LAPORAN TAHUN TERAKHIR
PENELITIAN TERAPAN UNGGULAN PERGURUAN TINGGI
(PTUPT)

ANALISIS RISIKO HUKUM ATAS JAMINAN SERTIFIKAT HAK ATAS MEREK DALAM TRANSAKSI PERBANKAN

TAHUN KE – 2 DARI RENCANA 2 TAHUN

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SESUAI DENGAN PERJANJIAN PENDANAAN PENELITIAN DAN PENGABDIAN
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NOMOR: 122/SP2H/PTNBH/DRPM/2018

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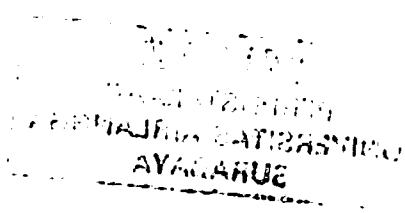
RINGKASAN

Berdasarkan hasil penelitian sebelumnya bahwa Hak atas merek dalam praktik perbankan syariah maupun perbankan konvensional tidak banyak diterima sebagai objek jaminan. Salah satu bank syariah, yaitu Bank Muamalat Indonesia Jakarta menerima hak atas merek sebagai objek jaminan pada pembiayaan *musyarakah* dan *murabahah.* Lembaga jaminan yang membebaninya adalah lembaga jaminan gadai. Merek sebagai benda tidak berwujud memungkinkan untuk dibebani lembaga jaminan gadai atau fidusia.

Dalam prespektif hukum jaminan, hak atas merek memenuhi syarat sebagai objek jaminan karena mempunyai nilai ekonomis dan dapat dipindahtangankan. Akan tetapi, untuk menilai bahwa merek tersebut mempunyai nilai ekonomis atau tidak, dibutuhkan keahlian khusus dalam menilainya, tidak seperti objek jaminan berupa hak atas tanah, kendaraan bermotor, mesin dan surat berharga yang lebih mudah untuk menilainya. Oleh karena itu, sebagai perwujudan prinsip kehati-hatian bank syariah harus melakukan analisis atas merek yang mendalam dan seksama, yaitu dengan cara melakukan penilaian atas merek yang dilakukan oleh penilai jaminan yang wajib memiliki kompetensi, memiliki etika dan berperilaku profesional. Di samping itu, merek yang diterima sebagai objek jaminan adalah merek yang terdaftar dengan bukti adanya sertifikat merek sehingga merek yang terdaftar mendapat perlindungan hukum 10 tahun sejak Tanggal Penerimaan.



PRAKATA

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Besar harapan kami laporan tahun terakhir ini dapat bermanfaat bagi pengembangan ilmu hukum khususnya Hukum Perbankan dan Hukum Jaminan

Surabaya, November 2018

Tim Peneliti

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1. Sertifikat sebagai presenter pada the 2 nd International Conference on Law, Governance and Globalization (ICLGG), Fakultas Hukum Universitas Airlangga, tanggal 28-29 Agustus 2018. Beserta Article ICLGG dengan judul "**THE CHARACTERISTICS OF PLEDGE IMPOSITION ON THE TRADEMARK RIGHTS IN MUSYARAKAH FINANCING**
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4. Acceptance Letter paper dengan judul: **Legal Risks On The Financing Of The Security Object In The Form Of Certificate Of Trademark Rights In Sharia Banks**. Di plublish pada The *National Academy of*

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BAB I

PENDAHULUAN

A. Latar Belakang Masalah

Berdasarkan hasil penelitian sebelumnya bahwa di dalam praktik perbankan konvensional maupun syariah tidak banyak menerima HKI khususnya hak atas merek sebagai objek jaminan dengan beberapa alasan yang dikemukakan bahwa HKI merupakan objek jaminan yang membutuhkan keahlian khusus dalam menilai ekonomis dari HKI tersebut, sedangkan ketersediaan sumber daya manusia yang mempunyai keahlian dibidang penilaian HKI terbatas bahkan tidak ada dalam bank tersebut, sehingga bank memilih objek jaminan yang sudah lazim dikenal dalam dunia perbankan dan relatif mudah dalam penilaiannya misalnya hak atas tanah, kendaraan bermotor, mesin produksi. Di samping itu, menyangkut mengenai keberadaan lembaga penilai yang kredibel yang akan bertugas menilai berapa nilai ekonomis yang terdapat dalam hak merek yang bersangkutan. Hal ini digambarkan dalam laporan penelitian sebelumnya, yaitu pada tabel dibawah ini:

Tabel 1. Daftar Bank Yang Menerima/ Tidak Menerima Merek Sebagai Objek Jaminan

No	Nama Bank	Menerima/Tidak Menerima Merek sebagai objek jaminan	Keterangan
1	Bank BCA[1]	Tidak menerima	Sertifikat hak merek hanya dipergunakan sebagai kesatuan oleh Bank BCA dalam menganalisis usaha dari calon nasabah

[1] Hasil wawancara dengan Legal Bank BCA Surabaya pada tanggal 17 April 2017

2	Bank Jatim[2]	Tidak menerima	Objek jaminan yang diterima berupa fix asset, yaitu berupa benda tidak bergerak dan bergerak berupa piutang atau hak tagih
3	BTPN[3]	Tidak menerima	Objek jaminan yang diterima berupa fix asset, yaitu berupa benda tidak bergerak dan bergerak berupa piutang atau hak tagih
4	Bank Mandiri[4]	Tidak menerima	Objek jaminan yang diterima berupa fix asset, yaitu berupa benda tidak bergerak dan bergerak, misalnya berupa piutang atau hak tagih
5	Bank Bukopin[5]	Tidak menerima	Merek hanya dipergunakan sebagai legalitas pendukung dari usaha dari nasabah, misalnya Pabrik Sosro yang memproduksi minuman teh Sosro maka sertifikat hak merek tersebut hanya sebagai pendukung legalitas dari usaha tersebut.
6	Bank Bukopin Syariah[6]	Tidak menerima	Objek jaminan yang diterima berupa fix asset, yaitu berupa benda bergerak dan tidak bergerak. Bahkan mesin hanya diterima sebagai supporting collateral bukan sebagai main collateral
7	Bank BRI Syariah[7]	Tidak menerima	Objek jaminan yang diterima berupa fix asset, yaitu berupa benda tidak bergerak, seperti hak atas tanah, mesin-mesin dan benda bergerak berupa piutang atau hak tagih
8	BTN Syariah[8]	Tidak menerima	Objek jaminan yang diterima berupa fix asset, yaitu berupa benda tidak bergerak, seperti hak atas tanah, mesin-mesin dan benda bergerak berupa piutang atau hak tagih
9	Bank Muamalat Indonesia[9]	Menerima Hak atas Merek sebagai Objek jaminan	Sertifikat hak merek diterima sebagai jaminan tambahan dan dibebani dengan lembaga jaminan gadai, akan

[2] Hasil wawancara dengan Legal Bank Jatim Surabaya pada tanggal 15 Mei 2017
[3] Hasil wawancara dengan Legal Bank BTPN Surabaya pada tanggal 22 Mei 2017
[4] Hasil wawancara dengan Legal Bank pada tanggal 19 Juni 2017
[5] Hasil wawancara dengan Legal Bank pada tanggal 28 Juni 2017
[6] Hasil wawancara dengan Legal Bank pada tanggal 10 Juli 2017
[7] Hasil wawancara dengan Legal Bank pada tanggal 31 Juli 2017
[8] Hasil wawancara dengan Legal Bank pada tanggal 7 Agustus 2017
[9] Hasil wawancara dengan legal Bank Muamalat Jakarta pada tanggal 12-13 Juli 2017

			tetapi ada pula hak merek yang hanya dipergunakan sebagai legalitas pendukung dari usaha dari calon nasabah
10	Bank Muamalat Surabaya[10]	Belum menerima sebagai objek jaminan	Objek jaminan yang diterima berupa fix asset, yaitu berupa benda tidak bergerak dan bergerak, misalnya berupa piutang atau hak tagih

Sebagaimana diketahui bahwa Pada Pasal 43 Peraturan Bank Indonesia Nomor 14/15/PBI/2012 tentang Penilaian Kualitas Aset Bank Umum, diatur bahwa Agunan yang dapat diperhitungkan sebagai pengurang dalam perhitungan Penyisihan Penghapusan Aset (PPA) ditetapkan sebagai berikut:[11]

a. Surat Berharga dan saham yang aktif diperdagangkan di bursa efek di Indonesia atau memiliki peringkat investasi dan diikat secara gadai;
b. tanah, gedung, dan rumah tinggal yang diikat dengan hak tanggungan;
c. mesin yang merupakan satu kesatuan dengan tanah yang diikat dengan hak tanggungan;
d. pesawat udara atau kapal laut dengan ukuran di atas 20 (dua puluh) meter kubik yang diikat dengan hipotek;
b. kendaraan bermotor dan persediaan yang diikat secara fidusia; dan/atau
c. resi gudang yang diikat dengan hak jaminan atas resi gudang.

Demikian halnya pada Pasal 45 Peraturan Otoritas Jasa Keuangan Nomor 16/POJK.03/2014 tentang Penilaian Kualitas Aset Bank Umum Syariah dan Unit

[10] Hasil wawancara dengan legal Bank Muamalat Surabaya pada tanggal 21 Agustus 2017

[11] Agunan sebagai pengurang PPA yang wajib dihitung oleh Bank terkait dengan fungsi agunan sebagai alat mitigasi risiko kredit. Sehubungan dengan itu, agunan yang dapat diperhitungkan sebagai pengurang PPA adalah agunan yang dapat direalisasi oleh Bank pada saat terjadi wanprestasi atas penyediaan dana yang diberikan.

Usaha Syariah, Agunan yang dapat diperhitungkan sebagai pengurang dalam perhitungan PPA ditetapkan sebagai berikut:

a. Surat Berharga Syariah dan saham yang aktif diperdagangkan di bursa efek di Indonesia atau memiliki peringkat investasi dan diikat secara gadai;
b. tanah, gedung, dan rumah tinggal yang diikat dengan hak tanggungan;
b. mesin yang merupakan satu kesatuan dengan tanah yang diikat dengan hak tanggungan;
c. pesawat udara atau kapal laut dengan ukuran di atas 20 (dua puluh) meter kubik yang diikat dengan hipotek;
d. kendaraan bermotor dan persediaan yang diikat secara fidusia; dan/atau
e. resi gudang yang diikat dengan hak jaminan atas resi gudang.

Pada Peraturan Otoritas Jasa Keuangan Nomor 19/POJK.03/2018 tentang Perubahan Peraturan Otoritas Jasa Keuangan Nomor 16/POJK.03/2014 tentang Penilaian Kualitas Aset Bank Umum Syariah dan Unit Usaha Syariah, di dalamnya tidak ada perubahan yang berkaitan Agunan yang dapat diperhitungkan sebagai pengurang dalam perhitungan PPA, Sehingga dalam POJK tersebut tidak mengatur tentang HKI sebagai agunan yang diperhitungkan sebagai pengurang dalam perhitungan PPA.[12] Berdasarkan Peraturan Bank Indonesia dan Peraturan Otoritas Jasa Keuangan tersebut menunjukkan bahwa HKI belum masuk sebagai agunan yang diperhitungkan sebagai pengurang dalam PPA.

[12] Berdasarkan hasil wawancara dengan Tim dari Departemen Learning dan Assesment Center OJK pada tanggal 9 Oktober 2018

Hasil penelitian yang pernah dilakukan oleh **Sri Mulyani** pada tahun 2014 [13]menunjukkan bahwa belum adanya pengakuan hukum terhadap hak atas merek sebagai obyek jaminan fidusia dalam praktik perbankan di Indonesia. Hak atas merek belum sepenuhnya dapat diterima sebagai agunan, hasil penelitian di PT. BNI (Persero)Tbk Jakarta menunjukkan, bahwa merek diterima sebagai obyek jaminan fidusia, tetapi tidak sebagai jaminan utama, hanya sebagai jaminan pelengkap dalam sebuah perjanjian kredit. Alasan BNI menerima merek bukan sebagai jaminan utama, karena nilai merek tidak terjamin seterusnya. Dasar pertimbangan BNI memberikan kredit dengan obyek merek tidak sebagai jaminan utama adalah :[14]

a. Adanya ketentuan internal BNI No.IN/0139/PAR/14 Desember 2000 tentang Buku Pedoman Perusahaan (BPP), mengatur mengenai ketentuan jaminan yang tidak dapat diterima dan jaminan yang dapat diterima, salah satunya adalah Merek.
b. BNI menerima merek "X" sebagai agunan, dengan alasan bahwa Merek "X" sebagai benda tidak berwujud dengan bukti sertifikat merek; Merek "X"mempunyai nilai baku yang tercantum dalam laporan keuangan; Merek "X" dapat diperjual belikan.

Menurut **Sri Mulyani** bahwa hambatan-hambatan perbankan dalam mengakui hak atas merek sebagai objek jaminan fidusia. disebabkan oleh beberapa, yaitu:

---

[13] Sri Mulyani, , "Realitas Pengakuan Hukum Terhadap Hak Atas Merek Sebagai Jaminan Fidusia Pada Praktik Perbankan", *Jurnal Hukum dan Dinamika Masyarakat*, Vol.11 No.2 April 2014,h.139

[14] *Ibid*

1. **Faktor hukum,** secara yuridis formal belum ada dasar legalitas yang dapat digunakan sebagai rujukan merek sebagai jaminan fidusia, meskipun hukum positif (*ius constitutum)* telah mengatur merek sebagai salah satu bentuk benda tidak berwujud dapat dijadikan jaminan fidusia (Pasal 1 ayat (2) UU Jaminan Fidusia). Eksistensi Merek sebagai jaminan fidusia belum diakui dalam Peraturan Bank Indonesia Nomor 14/15/PBI/2012 tentang Penilaian Kualitas Aset Bank Umum sebagai acuan para pelaku ekonomi khususnya perbankan dalam memberlakukan merek sebagai jaminan fidusia, sehingga dalam praktik perbankan belum ada pengakuan hukum terhadap berlakunya hak atas merek sebagai jaminan fidusia.
2. **Faktor Ekonomi,** tidak semua merek mempunyai nilai ekonomi, merek yang mempunyai nilai ekonomi (uang) yang bisa dijadikan jaminan dan mempunyai pangsa pasar (*marketable*). Dalam perspektif ekonomi, merek mempunyai peluang dan nilai merek dapat dipertanggung jawabkan secara ekonomi.[15]

Hak merek Pada **Bank Muamalat Indonesia di Jakarta** diterima sebagai objek jaminan akan tetapi lembaga yang membebaninya adalah lembaga jaminan gadai. Oleh karena, dibebani dengan lembaga jaminan gadai maka syarat sahnya gadai maka sertifikat hak merek ditarik dalam kekuasaan pemiliknya sebagaimana ditentukan Pasal 1152 (1) (2) BW:

> (1) Hak gadai atas benda-benda bergerak dan atas piutang-piutang bawa diletakkan dengan membawa barang gadainya di bawah kekuasaan si

[15] *Ibid.*,h.145

berpiutang atau seorang pihak ketiga, tentang siapa telah disetujui oleh kedua belah pihak.

(2) Tidak sah adalah hak gadai atas segala benda yang dibiarkan tetap dalam kekuasaan si berutang atau si pemberi gadai, ataupun yang kembali atas kemauan si berpiutang.

Sedangkan pada Bank BNI dari hasil penelitian yang dilakukan oleh **Sri Mulyani** sebelumnya bahwa hak merek sebagai objek jaminan yang dibebani dengan lembaga jaminan fidusia. Oleh karena, hak atas merek merupakan benda bergerak yang tidak berwujud maka sah-sah saja bilamana dibebani dengan lembaga gadai atau lembaga fidusia. Akan tetapi, bilamana memperhatikan karakteristik lembaga jaminan gadai yang mempersyaratkan bahwa benda harus dalam kekuasaan kreditor dan pemilik benda tidak diperbolehkan untuk mempergunakan atau memanfaatkan benda tersebut maka bilamana hak atas merek dibebani dengan gadai maka pemilik hak atas merek tidak diperbolehkan mempergunakan atau memanfaatkan merek tersebut. Akan tetapi, pada kenyataannya pemilik hak atas merek tetap dapat mempergunakan atau memanfaatkan merek tersebut. Oleh karena itu, bilamana merek tersebut tetap dapat dipergunakan atau dimanfaatkan oleh pemiliknya maka lembaga jaminan yang tepat untuk membebani Hak atas merek sebagai objek jaminan adalah lembaga jaminan fidusia. Berdasarkan uraian di atas maka permasalahan yang akan dianalisis adalah sebagai berikut:

1. Analisis hak atas merek oleh Bank Syariah sebagai perwujudan prinsip kehati-hatian.
2. Perjanjian jaminan yang membebani hak atas merek sebagai objek jaminan.

BAB II

TINJAUAN PUSTAKA

A. Merek Sebagai Benda Bergerak Tidak Berwujud

Berdasarkan Pasal 1 angka 1 Undang-Undang Nomor 20 Tahun 2016 tentang Merek dan Indikasi Geografis (UU Merek dan Geografis), yang dimaksud dengan merek adalah tanda yang dapat ditampilkan secara grafis berupa gambar, logo, nama, kata, huruf, angka, susunan warna, dalam bentuk 2 (dua) dimensi dan/atau 3 {tiga) dimensi, suara, hologram, atau kombinasi dari 2 (dua) atau lebih unsur tersebut untuk membedakan barang dan/atau jasa yang diproduksi oleh orang atau badan hukum dalam kegiatan perdagangan barang dan/atau jasa. Sedangkan yang dimaksud dengan Merek Dagang adalah merek yang digunakan pada barang yang diperdagangkan oleh seseorang atau beberapa orang secara bersama-sama atau badan hukum untuk membedakan dengan barang-barang sejenis lainnya.

Hak merek sebagai salah satu bagian Hak Kekayaan Intelektual (HKI) memiliki fungsi yang penting dalam dunia perdagangan, ia tidak saja menjadi pembeda antara barang dan atau jasa sejenis tetapi juga berfungsi sebagai alat untuk memenangkan persaingan dalam merebut pasar konsumen. Di samping itu, suatu merek yang telah menjadi merek terkenal juga berfungsi sebagai goodwill dan asset perusahaan yang tidak ternilai harganya.[16]

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[16] Agung Sujatmiko,et.all, "Prinsip Hukum Perlindungan Merek dalam Menunjang Peningkatan Industri Ekonomi Kreatif bagi Pengusaha Kecil dan Menengah", *Laporan Penelitian RKAT*, Fakultas Hukum, 2017, h.4

Merek berdasarkan hukum benda dikategorikan sebagai benda bergerak yang tidak berwujud. Bilamana mengacu pendapat dari Lorena Mitrione, et.all tentang aset tidak berwujud adalah:[17]

> "**Intangible assets** are non-current resources that do not have physical substance. They are initially recorded at cost, and this cost is allocated to future periods over the useful life of the intangible asset. intangible assets include patents, copyrights and trademarks or trade names that give holder exclusive right of use for a specific period of time. Their value to a business is generally derived from the rights of privileges granted by government agencies".

Merek sebagai benda bergerak yang tidak berujud memenuhi syarat sebagai objek jaminan karena:

1. Memiliki nilai ekonomis
2. Dapat dialihkan dengan perjanjian tertulis

Di samping kedua syarat di atas maka syarat-syarat lain yang harus dipenuhi, yaitu:

- Merek dapat dipergunakan sebagai objek jaminan bilamana merek tersebut merupakan merek yang terdaftar dalam Daftar Umum Merek di Dirjen HKI dengan dibuktikan adanya sertifikat merek, sehingga merek tersebut mendapat perlindungan hukum untuk jangka waktu 10 tahun sejak tanggal penerimaan dan jangka waktu perlindungan dapat diperpanjang sebagaimana diatur pada Pasal 35 UU Merek dan Geografis.
- Laporan keuangan perusahaan pemilik merek untuk mengetahui bahwa merek tersebut mempunyai nilai atau tidak.

[17] Lorena Mitrione, et.all, *Principles of Financial Accounting*, Wiley, Edition: 3rd Edition, 2013, p.153.

Menurut **Yunita Resmi Sari**, bahwa nilai ekonomis HKI dapat dihitung dengan *market approach, income approach* dan *cost approach.*[18] Untuk mengetahui nilai hak merek dapat dilihat dari laporan keuangan perusahaan pemilik hak merek. Dalam laporan keuangan, hak merek yang dimiliki termasuk dalam kolom aktiva khususnya aktiva tidak lancar, dengan demikian hak merek merupakan suatu aktiva. Dalam PSAK Nomor 19, hak merek khususnya merek dagang digolongkan sebagai aktiva tidak berujud.

Berdasarkan Pasal 41 UU Merek dan Geografis, Hak atas merek terdaftar dapat beralih atau dialihkan karena:

a. pewarisan;
b. wasiat;
c. Waqaf;
d. hibah;
e. perjanjian; atau
a. sebab-sebab lain yang dibenarkan oleh peraturan perundang-undangan[19].

Pengalihan hak atas Merek terdaftar wajib dimohonkan pencatatannya kepada Direktorat Jenderal untuk dicatat dalam Daftar Umum Merek. Permohonan pengalihan hak atas Merek disertai dengan dokumen yang mendukung. Pengalihan hak Merek terdaftar yang telah dicatat dimumkan dalam Berita Resmi

[18] Yunita Resmi Sari, "Mendorong Perbankan Menjadikan Aset HKI sebagai Alat Kolateral dengan memperhatikan Prinsip Kehati-Hatian", Lokakarya Tentang Penyiapan Regulasi Hak Atas Kekayaan Intelektual Sebagai Alat Kolateral Dalam Sistem Hukum Nasional, Jakarta 26 s/d 28 Maret 2014

[19] Yang dimaksud dengan "sebab lain yang dibenarkan oleh peraturan perundang-undangan" adalah sepanjang tidak bertentangan dengan peraturan perundang-undangan, misalnya perubahan kepemilikan Merek karena pembubaran badan hukum, restrukturisasi, merger, atau akuisisi.

Merek. Pengalihan hak atas Merek terdaftar yang tidak dicatatkan dalam Daftar Umum Merek tidak berakibat hukum pada pihak ketiga.[20]

B. Bank Syariah

Prinsip Syariah diartikan dalam Undang-Undang Nomor 21 Tahun 2008 tentang Perbankan Syariah (Undang-Undang Perbankan Syariah) pada Pasal 1 angka 12 adalah prinsip hukum Islam dalam kegiatan perbankan berdasarkan fatwa yang dikeluarkan oleh lembaga yang memiliki kewenangan dalam penetapan fatwa di bidang syariah. Sedangkan dalam Prinsip Syariah menurut Pasal 1 angka 13 Undang-Undang Nomor 7 Tahun 1992 tentang Perbankan sebagaimana tekah diubah dengan Undang-Undang Nomor 10 Tahun 1998 (Undang-Undang Perbankan) diartikan sebagai aturan perjanjian berdasarkan hukum Islam antara bank dan pihak lain untuk penyimpanan dana dan atau pembiayaan kegiatan usaha, atau kegiatan lainnya yang dinyatakan sesuai dengan syariah, antara lain pembiayaan berdasarkan prinsip bagi hasil (*mudharabah*), pembiayaan berdasarkan prinsip penyertaan modal (*musharakah*), prinsip jual beli barang dengan memperoleh keuntungan (*murabahah*), atau pembiayaan barang modal berdasarkan prinsip sewa murni tanpa pilihan *(ijarah*), atau dengan adanya pilihan pemindahan kepemilikan atas barang yang disewa dari pihak bank oleh pihak lain (*ijarah wa iqtina*).

