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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.

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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.

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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;

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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]

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

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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.

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.

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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.

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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), but also including the intangible sense that objects in the form of certain rights of a person. This means that the object of property could have property rights (ownership) or intellectual property rights as a translation of the Intellectual Property Right.

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.

[2] Sujatmiko, Agung and Trisadini, "Rights Trademark Certificates of as objects of loan collateral", research report, RKAT faculty of law, Airlangga University, 2015.

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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;
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

[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.
[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.

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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 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,

[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.

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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:

- 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

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title, the Fiduciary Certificates that include the words "BASED ON THE 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 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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[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.

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