mortgage rights in Islamic banking. The secondary legal materials used are legal books related to mortgage execution auctions in Islamic banking and articles written in journals, theses, dissertations, and articles related to the subject matter in this study. The results of this study show that the auction arrangements for the execution of mortgage rights in Indonesia are still regulated in general, both for Islamic banking institutions and for all other institutions, not limited to conventional banking institutions

Keywords: Auction; Execution; Islamic Banking; Mortgage; Sharia Compliance.

I. Introduction

In line with Indonesia's national development goals to achieve the creation of a just and prosperous society based on economic democracy, an economic system based on the values of justice, togetherness, equity and benefits in accordance with sharia principles is developed in accordance with the Preamble point a of Law Number 21 of 2008 concerning Sharia Banking (hereinafter referred to as the Sharia Banking Law):

"Islamic Banking is everything related to Islamic Banks and Islamic Business Units, including institutions, business activities, as well as ways and processes in carrying out their business activities."

Islamic banking activities are basically the same type as conventional banks, which can be in the form of commercial banks and credit/people's financing banks. Besides being an *intermediary institution*, Islamic banks also function socially as stipulated in Article 4 paragraph (2) of the Islamic Banking Law (Usanti, 2015).

The difference between Conventional Banks and Sharia Banks and UUS in carrying out their business activities is the Sharia Principles that must not be violated by Sharia Banks and UUS in accordance with Article 2 of the Sharia Banking Law. The definition of Sharia Principles itself is regulated in Article 1 number 12 of the Sharia Banking Law, which is as follows:

"Sharia Principles are the principles of Islamic law in banking activities based on fatwas issued by institutions that have the authority to determine fatwas in the field of sharia."

The definition of sharia principles in Article 1 number 12 of the Sharia Banking Law is different from the definition contained in Article 1 number 13 of Law Number 10 of 1998 concerning Amendments to Law Number 7 of 1992 concerning Banking (hereinafter referred to as the Banking Law), which is as follows:

"Sharia Principles are the rules of agreement based on Islamic law between banks and other parties for depositing funds and or financing business activities, or other activities that are stated to be in accordance with sharia, including financing based

on profit sharing principles (*mudharabah*), financing based on the principle of equity participation (*musharakah*), the principle of buying and selling goods with profit (*murabahah*), or financing capital goods based on the principle of pure lease without option (*ijarah*), or with the option of transferring ownership of goods leased from the bank by other parties (*ijarah wa iqtina*)."

From the two definitions above, although the provisions are different, they have similarities, namely the importance of Islamic banking business activities based on Islamic law. Every Islamic bank must ensure that all its activities are based on *shariah compliance*. Mohd Haridan stated that Shariah compliance in Islamic banks played a significant role in financial inclusion and global economic stability (Haridan, et al., 2023).

Islamic banks and Islamic Business Units (UUS) have a financial intermediation function in the community, namely carrying out the function of collecting and channeling public funds according to Article 4 paragraph 1 of the Islamic Banking Law. Fund distribution activities according to Article 19 of the Islamic Banking Law consist of:

- a. Distributing profit-sharing financing based on *mudharabah Akad*, *musyarakah Akad*, or other contracts that are not contrary to Sharia Principles;
- b. Distributing financing based on *murabahah Akad*, *salam Akad*, *istishna' Akad*, or other Akad that is not contrary to Sharia Principles;
- c. Distributing financing based on the *qardh Akad* or other Akad that is not contrary to Sharia Principles; and
- d. Distributing financing for the leasing of movable or immovable goods to customers based on *ijarah and / or lease purchase* in the form of *ijarah muntahiya bittamlik* or other Akad that is not contrary to Sharia Principles.

According to the Explanation of Article 37 paragraph 1 of the Sharia Banking Law, the distribution of funds based on Sharia Principles by Sharia Banks and UUS contains the risk of failure or congestion in repayment so that it can affect the Health of Sharia Banks and UUS. In the Basel II Framework, the role of collateral is mainly a tool for reducing risk in disbursing credit (Lisa, et al., 2012). In relation to Islamic financial institutions, Shariah-compliant guarantees have not been widely offered in their services, as the nature of Islamic finance is based on profit and loss sharing (Lisa, et al., 2012).

Collateral in Islamic Law for material security is called *al-rahn* etymologically, the word *al-rahn* means fixed, eternal, and guarantee. Akad *al-rahn* in positive legal terms with collateral security items. Meanwhile, according to the term *al-rahn* is property that is used by its owner as collateral for debt that is binding (Sutarno, 2003).

According to the Elucidation of the General Section 1 of Law Number 4 Year 1996 on Mortgage Rights on Land and Land-Related Objects (hereinafter referred to as UUHT), the importance of the position of credit funds in the development process, it is appropriate if the lender and recipient of credit as well as other related parties receive protection through a strong security right institution and which can also provide legal certainty for all interested parties. Article 51 of Law No. 5/1960 on the Basic Regulation of Agrarian Principles (hereinafter referred to as UUPA) provides a strong security right institution that can be imposed on land rights, namely Mortgage Rights, as a substitute for *Hypotheek* and *Credietverband* institutions. This is also confirmed by the Explanation of the General section number 2 of the UUHT.

Mortgage Rights on land and objects related to land (hereinafter referred to as Mortgage Rights) in Article 1 of the UUHT are as follows:

"A security right attached to a land right as referred to in the UUPA, together with or without other objects forming an integral part of the land, for the repayment of certain debts, which gives priority to certain creditors over other creditors."

