



## A LEGAL UNCERTAINTY IN THE IMPLEMENTATION OF MORTGAGE DEED AS A GUARANTEE IN SHARIA COMPLIANT FINANCE AND BANKING IN INDONESIA

*By Debi Susanti*  
*Student of Notarial Master's Program,*  
*Faculty of Law, Sebelas Maret*  
*University of Surakarta, Indonesia*

*By Pujiyono*  
*Permanent Lecturer of Faculty of Law,*  
*Sebelas Maret University of Surakarta,*  
*Indonesia*

*By Hari Purwadi*  
*Permanent Lecturer of Faculty of Law,*  
*Sebelas Maret University of Surakarta,*  
*Indonesia*

### Abstract :

This research aims to study the existence of charge mortgaging implementation in Sharia financial banking contracts, which is Mortgage deed, in Indonesia. This research is a normative analysis which is done by analyzing some resources or secondary legal materials by making research to some regulations. For example civil code, mortgage law, Banking system regulations, Sharia Banking system regulations, Head of National Land Authority Regulations, Sharia Economic Law Compilations, and Legislation Fatwa National Sharia Board which are related with the object of study. This research method is using Law Concept analysis approach by overviewing Mortgage Deed that is made by Land Deed Official to Sharia Compliant Finance and Banking System. The result of this Analysis shows

that Sharia Banking does not recognize debt. They recognize this as financing, which is different with debt, and it is not regulated in Mortgage Law. Mortgage Deed, which is now a standard format, issued by Head of National Land Authority, is not fit with Sharia Banking principles. If an Land Deed Official changes the standard format of Mortgage Deed with the aim of adjusting with Sharia Banking Principle, it will contradict to the Head of National Land Authority. It will also contradict to lawful cause, which one of the contract requirements is not contradicting the regulations. In Sharia, contracts are agreement, So have to obey the requirements of agreement that is ruled in article 1320 civil code. One of them is lawful objective causa requirements is that the agreement is null at law if it is not fulfilled. This raises dilemmatic problem to Land Deed Official. That is why a new special regulation should be made in implementating of Mortgage deed in line with Sharia banking principle. Hence, the different of Mortgage Deed existence to conventional bank and Sharia bank is quite clear. Moreover, the existence of Mortgage deed in Sharia compliant finance and banking has good foundation at law.

**KEYWORDS :** *Sharia compliant finance and banking, Indonesia, Sharia Mortgage Deed, Legal standing of Sharia Mortgage Deed in Indonesia*

### INTRODUCTION

Indonesia has two banking systems (dual banking system). They are conventional bank and Sharia bank that are regulated in law no 10 of 1998 about legal changes, nor 7 year 1992 about banking. Sharia banking is a specific matter which has not been regulated



specifically in law no 10 of 1998 about legal changes number 7 year 1992 about banking. Therefore, law no 21 year 2008 about Sharia was established. Dual banking system is recognized since 1998 in Indonesia by amending law number 7 year 1992 about banking. Since then, the existence of Sharia Bank started to be recognized, and popular with profit sharing.

Sharia Banking Law was enacted with the aim to avoid the interests of loan in conventional banking. Sharia Banking offers investment program and sharing profit based on Sharia regulations. As regulated in Sharia banking regulation about sharia banking “everything has something to do with sharia banking and sharia banking unit, includes institutions, business activities, also the procedure to operate the business.”<sup>1</sup>

Sharia banking or Islamic banking is a banking system that is developed based on Islamic law. Efforts to build this system literally based on the prohibitions in Islamic religion. The prohibitions of the collecting and lending money with interest by lenders and investors, called *riba*. Sharia also prohibits any investments involving items that are categorized as *haram*. These are not guaranteed by the conventional banking system.<sup>2</sup>

The procedures of operating Sharia banking based on Muamalat principle. The principles are derived from the *Al-Quran* and *Al-Hadist*. All the business practices are oriented to Rasulallah era, where all the new business

were born as the result of *ijtihad* effort from ulamas or intellectual which are not contradict to *Al-Quran* and *Al-Hadist*<sup>3</sup>

Therefore, Islamic banking, refers to financial activities that adhere to Sharia. The meaning of Sharia principle as written in article 1 no 12, The law of Banking Shariah is “the principle of Islamic law in banking activities are based on *fatwa* which are issued by Legislation Fatwa National Sharia Board.”