Pembentukan Bank Syariah pada mulanya memang banyak diragukan. **Pertama,** banyak orang beranggapan bahwa sistem perbankan bebas bunga (*Interest Free*) adalah sesuatu yang tidak mungkin dan tidak lazim. **Kedua,**

[20] Penentuan bahwa akibat hukum tersebut baru berlaku setelah pengalihan Hak atas Merek dicatat, dimaksudkan untuk memudahkan pengawasan dan mewujudkan kepastian hukum.

adanya pertanyaan tentang bagaimana Bank akan membiayai operasinya.[21] Dalam Syariah terdapat kewajiban bagi umat Islam untuk harus melaksanakan ketentuan dalam Al-Qur'an dan Al-Hadist. Sehingga dalam melakukan kegiatan ekonomi pun harus sesuai dengan Syariah. Dengan adanya, larangan riba di dalam Al-Qur'an dan Al Hadist yang kemudian muncul Bank Syariah yang beroperasi berdasarkan sistem bagi hasil. Hal ini merupakan peluang bagi umat Islam untuk memanfaatkan jasa bank secara optimal.

Ada empat prinsip utama dalam syariah yang senantiasa mendasari jaringan kerja perbankan dengan sistem syariah, yaitu :

1. Perbankan non riba
2. Perniagaan halal dan tidak haram
3. keridhaan pihak-pihak dalam berkontrak
4. pengurusan dana yang amanah, jujur, dan bertanggung jawab.[22]

Prinsip perbankan syariah yang dikemukakan oleh **Mardani** adalah sebagai berikut:[23]

1. Prinsip at-ta'awun

   Merupakan prinsip untuk saling membantu dan bekerja sama antara anggota masyarakat dalam kebaikan. Hal ini sesuai dengan firman Allah SWT dalam QS. Al-Maidah:2.

2. Prinsip menghindari al-iktinaz

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[21] Sutan Remy Sjahdeini, *Perbankan Islam dan Kedudukannya dalam Tata Hukum Perbankan Indonesia*, Pustaka Utama Grafiti, Jakarta, 1999,h.6 (Sutan Remy Sjahdeini I)

[22] Jafri Khalil, "Prinsip Syariah dalam Perbankan", *Jurnal Hukum Bisnis*, Vol. 20, Agustus-September, 2002,h.47

[23] Mardani, *Hukum Bisnis Syariah*, PrenadaMedia Group, Jakarta, 2014, h.155

Seperti membiarkan uang menganggur dan tidak berputar dalam transaksi yang bermanfaat bagi masyarakat umum. Hal ini sesuai dengan firman Allah dalam Qs. An-Nisa (4):29.

Dalam perbankan syariah dilarang keras melaksanakan suatu transaksi apabila terdapat hal-hal sebagai berikut:

a. Gharar, adanya unsur ketidakpastian atau tipu muslihat dalam suatu transaksi.
b. Maysir, yaitu unsur judi yang transaksinya bersifat spekulatif yang dapat menimbukan kerugian satu pihak dan keuntungan bagi pihak lainnya.

3. Riba, transaksi menggunakan sistem bunga.

Beberapa pandangan tentang tujuan Bank Islam didirikan. Secara garis besar pandangan itu dikategorikan dalam dua bentuk, yaitu pandangan yang dikemukakan para teoritis dan praktisi ekonomi Islam.[24] Menurut para teoritis ekonomi Islam, sebagaimana dikemukakan oleh **Sutan Remy Sjahdeini** perbankan Islam adalah perbankan yang menyediakan fasilitas dengan cara mengupayakan instrumen-instrumen yang sesuai dengan ketentuan-ketentuan dan norma-norma syariah.[25] Sedangkan tujuan perbankan Islam menurut **M.Umer Chapra** adalah untuk meningkatkan kesempatan kerja dan kesejahteraan ekonomi masyarakat Islam yang sesuai dengan nilai-nilai Islam. Oleh karenanya, perbankan Islam harus sungguh-sungguh dalam menyiapkan berbagai perantinya yang

[24] Muslimin H.Kara, *Bank Syariah di Indonesia: Analisis Kebijakan Pemerintah Indonesia Tentang Perbankan Syariah*, UII Press, Yogjakarta, 2005, h.69
[25] Sutan Remy Sjahdeini I, *Op.cit.*,h.21

menekankan bahwa pembiayaan yang disediakannya tidak akan meningkatkan bahwa pembiaayaan yang disediakan tidak akan meningkatkan konsentrasi kekayaan atau meningkatkaan komsumsi.[26] Sebaliknya para praktisi ekonomi Islam atau bankir Islam menganggap bahwa peranan perbankan Islam semata-mata bertujuan untuk komersial dengan mendasarkan pada instrumen-instrumen keuangan yang bebas bunga dan ditujukan untuk menghasilkan keuntungan finasial. Ini berarti bahwa para bankir Islam menganggap bahwa perbankan Islam bukan sebagai lembaga sosial semata.[27] Menurut **Abdul Ghofur Anshori** tujuan bank syariah secara umum adalah mendorong dan mempercepat kemajuan ekonomi suatu masyarakat dengan melakukan kegiatan perbankan, finansial, komersial, dan investasi sesuai kaidah syariah. Hal inilah yang membedakan dengan bank konvensional yang tujuan utamanya adalah pencapaian keuntungan yang setinggi-tingginya (*profit maximization*).[28]

Secara tegas disebutkan bahwa yang dimaksud dengan Bank Syariah adalah Bank yang *menjalankan kegiatan usahanya berdasarkan Prinsip Syariah* (cetak miring oleh peneliti) dan menurut jenisnya terdiri atas Bank Umum Syariah dan Bank Pembiayaan Rakyat Syariah. Penegasan kembali pada Pasal 2 Undang-Undang Perbankan Syariah bahwa Perbankan Syariah dalam melakukan kegiatan usahanya berasaskan Prinsip Syariah, demokrasi ekonomi, dan prinsip kehati-hatian. Prinsip syariah merupakan pondasi awal kegiatan usaha perbankan

[26] *Ibid*, sebagaimana mengutip dari M.Umer Chapra, *Toward a Just Monetery System*, The Islamic Foundation, London, 1985, h.173

[27] Muslimin H.Kara, *Op.cit.*,h.70

[28] Abdul Ghofur Anshori, *Perbankan Syariah Di Indonesia*, Gadjah Mada University Press, Yogjakarta,2007, h.,123 (untuk selanjutnya disebut Abdul Ghofur Anshori II)

syariah. Pada pasal-pasal selanjutnya ditegaskan kembali berulang-ulang dengan kata-kata "kegiatan usaha yang tidak bertentangan dengan Prinsip Syariah" atau " melakukan kegiatan usaha berdasarkan Prinsip Syariah". Hal ini juga ditegaskan oleh Mohamed Ridza Mohamed Abdullah bahwa:[29]

> Islam prohibits interest-based transactions. No individual or business entity should hoard money in order to earn interest; instead people and business should ude money to support productive economic activities especially thode that create investmentm trading and jobs. The returns of successful economic activities are thc distributed the different parties involved, hence wealth is shared.

Kegiatan usaha perbankan syariah yang berasaskan pada prinsip syariah, antara lain, adalah kegiatan usaha yang tidak mengandung:

a. Riba, yaitu penambahan pendapatan secara tidak sah (batil) antara lain dalam transaksi pertukaran barang sejenis yang tidak sama kualitas, kuantitas, dan waktu penyerahan (*fadhl*), atau dalam transaksi pinjam-meminjam yang mempersyaratkan Nasabah Penerima Fasilitas mengembalikan dana yang diterima melebihi pokok pinjaman karena berjalannya waktu (*nasi'ah*);

   Sebagai contoh: Adi meminjam uang pada Budi sebesar Rp.10.000.000,- dengan janji akan dikembalikan pada bulan ke 10. Oleh karena itu, Budi mensyaratkan adanya tambahan atas pinjaman tersebut sebesar 10 %, Adi sepakat. Maka tambahan sebesar 10 % dalam utang piutang yang ditetapkan secara pasti dan di awal oleh Budi termasuk sebagai tambahan yang tidak diperbolehkan menurut syariah. Tambahan tersebut dikategorikan sebagai riba yang hukumnya adalah haram. Dalam utang piutang menurut Islam Pada

[29] Mohamed Ridza Mohamed Abdullah, The life and Law of Fintech, Thomson Reuters Malaysia, Selangor Darul Ehsan, Malaysia, 2017,p.152

transaksi pinjam meminjam bukan termasuk sebagai usaha pengembangan modal, akan tetapi hubungan bisnis dalam ajaran Islam tidak hanya didasari kepentingan semata, tetapi juga di dasari atas tolong menolong. Terkadang dalan bisnis tidak selalu untung bahkan merugi sehingga tidak menutup kemungkinan untuk berhutang untuk menutup kerugian tersebut. Pada Peraturan Bank Indonesia Nomor 7/46/PBI/2005 Tentang Akad Penghimpunan dan Penyaluran Dana Bagi Bank Yang Melaksanakan Kegiatan Usaha Berdasarkan Prinsip Syariah, bahwa *Qardh* diartikan sebagai pinjam meminjam dana tanpa imbalan dengan kewajiban pihak peminjam mengembalikan pokok pinjaman secara sekaligus atau cicilan dalam waktu tertentu.[30] Oleh karena itu, apabila dalam pinjam meminjam/utang piutang ditetapkan suatu keuntungan maka keuntungan tersebut dikategorikan sebagai riba.

b. *Maisir*, yaitu transaksi yang digantungkan kepada suatu keadaan yang tidak pasti dan bersifat untung-untungan. Contoh: perjudian.

Maysir is gambling that refers to, " getting something or profit too easily without working for it or activities which involve betting whereby the winner will take all the bets and the loser will lose his bet. It is a game if pure chance where any party might gain at the expense of the liss of the other party".[31]

c. *Gharar*, yaitu transaksi yang objeknya tidak jelas, tidak dimiliki, tidak diketahui keberadaannya, atau tidak dapat diserahkan pada saat transaksi

[30] Trisadini Prasastinah Usanti, "Akad Al Qardh dalam Transaksi Pinjam Memimjam", artikel yang tidak terpublikasi. (Trisadini I)

[31] Rusni Hassan, et.all, Remedies for Default inIslamic Banking, Thomson Reuters Malaysia, Selangor Darul Ehsan, Malaysia, 2018,p.8

dilakukan kecuali diatur lain dalam syariah. Contoh: bank syariah menawarkan produk dengan promosi atau iklan yang tidak jujur agar nasabah tertarik pada produk tersebut.

Dalam fikih Islam terdapat suatu istilah yang disebut dengan *al-ghurur*. Definisi *al-ghurur* adalah:[32]

Usaha membawa dan menggiring seseorang dengan cara tidak benar untuk menerima suatu hal yang tidak memberi keuntungan disertasi dengan rayuan bahwa hal itu menguntungkannya, sedangkan sekiranya ia mengetahui hakikat ajakan tersebut maka ia tidak akan mau menerimanya.

Contoh *bai'al-gharar* dari hadis Ibnu Mas'ud: " jangan kamu beli ikan dalam air karena padanya terdapat gharar (tipuan).[33]

d. Haram, yaitu transaksi yang objeknya dilarang dalam syariah; atau
e. Zalim, yaitu transaksi yang menimbulkan ketidakadilan bagi pihak lainnya. Contoh: zalim dalam praktik perbankan syariah, yaitu bilamana bank mencantumkan klausuka eksonerasi/eksemsi, yaitu klausul yang meniadakan atau membatasi tanggung jawab bank syariah maka klausula ini merupakan klausula yang zalim bagi nasabah. Disamping itu klausula eksenorasi juga dilarang dalam Undang-Undang Perlindungan Konsumen maupun dalam POJK Nomor 1/POJK.07/2013 tentang Perlindungan Konsumen Sektor Jasa Keuangan.

Perbankan syariah sebagai perbankan tanpa bunga merupakan model ekonomi Islam yang pertama dirumuskan sebagai bentuk penolakan terhadap

[32] Muhammad dan Alimin, Etika *Perlindungan Konsumen dalam Ekonomi Islam*, BPFE-Yogjakarta, 2004/2005, h.200
[33] *Ibid*

bunga bank.[34] Hukum perbankan syariah termasuk ke dalam rumpun dimensi muamalah. Ketentuan tentang muamalah khususnya yang menyangkut masalah perbankan dimungkinan untuk diijtihadkan sesuai dengan kebutuhan zaman.[35]

C. Analisis Pembiayaan

Semua bank wajib memiliki kebijakan umum penanaman dana secara tertulis, definisi penanaman dana adalah penyediaan dana, dan /atau barang serta fasilitas lainnya kepada nasabah, yang tidak bertentangan dengan konsep syariah dan standar akuntasi perbankan Islam yang berlaku. Penanaman dana pada bank syariah berupa pembiayaan. Pembiayaan menurut Pasal 1.25 Undang-undang Perbankan Syariah adalah penyediaan dana atau tagihan yang dipersamakan dengan itu berupa :

a. Transaksi bagi hasil dalam bentuk Mudharabah dan Musyarakah;
b. Transaksi sewa-menyewa dalam bentuk ijarah atau sewabeli dalam bentuk ijarah muntahiyah bit tamlik;
c. Transaksi jual beli dalam bentuk piutang Murabahah, Salam dan Istishna;
d. Transaksi pinjam meminjam dalam bentuk piutang Qardh; dan
e. Transaksi sewa menyewa jasa dalam bentuk Ijarah untuk transaksi multijasa.
f. Berdasarkan persetujuan atau kesepakatan antara bank syariah dan/atau UUS dan pihak lain yang mewajibkan pihak yang dibiayai dan/atau diberi

[34]Abd. Shomad, *Hukum Islam: Penormaan Prinsip Syariah dalam Hukum Indonesia*, Kencana, Jakarta, 2010, h. 112.
[35] *Ibid*, h. 124-125.

fasilitas dana untuk mengembalikan dana tersebut setelah jangka waktu tertentu dengan imbalan ujrah, tanpa imbalan atau bagi hasil.

Pembiayaan adalah merupakan sebagian besar asset dari bank syariah sehingga pembiayaan tersebut harus dijaga kualitasnya. Menurut **Sutan Remy Sjahdeini** diabaikannya rambu-rambu kesehatan bank oleh bank yang melakukan kegiatan berdasarkan prinsip syariah memberikan dampak kerugian yang jauh lebih besar daripada hal itu dilakukan oleh suatu bank konvensional. ada paling sedikit dua alasan mengapa dampak tersebut lebih besar. **Alasan pertama** ialah karena risiko yang dihadapi oleh bank syariah dalam hal pembiayaan diberikan berdasarkan akad mudharbah kepada nasabahnya jauh lebih besar daripada risiko yang dihadapi oleh bank konvensional yang memberikan kredit dengan jaminan. Pada pembiayaan mudharabah bank syariah sebagai prinsip syariah tidak boleh meminta agunan dari nasabah yang diberi pembiayaan. Dengan kata lain bank syariah semata-mata hanya mengandalkan *first way out*.[36] **Alasan kedua**, apabila terjadi kegagalan pada pembiayaan yang diberikan oleh bank syariah, antara lain dalam bentuk mudharabah dan musyarakah, nasabah tidak berkewajiban untuk mengembalikan dana tersebut. [37]

Pembiayaan merupakan kegiatan perbankan syariah yang sangat penting dan menjadi penunjang kelangsungan hidup bank syariah jika dikelola dengan baik, pengelolaan pembiayaan yang tidak baik akan banyak menimbulan masalah bahkan akan menyebabkan ambruknya bank syariah.

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[36] Sutan Remy Sjahdeini, *Op.cit.*,h.173
[37] *Ibid.*,h.173

BAB III

TUJUAN DAN MANFAAT PENELITIAN

A. Tujuan Penelitian

1. Menganalisis hak atas merek sebagai objek jaminan oleh Bank Syariah sebagai perwujudan prinsip kehati-hatian.
2. Menganalisis perjanjian jaminan yang membebani hak atas merek sebagai objek jaminan oleh bank syariah.

B. Manfaat Penelitian

1. Manfaat Teoritis :
   a. Memberikan sumbangan pemikiran bagi perkembangan hukum perbankan pada umumnya dan hukum jaminan pada khususnya.
   b. Hasil penelitian diharapkan dapat menjadi tolok ukur bagi bank dalam menerapkan prinsip 5 C' dalam kegiatan usahanya.
2. Manfaat Praktis :
   a. Penelitian ini diharapkan dapat bermanfaat bagi para pelaku bisnis perbankan konvensional maupun perbankan syariah dalam membuat panduan analisis agunan berupa sertifikat hak atas merek.
   b. Hasil penelitian ini dapat digunakan oleh pembentuk undang-undang dalam menyempurnakan ketentuan tentang objek jaminan pada bank.

BAB IV

METODE PENELITIAN

A. Tipe Penelitian

Penelitian hukum adalah suatu proses untuk menemukan aturan hukum, prinsip-prinsip hukum, maupun doktrin-doktrin hukum guna menjawab isu hukum yang dihadapi. Hal ini sesuai dengan karakter preskriptif ilmu hukum.[38] Tipe penelitian hukum yang digunakan adalah penelitian hukum normatif

B. Pendekatan Masalah

Pendekatan masalah yang digunakan dalam melakukan analisis atas permasalahan yang dikemukakan dalam penelitian ini adalah pendekatan perundang-undangan (*statute approach*), pendekatan konseptual (*Conceptual Approach*) dan *case study*. Pendekatan perundang-undangan (*statute approach*), yaitu suatu pendekatan secara yuridis normatif dengan menguraikan dan mengkaji permasalahan berdasarkan peraturan perundang–undangan yang berlaku, sehingga diperoleh suatu bahasan atas permasalahan tersebut menurut perspektif peraturan perundang–undangan yang berlaku. Bahan hukum utama yang digunakan adalah Undang–Undang Nomor 7 Tahun 1992 tentang Perbankan sebagaimana dirubah dengan Undang-Undang Nomor 10 Tahun 1998, Undang-Undang Nomor 21 Tahun 2008 tentang Perbankan Syariah, Undang-Undang Nomor 4 Tahun 1996 Tentang Hak Tanggungan, Undang-Undang Nomor 42 Tahun 1999 tentang jaminan Fidusia dan Burgerlijk Wetboek dan peraturan pelaksananya. Pendekatan

[38] Peter Mahmud Marzuki, *Penelitian Hukum*, Kencana, Cet.2, Jakarta, 2005, h. 35

Konseptual (*Conceptual Approach*) dilakukan peneliti dengan mempelajari pandangan-pandangan dan doktrin-doktrin yang berkembang dalam ilmu hukum, terutama mengenai hukum perbankan[39]. *Case study* dalam hal ini adalah dilakukan pada bank syariah di Jakarta dan Surabaya.

C. Sumber Bahan Hukum

Bahan hukum dalam penelitian ini berasal dari berbagai sumber yang terbagi ke dalam bahan hukum primer dan bahan hukum sekunder. Bahan hukum primer adalah bahan hukum yang diperoleh dari semua peraturan perundang–undangan yang berkaitan dengan topik penelitian yang dibahas. Bahan hukum primer meliputi peraturan perundang–undangan dibidang perbankan dan jaminan. Bahan hukum sekunder adalah bahan hukum yang digunakan untuk menunjang pembahasan permasalahan yang diperoleh dari pendapat para ahli di bidang hukum yang dikemukakan dalam literatur, makalah–makalah, artikel–artikel ataupun jurnal–jurnal, hasil wawancara serta data–data statistik yang kiranya relevan dengan pembahasan penelitian ini.

D. Prosedur Pengumpulan Bahan Hukum

Bahan hukum primer diperoleh dengan jalan penelusuran peraturan perundang-undangan di bidang perbankan kemudian menginventarisasi dan mengelompokkannya sebagai bahan hukum primer. Bahan hukum sekunder diperoleh dengan melakukan kepustakaan, penelusuran pada kumpulan makalah–makalah, artikel–artikel serta jurnal–jurnal baik yang terdapat di perpustakaan, media cetak, situs–situs internet, dan hasil wawancara untuk mendukung analisis

[39] Peter Mahmud Marzuki, *Op.cit.*,h.94-95

dari penelitian ini dengan beberapa Notaris dan legal officer dari beberapa bank pemerintah dan bank swasta baik dari bank syariah di berbagai wilayah Indonesia, seperti Jakarta, Surabaya, Sidoarjo, Jember dan Malang. Di samping itu, juga melakukan survey ke OJK di Jakarta. Kemudian semua bahan hukum kemudian dipilah-pilah yang sekiranya relevan dan mendukung pembahasan permasalahan penelitian ini.

E. Analisis Bahan Hukum

Analisis terhadap bahan hukum dilakukan yang meliputi norma hukum, konsep hukum dan sumber hukum. Seluruh bahan hukum yang diperoleh kemudian diverifikasi untuk diketahui isi atau muatan yang terkandung di dalamnya. Bahan hukum primer dijadikan sebagai bahan utama untuk melakukan analisa permasalahan, sehingga permasalahan yang dikemukakan diuraikan terlebih dahulu untuk kemudian ditinjau menurut peraturan perundang–undangan yang berlaku. Bahan hukum sekunder dijadikan sebagai bahan analisa penunjang yang mendukung hasil analisa yang diperoleh dari bahan hukum primer, sehingga hasil yang diperoleh lebih dapat dipertanggung jawabkan.

BAB V

HASIL DAN LUARAN YANG DICAPAI

A. Analisis Hak Atas Merek sebagai Objek Jaminan Oleh Bank Syariah Sebagai Perwujudan Prinsip Kehati-Hatian

1. Prinsip Kehati-hatian Pada Bank Syariah

Mengamalkan prinsip-prinsip syariah ke semua aspek kehidupan merupakan kewajiban yang telah diperintahkan oleh Allah kepada hamba-hambaNya. Tujuan secara mendasar mengamalkan prinsip-prinsip syariah ialah untuk mencapai kemaslahatan hidup dunia akhirat (*falah*). Begitu pula dalam dunia perbankan, tujuan menerapkan prinsip-prinsip syariah ialah selain untuk mengharap ridha Allah, juga dalam rangka mencapai kemaslahatan di bidang ekonomi. Ketentuan ini mengacu pada kaidah fiqh: *Apabila hukum syara'dilaksanakan, maka pastilah akan tercipta kemaslahatan.* Dasar filosofis eksistensi prinsip kehati-hatian pada kegiatan usaha perbankan pada hakikatnya adalah sebagai jaminan kepercayaan masyarakat kepada perbankan, pada perbankan syariah dimaknai sebagai jaminan atas amanah yang sudah diberikan oleh masyarakat.

Perbankan syariah tidak semata-mata berfungsi sebagai lembaga intermediasi, tetapi juga berfungsi sosial dan merupakan mitra nasabah. Oleh karena itu, untuk melindungi kepentingan dana masyarakat maka perbankan syariah wajib memegang teguh prinsip kehati-hatian agar perbankan syariah selaku pemegang *amanah* dalam keadaan sehat, *likuid, solvent* dan *profitable.* Hubungan hukum bank syariah dengan nasabah adalah didasarkan pada prinsip

amanah. Tidak terbatas pada kepercayaan yang didasarkan pada itikad baik saja tetapi juga kepercayaan yang dilandasi dengan nilai ketauhidan bahwa apa yang dilakukan senantiasa diawasi oleh Allah SWT, sehingga setiap tindakan yang dilakukan merupakan ibadah, sehingga tujuan dari perbankan syariah tidak semata-mata mencari keuntungan (*profit oriented*) tetapi juga mencari kemakmuran di dunia dan kebahagian di akhirat (*falah oriented*).[40]

Adapun tujuan dari diberlakukannya prinsip kehati-hatian tidak lain agar bank-bank selalu dalam keadaan sehat, sehingga antara lain selalu dalam keadaan *likuid, solvent* dan menguntungkan (*profitable*). Dengan diberlakukannya prinsip kehati-hatian itu diharapkan kadar kepercayaan masyarakat terhadap perbakan selalu tinggi sehingga masyarakat bersedia dan tidak ragu-ragu menyimpan dananya di bank.[41] Suatu bank dapat hidup dan berkembang bergantung pada kemampuan bank mengerahkan dana dari masyarakat. Kemampuan mengerahkan dana berupa simpanan masyarakat sangat bergantung pada tingkat kepercayaan masyarakat pada bank tersebut. sebagaimana diketahui bahwa perbankan syariah berfungsi sama dengan perbankan konvensional, yaitu sebagai lembaga intermediasi yaitu berfungsi sebagai penghimpun dana masyarakat dan penyalur dana masyarakat.

