

CHAPTER II

GENERAL OVERVIEW OF SHARIA COMPLIANCE FULFILLMENT ON MUDHARABAH FINANCING PERFORMANCE THROUGH ASYMMETRY INFORMATION

A. *Mudharabah* Contract as a Product of Islamic Banking

1. Islamic Banking under Indonesian Law

Banks are one of the institutions that have an important role in a state because banks as financial institutions have a function to collect and distribute funds to the society with the principles of equity, in the name of economic growth and national stability towards improving people's welfare. Banks can also be an indicator of whether healthy or not a state in running their government, especially in the economic field, whereas, a major impact of an economic system adopted may have a direct impact to the society.

In Islam, the word bank as a financial institution has never been explicitly mentioned in the Qur'an, but if what is meant is something that has elements such as structure, management, functions, and rights and obligations, then they are referred to, such as *zakat*, *shadaqah*, etc. that has a connotation of functions carried out by a particular role in economic activity. On another hand, there is also a financial institution known as *Bait Al-mal* (house of funds) where during the prophetic era, *Bait Al-mal* was used as a storage place³⁴. Some Islamic economists argue that *Bait Al-mal* is a kind of central bank that exists today, but some argue that *Bait Al-mal* is a kind of finance minister or state

³⁴ Muhammad Ridwan, *Konstruksi Bank Syariah*, Yogyakarta: Pustaka SM. 2007. page 5.

treasurer.³⁵ It also became one of the backgrounds related to the implementation of the Islamic economic system in the modern age.

Although Indonesia is not the first country to implement an economic system based on Islamic principles, but along with the development of knowledge in the field of banking that occurred in Indonesia as an effort to achieve national development as mandated by the Pancasila and the 1945 Constitution of the Republic of Indonesia and supported by public demand for a complex economic system to meet the needs. Then triggered by demands from society to implement an economic system that is truly based on the values of Islamic teachings, considering that the majority of Indonesia's population is Muslim.

Therefore, to implement the banking system by the demands of society, Islamic banking is considered to be the right solution. Islamic banking is the banking system that is applied based on Islamic values and free from things that are forbidden by Allah and the Prophet Muhammad was based on the Qur'an and Hadith to avoid usury system that is applied to the Conventional Banks.³⁶

The development of Islamic banking in Indonesia initially manifested in the thinking of various groups such as community leaders, religious leaders, academics, practitioners of economics, as well as the full support from the Indonesian government³⁷ so that in 1991 was born the first Islamic bank in Indonesia, Bank Muamalat Indonesia. At the time of its founding deed made, initial funds collected around 84 billion rupiahs. Furthermore, on November 3, 1991, raised the initial funding of Rp. 106,126,382,000. With initial capital

³⁵ *Ibid*, h.6

³⁶ Muhammad Firdaus N.H, *Konsep dan Implementasi Bank Syariah*, Jakarta: P.T Renaisan, 2005, page 20.

³⁷ Muammar Arafat Y, *Aspek Hukum Perbankan Syariah dari Teori ke Praktik*, Yogyakarta: Deepublish, 2018. page 10.

accumulation, the Bank Muamalat Indonesia is officially established on March 1, 1992.³⁸

Islamic banking in Indonesia is regulated under Law No. 7 of 1992 concerning Banking and supported by various additional regulations made by Bank Indonesia in the form of Bank Indonesia Regulation (known as PBI) which is also the basis for the establishment of Bank Muamalat Indonesia and followed by the Bank Perkreditan Rakyat Syariah. As time goes by it turns out these two institutions are considered unable to touch the lower level of society.

Law No. 7 of 1992 has not yet regulated Islamic banking based on profit-sharing in detail and is separate from conventional banks based on interest. The law is considered to give less space for the development of Islamic banking following sharia principles because the unification of the legal basis applies even though the two banks have different nature and basis for the application.

This led to amendments to the law No. 7 of 1992 into Law No. 10 of 1998, which explicitly mentions the possibility of conventional banks to establish Islamic business units that showed that Indonesia adheres to the dual banking system³⁹, a dual banking system consisting of Islamic banks and conventional banks aimed at providing alternative banking services to society.

