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Harmonization of DSN-MUI Fatwa with Positive Law Study of Legal Bonding of Mortgage Right in Contract for Mudharabah & Musyarakah Agreement

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Abstract

The enactment of the principal agreement must be in line with the follow-up agreement because it is a single entity. However, in practice, in agreements that use sharia contracts such as mudharabah and musyarakah which are classified as mandated contracts, they still use acessoir agreements and the follow-up agreements used still follow debt-receivable agreements which are in accordance with the principal agreement. In the acessoir agreement, the dependent rights of Islamic banks still use conventional dependent rights deeds that use the terms creditor and debtor. In fact, mudharabah and musyarakah are cooperation agreements where one party or each party gives up their capital to be managed. Of course, it is wrong if the application of sharia dependent rights is equated with conventional dependent rights.

This research is a qualitative research with the method of analyzing the documents of sharia dependent rights deeds and laws. In this study, it was found that the basis for binding sharia dependent rights with mudharabah and musyarakah financing is not debts so that conventional dependent rights deeds cannot be used. The application of the guarantee can be executed if the debtor defaults also cannot be done because in the musyarakah contract the loss is borne together and in the mudharabah contract the loss is borne by the owner of the capital. Sharia dispute resolution should also be in sharia arbitration or religious courts not arbitration and state courts. For this reason, it is also necessary to design an alternative binding of guarantees that impose a profit-sharing-based agreementin accordance with Sharia so that there is no similar interpretation between the concept of debts in conventional contracts and financing in sharia contracts which refers to DSN-MUI Fatwa No. 105/DSN-MUI/X/2016 concerning Guarantee of Return of Financing Capital of Mudharabah, Musyarakah, and Wakalah bil Istitsmar.

Keywords: Acessoir agreement; dependent rights; mudharabah; musyarakah; Fatwa DSN-MUI

I. INTRODUCTION

In the management of a bank, there are four principles that affirm the legal relationship between a bank and its customers. The four principles are: (1) The principle of belief (fiduciary principle);(2) Confidential principle;(3) Know your customer principle; and (4) The prudential principle (Banking Law, 1992). *The prudential* principle is one of the most important principles that must be applied in carrying out banking business activities. This principle means that banks must always be consistent, professional, and in good faith in carrying out their business. Similarly (Hermansyah, 2012), in the context of providing credit to debtor customers, in accordance withArticle 8 of Law No. 7 of 1992, it is said that in the nature of providing credit, the Bank must have confidence in the ability and impression ofthe debtor in paying off its debts as promised. The credit given by perbankan to the nasabah debtor certainly contains risks, so in its implementation the bank must pay attention to the principles of sound credit. To reduce this risk, the provision of guarantees against credit is necessary as a form of the debtor's ability and ability to pay off his debt as promised. To obtain this confidence, before providing credit, banks generally conduct an analysis of 5 assessments known as 5C, namely: (1) *Character*, namely the bank conducts an analysis of thedebtor's nasaba h so that it is known how the character of the debtor is; (2) *Capacity*, meaning that the Bank manalyzes the ability of prospective customers to pay credit which is related to their ability to manage the business and their ability to make a profit; (3) *Capital*, i.e. measuring the business ability of the prospective debtorr to support financing with own capital, whether the existing capital allows the debtor to have the ability to return the credit provided; (4) C*ondition of economy*, dalam assess credit should also be assessed the present economic conditions and for in the future datang in accordance with the respective sektor; and (5) *Collateral*, i.e. guarantees provided by prospective bank customers both physical and nonphysical. Generally, the guarantee provided by the debtor sebanding with the requested kr edit, this is penting so that if the debtor is unable to pay off his credit the guarantee can be sold in exchange for a credit return (BOY, 2017).

The collateral provided by the customer gives rise to a new agreement of an additional nature between the bank as a creditur and the debtor customer on the credit agreement known as the *accesoir* agreement (Paputungan, 2016). The guarantees that can be promised can be *immaterial* (individual) guarantees and *material guarantees* (objects) (Saliman, 2007). Guarantees toan object include on liens (guarantees against movable objects), fiduciaries (guarantees against the right of ownership of securities) (LAW, 1999), mortgages (guarantees against immovable objects in the form of ships) and dependent rights (guarantees against immovable objects which in this case are land) (LAW, 1996).

In Islamic banking, the activity of disbursing funds is not known as credit, which exists as financing. Financing in sharia consists of cooperation financing consisting of *mudharabah* and *musyarakah; leases consisting of ijarah and ijarah muntahiyya bittamlik;* and buying and selling expenses such as *murabahah, salam,* and *istishna* (Syariah Law, 2008). In line with conventional banking, Islamic banking also conducts a 5C analysis in assessing the feasibility of its customers. However, in the sharia rules for the type of financing, *mudharabah* and *musyarakah* cooperation does not require collateral as a binding contract between the parties receiving the financing. Because in fact business cooperation in Sharia is an activity that prioritizes the principle of trust and mutual trust so that it no longer makes guarantees an absolute condition for the emergence of an agreement.