Kegiatan usaha yang dilakukan oleh bank syariah mengandung risiko, oleh karena itu bank syariah wajib menerapkan manajemen risiko sebagaimana diatur dalam Pasal 38 dan Pasal 39 Undang-Undang Perbankan Syariah bahwa Bank

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[40] Trisadini Prasastinah Usanti, *Prinsip Kehati-hatian Pada Transaksi Perbankan*, Airlangga University Press, Surabaya, 2013,h.87 dan 137

[41] Sutan Remy Sjadeini, *Kapita Selecta Hukum Perbankan* ,Jilid I, h.53 (Sutan Remy Sjahdeini III)

Syariah dan UUS wajib menerapkan manajemen risiko, prinsip mengenal nasabah, dan perlindungan nasabah. Bank Syariah dan UUS wajib menjelaskan kepada Nasabah mengenai kemungkinan timbulnya risiko kerugian sehubungan dengan transaksi Nasabah yang dilakukan melalui Bank Syariah dan/atau UUS.[42] Hal ini juga dikemukakan oleh **Abu Bakar Munir** arti pentingnya hak untuk mengakses informasi, bahwa:

> "The right to acces to information has assumed increasing importance in recent year as one of the steps in achieving the concept of open goverment. I believe that we need a freedom of information, under which members of the public have a right to access specifically requested record, and that these should be made available, as a right, within reasonable time. A freedom of information act will greatly improve the climate of trust in this country.[43]

Salah satu risiko yang dihadapi bank syariah adalah risiko pembiayaan, risiko pembiayaan adalah risiko timbulnya kerugian akibat kegagalan/ketidakmampuan nasabah dalam memenuhi kewajiban sesuai akad atau perjanjian yang telah ditetapkan antara bank syariah dan nasabah. Risiko pembiayaan umumnya bersumber dari karakter nasabah, kemampuan nasabah dan siklus bisnis. Risiko tersebut dapat berdampak lebih besar bagi bank syariah, sehingga risiko pembiayaan harus diidentifikasi, diukur, dipantau, dan dikendalikan. Manajemen risiko dalam bank syariah mempunyai karakter yang berbeda dengan bank konvesional, terutama karena adanya jenis-jenis risiko yang khas melekat yang hanya ada pada bank syariah. Perbedaan mendasar antara bank syariah dan bank konvensional bukan terletak pada bagaimana cara mengukur

[42] Trisadini Prasastinah Usanti, " Penanganan Risiko Hukum Pembiayaan di Bank Syariah", *Jurnal Yuridika* Volume 27 Nomor 1, Januari-April 2014, h.59

[43] Abu Bakar Munir and Siti Hajar Mohd Yasin, Information and Communication Technology Law State, Internet and Information, Thomson Reuters Malaysia, Selangor Darul Ehsan, Malaysia, 2017,p.33

(*how to measure*), melainkan pada apa yang dinilai (*what to measure*). Menurut **Adiwarman Karim** perbedaan itu terlihat dalam proses manajemen risiko operasional bank Islam yang meliputi identifikasi risiko, penilaian risiko, antisipasi risiko dan monitoring risiko.[44] Hal ini dikarenakan dari karakteristik dari kegiatan usaha perbankan syariah yang didasarkan pada berbagai macam prinsip dalam penghimpun dana, penyaluran dana dan pemberian jasa.

Salah satu upaya untuk meminimalkan risiko dengan cara melakukan analisa pembiayaan. Analisa pembiayaan merupakan upaya preventif yang harus dilakukan oleh bank secara profesional berdasarkan prosedur pemberian pembiayaan yang dimiliki oleh bank. Analisa pembiayaan dapat berperan sebagai saringan pertama dalam usaha bank menangkal risiko pembiayaan bermasalah. Tujuan utama kegiatan analisa pembiayaan adalah menilai keyakinan atas kemampuan dan kesanggupan calon nasabah penerima fasilitas pembiayaan untuk melunasi kewajibannya sesuai dengan yang diperjanjikan merupakan faktor penting yang harus diperhatikan oleh bank. Untuk memperoleh keyakinan tersebut, sebelum memberikan pembiayaan, bank harus melakukan penilaian yang seksama terhadap watak, kemampuan, modal, agunan, dan prospek usaha dari calon nasabah debitur atau dikenal dengan analisis 5 "C.[45]

Sutan Remy Sjahdeini mengemukakan bahwa analisa pembiayaan diperlukan agar bank syariah memperoleh keyakinan bahwa pembiayaan yang

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[44] Adiwarwaman Karim, *Bank Islam: Analisis Fiqih dan Keuangan*, RajaGrafindo Persada, Jakarta, 2007,h..256

[45] Trisadini Prasastinah Usanti, et.all, " Benda Yang Diperoleh Kemudian Hari Sebagai Objek Jaminan Fidusia Pada Kredit Bank", *Laporan Penelitian*, Dana RKAT Fakultas Hukum Universitas Airlangga, Surabaya, 2016, h.5

diberikan dapat dikembalikan oleh nasabah. Pada dasarnya ada 2 (dua) aspek yang dianalisa :

a. Analisa terhadap kemauan membayar disebut analisa kualitatif (*willingnes to repay*). Aspek yang dianalisa mencakup karakter dan komitmen nasabah.
b. Analisa terhadap kemampuan membayar disebut analisa kuantitatif (*ability to repay*). Pendekatan yang digunakan adalah menentukan kemampuan bayar dan perhitungan kebutuhan modal usaha nasabah adalah dengan pendekatan pendapatan bersih.[46]

Pembiayaan yang dilakukan bank syariah pada umumnya hanya diberikan kepada nasabah penerima fasilitas yang telah memiliki usaha berkembang, dalam artian pembiayaan tidak akan diberikan kepada usaha yang baru akan dirilis. Pembiayaan yang diberikan oleh bank syariah harus dituangkan dalam bentuk perjanjian tertulis. Hal ini sebagaimana ditegaskan dalam Pasal 8 ayat (2) Undang-undang Perbankan, yang dirumuskan sebagai berikut:

> "Bank Umum wajib memiliki dan menerapkan pedoman perkreditan dan pembiayaan berdasarkan Prinsip Syariah, sesuai dengan ketentuan yang ditetapkan oleh Bank Indonesia".

Penjelasannya, sebagaimana dirumuskan sebagai berikut:

> "Pokok-pokok ketentuan yang ditetapkan oleh Bank Indonesia memuat antara lain: a. Pemberian kredit atau pembiayaan berdasarkan prinsip syariah dibuat dalam bentuk perjanjian tertulis....".

[46] Sutan Remy Sjahdeini III, *Op.cit*,h.175

Mengacu pada penjelasan Pasal 8 ayat (2) Undang Undang Perbankan tersebut, maka dalam praktik perbankan syariah pemberian pembiayaan wajib dituangkan dalam perjanjian pembiayaan secara tertulis, karena terkait dengan fungsinya sebagai alat bukti bagi para pihak yang membuatnya.

Bank syariah dalam memberikan pembiayaan wajib menempuh cara-cara yang tidak merugikan bank dan kepentingan nasabahnya yang telah mempercayakan dananya. Selain itu juga adanya keharusan bagi setiap bank untuk terus menjaga kesehatannya dan memelihara amanah masyarakat padanya. Salah satu unsur yang penting dari prinsip 5 C adalah adanya *collateral*. Keberadaaan *collateral* sangat penting dalam pembiayaan karena dana yang dipergunakan oleh bank syariah dalam rangka penyaluran dana adalah nasabah penyimpan dan nasabah investor, sehingga keberadaan *collateral* adalah untuk menjamin pelunasan pembiayan jika terjadi pembiayaan bermasalah. [47]

Bank syariah dalam menjalankan usahanya harus sesuai dengan rambu-rambu kesehatan agar tetap eksis keberadaannya. Penerapan prinsip kehati-hatian oleh bank syariah tidak lain untuk menjamin keamanan dana masyarakat, yang akan berdampak pada kepercayaan masyarakat terhadap keberadaan bank syariah. Setiap pembiayaan yang akan disalurkan kepada nasabah oleh bank syariah tidak akan lepas dari tahapan-tahapan seperti halnya proses pemberian kredit oleh bank konvensional. Ada 4 (empat) tahapan, yaitu sebagai berikut:

[47] Trisadini, *Op.cit.*,h.252

1. Tahap sebelum pemberian pembiayaan diputuskan oleh bank syariah, yaitu tahap bank mempertimbangkan permohonan pembiayaan calon nasabah penerima fasilitas, tahapan ini disebut **tahap analisa pembiayaan.**
2. Tahap setelah pembiayaan diputuskan pemberiannya oleh bank syariah dan kemudian penuangan keputusan kedalam perjanjian pembiayaan serta dilaksanakannya pengikatan agunan untuk pembiayaan yang diberikan ini. Tahap ini disebut **tahap dokumentasi pembiayaan.**
3. Tahap setelah perjanjian pembiayaan ditandatangani oleh kedua belah pihak dan dokumentasi pengikatan agunan pembiayaan telah selesai dibuat serta selama pembiayaan itu digunakan oleh nasabah penerima fasilitas sampai jangka waktu pembiayaan belum berakhir. Tahap ini disebut **tahap pengawasan dan pengamanan pembiayaan.**
4. Tahap setelah pembiayaan menjadi bermasalah yaitu **tahapan penyelamatan dan penagihan pembiayaan.**

Tahap (1), (2) dan (3) adalah tahap-tahap preventif atau tahap-tahap pencegahan bagi bank syariah agar pembiayaan tidak jadi bermasalah, sedangkan tahap (4) represif setelah pembiayaan menjadi bermasalah.

Pada Pasal 23 jo. Pasal 36 Undang-Undang Perbankan Syariah sudah menegaskan bahwa pembiayaan berdasarkan Prinsip Syariah yang diberikan oleh bank mengandung risiko, sehingga dalam pelaksanaannya bank harus memperhatikan asas-asas pembiayaan berdasarkan Prinsip Syariah yang sehat. Untuk mengurangi risiko tersebut, jaminan pemberian pembiayaan berdasarkan

Prinsip Syariah dalam arti keyakinan atas kemampuan dan kesanggupan Nasabah Debitur untuk melunasi kewajibannya sesuai dengan yang diperjanjikan merupakan faktor penting yang harus diperhatikan oleh bank. Untuk memperoleh keyakinan tersebut, sebelum memberikan pembiayaan, bank harus melakukan penilaian yang seksama terhadap watak, kemampuan, modal, agunan, dan prospek usaha dari Nasabah penerima fasilitas. Mengingat bahwa agunan sebagai salah satu unsur pemberian pembiayaan, maka apabila berdasarkan unsur-unsur lain telah dapat diperoleh keyakinan atas kemampuan Nasabah mengembalikan utangnya, agunan dapat hanya berupa barang, proyek, atau hak tagih yang dibiayai dengan pembiayaan yang bersangkutan. Tanah yang kepemilikannya didasarkan pada hukum adat, yaitu tanah yang bukti kepemilikannya berupa girik, petuk, dan lain-lain yang sejenis dapat digunakan sebagai agunan. Bank tidak wajib meminta agunan berupa barang yang tidak berkaitan langsung dengan obyek yang dibiayai, yang lazim dikenal dengan agunan tambahan. Di samping itu, bank dalam memberikan pembiayaan berdasarkan Prinsip Syariah harus pula memperhatikan hasil Analisis Mengenai Dampak Lingkungan (AMDAL) bagi perusahaan yang berskala besar dan atau berisiko tinggi agar proyek yang dibiayai tetap menjaga kelestarian lingkungan.

Ditegaskan pada penjelasan Pasal 23 ayat (2) Undang-Undang Perbankan Syariah bahwa penilaian atas watak, kemampuan, permodalan, agunan dan prospek usaha calon nasabah penerima fasiltas pembiayaan adalah sebagai berikut:

1. Penilaian watak calon Nasabah Penerima Fasilitas terutama didasarkan kepada hubungan yang telah terjalin antara Bank Syariah dan/atau UUS dan Nasabah atau calon Nasabah yang bersangkutan atau informasi yang diperoleh dari pihak lain yang dapat dipercaya sehingga Bank Syariah dan/atau UUS dapat menyimpulkan bahwa calon Nasabah Penerima Fasilitas yang bersangkutan jujur, beriktikad baik, dan tidak menyulitkan Bank Syariah dan/atau UUS di kemudian hari.
2. Penilaian kemampuan calon Nasabah Penerima Fasilitas terutama Bank harus meneliti tentang keahlian Nasabah Penerima Fasilitas dalam bidang usahanya dan/atau kemampuan manajemen calon Nasabah sehingga Bank Syariah dan/atau UUS merasa yakin bahwa usaha yang akan dibiayai dikelola oleh orang yang tepat.
3. Penilaian terhadap modal yang dimiliki calon Nasabah Penerima Fasilitas, terutama Bank Syariah dan/atau UUS harus melakukan analisis terhadap posisi keuangan secara keseluruhan, baik untuk masa yang telah lalu maupun perkiraan untuk masa yang akan datang sehingga dapat diketahui kemampuan permodalan calon Nasabah Penerima Fasilitas dalam menunjang pembiayaan proyek atau usaha calon Nasabah yang bersangkutan.
4. Dalam melakukan penilaian terhadap Agunan, Bank Syariah dan/atau UUS harus menilai barang, proyek atau hak tagih yang dibiayai dengan fasilitas Pembiayaan yang bersangkutan dan barang lain, surat berharga atau garansi risiko yang ditambahkan sebagai Agunan tambahan, apakah sudah cukup memadai sehingga apabila Nasabah Penerima Fasilitas kelak tidak dapat

melunasi kewajibannya, Agunan tersebut dapat digunakan untuk menanggung pembayaran kembali Pembiayaan dari Bank Syariah dan/atau UUS yang bersangkutan.

5. Penilaian terhadap proyek usaha calon Nasabah Penerima Fasilitas, Bank Syariah terutama harus melakukan analisis mengenai keadaan pasar, baik di dalam maupun di luar negeri, baik untuk masa yang telah lalu maupun yang akan datang sehingga dapat diketahui prospek pemasaran dari hasil proyek atau usaha calon Nasabah yang akan dibiayai dengan fasilitas Pembiayaan.

Menurut **Muhammad Syafii Antonio** bahwa tujuan analisis pembiayaan tersebut, untuk menyakinkan bank bahwa pembiayaan yang dimohonkan itu adalah layak dan dapat dipercaya serta tidak fiktif. Suatu pembiayaan tidak akan disetujui sebelum dipastikan beberapa hal pokok, yaitu :[48]

1. Apakah objek pembiayaan halal atau haram?
2. Apakah proyek menimbulkan kemudharatan untuk masyarakat?
3. Apakah proyek berkaitan dengan perbuatan asusila?
4. Apakah proyek berkaitan dengan perjudian?
5. Apakah usaha itu berkaitan dengan industri senjata ilegal atau berorientasi pada pengembangan senjata pembunuh massal?
6. Apakah proyek dapat merugikan syiar Islam, baik secara langsung maupun tidak langsung?

[48] Muhamad Syafi'i Antonio I , *Op. Cit.*, h. 33

Sedangkan **Zainul Arifin**, menekankan bahwa perlunya bank syariah berhati-hati pada saat akan memberikan pembiayaan pada usaha nasabah, oleh karenanya bank syariah harus menghindari usaha yaitu :[49]

a. Usaha yang tidak sesuai dengan prinsip syariah
b. Usaha yang bersifat spekulatif (*maisir*) dan mengandung ketidak pastian yang tinggi (*gharar*)
c. Usaha yang tidak mempunyai informasi keuangan yang memadai
d. Bidang usaha yang memerlukan keahlian khusus sedang aparat bank tidak memiliki keahlian atau menguasai bidang usaha tersebut.
e. Pengusaha yang bermasalah.

2. Analisis Hak Atas Merek sebagai Objek Jaminan

Secara umum syarat-syarat ekonomi yang dipenuhi dari jaminan kredit sebagaimana dikemukan oleh **Teguh Pudjo Muljono**, yaitu: [50]

- mempunyai nilai ekonomis (dapat diperjual belikan) secara umum dan bebas.
- nilai tersebut harus lebih besar dari jumlah kredit yang diberikan.[51]
- Objek jaminan tersebut harus mudah dipasarkan tanpa harus mengeluarkan biaya pemasaran yang berarti.
- nilai objek jaminan harus konstan dan akan lebih baik kalau nilainya juga ada kemungkinan akan mengalami pertambahan dikemudian hari.
- kondisi dan lokasi objek jaminan tersebut cukup strategis.
- secara fisik objek jaminan tersebut tidak cepar rusak atau sebab-sebab lain yang akan mengurangi nilai ekonomisnya.

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[49] Zainul Arifin, *Op.Cit.*, h.10

[50] Teguh Pudjo Muljono, *Manajemen Perkreditan bagi Bank Komersil*, BPFE-Yogjakarta, 2001, h.300

[51] Kelaziman dalam praktik perbankan bahwa nilai jaminan jauh lebih besar dibandingkan dengan plafond kredit yang diberikan oleh bank, yaitu dengan perbandingan 1:1.25. Akan tetapi, dalam praktik perbankan pada kredit back to back loan, yaitu kredit yang dijamin dengan deposito maka nilai deposito dengan plafond kreditnya adalah sama

- objek jaminan tersebut mempunyai manfaat ekonomis dalam jangka waktu yang relatif lama dari jangka waktu kredit yang akan dijaminnya.

Syarat-syarat yuridis yang harus dipenuhi dari suatu objek jaminan adalah:

- diutamakan milik dari calon nasabah debitor, bilamana milik pihak ketiga maka harus dipastikan kepemilikan dan pengikatannya.
- berada dalam kekuasaan calon debitor.
- tidak dalam sengketa.
- memiliki bukti kepemilikan yang sah.
- objek jaminan tersebut bebas tidak sedang dalam ikatan jaminan pada pihak lain.
-

Jaminan pembiayaan yang mempunyai nilai yuridis yang sempurna akan lebih baik dibandingkan dengan jaminan yang nilai ekonomisnya tinggi tetapi tidak memenuhi syarat-syarat yuridis yang memadai. Oleh karena, jaminan seperti itu akan sulit membebaninya dengan lembaga jaminan dan akan sulit dalam eksekusinya. Tujuan dari jaminan yang bersifat kebendaan bermaksud memberikan hak *verhaal* (hak untuk meminta pemenuhan piutangnya) kepada kreditor, terhadap hasil penjualan benda-benda tertentu dari debitor untuk pemenuhan piutangnya.[52]

Sesungguhnya keberadaan jaminan merupakan prasyarat untuk memperkecil risiko kreditur dalam penyaluran pembiayaan. Sebagai langkah antisipatif dalam menarik kembali pembiayaan yang telah diberikan kepada nasabah penerima fasilitas pembiayaan, jaminan hendaknya dipertimbangkan dua faktor, yaitu :

1. *Secured*, artinya jaminan dapat diadakan pengikatan secara yuridis formal, sesuai dengan ketentuan hukum dan perundang-undangan. Jika

[52] Sri Soedewi Masjchoen Sofwan, *Hukum Jaminan di Indonesia Pokok-Pokok Hukum Jaminan dan Jaminan Perorangan*, Liberty, Jogjakarta, 2001,h.38.

kemudian hari terjadi wanprestasi dari debitur, maka bank memiliki kekuatan yuridis untuk melakukan tindakan eksekusi.

2. *Marketable*, artinya jaminan tersebut bila hendak dieksekusi, dapat segera dijual atau diuangkan untuk melunasi seluruh kewajiban debitur.[53]

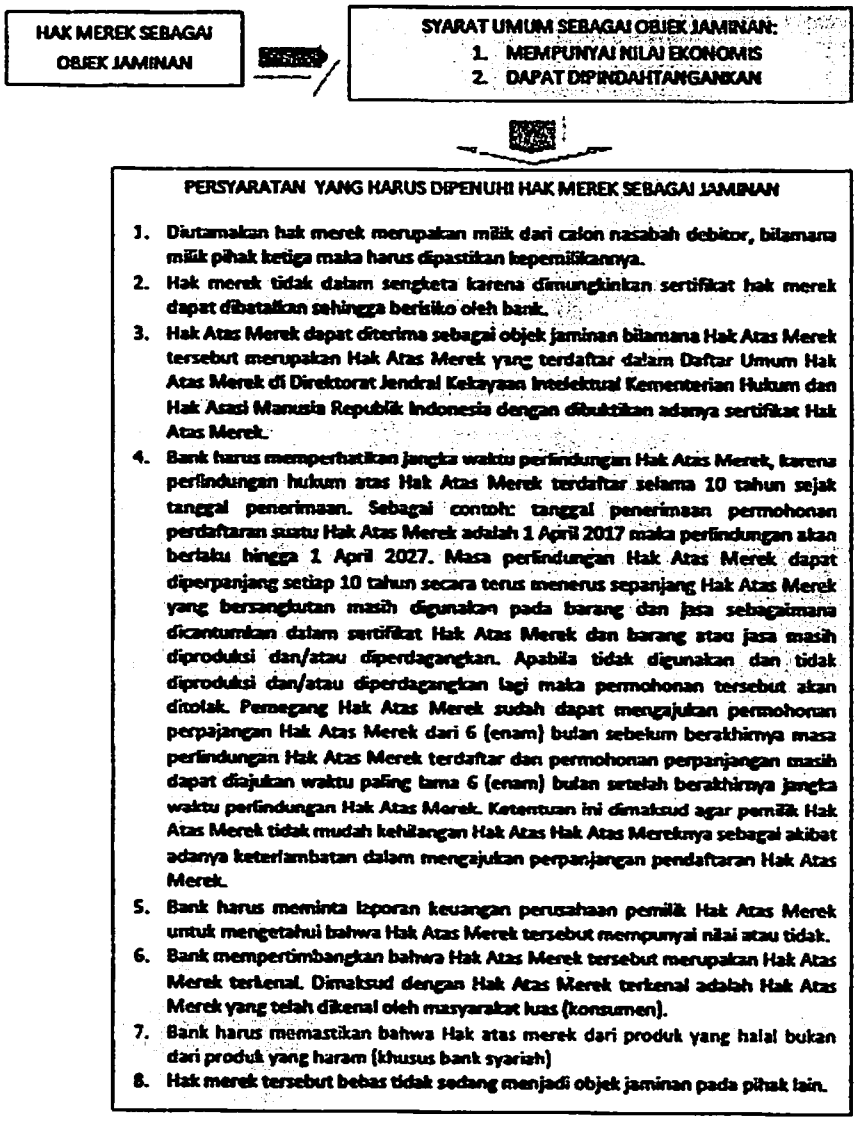
Di samping itu, agunan dalam pembiayaan bank harus memenuhi persyaratan tertentu, dalam kaitannya dengan penilaian atau analisa pembiayaan terhadap agunan terdapat beberapa konsep atau persyaratan untuk menentukan layak tidaknya suatu agunan. Di dunia perbankan dewasa ini dikenal dengan konsep "MAST" untuk menilai kondisi agunan, yaitu :

1. *Marketability*, artinya bahwa agunan/jaminan itu mudah untuk dipasarkan.
2. *Ascertainability of value*, artinya bahwa ada standar harga tertentu (nilai) untuk agunan tersebut.
3. *Stability of value*, artinya bahwa agunan/jaminan itu mempunyai stabilitas nilai dimasa mendatang.
4. *Transferability*, artinya bahwa jaminan itu mudah untuk dipindahtangankan.

Berdasarkan uraian di atas maka dapat digambarkan model analisis yang dilakukan oleh bank syariah atau bank konvensional atas objek jaminan berupa hak atas merek:

[53] Johannes Ibrahim, *Cross Default & Cross Collateral Sebagai Upaya Penyelesaian Kredit Bermasalah*, Refika Aditama, Bandung, 2004, h. 71.