In addition, according to the Elucidation of the General section number 2 of the UUHT, the priority position certainly does not reduce the preference of the State's receivables according to the applicable legal provisions. Based on Article 20 of the UUHT, in principle there are three ways of executing a mortgage right. First, execution based on a promise to sell the object of the mortgage right on its own power. Second, execution based on the executorial title contained in the Mortgage Rights Certificate. Third, execution through the sale of the object of mortgage rights carried out under the hand based on an agreement made between the buyer and the holder of the mortgage right (Putriana, 2022). In *fiqh mu'amalah*, auction is known as *muzayadah*, *muzayadah* itself comes

from the word *zayadah*, which means to increase. *Muzayadah* means adding to each other. That is, people add to each other's bid prices for an item (Kamal, 2020).

To carry out the Mortgage Rights Execution Auction as a form of execution based on the executorial title contained in the Mortgage Rights Certificate against collateral that has been encumbered by Mortgage Rights, Sharia Banks and UUS refer to the Minister of Finance Regulation Number 213 / PMK.06 / 2020 concerning Guidelines for the Implementation of Auctions (hereinafter referred to as PMK Auction Implementation). The definition of auction is regulated in Article 1 number 1 of the PMK on Auction Implementation, which is as follows:

"An auction is a sale of goods open to the public with written and/or oral price offers that increase or decrease to reach the highest price, which is preceded by an Auction Announcement. To achieve the highest price, it is necessary to price the goods to be offered openly."

Based on the provisions of the Islamic Banking Law, that "the sale of collateral must be carried out based on an agreement with the debtor customer and carried out by auction" can be carried out by the bank or the debtor customer authorizes the bank to sell the collateral to a third party. The provision for the sale of collateral is known as *parate execution*, namely the bank as the holder of the Mortgage Rights can sell the Mortgage Rights directly to its customers to cover the bank's deficit due to the default of the debtor customer (Marnita, 2016).

In accordance with the provisions of Article 6 jo. Explanation of Article 6 of the UUHT, if the debtor is in default, the holder of the Mortgage Rights, namely the Sharia Bank and UUS, has the right to sell the object of the Mortgage Rights under its own authority through a public auction and take repayment of its debts from the proceeds of the sale. This shows that there is harmony between Article 6 of the UUHT and Article 40 of the Islamic Banking Law, where it is possible for Sharia Banks and UUS to sell debtor assets through public auction after obtaining approval from the debtor when financing is provided. Sales through auctions of Islamic banking debtor assets in Indonesia currently still follow the procedures stipulated in the PMK on Auction Implementation.

Based on the description above, the authors are interested in analyzing the Mortgage Rights Execution Auction in Islamic Banking and the Implementation of Mortgage Rights Execution Auctions in Islamic Banking.

II. Method

Law is a field of science that is *sui generis*, namely a field of science with a distinctive normative character. Thus, the type of research used in this study, in accordance with its nature, is normative legal research (*legal research*). The normative nature brings legal science as a science that studies the existence, nature, substance, procedures, and objectives of legal norms or rules. According to Peter M. Marzuki, legal research is a process for finding legal rules, legal principles, and legal doctrines in order to answer the legal issues at hand. This legal research is conducted to produce a description of the issues regarding the applicable law in Indonesia related to the implementation of auction execution of mortgage rights in Islamic banking whether it is in accordance with *sharia compliance*.

In this legal research, 2 (two) approaches to the problem will be used, namely the *statutory approach* and *conceptual approach*. The *statutory approach* is to examine all laws and regulations that are related to the legal issues being addressed, especially regarding the fulfillment of *sharia compliance* in the implementation of auction execution of mortgage rights in Islamic banking. Thus, researchers will examine all laws and regulations in related fields. The *conceptual approach* is an approach that departs from the views and doctrines that have developed in legal science, especially in the auction of execution of mortgage rights in Islamic banking.

III. Results and Discussion

Mortgage Execution Auction in Islamic Banking

An auction is a series of events that occur between the time when someone wants to sell something or more than one item, either personally or through his proxy, giving the opportunity to people who are present to make an offer to buy the items offered to the time when the opportunity disappears (Soemitro, 1997). Indonesia has known auctions since the Dutch colonialism period, where at that time regulations related to auctions were regulated in the form of *Vendu Reglement* (*Staatsblad* Year 1908 Number 198, amended by *Staatsblad* 1940 Number 56). Until now, the *Vendu Reglement* is still actively used as the legal basis for auctions in Indonesia, along with various Government Regulations and Decrees of the Minister of Finance to balance the economic development of society. Article 1 of the *Vendu Reglement* regulates the definition of auction or public sale as referred to in the *Vendu Reglement*, as follows:

"Public sale (openbare verkopen) is an auction or sale of goods made to the public by means of increased or decreased price bids or by the insertion of prices in a sealed cover, or to persons invited or previously informed of the auction or sale, or permitted to participate, and given the opportunity to bid the price, agree to the price offered or insert the price in a sealed cover."

Meanwhile, according to Article 1 point 1 of the PMK on Auction Implementation, it regulates the definition of auction that:

"Auction is the sale of goods open to the public by written and/or oral price offers that are increasing or decreasing to reach the highest price, which is preceded by an Auction Announcement."

Based on the descriptions related to the auction mentioned above, it can be concluded that the auction is a mechanism for selling goods openly to the general public either in writing and/or orally or directly and/or indirectly with an increasing bid price or according to achieve a high price that benefits the seller. Regarding the implementation of the auction, the elements that need to be fulfilled in the auction are as follows (Ngadijarno, et al., 2009):

- a. Performed at a predetermined time and place
- b. Done by announcing in advance
- c. Conducted by means of competitive oral or written price quotations
- d. The bidder submitting the highest bid is declared the buyer
- e. The auction is conducted in the presence of an Auction Officer.
- f. Every auction must be made Minutes of Auction by the Auction Officer who conducts the auction.