Mudharabah is a business cooperation in the form of investment in the form of investment in the ownership of funds (*shahibul maal* / yang dalam this case Islamic banking) to fund managers (*mudharib* /

who in this case are recipients of Islamic banking financing facilities) to carry out certain business activities, by sharing using the profit and loss sharing method *(profit and loss sharing)* or by the *revenue sharing* method between the two parties based on the ratio agreed at the beginning of the agreement. Meanwhile, *musyarakah* is the investment of capital owners to mix their capital in a certain business (the owner of the capital of the Islamic banking party and the recipient of the financing facility), with the distribution of profits based on the previously agreed ratio, while the loss is borne by all capital owners based on their respective parts of funds / capital (Bank Indonesia Regulation, 2005). In accordance with this definition which states that the formula for *mudharabah* and *musyarakah* is a cooperation agreement, there is no obligation for customers receiving financing facilities to provide guarantees.

In line with this, in fatwa No 7/DSN-MUI/IV/2000 On *Mudharabah Financing (Qiradh)* and fatwa No. 8 On *Musyarakah* Financing it is said that in principle in *mudharabah* and *musyarakah* financing there is no guarantee, but in order to avoid any deviations, the Islamic Financial Institution (hereinafter abbreviated as LKS) can ask for guarantees from one of the beneficiaries or third parties. Although it is known as a product of cooperation financing that is a mandate, in practice today at the Keuangan *mudharabah* and *musyarakah institutions* still need guarantees. This is because banks do not know all their customers, for this reason, in order to avoid *fraud*, guarantees are allowed to be held in their financing, although *mudharabah* and *musyarakah* financing is a type of financing that is different from conventional, in practice akta which is used as collateral for *mudharabah* and *musyarakah* financing still uses deeds on l conventional financial institutions so still use the term credit. Even though cooperation financing is not debt (credit). This difference is found by the author in the deed of dependent rights which is part of the deed of guarantee contract which still uses the same template between conventional credit financing and *mudharabah* and *musyarakah* financing in Islamic banking financing. By seeing this phenomenon, the author is interested in conducting a study of this case with the title "Harmonization of DSN-MUI Fatwas with Positive Law Legal Studies binding of Dependent Rights Guarantees in Mudharabah & Musyarakah Profit Sharing Agreements."

To support this research, the authors collected several previous studies such as research conducted by Sawitri Putri Nursakti. In his writing, Sawitri conveyed the guarantee of dependent rights in the financing of murabahah and musyarakah at Bank Muamalat Indonesia. In this study, Nursakti said that bhawa on murabahah is allowed to have a guarantee because the sale and purchase is carried out in a tempo so that it is necessary to present a guarantee. Meanwhile, musyarakah financing is not required to have collateral, but considering that the funds used by Islamic banks come from the public entrusted to the bank, the auariah bank must be obliged to take ways that do not harm the sharia bank and the interests of customers who have entrusted their funds. For this reason, as a guarantee for payment, Islamic banks can ask customers for guarantees in the form of collateral (Sawitri, 2018).

Rina Nurhidayati in her article raised the mudharabah contract as the main contract with the acessoir agreement of dependent rights. In line with Nursakti, Nurhidayati stated that mudharabah is a cooperation agreement between antara fund owner (shahibul maal) and fund manager (mudharib) and is not a debt-receivable so it is not appropriate to use conventional dependent rights deeds. In his writing, Nurhidayati suggested that Rahn Tasjily should be used according to DSN-MUI Fatwa No. 68 of 2008 concerning Rahn Tasjily as the basis for binding guarantees in the form of land rights (Nurhidayati, 2016).

In his thesis Mohammad Pradhipta Erfandhiarta stated that in principle mudharabah is a Amanah contract so as to prohibit any guarantees. Four priests of the school also forbade the imposition of bail. Guarantees are imposed only so that the Mudharib Amanah in managing shahibul maal. When there is a default there is a principle of parate excesses on the right of dependents allowing shahibul maal to immediately make an assessment of the negligence of the mudharib, this is not allowed (Erfandhiarta, 2020).

Pandan Nurwulan in his research wrote about a guarantee binding card in Islamic banking which still uses the concept of conventional banking guarantees because there is no regulation governing binding of guarantees for sharia contracts, causing legal vacuum. The guarantee procedure for sharia contract deeds uses dependent and fiduciary rights as found in conventional banks. If the notary wants to formulate a sharia contract deed, it must be based on Article 38 of Law No. 30 of 2014 concerning the Position of Notary without leaving the principles of sharia. This means that the notary who inaugurates the deed of a sharia card must fully understand the principles of sharia (Nurwulan, 2018).