Sharia banking, as an intermediary, has some fundamental works. They are, collecting funds in the form of savings, giro and deposits based on *wadiah* and *d jamanah* and distributing them to the public in different skim which is different from conventional bank.<sup>4</sup>

Sharia banking does not familiar with credit system, only financing. In the context of financing, Sharia banking is consistently implementing prudential banking principles as in conventional banking in distributing their credits in order to minimalize financing risks in Sharia banking. As regulated in article 2 Sharia banking law explaining that Sharia banking in operating their business compliant with Sharia principles, economic democracy and the principle of prudence.<sup>5</sup>

Article 23 law of Sharia banking concerning prudential banking principle mentions that Sharia banking and Sharia Business Unit (UUS) must have confidence in the willingness and ability of prospective

<sup>1</sup> Article no 1 of the Republic of Indonesia Law Number 21 of 2008 concerning Islamic Banking.

<sup>2</sup> Mujahidin Akhmad, Sharia Banking Law, Jakarta (2016), 16.

<sup>3</sup> Sumitro Warkum, Principles of Islamic Banking and Related Institutions (BAMUI, Takaful and Capital Markets) in Indonesia, Jakarta (2004), 6.

<sup>4</sup> Widjanarto, Banking Laws and Provisions in Indonesia, Jakarta (2003), 59-61. See Lathif. Ah. Azharuddin,, Application of Collateral Law in Financing in Sharia Banking 1.

<sup>5</sup> Article no 2 of the Republic of Indonesia Law Number 21 of 2008 concerning Islamic Banking.



customer who receive facilities to pay off all obligations on time before the Sharia bank distributing funds to the customer receiving facility.<sup>6</sup>

The implementation of prudential principle is aimed to avoid losses in Sharia banking, minimalizing business risks like commercial bank as in conventional bank.<sup>7</sup> One of the implementations is the choice of leasing contracts in Sharia banking products. To anticipate the risks, which can influence health, liquidity, also stability of business banking, Sharia banking also needs a guarantee, for the safety of the finance.<sup>8</sup>

As it case in conventional banking, Sharia bank also has assessment criteria to customer from every aspects of 5C principles. They are Character, Capacity, Capital, Collateral and Condition.<sup>9</sup> Collateral becomes one of important aspects 5C principles because Sharia Finance and banking is distributing the Customer's funds. So, collateral is needed to guarantee the financing repayment as it is written in article 1 paragraph (26) law of Sharia banking. It says that : "Collateral is an additional guarantee either movable or immovable objects submitted by the owner of the collateral to the Sharia bank and/or Sharia business Unit in order to guarantee the

repayment of customer's obligations receiving facility."<sup>10</sup>

Collateral which given by debtor could minimizes the risks (degree of risk) that could happen anytime. In other words, collateral is an item of value used to secure a loan, providing legal standing in credit activities.<sup>11</sup>

Guarantee in Sharia banking is a bank's effort to ensure that the borrower keeps up with their financial obligation agreed in the contract. A guarantee contract signed by lender and borrower that contains of debtor's ability or third party to guarantee a loan repayment from the credit or finance.<sup>12</sup>

In the concept of Islamic law, guarantee has been known as *al-rahn* and implemented in Rasullullah SAW era. In Islamic Jurisprudential, *rahn* (mortgage or security money) means possessions offered as security for a debt so that the debt will be taken from them in case the debtor failed to pay back the due money.<sup>13</sup>

In *Hadits* narrated by Bukhari and Moslem, have been narrated that Rasulullah SAW has bought some meals from a Jewish and exchange His harness as a guarantee. According to intellectual of Islamic Law, a guarantee that had been given by Rasullullah

<sup>6</sup> Article no 23 of the Republic of Indonesia Law Number 21 of 2008 concerning Islamic Banking.