In order for the auction to be carried out properly and in accordance with the objectives of the auction, it is necessary to fulfill the following principles in its implementation (Sutarjo, 1993):

- a. The principle of openness, meaning that the auction is carried out with the intention to be known by the general public.
- b. The principle of competition means that the auction is carried out with the process of each bidder being given the same opportunity to compete.
- c. The principle of fairness, which means that the auction must be carried out in such a way that makes the parties involved.
- d. The principle of legal certainty means that the auction must be carried out with legal protection for interested parties.
- e. The principle of efficiency means that the auction must be carried out quickly and at an affordable cost.
- f. The principle of accountability means that the auction must be accountable by the Auction Officer in charge to all interested parties.

The methods used in the auction system are open auction and closed auction, both of which can be explained as follows (Marnita, et al., 2019):

- a. Open auction, is an auction that is carried out by direct bidding by bidders with an upward price system.

- b. A closed auction is an auction that is conducted by means of written bids by bidders and put in an envelope.

Based on the provisions related to auctions and their development contained in the applicable *Vendu Reglement*, Government Regulations, and Minister of Finance Regulations, various types of auctions can be identified. Types of auctions according to the provisions in Article 2 of the PMK on Auction Implementation, consist of:

- a. Execution Auction;
- b. Mandatory Non-Execution Auction; and
- c. Voluntary Non-Execution Auction.

Meanwhile, based on the provisions of Article 1 point 7 of the PMK on Auction Implementation, Voluntary Non-Execution Auction is an auction to carry out the sale of goods owned by private parties, individuals or legal entities/business entities that are auctioned voluntarily.

Aspects of the auction object or goods to be auctioned, can also be a differentiator of the type of auction. This type of auction is made into auction of movable objects and auction of immovable objects. Auction of movable objects is an auction of objects that can be moved in real terms.

There are 3 (three) stages of the auction procedure, namely the pre-auction / auction preparation stage, the auction implementation stage, and the post-auction stage (Wahyudi, 2017). These stages if described are as follows:

1. Pre-auction/auction preparation

This stage is a stage of action, namely:

Auction Request

According to Article 26 of the PMK on Auction Implementation, the request for auction is submitted in writing by the Seller to the State Wealth and Auction Service Office (KPKNL), Auction Center, or Class II Auction Officer Office according to the type of auction accompanied by auction requirement documents.

The elements contained in the request for auction include:

- a. Time and Place of Bidding
- b. Auction Limit Value
- c. Auction Bid Guarantee and Bank Guarantee Auction Bid Guarantee
- d. Request for Land Certificate (SKT) or Land Registration Certificate (SKPT)

Auction Announcement

According to the provisions of Article 1 of the PMK on Auction Implementation, auction announcement is a notification to the public about the upcoming auction with the intention of gathering auction enthusiasts and notifying interested parties. Based on the provisions of Article 53 of the PMK on Auction Implementation, the auction announcement must be carried out before the auction is held and carried out by the seller by being published on the KPKNL working day.

2. Auction Implementation

The auction implementation stage is a stage that aims to determine the auction winner. Determination of the Auction Winner

The auction winner is the person or legal entity that submits the highest bid in the auction process and must be authorized as the auction winner by the official.

3. Post Auction

The post-auction stage is the stage after the implementation is completed as follows:

Payment of auction price

PMK on Auction Implementation in Article 80 regulates the payment of auction prices and auction fees must be made no later than (five) working days after the auction.

Preparation of Auction Minutes

Every auction will be made minutes of the auction by the auction official. The minutes of the auction is essentially the minutes of the auction made by the auction official in the form of an authentic deed that has perfect legal force.

Submission of ownership documents

According to the provisions of Article 83 of the PMK on Auction Implementation, the submission of documents of ownership of goods in the event that the seller submits the original documents of ownership of the auction goods to the auction official,

Refund of security deposit of non-winning bidders

The security deposit of the bidder who does not win is returned to the relevant bidder no later than 1 (one) working day after the requirements for returning the security deposit from the bidder are completed.

Auction according to the term is the sale of collateral carried out in public including through electronic media by making oral offers with increasing prices or decreasing prices (Usman, 2017).

UUHT in Article 10 paragraph (1) emphasizes that the granting of a mortgage right is preceded by a promise to grant a mortgage right as a guarantee for the repayment of certain debts, which is stated in and is an inseparable part of the relevant debt agreement or other agreement that gives rise to the debt. Thus, based on the provisions of Article 10 paragraph (1), a mortgage right must fulfill three elements that are cumulative in nature, namely (Santoso, 2015):

- a. There is a debt and credit agreement as the main agreement, this debt and credit agreement can be made by notarial deed or under hand.
- b. The existence of a Deed of Granting Mortgage Rights (APHT) as an ancillary agreement (additional agreement), this deed is only made by a Land Deed Official (PPAT) because of its authority.
- c. There is registration of the Deed of Granting Mortgage, the purpose of this registration is to be registered with the Regency / City land office to be recorded in the land book and issued a Mortgage Title Certificate.

Related to the provisions of Article 10 paragraph (1) of the UUHT, it can be drawn that Mortgage Rights is an accessory agreement to the main agreement, namely a debt agreement. The main agreement in the form of a debt and credit agreement in accordance with the provisions of Article 1233 BW will give birth to an obligation, so that the parties will bear an obligation that must be fulfilled (Isnaeni, 2016). The purpose of Hak Tanggungan can be said to be to give creditors a more powerful position than other creditors or concurrent creditors when the debtor defaults.