MODEL ANALISIS HAK ATAS MEREK SEBAGAI OBJEK JAMINAN KREDIT / PEMBIAYAAN OLEH BANK



B. Perjanjian Jaminan yang Membebani Hak atas Merek sebagai Objek Jaminan pada Bank Syariah

Pada penelitian yang dilakukan di Bank Muamalat Indonesia (BMI), menerima Sertifikat Hak Atas Merek sebuah Restoran yang dikeluarkan oleh Direktorat Jendral Hak Kekayaan Intelektual Kementerian Hukum dan Hak Asasi Manusia Republik Indonesia sebagai objek jaminan gadai atas pembiayaan dengan akad *Murabahah*[54] dan akad *Musyarakah*[55] yang diperoleh nasabah. Sebelum diterima sebagai objek jaminan maka BMI melakukan penilaian atas objek jaminan tersebut, bahwa Hak Atas Merek restoran harus sudah terdaftar yang dibuktikan dengan diterbitkannya Sertifikat Hak Atas Merek dan diumumkan di dalam Berita Resmi baik secara eletronik maupun non elektronik. Sertifikat Hak Atas Merek tersebut memuat:

a. nama dan alamat lengkap pemilik Hak Atas Merek yang didaftar;
b. nama dan alamat lengkap Kuasa, dalam hal Permohonan melalui Kuasa;
c. tanggal Penerimaan;
d. nama negara dan Tanggal Penerimaan permohonan yang pertama kali dalam hal Permohonan diajukan dengan menggunakan Hak Prioritas;

[54] "Akad *murabahah*" adalah Akad Pembiayaan suatu barang dengan menegaskan harga belinya kepada pembeli dan pembeli membayarnya dengan harga yang lebih sebagai keuntungan yang disepakati.

[55] "Akad *musyarakah*" adalah Akad kerja sama di antara dua pihak atau lebih untuk suatu usaha tertentu yang masing-masing pihak memberikan porsi dana dengan ketentuan bahwa keuntungan akan dibagi sesuai dengan kesepakatan, sedangkan kerugian ditanggung sesuai dengan porsi dana masing-masing.

c. label Hak Atas Merek yang didaftarkan, termasuk keterangan mengenai macam warna jika Hak Atas Merek tersebut menggunakan unsur warna, dan jika Hak Atas Merek menggunakan bahasa asing, huruf selain huruf Latin, dan/atau angka yang tidak lazim digunakan dalam bahasa Indonesia disertai terjemahannya dalam bahasa Indonesia, huruf Latin dan angka yang lazim digunakan dalam bahasa Indonesia serta cara pengucapannya dalam ejaan Latin;
f. nomor dan tanggal pendaftaran;
g. kelas dan jenis barang dan/atau jasa yang Hak Atas Mereknya didaftar; dan
h. jangka waktu berlakunya pendaftaran Hak Atas Merek.

Menurut **Agung Sujatmiko**[56] bahwa Hak Atas Merek merupakan hak khusus yang diberikan negara kepada pemilik Hak Atas Merek untuk menggunakan atau memberikan persetujuan pada orang lain untuk menggunakannya. Dengan demikian, Hak Atas Merek tersebut tidak hadir begitu saja secara otomatis pada seseorang. Seseorang yang ingin mendapatkan Hak Atas Mereknya dari negara harus mengajukan permohonan pendaftaran pada negara. Maka sifat pendaftaran tersebut adalah wajib, tanpa adanya pendaftaran atas Hak Atas Merek tidak akan timbul sehingga tidak mendapatkan perlindungan dari negara. Demikian halnya dikemukan oleh **Amirul Mohammad Nur**[57] bahwa

[56] Agung Sujatmiko, " Prinsip Hukum Kontrak Dalam Lisensi Hak Atas Merek", *Jurnal Mimbar Hukum*, Volume 20 Nomor 20 Juni 2008,h.251.

[57] Amirul Mohammad Nur, " Import Pararel Dalam Hukum Hak Atas Merek Indonesia", *Jurnal Yuridika*, Volume 30, Nomor 2 Mei-Agustus 2015,h.229.

pada dasarnya untuk mendapatkan perlindungan atas suatu Hak Atas Merek di Indonesia, mutlak harus melalui pendaftaran. Ditegaskan pula oleh **Rika Ratna Permata**[58] bahwa Indonesia menganut sistem pendaftaran Hak Atas Merek dengan sistem konstitutif, pendaftaran merupakan suatu keharusan agar dapat memperoleh hak Hak Atas Merek, tanpa pendaftaran negara tidak akan memberikan Hak Atas Merek kepada pemiliknya. Hal ini berarti tanpa mendaftarkan Hak Atas Merek seseorang tidak akan diberikan perlindungan.

Di samping Hak Atas Merek tersebut sudah terdaftar, BMI juga harus memperhatikan jangka waktu perlindungan Hak Atas Merek, karena perlindungan hukum atas Hak Atas Merek terdaftar selama 10 tahun sejak tanggal penerimaan. Sebagai contoh: tanggal penerimaan permohonan perdaftaran suatu Hak Atas Merek adalah 1 April 2017 maka perlindungan akan berlaku hingga 1 April 2027. Masa perlindungan Hak Atas Merek dapat diperpanjang setiap 10 tahun secara terus menerus sepanjang Hak Atas Merek yang bersangkutan masih digunakan pada barang dan jasa sebagaimana dicantumkan dalam sertifikat Hak Atas Merek dan barang atau jasa masih diproduksi dan/atau diperdagangkan. Apabila tidak digunakan dan tidak diproduksi dan/atau diperdagangkan lagi maka permohonan tersebut akan ditolak. Pemegang Hak Atas Merek sudah dapat mengajukan permohonan perpajangan Hak Atas Merek dari 6 (enam) bulan sebelum berakhirnya masa perlindungan Hak Atas Merek terdaftar dan permohonan perpanjangan masih dapat diajukan waktu paling lama 6 (enam) bulan setelah berakhirnya jangka waktu perlindungan Hak Atas Merek. Ketentuan ini dimaksud

[58] Rika Ratna Permata dan Muthia Khairunnisa,. " Perlindungan Hukum Hak Atas Merek Tidak Terdaftar di Indonesia", *Jurnal Opinio Juris*, Volume 19, Januari-April 2016,h.84.

semua harta kekayaan dari debitor dan hak yang dimiliki oleh kreditor konkuren adalah hak yang sifatnya relatif, yaitu hak yang hanya dapat ditegakkan pada lawan kontraknya saja. Hal ini berbeda jika berkedudukan sebagai kreditor preferen, hak yang dilahirkan adalah hak kebendaan. Hak kebendaan yang sifatnya mutlak dan mempunyai ciri-ciri unggulan sebagai pemegang hak kebendaan. Oleh karena itu, BMI seksama dan cermat pada saat menganalisis objek jaminan berupa Sertifikat Hak Atas Merek.

Sertifikat Hak Atas Merek restoran oleh BMI dibebani lembaga jaminan gadai bukan jaminan fidusia sebagaimana pada BNI. Pembebanan Sertifikat Hak Atas Merek oleh BMI dengan perjanjian gadai yang dibuat dengan akta otentik. Jika mengacu pada Pasal 1151 BW memang tidak disyaratkan harus otentik: "Bahwa Perjanjian gadai harus dibuktikan dengan alat yang diperkenankan untuk membuktikan perjanjian pokoknya". Hal ini berbeda dengan jaminan fidusia bahwa prosedur yang harus diikuti agar jaminan fidusianya lahir maka perjanjian jaminan fidusia harus dibuat dengan akta notaris dalam bahasa Indonesia dan merupakan akta jaminan fidusia sebagaimana diatur pada Pasal 5 UUJF jo. Pasal 2 dan Pasal 3 Peraturan Pemerintah Nomor 21 Tahun 2015 tentang Tata Cara Pendaftaran Jaminan Fidusia dan Biaya Pembuatan Akta Jaminan Fidusia, apabila tidak dibuat dalam akta notaris maka tidak dapat dilakukan pendaftaran jaminan fidusia secara eletronik oleh penerima fidusia, kuasa atau wakilnya akibatnya jaminan fidusia tidak akan lahir, bilamana jaminan fidusia tidak lahir maka kreditor hanya sebagai kreditor konkuren.

agar pemilik Hak Atas Merek tidak mudah kehilangan Hak Atas Hak Atas Mereknya sebagai akibat adanya keterlambatan dalam mengajukan perpanjangan pendaftaran Hak Atas Merek.

Sertifikat Hak Atas Merek oleh BMI sebagai jaminan tambahan bukan sebagai jaminan pokok. Jaminan pokok tetap merupakan benda yang yang relatif mudah dalam penilaiannya dan mudah untuk dieksekusi misalnya hak atas tanah, kendaraan bermotor, mesin produksi dan surat berharga. Sertifikat Hak Atas Merek meskipun hanya sebagai tambahan tidak berarti BMI menghilangkan prinsip kehati-hatian yang harus dilakukan. BMI memperhatikan tanggal penerimaan Hak Atas Merek dengan jangka waktu pembiayaan yang akan diberikan kepada nasabah penerima fasilitas pembiayaan. Apabila hal tersebut diabaikan maka akan berisiko bagi kedudukan BMI. Bilamana jangka waktu pembiayaan belum jatuh tempo sedangkan jangka waktu perlindungannya telah berakhir dan tidak dilakukan perpanjangan oleh pemiliknya bahkan terlewat waktunya maka Hak Atas Mereknya menjadi berakhir. Hal ini merupakan konsekuensi dari keberadaan jaminan tambahan (accessoir), bilamana Hak Atas Mereknya berakhir maka perjanjian gadainya hapus akan tetapi perjanjian pokoknya tidak ikut berakhir. Apabila hal ini terjadi akan berisiko bagi kedudukan bagi BMI yang semula sebagai kreditor preferen berubah menjadi kreditor konkuren.

Kedudukan BMI sebagai kreditor konkuren sangat tidak menguntungkan. Hal ini dikarenakan kreditor konkuren hanya dijamin dengan jaminan umum sebagaimana yang diatur pada Pasal 1131 BW, yaitu jaminan yang meletak pada

Beberapa klausula penting yang tercantum dalam perjanjian gadai adalah sebagai berikut:

a. Berkaitan dengan penggunaan Hak Atas Merek oleh pemberi gadai, bahwa selama cidera janji tidak terjadi dan tidak berlanjut pemberi gadai berhak menggunakan seluruh hak sehubungan dengan Hak Atas Merek dalam hubungannya dengan pihak ketiga dan memberikan hak kepada pihak ketiga untuk menggunakan Hak Atas Merek sebagaimana terdapat dalam sertifikat Hak Atas Merek.

   Sertifikat Hak Atas Merek diserahkan oleh pemiliknya kepada BMI untuk disimpan secara aman oleh BMI. Penyerahan ini bukan dalam arti mengalihkan kepemilikan. Selama periode jaminan sampai terjadinya cidera janji, Hak Atas Hak Atas Merek tetap melekat pada pemberi gadai (pemilik Hak Atas Merek). Hal ini merupakan perwujudan dari Pasal 1152 (1) BW bahwa benda gadai diserahkan kepada kekuasaan kreditor atau pihak ketiga. Akan tetapi, pemilik Hak Atas Merek tetap dapat menggunakan Hak Atas Mereknya selama cidera janji tidak terjadi. Benda gadai dalam arti Sertifikat Hak Atas Merek sebagai bukti kepemilikan atas Hak Atas Merek tersebut.

b. Berkaitan dengan keuntungan dan pembagian lain. Selama tidak cidera janji pemberi gadai berhak menerima dan mempertahankan setiap dan seluruh keuntungan dan pembagian lain yang dibayar sehubungan dengan Hak Atas Merek. Setelah cidera janji maka seluruh hak dari pemberi gadai untuk memberikan hak pemakaian nama kepada pihak ketiga dan pembagian lain tidak ada lagi dan setelah itu seluruh hak tersebut diberikan kepada penerima

gadai. Penerima gadai memiliki hak tunggal untuk menerima dan mempertahankan Hak Atas Merek tersebut dan pembagian keuntungannya.

c. Berkaitan dengan larangan yang harus dipatuhi oleh pemberi gadai. Bahwa pemberi gadai tidak diperbolehkan mengalihkan atau membebani hak Hak Atas Merek dalam bentuk apapun. Pemberi gadai dilarang untuk memanfaatkan Hak Atas Merek dengan yang bertentangan dengan kepentingan penerima gadai.

Klausula ini wajib diperjanjikan sebagai bentuk perlindungan bagi BMI sebagai penerima gadai, meskipun pemilik Hak Atas Merek (pemberi gadai) masih diperbolehkan untuk mempergunakan Hak Atas Mereknya bahkan menerima segala keuntungan yang berkaitan dengan hak Hak Atas Merek, akan tetapi tidak diperbolehkan pemilik Hak Atas Merek (pemberi gadai) melakukan perbuatan hukum yang akan merugikan pihak penerima gadai.

Klausula larangan ini lazim dalam akta jaminan fidusia, akta pemberian hak tanggungan maupun akta jaminan hipotek, yaitu terdapat janji-janji yang harus dipatuhi oleh pemilik jaminan agar tidak melakukan perbuatan hukum tanpa adanya persetujuan tertulis dari kreditor sebagai pemegang jaminan. Pada Persetujuan prinsip pembiayaan atas nama nasabah penerima fasilitas pembiayaan yang diberikan oleh BMI disebutkan bahwa: Selama masa pembiayaan tanpa persetujuan tertulis dari BMI, nasabah (pemilik jaminan) dilarang menjaminkan kembali atas aset yang telah dijaminkan berdasakan akad pembiayaan.

d. Klausula berkaitan penyelesaian sengketa. Apabila terjadi cidera janji penerima gadai dapat mengambil segala tindakan atas keputusannya sendiri dianggap diperlukan untuk melindungi setiap haknya berdasarkan perjanjian ini, termasuk tidak terbatas kepada menjual, mengalihkan, memindahkan atau dengan cara lain menyerahkan setiap bagian dari sertifikat Hak Atas Merek melalui penjualan langsung, penjualan lelang atau melalui cara lain yang diperbolehkan oleh ketentuan yang berlaku.

Pada jaminan gadai oleh undang-undang telah disediakan parate eksekusi bilamana debitor melakukan wanprestasi sebagaimana diatur pada Pasal 1155 BW. Bila oleh pihak-pihak yang berjanji tidak disepakati lain, maka jika debitur atau pemberi gadai tidak memenuhi kewajibannya, setelah lampaunya jangka waktu yang ditentukan, atau setelah dilakukan peringatan untuk pemenuhan perjanjian dalam hal tidak ada ketentuan tentang jangka waktu yang pasti, kreditur berhak untuk menjual barang gadainya dihadapan umum menurut kebiasaan-kebiasaan setempat dan dengan persyaratan yang lazim berlaku, dengan tujuan agar jumlah utang itu dengan bunga dan biaya dapat dilunasi dengan hasil penjualan itu. Bila gadai itu terdiri dan barang dagangan atau dan efek-efek yang dapat diperdagangkan dalam bursa, maka penjualannya dapat dilakukan di tempat itu juga, asalkan dengan perantaraan dua orang makelar yang ahli dalam bidang itu. Bahwa Pasal 1155 BW merupakan ketentuan yang bersifat mengatur. Oleh karena itu, para pihak bebas menetapkan lain dalam hal ini jika para pihak tidak menyimpangi Pasal 1155 BW maka ketentuan Pasal 1155 BW menjadi berlaku. Parate eksekusi dalan gadai lahir karena undang-undang tidak perlu diperjanjikan.

Tidak diperlukan adanya titel eksekutorial, kreditor dapat melaksanakan penjualan benda gadai tanpa meminta bantuan pengadilan, tidak perlu bantuan dari juru sita. Para pihak dapat memperjanjikan eksekusi diluar Pasal 1155 BW dengan parate eksekusi dengan cara pemilik hak merek atau bank mencari colon pembeli yang bersedia membeli hak merek tersebut, bilamana sudah ditemukan calon pembeli maka dilakukan jual beli merek dihadapan notaris. Hal ini lazim dilakukan oleh pemilik hak merek dengan pembeli hak merek.[59]

Eksekusi gadai sederhana bahwa setelah dilakukan eksekusi atas Hak Atas Merek dan hasil penjualan digunakan untuk pelunasan utang dari debitor maka langkah selanjutnya adalah melakukan permohonan pengalihan hak ke Dirjen HKI dengan mengajukan Surat Permohonan pengalihan Hak Atas Merek diketik dalam 2 (dua) rangkap oleh pemohon atau kuasa terdaftar sebagai Konsultan HKI di Direktorat Jenderal dalam bahasa Indonesia di tujukan ke Direktur Hak Atas Merek, Ditjen HKI, Kementerian Hukum dan HAM RI. Pada gadai tidak perlu adanya langkah penghapusan gadai pada register umum karena pada gadai tidak ada ketentuan tentang pendafataran sehingga perjanjian gadainya otomatis hapus bilamana perjanjian pokoknya hapus atau dengan hapusnya perjanjian pokoknya maka perjanjian gadainya ikut hapus sesuai dengan sifat accessoir dari perjanjian gadai. Berdasarkan uraian di atas maka syarat minimal yang harus ada pada perjanjian gadai adalah sebagai berikut:

[59] Hasil wawancara Notaris Zaenah,S.H.MKn di Sidoarjo pada tanggal 24 September 2018

PERSYARATAN MINIMAL YANG TERDAPAT DALAM PERJANJIAN CADAI ATAS OBJEK HAK MEREK

Beberapa klausula penting yang harus tercantum dalam perjanjian gadai adalah sebagai berikut:
a. Berkaitan dengan penggunaan Hak Atas Merek oleh pemberi gadai, bahwa selama cidera janji tidak terjadi dan tidak berlanjut pemberi gadai berhak menggunakan seluruh hak sebubungan dengan Hak Atas Merek dalam hubungannya dengan pihak ketiga dan mencbcrikan hak kepada pihak ketiga untuk menggunakan Hak Atas Merek sebagaimana tertapat dalam sertifikat Hak Atas Merek.
b. Berkaitan dengan kemunguan dan pembagian lain. Selama tidak cidera janji pemberi gadai berhak menerima dan mempertahankan setap dan seluruh keuntungan dan pembagian lain yang dibayar sehubungan dengan Hak Atas Merek. Setelah cidera janji maka seluruh hak dari pemberi gadai untuk memberikan hak pemakaian nama kepada pihak ketiga dan pembagian lain tidak ada lagi dan setelah ini seluruh hak tersebut dicerikan kepada pemerima gadai. Penerima gadai memiliti hak tunggal untuk menerima dan mempertahankan Hak Atas Merek tersebut dan pembagian keuntungannya.
c. Berkaitan dengan larangan yang harus dipenuhi oleh pemberi gadai. Bahwa pemberi gadai tidak diperbolehkan mengalihkan atau memberoni hak Hak Atas Merek dalam bentuk apapun. Pemberi gadai dilarang untuk memanfaatkan Hak Atas Merek dengan yang bertentangan dengan kepentingan penerima gadai.
d. Klausula berkaitan penyelesaian sengketa. Apabila terjadi cedera janji pemerima gadai sejauh diijinkan oleh hukum yang berlaku dapat mengambil segala tindakan yang atas kepentingan sendiri diangap diperlukan untuk melindungi sehingga haknya berdasarkan perjanjian ini, termasuk namun tidak terbatas kepada menjual, mengalihkan, memindahkan atau dengan cara lain memerahkan sehap bagian dari sertifikat merek melalui penjualan langsung, penjualan lelang atau melalui cara lain yang diperbolehkan oleh ketentuan yang berlaku.

BAB VI

KESIMPULAN DAN SARAN

A. Kesimpulan

1. Bank syariah wajib menerapkan prinsip kehati-hatian dalam menyalurkan dananya dalam bentuk pembiayaan, salah satunya dengan menganalisis 5 C. Berkaitan dengan agunan (collateral) berupa sertifikat hak merek maka bank syariah harus melakukan secara profesional berdasarkan prosedur pemberian pembiayaan yang dimiliki oleh bank syariah. Bank syariah harus melakukan analisis atas merek yang mendalam dan seksama, yaitu dengan cara melakukan penilaian atas merek yang dilakukan oleh penilai jaminan yang wajib memiliki kompetensi, memiliki etika dan berperilaku profesional. Di samping itu, merek yang diterima sebagai objek jaminan adalah merek yang terdaftar dan masih dalam masa perlindungan 10 tahun. Mengingat urgensi dari adanya jaminan adalah bilamana nasabah fasilitas pembiayaan ingkar janji maka merek tersebut dalam dilakukan eksekusi.
2. Perjanjian gadai dibuat dengan akta otentik meskipun dalam ketentuan BW tidak mewajibkan dalam bentuk akta otentik. Klausula pada perjanjian gadai memberikan kedudukan yang seimbang antara bank syariah dan pemilik hak atas merek. Di samping itu, dengan dibebani lembaga jaminan gadai maka kedudukan bank syariah sebagai kreditor preferen.

B. Saran

1. Seharusnya BI dan OJK segera mengeluarkan peraturan yang menyatakan bahwa HKI khususnya hak atas merek dapat dijadikan objek jaminan kredit perbankan baik pada perbankan konnvensional maupun perbankan syariah.
2. Dalam rangka meningkatkan usaha pengusaha kecil dan menengah maka perbankan harusnya berperan serta dengan menerima hak atas merek dari pengusaha kecil dan menengah sebagai objek jaminan mengingat kendala utama para pengusaha kecil dan menengah tidak memiliki fix asset yang dapat dijadikan objek jaminan.

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4. Sertifikat sebagai presenter pada the 3rd International Conference on Islamic Law in Indonesia (ICILI), Fakultas Hukum Universitas Mulawarman, Samarinda tanggal 4-6 September 2018.
5. Article ICILI dengan judul: **THE PRUDENTIAL PRINCIPLE OF TRADEMARK AS THE OBJECT OF SECURED TRANSACTION IN FINANCING**
6. Sertifikat sebagai presenter pada International Law Conference 2018 (i-NLAC2018), on Faculty of Law Universiti Teknologi MARA. Beserta Article i-NLAC2018 dengan judul: **THE ADVANTAGES OF PLEDGE ON TRADEMARK CERTIFICATION OF BANK CREDIT IN INDONESIA**
7. Acceptance Letter paper dengan judul: **Legal Risks On The Financing Of The Security Object In The Form Of Certificate Of Trademark Rights In Sharia Banks**. Di plublish pada The *National Academy of Managerial Staff of Culture and Arts Herald (ISSN: 2226-3209) (Web of Science Core Collection Journal).*
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Dear Mr/Ms Trisadini Prasastinah Usanti, Fiska Silvia Raden Roro

Greetings from the Conference Secretariat for the 2nd International Conference On Law, Governance And Globalization (ICLGG) 2018. On behalf of Organizing Committee of the 2nd ICLGG 2018, we are delighted to inform you that your proposed abstract on "THE CHARACTERISTICS OF IMPOSITION OF PLEDGE ON THE TRADEMARK RIGHTS IN MUSHARAKAH FINANCING" has been accepted for oral presentation at the forthcoming 2nd ICLGG 2018. Herewith, we would like to invite you to attend this conference hosted by Universitas Airlangga Faculty of Law, Indonesia to be held on 28th-29th August 2018 in Surabaya, Indonesia.

Please note that your registration will not be processed without receipt of full payment as provided. Deadline for registration and payment to the conference is 17th July 2018 – 20th August 2018.

