IMPLEMENTATION OF MUSYARAKAH MUTANAQISHAH IN REFINANCING AND TAKE OVER PRODUCTS: A STUDY OF LEGAL ASPECTS AND BASIC PROVISIONS IN ISLAMIC BANKING

Salfin Abdul Rahma Al'auf[1], Nana Herdiana[2], Yoyok Prasetyo[3]

[1,2,3]UIN Sunan Gunung Djati Bandung, Indonesia

E-mail: 1) abdulsalfin19@gmail.com. 2) nanaherdiana@uinsgd.ac.id. 3) yoyok@uninus.ac.id

Abstract

This research investigates the application of the Musyarakah Mutanaqishah Agreement in two sharia-based financing products, namely refinancing products and take over products, which are used by sharia banking institutions. This study aims to analyze how the Musyarakah Mutanaqishah Agreement is used in these two products and its impact on sharia compliance, flexibility and profits for financing holders. The research method used involves documentation analysis, interviews with sharia banking practitioners, and case studies of refinancing and take over products that have been implemented. The main advantage of Akad Musyarakah Mutanaqishah is adherence to sharia principles as it avoids interest. Customers also get the flexibility to adjust payment schedules and financing terms. Although complex, it has the potential to advance the Islamic banking industry and provide options according to Islamic principles in the changing global financial world.

Keywords*: Application, Musyarakah Mutanaqishah, Products*

1. INTRODUCTION

Islamic banking has emerged as an important foundation in the establishment of a world financial system that adheres to the principles of sharia. Amid economic instability and growing demand for moral financial solutions, there is increasing global interest in banking offerings and services that adhere to Islamic principles. Islamic banking adheres to strict ethical criteria and provides a diverse range of creative financial instruments that embody the ideals of justice, sustainability and mutual collaboration.

Islamic financial products, such as refinancing and take over, use Akad Musyarakah Mutanaqishah as a strong legal foundation to offer alternatives that are in accordance with Islamic ethics and values. These contracts have gained popularity among individuals and companies looking to improve their funding arrangements while still maintaining adherence to sharia rules.

Akad Musharakah Mutanaqishah provides significant benefits by avoiding transactions involving interest, which is considered prohibited in Islamic law. Using this approach, financiers can engage in the process of restructuring their funds without any concern of violating sharia rules. This is especially important for individuals and companies who want to ensure the alignment of their financial actions with their religious beliefs.

In addition, Akad Musyarakah Mutanaqishah provides significant flexibility for financing holders. They have the ability to change payment schedules and financing terms based on individual needs and financial circumstances. This allows them to strategically adjust their financial framework to align with their goals, such as minimizing interest costs or maximizing asset utilization.

However, as with any other financial item, the use of Akad Musyarakah Mutanaqishah in refinancing and product takeover also has many complexities. An important factor to note is the profit-sharing mechanism between Islamic banks and fund holders. This requires a clear and understandable agreement that adheres to the principles of sharia.

Over time, the creation of refinancing and takeover products rooted in Akad Musyarakah Mutanaqishah will continue to offer benefits to individuals and companies seeking financial solutions that comply with sharia standards. It will also drive good expansion and progress in the Islamic banking sector as a whole, resulting in more options that conform to Islamic principles in the dynamic field of global finance.

2. IMPLEMENTATION METHOD

In this research method, the author uses qualitative methods that are separated from texts, books, images, and others which are not numerical targets, where the results of the research are described in the form of writing that explains something. This time the author focuses on writing about Ibn Taymiyah in his economic field with literature studies and making reports or results in the form of journals or scientific papers. This methodology uses qualitative methodology by using the literature review method which in writing refers to previous books, journals, or other written works to describe what is discussed and also more accurately.(Setiawan &; Anggito, 2018, p. 20)

3. RESULTS AND DISCUSSION

Musharakah Mutanaqishah Study

Musharakah mutanaqishah is a derivative product of musharakah contract, which is a type of cooperation agreement between two or more parties. The term "musharakah" comes from the word "shirkah" which comes from the word "syaraka-yusyriku-syarkan-syarikan-syirkatan" (shirkah). It shows the concept of cooperation, company, or group/collection. Musharakah, also known as shirkah, refers to a cooperative arrangement involving a combination of capital and profits. While the term "mutanaqishah" comes from the term "yatanaqishu-tanaqish-tanaqishan-mutanaqishun" which means progressive reduction.(Hosen, 2016, p. 4)