The desire to create this goal is reflected in the provisions of Article 6 of the UUHT, which stipulates that, in a debt and credit agreement with a mortgage collateral institution, when the debtor is in default, the first mortgage holder has the right to sell the object of the mortgage on its own authority through a public auction and take repayment of its debt from the proceeds of the sale.

Related to the provisions of Article 6 of the UUHT, Article 20 paragraphs (1) and (2) of the UUHT are also regulated, which essentially regulates that, when the debtor is in default, the holder of the first mortgage right has the right to sell the object of the mortgage right and or when the debtor is in default, the creditor can exercise the executorial title contained in the title deed where the object of the mortgage right is sold through a public auction according to the procedures specified in the laws and regulations for the settlement of the receivables of the holder of the mortgage right with prior rights to other creditors.

Based on the description of Article 6 and Article 20 of the UUHT above, it can be seen that the execution of Mortgage Rights can be carried out in 3 (three) ways, namely as follows:

1. Sales Under Hand

Article 20 paragraph 2 of the UUHT regulates the sale of the object of Mortgage Rights under the hand, the arrangement is in the form of an agreement between the grantor and the holder of the Mortgage Rights, the sale of the object of Mortgage Rights can be carried out under the hand. The purpose of regulating the sale under the hand of the object of mortgage rights is to achieve the highest price that benefits all parties, in contrast to the way of execution of parate execution or executorial title which needs to go through the intermediary of the Auction Office as an auction executor which certainly requires more costs.

Sale under the hand by the holder of the Mortgage, according to the provisions of Article 20 paragraph (3) UUHT, can only be done after 1 (one) month has passed since it was notified in writing by the grantor and/or the holder of the Mortgage to the interested parties and announced in at least 2 (two) newspapers circulating in the area concerned and/or local mass media, and no party has expressed objections.

2. Title executorial (*title executorial*)

The executorial title in Mortgage Rights is a mandate from the provisions of Article 20 paragraph (1) letter b of the UUHT, which regulates that when the debtor defaults, then based on the executorial title contained in the Mortgage Rights Certificate as referred to in Article 14 paragraph (2), the object of Mortgage Rights is sold through a public auction according to the procedures stipulated in laws and regulations to pay off the receivables of the Mortgage Rights holder with prior rights to other creditors.

As stated in Article 14 paragraph (2), the executorial title on the Mortgage Rights Certificate contains the words "For the Sake of Justice Based on God Almighty" which has the same executorial power as a court decision that has obtained permanent legal force and applies as a substitute for the *grosse acte hypotheek* as far as land rights are concerned (Poesoko, 2013). Regarding the procedure for executing Mortgage Rights, the provisions follow the procedure for executing mortgages, which is based on Article 224 HIR and Article 258 RBg. Based on the provisions of Article 224 HIR and Article 258 RBg, the procedure that must be carried out by the creditor is to submit an application to the Chairman of the District Court regarding the Mortgage Rights Certificate to be executed (Kohidin, 2017).

The execution fiat referred to above is an execution action carried out by the Auction Office after obtaining approval from the Chairman of the local District Court. The approval from the Chairman of the Court is in the form of a Stipulation of the Chairman of the District Court which is not through a civil lawsuit mechanism.

Through the execution fiat from the President of the Court, a warrant will then be issued for the public sale of the Mortgage object. This warrant is given after giving a warning (*aanmaning*) to the debtor to give the debtor the opportunity to fulfill his obligations voluntarily.

As stipulated in Article 20 paragraph (7) HIR, the next stage before the implementation of the auction is carried out, namely making an announcement of the auction. This auction announcement is preceded by giving creditors the opportunity to pay off debts, costs and interest incurred as in Article 20 paragraph (5) UUHT. This auction announcement is made through newspapers 2 (two) times in a row within a deadline of 15 (fifteen) days as stipulated in Article 20 paragraph (7) HIR mentioned above.

The next step, after all auction requirements have been met, the Auction Office conducts a public auction of the object of Mortgage Rights with the proceeds from the auction used to pay off the debtor's debt. If the proceeds from the auction exceed the principal receivable, the remaining proceeds from the auction are returned to the creditor.

3. Parate Executie

The provisions of Article 6 of the UUHT facilitate the execution of the object of Mortgage Rights to the creditor holding the security object of Mortgage Rights, where the creditor is given the right on its own power to carry out the execution of Mortgage Rights when the debtor defaults.

Parate executie is to carry out itself or take its own rights, in the sense that without the intermediary of a judge, which is aimed at the collateral to further sell the goods themselves (Poesoko, 2013).

Article 6 and Explanation of Article 6 of the UUHT above can be concluded to experience conflict of norms. When there is a conflict of norms between the Article and the Explanation of the Article, the norm contained in the article is used, not the explanation of the article. So that even though the grantor and the holder of the Mortgage Rights do not agree on a clause where when the debtor defaults, the holder of the Mortgage Rights or the creditor has the right to sell by its own power the object of the Mortgage Rights and take the proceeds from the sale to pay off the receivables, the right is still born because it is regulated in Article 6 of the UUHT.

The auction applicant or creditor who will conduct the sale of collateral objects that have been encumbered with Mortgage Rights by auction must submit an application to the State Wealth and Auction Service Office, hereinafter referred to as KPKNL. Based on the principle of parate execution, the creditor must submit a written request for auction with the required documents to the Head of KPKNL to request a schedule for the auction. While the auction applicant or creditor based on the principle of fiat execution who will conduct the sale of collateral objects that have been burdened with Mortgage Rights must go through the local District Court together with the KPKNL (Sidabariba, 2019).

Banking institutions are the core of the financial system in every country, because banks are a reference for every person, business entity, both private and state/government-owned, to carry out transactions in the form of money storage, accounts payable, and other services related to financial matters (Suwandi, 2007).

