



A notary's role in the subrogation of converted mortgage guarantee right from conventional banks to sharia banks

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Abstract

The Aceh Qanun No. 11 of 2018 pertaining to Islamic Financial Institutions provides legislation and regulations governing the activities of financial institutions in the context of achieving a just and thriving Acehese economy under the auspices of Islamic law. As a result of this conversion, there are barriers, particularly in the process of transferring finance or credit from conventional banks to Islamic banks, primarily the subrogation process for transferring mortgage rights. This research was conducted using the normative legal research technique. This paper aims to describe the role of a notary in the subrogation of mortgages resulting from the conversion of conventional banks to Islamic banks. When converting credit utilization from conventional to sharia banking, a subrogation method is utilised to transfer customer credit from conventional banking to sharia banking. The subrogation transition practiced by Islamic banking is antithetical to the principle of credit transfer outlined in DSN Fatwa 31/DSN-MUI/VI/2002 on the Transfer of Debt. In essence, notaries have both moral and legal responsibilities. Moral duty entails, among other things, the Notary's commitment to performing his duties and obligations as effectively as possible so that the deed's intended purpose is realized and the deed is valid. Legal obligations include both civil and criminal law responsibilities. Civil law responsibilities pertain to the possibility of a notary being sued for the deed of takeover agreement that the notary drafted. Claims from clients can take the form of lawsuits for default or lawsuits for unlawful acts (onrechtmatigedaad). Regarding making the takeover deed with guaranteed land rights (mortgages), the notary is also responsible, especially in proving the deed, if there is an oversight or mistake that causes the deed to lose its authenticity due to an oversight or mistake.

Keywords: notary's raole, subrogation, mortgage

Introduction

The Aceh Qanun No. 11 of 2018 on Islamic Financial Institutions (hence referred to as Qanun LKS) provides legislation and regulations controlling the activities of financial institutions within the context of achieving an equitable and thriving Acehese economy under the auspices of Islamic law. Since its formal implementation on January 4, 2019, the LKS Qanun has significantly improved Aceh's financial activities. In accordance with Aceh's special status, the regulation is issued in accordance with the implementation of Qanun Aceh No. 8 of 2014 on Islamic Sharia Principles, which stipulates that all financial institutions operating in Aceh must adhere to sharia principles. As a result, the Conventional Banks in the Aceh province ceased to function, and several Islamic Banks in Aceh amalgamated with Bank Syariah Indonesia.

As a result of this conversion, hurdles have arisen, particularly in the process of moving finance or credit from conventional banks to Islamic banks, leaving one mechanism unfinished: the process of transferring mortgage rights. The Notary is one of the stakeholders that play a significant role in this process. The Central Board of the Indonesian Notary Association has instructed the Aceh Notary Association that the subrogation system cannot be used to convert non-sharia transactions into sharia transactions. In the meantime, the National Sharia Council stated that subrogation based on sharia principles can be implemented for the conversion of conventional bank credit customers into sharia bank financing customers by referring

to DSN MUI Fatwa Number 104/DSN-MUI/IX/2016 Concerning Subrogation Based on Sharia Principles.

The procedure of transferring mortgage rights is one of the interesting technical mechanisms while applying the LKS Qanun. In order for the transfer of receivables to be valid, it must be accompanied by documented proof of the transfer and/or transfer. A cession deed of transfer of receivables is an authentic deed if it meets the criteria of being executed in the presence of a notary and in accordance with the law's prescribed format ^[1]. The notary plays a crucial role in the execution of the takeover, particularly in the creation of a deed as a type of credit/financing arrangement. In practice, however, there are challenges that must be overcome and solutions must be found when implementing take over. As a result of the implementation of the takeover, both the Notary, the Bank, and the Customer will be subject to legal repercussions ^[2]. One of the legal ramifications is the position of the notary in the mortgage subrogation procedure.

Research Method

This research was conducted using the Normative Juridical technique, which is a legal strategy involving the examination of secondary data or secondary literature ^[3] and research on legal principles, legal systematics, legal synchronization, legal history, and legal comparisons ^[4]. The form and content of library items have been compiled by earlier researchers and can be accessed regardless of time constraints ^[5].

Results and Discussions

A bank is a financial intermediary institution with the capacity to accept deposits, make loans, and issue banknotes, sometimes known as promissory notes. In the meantime, according to banking legislation, a bank is a corporate company that gathers funds from the public in the form of savings and distributes them to the public in the form of credit and/or other forms in order to better the common people's standard of living. The origin of the word bank is the Italian *banque* or *banca*, which both mean bench. During the Renaissance, Florentine bankers conducted their transactions while seated behind a money exchange counter, in contrast to the majority of individuals whose jobs did not permit them to sit while working. Banks have a significant role in the Indonesian economy as financial institutions. Based on Law Number 10 of 1998, Normal Banks are banks that conduct conventional commercial activities and, as part of those activities, provide payment traffic services in accordance with defined procedures and terms.