Musharakah mutanaqishah, also known as a declining partnership, is a collaborative arrangement involving two or more parties for joint ownership of a product or asset. This cooperation will result in a decrease in the ownership rights of one party, while the ownership rights of the other party will increase. This transfer of ownership is facilitated by a payment mechanism in exchange for alternative ownership rights. This type of cooperation ends with the transfer of the rights of one party to another.

The implementation of Islamic banking operations involves collaborative efforts between Islamic banks and customers to obtain or purchase goods. Where the property is combined and becomes common property. The level of ownership can be determined based on the amount of capital or funds stipulated in the cooperation agreement. Furthermore, consumers will reward Islamic banks with a principal amount in a series of scheduled payments. The transfer of ownership of Islamic bank components to customers occurs when the customer's capital increases due to new installments given by customers. After completing the installment, the customer takes full ownership of the item or objects. The proportion of ownership of Islamic bank assets or objects decreases in direct correlation with the amount of installments.

In addition to the installment obligation to transfer ownership, customers are required to pay rent to Islamic banks until the end of the bank's ownership period. Rental payments are made simultaneously with installment installments. Installment payments involve the acquisition of partial shareholding in Islamic banks. Simultaneously, Islamic banks generate profits through lease payments, which serve as a cost of ownership of those assets. Rental payments serve as a reward for ownership and as compensation for Islamic banking services.(Rohmi, 2015, p. 6)

Basic Provisions of Musharakah Mutanaqishah

Musharakah mutanaqishah involves cooperative elements (shirkah) and rental elements (ijarah). Cooperation occurs through the involvement of capital or funds and the division of ownership. While rent is a reward given by one party to another party. The main provisions included in musharakah mutanaqishah relate to these two fundamental aspects.(Al Ghifari, 2021, p. 42)

In relation to shirkah, the presence of the participating parties and the main capital that is the subject of the shirkah agreement, as well as shighat (words of agreement or agreement spoken) are important conditions that must be met. To be able to carry out the shirkah contract, there are several conditions that must be met: [1] both parties must show mutual agreement and willingness to cooperate, [2] must establish trust in each other, and [3] there is a union of the shirkah contract. The principal capital involves the incorporation of each other's rights. have ownership of the agreed object.

Regarding the components of the lease, the main parts are the leasing party (musta'jir) and the leasing party (mu'jir), shighat (declaration of consent), ujrah (payment), and the goods / objects leased and are the leasing party. the subject of the lease contract. Both parties must have a clear and explicit understanding of the amount of rent.

In shirkah mutanaqishah, it is very important that there is transparency regarding the amount of installments and rent that must be paid by customers. Payment time limits are mutually known limits and must be aware of by both parties. Rental fees are subject to change based on the agreement. The rental amount can be renegotiated within a certain period of time.(*Construct and Financing Model of Musyarakah Mutanaqishah in Sharia Banks | Rokhim | HUMAN FALAH: Journal of Islamic Economics and Business*, T.T., p. 5)

Legal Aspects of Musharakah Mutanaqishah

The reliance of Islamic law on the financing of musharakah mutanaqishah, at present, can be based on musharakah (partnership) and ijarah (rent) contracts. Because in the musharakah mutanaqishah contract there are elements of shirkah and elements of ijarah(*Implementation of Akad Murabahah and Musyarakah Mutanaqishah in Home Ownership Financing in Sharia Banking (Case Study at Bank Muamalat Indonesia) | Andriani | Az-Zarqa': Journal of Islamic Business Law*, T.T., p. 7). The postulates of musharakah law are:

Qur'an Surah Shad [38], verse 24:

﴿ قَالَ لَقَدْ ظَلَمَكَ بِسُؤَالِ نَعْجَتِكَ اِلٰى نِعَاجِهٖۗ وَاِنَّ كَثِيْرًا مِّنَ الْخُلَطَاۤءِ لَيَبْغِيْ بَعْضُهُمْ عَلٰى بَعْضٍ اِلَّا الَّذِيْنَ اٰمَنُوْا وَعَمِلُوا الصّٰلِحٰتِ وَقَلِيْلٌ مَّا هُمْۗ وَظَنَّ دَاوٗدُ اَنَّمَا فَتَنّٰهُ فَاسْتَغْفَرَ رَبَّهٗ وَخَرَّ رَاكِعًا وَّاَنَابَ ۩ ٢٤ ﴾ (ص/38: 24)

24. He (David) said, "Indeed, he has truly wronged you by asking your goats to (be merged) with his goats. **Indeed, many of the people in association are at a great disadvantage to each other, except those who believe and do righteous deeds, and very few of them.**David believed that We were just testing him. So he asked his Lord for forgiveness and he fell down and repented. **(Sad/38:24)**

Qur'an Surah al-Ma'idah [5], Verse 1:

﴿ يٰٓاَيُّهَا الَّذِيْنَ اٰمَنُوْٓا اَوْفُوْا بِالْعُقُوْدِۗ اُحِلَّتْ لَكُمْ بَهِيْمَةُ الْاَنْعَامِ اِلَّا مَا يُتْلٰى عَلَيْكُمْ غَيْرَ مُحِلِّى الصَّيْدِ وَاَنْتُمْ حُرُمٌۗ اِنَّ اللّٰهَ يَحْكُمُ مَا يُرِيْدُ ١ ﴾ (المآئدة/5: 1)

1. **O believers, fulfill these covenants!** It is lawful for you to livestock, except those that will be mentioned to you (haramnya) by not allowing hunting when you are in ihram (Hajj or Umrah). Indeed, God established the law according to His will.

Hadith narrated by Abu Daud from Abu Hurayrah, the Prophet (peace be upon him) said:"Alla Almighty. said: 'I am the third of two persons in association as long as one party does not betray the other. If either party has betrayed, I get out of them." (HR. Abu Daud, preached by al-Hakim, from Abu Hurayrah).

Hadith of the Prophet narrated Tirmidhi from 'Amr bin 'Auf:"Peace can be made among Muslims except peace that forbids the lawful or lawful that is haram; And the Muslims are bound by their conditions except those that forbid the lawful or the lawful that are haram."Rules of fiqh: "Basically, all forms of muamalah can be done unless there is a reason that forbids it."

Study on the Civil Code

Looking at the main provisions of musharakah and ijarah contracts above, both have conformity in Article 1313 of the Civil Code, the agreement is defined as "an act by which one or more persons bind themselves to one or more other persons". Where one party promises to the other party or where two people promise each other to do something. In this case, Islamic banks and customers promise each other.(Priyambada, 2011, p. 4)

From that event arose a relationship between the two parties called an engagement. Thus the relationship between an engagement and a covenant is that it gives rise to an engagement. One party can demand the realization of what was agreed by the other party and can sue it before a judge if the demands of what was agreed are not fulfilled voluntarily.(Muhammad Farizki, 2018, p. 36)

Article 1338 of the Civil Code reads: "All agreements made validly apply as law to those who make them. An agreement cannot be revoked other than by agreement of both parties. An agreement must be executed in good faith", this article gives freedom to make various kinds of agreements containing anything as long as it does not contradict the law. This article underlies the birth of agreements such as agreements made by banks and users of bank services that function as laws for the parties.

The conditions that must be met for an agreement to be valid in the Civil Code of the third book on Engagement, the second chapter, the second part on the conditions necessary for the validity of the agreement starting from article 1320 to article 1337. Broadly speaking, these conditions can be seen in article 1320, which states that for the validity of an agreement, four conditions are needed as follows:

1) Agree those who bind themselves;
2) The ability to make an engagement;
3) A certain thing;
4) A lawful cause.

The conditions mentioned in article 1320 above can be divided into subjective conditions and objective conditions. The first two conditions mentioned in article 1320 are called subjective conditions which if the conditions are not fulfilled then the agreement can be requested *for cancellation while* the last two conditions are called objective conditions which if it turns out not to be fulfilled then the agreement will be null *and void* which means that the agreement never existed or in other words the efforts of the parties mentioned in the agreement failed to give birth to an agreement. If all the legal conditions of the agreement have been fulfilled, then the agreement can be said to be valid.