The Islamic banking system is part of the concept of Islamic economics, therefore Islamic banking is not only required to generate profits through every commercial transaction, but also required to implement sharia values in accordance with the Qur'an and Hadith (Shomad, 2012). This description is the main point of difference between Islamic banks and conventional banks, where conventional banks only prioritize transactions for profit (profit oriented). Sharia values in accordance with the Qur'an and Hadith in the implementation of Islamic banks include principles (Suma, 2002):

The principle of *ridha'iyah* or willing to be willing, the purpose of this principle is that economic transactions in Islamic banking must be based on the principle of mutual willingness, especially with customers.

The principle of benefit, the purpose of this principle is that the contract made between the Islamic bank and the customer must be beneficial for both parties. This principle of benefit is in accordance with the Qur'an Surah Al-Hadid (57: 20) that the life of a Muslim in the world is a struggle for physical and mental, world and afterlife, as a sustainable life in the afterlife, which is measured from life in the world.

The principle of justice, the purpose of this principle is that in Islamic banking the transactions carried out must be fair in a broad and concrete context of transactions carried out by the Bank and the Customer. The principle of justice in Islamic banking aims to create public good by sticking to the Qur'an and Hadith.

The principle of mutual benefit, the purpose of this principle is that every transaction in Islamic banking between the Bank and the Customer must be beneficial to the Bank and the Customer. According to the provisions of Al-Qur'an Surah An-Nisa (4:33) that believers should walk and trade in a mutually beneficial way.

Transactions in Islamic banking in order to avoid deviations from sharia and violations of rights, norms and ethics in auction practices, there are general views and criteria including (Suma, 2002):

- a. Transactions are carried out by legally capable parties on a mutually voluntary basis ('an taradhin)
- b. The object of the auction must be halal and useful
- c. Full ownership/possession of the goods sold.
- d. Clarity and transparency of the goods being auctioned without any manipulation.
- e. The ability to deliver goods from the seller.
- f. Clarity and certainty of the agreed price without the potential for disputes.
- g. Do not use methods that lead to collusion and bribery to win bids.

The implementation of credit and financing refers to the guidelines set by Bank Indonesia. Specific arrangements for the implementation of the prudential principles of Islamic banking are mandated in Article 2 jo. Article 35 paragraph (1) of the Syariah Banking Law.

The principle of prudence in channeling bank financing is usually realized in the form of the 5c banking principle, which consists of *character*, *capacity*, *capital*, *collateral*, and *condition*. The *character* principle relates to the bank examining the *character* and habits of the prospective debtor; the *capacity* principle relates to the bank examining the *prospective debtor's* ability to manage finances; the *capital* principle relates to the bank examining the prospective debtor's economic ability before obtaining appropriate financing from the bank; and the *collateral* principle relates to the bank requiring collateral to follow the financing to be provided.

Based on the description related to Islamic banking and the prudential principle above, if it is related to the financing channeled by Islamic banks, it can be seen that in order to fulfill the prudential principle, Islamic banks need to require *collateral* or guarantee, as well as conduct an assessment of the debtor regarding the character, ability, capital and prospects of the recipient of the financing. This collateral can be in the form of mortgages, fiduciaries, pawning, mortgages, and warehouse receipts.

Article 40 of the Syariah Banking Law stipulates that if the customer receiving the financing facility does not fulfill its obligations, the Islamic bank can purchase part or all of the object pledged as collateral, either through auction or outside the auction, based on voluntary submission by the owner of the collateral or based on the granting of power to sell from the owner of the collateral, the purchased collateral must be disbursed within a period of one year.

The sale of collateral objects through auctions is known by Islamic Banks, but related to auctions for Islamic Bank Institutions, the procedures are not specifically regulated. So that the auction rules used in Islamic Banks are no different from the auction rules in conventional banks, namely the PMK on Auction Implementation. Regarding the mechanism for implementing the auction, it has been discussed in sub-chapter number 2 above.

Regarding the settlement of banking default disputes through auctions, associated with Islamic banking is the last alternative in settlement. Because there is a hadith that regulates the auction, namely Do not bid on something that has been bid on by others and do not propose to other people's proposals HR, Bukhari and Muslim. The hadith tells us that there is a prohibition on the practice of bidding on goods above the bidding of people by the Prophet Muhammad S. A. W, which can also be interpreted as buying and selling by auction. However, according to the opinion of Az-Zaila'I in Tabyin Al-Haqair, the prohibition of bidding practices that have been bid on by others is not analogous to auctions, because what is meant is the practice of bidding that has received an explicit statement from the seller, has received approval regarding the price, and there is an indication of approval or rejection of the offer from the seller.

As a supporter of the Hadith on the position of auctions in Islamic transactions, especially Islamic Banking, there is an Ijma' (agreement) of scholars regarding the permissibility of buying and selling by auction, because it is a habit of the people since the past even Umar Bin Khatab has also done it, and the auction is also considered as one of the ways in buying and selling. This Ijma' is adhered to in Islam with the Hanafi, Maliki, Shafi'I, Hanbali and Dzahiri schools of thought.

Based on the description of the auction in Islam above, it can be seen that the auction in Islam is allowed, but it must be implemented with sharia principles. The embodiment of the auction carried out under sharia principles, namely this auction originates from the agreement of the Islamic Bank in raising funds and channeling financing based on Islamic Law.