<sup>7</sup> Keenan Richard, "Overlapping Authorities in Sharia Banking Dispute Resolution", Islamic Finance: Structures and Challenges, Project Newswire, Dubai, (2010), 6. See, Jalil Abdul, articles in the Constitutional Journal, 10th Volume, No 4, (2013), 682.

<sup>8</sup> Junita Fifi, "Execution of Fiduciary Guarantees according to the Fiduciary Law Number 42 of 1999 and the Problems in Practice", article in the Yuridika Journal, 16th Volume, No 3, May-June 2001, 252-253.

<sup>9</sup> Kasmir, Banks and Other Financial Institutions, (2012), 95.

<sup>10</sup> Article 1 of the Republic of Indonesia Law Number 21 of 2008 concerning Islamic Banking.

<sup>11</sup> Hernoko Agus Yudha, Mortgage Guarantee Institution as Support for National Banking Credit Activities, Thesis, Airlangga University, Surabaya, (1998), 67.

<sup>12</sup> Wangsawidjaja Z. A., Islamic Bank Financing, Jakarta, (2012), 323.

<sup>13</sup> Ala' Eddin Kharofa, Transactions in Islamic Law, : A.S. NOORDEEN, Kuala Lumpur, (1997), 157.



was the first momentum of giving a guarantee. It can be seen that Rasulullah has introduced a guarantee as Islamic Law resource.

Based on *Al Quran* and *Al Hadits*, Ulama Fikih agrees to say that *al rahn* is a form of a guarantee based on Islamic Law. The implementation of Sharia guarantee based on *Jumhur Ulama* is allowed, because they see many benefits concerning human muamalah relation and as a moral existence to implement the Islamic economics.<sup>14</sup>

National Sharia Board also claims fatwa about Musyarakah Financing, which also explain about guarantee, No 08/DSN-MUI/IV/2000 in provision no 3 point a article (3) : “Principally, There is no guarantee in Musyarakah Financing , however to avoid distortion, Musyarakah Syarik Assets (LKS) can ask the guarantee.”

According to Abdukadir Muhammad, guarantee is an additional agreement (accessoir) to debts and receivables or credits agreements. In a guarantee agreement determined that goods guarantee or ownership of assets evidence are controlled by the creditor. If debtor default on their payment during the credit installment payment period, Creditor has a control to auction the goods guarantee to the repayment of the debt.<sup>15</sup>

There are various types of guarantee which are used by Sharia bank in order to provide

facilities to the customer. One of them is collateral which take a form of movable goods ( fidusia and lien), registered boat ownership collateral (hipotek), warehouse receipt collateral. In addition, Collateral which take a form of immovable goods, for instance ; land and the buildings on it (mortgage right). From all those guarantees , mortgage right is the most frequently used as a guarantee binder by public in Sharia finance.<sup>16</sup>

In order to guarantee the legal certainty on a guarantee which is given by the customer receiving facility to the bank. Likewise conventional banks, Sharia bank implements charge mortgaging on the land guarantee with assistant of authorized official , in this case is Land deed official.<sup>17</sup>

Mortgage right is a .form of a debt repayment guarantee, with the rights before the object of guarantee, which is land rights regulated in Law No 5 of 1960 about Basic Agrarian Principles (UUPA).<sup>18</sup>

The application of guarantee in finance is implemented by both Conventional bank and Sharia bank. Basically oriented to the provision of mortgage guarantee applied in Indonesia, it is a guarantee that is charged on loan agreement or other agreements causing debts is regulated in provision article 10 paragraph (1) Law No 4 of 1996 about Mortgage rights (Law of Mortgage Rights) explain that “(1) The granting of Mortgage

<sup>14</sup> Hafidah Noor, Study of Sharia Guarantee Legal Principles in the Framework of the Sharia Law System, Trunojoyo Journal, (2013), 11

<sup>15</sup> Muhammad Abdulkadir, Law of Property, Bandung, ( 1994), 95.

<sup>16</sup> Hidayati Nurul, “Implementation of Mortgage Rights in Sharia Banking”, (Thesis: Master of Islamic Law Faculty of Sharia and Law S te Islamic University Sunan Kalijaga), Yogyakarta, 2017), 23.