By looking at the literature, the similarity of the research conducted by the author is that the basis of the main agreement on islamic financing *of mudharabah* and *musyarakah* in Islamic banks using debt-receivables acessoir agreements is the same as conventional banks. Pengakuan contract guarantee financing *mudharabah* and *musyarakah* using debt recognition. Guarantees on conventional dependent rights can be executed if the debtor defaults on the promise, while in the agreement the dependent rights of the mudharabah the loss is borne by the financier and in the agreement of the Right of Dependents the loss is borne jointly, meanwhile, the differences that researchers found that dispute resolution on sharia guarantees still refers to arbitration or state courts, which should be sharia dispute resolution under sharia arbitration or religious courts. The author tries to introduce DSN-MUI fatwa No. 105/DSN-MUI/X/2016 concerning Guarantee of Return of Capital financing of *Mudharabah, Musyarakah, and Wakalah bil Istitsm*ar as a solution to the APHT model whose principal contract is Sharia profit sharing financing. In this fatwa, it is said that in principle the owner of the capital should not ask the manager to guarantee the return of capital, but the manager can guarantee the return of capital at his own will without the request of the owner of the capital. This fatwa emphasizes that the imposition of guarantees on capital provided by the owner of the capital is not a unilateral decision by the financier, but at the will of the manager as well. This fatwa can be the answer to the legal vacuum that has been occurring where conventional APHT is based on debt-receivables contracts whose concept is far different from the contract financing *mudharabah* and *musyarakah.*

II. LITERATURE REVIEW

A. Sifat *Droit De Suite and De Prefent on* Dependent Rights

Trightsare part of thelaw of guarantees in the form of guarantees over land. In Law No. 4 of 1996 concerning Dependent Rights to Land and Objects Related to Land, it is said that Dependent Rights is a guarantee right imposed on land rights as contained in Law No.5 of 1960 concerning the Basic Regulation of Agrarian Principles. In Article 10 of this Act, it is also said that the granting of Dependent Rights is preceded by a promise that makes the Dependent Rights a guarantee for repayment of debts and is an integral part of the debt-receivable agreement or other agreement that gives rise to the debt.

According to Budi Harsono, the control of land rights contains the authority for creditors to do something about the land used as collateral. But not to be physically controlled and used, but rather to sell it if the debtor defaults on the promise and takes from the proceeds in whole or in part as a payment in full of the debtor's debt to him (Salim, 2004). Suharnoko in his book stated that the principle applicable to the guarantee law does not cause creditors to ask for a promise to have an object that is guaranteed for the repayment of debtors to creditors. This provision was formed to prevent the occurrence of injustice that would occur if the creditor had a collateral object whose value was greater than the amount of the debtor owed to the creditor. Therefore, the collateral must be approved and the creditor has the right to take the money from the sale as repayment of his receivables. If there is still an excess, then the remaining proceeds from the sale must be returned to the debtor (Suharnoko, 2009).

The characteristic of a dependent right, has the nature of *droit de suite and de prefent*. *Doit de suite*, meaning that the dependent rights holder (creditor) retains the right to the property (the land to which the land is made a dependent right) wherever the land changes hands or is transferred or transferred, whether due to sale and purchase, exchange, grant, inheritance, or because of a percaproperty dispute. The new owner is not necessarily able to release the burden of existing dependent rights on the land. That is, the land still has a burden of right tobear, whilethe nature of *the droit de preferent* reaffirms the nature of the *droit de suite*, that is, the holder of the credit guarantee right has the right to take precedence over the repayment of his debt from other creditors (Widiyono, 2009).

Not all land can be used as collateral because a land right can be used as credit collateral only if it has special requirements. The main requirement in question is to meet the juridical element and the economic element. The definition of juridical elements includes: (1) Status of land rights; (2) Eligibility of publicity conditions; (3) The land is transferable; and (4)The transfer of land shall be carried out by the owner himself. The status of land rights must be fulfilled that the status of rights to the land is indeed in accordance with the applicable laws and regulations as land rights that can be bound by dependent rights. See Law No.4 of 1996 concerning Dependent Rights to Land and Objects Related to Land. Publicity here means that the land must have been registered with the local land registration office with proof in the form of a certificate of land rights. The party who can grant the dependent rights hais the owner of the land. If in the making of the deed the granting of dependent rights is carried out not by the owner himself without a power of attorney granting dependent rights, then the deed of granting dependent rightscan be canceled (Widiyono, 2009).

B. Mudharabah : Cooperation Agreement between Capital Owners and Managers

The origin of *the word mudharabah* is *dharaba*; which has many meanings, depending on the word follow. Among its literal meanings is "go looking for rizki" (*dharaba al-thair*); "mix" (*dharaba al-syai' bi al-syai'*); " commerce" or "trade" (*dharaba fi al-mal bi al-mal*). Wahbah al-Zuhaili explains among theliteral meanings of *mudharabah* is "to travel on the face of the earth" (*al-sir fi al-ardh*); among the derivations of the word *al-sir* is *istar* or *istiyar* which means, "shopping for the purposes of his travels." (al-Zuhali, 2002).