As described above, the auction in Islamic banking is the last alternative, therefore there are steps that need to be taken in settling receivables for debtors who are unable to pay before the auction is held. One of the provisions that can be referred to regarding these steps is the provision in the National Sharia Council Fatwa Number 47 / DSB-MUI / II / 2005 concerning Settlement of Murabahah Receivables for Customers Unable to Pay, namely:

- a. The murabahah object or other collateral is sold by the customer to or through the Shari'ah Financial Institution (LKS) at an agreed market price;
- b. The customer pays off the remaining debt to LKS from the proceeds of the sale;
- c. If the sale proceeds exceed the remaining debt, the LKS returns the rest to the customer;
- d. If the sale proceeds are less than the remaining debt, the remaining debt remains the customer's debt;
- e. If the customer is unable to pay the remaining debt, the LKS can release it.

Sharia Compliance of Mortgage Execution Auctions in Islamic Banking

Islamic banking in Indonesia and Malaysia is experiencing rapid growth. In 2017 in Malaysia the number of licensed Islamic banks was 16 Islamic Banks of which 14 were Malaysian banks and 2 were foreign banks (Bank Negara Malaysia, 2023). Islamic banks as one of the financial institution entities are required to have good and standardized risk management, especially those related to the risk of bad credit, which requires banks to implement a guarantee system in every financing transaction (Hidayati, et al., 2018).

In accordance with the provisions of Perlembagaan Persekutuan Perkara 3 (1), Malaysia is an Islamic country. Prior to the British colonization, Malaysia applied Islamic law and Customary Law. The implication of the application of these two laws is the existence of several legal products that strengthen the existence of Islamic law in Malaysia such as the Pawn Tax Act 1972, the Federal Territory Islamic Law Administration Act 1985, the Kedah Sharia Court Act 1983, the Malaysian Muamalat Act which regulates buying and selling, pledging, lending and borrowing, accounts payable, wages and others with the nuances of the Syafii school of thought (Hidayati, et al., 2018).

Malaysia implements a financing risk management system based on the prudential principle in the distribution of financing to Islamic Banks. One of the implementations is material collateral to reduce future credit risk. Etymologically, aminan or rahn means fixed, lasting, and holding. In terms, rahn is holding something in the right way for the purpose of fulfilling debt payment obligations for the debtor (Hidayati, et al., 2018).

Rahn tasjily is explicitly not recognized in the formal juridical regulation of rahn in Malaysia. However, rahn tasjily is implicitly included in the rahn rules where the object of rahn is not limited in type. Pawn objects such as cars, motorbikes, or others can change hands which are handed over to the murtahin physically, where the provision of custody fees is charged to the rahin as the murtahin's profit according to the concept of rahn known in classical Islamic law. This can be observed from complementary regulations such as the 1972 Pawn Tax Deed, which does not differentiate between the types of objects that can be used as objects of pawn, as is the case with pawn regulations in Indonesia (Hidayati, et al., 2018).

Based on the provisions of Perlembagaan Persekutuan Perkara 3 (1), it can be said that the complementary regulations in carrying out rahn operations in Islamic bank financing are in accordance with the principles and norms of Islamic law. The complementary regulations include: Akta Kontrak 1950, Kanun Tanah Negara 1965; Akta Jualan Barangan 1957; Akta Duti Setem 1959; and Akta Sewa Beli 1967 as stated earlier (Hidayati, et al., 2018).

As a financial intermediary institution, Islamic banks and also conventional banks that open Islamic banking services, provide product services in the form of deposits and financing schemes based on various contracts in muamalah. Islamic banking uses the words Islam or sharia because of the close relationship between the conceptual and practical aspects of the banking business and the principles of Islam or sharia (Triyanta, 2009).

The concept of shariah compliance in Malaysia has many similarities with that in Indonesia. Both countries show that the existing regulatory instruments focus on compliance with the principles of Islamic teachings rather than the banking business in at least three (3) aspects: in the definition, requirements for obtaining a license, as well as in operational principles. There are several acts or statutes that regulate Islamic banking business in Malaysia, namely the Islamic Banking Act (IBA) 1983 and the Bank and Financial Institutions Act (BAFIA) 1989. Guidelines are also issued by the Central Bank of Malaysia to encourage the performance of the Islamic banking business, the most important of which are the 1993 Tanfa Faedah Banking Scheme (SPTF) and the 2004 Guidelines on the Governance of Shariah Committee for the Islamic Financial Institution (BNM/GPS1) (Triyanta, 2009).

The legal concept of Islamic Banking (sharia) in Malaysia recognizes the existence of 2 (two) levels of sharia supervision. The first level is the Sharia Council in banking institutions and the second is the Sharia Council at the national level (Triyanta, 2009). In Malaysia, the first level is called the Sha'riah Committee (SC), and the second is called the Sha'riah Advisory Council (SAC) (Bank Negara Malaysia, 2004). As per section 16B of the Central Bank Act 1958, the SAC or the second level of supervision in Malaysia is positioned under the Central Bank and has the authority to regulate issues related to Islamic banking.

The responsibility of the Shariah Board in Malaysia is to ensure or oversee shariah compliance in both the products and operations of Islamic banking by regulating it in the Guidelines on Skim Banking Without Benefits SPTF 1993 and Guideline on the Governance of Shariah Committees for the Islamist Financial Institutions BNMGPS1 2004 with regard to membership qualifications, duties and obligations, recognition of fatwas issued, as well as their independence from any interference. In the process of supervising shariah compliance in Malaysia, business supervision is conducted both before the business is conducted ex ante and after the business is conducted ex post (Triyanta, 2009).

The Shariah Committee (SC) cannot be appointed or be appointed as a supervisory member in another bank. This also applies to members of the Shariah Advisory Council (SAC) who also cannot be appointed as members of the shariah board in any bank in Malaysia. In the advisory and supervisory model, Malaysia uses an advisory model where the Shariah Council is the advisory body. If there is a compliance issue in an Islamic Bank or Conventional Bank that offers Islamic services, it will be handled by the Supervisory Department of the Central Bank of Malaysia, not the SC members (Triyanta, 2009).