<sup>17</sup> Andani Dwi Rezky, “The Imposition of Mortgage Rights in Financing Contracts at Banks Sharia and Its Execution”, (Thesis: Notary Masters Program, Graduate Program, Faculty of Law, Islamic University of Indonesia), 2018, 16.

<sup>18</sup> Muljadi Kartini and Widjaja Gunawan, Mortgage Right, Jakarta, (2005), 14.



rights is preceded by a promise to provide mortgage rights as collateral for the repayment of certain debts, which are stated in and are inseparable part of the loan agreement or other agreements that rise the debts “<sup>19</sup>

It becomes a guideline that Mortgage rights guarantee must based on loan agreement, or other agreements causes debts. While in Sharia banking, specifically the basic principle of Murahabah, It is not a matter of debts and receivables, it is a sell -purchase agreement. Moreover, Article 10 paragraph (2) Law of Mortgage Rights arranges the giving of Mortgage rights signed in a written agreements, poured in Mortgage deed.

Article 1 No 5 Law of Mortgage Rights mentions that Mortgage deed is a land deed contains of granting Mortgage rights to certain creditor as a guarantee of the the debts repayment. Follow the article, it is not suitable if the financing contract is attached with the Mortgage rights guarantee, because not all financing contract in Sharia banking raises debts and receivables. However, what happens in Sharia banking, the financing provided by Sharia banks to customers is usually attaced with material guarantee, especially mortgage rights.<sup>20</sup>

It is based on Head of National Land Authority Regulations No 8 of 2012 (Perkaban No 8 of 2012) about amendment to regulations of the State Minister of Agrarian Affairs / Head of National Land Authority No

3 of 1997 about the implementation of Government regulations No 24 of 1997 about Land registration in article 96 paragraph (1) point f about Mortgage Deed, which the form of Mortgage Deed must be made by a Land Deed Official regulated by the Land office formally in accordance with the standard of The procedures for filling also based on Annex in the regulations. In article 96 paragraph (3) regulates that registration of land Data transformation and the making of Mortgage Deed cannot be done based on the inappropriate deed in provision paragraph (1) juncto article 96 paragraph (5) which claim that “Head of National Land Authority rejects the registration of land deed which inappropriate with provisions regulated in paragraph II).

Meanwhile, Mortgage Deed in the annex regulations is made to accommodate the imposition of mortgage on guarantee to conventional bank civilly, not to Sharia bank, in which in the standard format found the words “credit/debts” also “ credit agreements/debts agreements”. The substance written in Mortgage Deed specially provided to debts and receivable contracts, either in the form of debt that already exist or has been agreed upon with a certain amount based on a debt agreement or other agreements that rise to debt law. Meanwhile in Musyarakah contract does not consist of debts and receivables agreement, indeed, it consists of cooperationship/partnersip.<sup>21</sup> It raises confusion and uncertainty to the Land

<sup>19</sup> Jamilah Siti, Purwaningsih Endang, and Yusuf Chandra; "The Imposition of Mortgage Guarantees in Murahabah Contracts", ADIL: Law Journal, 12th Volume No 1, (2021), DOI: <https://doi.org/10.33476/ajl.v12i1.1915>

<sup>20</sup> Wicaksono Putra, “Overview of the Implementation of Apht (Deed of Granting Mortgage Rights) Made Before Ppat (Official Land Deed

Maker) in Musyarakah Financing Contracts, (Study on Sharia Banks in Yogyakarta City)”, (Thesis: Masters Program in Notary Program, Faculty of Postgraduate Program Law of the Islamic University of Indonesia), 2016, 16

<sup>21</sup> *Op.Cit.*, Wicaksono Putra.



Deed Official (PPAT) in order to make The imposition of Mortgage rights deed for finance and bank-compliant Sharia. Because if it is oriented to Sharia principle, it does not recognize the words credit and debts. The formal standard of that Mortgage deed has raised distortion in making of Mortgage deed based on Sharia-compliant contract.

Therefore, in practical, the Mortgage deed which is the formal standard from National Land Agency (BPN), sometimes some words found changed by the Land Deed Official (PPAT) in order to harmonize them with Sharia banking principles that does not recognize the word credit/debts or "credit agreement/ loan agreement". However, it makes Land Deed Official (PPAT) insecure. Because if look back to Head of National Land Authority regulations, what the Land deed official does in changing the formal words in Mortgage deed is not appropriate with the procedure of filling stipulated by National Land Agency (BPN).