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THE CHARACTERISTICS OF PLEDGE IMPOSITION ON THE TRADEMARK RIGHTS IN MUSYARAKAH FINANCING

(Case study at Bank Muamalat Indonesia)

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Abstract. *This article described the characteristics of pledge on the trademarkright imposed on financing in Islamic banks. Based on the research, practically, it was very rare that an Islamic bank that accepted the rights of trademark as an object of collateral or pledge with some reasons. One of the Islamic banks which received the rights of trademark as pledge or collateral for musharakah (partnership) financing was Bank Muamalat Indonesia (BMI). It imposed a pledge on a right of trademark and was different from State Bank of Indonesia (BNI). It preferred imposition fiduciary guarantee or fiduciary transfer of ownership in their financing. Pledge was favorable and had more advantages in its characteristics for banks and debtors as compared to fiduciary guarantee. Pledge had simple mechanism and its perform execution. In addition, pledge was more efficient especially in terms of cost. Furthermore, in mechanism of the pledge, there was no registration and was not necessarily in the form of authentic deeds while in fiduciary guarantee mechanism, there was obligation to register electronically (by online).Thus, it was necessary in the form of authentic deeds. On pledge, there was no obligation to rescission of pledge, but in fiduciary guarantee, there is rescission fiduciary guarantee mechanism.*

Keywords: Trademark Certification, Pledge, Musharakah, Islamic Bank

Introduction

The trademark right for intangible goods could be a bank credit guarantee because it fulfilled the object prerequisite. On sharia banking practice, Bank of Muamalat Indonesia accepted trademark right as guarantee for *musyarakah* financing. Thus, the guarantee institution burdened is pledge guarantee institution, not fiduciary guarantee institution as done by BNI Bank.[1]

[1] Sri Mulyani, "Realitas Pengakuan Hukum Terhadap Hak atas Merek Sebagai Jaminan Fidusia Pada Praktik Perbankan", in *Jurnal Hukum dan Dinamika Masyarakat*, (11) (2) (2014),p.139

Basically, trademark right enhance to burden pledge or fiduciary institution. This was due to 1150 Legislations BW:

> Pledge is a creditor right after moved goods, which submit to them, or authority, as debtor guarantee, and gives creditor an authority to take their redeem and precedes other creditors; sales costs as the exception and decision implementation based on demand about ownership or authority, and Insurance expense selling, which is issued after that goods as mortgage, also must be preceded.

Fiduciary guarantee has been explained in Clause 1, No.2 of the Law No. 42/1999, as followed:

> Fiduciary guarantee was a guarantee right based on intangible or tangible moved goods and unmoved goods, particularly the unburdened land mortgage as meant no.4 1996 Legislations about land mortgage that was still on fiduciary giver authority, as collateral to particular redeem, which gives position to main fiduciary receiver to other creditors.

Although those two guarantee institutions were burdened by trademark right, but they have the different characteristics.

Trademarks, which is part of Intellectual Property Rights (IPR), are classified as intangible movable object. The trademark qualifies as something that can be used as bank credit collateral . The function of assurance is a means of protection for the bank security, namely certainty of debtors debt settlement.[2] According to Roza Iosifovna Sitdikova, Guzel Bulatovna Iumadilova that[3] :

> In the economic aspect, intellectual property items represent the possibility of extracting profits and income from sales and from transfer for temporary use. Economic relations with respect to intellectual property arise in the process of commercial use of intellectual property items and are aimed at achieving economic interests of entities. The main subjects of intellectual property in the process of transnationalization of science and patent cooperation are scientists and inventors

[2] Trisadini Prasastinah Usanti, Agung Sujatmiko, "Execution of Trademark as Collateral Object of Credit Bank", GSTF Journal of Law and Social Sciences, (6) (1) (2017), p.1 from http://dl6.globalstf.org/index.php/jlss/article/view/1227, accessed 09.09.2018

[3] Roza Iosifovna Sitdikova, Guzel Bulatovna Iumadilova, "The Creation Possession and Disposal of Intellectual Property in Russian Federation", *Astra Salvensis, Supplement*, No. 2/2017, p.648

which are residents of different countries working to create the knowledge necessary for the development of the world as a whole. Proceeding from this, it can be stated that the institution of intellectual property reflects the legal aspect of the intellectual property concept, whereas the totality of economic relations of appropriation reveals the economic content of intellectual property.

The Characteristic of *Musharakah* Financing

Sharia bank on clients financing distribution is divided into four financing categories, those are:

1. Financing by profit sharing principle (*Mudharabah* and *Musyarakah*)
2. Financing by merchant principle (*Murabahah, salam* and *Istisha*)
3. Financing by rent principle (*Ijarah* and *IjarahMuntahiyaBittamlik*)
4. Financing by loan (*Qardh*)

Musyarakah of partnership contract is a corporation contract between two parties or more, particularly about business. Each party gives fund portions with provisions containing that profit will be divided based on the agreement while the loss will be burdened as each fund portion. Another term from *syarikah*is *musyarakah*. It is an alliance between two persons or more by dividing profit and loss based on the agreement. Therefore, the *musyarakah* financing given by sharia bank is through financing company capital partially. Sharia bank also allowedbeing involved in Management Company. It needs the agreement existence certainty although the capital management sharia banking is given to the customer.

Musyarakah financing, in terms of financing, can do profit sharing based on modal portion or agreement. Thus, it is based on the profit sharing ratio agreed by parties. Meanwhile, in regards to the loss sharing must be burdened based on each modal portion mixed parties. This decreed is different because of the contrast profit and lost absorption ability. As big the profit was, it can be absorbed by any parties. Meanwhile,

not all parties may have the same lost absorption. Hence, if the lost is happened, then the amount burdened is in accordance to the amount invested modal in the business. [4]

Sharia will get profit sharing allowance from *musyarakah* financing in *syirkah-al inan* form. Sharia banking application, in regards to *musyarakah* financing, is usually undertaken to customer project financing. After it has been finished, as the confirmation agreed, customers must refund along with profit sharing bank.[5]*Musyarakah* financing is also distributed by BMI to restaurant business in which the guarantee object is restaurant's brand.

Pledge Burden for Trademark Rights

Burgerlijk Wetboek (BW), in rule No 499, stated that goods legislations concept is each good and right authorized by trademark. Trademark is divided into moved tangible or intangible good. According to Arthur S. Hartkamp, trademark was reasoning product right.[6]

> "It was originally intended to devote the last book of the Code (Book 9) to the third category of subjective patrimonial rights: "the rights on the products of the mind". The statutes containing these rights (at that time: patents, trade mark, copyright, trade name) were to be split up. The provisions of a civil character would be included in Book 9, those of an administrative, procedural and penal character were to be placed elsewhere."

Besides fulfilling the guarantee object requirements, trademark right also has economized value and transferable, and fulfilled other requirements:[7]

a. Company finance report of trademark right owners have to know whether their trademark has value or not.

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[4]Adiwarman Karim, *Bank Islam, AnalisisFiqh dan Keuangan*, Raja GrafindoPersada,2004, p.76-77

[5]Trisadini Prasastinah Usanti, *PengantarPerbankanSyariah*, Revka Petra Media, 2016,p.80

[6] Arthur S, Hartkamp, "Civil Code Revision in the Netherlands: A Survey of Its System and Contents and its Influence on Dutch Legal Practice", in *Louisiana Law Review*. (35)(5) (1975),p.1072.

[7] Trisadini Prasastinah Usanti, "Analisis Pembebanan Gadai atas Sertifikat Merek pada Bank Syariah", in *Jurnal Mimbar Hukum*, (29) (3) (2017),p.419

b. That trademark right was famous trademark meaning that well-known trademark in society or consumer. According to HaedahFaradz[8], to make a well-known trade enabling to be a quality guarantee or reputation a particular product is not easy and take much time. Coca-Cola needed a hundred years to make the trade worldly famous.

c. Trademark right can be used as an object guarantee if it is listed in public trademark rights in Directorate General of State Assets Management, Ministry of Justice and Human Rights of Indonesia to be given trademark certificate. Hence, trademark can beten years law protection since the protection acceptance and extended terms.

To assess the benefits of a company according to Abdul Hakim, et al are assessed from the performance in managing the wealth. This is described below:[9]

> Profitability is a performance indicator in managing the wealth of the company's management indicated by the profit generated. The dependent variable used as a measure of profitability of a company in this study is Return On Assets (ROA). The formula of ROA: ROA= Net Profit/Total Assets Earnings information may be indicated as the ability to respond to the market return. In other words, earnings are reported to have a response force (power of response). Earnings reflect how much profit the company earned in a given period. Profitability is the company's ability to produce a profit that would sustain long-term and short-term growth.

In addition, from the results of the research Abdul Hakim mentioned that Profitability has influence on Value of the firm. So the higher profitability reflected the better performance and this will affecting the higher value of the firm.[10]

Pledge guarantee institution has characteristics. Its contract prerequisite is valid if the Pledge good is under the creditor authority or third parties, as stated in 1152 Legislations verse (1) and (2) BW:

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[8]Haedah Faradz, "Perlindungan Hak Atas Merek", in *Jurnal Dinamika Hukum*, (8) (1) (2008),p.40.

[9] Abdul Hakim Ali Sahboun, et.all, Firms Characteristics, Sustainability Reporting And Value Of The Firm (An Empirical Analysis of Public Companies Listed in Indonesia), *Astra Salvensis*, VI (2018), Supplement no. 1, p. 735-748

[10] *Ibidem*,p.745

> The trademark right and claims of tangible goods were laid by bringing them under the claimer of authorityor a third party, as had been agreed by both parties. While invalid agreement is when trademark right after all left out goods on claimer or creditor authority, or returned as the claimer will.

This determination is called *inbezitstelling* pattern. It is to guarantee the creditor from loss risks, including debtor cheating threat to segregate the guarantee goods. The mortgage goods submission to creditor or third partiesagreed is not judicial submission (*levering*). It means that transferable ownership is from debtor to creditor. That submission is the birth prerequisites of good right; pledge right. Therefore, *Inbezitstelling* pattern is as below points.

a. The sign of creating goods rights
b. Publicity fundamental manifestation
c. Mortgage agreement is real agreement
d. As the mortgage valid reflection
e. As law protection to creditor (Mortgage holder)

Publicity fund pledge does not only have to be listed on public registration, but also mortgage publicity fundamental. It is conducted through segregating goods from the owner, to creditor or third parties as publicity fundamental manifestation.

Inbezitstelling pattern is law protection to creditor because the object is tangible goods. As the applied tangible goods fundamental on verse (1) 1997 BW:

> "In regarded to tangible goods with no interest and credit which had to be paid by the claimer, parties who authorized them were considered as the owners".

Therefore, if the pledge object is still in the owner, they may easily transfer them, whereas, those goods have been the pledge object. Thus, it also may give disadvantage for the creditor who has been given the credit. The existence of *inbezitstelling* pattern may avoid the burden of pawn objects to be hypothecated to the second creditor or more.

However, to validate the object hypothecated to the second creditor, the authority of the first creditor must also be freed.Judicially, if the pledge authority is taken off from the first creditor, the agreement becomes failed. This statement is based on the rule No. 1152 verse (3) of BW.

Besides that, the pledge agreement does not require authentic form. Therefore, it can be on Private Deed or Authentic Deed. As stated 1151 BW, pledge agreement must be proven by allowed tools to proof the main agreement.Practically, Muamalat Bank of Indonesia uses authentic deed to burden trademark right.

Tabel 1. The Characteristics of Pledge Imposition on The Trademark Rights

Explanation	**Pledge**
Basic Law	Article1150-1160 BW
Form of Agreement	Written Form
Object	both tangible and intangible moving objects
Mastery of collateral object	On a Creditor or a third party
The authority to pledge	It is possible not the owner of the object to pledge the object of pledge. Referring to Article 1152 paragraph (4) of the BW: The absence of the pledgebroker's authority to act freely on the goods cannot be held accountable to the creditor, without prejudice to the right of the person who has lost or suspected the goods to claim it again.
Characteristics of Material Right	**Pledge BW**

droit de suite principle	The pledge is removed when the pledge is separated from the pledgebroker's power. However, if the item is lost, or taken from his or her power, then he/ she is entitled to reclaim it under Article 1977 (2) BW, and if the pledge has returned, then the lien is considered never to be lost.
droit de preference principle	A pledge is a right earned by a creditor of a moving good, which is delivered to him by the creditor, or by his/her proxy, as collateral for their debt, and which authorizes the creditor to take his or her receivables and the goods off by **taking it before other creditors**; with the exception of the cost of the sale as the execution of the judgment on the claim of ownership or control, and the cost of saving the goods, issued after the goods as pledge in which they must take precedence
Publicity principle	The pledge on tangible moving objects and on the receivables arise by way of surrendering the pledge to the creditor's power or under the authority of a third party.
Priority principle	Not in pledge because there is no redistribution for different creditors
Specialty principle	Not specifically set
Issue of Material Right	At the moment the object is left to the creditor

	or a third party.
Execution of collateral object	Parate execution

Based on the explanation above, pledge guarantee institution is a simple and efficient institution on finance. Thus, because of the mortgage guarantee act obligatory to make private deed,the goods right creation requirement is submitted to creditor or third party. Therefore, their position is as preference creditor.

Pledge object execution is very simple. It is also provided by *parate executie* (direct execution), if the breach contract does tort as stated in the rule No.1155 of BW. However, if it does not fulfill the obligation, after the confirmed terms or the notice undertaken on particular terms, the creditor has right to sell the pledge goods on public, based on local customs and applied prerequisite. This is done to pay off the debt. Yet, if the pledgeincludes merchant or stock exchange, then the selling activity may be on the same place based on those both realtors expertise. The rule No.115 also has ruled provision characteristics. Therefore, all parties confirm others on these things are considered as deviatingrule No.1155 of BW. *Parate execution* was appealed because the legislation did not need to be contracted. It did not need the existence of executorial title for creditor to undertake the selling without asking the court assistance or tax bailiff assistance.

After the trademark right execution, the revenue is used as repayment from debtor. Next, the company should propose the transferrable applicant to the General Directorate of Intellectual Property Right (IPR). The proposal is made for IPR consultant in directorate general of Indonesian and the trademark right director, IPR directorate general, Ministry of Justice and Human Rights of Indonesia. There is no pledge deletion on regular registration because it is automatically deleted. If the main agreement is deleted, so does the pledge as *accessoir* agreement (additional agreement).

Conclusion

Trademark right can be burdened by fiduciary or pledge guarantee. Practically, trademark right considered by Muamalat Bank of Indonesia is burdened by pledge guarantee institution to cover *musyarakah* finance. The characteristics that relate to the guarantee deed are authentic form, creation of good rights by submitting the object to creditor or third party, simple pledge execution; execution *parate.*

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No. : 049/ext/VII/ICILI/2018

Re : Acceptance Letter for 3rd ICILI Conference 2018

Depok, 10 August 2018

Dear Ms. Trisadini Prasastinah Usanti,

Assalamualaikum warrahmatullahi wabarakatuh,

We are pleased to inform you that your abstract has been accepted for the 3rd International Conference on Islamic Law in Indonesia (ICILI) on September 4th-6th 2018 in cooperation with ADHII (Asosiasi Dosen Hukum Islam Indonesia) and Faculty of Law Universitas Mulawarman, Samarinda, Indonesia.

The Committee needs to have confirmation from you that you will be able to submit your full paper to us by 30th August 2018 and that you will be able to present your paper in a 15 minutes time slot during Panel Session at the Conference in 4th-6th September 2018. The paper should be no more than 5000 words, Times Roman 12pt and 1.5 space and comply the standards as described on lkihi.law.ui.ac.id/icili-submission/.

Please confirm that you will attend the conference to present your paper, and kindly notifying us as soon as possible, no later than 16th August 2018. If we do not have confirmation from you by 16th August 2018, your 15-minute time slot will be allocated to a reserved speaker.

We would also like you to submit your PowerPoint slides presentation to us by 2nd September 2018 so that we can give you feedback regarding the likelihood that your presentation will stay within the 15 minutes of allocated time. A member of our Committee will be in contact with you about this after we have had confirmation that you will attend the conference to present your paper.

When we receive confirmation from you, The Committee will send you the 3rd ICILI Speakers Form that will provide The Committee with the full details of your paper so that the information can be incorporated into the conference program.

We are looking forward to hearing from you.

Should you need any more information about this acceptance letter, please contact +62-87785373497 (Vidya) or send email to lkihi.fhui@yahoo.com or lkihi.fhui@ui.ac.id.

Wassalamualaikum warrahmatullahi wabarakatuh,

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THE PRUDENTIAL PRINCIPLE OF TRADEMARK AS THE OBJECT OF SECURED TRANSACTION IN FINANCING

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Abstract

Following Islamic banking practice, the trademark has been applied as an object of pledge in imposition of financing. Trademark as an intangible object in secured transaction law perspective. Trademark as an intangible object qualifies as object of secured transaction. However, in assessing the trademark which it has an economic value it requires special expertise in appraisal. Unlike other objects of secured transaction which it is easier to be assessed, for example the form of the rights to land in the form of rights to land, vehicles, machinery. Therefore, as embodiment of the prudential principle, Islamic banks apply deeply and thoroughly analysis the trademark by an assessment of the trademark by the appraisers of object secured transaction who must have competence, have ethics and behave professionally. Moreover, the trademark which it is received as an object of secured transaction namely a registered trademark and still within 10 years of legal protection. Considering the urgency of the collateral, if the customers of the Musharakah financing facility break their promises, the trademark will be executed. The approach of this paper is the statute approach and conceptual approach.

Keywords: Prudential principle, Musharakah, the trademark rights, object of secured.

Introduction

Financing in terms of Islamic bank balance sheet assets is the largest part of operational funds, but at the same time is the biggest source of business operating risk. Non-performing financing, even becoming a problem, is a problem for Islamic banks, because of the problematic financing not only decreases revenue for Islamic banks but also undermines the amount of operational funds and

financial liquidity of Islamic banks, which will ultimately destabilize the health of Islamic banks and ultimately harm deposit customers and investation. Therefore, in Article 2 of Act Number 21 of 2008 concerning Sharia Banking (Sharia Banking Act), it is stipulated that Indonesian Banking in conducting its business is based on economic democracy using the principle of prudence and based on Sharia Principles. The purpose of the prudential principle is not limited so that banks are always in good health, always liquid, solvent and profitable. With the enactment of the prudential principle, it is expected that the level of public trust in banks is always high so that the public is willing to not hesitate to save their funds in the bank.[1]

One of the efforts made by Islamic banks in minimizing financing risk by conducting financing analysis. Financing analysis is the most important preventive phase and carried out professionally can act as the first filter in the business of Islamic banks to counter the dangers of financing problems. The main objective of the financing analysis activity is to assess the willingness and ability of prospective financing facility recipients to fulfill their obligations in accordance with the contents of the financing agreement. Based on the results of the assessment, Islamic banks can estimate the high and low risk borne by Islamic banks when approving the financing.

The bank's efforts in minimizing the risk of financing one of them by asking for collateral in the form of objects belonging to the debtor. The existence

[1] Sutan Remy Sjadeini, *Kebebasan Berkontrak dan Perlindungan Yang seimbang Bagi Para Pihak Dalam Perjanjian Pembiayaan Bank Di Indonesia*, Institut Bakir Indonesia, Jakarta, 1994,h.53

of collateral for financing is considered important even though it cannot be said to be absolute. The mission of the Sharia Banking Act is, in principle, not always providing financing by Islamic banks must be accompanied by a collateral condition, because the collateral is considered to exist by looking at opportunities and business prospects that are good recipients of financing facilities (prospective business). However, if in the provision of financing without a collateral, the Islamic bank has taken the financing risk that must be faced by the bank.

Possible objects are used as collateral objects, one of which is Intellectual Property Rights (IPR), which includes trademark rights, copyrights, patents then land rights, motor vehicles, machinery, gold, receivables or claim rights. However, the majority of Islamic banks in Indonesia do not want to receive Intellectual Property Rights (IPR), especially the rights to the trademark as an object of financing collateral for various reasons. Islamic banks in Indonesia generally prefer collateral objects that are commonly known in the banking world and are relatively easy in their assessment, for example land rights, motorized vehicles, production machinery, accounts receivable.

Trademark As Intangible Moving Objects

Based on Article 1 number 1 of Act Number 20 of 2016 concerning Trademarks and Geographical Indications, the definition of **brand** is a sign that can be displayed graphically in the form of images, logos, names, words, letters, numbers, color arrangements , in the form of 2 (two) dimensions and / or 3 (three) dimensions, sound, hologram, or a combination of 2 (two) or more elements to

distinguish goods and / or services produced by a person or legal entity in goods trading activities and / or services. Moreover the definition of **trademarks** is a brand that is used on goods traded by a person or several people jointly or a legal entity to distinguish from other similar items.

Trademark as an intangible movable objects qualified for fullfil as a collateral object for Islamic banks due to:

1. Has economic value

2. Can be transferred by written agreement

Beside the two conditions above, there are several requirements must be fullfil, namely:

a. The financial statements of the company that owns the Trademark Rights to know that the Trademark Rights have value or not.

b. The rights of trademark are rights to well-known trademark. Referred to as the Right to a well-known Trademark is the Right to Trademark that has been known by the public (consumers). Referring to the opinion of Haedah Faradz [2] that to make a trademark become famous must be able to collateral the quality or reputation of a particular product. It is not easy and requires a very long time, for example Coca Cola from the United States takes 100 years to become famous.

[2] Haedah Faradz, Perlindungan Hak Atas Merek, *Jurnal Dinamika Hukum*, Volume 8, Number.1 January, 2008,h.40.

c. The right to a trademark from a halal product is not from an illicit product. The Right of Trademark can be used as an object of collateral if the Trademark Rights are the Right to Trademark registered in the General Register of Trademark Rights in the Directorate General of Intellectual Property of the Ministry of Law and Human Rights of the Republic of Indonesia as evidenced by the Right to Trademark certificate, so that the Right to Trademark the legal protection for a period of 10 years from the date of receipt and the period of protection can be extended.

Under Article 41 of the Trademark and Geographical Law, the right to a registered trademark can be transferred or transferred because:

a. inheritance;

b. will/ testament;

c. Waqf;

d. grant;

e. agreement; or

f. other reasons justified by the legislation.[3]

The transfer of rights to a registered trademark must be filed with the Directorate General to be recorded in the General Register of Marks. Application for transfer of rights to Trademarks is accompanied by supporting documents. The transfer of

[3] "other reasons' means " justified by laws and regulations" are as long as they are not contrary to the laws and regulations, for example the transfer of n Trademark ownership due to the insolvency, dissolution of legal entities, restructuritation, mergers or acquisitions.

registered trademark rights that have been recorded is published in the Trademark Official News. The transfer of rights to registered trademarks that are not listed in the General Register of trademarks does not have legal effect on third parties.[4]

Registered trademarks receive legal protection for a period of 10 (ten) years from the date of receipt. The period of protection can be extended for the same period. An application for renewal is submitted electronically or non-electronically in Indonesian by the owner of the trademark or his Proxy within a period of 6 [six] months before the expiration of the period of protection for the registered trademark at a cost. Application for an extension is approved if the applicant attaches a statement regarding:

a. The relevant trademark is still used in goods or services as stated in the trademark certificate; and

b. Goods or services are still produced and / or traded.

Financing Analysis

Fund distribution by Islamic banks as outlined in the financing agreement needs intense security as well as the realization of the prudential principle that must be carried out by Islamic banks. For this purpose the law has provided facilities as stipulated in the legal provisions of the collateral. In Book II Burgerlijk Wetboek (hereinafter abbreviated as BW) there is a collateral that is of a material nature that is individual in nature. However, in banking practices collateral is relatively more than individual collaterals. This is because the

[4] The determination of the legal consequences only applies after the transfer of the Right to the Mark is registered, intended to facilitate supervision and realize legal certainty.

characteristics inherent in material security provide the position of creditors as preferential financing, namely having the right to the bound object to get repayment in advance rather than other financing, not so with an individual collateral because there is no particular object tied as collaterals and collaterals are the ability of third parties or third party promises to pay off debtor debts. Whereas in individual collaterals the financing position is only for concurrent financing.

The provisions of Article 23 of the Sharia Banking Act and its explanations expressly state that the orientation of banks in providing financing prioritizes the feasibility of the project or business of the customer, not collateral oriented. Islamic banks in providing financing must have confidence based on an in-depth analysis of the willingness and ability and ability of prospective recipient customers to repay all obligations on time. The bank's confidence is formed from the results of a careful assessment of the character, ability, capital, collateral and business prospects of prospective customers who receive the facility, known as the C 5C 'analysis. Collateral is one element of the assessment of Islamic banks on financing applications submitted by prospective recipient customers of the facility, although collateral is not the first element but its existence is important considering collateral will play a role if there is problematic financing.