Multi Akad in Sharia Studies

Scholars allow the use of multiple contracts in transactions as long as they meet certain restrictions or standards. One of the limitations agreed upon by scholars is that multi-contracts must not violate the provisions of sharia or contradict one contract with another. Moreover, multi-contracts cannot produce haram or involve usury. Ulama also propose a standard that multi-contracts should not combine an exchange contract (mu'awadlah) with a benevolent contract (tabarru').

Some scholars allow multi-contract modifications, as long as the contract involved does not violate Sunnah principles regarding the fusion of contracts. However, it should be noted that there is a difference of opinion among scholars about the validity of multi-contracts, and a number of hadiths seem to forbid their use. Therefore, further analysis and clarification from scholars regarding the concept and legality of multi-contract is needed.

In conclusion, multiple contracts can be allowed as long as they comply with the restrictions set by the scholars, do not violate the principles of sharia, and do not conflict with one contract with another. In addition to the two enabling contracts, there are two prohibited contracts. The two prohibited contracts are:

1. Multi contract between salaf (lending / qardh) and buying and selling. It is forbidden because someone lends one thousand, then sells an item worth eight hundred for one thousand. In this regard, he obtained an excess of two hundred, which can be regarded as forbidden usury.
2. Multi contracts between various types of buying and selling contracts and qardh in one transaction. For example, the merger of ijarah and qardh contracts in one transaction. All contracts containing elements of buying and selling are prohibited to be combined with qardh in one transaction.(Kurniawan &; Shomad, 2023, p. 59)

Refinancing Products in Sharia Banking

Refinancing is the process of replacing existing financing with new financing. In Islamic banking, refinancing products provide an opportunity for individuals or businesses to restructure their financing while still adhering to sharia principles. This can be done for various purposes, such as reducing interest expenses, extending the financing period, or optimizing the use of assets.(*UNDERSTANDING Islamic Finance - Muhammad Ayub - Google Books*, T.T., p. 48)

1) Implementation of Musyarakah Mutanaqishah in Product Refinancing

Musyarakah Mutanaqishah can be applied in refinancing products in the following ways:

a) Buyout: Islamic banks can buy back a client's share of ownership in assets that have previously been funded by conventional banks or other Islamic financial institutions. In this situation, Musharakah Mutanaqishah is used to facilitate this buyback process.
b) Profit Sharing and Ownership: Once the buyback is made, the Islamic bank and the client become partners in the ownership of the asset. Profits and losses are divided according to the initial agreement. This allows clients to reduce costs associated with interest and enter into partner agreements that comply with Shariah principles.
c) Payment Scheduling: Musharakah Mutanaqishah also allows for more flexible rescheduling of payments according to the client's financial capabilities. Thus, clients can restructure their financing to better suit the current financial situation.

2) Advantages of Musyarakah Mutanaqishah in Refinancing Products
   a. Sharia Compliance: Musharakah Mutanaqishah is fully compliant with Sharia principles as it avoids transactions involving interest, thus ensuring conformity with ethical and religious values.
   b. Flexibility: Clients can adjust payment schedules and financing terms according to their needs, increasing financial flexibility.

c. Sharing Profits and Risks: Clients and banks share profits and risks according to the initial agreement, creating a balanced and fair partnership.

One of the references in the implementation of sharia refinancing is in fatwa Number 89 / DSN-MUI / XII / 2013 where sharia refinancing is the provision of financing facilities for partners or new customers or existing customers who have not paid off previous financing based on sharia principles. Sharia refinancing has two conditions, namely financing that will be given to prospective partners or customers who already have full assets; Then the financing given to prospective partners or customers who have received financing that has not been repaid.(Febrianto, 2019, p. 9)

In sharia refinancing, it is known as taqwim al-urudh, which is an assessment of the price of goods or an assessment of assets in certain currencies that have been agreed upon by the parties who have made a financing contract in accordance with sharia principles. The purpose or benefit of sharia refinancing is for sharia banking as a form of effort in disbursing funds, and expanding the diversity of products for sharia banking activities, and also obtaining profit or ujrah or also called the ratio. As for financing partners or customers, namely obtaining additional financing.