In formulating the meaning of mudharabah, Wahbah Al-Zuhaili said in his book *al-Fiqh al-Islam wa Adillatuhu* it is said: The owner of modal gives up his property toa businessman to trade with the agreed profit sharing provided that the loss is borne by the owner of the capital, while the ownerha is not burdened with the slightest loss, except loss in the form of labor and his earnestness. In the Codification of Products and Activities of Sharia Commercial Banks and Sharia Business Units, it is said that mudharabah is the provision of funds for business cooperation between two parties where the owner of the funds *(shahibul mal)* provides all funds, while the fund manager *(mudharib)* acts as the manager, and the profits are divided in their anatra according to the agreed ratio.

The definition of *mudharabah* is also found in fatwa DSN-MUI No 7/DSN-MUI/IV/2000 Concerning *Mudharabah*, it is said that Mudharabah financing is a form of financing distributed by Lembaga Keuangan Syariah to other parties for a productive business. In this financing,the Islamic Financial Institution as *the shahibul maal* (fund owner) finances 100% of the needs of a project (business), while the entrepreneur (customer) acts as *a mudharib* or business manager, while the *mudharabah* contract can be seen in fatwa DSN-MUI No.115/DSN-MUI/IV/2017 Concerning the Mudharabah Contract, it is said that a *mudharabah* card is a cooperation agreement of a business between the owner of the capital *(malik / shahib al-mal)* that provides all capital with the manager *('amil / mudharib)* and the business profits are divided among them according to the ratio agreed in the contract.

The *mudharabah* contract is divided into two; namely: 1) the *mudharabah-muthlaqah* contract (*unbound/free mudharabah*); and 2) *the mudharabah-muqayyadah* contract (*bound mudhabarah*). Mudharabah *muthlaqah* is the same as *qiradh 'am*; and *mudharabah muqayyadah* is the same as *qiradh khash*. The difference between the two is explained by Wahbah al-Zuhaili as follows (Hasan,):

1. A non-bound *mudharabah* cadd is the handover of capital from *shahib al-mal* to *the mudharib* to conduct business (business) without specifying the type of business, its place, its time, the nature of its business, and/or the party doing its business; and
2. A bound mudharabah contract is a mudharabah contract in the form of handing over capital from *shahib al-mal* to *the mudharib* to conduct a business (business) determined by the type of business, its place, its time, the nature of its business, and/or the party doing its business (al-Zuhaili, 1997).

Scholars agree on the validity of the *mudharabah-muthlaqah* contract, but scholars disagree on the legal status/validity of *mudharabah-muqayyadah*. Thedifferences of opinion of scholars regarding hukum *mudharabah-muqayadah* are (al-Zuhaili, 1997):

1. Ulama Malikiyah and Shafi'iyah argue *that mudharabah-muqayyadah* is illegitimate; hence the scholar Malikiyah, and Shafi'iyah forbid it.
2. Ulama Hanafiyah argued that the *mudharabah-muqayyadah* contract was validly performed under the following conditions:
   a) Imam Abu Hanifah and Imam Ahmad Ibn Hanbal *allowed mudharabah-muqayyadah* relating to the time of the business, the party who made the effort, and the time to come *(idhafatuha ila al-mustaqbal);*

b) while imam Malik and imam al-Shafi'i forbade it;*mudharabah-muqayyadah* contracts associated with uncertain conditions (e.g. someone says; if someone comes to you by paying a debt to me through you, then the payment of that debt that you have received can be used as business capital with the mudharabah contract); Ulama Hanabilah and Zaidiah allowed the *mudharabah-muqayyadah* contract.

C. Musyarakah: Cooperation Agreement between Several Parties

In the literature of the book of jurisprudence, *syirkah* linguistically has at least two meanings; namely (Abdullah, 1996):

1. *Al-ikhtilath*; whose meaning of harfiah is merging, or mixing). *Al-syirkah* , whose meaning is its literal meaning, is widely explained in the books of jurisprudence; and
2. *Al-nashib, al-hishshah* (portion or portion). In Ibn Manzhur's *Oral book of al-'Arab* as Muhammad Abdullah 'Athiqi explained in the book *of 'Uqud al-Syirkat*, it is explained that in the syirkah there is the property of each partner whose portion must be clear, either half of it, one-third, or one-tenth of it; as Ibn Mu'adz allowed the inhabitants of Yemen to perform syirkah (*al-isytirak*); that is, the owner hands over his property to another party to be used as a portion of business capital either half of it, one-third of it, or another portion.

In the Kodification of products and activities of Sharia Commercial Banks and Sharia Business Units, it is said that *musyarakah* isafund or bill for certain business partners, each party provides a portion of funds provided that the profits will be divided according to the agreement, while losses are borne according to the portion of their respective funds. Thus, in the context of business law in Indonesia, the legally recognized *syirkah* is *syirkah-'uqud* (because the purpose *of syirkah-milk* is not aligned with the business goal; i.e. profiteering). The meaning of *syirkah* in terms is the merger of assets to be used as business capital and the result in the form of profit is divided according to the agreed or proportional profit sharing ratio, and losses are divided proportionally (Sabiq, 1983).