The polemic of making the Mortgage deed in Sharia finance is not only concerning to the formal and standard of Mortgage Deed by National Land Agency (BPN), but also inexistence of special regulation about Mortgage rights which accommodate the guarantee on land in Sharia banking. It causes dilemmatic and uncertainty to Land Deed Official (PPAT) in carrying out their responsibilities. It sometimes makes the Land deed Official (PPAT) does not have bravery to imposition Mortgage rights on Sharia Financing contract.

Based on that history, there are several obstacles need to be discussed. They are the

uncertainty of granting goods guarantee in the form of Mortgage rights namely Mortgage Deed (APHT) in Sharia banking finance by Land Deed Official (PPAT). Concerning those problems, this law discussion taking title;

### **“A Legal Uncertainty In The Implementation Of Mortgage Deed As A Guarantee In Sharia Compliant Finance And Banking In Indonesia”**

This research is a normative law research, done by researching some sources and secondary data as resources, by searching through the regulations and literatures related with Sharia banking specifically to guarantee concept in Sharia banking connected with the imposition of Mortgage rights done by Land Deed Official, in order to reach conclusion about the validity of granting goods guarantee in the form of Mortgage rights namely Mortgage Deed in Sharia banking Finance by Land Deed Official.<sup>22</sup>

This approach used Conceptual approach, that used provisions and regulations which already exist, considering related provisions Mortgage rights guarantee in Sharia banking is uncertain. Hence, it still use law system stipulated by National Banking.

The writer used both primary and secondary law sources. The data collection technics by reading, overviewing, also studying library sources relevant with the object of study, including some references books, papers, law regulations, documents and other sources related with the problem of analysis. Been analyzed by using both descriptive and argumentative methods. Descriptive means describing what is according to conditions.

<sup>22</sup> Soekamto Soerjono and Mamudji Sri, Normative Legal Research (A brief overview), Jakarta, (2001), 13 – 14.



Argumentative method is going to answer the problem formulations that will be analyzed both theoretically and critically.<sup>23</sup>

## DISCUSSION

### A Legal Uncertainty In The Implementation Of Mortgage Deed As A Guarantee In Sharia Compliant Finance And Banking In Indonesia

Article 1 paragraph (1) Law of Mortgage rights arranges the mortgage rights which is mentioned as a guarantee rights, and it is charged to right on land referred to in Law No 5 of 1960 about Basic Agrarian Principles Regulations, inclusive or not inclusive other goods which becomes united with the land in order to the certain repayment to the other creditors.

Meanwhile, the definition of debts or credit stipulated in article 1 paragraph (11) law of banking which mentions it as a money provider or bill that can be equated with that, based on the agreement or loan contract between bank and another party that made obligatory to loaner to pay off the debts in certain period with interests.

The term of debt or credit are known in Sharia Bank. However, in Sharia it is known as financing. Article 1 paragraph (25) Sharia Banking Law mentions the meaning of financing is a money provider or equated bills, which are :

- a. Profit Sharing Transaction in the form of *mudharabah* and *musyarakah*.
- b. Lending-borrowing Transaction in the form of *ijarah* or Lending – Purchasing in the form of *munthahiya bittamlik*.

- c. Selling-Purchasing Transaction in the form of receivables *murabahah*, *salam* and *istishna*.
- d. Lending-Borrowing Transaction in the form of receivables *qardh*
- e. Lending-borrowing service Transaction in the form of *ijarah* to a multi service transaction based on agreement or contract between Sharia Bank and /or Sharia Business Unit (UUS) with other parties that give obligatory the funded party and/or money facility given to return the money in the certain period with exchange namely *ujrah*, no exchange, or profit sharing.<sup>24</sup>

From the definitions above, it can be concluded that debts / credit and financing, both are the form of money provider facility granted by banks, where there is a difference between debts/credit (in conventional bank) and financing (in Sharia banking). The difference is in the profit or compensation received by bank for its service providing funds. In credit/ debts which is given by conventional bank, the funds return with interests, while Sharia banking prohibits interests/*riba*.<sup>25</sup>