While Islamic Banks are financial institutions that do business in accordance with Sharia principles, their types include Islamic Commercial Banks (BUS), Islamic Business Units, and Islamic People's Financing Banks (BPRS). Islamic Commercial Banks (BUS) are Islamic banks that provide payment traffic services as part of their operations. Sharia Business Unit is a work unit of a conventional commercial bank head office that serves as the main office of an office or unit that conducts business activities based on sharia principles or a work unit in a branch office of a bank domiciled overseas that serves as the main office of the sharia sub-branch or sharia unit. In addition, Islamic People's Financing Banks are Islamic banks whose activities do not include payment flow services.

In 1990, a more focused effort to establish an Islamic bank in Indonesia was undertaken. On August 18-20, 1990, the Indonesian Ulema Council (MUI) hosted a Workshop on Bank Interest and Banking in Cisarua, Bogor, West Java. The results of the workshop were reviewed in greater detail at the IV MUI National Conference, held at the Sahid Jaya Hotel in Jakarta from August 22-25, 1990. In accordance with the directive of the IV MUI National Conference, a working committee to establish an Islamic bank in Indonesia was organized. The MUI Banking Team has the responsibility of approaching and consulting with all necessary partners.

Bank Muamalat Indonesia was established as a result of the preceding MUI Banking Team's efforts. At the outset of Bank Muamalat Indonesia's establishment, the existence of this Islamic bank did not attract optimal attention in the national banking sector. The legal basis for bank activities based on the sharia system is simply described as a "bank with a profit-sharing system," and there are no specifics regarding the basis of sharia law and the categories of permissible companies.

The enactment of Law No. 10 of 1998 pertaining to Banking heralded the emergence of Islamic banking during the reform era. This law specifies the legal foundation and sorts of enterprises that Islamic banks may run and implement. The law also directs conventional banks to establish sharia branches or transform themselves entirely into sharia banks. The banking community enthusiastically embraced this chance. A number of banks have begun to provide Islamic banking training to their employees. Some of these banks are exploring the possibility of establishing a sharia division

or branch. Some of them even intend to completely turn into Islamic banks.

Bank Syariah Mandiri (BSM) is the first state-owned bank to operate in accordance with sharia law. Bank Susila Bakti (BSM), one of the subsidiaries within the scope of Bank Mandiri (ex-BDN), which was afterward fully converted into a sharia bank, is the structural ancestor of BSM. To hasten the process of converting to an Islamic bank, BSM collaborates with the Tazkia Institute, particularly in the area of conversion training and assistance.

As one of Bank Mandiri's banks with hundreds of trillions of dollars in assets and a vast network, BSM has significant advantages over its predecessors. Similarly, the most recent political changes in Aceh have become a disguised boon for BSM. This is because BSM will assume sharia-compliant management of all Bank Mandiri branches in Aceh.

In Aceh, there are several additional Islamic banks besides Mandiri Syariah Banks, including BNI Syariah, BRI Syariah, and others. Prior to the implementation of Qanun Aceh No. 11 of 2018 about Islamic Financial Institutions (hereafter referred to as Qanun LKS), conventional banks still operated in Aceh. One mechanism remains incomplete in the process of moving finance or credit from conventional banks to Islamic banks: the procedure of transferring mortgage rights through subrogation.

Credit transfer (take over) is a term used in the banking industry to describe a third party providing credit to a debtor with the intention of paying off the debtor's debt/credit to the original creditor and providing new credit to the debtor so that the position of the third party replaces that of the initial creditor^[6]. Article 1400 of the Civil Code regulates subrogation. The article defines subrogation as the substitution of rights by a third party who pays the creditor. Subrogation can take place either by consent or by operation of the law. Subrogation must be specifically mentioned because it is distinct from debt relief. The goal of third parties making payments to creditors is to replace the position of the previous creditor, not to relieve the debtor of his or her obligation to pay debts to creditors^[7].

In practice, based on letter number 71/3-IV/PP-INY/2020 from the Central Management of the Indonesian Notary Association dated April 17, 2020, Concerning Conventional Banking Conversion, the Central Management of the Indonesian Notary Association declared that a subrogation scheme cannot be used to convert non-sharia transactions into sharia-compliant transactions.

Obviously, in notarial activity, the Notary must be able to bridge the desires of the parties or a solution in producing a deed without violating a provision of laws and regulations. The outcome of the notary is an authentic document. Article 1868 of the Criminal Code defines an authentic deed as a deed prepared in a form prescribed by law, made by or before a public authority in charge of such function at the location where the deed was executed. An official deed/release deed (*ambtelijke acte*) is a notary deed that only contains what has been experienced, heard, and witnessed by a notary in his or her capacity as a public official^[8].