In fatwa DSN-MUI No. 8 / DSN-MUI / 2000 concerning *Musyarakah, it* is said that the *musyarakah* financing is financing based on a cooperation agreement between two or more parties for a certain business, where each party contributes funds provided that profits and risks will be borne together in accordance with the agreement. Whereas in fatwa DSN-MUI No. 114/DSN-MUI/2017 concerning the *Syirkah* contract, it is said that *the syirkah* contract is a cooperation agreementbetween two or more parties for a certain business where each party contributes funds/business capital *(ra's al-mal)* provided that the profit is divided according to the agreed ratio or proportionally, while the loss is borne by the parties proportionally. *Syirkah* is a form of *syirkah amwal* and is known as *syirkah inan.*

III. METHOD

The research method used is through a normative juridical approach with a library approach or document research to analyze problems using secondary legal sources, namely legislation or legal sources that are relevant to the issues studied.

IV. RESULT AND DISCUSSION

1. Dependent Rights in Sharia Guarantee Law

The concept of guarantee law in sharia is known by two terms, namely *kafalah and rahn. Kafalah* is a guarantee given by the other party for obligations/achievements that must be carried out by the guaranteed party (debtor) to the party entitled to receive the fulfillment of obligations/achievements (creditors), while *rahn* is a treasury guarantee that must be given by the debtor (the person who owes the debt) to the creditor (the person who owes it) (FATWA, 2002). Because dependent rights are a guarantee of the treasury, in sharia it is included in the *rahn family.*

As previously explained, dependent rights are *accesoir* agreements that are born from the main contract in the form of a credit agreement between creditors and debtors, as the dependent rights in the sharia agreement are objects that have been placed dependent rights based on an or were born from sharia contracts (Rosyadi, 2017). The basic sharia contract that is the basis for the issuance of sharia dependent rights.

In Sharia financing, the provision of guarantees is not mandatory. However, in order for the nasabah to fulfill its obligations, the Islamic bank can ask for a certain guarantee to be established in the financing contract. Suchas in the sale and purchase financing *(Murabahah, Salam, Istishna),* the request used in this jual beli agreement is intended so that customers or recipients of financing facilities can make payments in an orderly manner in accordance with the agreed schedule. Fatwa No.04/DSN-MUI/IV/2000 About *Murabahah* said that the guarantee on *the murabahah* is allowed, so that the customer is serious about his order. That way the bank can ask the customer to provide a guarantee that can be held (Irma, 2011).

In *mudharabah* financing, the relationship between the bank and the fund management customeris based on the principle of trust (amanah), meaning that the fund manager *(mudharib)* is trusted to manage *mudharabah capital, mudharib* is not subject to compensation *(dhaman)* for damages, destruction, or losses that have befallen him as long as it is not caused by negligence, carelessness, or actions that violate the conditions in the agreement. On the basis of this principle (al-Kasani, 1969), the owner of the capital *(shahibul mal)* basically cannot demand any guarantee from the *mudharib* to return the capital or capital with profit. If the *shahibul mal* requires the provision of guarantees from the managing customer *(mudharib)* and states this in the terms of the contract, then the *mudharabah* contract according to the majority of scholars (jumhur ulama) is invalid *(ghair shahih)* because it is contrary to the basic principle of *the mudharabah* contract based on "amanah".

In line with this it was stated in the Decree Lof the institution of Fikih lnternational (Organization Kerjasama Islam) that in *mudharabah* ti cannot require *mudharib* to guarantee modal. If direquired either expressly or tersirat, maka condition for entrenchment of capital is batal and *mudharib entitled* atas reasonable profit *(ribh al-mitsl)."* Not much different, *the Sharia Accounting And Auditing Organization For Islamic Financial Institutions (AAOIFI)* as an international sharia accounting and auditing standards organization states that: "Dasar law totidakbolehan the existence of

guarantees by the manager of the investasi is the agreement of the jurists who saythat the kan bahwa manager is not responsible for the return of capital except at the time *of ta 'addi* or *taqshir*. Theha l is due to the pengelola receiving capital over its izin pemilikand managing it ufor the benefit of the owner of the model. Thus, the pengelola is the representative of the owner of the capital in the authority and permade by law. It causes the lossof capital in the hands of the manager to be the same as the damage or loss in the hands of the owner because the managerla receives capital atas izin pemiliknya and basically the manager terlepas from *dhaman* (guarantee of return of capital). Therefore, the grouperla should not be asked uJh "(asy-Syar'iyyah, 2015)