Not all Financing in Sharia banking equaled with debts/credit. Funds providing in conventional banking literally is debts/credit. Meanwhile in Sharia banking the provider must be seen from the form of contracts in the sharia banking itself. Contracts which are generally met in sharia banking is *Musyarakah* contract, *Mudharabah* and *Murabahah*.<sup>26</sup>

<sup>23</sup> Mertokusumo Sudikno, Legal Inventions (An Introduction), Atma Jaya University Yogyakarta, (2010), 89.

<sup>24</sup> *Op. Cit.*, Andani Dwi Rezky, 75

<sup>25</sup> Triyanta Agus, Sharia Banking Law, Malang, (2016), 43.

<sup>26</sup> *Op. Cit.*, Mujahidin Akhmad, 83



*Musyarakah* is a partnership contract between two parties or more in term of each party give portion of funds, and profit will be shared based on agreement in the contract. Meanwhile, the losses are certified based on the portion of each party's fund.<sup>27</sup> *Mudharabah* is a partnership contract on a business where first party (*Malik, Shahibul Mal*, or Sharia bank) provides capital and the second party (*amil, mudharib* or customer) acts as funds organizer. Profits are shared on a ratio agreed in contract. While loss is borne by Sharia bank, unless mistakes made by second party.<sup>28</sup>

*Murabahah* contract is a financing contract on assets and affirms the value of buying to buyer. In addition, buyer buys the assets back with higher value as a profit that is agreed.<sup>29</sup>

Considering the financing contract forms, it is unfair if they are equated with conventional bank loans. *Mudharabah* and *Musyarakah* contracts are based on the principle of partnership between bank and client, and *Murabahah* contract is based on selling purchasing principle, that is why cannot be equated with finance that principally not based on debts/credit.<sup>30</sup>

Considering the difference between debts/credit and financing in Sharia banking, as mentioned above, it will be unfair if the finance is guaranteed by Mortgage rights guarantee. Considering the existence of Mortgage rights based on debts, while in financing contract in Sharia banking can not be equated with debts. Regardless, the basic

of Mortgage rights born, as regulated in article 1 paragraph (1) junto article 10 paragraph (1) Law of Mortgage rights, is to guarantee the repayment of debts which can not be used as a basis for guaranteeing the fulfillment of obligations by customer under Sharia Finance banking. Because principally debts / credit is different with financing.<sup>31</sup>

Talking about the existence of Mortgage rights imposition in Sharia banking finance, it needs to be viewed based on the form of contract or agreement when the agreement before the imposition of Mortgage rights on land as guarantee in Sharia finance is given. Article 10 paragraph (2) Law of Mortgage rights mentions that the granting of mortgage rights is carried out by making mortgage deed by Land Deed Official based on applicable laws and regulations. It is mentioned that Mortgage Deed must be made by Land Deed Official in accordance with applicable laws and regulations, Head of National Land Authority Regulations No 8 of 2012. Head of National Land Authority Regulations (Perkaban) should attach the form of Mortgage Deed that become the basic of making certificate related with the imposition of Mortgage rights by Land Deed Official (PPAT).

Article 96 paragraph (1) Head of National Land Authority Regulations (Perkaban) No 8 of 2012 mentions that the form of deed that is used in Mortgage Deed, the procedure of filling is made according to the attachment in the Head of National Land Authority Regulations (Perkaban). In article 96

<sup>27</sup> Elucidation of Article 19 paragraph (1) letter (c) of the Republic of Indonesia Law Number 21 of 2008 concerning Islamic Banking

<sup>28</sup> Mardani, *Sharia Business Law*, Jakarta, (2014), 138.