Mortgage Right is characterized by its straightforward and reliable execution. Irah-irah on Mortgage certificates have the same executive power as court rulings with permanent legal effect and are valid replacements for the Grosse Acte Hypotheek in terms of land rights. So that, if the debtor defaults, the land rights that have been burdened with the

Mortgage are ready to be executed, similar to a court order that has received permanent legal provisions in line with applicable legislation. Execution is a coercive act carried out by the District Court against the losing party in a lawsuit to ensure that the losing party complies with the Court's Ruling^[9].

In accordance with the terms of Article 20 Paragraph 1 Letter b and Article 20 Paragraph 2 of the Mortgage Law, the execution of a mortgage can be accomplished in two ways: through public auctions or private sales. There are two methods for conducting sales through public auctions or the auction process: open auctions and closed auctions. Open auctions are public sales in which bids are made openly or publicly, whereas closed auctions are public sales in which bids are made in secret. The sale under the hand is the sale of land used as collateral and encumbered with a Mortgage by the creditor himself directly to another interested person or party, with the assistance of the owner of the land and structures^[10].

As a logical result of the adoption of Qanun Aceh Number 11 of 2018 pertaining to Sharia Financial Institutions in Aceh, all conventional banks must adopt shari'ah-based banking standards. The next consequence relates to all consumers who have previously engaged in conventional banking transactions^[11]. Due to the fact that conventional banks are not permitted to operate in Aceh, credit arrangements entered into by customers of traditional banks also pose a challenge. The implementation of changes to credit agreements in conventional banking into contracts in sharia banking performed by conventional banks occurs via subrogation, as mutually agreed upon by the client at the time the credit agreement transaction was conducted. Conventional banks employ subrogation by assigning Islamic banking as a new creditor for the repayment of all customer debts to Islamic banking.

The position of a Notary as a public official, in the sense that a Notary's authority is never delegated to other officials, provided that this authority does not become the authority of other authorities. According to these provisions, the Notary is the only official authorized to make authentic deeds for all actions, agreements, and stipulations that are required by general regulation or by interested parties to be stated in an authentic deed so long as the making of the deed is not also assigned or excluded to other officials or individuals^[12].

A Notary's function in society is that of an official who can be relied upon by the community. A notary is typically perceived as an official from whom one can obtain trustworthy advice. A Notary is a strong document maker in a legal proceeding, as all that is written and determined (*constatir*) is true^[13].

The takeover agreement is a permitted form of contract in legal science so long as it does not contradict statutory rules and contract law principles. This transfer agreement may be executed before a notary (notary) or by hand (without going through a notary intermediary). Therefore, the parties (creditor, original debtor, and substitute debtor) have the option of executing the agreement before a Notary, but in reality, the banking industry prefers that the takeover agreement be executed before a Notary. This is to ensure the parties' clarity and sense of safety. If the parties opt to engage a notary to execute the takeover agreement, a difficulty emerges regarding the notary's liability for the document he drafted. If the parties choose to execute the takeover agreement in front of a Notary (Notarial), the

agreement is referred to as a valid deed. Article 1868 of the Civil Code states, "Authentic deed is a deed completed and codified in a legal form, by or before public officials, who are allowed to do so, in the location where the deed was made." The notary is needed to carry out all procedures for drafting a takeover agreement deed in accordance with the relevant laws and regulations. This is done to ensure that the notarial act has complete evidentiary force. Additionally, notaries must adhere to the code of ethics applicable to them as public officers.

This establishes that a notary is a public officer who is chosen and removed by the government and is tasked with serving the public. In this instance, a Notary is a public official with the authority to authenticate documents. Notaries exist as public officials not merely to assist members of the public who require their services, but also by mandate of the law. A notary is one of the occupations in the realm of law that requires specialized knowledge. This role needs considerable expertise and accountability in every aspect of serving the public interest. Consequently, in every deed that he does, a Notary must pay attention to and follow every method for executing a deed in compliance with existing laws, including adhering to the notary's code of ethics.

Regarding the creation of a takeover deed with secured land rights, the notary is also responsible, particularly for proving the deed if an oversight or error renders the deed he created invalid. An examination of legal research reveals that legal duty has two dimensions: moral responsibility and legal accountability. The notary is obligated to carry out the duties and responsibilities to the best of his or her ability so that the intent of the deed is achieved and the deed is valid. This is an example of notary duty from a moral standpoint^[14].

Conclusion

A subrogation method is used to transfer customer credit from conventional banking to sharia banking when converting credit agreements from conventional banking to sharia banking contracts. The subrogation transition conducted by Islamic banking is opposed to the principle of credit transfer outlined in DSN Fatwa 31/DSN-MUI/VI/2002 about Debt Transfer. This is due to the fact that Islamic banks repay all customer debts to conventional banks. Regarding the creation of a takeover deed with secured land rights, the notary is also responsible, particularly in the case of proving the deed, if an oversight or error renders the deed he created invalid.

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