The collateral is given a definition in Article 1 number 26 of the Sharia Banking Act that: Collateral is an additional collateral, whether in the form of movable objects or immovable property, which is submitted by the Collateral owner to Sharia Banks and / or UUS, to collateral the repayment of the obligations of the Facility Recipient Customer. Assessment of collateral under the

Sharia Banking Act that Islamic Banks and / or UUS must assess goods, projects or claim rights financed by the relevant Financing facilities and other goods, securities or risk collaterals added as additional Collateral, is sufficient if the Facility Recipient Customer will not be able to repay his obligation, the Collateral can be used to cover the Financing repayment from the Sharia Bank and / or the Sharia Business Unit concerned.

1. Islamic banks receive collateral in the form of rights to the trademark and are then burdened with a fiduciary collateral institution or pawning perfectly, the material rights are born. So Islamic banks are based on preferred financing. Holders of material collaterals have a better position because:

2. 1. The creditor takes precedence and is facilitated in taking repayment of the bill for the sale of certain objects or a group of certain objects belonging to the debtor or third party; and / or

3. 2. There are certain objects belonging to debtors or third parties held by creditors and tied to the creditor's rights, which are valuable to the debtor and can provide a psychological pressure on the debtor to fulfill his obligations properly to the creditor.

Fund distribution through financing in the form of collateral in the form of rights to trademark cannot be separated from the existence of financing risk, namely the emergence of problematic financing. Therefore, risk management is needed in all aspects of Islamic bank management, one of the things that needs to

be managed is in terms of fund distribution, even though there is also a risk in fundraising (liquidity risk) but the risk in fund distribution is more complicated involving many factors. The risk of channeling funds in buying and selling based transactions and debt receivable is the risk of losses arising from the failure/ inability of the customer to fulfill their obligations in accordance with the contract or agreement that has been established between the bank and the customer. While the risk of channeling funds in profit-based transactions occurs if the risk of business failure results in non-fulfillment of profit targets, and / or business losses that result in depreciation of capital participation in disbursing funds by Islamic banks in the customer's business and / or customers unable to repay capital Islamic bank at the time specified in the contract or agreement. Therefore, Islamic banks must carry out the process of identifying, measuring, monitoring, and controlling risks.

One of the legal efforts to minimize risk by conducting financing analysis. Financing analysis is a preventive effort that must be carried out by a bank in a professional manner based on the procedure for providing financing owned by the bank. Financing analysis can act as the first filter in the bank's efforts to counteract the problematic financing risk. The main objective of financing analysis activities is to assess the confidence in the ability and ability of prospective debtor customers to pay off their obligations according to what is agreed upon is an important factor that must be considered by the bank. To obtain these beliefs, before providing financing, banks must make a careful assessment

of the character, ability, capital, collateral, and business prospects of prospective debtor customers, known as the 5 "C analysis.[5]

It cannot be denied that the bank's business activities contain a lot of risks, therefore the bank needs to be regulated strictly. The reason for the tight banking regulations is because of the failure of a bank, can have a quite deep and long-term impact on the economy. Failure of a bank in part or in whole can affect the overall economic system. Banks as financial institutions that have permits to do many business activities have the opportunity to earn income in the form of interest, administrative fees, provision fees. In carrying out these activities is always faced with a risk, because the risks that may occur can cause losses to the bank if it is not detected and not properly managed. [6] The financing provided by Islamic banks is full of financing risks so that banks need to carry out financing risk management, the more accurate and accurate the implementation of financing risk management conducted by banks, the smaller the risk. Financing standards must be objective and based on the principles of healthy financing. This must be reflected in the form of a written policy that includes the policy of granting financing, financing approval processes, administrative procedures, and order of financing documentation, monitoring of the financing that has been provided. Non-performing financing risks can be minimized by way of one of them to do financing analysis.

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[5] Trisadini Prasastinah Usanti, et.all, " Benda Yang Diperoleh Kemudian Hari Sebagai Objek Jaminan Fidusia Pada Pembiayaan Bank", *Laporan Penelitian*, Dana RKAT Fakultas Hukum Universitas Airlangga, Surabaya, 2016, h.5

[6] Trisadini P.Usanti dan Nurwahjuni *Model Penyelesaian Pembiayaan Bermasalah*, Revka Pertra Media, Surabaya, 2014,h.19

In addition, that the financing guidelines set by Bank Indonesia that must be owned and applied by banks in providing financing are as follows:[7]

a. the provision of financing or financing based on Sharia Principles is made in the form of a written agreement; b.online.com

b. the bank must have confidence in the ability and ability of the Debtor Customer which, among others, is obtained from a careful assessment of the character, ability, capital, collateral, and business prospects of the Debtor Customer;

c. the bank's obligation to prepare and implement procedures for granting financing or financing based on Sharia Principles;

d. the bank's obligation to provide clear information regarding financing and financing procedures and requirements based on Sharia Principles;

e. prohibition of banks to provide financing or financing based on Sharia Principles with different requirements to Debtor Customers and or affiliated parties;

f. dispute resolution

Based on the Explanation of Article 23 paragraph (2) of the Sharia Banking Act, the character, ability, capital, collateral and business projects of prospective customers are as follows:

[7] Trisadini et.all, Analisis Risiko Hukum atas Jaminan Sertifikat Hak Atas Merek dalam Transaksi Perbankan, Laporan Akhir Tahun Penelitian Terapan Unggulan Perguruan Tinggi, 2017.

a. The assessment of the character of prospective Facility Recipient Customers is mainly based on the relationship that has been established between the Sharia Bank and / or Sharia Business Unit (Unit Usaha Syariah, hereinafter referes to UUS) and the Customer or the prospective Customer concerned or information obtained from other parties that can be trusted so that the Sharia Bank and / or UUS can conclude that the prospective Facility Recipient Customer concerned is honest, in good faith, and does not complicate the Sharia Bank and / or Shariah Business Unit in the future.

b. Assessment of the ability of potential Recipient Customers, especially Banks, must examine the expertise of Facility Recipient Customers in their business fields and / or prospective Customer management capabilities so that Islamic Bank's and / or UUS feel confident that the business to be financed is managed by the right person.

c. Assessment of capital owned by prospective Facility Recipient Customers, especially Islamic Banks and / or UUS must conduct an analysis of the overall financial position, both for past periods and forecasts for the foreseeable future so that it can know the capital capacity of prospective Recipient Customers in supporting financing of the project or business of the prospective Customer concerned.

d. In assessing Collateral, Sharia Banks and / or UUS must assess goods, projects or claim rights financed by the relevant Financing facilities and other goods, securities or risk collaterals which are added as additional

Collateral, whether it is sufficient enough so that if the Recipient Customer The facility will not be able to pay off the obligation later, the Collateral can be used to cover the repayment of Financing from the Sharia Bank and / or UUS concerned.

In general, economic requirements to be fullfilled from the collateral of financing as stated by Teguh Pudjo Muljono, [8] namely:

- it has economic value (can be traded) in general and free.
- the value must be greater than the amount of financing provided. [9]
- The object of the collateral must be easy to market without having to spend significant marketing costs.
- the value of the collateral object must be constant and it will be better if the value is also likely to experience an increase in the future.
- the conditions and location of the collateral object are quite strategic.
- physically the object of collateral is not broken or other causes that will reduce its economic value.
- the collateral object has economic benefits within a relatively long period of time from the financing period that will be collaterald.

The juridical conditions that must be fulfilled from an object of collateral are:

- prioritizing the property of prospective borrowers, if the ownership of a third party, then ownership must be ensured.

[8] Teguh Pudjo Muljono, *Manajemen Perpembiayaanan bagi Bank Komersil*, BPFE-Yogjakarta, 2001, h.300

[9] Kelaziman dalam praktik perbankan bahwa nilai jaminan jauh lebih besar dibandingkan dengan plafond pembiayaan yang diberikan oleh bank, yaitu dengan perbandingan 1:1.25. Akan tetapi, dalam praktik perbankan pada pembiayaan back to back loan, yaitu pembiayaan yang dijamin dengan deposito maka nilai deposito dengan plafond pembiayaannya adalah sama

- not in dispute.

- have valid proof of ownership.

- the object of the collateral is free not being bonded to the other party.

Collaterals that have perfect juridical value will be better than collaterals that have high economic value but do not meet adequate juridical requirements. Therefore, such collaterals will be difficult to be burdened with collateral institutions and will be difficult in their execution. The purpose of a material collateral is to give the right of right (the right to request fulfillment of the loan) to the financing, on the sale of certain objects from the debtor for the fulfillment of the receivables. [10]In Article 1 point 27 of the Sharia Banking Act, collateral is provided, namely additional collateral in the form of movable objects and immovable objects submitted by Collateral owners to Sharia Banks and / or UUSs, to collateral repayment of the obligations of Facility Recipient Customers.

a. Assessment of business projects of potential Facility Recipient Customers, Islamic Banks must mainly analyze the state of the market, both at home and abroad, both for past and future periods so that marketing prospects can be identified from the results of the prospective customer's project or business will be financed with Financing facilities.

The existence of a collateral is a prerequisite for minimizing financing risk. As an anticipatory step in withdrawing financing that has been given to debtors, two factors must be considered, namely:

[10] Sri Soedewi Masjchoen Sofwan, *Hukum Jaminan di Indonesia Pokok-Pokok Hukum Jaminan dan Jaminan Perorangan*, Liberty, Jogjakarta, 2001,h.38.

1. Secured, meaning that the collateral of financing can be held in formal juridical binding, in accordance with legal provisions and legislation. If the debtor defaults later, the bank has juridical powers to carry out the execution.

2. Marketable, meaning that if the collateral is to be executed, it can be immediately sold or cashed to pay off all debtor obligations. [11]

Based on the results of research conducted by Sri Mulyani the implemtation of prudential principal are the debtor must submit a photocopy of the Trademark Certificate as proof of ownership of the Trademark registered in the General Register of Trademarks at the Director General of Intellectual Property Rights to find out who the owner of the Trademark is, a copy of the identity of the Trademark's owner, The list of trademark which has built on an agreement (non authentic deed) by the owner of the trademark rights or the person who represents the legal entity as the holder of the trademark rights, submits the financial statements of the owner of the trademark rights to know the trademark rights have economic value or not.[12]

Furthermore, Sri Mulyani argued that banking barriers in recognizing the right to the trademark as an object of fiduciary collateral. caused by several, namely:

1. Legal factors, there is no legal basis for formal legality that can be used as a brand reference as a fiduciary collateral, although positive law (ius constitutum)

[11] Johannes Ibrahim, *Cross Default & Cross Collateral Sebagai Upaya Penyelesaian Pembiayaan Bermasalah*, Refika Aditama, Bandung, 2004, h. 71.

[12] Sri Mulyani, "Realitas Pengakuan Hukum Terhadap Hak atas Merek Sebagai Jaminan Fidusia Pada Praktik Perbankan", *Jurnal Hukum dan Dinamika Masyarakat*, Vol.11 No.2 April 2014,h.140

has regulated the brand as a form of intangible objects can be used as a fiduciary collateral (Article 1 paragraph 2 Collateral Law Fiduciary). The existence of the Brand as a fiduciary collateral has not been recognized in the Bank Indonesia Regulation Number 14/15 / PBI / 2012 concerning Asset Quality Assessment for Commercial Banks as a reference for economic actors, especially banks in imposing brands as fiduciary collaterals, so that in banking practice there is no legal recognition of the validity of rights. for the brand as a fiduciary collateral. Economic Factors, not all brands have economic value, brands that have economic value (money) that can be used as collateral and have a marketable share. In an economic perspective, brands have opportunities and brand value can be accounted for economically.[13]

Islamic banks in analyzing financing is a study to determine the feasibility of a financing proposal submitted by the customer. Through the results of the analysis it can be seen whether the customer's business is feasible in the sense that the business being financed is believed to be a source of return from the financing provided, the amount of financing according to the needs both in terms of number and usage and the exact structure of the financing, so as to secure the risk and benefit the bank and customers. In analyzing financing must be considered the willingness and ability of customers to fulfill their obligations and fulfillment of aspects of sharia provisions.

Conclusion

[13] *Ibid.*,h.145

The prudential principle must be carried out by Islamic banks in distributing collateral financing in the form of brand rights, namely by conducting collateral analysis. Analysis is carried out on the financial statements of the company that owns the Trademark Rights to know that the Trademark Rights have value or not. The rights to the mark are rights to well-known brands. The right to a brand from a halal product is not from an illicit product. The Rights to Trademarks received as collateral are those registered in the General Register of Trademark Rights in the Directorate General of Intellectual Property of the Ministry of Law and Human Rights of the Republic of Indonesia as evidenced by a Right to Trademark certificate, so that the Rights to Trademark receive legal protection for a period of 10 years from the date of receipt and the period of protection can be extended. Then the juridical binding of the brand is carried out with the burden of a fiduciary collateral institution or pawning perfectly.

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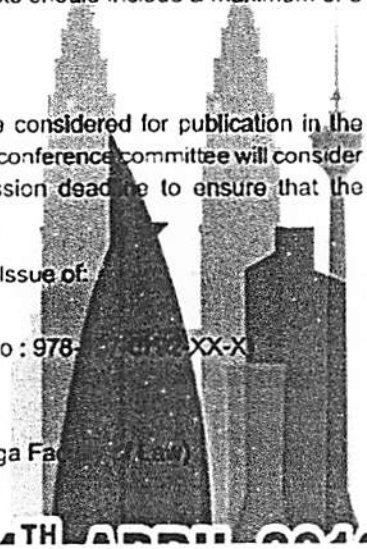

ABSTRACT DEADLINE EXTENDED TO 24TH APRIL 2018

THE ADVANTAGES OF PLEDGE ON TRADEMARK CERTIFICATION OF BANK CREDIT IN INDONESIA

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Abstract

This study discusses the advantages of pledge as an appropriate security institution to impose Trademarks Rights as collateral. In the previous study, it was mentioned that fiduciary security was the institution that imposed Trademark Right. However, I believe that pledge is more beneficial for banks and debtors than fiduciary security. Pledge is simpler in imposition and execution and more efficient in terms of cost. There are several advantages such as no obligation for authentic pledge, no registration needed in pledge, the process of issuing material rights on the pledge done through delivery of lien to creditors or third parties which is different from fiduciary in which it must be done electronically and post-execution procedures of the secured objects, then, there is no obligation in pledge to carry out the write-off as in fiduciary.

Keywords: trademark, pledge, credit, bank

1. Introduction

In terms of conventional and *syariah* banking in Indonesia, there are few banks which accept the Trademarks right as collateral for several reasons. Trademarks right is collateral which requires certain expertise in assessing its economic aspect, while the availability of related expertise is limited; they are not even available in banks. Therefore, conventional and sharia banking tends to choose security object that is commonly known in banking world, which is relatively easy in its assessment and execution for instance rights to land, vehicles, production machinery or securities. Based on the results of research into several banks in Indonesia can be described as follows:

Table 1. List of Banks Accepting/Declining Trademarks right as Collateral

No	Name of Bank	Accept/decline	Explanation
1	Inc. Bank Central Asia, Plc.	decline	Trademarks Rights Certificate is used as a unity by BCA in analyzing the business of the prospective customer
2	Inc. Bank Rakyat Indonesia (Persero), Plc.	decline	Objects received in the form of fixed assets are immovable objects for instance rights to land, vehicles, machinery and moves, for example in the form of receivable accounts or collateral
3	Inc. Bank Jatim	decline	Objects received in the form of fixed assets are immovable objects for instance rights to land, vehicles, machinery and moves, for example in the form of receivable accounts or collateral
4	Inc. Bank Tabungan Pensiunan Nasional, Plc.	decline	Objects received in the form of fixed assets are immovable objects for instance rights to land, vehicles, machinery and moves, for example in the form of receivable accounts or collateral
	Inc. Bank Negara Indonesia (Persero), Plc. Jakarta	Accept	Trademarks Certificate is accepted as additional collateral and imposed with fiduciary security.
5	Inc. Bank Negara Indonesia (Persero), TBK. Cabang Surabaya	Decline	Objects received in the form of fixed assets are immovable objects for instance rights to land, vehicles, machinery and moves, for example in the form of receivable accounts or collateral.
6	Inc. Bank Mandiri (Persero), Plc.	Decline	Objects received in the form of fixed assets are immovable objects for instance rights to land, vehicles, machinery and moves, for example in the form of receivable accounts or collateral.

7	Inc. Bank Bukopin, Plc.	Decline	Trademark Right only functions as supplementary legality of customer's business. For instance, a company which produces a packed tea can only make use of its trademark right certificate as supplementary legality.
8	Inc. Bank Syariah Bukopin	Decline	Objects received in the form of fixed assets are immovable and moveable objects. Even machines are only accepted as additional collateral not as a main collateral.
9	Inc. Bank BRISYARIAH	Decline	Objects received in the form of fixed assets are immovable objects for instance rights to land, vehicles, machinery and moves, for example in the form of receivable accounts or collateral.
10	BTN Syariah	Decline	Objects received in the form of fixed assets are immovable objects for instance rights to land, vehicles, machinery and moves, for example in the form of receivable accounts or collateral.
11	Inc. Bank Panin Syariah	Decline	Objects received in the form of fixed assets are immovable objects for instance rights to land, vehicles, machinery and moves, for example in the form of receivable accounts or collateral.
12	Inc. Bank Muamalat Indonesia Jakarta	Accept	Trademarks certificate is accepted as additional collateral and is encumbered with a pledge security but there is also a Trademark Right that is used only as the supporting legality of the customer's business.

This condition is supported by the absence of supporting regulations such as Bank Indonesia Regulation (*PBI*) and the Financial Services Authority's Regulation (*POJK*) on the existence of Trademarks right as collateral which can be calculated as a deduction in Asset Allowance for Asset Losses (*PPA*) calculation on conventional banking and sharia banking.

Based on research conducted by Sri Mulyani (2014) At Inc. BNI (Persero), Plc. Jakarta (BNI) and according to my research at PT. Bank Muamalat Indonesia Jakarta (BMI), both banks receive Trademarks right as proven by Trademarks Right Certificate as collateral. However, it is not as main collateral but additional collateral. The reason is the value of the Brans cannot be guaranteed; therefore, it is very risky for the bank if it is placed as the main collateral.

It is reasonable to refer to Rahmi Jened's opinion (2007) that the Trademark Rights as Intellectual Property Rights is basically a sign to identify an indication of origin of a company with goods and/or services of other companies. This identification function has been enacted in medieval Europe in order to show the origin of a product. At that time, Trademarks Right was often symbolized on merchandise. This symbol helped show the origin of product or services, as well as commercial enterprises engaged in the field of providing goods and services.

In market share, the names and symbols would be recognized as Business Name, Company Name, Brand Name, Trademark and Trade Dress. Therefore, the economic value of Trademarks right depends on the value of the products or services sale, when the products or services are sold in the market, the economic value will be high. Conversely, if there is a decrease in sales of products or services, the economic value of the Trademarks right decreases. This is also stated by Jean Matthes (2013) that:

> In practice, valuation is not main issue where the trademark rights are only one category of asset in security for a large-scale financing. In such cases the lender's overall goal is to take security over virtually each asset that the debtor owns. Sometimes the impression is that this catch-all approach makes detailed valuation redundant, at least for assets that are difficult to value, such as IP rights.

Even though Trademarks right as an additional security object, it does not mean that conventional banks and sharia banks override precautionary principle especially in conducting collateral analysis and imposing a perfect collateral charge. On the banking practices in Indonesia, there emerged fiduciary and pledge security to burden the Trademarks right. Referring to the objects of both agencies, it does allow Trademarks right as an intangible moving object to be burdened with

a fiduciary security agency. However, both institutions have different characteristics and, consequently, they have different risk effects. Therefore, this research will discuss the advantages of pledge as a proper security institution to burden the certificate of Trademarks right as the object of collateral.

a. Fiduciary Security on Trademarks right

According to Sri Mulyani (2014), in the context of civil law, the rights attached to the brand have a material nature. The nature of property in brand which is one of the intellectual property rights contained in the existence of two rights, they are economic rights that can provide benefits in the form of royalty, and moral rights that is always attached to the owner. The economic rights of person for his or her creativity can be transferred to another person (transferrable); therefore, others as beneficiaries of the transfer of rights can also get benefit from economic gain.

Based on Article 499 of Burgerlijk Wetboek (BW), they mention the understanding of material legislation where each goods and every right can be controlled by property rights. Trademarks right is categorized as an object, that is, an intangible moving object. Arthur S. Hartkamp (1975) argues that Trademarks right is the right of mind product:

> "It was originally intended to devote the last book of the Code (Book 9) to the third category of subjective patrimonial rights: "the rights on the products of the mind". The statutes containing these rights (at that time: patents, trade mark, copyright, trade name) were to be split up. The provisions of a civil character would be included in Book 9, those of an administrative, procedural and penal character were to be placed elsewhere."

Referring to the condition of the object may be security object; the Trademarks right qualifies as the security object for economic value and transferrable by written agreement. In addition to these two conditions, other conditions that must be met, namely:

a. The financial statement of the company owner on Trademarks right in order to acknowledge whether the Brand has value or not.

b. Trademarks right is a well-known Trademarks right. It refers to Trademarks right known to the public (consumer). Referring to the opinion of Haedah Faradz (2008) who believes that in order to make a brand famous, they need to realize quality assurance or reputation of a certain product which is not easy and require a long time. Coca Cola from the United States takes 100 years.
c. Trademarks right may be used as security object when registered in the General Register of Trademarks right at the Directorate General of Intellectual Property of the Ministry of Justice and Human Rights of the Republic of Indonesia with the proven certificate of Trademarks right, so the Trademarks right shall be protected by law for 10 years from the date of receipt and the period of protection may be extended.

Given the juridical security function is to ensure legal certainty for debt repayment or the implementation of an achievement, it is clear that the security items must be cashable, because the existence of material security is a preventive measure in securing the credit where it is not possible to guarantee something not cashable as stated by Djuhaendah Hasan (2011).

In a study conducted by Sri Mulyani and her team (2014) that the Trademarks right by BNI is encumbered with fiduciary security as regulated in Law Number 42 Year 1999 on Fiduciary Security (UUJF), whereas in BMI, Trademarks right is burdened with pledge insurance agency. It is possible to be encumbered with pledge or fiduciary, when referring to the scope of pledge and fiduciary objects. In Article 1150 BW, it is affirmed that a pledge is a right earned by a creditor of a moving good. Likewise, in Article 1 point 2 UUJF mentioned that Fiduciary Security is the security right for tangible objects either tangible or non-material. Based on these provisions, in the practice of conventional banking and sharia banking, it emerges two collateral institutions that burden the Trademarks right as security object.

Both institutions have different characteristics, especially in the mastery of objects. The possession of object on the pledge in the power of creditor or the third party while in the fiduciary, the mastery of fixed object is on the owner of

the object. In the fiduciary security, the object remains to the owner of the object because it functions a capital object used by the owner to support its business activities. While on the pledge, the object must be removed from the power of the object owner (giver) and even threatened their unlawful pledge when the pledge is allowed to remain in the power of debtor or the lender.

In addition, pledge is not required for an authentic form agreement so that an informal agreement is possible. Meanwhile fiduciary security requires it since the authentic form of fiduciary security certificate is used to issue fiduciary security.