<sup>29</sup> Elucidation of Article 19 paragraph (1) letter (d) of the Republic of Indonesia Law Number 21 of 2008 concerning Islamic Banking

<sup>30</sup> *Op. Cit*, Andani Dwi Rezky, 76

<sup>31</sup> *Ibid*



paragraph (2) Perkaban No 8 of 2012 mentions that the making of Mortgage Deed cannot be done based on deed which is not appropriate with paragraph (1), about the form of deed and the procedure of filling deed attached in that Head of National Land Authority Regulations (Perkaban). Regardless, the form of deeds that becomes instruction and procedure of the way to fill in deed that is a formal form standarised from deeds under Land Deed Official (PPAT) authority, inclusive of Mortgage Deed.

Some phrases found in Mortgage Deed attachment seen in Head of National Land Authority Regulations (Perkaban) No 8 of 2012 only accommodates matter of debts/credit in conventional banking. It is shown with the facts in Mortgage Deed found in that Head of National land Authority Regulations attachment :

- a. Using words Debtor and Creditor.
- b. There is phrase "... has been signed the agreement of debts and receivable..."<sup>32</sup>
- c. There is a phrase "in order to guarantee debtor's repayment amount Rp.../ amount of money can be determined at a later time based on debts and receivable agreement mentioned, and addition, change, extension also the updates (hereinafter referred to as debts and receivables)."<sup>33</sup>
- d. The words "debts and receivables" frequently mentioned in article 2 attachment of Mortgage Deed.<sup>34</sup>
- e.

Those phrases in Head of National Land Authority Regulations (Perkaban)

Attachment No 8 of 2012 is a standard format that becomes an instruction of procedure in filling Mortgage Deed by Land Deed Official (PPAT) that imposition mortgage right , in which there is debt in it. As a matter of fact, that format standard is in right position if it is used in conventional bank that implementing debts/credit, and where the words debt, debtor and creditor can be found.

However, it is inappropriate if it is applied in Sharia Financing , because financing is not equal with debts. In addition, debtor is not equal with client or recipient of financing facilities and creditor is not equal with fund provider as those phrases mentioned in Perkaban attachment.

The validity of a contract, Sharia Economic Law Compilation regulated in article 26 which mentions that contract is not valid if it contradicts to:

- a. Islamic Law
- b. Law Regulations
- c. Public Order
- d. Decency

Islamic Law is a basic foundation or principle, the making of contract should be based on the principle of a lawful cause, meaning it is not contradict to law and it is not prohibited to law, and it is not *haram*.<sup>35</sup>

Basically, Mortgage rights is guaranteeing debts repayment. It is straightly mentioned in Law of Mortgage rights in article 1 paragraph (1) juncto article 10 paragraph (1). On the other hand, financing as explained before is

<sup>32</sup> Attachment to Mortgage Deed, Perkaban No 8 of 2012, 3.

<sup>33</sup> *Ibid*

<sup>34</sup> *Ibid*, 7

<sup>35</sup> Article 21 letter (k) Compilation of Sharia Economic Law



not equal with debt. So with the imposition of collateral for land in financing in Sharia banking which is burdened with land rights guarantee institutions in financing sharia banking which is burdened by mortgage guarantee institution is not appropriate with article 1 paragraph 1 juncto article 10 paragraph (1) Law of mortgage rights. If then Land Deed official carries out phrase change that is formal in Mortgage Deed, with the aim of harmonizing with Sharia banking principle, this action contradicts to article 96 paragraph (1) which mention that the form of deed which is applied in Mortgage deed and the procedure of filling the deed is made based on attachment of Perkaban. In addition, in paragraph 3 Perkaban No 8 of 2012 regulates the registration of the data change of land registration as mentioned in article 95 paragraph 1 and Mortgage Rights Granting deed making as mentioned in article 95 paragraph (2), cannot be done based on deed that contradict to provision in article 2.