Shariah compliance can be defined as a condition where all activities of a financial institution are in accordance with sharia or the equivalence of all activities of Islamic financial institutions with Islamic Sharia in accordance with agreed fatwas or all activities in Islamic financial institutions based on Islamic Sharia (Kasim, 2018).

Islamic banking activities basically have the same type as conventional banks, which can be in the form of commercial banks and credit/people's financing banks. Apart from being an intermediary institution, Islamic banks can also function socially as stipulated in Article 4 paragraph (2) of the Islamic Banking Law (Usanti, 2015). The fundamental difference between Conventional Banks and Islamic Banks in carrying out their business activities is the Sharia Principles that must not be violated by Islamic Banks in accordance with Article 2 of the Islamic Banking Law. The definition of Sharia Principles itself is regulated in Article 1 number 12 of the Islamic Banking Law, which is as follows:

"Sharia Principles are the principles of Islamic law in banking activities based on fatwas issued by institutions that have the authority to determine fatwas in the field of sharia."

The purpose of Islamic Banking in Article 3 of the Islamic Banking Law and its Explanation is basically to support the implementation of national development in order to increase justice, togetherness, and equitable distribution of people's welfare. In achieving the objective of supporting the implementation of national development, Islamic Banking must adhere to Sharia Principles in a comprehensive (kaffah) and consistent (istiqamah) manner.

Shariah compliance is one of the important aspects in Islamic banking. Islamic banks are the object of supervision of prudential aspects of banking prudential supervisory as is done in Conventional Banks. In addition, Islamic banks are also the object of supervision on compliance with sharia principles. Thus, the implication of the meaning of sharia compliance is a legal aspect that is inherently inherent in an Islamic banking business or conventional banking that opens an Islamic banking service window (Kasim, 2018).

In the implementation of sharia compliance in Indonesia, the first level is called the Sharia Supervisory Board (DPS) and the national level is called the National Sharia Council (DSN). The DSN is part of the Indonesian Ulema Council (MUI), which is not a government body but has the authority to issue fatwas related to Islamic banking issues. Based on the mandate of Article 26 paragraph (4) and paragraph (5) of the Islamic Banking Law, the Islamic Banking Committee was established, which became the institution that formulated the DSN fatwa into PBI (Triyanta, 2009).

In accordance with the provisions of Article 4 paragraph 1 of the Islamic Banking Law, it is stipulated that Islamic Banking has the same function as Conventional Banks, namely the intermediary function to collect and distribute public funds. In carrying out this function, Islamic Banking cannot be separated from the principles of sharia, economic democracy, and the principle of prudence which is emphasized in Article 2 of the Islamic Banking Law as follows:

- a. Riba, which is the addition of income illegally (batil), among others, in exchange transactions of similar goods that are not of the same quality, quantity, and delivery time (fadhl).

- b. Maisir, which is a transaction that is dependent on an uncertain and fortuitous condition.
- c. Gharar, which is a transaction whose object is unclear, not owned, not known to exist.
- d. Haram, which is a transaction whose object is prohibited in sharia;
- e. Zalim, which is a transaction that causes injustice to the other party.

Economic democracy in the above provisions is sharia economic activities that contain the values of justice, togetherness, equity, and benefits, and for the Precautionary Principle is a Bank management guideline that must be adhered to in order to realize healthy, strong, and efficient banking in accordance with statutory provisions.

In 2019, OJK issued Financial Services Authority Regulation Number 10/POJK.05/2019 concerning the Business Implementation of Sharia Financing Companies and Sharia Business Units of Financing Companies which regulates the product standards that exist in Islamic Banking along with the deed of contract made later. The product standard is not a standard clause that must be followed in the deed of contract that will be made by Islamic banking with customers (Purbatin, Nantika, 2017).

Against defaulted Islamic banking financing agreements, the execution of collateral objects can use an auction system implemented under sharia principles. The sale of collateral objects through auctions has been recognized in Islamic banking, but related to auctions for Islamic banking institutions has not been specifically regulated. The regulation of the auction of execution of mortgage rights in Indonesia is still regulated in general, both for conventional bank institutions and for Islamic banking institutions, through the Mortgage Rights Law in general and the PMK on Auction Implementation in particular.

IV. Conclusion

The regulation of the auction of execution of mortgage rights in Indonesia is still regulated in general, both for Islamic banking institutions and for all other institutions not limited to conventional banking institutions. Arrangements regarding the encumbrance of land and/or building collateral on it use the mechanism stipulated in the Mortgage Rights Law, while for the procedures for implementing the auction of execution of mortgage rights use the provisions stipulated in the PMK on Auction Implementation, where these provisions have not yet been promulgated by the Government of Indonesia. The PMK on Auction Implementation has not specifically regulated the specific rules to the procedures for the auction of execution of mortgage rights for debtor assets pledged to Islamic banking. This is because in the process of encumbering mortgage rights against collateral, provisions based on sharia principles have not been regulated. In addition, technical procedures related to the implementation of the auction of execution of mortgage rights have also not been based on sharia principles whose sources come from Islamic Law where until now there have been no official regulations issued by institutions authorized to issue provisions related to Islamic banking.

Acknowledgments

The authors would like to thank the Master of Kenotariatan of Universitas Airlangga for supporting and providing opportunities for the completion of this research. The author also expresses his gratitude to the writing team for all the kindness and assistance that has been given during the completion of this research.