Furthermore, this international accounting and auditing organization argues that there are some contracts that are not allowed mensyaratkan adanya jaminan barang *(rahn)* atas akad yang bersifat ama nah, seperti akad *wakalah*, akad *wadi'ah*, akad *musyarakah*, akad *mudharab ah*, dan barang sewa in hand *musta 'jir*. Jika *rahn* dijadikan sumber pembayaran (right of pemberi amanah) on kasus p emegang amanah melampaui batas, lal ai dan/or violate syarat-s yarat, then rahn it diperbolehkan (asy-Syar'iyyah, 2015). " However, in its development, *mudharabah* and *musyarakah agreements were* seen as necessary to establish guarantees. The establishment of guarantees in *mudharabah* transactions is morebased on theapplication of the ijtihad method which is not in the intention of setting aside from the law of its origin namun is more based on the principle of using the istihsan method. This method in principle prioritizes the goal of realizing benefit in order to resist danger specifically karena general arguments wanting to be prevented (asy-Syar'iyyah, 2015). In the event that there is a guarantee on the *mudharabah*, it can only be disbursed if the *mudharib* is proven to have violated the matters that have been mutually agreed upon in the contract. The purpose of the guarantee in *the mudharabah* transaction is as a binder so that the partnersof ama *mudharabah* are in good faith and earnest in carrying out their business and mandate in accordance with Islamic law. Another goal is to avoid moral hazard carried out by *mudharabah* business partners in order to mitigate risks (asy-Syar'iyyah, 2015).

For this reason,p. there is Fatwa No.07 DSN-MUI/IV/2000 concerning *Mudharabah Financing (Qiradh)* it is said that : In principle, in *mudharabah* financing there is no guarantee, but in order for mudharib not to commit irregularities, LKS can ask for guarantees from mudharib or third parties. This guarantee can only be disbursed if the mudharib is proven to have violated the matters that have been mutually agreed upon in the contract. Then, in the provisions of fatwa No. 08 / DSN-MUI / IV / 2000 concerning *Musyarakah* Financing, it is also said: In principle, in *musyarakah* financing there is no guarantee, but to avoid deviations, LKS can ask for guarantees.

The presence of the two fatwas is emphasized bythe irnya Article 6 letter (o) and Article 8 of Bank Indonesia Regulation No. 7/46/2005 concerning The Agreement for

The Collection and Distribution of Funds for Banks That Carry Out Business Activities Based on Sharia Principles, in this regulation it is stated that bank can ask for guarantees or collateral to anticipate risks if the customer is unable to fulfill the obligations as contained in the *mudharabah* agreement and *musyarakah* due to negligence or cheating. In the 2013 Indonesian Sharia Banking Accounting Guidelines, it is also stated that in principle in *mudharabah* financing there is no requirement for guarantees, but in order not to have *moral hazard* in the form of deviations by fund managers, fund owners can ask for guarantees from fund managers or third parties. This guarantee can only be disbursed if the fund manager is proven to have violated the things that have been mutually agreed upon in the contract. Article 8 paragraph (1) ofU ndang-Law No. 10 of 1998 concerning Banking also confirms that in providing credit or financing based on the principle of shari'a, commercial banks must have confidence based on in-depth analysis or good faith and the ability and ability of debtors to pay off their debts or return the financing in accordance with the agreement.

Credit or financing based on the principle of shari'ah yang given by the bank contains risiko, so that in its implementationthebank must pay attention to the principles of credit or financing based on theprinciple of sound shari'a. To reduce the amountof credit, the guarantee of providing credit or financing based on the principle of shari'a in the sense of confidence in the ability of the debtor customer to pay off his obligations in accordance with the promised is an important factor that the bank must pay attention to. To obtain this confidence, before providing credit, the bank must conduct a careful assessment of the disposition, ability, capital, collateral, and business prospects of the Debtor Customer. Given that collateral is one of the elements of crediting, if based on other elements, confidence can be obtained in the ability of the Debtor Customer to return the debt, the collateral can only be in the form of goods, projects or bill rights financed with the credit concerned. Thus, it can be concluded that the difference between the concepts of *mudharabah* and *musyarakah* in classical fiqh compared to those found in Islamic banking includes the issue of guarantees that must be given by capital managers to capital owners, in this case Islamic banks.

Responding to this problem, contemporary jurists such as Muhammad Abdul Mun'im Abu Zaid stated that guarantees for financing business cooperation, in this case *mudharabah* and *musyarakah*, in the practice ofsharia banking are allowed and it isvery important to exist because of two things, namely: (1) business cooperation agreements in the present are different from the past (traditional business cooperation), in the past, both mudharabah and musyarakah business people met and knew each other, while in today's business cooperation, the mudharabah and musyarakah actors did not know each other, financiers in this case depository customers and fund investors used banking services that acted as *intermediary*, therefore to maintain the trust of fund storage

customers and bank investors carried out the principle of *prundential principle* by implementing the 5C principle, one of which is analyzing the feasibility of guarantees owned by customers receiving financing facilities; and (2) the current situation and conditions of society have changed in terms of commitment to noble moral values, such as trust and honesty (Abu Zaid, 2000). Abdul Mun'im Abu Zaid stated that the biggest factor that hinders the development of Shari'a Banking, especially in the field of investment, is the low morality of the customers receiving financing funds in terms of honesty (*al-shidq*) and holding the mandate (*al-amanah*) (Abu Zaid, 1996).