Related provisions regarding the implementation of sharia refinancing are:

1) PBI No.7/6/PBI/2005 concerning Transparency of Bank Product Information and Use of Customer Personal Data and implementing provisions namely SE BI No.7/25/DPNP along with its amendment provisions.
2) PBI No.9/19/PBI/2007 concerning the Implementation of Sharia Principles in Fund Collection Activities and Fund Disbursement and Sharia Bank Services and implementing provisions namely SE BI No.10/14/DPBS along with its amendment provisions.
3) PBI No.14/27/PBI/2012 concerning the Implementation of Anti-Money Laundering and Countering the Financing of Terrorism Program for Commercial Banks.
4) PBI No.13/23/PBI/2011 concerning the Implementation of Risk Management for Sharia Commercial Banks and Sharia Business Units.
5) PBI No. 14/26/PBI/2012 concerning Business Activities and Office Network Based on the Bank's Core Capital.
6) POJK No.1/POJK.01/2013 concerning Consumer Protection in Financial Services Sector.
7) SEOJK No.12/SEOJK.07/2014 concerning Information Delivery in the Framework of Marketing Financial Products and/or Services.
8) SEOJK No.13/SEOJK.07/2014 concerning Standard Agreement.
9) SEOJK No.14/SEOJK.07/2014 concerning Confidentiality and Security of Consumer Data and/or Personal Information.
10) POJK No.16/POJK.03/2014 concerning Asset Quality Assessment of Sharia Commercial Banks and Sharia Business Units.
11) SEOJK No.8/SEOJK.03/2015 concerning Asset Quality Assessment of Sharia Commercial Banks and Sharia Business Units.

Sharia refinancing has three types of applications that can be used according to the conditions being experienced by customers, the first is rate and term refinancing is a very common type to pay off loans with margins that tend to be lower, the second is cash out refinancing this way can be done when the assets that are being collateralized experience price increases, The last is cash in refinancing, financing in the form of cash to pay part of the loan so that the value becomes lower. In refinancing, the method of applying for new financing can be in Islamic banking which is the same as the previous loan, it can also be by applying for financing in other banks. This aims to ease loan repayment or to increase asset ownership capital.

Take Over in Sharia banking

"Take over" products are Islamic financing products that allow customers to take over existing financing from conventional financial institutions or other Islamic financial institutions. The main purpose of this product is to enable customers to obtain financing that is more in accordance with sharia principles, reduce interest expenses, or optimize their financing structure.(Julia, 2021, p. 8)

1) Implementation of Musyarakah Mutanaqishah Agreement in "Take Over" Products

   Akad Musyarakah Mutanaqishah can be applied in "take over" products as follows:

   a. Buyout: Islamic banks can buy back part of a customer's ownership in existing assets or financing from other conventional or Islamic financial institutions. In this case, Akad Musyarakah Mutanaqishah is used to facilitate this buyback process.
   b. Profit Sharing and Ownership: After the buyback is made, the Islamic bank and the customer become partners in the ownership of the asset or financing. Profits and losses are divided according to the initial agreement. This allows customers to reduce interest expense and enter into partner agreements that comply with sharia principles.
   c. Payment Scheduling: Akad Musyarakah Mutanaqishah also allows for more flexible rescheduling of payments according to the customer's financial capabilities. Thus, customers can restructure their financing to better suit the current financial situation.
2) Advantages of Musyarakah Mutanaqishah Agreement in "Take Over" Products
   a. Sharia Compliance: Akad Musyarakah Mutanaqishah is fully compliant with Sharia principles as it does not involve interest transactions, thus ensuring ethical financing.
   b. Flexibility: Customers can adjust payment schedules and financing terms to suit their needs, increasing financial flexibility.
   c. Profit and Risk Sharing: Customers and banks share profits and risks according to the initial agreement, creating a balanced and fair partnership.