For pledge, there is no regulation on the registration of a security object. A lien emerges at the time the pledge is delivered to a creditor or a third party as defined in Section 1152 (1) BW, known as *inbezitstelling* pattern. In pledge, the principle of publicity is not meaningful to be registered in the general register, but the principle of publicity on the pledge, namely by alienating objects from the owner to be submitted to creditors or third parties. This is a manifestation of the principle of publicity. In contrast to fiduciary security, the issue of fiduciary security is based on the obligation to register objects charged with fiduciary collateral to the Law and Human Rights Registry. Fiduciary Security Registration is recorded electronically after the applicant has paid Fiduciary security registration fee. The Fiduciary security was issued on the same date as the Fiduciary security date recorded in the Fiduciary Registration Office database. The Fiduciary security certificate is electronically signed by the Official at the Fiduciary Registration Office. The Fiduciary security Certificate can be printed on the same date as the Fiduciary security Date recorded. Therefore, the birth of fiduciary security is based on the obligation to register. Comparisons of pledge and fiduciary charges can be illustrated below:

Table 2. Comparison of Pledge and Fiduciary Security

Explanation	Pledge	Fiduciary Security
Basic Law	Article1150-1160 BW	Law Number 42 Year 1999 on Fiduciary Security
Form of	Written Form	Needs to be in form of

Agreement		authentic deed
Object	both tangible and intangible moving objects	Both tangible and intangible moving objects, especially buildings that cannot be burdened with pledge
Mastery of collateral object	On a Creditor or a third party	On the object owner
The authority to pledge	It is possible not the owner of the object to pledge the object of pledge. Referring to Article 1152 paragraph (4) of the BW: The absence of the pledgebroker's authority to act freely on the goods cannot be held accountable to the creditor, without prejudice to the right of the person who has lost or suspected the goods to claim it again.	Must be the owner to pledge
Characteristics of Material Right	**Pledge BW**	**Fiduciary**
droit de suite principle	The lien is removed when the pledge is separated from the pledgebroker's power. However, if the item is lost, or taken from his or her power, then he/ she is entitled to reclaim it under Article 1977 (2) BW, and if the pledge has returned, then the lien is considered never to be lost.	Fiduciary Security still follows the Object which is the object of the Fiduciary security in the hands of whoever it is located, except the transfer of the inventory item to the object of the Fiduciary security.
droit de preference principle	A pledge is a right earned by a creditor of a moving good, which is delivered to him by the creditor, or by his/her proxy, as collateral for their debt, and which authorizes the creditor to take his or her receivables and the goods off **by taking it before other creditors**; with the exception of the cost of the sale as the execution of the judgment on	Non-moving objects, especially Buildings that cannot be encumbered by the pledge rights as referred to in Act Number 4 of 1996 on Pledge Rights which remain in the control of the Fiduciary giver as collateral for the settlement of certain money, **which gives priority to the Fiduciary**

	the claim of ownership or control, and the cost of saving the goods, issued after the goods as pledge in which they must take precedence	**recipients to other creditors.**
Publicity principle	The liens on tangible moving objects and on the receivables arise by way of surrendering the pledge to the creditor's power or under the authority of a third party.	Objects encumbered with Fiduciary shall be registered electronically
Priority principle	Not in pledge because there is no redistribution for different creditors	In principle the priority principle is not in the fiduciary security
Specialty principle	Not specifically set	Fiduciary security Act contains at least the following: a. the identity of the Fiduciary· Recipient and Receiver; b. data c. principal agreement guaranteed by fiduciary; d. description of the object of Fiduciary security ; e. the value of the security; and f. the value of the Object being the Fiduciary object
Issue of Material Right	At the moment the object is left to the creditor or a third party.	Fiduciary registration is done electronically
Execution of collateral object	Parate execution	a. Parate Execution b. Based on the executorial title c. Sales are under the deal

Referring to the description above, it shows that pledge is a security institution that is simple and efficient, especially in terms of cost compared to fiduciary. There are some basic things including imposition and the issue of material rights of both securities. Fiduciary requires the cost of making a fiduciary

certificate and registration fee electronically charged to the debtor. Meanwhile, pledge does not require authentic form and must be registered so that the cost in the pledge can be minimized. Then, regarding the issue of material rights, the fiduciary must be registered electronically to the Fiduciary Registration Office, while the pledge, material rights with the object of pledge is left to the creditors or third parties. From the aspect of legal assurance for the position of the bank receiving the pledge or fiduciary as the creditor is the same as the position of the preferred creditor from the process of security burden which is done perfectly.

When referring to Nieuw Nederlands Burgerlijk Wetboek (NBW), Title 9: Rechten Van Pand en Hypotheek, there are only two types of security namely the right to pledge and the right to pledge. Norton Rose (2000) also asserts that immovable objects such as properties, ships, and aircrafts are the object of pledge (hypotheekrecht). Immovable objects such as ships and aircraft shall be registered as proof of ownership and as collateral. While moving objects such as accounts receivables, collect rights, and Intellectual Rights are burdened with pledge.

In terms of NBW, pledge is distinguished into: possessory pledge (disclosed pledge) and non-possessory pledge (undisclosed pledge). According to the provisions of Article 2: 236, what is meant by possessory pledge are:

> "The right of pledge on a movable thing or on a right payable to bearer or order, or on the usefruct of such a thing or right, is established by bringing the thing or the document to bearer or order under the control of the pledgee or of a third person agreed upon by the parties. Furthermore, endorsement is required for the establishment of a right of pledge on a right payable to order or on the usufruct thereof."

In a possessory pledge, the grant of a moving object is followed by the goods delivery in the creditor real power (the security recipient) or a third party. This is similar to the pledge arrangement in BW, called *inbezitstelling*. This principle is an absolute requirement of possessory pledge.

Furthermore, Ninis Nugraheni (2016) stated in the possessory pledge made a pledge (written) agreement between pledgebroker and pledge recipient which is guaranteed the existence of the liens and the notification by the pledge recipient to the debtor. It is impossible for the debtor to transfer the guaranteed goods because

the real possession of the goods is on the creditor / guarantee recipient (bank). This possessory pledge fulfilled the requirements of legitimate liens of the bank to make repayment of its receivables through the pledged objects contain the following components:

1. Title (the right to exercise a transfer of rights) of a contract of pledge;
2. Collateral
3. Power of disposition over property (*beschikkings bevoegdheid*).

Meanwhile, the meaning of non-possessory pledge is stipulated in the provisions of Article. 1: 239, which states that:

> A right of pledge on a right, or a right of pledge on the usefruct of such a right, can also be established by an authentic deed or a registered deed under private writing without notification thereof to those persons, provided that the right of pledge or will be acquired pursuant to a juridical relationship already existing at the time.

Affirmed by Ninis Nugraheni (2016) that non-possessory pledge, which is pledgeed on a moving object, is realized through notarized deed or registered private deed and not accompanied by a concrete delivery of goods guaranteed to the creditor/Article 1: 237 NBW). In this regard, it is affirmed that the debtor/lender has right to pledge and transfer over the secured asset without being burdened with other material rights. If the debtor defaults, the creditor/pledge broker (non-possessory pledge) may request that the subsequent collateral be handed over him/her. Thus, it is possible that the pledge is encumbered with two or more non-possessory pledges. Non possessory/undisclosed pledge is usually done by deed under the registered/notarial deed. This type of pledge does not need for any real collateral transfer to the creditor (without notice to the debtor). Non possessory pledge as intended in Article 1: 239 NBW discusses the document of titles. If the debtor defaults, the bank will convert the undisclosed to disclosed right by making a notice to the debtor. Different from pledges in BW which do not recognize registration, pledges in NBW might involve registration. The meaning of registration, as described by O.K Brahn (1999) is not in general meaning but the making of authentic or under registered deeds.

The making of this deed explains that there has been a pledge agreement between the debtor and the creditor that the secured asset is not submitted *inbezitstelling* to the creditor and in the event of default the creditor will notify the debtor to make a goods transfer for the execution. In other words, according to Reinout Wibier (2014) the agreement contains the authority of the collateral transfer by creditors. This registration is intended as publicity for third parties, regarding the security existence.

The fiduciary institution in the Dutch no longer existed as stated by J.H.M Van Erp and L.P.W.Van Vliet (2002) that:

> The fiduciary ban will not be adopted in the new Netherlands Antilles and Aruba Civil Code which is based on the new Dutch Civil Code. Generally speaking, the new Dutch Civil Code following established civil law principles in regard to real and personal security law as the code seems to function well in legal practice. There is, however, one area where this is not the case: the ban on fiducia cum creditore. The Civil Code explicitly adheres to the principle that ownership is a unitary concept and that it cannot be transferred for security purposes. However, the Supreme Court acknowledged sale and lease back by way of security as a valid transaction. Also, the Dutch legislator has already limited the impact of the fiduciary ban in special statutes.

In the Netherlands, the fiduciary has been imposed on the basis of Jurisprudence on the decision of Hoge Raad on 29 January 1929 which is famous for Bierbrouwerij Areest. Likewise in Indonesia before the enactment of UUJF, the fiduciary was based on Jurisprudence based on Hooggerechtsh of (HGH) dated August 18, 1932. Before the enactment of UUJF, fiduciary was no regulation on registration so as to legal engineering by transferring ownership of fiduciary objects from their owners to creditor with submission constituted posessorium. The ownership of fiduciary objects switched over the credit period while the object remained in the power of the fiduciary giver because it was a capital object so that the fiduciary giver could still run its business.

The existence of fiduciary in Indonesia in the period since its enactment in 1999 until present cannot be separated from legal problematics that do not provide legal certainty for fiduciary recipients in this case is the bank. Problematic in UUJF:

- The fiduciary object is divided into inventory and non-inventory items. The problem is in the stock. Items are defined as changeable and unfixed objects used as objects in a business. Thus by UUJF, fiduciary givers are allowed to divert fiduciary objects in the manner and procedure commonly practiced in trade. The object which becomes the Fiduciary security object that has been transferred shall be replaced by the Fiduciary Giver with an equivalent object. The position of the bank is preferred to creditor as long as collateral exists. It would be the problem if the supplies of the transferred goods are not replaced by fiduciary givers even the proceeds of sale are not used as debt repayment. Does the bank remain preferred creditor when the collateral object is a non-existent inventory item that has been transferred to the buyer? Even the buyer of fiduciary security objects in the form of inventory objects is free from the demands of the bank according to UUJF. This is obviously risky for the bank to accept secured asset in the form of a stock item.
- Fiduciary objects are possible in the form of subsequently acquired receivables based on research I have done that most banks in Indonesia receive collateral. In terms of commercial and flexibility for the bank capital seekers are very helpful but principles of material rights, principle of specialism, principle of publicity and the principle of legal certainty for the position of the bank as a creditor are somehow neglected. Given the collateral in the form of newly subsequently acquired objects resulted in the non-fulfillment of the specification of objects that must be listed on the fiduciary security certificate. This resulted in no legal certainty over which objects are burdened with fiduciary. There is no legal certainty of objects as collateral which puts the bank at stake in the event of the debtor defaults. The execution problem of subsequently-acquired assets emerges when the debtor breach the contract while the collateral in the form of subsequently acquired receivables on the client debtor cannot be collected or under-performing loan, consequently, the bank cannot execute the receivables.

b. Minimizing Pledge or Fiduciary Charges on Trademarks right

Credit or financing distributed by conventional or sharia bank is a majority of productive assets owned by banks, then its quality must be maintained because the business activity cannot be separated from the risk which can disrupt the continuity of bank business. Therefore, bank must manage that risk by applying risk management including credit risk, market risk, liquidity risk, operational risk, law risk, reputation risk, strategic risk, compliance risk. Meanwhile, sharia banks apply additional risks such as yield risk and investment risk. One of the risks closely related to pledge or fiduciary charges on Trademarks right is law risk. Law risk is a risk caused by lawsuits and/or weakness of juridical aspect.

Sharia or conventional banks must apply strict secure measures in order not to cause weakness juridical aspect in accepting trademark as secured object. This must be anticipated considering its important role when debtor defaults. if security imposition is not executed in accordance with the set procedures, it would cause bank loss in terms that bank cannot do the execution towards the secured object because its material rights do not exist and the other loss for the bank is the position of the bank is only concurrent creditor not preferred creditor. This is confirmed by Jean Matthes (2013) that:

> In essence, the first decision to be made is whether the trademark owner (as the debtor under a financing arrangement) is supposed to remain the legal owner of the marks. If so, the lender and the trademark owner must reach an agreement about pledging the marks. If not, they must consider a security assignment of the trademarks to the lender. While some basic exercises – such as due diligence and proper identification of trademarks concerned – do apply to each of these two concepts, the legal and contractual implications differ significantly.

One of the efforts to minimize law risk to pledge or fiduciary charges on trademark is by analyzing it thoroughly submitted by customers. Valuation towards collateral involves type, location, proof of ownership and its legal status. Valuation toward collateral can be reviewed from the following aspects:

a. Economic aspect, it is economic value from objects to be secured

b. Juridical aspect, it assesses whether the objects are qualified as pledge in juridical requirements.

As a research example that I conducted in BMI, accepting trademarks certificate from a restaurant permitted by Directorate General of Intellectual Property Rights of the Ministry of Justice and Human Rights of the Republic of Indonesia as a pledge in financing *Muharabah*[1] and *Musyarakah*[2]contract which customers gain. BMI makes an assessment towards the collateral, that the restaurant trademarks have been registered proven by certificate which was published and officially announced in electronic or non-electronic Official News. Trademarks Certificate contains:

a. Name and full address of the owner of registered trademarks;
b. Name and full address of the attorney in fact, in the application through the attorney in fact;
c. Receipt date;
d. Name of state and date of receipt of initial application using priority rights
e. Registered Trademarks label includes information about kind of colors if it uses any color, and if trademarks use foreign language, except Latin, and/or unusual number used in Indonesia along with its translation in Indonesia, Latin letters and usual numbers used in Indonesia along with the spelling in Latin;
f. date and number of registration
g. class and type of object and/or services that trademarks registered, and
h. expiration date of trademarks

According to Agung Sujatmiko (2008), Trademarks right is a special right given by a state to the trademarks holder to use or given approval to someone to use it. Thus, trademarks right is not automatically given. Those who want it must

[1] "Akad *murabahah*" is a financing Agreement of an item by asserting its purchase price to the buyer and the buyer pays it at a price more as an agreed profit.

[2] "Akad *musyarakah*" is Contract of cooperation between two or more parties for a particular business which each party provides a portion of funds provided that the profits will be divided in accordance with the agreement, while the losses are borne in accordance with the portion of their respective funds.

apply a registration which is obligatory to issue a trademark right. As Amirul Mohammad Nur (2015) stated that a registration is required to get a protection for Trademarks right in Indonesia. Similarly, Rika Ratna Permata (2016) confirmed that Indonesia adheres to the constitutive system in Trademarks right registration system. Registration is an obligation to gain the right unless the state will not give permission to the owner. This means without registering the trademarks, someone will not get a protection.

Besides the registered Trademarks right, BMI must pay attention to the protection period towards the Trademarks right since the law protection has been set for 10 years since the receipt date. As an example, receipt date of application Trademarks right on April 1 2017 then it will be valid until April 1 2027. The protection period can be renewed every ten years continuously as long as the Trademarks right is used on goods or services as included in certificate of Trademarks right and the goods and services are still produced and/or traded. If it is not anymore, the application will be rejected. The holder of Trademarks right can file an application for renewal six months before the expired date and it can still be filed six months after the expired date. This condition is set so the owner will not easily lose the trademark because of the delay in applying for Trademarks right renewal.

Certificate for Trademarks right by BMI is as ancillary not primary security. The primary is still the goods relatively easy in value and in the execution, for instance land rights, vehicles, production machine, and securities. Even though certificate of Trademarks right is only ancillary, it does not mean BMI eliminates the principle of conscience that must be done. BMI still pays attention to receipt date and range of payment which will be given to customer of the facility costs. If it is neglected, it will risk the position of BMI. If the range of payment is not on due yet the protection period is over and there is no renewal and miss the time, the trademarks is no longer valid. It is consequence of ancillary in terms that when Trademarks right is over, the pledge dealing is removed but not the main dealing. If this occurs, it can risk the position of BMI as preferred creditor changing into concurrent creditor.

The position of BMI as concurrent creditor is disadvantaged since they are only secured by general security as has been set in Article 1131 BW, that the security which lies on treasures from the debtor and the right which is owned by concurrent creditor is relative. The right is only enforced by the opposite contract. It will be different if BMI is as preferred creditor; the emerged right is material rights. Material right is absolute and accurate in analyzing the collateral in form of Certificate of Trademarks right.

Certificate of Trademarks right for restaurant by BMI is burdened by the pledge institution not fiduciary security as in BNI. The burden of Certificate of Trademarks right by BMI with pledge arrangement is made by authentic deed. If it is referred to Article 1151 BW, authentic deed is not a must: "That the pledge agreement must be proven by equipment that is allowed to prove the main agreement". It is different from fiduciary that the agreement must be made. Hence the agreement must be made by notarial deed in Indonesia as ruled by Article 5 UUJF jo. Article 2 and Article 3 Government Regulation Number 21 Year 2015 on Fiduciary registration procedure and Fiduciary deed making cost. If it is not made in notarial deed, the registration cannot be performed electronically by fiduciary recipient, agent or the representative as a result of the fiduciary absence and make creditor only as concurrent creditor.

Several important clauses which listed in pledge agreement, they are :

a. Related to trademarks right used by pledgee (pledge giver), unless the default occurs, the pledger deserves the right in relation to third parties and give them the rights as listed in Trademarks right certificate.

   Trademarks right certificate is given by the owner to BMI to be kept securely. It does not mean ownership transfer but unless default occurs, the copyrights still belong to the owner of Trademarks right (pledger). It is in accordance with Article 1152 (1) BW that the pledged item is given to the creditor or third parties. Yet, the owner can still use the rights unless default occurs. In this context, the collateral in terms of certificate functions as proof of ownership.

b. Related to profit and other sharing. Unless default occurs, the pledger has a right to receive any profit and other sharing paid under the name of Trademarks right. However, if the agreement broke, there is no such right and it should be given to the pledgee. The pledgee has a single right to receive and maintain the Trademarks right with its profit.

c. Related to restrictions that must be obeyed by the pledger, he is not not allowed to transfer or burden Trademarks right in form of anything nor manipulate Trademarks right which contradicts to pledgee's interest.
This clause must be agreed as form of protection to BMI as pledgee, although the owner of Trademarks right is (pledger) still allowed to use his copyrights and receive any profit related to the copyrights but the pledger is not allowed to do any unalwful act that harms the pledgee.
This restrictive clause is common in fiduciary deed, pledge deed and hyphotec deed which listed promises that must be obeyed by pledger to prevent unlawful act without written contract from creditor as pledgee. In agreement of financing principle on behalf of a customer who receives financing facility by BMI, it is mentioned that: during the financing period without written agreement from BMI, customer (owner) prohibited to pledge asset which have been pledged based on financial contract.

d. Clause related to dispute settlement. Any breach of contract, pledgee can take any necessary action to protect their rights based on this agreement including sell, transfer, and handover or in other way give every part of copyrights certificate through direct selling, auction or other way allowed in applicable provision.

Parate executie is provided in pledge law, if debitor defaults as ruled in Article 1155 BW. If the parties do not agreed, debitor or pledger does not fulfill their obligation, after the set time or after a warning in case there is no certain period of time, creditor has the rights to sell their asset in front of public convenient with local customs with the given regulation. The purpose is in order to pay debt with its interest using sales result. If the collateral consists of

merchandise or saleable effects in stock exchange, thus it can be sold directly, as long as there are two expert brokers. Since the Article 1155 BW is a governing rule, all of the parties are free to do anything as long as it does not violate Article 1155 BW. Parate executie in pledge appear because law does not need to be agreed. No executive title necessary, the creditor can sell the secured items without any court or bailiff help.

Meanwhile execution of fiduciary deed as governed in Article 15 and Article 29 UUJF stipulate that bank in settling credit does not need to submit a lawsuit to district court. Yet, creditor can choose one of three ways of execution namely parate executie, execution with executive title or privately sale execution based on agreement between fiduciary giver and recipient which is beneficial for both parties. Among the three ways, the most effective execution for Trademarks right is privately sales execution that has to meet the following.

1. There is an agreement between fiduciary giver and recipient, therefore there is a good will from fiduciary giver, owner of Trademarks right.
2. Sale and purchase are done after one month starting from written notice by fiduciary giver and recipient to interest parties.
3. And announced at least on 2 (two) newspapers circulated in related region.

If there is a transaction of Trademarks right, several steps will be taken as a protection for bank and the buyer of coprights including an authentic sale agreement made between the owner of Trademarks right and buyer witnessed by bank to ensure sale and purchase agreement occur. Money from the selling is used for loan repayment. If there any surplus, it would be given to the previous copyright owner. Having completed repayment of credit bank, the fiduciary giver requests right conveyance to HKI Directorate General by submitting statement request of rights conveyance typed in two duplicates by applicant or his attorney/agent who registered as HKI consultant in Directorate General. The statement typed in Bahasa Indonesia addressed to copyrights director, Ditjen HKI, ministry of justice, HAM RI, which clearly contains :

1. Name of Trademarks right and its registration number.

2. Name and complete address of the Trademarks right owner which was registered as previous owner.
3. Name and address of the new owner.

By enclosing:

- Photocopy of both parties identity;
- Photocopy deed of the company and its change;
- Proof of conveyance of rights, in form of sales and purchase agreement, letter of endowment, legal inheritance certificate, last will, original or photocopy which has been legalized by official authorized;
- Statement of copyright use from the rights recipient and stamped;
- Special power of attorney if the request of Trademarks right conveyance submitted through consultant HKI in Directorate General by mentioning copyrights and the number which will be taken over and stamped;
- Proof of payment of rights conveyance application, convenient with current goverment regulations;
- Photocopy of Trademarks right certificate;
- Documents of rights conveyance which uses foreign language must be translated first into Bahasa Indonesia.

After request of rights conveyance, there is still another procedure which should be passed namely removal procedure of fiduciary security application from the list of fiduciary agreement by fiduciary recipient, attorney, or his representative. It must be noticed to ministry within 14 days starting from the date of fiduciary security removal. The removal can be conducted by notary public electronically and printed statement telling that fiduciary security is out of date. If fiduciary recipient, attorney and his representative do not announce the removal of fiduciary security, it can not be registered again which means it cannot be used as fiduciary security objects.

It is different from simple execution, which is after the execution of copyrights, the sales result is used for loan repayment from debitor so the next step is request for copyrights conveyance to Directorate General HKI with

submitted statement request of Trademarks right conveyance typed in two duplicates by applicant or attyorney registered as HKI consultant in Directorat general in Bahasa Indonesia adressed to Director of Trademarks right, HKI Dirjen, ministry of justice, HAM RI. In pledge, it is unnecessary to remove pledge public register as in fiduciary security since there is no regulation of registration so the pledge agreement will be automatically deleted according to the nature of accesoire agreement.

Conclusion

From the research that Ihave conducted, pledgeis more advantageous to make copyrights as collateral for its simple and efficient mechanism rather than fiduciary. There are several advantages of pledge which related to cost of security deed, imposition deed cost, and resulted to material rights after the execution from those two secured assets.

If fiduciary requires cost to make fiduciary deed and electronic registration cost burdened to debitor, pledge does not require obligation of authentic pledge agreement and no regulation of registration, in returns, the cost can be minimized. Related to material rights, fiduciary needs to be registered electronically to fiduciary office meanwhile, in pledge, the requirement of material rights with pledge objectis given to the third parties. Futhermore, fiduciary has an obligation to remove fiduciary from fiduciary list while pledge is not.

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Legal Risks On The Financing Of The Security Object In The Form Of Certificate Of Trademark Rights In Sharia Banks

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Abstract:*Most of the assets of sharia banks are financing. On one side is a source of income the largest but also as a source of the greatest business risk too, so that the financing is mustbe protected its quality. The legal issue analyzed is what efforts undertaken by sharia banks to deal with legal risks arising from financing the objects of collateral in the form of trademark rights certificates. The approach that is used is the statute approach, conceptual approach and case study. Trademarks which a form as Intellectual Property Rights (IPR) are classified as intangible, movable objects. The trademarksqualify as something that can be used as bank credit collateral. Trademarks as intangible objects in sharia banking are not used as main collateral for credit because for the assessment of the trademark as a guarantee requires specific skills in the evaluation of IPR as collateral, unlike the collateral object is land rights or motor vehicle which is relatively easy to assess.*

Keywords: legal risk, trademark, collateral, sharia banks.

Introduction

Islamic Bank in conducting its business activities should be based on the prudential principle which aims for Islamic banks in a healthy condition and to ensure the safety of public funds. One of the activities undertaken by sharia banks is channelling funds in the form of financing. Islamic banks will channel each financing to customers would not be separated from the stages as well as the loan process in conventional banks. There are four (4) phases, as follows:

1. The sharia bank decides the stage before the financing, the stage of the bank consider the application of financing of prospective customers receiving the facility, this stage is called the stage of financing analysis.