In the Mudharabah Standard Contract agreement (contract), the Mudharabah Product Standard Series Guarantee Clause it is said that Islamic Banks are allowed to request guarantees in the style ofMudharabah financing aimed at making customers serious about making payments in an orderly manner. Islamic banks are allowed to request anasabah to make a statement regarding the obligation to return capital by customers to Sharia Banks referring to the DSN-MUi Fatwa No. 105 of 2016 concerning Guarantee of Return of Capital financing of Mudharabah, Musyarakah, and Wakalah bil Istitsmar.

Therefore, the prohibition of guarantees in mudharabah because it is contrary to its basic principles which are mandate can change due to changes in the objective conditions of society in the field of morality. in accordance with the rules *of al hukmu yaduru ma'a illat wujudan wa 'adaman*. That is to say: The existence of the law is determined by the presence or absence *of 'illat* (reason). If *'illat* changes then the legal consequences change.

2. Deed of Grant of Dependent Rights in the Cooperation Agreement

In the Law on Dependent Rights to Land and Objects Related to Land, it is said that the Deed of Granting Dependent Rights is a PPAT Deed containing the granting of Dependent Rights to certain creditors as collateral for the repayment of their receivables. So far, the Dependent Rights made by PPAT for conventional and sharia agreement contracts are the same, there is a basic contract agreement in conventionally different from sharia. The basis of conventional contracts is debts, while in sharia it can vary according to the original contract used, such as in the contract of origin of *mudharabah* and *musyarakah* which are cooperation activities of capital participation, so the treatment of guarantees must also follow the provisions of the mudharabah contract and *musyarakah.*

So far, it is known in the deed of granting dependent rights in collaboration with one of the Islamic banking institutions that still uses the deed of granting conventional dependent rights. In the deed, it is said that the right of dependents is the guarantee of the party who owes the debtor. The deed is formed on the basis of an agreement

between the creditor and the debtor. Meanwhile, the *mudharabah* and *musyarakah* agreement is not a debt receivable agreement, but a cooperation agreement.

Then on the deed of granting dependent rights, it was also found that the dependent rights can be executed if the debtor commits a default.' Meanwhile, if in the *mudharabah* and *musyarakah* agreement which is a cooperation agreement, losses in carrying out business are risks borne by financiers in the *mudharabah* and jointly on *the musyarakah* unless the loss of cooperation occurs due to the negligence of the business manager, then it is the responsibility of the manager.

In dispute resolution, there are also differences, bila in the Deed of granting conventional dependent rights, dispute resolution is carried out in the state court, but not so with the rights of sharia dependents who must resolve their disputes in religious courts. This can be seen from the source of the contract implemented that the right of sharia dependents means that the basic agreement is a sharia agreement, so this is in accordance with Supreme Court Regulation No. 14 of 2016 concerning Procedures for Resolving Sharia Economic Cases which states that every sharia economic case must be resolved in a religious court.

No.	Hak Conventional Dependents	Dependent Rights of Mudharabah and Musyarakah Financing
1.	Basis for binding debt-receivables	Based on the contract used (can be in the form of buying and selling or capital participation cooperation)
2.	Debt recognition	The term debt recognition is not appropriate in Sharia because the contract that is established is a cooperation contract.
3.	The guarantee can be executed if the debtor commits default	• On the *mudharabah* Dependent Rights agreement the loss is borne by the financier *(shahibul mal)* • In the agreement of the Right of Dependents, *the* loss is borne jointly
4.	Dispute resolution through arbitration and/ District Courts	Settlement of Sengketa through Sharia arbitration and/ Religious Courts

Differences in the basis of contracts in conventional and sharia have had a different legal impact on the application of guarantees. For this reason, PPAT should make its own standards for guaranteeing dependent rights in Syariah financing products found in Islamic Financial Institutions because of differences in concepts fundamentally affecting the entirety of the contract of the agreement as well as its accesoir contract.

3. Model of Deed of Grant of Dependent Rights in *Mudharabah* and *Musyarakah* Profit Sharing Agreements in Sharia Guarantee Law

It has been stated in the previous sub-chapter that basically the *mudharabah* and *musyarakah* revenue sharing agreement is a mandate agreement. It is this nature that causes the enactment of hukum of the two contracts does not allow any guarantees. However, due to the difference in the situation in the practice of *mudharabah* and *musyarakah* contracts in ancient times with the present, the application of guarantees on the two contracts is allowed.

In order to be adapted to the context of this era, Islamic financial institutions must be guided by the fatwa DSN-MUI No. 105 / DSN-MUI / X / 2016 concerning Guarantee of Return of Capital financing of Mudharabah, Musyarakah, and Wakalah bil Istitsmar. In this fatwa, it is said that in principle the owner of the capital should not ask the manager to guarantee the return of capital, but the manager can guarantee the return of capital on his own wishes without the request of the owner of the capital. This fatwa emphasizes that the imposition of guarantees on the capital provided by the owner of the capital is not a unilateral decision by the financier, namun by the will of the manager as well.