Based on the explanation above, we can conclude that the Islamic banking system was developed with the aim⁴⁰.

³⁸ *Ibid.*

³⁹ Arivatu Ni'mati Rahmatika, *Dual Banking System di Indonesia*, [website], 2014, <http://ejournal.kopertais4.or.id/mataraman/index.php/tahdzib/article/view/2918/2157>, (accessed October 13, 2019 time 15:26 WIB)

⁴⁰ Nofinawati, Perkembangan Perbankan Syariah di Indonesia, *JURIS*, Vol 14 No. 2, 2015. page 172.

1. As an alternative to meet the needs of banking services to people who avoid the concept of interest;
2. Open financing opportunities for business development based on the principle of partnership which means there is a mutual investor relationship;
3. Meeting the needs of services in the banking sector that limits unproductive speculative activities and also financing aimed at businesses that pay more attention to the moral element.

Until July 16, 2008, the enactment of Law No. 21 of 2008 into law which fully regulates Islamic banking. The reason behind the enactment of these laws is because the previous legislation still not considered specific and less accommodates the characteristics of Islamic Banking operations, whereas, the growth of Islamic Banking business volume is growing rapidly.⁴¹ This law comes as a solution to the existence of previous Islamic banking remains uncertain given the legal basis of Law No. 7 of 1991 which was later changed to be Act No. 10 of 1998 only mentions explicitly and there is no real separation between Islamic banking and conventional banking. In this law, there are also articles concerning sharia compliance and Islamic principles that must be obeyed by Islamic banking in carrying out bank operations.

2. Advantage and Disadvantage of Islamic Banking

Nowadays, an Islamic bank is not strange anymore because the performance of Islamic banking is starting to be felt by the public. It was proven when the monetary crisis occurred in 1998 and 2009, many conventional banks

⁴¹ Indonesian Law of Islamic Banking No. 21 of 2008.

were affected, so they went bankrupt, while Islamic banks were more stable and could survive and continue their development.⁴²

It shows the advantages of the Islamic banking system were implemented in Indonesia. This is because on every transaction in Islamic finance must be based on the underlying assets and also prioritize the principle of efficiency, justice, togetherness. Islamic banks are also more independent in determining the profit-sharing policy, pricing for profit-sharing banks is based on an agreement between *mudharib* and *sahibul maal* following the type of savings and the period (will determine the size of the portion of the revenue to be received), Islamic banks are relatively easier respond to government policies, and avoid money laundering practices.⁴³

But that does not mean there are no weaknesses that are owned by Islamic banking, among others, that is sometimes too prejudiced to all customers and assume that everyone looks honest and trustworthy, in calculating the profit-sharing method is something complicated so that the risk of miscalculating potential is greater than potential conventional banks, mistakes in project appraisal can also cause greater losses than conventional banks, products from Islamic banks also cannot accommodate the needs of the community and are less competitive because the management of Islamic banks tends to adopt conventional banking products, and finally the community's understanding is less the operational activities of Islamic banks.⁴⁴

⁴² No Author, *Menkeu Bambang: Perbankan Syariah Lebih Tahan Menghadapi Krisis*, [website], 2015, <https://finance.detik.com/moneter/d-2886801/menkeu-bambang-bank-syariah-lebih-tahan-menghadapi-krisis>, (Accessed 14 October 2019 time 22:26 WIB).

⁴³ Ramlan Gumilang, *Transaksi Bisnis dan Perbankan Internasional*, Jakarta: Salemba Empat, 2007.

⁴⁴ Cik Basri, *Penyelesaian Sengketa Perbankan Syari'ah di Pengadilan Agama dan Mahkamah Syar'iyah*, Jakarta: Kencana Prenada Media Grup. 2009.

The fundamental difference between the working system of Islamic banking and conventional banking is also the reason why Islamic banking is more stable in carrying out its bank operations. Mentioned as follows:⁴⁵

1. Contract and Legality Aspects

Islamic banking in carrying out its operations is based on Islamic law and positive law, whereas conventional banking only uses positive law as the main source.