References

- Bank Negara Malaysia. <https://www.bnm.gov.my/index.php?ch=li&cat=iib&type=IIB&fund=0&cu=0> (diakses 01 Juni 2023).
- Hidayati, T. et. al. (2018). Mekanisme Penggunaan Jaminan Kebendaan (Rahn Tasjily) dalam Pembiayaan Bank Syariah di Indonesia dan Malaysia. *Jurnal Nurani*, 18(1), 164.
- IBA 1983, section 3 (b), 13A, and BAFIA 1989 section 124 (3) & (6) CBA 1958, section 16B (1). dan BNM GPS1, Guidelines on the Governance of Shariah Committee for the Islamic Financial Institutions, (December 2004) : 3.
- Isnaeni, M. (2016). *Lembaga Jaminan Kebendaan dalam Burgerlijk Wetboek*, Revka Petra Media.

- Kamal, H. (2020). Lelang Eksekusi Hak Tanggungan pada Perbankan Syariah Menurut Hukum Positif dan Fiqh Muamalah. *Jurnal Al Mushaadir*, 1 (2), 58-59.
- Kasim, S. R. (2018). Urgensi Hukum Kepatuhan Syariah dalam Perbankan Syariah di Indonesia. *Jurnal Potret – Journal Penelitian dan Pemikiran Islam*, 2(22), 3.
- Kohidin, M. (2017). *Hukum Jaminan, (Hak-Hak Jaminan, Hak Tanggungan dan Eksekusi Hak Tanggungan)*, Laksabang Yustitia Surabaya.
- Lisa, R., Galliani, C., Marchesi, M., Vallascas, F., & Stefano, Z. (2012). The mitigation role of collaterals and guarantees under Basel II. *JRC Technical Reports*. <https://doi.org/doi:10.2788/50944>.
- Marnita, (2016). Eksekusi Jaminan Hak Tanggungan sebagai Upaya Penyelesaian Pembiayaan Bermasalah (Studi Pada PT Bank Muamalat Indonesia Cabang Lampung). *Jurnal Fiat Justisia Journal of Law*, 10 (3), 526.
- Marnita, et al. (2019). Prosedur Jual Beli Lelang Barang Hasil Sitaan di Kejaksaan Negeri Bandar Lampung dalam Kajian Hukum Islam. *Asas: Jurnal Hukum dan Ekonomi Islam*, 11(2), 110. DOI:10.24042/asas.v11i2.5600.
- Mohd Haridan, N., Sheikh Hassan, A.F., Mohammed Shah, S., Mustafa, H. (2023). Financial innovation in Islamic banks: evidence on the interaction between Shariah board and FinTech. *J. Islam. Account. Bus. Res.* <https://doi.org/10.1108/JIABR-11-2022-0305>.
- Ngadijarno, F.X., Laksito, N. E., & Listiani, I. I. (2009). *Lelang: Teori dan Praktik*, Badan Pendidikan dan Pelatihan Keuangan Departemen Keuangan.
- Poesoko, H. (2013). *Dinamika Hukum Parate Executie Obyek Hak Tanggungan*. Aswaja Pressindo.
- Purbatin, A. N. (2017). Pembuatan Akta Syariah oleh Notaris di Wilayah Purwokerto dalam Perspektif Hukum Islam (Analisis Kritis Terhadap Keabsahan Saksi), *Repertorium*, 2, 4-5.
- Putriana, A. (2020). Lelang Benda Jaminan Hak Tanggungan Akibat Wanprestasi Perspektif Hukum Nasional dan Hukum Islam. *Shautuna Jurnal Ilmiah Mahasiswa Perbandingan Mazhab*, 3 (1), 196.
- Santoso, U. (2015). *Perolehan Hak Atas Tanah*. Prenada Media Group.
- Shomad, A. (2012). *Hukum Islam Penormaan Prinsip Syariah Dalam Hukum Indonesia*. Kencana Prenada Media Group.
- Sidabariba, B. (2019). *Lelang Eksekusi Hak Tanggungan (Meniscayakan Perlindungan Hukum bagi Para Pihak*. Papas Sinar Sinanti.
- Soemitro, R. (1997). *Peraturan dan Instruksi Lelang: Edisi Kedua*. Eresco.
- Suma, M. A. (2002). Ekonomi Syariah Sebagai Alternatif Sistem Ekonomi Konvensional. *Jurnal Hukum Bisnis*, XX, 18.
- Sutarjo. (2019). Eksekusi Lelang Barang Jaminan dan Masalah yang timbul dalam Praktek, *Makalah Penyuluhan Lelang*, 24-26.
- Sutarno. (2003). *Aspek-aspek Hukum Prekreditasi Bank*. Alfabeta.
- Suwandi, (2007). Pembangunan Hukum Perbankan Syariah di Indonesia. *Jurnal Hukum Islam El Qisth*, 3(2), 211.
- Triyanta, A. (2009). Implementasi Kepatuhan Syariah dalam Perbankan Islam (Syariah) (Studi Perbandingan antara Malaysia dan Indonesia). *Jurnal Hukum*, Edisi Khusus(16), 211-212.
- Usanti, T. P. (2015). Syaria Compliance sebagai Bentuk Perlindungan Bagi Nasabah pada Bank Syariah. *Jurnal Media Hukum dan Peradilan*. 1 (2), 2.
- Usman, R. (2017). *Hukum Lelang*. Sinar Grafika.

Wahyudi, S. (2017). Lelang Harta Waris Berdasarkan Putusan Pengadilan Agama. *Hakam: Jurnal Hukum Islam dan Hukum Ekonomi Islam*, 1(2), 157. DOI: <https://doi.org/10.33650/jhi.v1i2.71>.