Furthermore, in this fatwa it is also submitted that basically pengelola is not obliged to return the business capital in full at the time of the loss, except for losses due to *ta'addi, tafrith* or *mukhalafat al-syuruth. Ta'aadi (ifrath)* can be interpreted as doing something that should not or should not be done. That is, the manager must be capable, careful and careful (must not be negligent) in carrying out his duties of managing the invested capital. Second, taqshir(tafrith) is a state in which the manager does not do something that should be done. This means that managers must have the courage to execute every thing that has a positive impact on the development of capital investment. Finally, mukhalafat al-syuruth, that is, the manager violates the provisions that are not in principle contrary to Sharia, but have been agreed upon by the parties to the law. If one or more of the three things mentioned above occur, then the owner of the capital has the right to request a full return of his capital.

If during the management period, the investasi suffers a loss, while the owner of the capital and the manager have a difference of opinion on the losses incurred, then the manager must prove that the loss was not due to faktor *ta'addi, tafrith,* nor *mukhalafat al-syuruth.* Then if in the course of it the manager is proven not to have committed any of the three violations and the proof submitted by the manager is received by the owner of the capital then the loss becomes responsibility of the owner of the capital. However, if the evidence submitted by the manager is not accepted by the owner of the capital, then the parties' dispute is resolved through deliberation and consensus, but if musyawarah consensus is not reached, so the settlement of disputes is resolved through litigation and non-litigation channels . Because it is included in Sharia disputes, dispute

resolution can be done through The Sharia A rbitrase Agency for non-litigation settlement and Court Agama on litigation dispute resolution.

Finally, if a permanent and binding decision has not been reached in the dispute, then the investment loss is the responsibility of the capital manager so that it is proven that the investment loss is not due to the negligence of the capital manager.

Thus, the enactment of the Deed of Grant of Dependent Rights on the mudharabah and musyarakah profit sharing agreement on hukum jaminan syariah refers to the fatwa of DSN-MUI No. 105 / DSN-MUI / X / 2016 concerning Guarantee of Refund of Financing Capital of Mudharabah, Musyarakah, and Wakalah bil Istitsmar. This fatwa can be the answer to the legal vacuum that has been occurring where conventional APHT which has a debt-receivable contract whose concept is far different from *mudharabah* and *musyarakah financing agreements.*

V. CONCLUSION

Dependent Rights as an acessoir agreement must follow its main agreement. As in conventional agreements that use debts as their primary agreements, the agreements are also debts. Likewise, in shari'a agreements, if the main agreement is in the form of cooperation financing, the acessoir agreement must also follow the principle of cooperation. Likewise in buying and selling financing, renting, and others. However, in practice, Syrian banking in Indonesia still uses the exact same acessoir agreements as conventional debt-receivables agreements, causing misinterpretations in enactment of the agreement. This has caused thedifference in the basis of contracts in conventional and sharia has had a different legal impact on the application of guarantees.

By seeing the phenomenon that occurs that there is a disharmonization between the binding of APHT guarantees on the main contract in the form of profit-sharing-based financing using mudharabah and musyarakah contracts, the author tries to introduce DSN-MUI fatwa No. 105 / DSN-MUI / X / 2016 concerning Guarantee of Return of Capital financing *of Mudharabah, Musyarakah, and Wakalah bil Istitsm*ar as a solution to the APHT model whose principal contract is Sharia profit sharing financing.

Although the fatwa says that the manager may guarantee the return of capital of his own accord, the most ideal is to impose *a mudharabah* and *musyarakah* contract as the original characteristics. In profit-sharing-based financing, the relationship between the parties is a partnership, the existence of guarantees is applied as an effort to anticipate moral hazard, not as an affirmation of the relationship between the parties as the pattern of the relationship between creditors and debtors. In this fatwa, it is also stated that the executionof j aminan can be carried out if it can be ascertained that the cause of the loss occurred due to mistakes or carelessness

committed by the management or one of the parties violated the agreement that had been mutually agreed upon.

Some of the solutions he can use to solve the following alternative solutions, such as :

1. In addition to the implementation of the *mudharabah* and *musyarakah* principal contract , a statement of guarantee for the return of the principal capital is made separately and signed after the principal contract.
2. The affidavit of acknowledgmentis replaced by a statement of acknowledgment of obligations of at least the principal amount of financing.
3. The term interest is replaced with the term profit sharing/projected profit sharing (if any)
4. Dispute resolution dalam assailance agreement binding guarantees adjusted to the principal agreementa.
5. After the statement of guarantee of returning the principal of the financing, then if the customer *defaults* the guarantee can be executed.

In addition to the proposal alternative harmonization above, it is also necessary to design an alternative binding of guarantees that impose a profit-sharing-based contract in accordance with Sharia so that there is no similar interpretation between the concepts of debts and receivables on conventional contracts and financing on sharia contracts.

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