2. Dispute resolution institutions

If in carrying out economic activities, which then conflicts between the bank and the customer, then Islamic banking will resolve it in BASYARNAS (National Sharia Arbitration Board). However, if this happens to conventional banks, it will be resolved at BANI (Indonesian National Arbitrage Agency).

3. Organizational structure

Islamic banking is established and implemented based on sharia principles which are controlled by DSN (National Sharia Board) and DPS (Sharia Supervisory Board) which are not found in conventional banks.

4. Operational principles

Islamic banking emerged as an alternative to the banking system that avoids the interest system, so in carrying out its economic activities Islamic banking is based on the principle of profit-sharing, buying and selling and leasing.

⁴⁵ Mardani, *Aspek Hukum Lembaga Keuangan Syariah di Indonesia*, Jakarta: PRENADAMEDIA GROUP, 2015.

5. Purpose

In Islamic banking, it is known as *Qardh Hasan*⁴⁶ which means good loans, these loans are examples that the purpose of Islamic banking is not solely for profit but also *Falah* (material and spiritual prosperity). Whereas conventional banking tends to get as much profit as possible.

6. Customers Relationship

In Islamic banking, customer relations are known as partnerships, whereas in conventional banking it is commonly called debtors and creditors.

3. Principles of Islamic Banking

After the enactment of various regulations that could support the implementation and provide a legal basis also certainty in Islamic banking operations following the Islamic principles, Islamic banks began to show their existence in the Indonesian banking industry. Islamic banking in Indonesia adheres to several principles in carrying out its economic activities, including:

1. Economic Democracy Principles

This principle is a follow up of the mandate of Pancasila and the 1945 Constitution in the Chapter on National Economy and Social Welfare which aims to implement the national economy following democratic values to the welfare of society.⁴⁷ This principle is not only

⁴⁶ *Ibid*

⁴⁷ The principle of Economic Democracy is contained in the 1945 Constitution Chapter XIV concerning the National economy and Social Welfare as a result of the Fourth Amendment to the 1945 Constitution.

applied by conventional banking, but also in the Islamic banking system.

What is meant by the principle of economic democracy is:⁴⁸

- a. Justice;
- b. Equity;
- c. Togetherness;
- d. Efficient Justice;
- e. Environmental Insight;
- f. Independence;
- g. Balance of progress and national economic unity.

2. Sharia Principles

Sharia principles are Islamic legal principles in banking activities based on fatwas issued by institutions that have the authority to apply fatwas in the sharia field.⁴⁹ Sharia principles have an important role in the Islamic banking operating system because if Islamic banking does not comply with sharia principles following applicable laws, it will be able to have an effect on the level of compliance and be questioned about the sharia legal aspects of the banking itself.

3. Prudential Banking

Prudential Banking principle in Islamic banking stipulated in article 35-37 of Act No. 21 of 2008 concerning Islamic banking. The principle of prudential banking is a bank management guideline that

⁴⁸ Ali Murtadho, *Demokrasi Ekonomi dan Kontribusi Ekonomi Islam dalam Undang-undang Dasar 1945*, *Walisongo: Jurnal Penelitian Sosial Keagamaan*, Vol. 24 No. 1, 2016.

⁴⁹ Article 1 clause 6 Law No. 21 of 2008 regarding Islamic Banking.

must be obeyed to create a healthy, strong, efficient bank following statutory regulations.⁵⁰

4. Know Your Customer Principles

This principle serves as a guideline for Islamic banking in channeling funds or conducting economic activities with prospective customers by knowing the customer's identity and monitoring customer transaction activities so that there is no mistake in providing funds which if there are cases of abuse will result in losses borne by the banking itself.⁵¹

5. Fiduciary Principles

Trust is something important in establishing a business relationship in Islamic banking. Islamic banks as financial institutions that carry out economic activities following sharia principles, must carry out the principle of trust through the establishment of bank operations to provide mutual trust to the public in using Islamic bank products and services.⁵²

6. Secrecy Principles

The principle of secrecy is regulated in articles 41 - 49 of Law No. 21 of 2008 concerning Islamic Banking. What is meant by the

⁵⁰ Toto Octaviano, Penerapan Prudential Banking Principle dalam Upaya Perlindungan Hukum Bagi Nasabah Penyimpan Dana, *Lex et Societatis*, Vol.I/No.1, 2003.