2. The stage after financing shall be decided upon by the Islamic bank and then casting the decision into the financing agreement and the implementation of the binding of the collateral for this financing. This stage is called the stage of the financing documentation.

3. Both parties sign the stage after the financing agreement and the documentation of the binding of the financing collateral has been completed and as long as the financing is used by the receiving customer of the facility until the term of the financing has not expired. This stage is called the stage of supervision and security of financing.

4. The stage after financing becomes problematic that is rescue and financing billing step.

Steps (1), (2) and (3) are preventive stages or stages of prevention for sharia banks so that financing is not a problem, while repressive (4) after financing becomes problematic.

Sharia banks in channellingfinancing are obliged to undertake ways that do not harm Islamic banks and the interests of customers who entrust their funds. The risk of non-performing financing can be minimized by one way of performing a financing analysis often referred to as the 5C analysis. The financing analysis is the most important and professionally implemented preventive stage so that it acts as the first filter in the bank's effort to counter the danger of problem financing. The feasibility of financing is the focus and the most important thing in making financing decisions because it determines the quality of financing and smooth payment.

The stage of financing analysis is a study to determine the feasibility of a proposed financing proposed by the customer. Through the analysis results can be known whether the business is feasible in the sense of financed business is believed to be a source of return from financing provided, the amount of financing as needed both in terms of amount and use and precisely the structure of financing, thus securing the risks and profitable for the bank and customers. In analyzing the financing must be considered the willingness and ability of customers to fulfil their obligations as well as the fulfilment of aspects of Sharia provisions.

One important element of the 5C analysis is the presence of collateral. Collateral existence is significant in financing because the funds used by sharia banks to channel funds are depositors and investor customers, so the existence of collateral is to guarantee payment of financing in case of problem financing. Sharia banks in providing financing are required to undertake ways that do not harm the bank and the interests of its customers who have entrusted their funds. In addition, every bank has to continue to maintain its health and maintain community trust in it.

One object of guarantee received by PT.Bank Muamalat Indonesia Jakarta as the object of guarantee is the Right to Trademark. Based on the above description then the issues to be discussed, namely the legal risk analysis on the financing guaranteed by the brand certificate in Islamic banks.

Method and Materials

This research methodology employs normative or legal approach based on the characteristic of law study. This includes descriptive and presciptive legal methodology. So, the methodology and procedure of social science can not be employed for law study. This is related to academic research. That is to say, this research is to differentiate from practical analysis that address the difficulty of practical law. The research methodology employ statute approach, conceptual approach. The law sources of this research consist of primer origins and secondary sources. The primer sources originate from all provisions related to the topic. This includes The Act of Sharia Bank, No. 21 of 2008, The Act No. 20 of 2016 on Marks and Geographical, The Act No. 42 of 1999 the fiduciary, Burgerlijk Wetboek and all provisions that regulate. Secondary origins come from the view of the scientist that could be seen in the literature and journal.

Result and Discussion

a. Legal Risk of Financing in Shariah Bank

Business activities undertaken by sharia banks carry risks, therefore sharia banks are required to apply risk management as stipulated in Article 38 and Article 39 of the Sharia Banking Law that Sharia Banks are required to apply risk management, customer recognition principles, and customer protection. Bank Syariah and UUS shall explain to the Customer regarding the possibility of risk of loss related to Customer's transaction through Bank Syariah.

In Bank Indonesia Regulation Number 13/23 / PBI / 2011 concerning the Implementation of Risk Management for Sharia Commercial Banks and Sharia Business Units, there are 10 (ten) kinds of risks that exist in sharia banking business activities, as regulated in Article 5, namely:

a. Credit Risk;
b. Market Risk;
c. Liquidity Risk;
d. Operational Risk;
e. Legal Risk;
f. Reputation Risk;
g. Strategic Risk;
h. Compliance Risk;
i. Rate of Return Risk;
j. Equity Investment Risk.

One of the risks which is the discussion in this research is legal risk. This risk arises, among others, due to the absence of legislation in favor of or weakness of the engagement, such as the non-fulfillment of the terms of contract validity or imperfect collateral binding. Legal risk in financing is very closely related to credit risk (financing). The impact of legal risk for sharia banks is problematic financing. One of them is due to the weakness of the binding of the guarantee, that is, the imperfect binding of the assurance that the sharia bank will find it difficult to execute the collateral in case of credit risk (financing). Therefore, legal risk and credit risk (financing) must be identified, measured, monitored and controlled.

Risk is the potential loss due to the occurrence of a particular event (events). While Risk Management is a set of methodologies and procedures used to identify, measure, monitor, and control Risks arising from all business activities of the Bank. Legal risk in financing is closely related to Credit Risk. Credit Risk is Risk due to

failure of the customer or other party in fulfilling obligations to Bank in accordance with the agreed agreement.

One effort to minimize risk by means of credit analysis or financing analysis. Credit analysis is a preventive effort that must be done by the bank in a professional manner based on crediting procedures owned by the bank. Credit analysis can serve as the first filter in the bank's business to counter the risk of non-performing loans. The main purpose of credit analysis activities is to assess the belief in the ability and capability of the borrower's clients to settle their obligations in accordance with the agreement is an important factor to be considered by the bank. To obtain such confidence, before granting credit, the bank shall exercise a careful assessment of the nature, abilities, capital, collateral and business prospects of a prospective borrower or otherwise known as a 5 "C.

One of the 5 c elements, is collateral. In general, the economic conditions fulfilled from the credit guarantee as presented by Teguh Pudjo Muljono, namely:[1]

a. Have economic value (tradable) in general and free.

b. The value must be greater than the amount of credit granted.

c. The object of the warranty should be easy to market without having to spend a significant marketing cost.

d. The value of the collateral object must be constant and it would be better if the value is also likely to increase in the future.

e. The condition and location of the guarantee object is quite strategic.

f. Physically the object of the guarantee is not fragile damage or other causes that will reduce its economic value.

g. The object of such guarantee has economic benefits within a relatively long period of the credit period to be guaranteed.

The juridical requirements to be met of a guarantee object are:

a. In the case of the property of a prospective borrower, where the third party belongs, it shall be ensured ownership and binding.

b. In the power of the prospective debtor.

c. It is not in dispute.

d. Have valid proof of ownership.

e. The object of the guarantee is free is not in a bond of guarantee on the other party.

[1] Teguh Pudjo Muljono. Credit Management for Commercial Banks. Yogjakarta: BPFE, 2001

Credit guarantee that has a perfect juridical value will be better than the guarantee that high economic value of therapy does not meet the requirements of juridical adequate. Therefore, such a guarantee would be difficult to burden it with the guarantee agency and would be difficult in its execution. The purpose of the material guarantee is to grant the right of verhaal (the right to request the fulfillment of the receivables) to the creditor, to the proceeds of the sale of certain objects from the debtor to the fulfillment of the receivables.

In Article 1 point 23 of the Banking Law is granted a collateral definition, which is an additional guarantee submitted by the Debtor Customer to the bank in the framework of granting credit or financing facility based on Sharia Principles. In the explanation of Article 8 of the Banking Act, it can be concluded that there are 2 (two) types of collateral:

a. The principal collateral is the goods, projects, or claim rights financed by the credit concerned.

b. Additional collateral is objects that are not directly related to credit-financed objects.

The provisions of Article 8 of the Banking Act and its explanation expressly state that the bank's orientation in granting credits prioritizes the feasibility of the project or the business of the customer, rather than collateral oriented. The banking institution is different from the Pawnshop institution whose orientation is collateral oriented, as long as the customer has collateral which according to the Pawnshop rating is sufficient then the credit will be disbursed. While the bank in providing compulsory credit has a belief based on a deep analysis of the intention and ability and ability of debtors to settle debts. The confidence of the bank is formed from the results of a careful assessment of the nature, capability, capital, collateral and business prospects of the debtor customers, known as the '5C' analysis. Collateral is an element of the bank's appraisal of a loan application filed by a prospective customer, although the collateral is not the first element but its existence is important as the collateral plays a role in the event of problem loans.

The imposition of the object concerned shall be subject to the type of guarantee body which is determined by the type of object to which the object of warranty is, that is:

a. The guarantee institution as regulated in the BW is a Pledge and Hypoteek, if the object as the object of collateral in the form of a tangible or tangible moving object, BW shall be stipulated in Article 1150-1160 BW. As for the immovable object in the form of a marine vessel with a weight of 20 m3, the guarantee institution used is a Hypoteek guarantee institution set forth in Article 1162-1232 BW.

b. Guarantee Institution outside BW, namely Law Number 4 Year 1996 concerning Land and Property Rights related to land (UUHT) and Law Number 42 Year 1999 concerning Fiduciary Security (UUJF).

Surely the existence of collateral is a prerequisite to minimize the risk of creditors in lending. As an anticipative step in withdrawing credit or financing that has been given to the debtor, the guarantee should be considered two factors, namely:

1. Secured, meaning credit guarantee can be held formal legal binding, in accordance with the provisions of law and legislation. If there is later a default from the debtor, then the bank has the juridical power to execute the action.

2. Marketable, meaning that the guarantee if it is to be executed, can be immediately sold or cashed to repay all debtor's obligations.

In addition, collateral in bank credit must meet certain requirements, in relation to credit assessment or analysis of collateral there are several concepts or requirements to determine whether or not a collateral is feasible. In the banking world today known as the concept of "MAST" to assess the condition of collateral, that is:

1. Marketability, meaning that the collateral / guarantee is easy to market.

2. Ascertainability of value, meaning that there is a certain price standard (value) for the collateral.

3. Stability of value, meaning that the collateral / guarantee that has stability value in the future.

4. Transferability, meaning that the guarantee is easy to transfer.

b. Trademark As Collateral

Referring tothe provisions ofArticle499 BW, the meaning of zaak or object in BW perspective is not only in the form of goods (goed), butalso including theintangiblesensethatobjectsin the form ofcertain rightsofa person. This means thatthe objectofpropertycould haveproperty rights(ownership) orintellectual property rightsas a translationof theIntellectual PropertyRight.

According to Article1 of The Act No. 20 of 2016 on Marks and Geographical, the meaning of Brand is a sign that can be displayed graphically In the form of pictures, logos , names, words, letters, numbers, arrangement Color, in the form of 2 (two) dimensions and / or 3 (three) Dimensions, sounds, holograms, or any combination of 2 (two) Or more of the element to distinguish the goods And / or services produced by a person or entity Law in goods trading activities and / or services.While the definition oftrademarkare the Marks used on Goods traded by a person or some people together or legal entity to distinguish with other similar items.

The Right of Trademark is an exclusive right granted by the state to the owner of the mark for a certain period of time by the use of the mark itself or granting permission to the other party to use it through a license agreement, including also

making the brand certificate as the object of warranty. The rights of trademark as intangible asset can qualify as collateral because:

a. Trademark has economic value;
b. Trademark Can be transferred by a written agreement.

In addition to theabovetwo conditions, the other requirementsthatmust be met, namely:[2]

a. The financial statements of the company of trademark owner to know that the brand has value or not.
b. The trademark is a famous brand. Is meant by the famous trademark that has been recognized by the public (consumers).
c. The right of trademark can be used as a collateral when these trademarks registered and the certificate of mark shall be issued by the Minister since the mark are listed. The trademark is protected by law for a period of 10 years from the filing date and the term of protection may be extended as provided by Article 35 The Act No. 20 of 2016 on Marks and Geographical.

Similarly,proposed byCitaCitrawindaNoerhadithatas the intangible and movable objectIPRhasthe prospecttobe used asloan collateralbecause:[3]

- IPReconomic valuecanbe calculatedbased on market prices;
- Canbe sold;
- Can be licensed;
- Can beswitched/transferred, either in whole orin part(inheritance, grant, will,writtencontractorother causesthatjustifiedby thelegislation).

According to Ida Madieha Azmi and Engku Rabiah Adawiyah Engku Ali that trade mark qualify to be given as a form of collateral, several practical steps would have to be undertaken by the parties. Thus, it was recommended that the relevant security document includes covenant that the registered proprietor will:

a. use the trade mark in its refistered form;
b. control all authorized users of the trade mark;
c. protect the trade mark only as a trade mark and not permit any conduct which may lead to the tarde mark becoming descriptive of the goods and services;

[2] Sujatmiko, Agung and Trisadini, "Rights Trademark Certificates of as objects of loan collateral", research report, RKAT faculty of law, Airlangga University, 2015.
[3] Cita Citrawinda Noerhadi, "Aspects of Legal Had a very significant correlation with the status of IPR as collateral for credit," *Preparation Workshop On Regulation of Intellectual Property Rights as a Tool Collateral In the National Legal System*, Jakarta 26 s / d March 28, 2014.

d. take all necessary steps to change and to consent to the adoption by any assignee of the mark of any business name or corporate name which includes the marks; and

e. include in the secured property all associated marks to enable compliance with section 37 of the act.[4]

The Right to Trademark as an immovable moving object enables the burden of pledge and fiduciary. When referring to pledge object and fiduciary guarantee object. In Article 1150 BW it is affirmed that Pledge is a right earned by a creditor of a moving good. Likewise in Article 1 point 2 of Law Number 42 Year 1999 on Fiduciary Guaranty (UUJF) stated that Fiduciary Guaranty is the right of guarantee for tangible object either tangible or non material. Based on these provisions, in the practice of conventional banking and sharia banking, the two institutions appear to be burdened to impose the Right on Trademark as the object of guarantee.

However, both institutions have different characteristics, especially in the possession of objects. Mastery of objects in pledge to creditors or third parties while in fiduciary mastery of objects fixed to the owner of the object. In fiduciary warranty, the object remains to the owner of the object because the object is used as an object of capital used by the owner to support its business activities. While on the pledge, the object must be alienated from the owner of the object (giver of the pledge) and even threatened his unlawful pledge when the object is left in the power of the debtor or the giver of the pledge.

In addition, on the pledge there is no regulation on the registration of the pledge object, the liens are born at the time when their pledge goods are handed over to creditors or third parties as defined in Article 1152 (1) BW, known as inbezitstelling patterns. On pledge, the principle of publicity is not meaningful to be registered in the general register, but the principle of publicity on the pledge, that is by alienating objects from the owner to handed over to creditors or third parties is the embodiment of the principle of publicity. Therefore, on pledge does not appear registration fee. Unlike fiduciary guarantees, the birth of fiduciary security depends on the obligation to register objects charged with fiduciary collateral to the registration office of Law and Human Rights (Article 11 UUJF). Fiduciary security was born on the same date as the date of fiduciary guarantee in the fiduciary register (Article 14 paragraph (3) UUJF). Therefore, the birth of fiduciary security depends on the obligation to register it appears the registration fee to be paid by the debtor.

c. Execution of a trademark as an Collateral

Parate execution is an execution that can be done by the creditor when the debtor wanprestasi. On the pledge arranged in Article 1155 BW. Parate execution in the pledge is born because the law does not need to be promised. There is no need

[4] Ida Madieha Azmi and Engku Rabiah Adawiyah Engku Ali, "Legal Impediments to the collateralization of Intellectual property in the Malaysian Dual Banking System", *Asian Journal of Comparative Law*, Volume 2, 2007.

for an executory title, the creditor may execute the sale of a plegde without seeking court assistance, not necessarily a bailiff's hand. Creditors sell pawn objects publicly on the basis of their own power. It's as if it's selling her own thing. This always-ready execution right is in the name of "paraat" which means that the right is ready at the hand of the creditor to be executed. creditor based on parate execution sell pawn objects as if selling their own items, parate execution is a means of making repayment simplified and simplified.[5]

While in fiduciary is regulated in articles 15 and 29 UUJF. The provisions on the execution of the object of fiduciary guarantee that banks in completing the credit does not have to file a lawsuit to the court, but the creditor can execute three (3) ways, namely through separate execution: execution with executorial title: execution with sales under the handmade under the agreement Giver and Receiver Fiduciary if in this way can be obtained the highest price that benefits the parties.Of the three ways mentioned above, the method of execution that is more effective for brands is to execute the sale under the hand. However, the sales under the hands to do if they meet the requirements, namely:

a. There is an agreement between the giver and the recipient fiduciary, meaning, in this case, there is the good faith of the giver fiduciary, ie the owner of trademark rights.
b. Implementation of sales is made after the expiration of one (1) month since notified in writing by the Giver and Receiver fiduciary or to the parties concerned.
c. And be announced in at least two (2) newspapers circulating in the area concerned.

Whenever there is a buyer for the brand rights,then do the steps as protection efforts for the bank and the buyer the right to the trademark, which is done in an authentic purchase agreement between the owner of the brand with the buyer which was witnessed by the bank to ensure happening purchase agreement. The money from the sale by the owner of trademark rights used as loan repayment. When there is excess the excess is the right of the owner of the old trademark rights.
After the repayment of bank loans, then the next step is to request the transfer of the right to DG IPR and submit the Application for transfer of rights Brands typed in two (2) copies to the applicant or authorization shall be registered IPRs in the Directorate General of the Indonesian addressed to the Director of Brand Directorate General of Intellectual Property rights, Ministry of Law and human rights, to contain clearly about:

a. Name Brand and Trademark registration number petitioned the transfer rights;
b. The name and full address of the owner of a registered trademark in the name of the old
c. The name and address of the new owner.

By attaching:

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[5] Teddy Anggoro, "Parate Eksekusi: The Right of Creditor Who Overrides Formal Law (A Basic and Deep Understanding)", *Jurnal Hukum dan Pembangunan*, Tahun ke-3, Nomor 4, Oktober-Desember 2009.

- Copy of the identity of both parties;
- Copy of the deed of the company and amendments;
- Proof of transfer of rights could form letter purchase agreement, the grant letter, letter of determination of heirs, wills, original or copy of which has been legalized by the competent authority;
- A letter of use of the mark by the assignee and stamped;
- Special Power of Attorney if the request for the transfer of trademark rights posed by the power shall be registered in the Directorate General of Intellectual Property Rights by stating the brand and the number to be diverted over sufficient duty;
- Proof of payment of the application fee for transfer of rights in accordance with applicable government regulations;
- Copy of certificate of the brand;
- The transfer of documents in foreign languages must be translated in advance in Indonesian.

Request transfer of rights was accompanied by the submission of a list the elimination of Fiduciary Fiduciary guarantees made by the recipient fiduciary, power or his representative, in this case, carried out by a notary online, and then will be issued a certificate stating that the certificate is a no longer valid fiduciary.

Where the debtor at the same fiduciary giver is not in good faith, the manner of execution can be carried out by the bank using separateexecution or with the executorial title, the Fiduciary Certificates that include the words "BASED ON TIIE JUSTICE BY ONE ALMIGHTY GOD". Fiduciary Certificates have executorial power equal to a court decision which has obtained permanent legal force. This execution less effective way for banks because it is done through auction sales, while the object of the auction for a brand based on previous research has not been done.[6]

Conclusion

Trademark as intangible, movable assets which qualify as objects of credit guarantees, which have economic value and are transferable. In addition to theabovetwo conditions, the other requirementsthatmust be met, namely:The financial statements of the company or trademark owner to know that the brand has value or not. The trademark is a famous brand. Is meant by the well-knowntrademark that has been recognized by the public (consumers).The right of trademark can be used as a collateral when these trademarks registered, and the certificate of mark shall be issued by the Minister since the mark are listed. Law protects the trademark for 10 years from the filing date, and the term of protection may be extended as provided by Article 35 The Act No. 20 of 2016 on Marks and Geographical. The Right to Trademark as an immovable moving object enables the

[6] IrartoPurwasidarma, "Handing in Fiduciary Trademark to ensure the provision of creditfacilities",repository.ugm.ac.id/index.php?mod=penelitian_detail&sub=PenelitianDetail&act=view&typ=html&buku_id=51373. accessed on February 10, 2016.

burden of pledge and fiduciary. However, both institutions have different characteristics, especially in possession of objects. Mastery of objects in a pledge to creditors or third parties while in the fiduciarymastery of objects fixed to the owner of the object. The pledge there is no regulation on the registration of the pledge object, the liens are born at the time when their pledge goods are handed over to creditors or third parties. Unlike fiduciary guarantees, the birth of fiduciary security depends on the obligation to register objects charged with fiduciary collateral to the registration office of Law and Human Rights.

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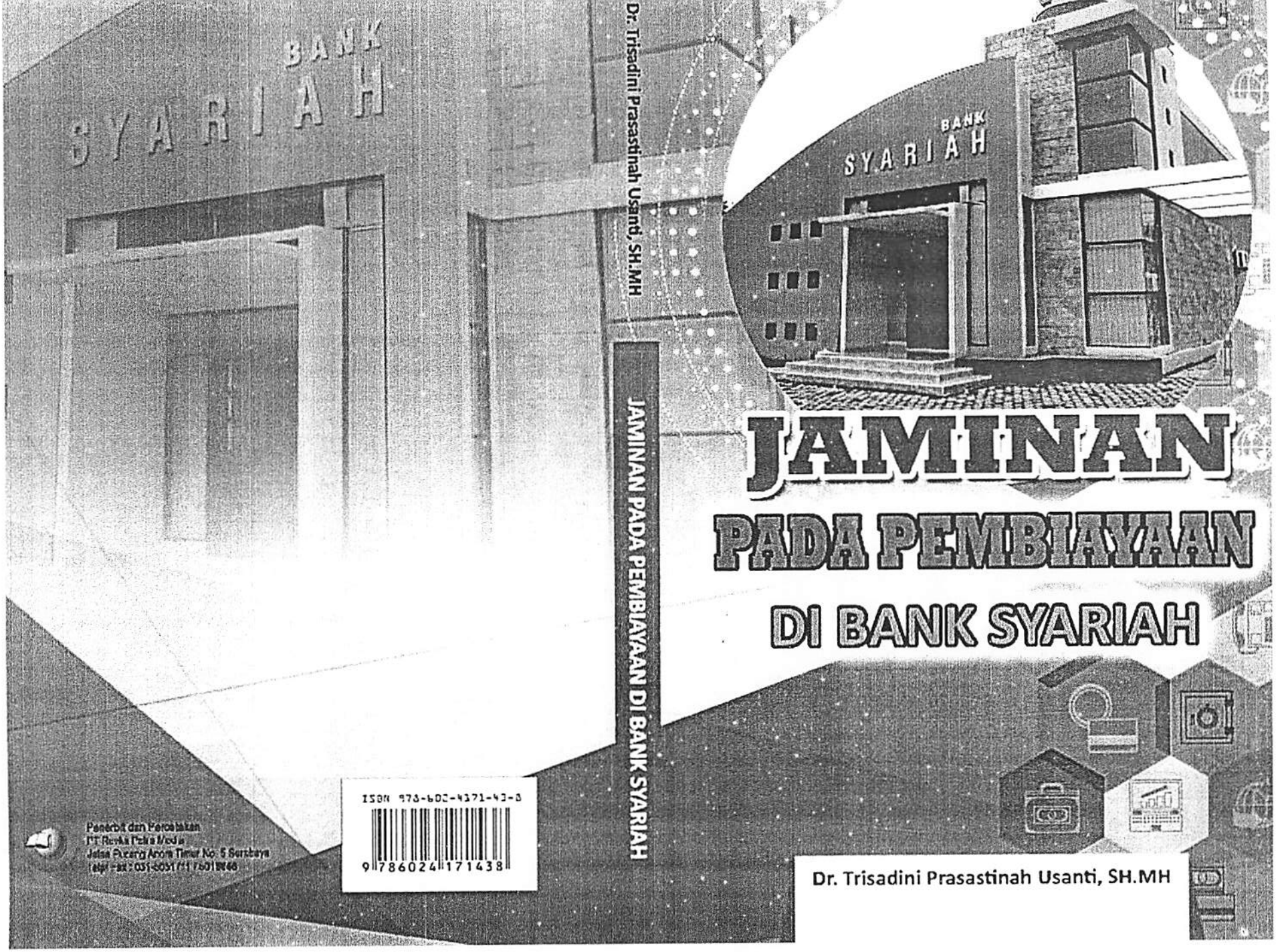

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