4. CONCLUSION

Akad Musyarakah Mutanaqishah is used in refinancing and take over to divide ownership and risk between Islamic banks and customers. In refinancing, Islamic banks buy back part of the customer's ownership in existing assets or financing, then they become partners in the ownership. Profits and losses are divided according to the initial agreement, and customers can adjust payments according to their financial capabilities.

In takeover, Islamic banks buy back part of the customer's ownership in the existing financing, then they become partners in the ownership of the financing. Profits and losses are divided according to the original agreement, and customers can reschedule payments according to their financial capabilities.

The main advantage of Akad Musyarakah Mutanaqishah is adherence to sharia principles as it avoids interest. Customers also get the flexibility to adjust payment schedules and financing terms. Although complex, it has the potential to advance the Islamic banking industry and provide options according to Islamic principles in the changing global financial world.

REFERENCES

Al Ghifari, M. (2021). Analisis Kepatuhan Syariah Pada Produk Pembiayaan Pemilikan Rumah Dengan Akad Musyarakah Mutanaqisah Di Bjb Syariah Kcp Rawamangun [Sarjana, Universitas Siliwangi]. http://repositori.unsil.ac.id/3118/

Febrianto, Y. (2019). "Pelaksanaan Refinancing Syariah Pada Perbankan Syariah (Studi Kasus Bank CIMB Niaga Syariah dan Bank DKI Syariah)" [bachelorThesis, Fakultas Syariah dan Hukum Universitas Islam Negeri Syarif Hidayatullah Jakarta]. https://repository.uinjkt.ac.id/dspace/handle/123456789/47992

Hosen, N. (2016). Musyarakah mutanaqishah. https://repository.uinjkt.ac.id/dspace/handle/123456789/30956

Implementasi Akad Murabahah dan Musyarakah Mutanaqishah dalam Pembiayaan Pemilikan Rumah pada Perbankan Syariah (Studi Kasus Pada Bank Muamalat Indonesia) | Andriani | Az-Zarqa': Jurnal Hukum Bisnis Islam. (t.t.). Diambil 21 September 2023, dari https://ejournal.uin-suka.ac.id/syariah/azzarqa/article/view/2078

Julia, A. T. (2021). Pelaksanaan Take Over Pembiayaan Nasabah Pensiunan Oleh Bank Syariah Mandiri Kc Tulungagung [Diploma, Iain Ponorogo]. http://etheses.iainponorogo.ac.id/13518/

Konstruk dan Model Pembiayaan Musyarakah Mutanaqishah Di Bank Syariah | Rokhim | HUMAN FALAH: Jurnal Ekonomi dan Bisnis Islam. (t.t.). Diambil 21 September 2023, dari http://jurnal.uinsu.ac.id/index.php/humanfalah/article/view/170

Kurniawan, A., & Shomad, A. (2023). Pengantar Composite Islamic Contract Dalam Transaksi Perbankan Syariah. Uwais Inspirasi Indonesia.

Muhammad Farizki, 131000038. (2018). pembatalan transaksi jual beli secara sepihak oleh pt.lazada indonesia terhadap achmad supardi sebagai konsumen dihubungkan dengan buku iii kitab undang undang hukum perdata [Other, Fakultas Hukum Unpas]. http://repository.unpas.ac.id/33585/

Priyambada, M. K. (2011). Komparasi Perjanjian Kredit Pada Bank Konvensional Dan Bank Syariah Dalam Perspektif Kitab Undang Undang Hukum Perdata. https://digilib.uns.ac.id/dokumen/22904/Komparasi-Perjanjian-Kredit-Pada-Bank-Konvensional-Dan-Bank-Syariah-Dalam-Perspektif-Kitab-Undang-Undang-Hukum-Perdata

Rohmi, P. K. (2015). Implementasi Akad Musyarakah Mutanaqishah pada Pembiayaan Kepemilikan Rumah di Bank Muamalat Lumajang. Iqtishoduna: Jurnal Ekonomi Islam, 4(1), 17–37.

Setiawan, J., & Anggito, A. (2018). Metodologi Penelitian Kualitatif. CV Jejak. Understanding Islamic Finance—Muhammad Ayub—Google Buku. (t.t.). Diambil 21 September 2023,