⁵¹ Abdul Rasyid, *Prinsip Mengenal Nasabah dalam Perbankan*, [website], 2016, <https://business-law.binus.ac.id/2016/12/29/prinsip-mengenal-nasabah-dalam-perbankan/> (Accessed 14 October 2019 time 13:46 WIB).

⁵² Zainuddin Ali, *Hukum Perbankan Syariah*, Jakarta: Sinar Grafika, 2008.

principle of secrecy is in carrying out its economic activities, Islamic banking must keep various data and types of transactions carried out by customers because to maintain the trust given by customers, especially depositors and investors.⁵³

Besides many principles that must be obeyed by Islamic banking in carrying out its banking activities, especially sharia principles that give a huge impact on the performance of Islamic banking. Then the sharia principle will be applied to be a product of Islamic banking itself. Mentioned as follows:⁵⁴

1. Products with profit-sharing Principle

Funds must be collected by Islamic banks to carry out the functions of financial institutions. The fundraising will be used to carry out banking activities and distributed them to customers. Collecting funds from the public in Islamic banking using the principle:

- a. *Mudharabah* Principle (Trustee profit-sharing);
- b. *Wadi'ah* Principle (Demand Deposit, Saving Deposit, Time Deposit);
- c. *Musyarakah* Principle (Joint Venture Profit and Loss Sharing).

2. Products with Buying and Selling Principle (*Al-Buyu' /Tijarah*)

- a. *Murabahah* Principle;
- b. *Ba'I Al-Salam* Principle;

⁵³ *Ibid*

⁵⁴ *Ibid*

c. *Ishtisna'* Principle.

3. Products with Service Principle

Besides, the Bank can gain and distribute funds, the Bank is also able to provide services to its customers by getting in return for rent or profit, the banking services which include;

- a. *Ijarah* Principle;
- b. *Wakalah* Principle;
- c. *Kafalah* Principle;
- d. *Hawalah* Principle;
- e. *Sharf* Principle;
- f. *Rahn* Principle;
- g. *Qardh* Principle.

4. Product with Social Activities Principle

- a. *Qardh Hasan*

Also can be simplified into raising funds from the public in the form of deposits include:⁵⁵

1. Current accounts based on the *wadiah* principle;
2. Savings based on the *wadiah* or *mudharabah* principle;
3. Time deposits based on the *mudharabah* principle;
4. Other forms based on the principle of *wadiah* and *mudharabah*.

⁵⁵ Sutan Remy Sjahdeni, *Perbankan Syariah: Produk-Produk dan Aspek –Aspek Hukumnya*, Jakarta: Kencana, 2014.

Also in the form of financing:⁵⁶

1. Sale and purchase transactions based on *mudharabah*, *musyarakah*, and other profit-sharing principles;
2. Profit-sharing financing based on *mudharabah*, *musyarakah* and other profit-sharing principles;
3. Another financing is based on the principles of *Hiwalah*, *Rahn*, and *Qardh*.

Financing is the main activity in Islamic banking because business activities in the form of financing will generate profits received by Islamic banking in the form of profit-sharing. But sometimes financing in Islamic banks do not always run smoothly. If there are financing problems, it is necessary to secure financing both before and after the realization of financing. Securing the financing in Islamic bank financing can be done with the following steps:⁵⁷

1. Before the realization of financing

In this stage based on customer approval above, the bank closes insurance and/or collateral binding (if treated). After this step is done, then the financing can be disbursed.

2. After the financing realization

In the initial disbursement stage, the funds are directed at financing as proposed in the financing application contract to the bank, and should not be used for things outside the contract. Furthermore, banks provide guidance and control over customers' business activities.