Hence, the *halal* lawful cause mentions that it is not contradict to law, in this case is Islamic Law, then it becomes not fulfilled. Lawful cause related with the validity of criteria deed that is not contradict to Law regulations also is not fulfilled. Non fulfillment of the contract criteria based on article 28 paragraph (3) Islamic Economic Law Compilaton causes the contract is cancelled at law, because cancelled contracts is uncooperative and or the requirements.<sup>36</sup> The contract is seen valid by *syara*. If it is in

line with faith and requirements set by *syara* law.<sup>37</sup>

Contract in Sharia is also an agreement<sup>38</sup>, that is why it should compliant with valid requirements of agreement regulated in article 1320 civil code . They are agreement, the object, and lawful cause. The requirement of lawful cause is same with the valid requirement of the contract in article 26 Sharia Economic Law Compilation which mention that it cannot contradict with law regulations. Article 1335 juncto Civil code mentions that a cause is prohibited if it contradicts with law, decency and public order. A cause is declared contradict to law if it contradict to law.<sup>39</sup> The requirement of valid agreement is lawful cause . It is an objective requirement which can make the agreement is cancelled at law if the requirement is not fulfilled. It means that if the agreement is not valid in previous time, law recognize that the agreement is never exist.<sup>40</sup>

The effect to The imposition of Mortgage rights in Sharia Finance banking which is preceded by Mortgage deed making by Land deed official is a form of a contract or agreement when it is improved and does not meet the legal requirements of the contract, which is not contradicting to law regulations, the imposition of Mortgage rights in Sharia finance banking contract will be cancelled at law.

<sup>36</sup> Article 28 paragraph (3) Compilation of Sharia Economic Law.

<sup>37</sup> Susanto Burhanuddin, Sharia Banking Law in Indonesia, Yogyakarta, (2008), 235

<sup>38</sup> Faqih Aunur Rohim, Sharia Banks, Sharia Business Contracts & Dispute Resolution in Court, Yogyakarta, (2017), 149.

<sup>39</sup> Khairandy Ridwan, Indonesian Contract Law, Yogyakarta, (2013), 190

<sup>40</sup> *Ibid*, 192



This problem raises the legal uncertainty for Legal Deed Official in Mortgage deed making In Sharia finance banking. If follow the standard format Mortgage deed as in Perkaban No 8 of 2012, neither does fulfill Sharia banking principles nor have legal standing. It because the formal standar oriented to Mortgage right law that arrange the repayment guarantee, while financing in Sharia banking is not equal with debt. However, if the Land deed official is able to improve by changing the phrases in Mortgage deed by harmonizing it with Sharia principles, it can contradict to law regulations, with the effect of deed cancellation at law.

### CONCLUSION AND SUGGESTION

The granting of guarantee in the form of Mortgage Deed in Sharia finance and banking based on some points: **First**, Mortgage Deed Right regulations in law No 4 of 1996 about Mortgage right article 1 paragraph 1 juncto article 10 paragraph (1) arranges the repayment of debt guarantee, while in Sharia banking is not familiar with debt. **Second**, phrases that found in Mortgage Deed has been stipulated formally in Head of National Land Authority Regulations (Perkaban) No 8 of 2012, which is not suitable to Sharia banking principles. If Land Deed Official improves to change the standard format of Mortgage Deed in order to be suitable to Sharia banking principles. Hence, based on article 95 paragraph (3), Head of National Land Authority Regulations (Perkaban) considers Mortgage Deed is no longer applied because of provisions offense. **Third**, the improvisation made by Land Deed Official also can contradict to lawful cause related to the validity of the contract, in which cannot contradict to law regulations. **Fourth**, that

point also contradict to the requirement validity of agreement as regulated in article 1320 civil code. One of them is lawful cause, that is an objective requirement that can make the agreement is cancelled at law.

This problem can raise the legal uncertainty for Land Deed official. If the standard format of Mortgage Deed is followed as in Head of National Land Authority Regulations (Perkaban) No 8 of 2012, it does not meet Sharia banking principles. Besides, there is no special law arranges the imposition of Mortgage rights in Sharia finance banking. However, if Land Deed Officer improves by changing the phrases in Mortgage Deed, harmonizing it with Sharia banking principles, it will contradict to law regulations. The effect is deed is cancelled at law. Therefore, it is an urgent case to make legal standing in Mortgage Deed making which is suitable to Sharia banking. Therefore, the difference could be seen clearly between Mortgage Deed for conventional bank and for Sharia bank. It could guarantee the implementation of Mortgage Deed Sharia finance banking in Indonesia that suitable to Sharia banking principles and in line with the law which regulates it, and Indonesian customer are more safe and comfortable using the Finance service Sharia banking in Indonesia.

\*\*\*\*\*