⁵⁶ *Ibid*

⁵⁷ *Ibid*

The elements of Islamic banking in giving the financing must contain⁵⁸

1. Trust

Trust given by banks to the use of funds is the main basis or first foundation for the funds or costs provided. Therefore, we need an in-depth investigation of both internal and external customers.

2. Agreement

The agreement between the borrower and the bank is contained in a contract that is known and signed by both parties in the making.

3. Period

The period is the time limit for how long the funds will be returned, which has been agreed by both parties when the contract is made. And can be extended for certain reasons which must be based on the consensus of both parties.

4. Risk Management

In financing, the risk borne by both parties depends on the large portion of capital. And in general, the biggest risk is borne by banks, both intentional and unintentional risks.

5. Remuneration

If in a conventional bank the remuneration is known as the interest of an Islamic bank the remuneration is known as margin or profit-sharing

⁵⁸ Arifin Zainul, *Dasar-Dasar Manajemen Bank Syariah*, Jakarta: Azkia Publisher, 2009.

4. Mudharabah Contract

One of the most popular products in Islamic banking is *Mudharabah* financing. *Mudharabah* is a contract between two parties where one party called *sahibul mal* (capital giver) entrusts money to the second party, called *mudharib* (capital receiver), to run a trading business.⁵⁹ *Mudharabah* is a contract has been used to carry out the trade by the early Muslim generation. The legal basis for *mudharabah* in Al-Qur'an is mentioned in *Surah Jumu'ah* verse 10:⁶⁰

فَإِذَا قُضِيَتِ الصَّلَاةُ فَانْتَشِرُوا فِي الْأَرْضِ وَابْتَغُوا مِن فَضْلِ اللَّهِ وَاذْكُرُوا اللَّهَ كَثِيرًا لَّعَلَّكُمْ تُفْلِحُونَ ﴿١٠﴾

“And when the Prayer is finished, then may disperse through the land, and seek of the Bounty of God: and celebrate the Praises of God often (and without stint): that ye may prosper.”

There were also a *qiyas*⁶¹ as a legal basis for applying *Mudharabah*. *Mudharabah* can be interpreted as a form of interaction between human beings as social beings. As social creatures, humans certainly need other people in their daily activities to meet their needs such as household needs. However, in the process of cooperation, the reality shows that some people have capital, but cannot run a business productively, but want to help others who are less able by transferring part of their capital to those who need it. On the other hand, some people have expertise and ability in trading but do not have capital.

⁵⁹ Mahmudatus Sa'diyah, Meuthiya Athifa Arifin, *Mudharabah dalam Fiqn dan Perbankan Syariah*, [website], 2013 <https://journal.stainkudus.ac.id/index.php/equilibrium/article/download/215/pdf>. Accessed October 19, 2019 time 14:01 WIB)

⁶⁰ Abdullah Yusuf Ali, *Loc. Cit.*

⁶¹ *Qiyas* is derived from Arabic, which means to measure and equate between two things, both concretion, as well as objects that can be held, carved and so on, as well as abstract ones. *Qiyas* according to the term *ushul fiqhi*, is to equate a problem that does not have legal provisions in the text (Al-Qur'an and Sunnah), because of the existence of the legal *illat* similarity (legal motives) between the two problems.

Based on the explanation above, it is very necessary for the cooperation of capital owners with people who do not have or lack of capital. In this form of cooperation, the poor who lack capital will be greatly helped, and the owners of capital will not be disadvantaged because of the transfer of their capital to the other party, then the benefits can be shared according to the agreement of both parties. *Mudharabah* products in Islamic banking in Indonesia are divided into 3 namely:⁶²

1. *Mudharabah Mutlaqah*

Based on this principle there are no restrictions for banks to use the funds raised. There are also some general provisions, such as in *aqad*, banks are required to inform fund owners about the ratio and procedures for profit-sharing and risks, for *mudharabah* savings banks can provide savings books as proof of deposit while for *mudharabah* deposits banks are required to provide certificates.

2. *Mudharabah Muqayadah* On Balance Sheet

In the application of this type of *Mudharabah* the owner of the capital is required to set specific conditions that must be obeyed by the bank and also in carrying out its banking operations activities must inform the capital owner of the profit-sharing ratio and profit-sharing.

3. *Mudharabah Muqayadah* Off-Balance Sheet

In this type of *mudharabah*, the owner of the fund can determine the conditions that must be obeyed by the bank, but the bank is only as

⁶² Article 189 of Compilation of Sharia Economic Law

an intermediary to bring together the capital owner and executor of business activities. After receiving funds from the lender, the bank is obliged to separate the funds from its account, as well as the bank must directly channel it according to the contract that has been made, and the bank also receives a commission for the service of bringing the two parties together.

5. Terms and Condition of *Mudharabah* Contract

The purpose of implementing *mudharabah* contracts is more for the principle of benefit for the people,⁶³ considering that *mudharabah* contracts themselves are contracts aimed at helping capital owners to channel funds to people who want to carry out business activities but do not have capital. To be able to carry out *mudharabah* financing following agreements that have been made between parties and applicable regulations based on Islamic law or existing fatwa, *mudharabah* financing must meet the following terms⁶⁴:

1. There were parties called as a capital owner (*sahibul maal*) and capital receiver (*mudharib*) who's *baligh* and sane;
2. The source of capital is clear, not in the form of debt. Capital can be in the form of cash or other assets;
3. There were an *ijab* and a *qabul* that showed the agreement of the two parties between the *sahibul maal* and *mudharib*;

⁶³ Muhamad, *Sistem Bagi Hasil dan Pricing Bank Syariah*, Yogyakarta: UII PRESS, 2016.

⁶⁴ Mansur, *Seluk Beluk Ekonomi Islam*, Salatiga: STAIN Salatiga Press, 2009

4. Ratio made by both parties must be fair and clear, if there is a change in ratio in the future, then it must be with the agreement of both parties first;
5. Each party fulfills *wakalah* skill requirements.

Besides the terms that must be fulfilled by the parties, there is also the condition that can determine the validity of the *mudharabah* contract. *Mudharabah* contract will be implemented if it meets the following condition (*rukun*):⁶⁵

1. Actors (*capital owners and business operators*)

Transactions in *mudharabah* involve two parties. The first party as the owner of capital (*shahibul maal*) and the second party as the manager of the business (*mudharib or amil*). So, without these two parties, a *mudharabah* agreement can't be implemented.

2. *Mudharabah* objects (capital and work).

Shahibul maal gave capital as an object of *mudharabah* and *mudharib* as a capital receiver was handed over the business as an object of *mudharabah*.

3. Agreement from both parties (*ijab-qabul*).

Agreement from both parties is a consequence of the principle consensus (*an-taroddin minkum*). That is, the two parties must agree to be equally binding on *mudharabah*. The owner of capital agrees as his duty to

⁶⁵ Adiwarman Karim, *Op. Cit.* Page 182.

provide capital, and on the other hand, the capital receiver of the business agrees to conduct business activities based on the contract.

4. Profit Ratio.

Nisbah is a pillar that does not exist in the sale and purchase agreement, which is characteristic of *mudharabah*. *Nisbah* reflects the compensation that is entitled to be received by the parties involved in the *mudharabah* agreement. Rewards for investors for capital participation, and compensation to *mudharib* for their work contributions.

6. Implementation of *Mudharabah* Financing Contract

Mudharabah financing contract in Indonesia is regulated under Law No. 21 of 2008 regarding Islamic banking but specifically regulated under DSN-MUI fatwas such as DSN-MUI Fatwa No. 07 / DSN-MUI / IV / 2009 concerning *Mudharabah* Financing (*Qiradh*), DSN-MUI Fatwa No. 33 / DSN-MUI / IX / 2002 concerning *Mudharabah* Syariah Bonds, DSN-MUI Fatwa No. 38 / DSN-MUI / X / 2002 concerning Interbank *Mudharabah* Investment Certificate (IMA Certificate), and DSN-MUI Fatwa No. 59 / DSN-MUI / IV / 2007 concerning Conversion *Mudharabah* Syariah Bonds.⁶⁶

The principle of applying *mudharabah* financing contracts in Islamic banking in Indonesia is in applying the *mudharabah* principle, the giver of capital acts as *sahibul maal* and the bank as *mudharib*. Due to this legal relation, it arise the right and obligation between the parties which in form of the given capital is used to carry out *mudharabah* financing and business results or profit

⁶⁶ Abdul Ghofur Anshori, *Payung Hukum Perbankan Syariah*, Yogyakarta: UII PRESS, 2002.

are shared based on the agreed ratio, if the bank uses it to carry out *mudharabah* financing, then the bank is fully responsible for losses incurred.

This shows that the core principle of *mudharabah* financing is based on trust, trust is the most important position in the application of *mudharabah* contracts. Trust is the core of the application of *mudharabah* contracts because sometimes financing is not accompanied by collateral for the given capital itself so that if it loses it will have an impact on the losses borne by the capital owner (*sahibul maal*).⁶⁷ Maintaining trust between parties who contract in the application of the *mudharabah* principle is also a form of applying the principle of sharia compliance. Because if that trust no longer exists in the implementation of *mudharabah* financing contracts, it will lead to the in-validity of the contract itself.

Mudharabah financing contracts may end not only because of violations of the core principle of *mudharabah* itself, namely honesty, but can also be due to various unexpected events such as breach of contract, etc. contract of financing can be terminated if⁶⁸ One party decides to resign from the agreement or each party declares that the contract is canceled, there is a clear statute that mentions the date of expiration of the *mudharabah* financing contract.

Also if one of the parties dies or has lost her mind. So the contract will automatically terminate because one of the parties is loss their legal capacity to enter into a contract. The last condition is the capital receiver did not conduct an act based on contract or breach of contract and the contract will automatically terminate when the capital is already used up before the financing is conducted.

⁶⁷ Heri Sudarsono, *Bank dan Lembaga Keuangan Syari'ah*, Yogyakarta: Ekonisia, 2004.

⁶⁸ Any Nugroho, *Hukum Perbankan Syariah*, Yogyakarta: ASWAJA PRESSINDO, 2015.

In *mudharabah* financing agreements or financing, agreements are important factors and are the basis of providing financing to customers. The preciosity and accuracy of the inclusion following the terms and conditions in the *mudharabah* financing stated in the contract will affect the validity of the agreement. *Mudharabah* agreement that does not meet terms and conditions can be stated as invalid. Thus, that if it becomes a dispute in court, the court will announce a contract is canceled.

B. Sharia Compliance Principle

1. Sharia Compliance as a Supervisory Aspect of Islamic Banking Operational

Islam is a perfect religion that can regulate all aspects of human life, as a whole, good faith, worship, morals and is no exception in the field of *muamalah*. The principle of sharia must be practiced in all aspects of life as ordered by Allah to its servants whose purpose is to achieve the benefit of the life of the world and the hereafter. No exception in the economic field is the application in the operational system of Islamic banking itself.⁶⁹

Islamic banking exists as an alternative for Islamic communities who in their economic activities are very avoiding the usury system. As we know that the uniqueness of Islamic banking itself is that in its banking operations it must be following Islamic law or existing fatwa. Shariah compliance is defined as a condition where all the activities of a financial institution in line with sharia, or equivalence of all activities of Islamic financial institutions with Islamic Sharia.⁷⁰

⁶⁹ Burhanuddin Susanto, *Hukum Perbankan Syariah di Indonesia*, Yogyakarta: UII Press, 2008.

⁷⁰ Mohammad Amin Ali Qaththan, *Op. Cit.* Page 12-13.

The basic principles of sharia transactions that have been adopted by the Indonesian Institute of Accountants as a body that is authorized to determine Statement of Financial Accounting Standards in Indonesia as contained in the Basic Framework for Preparation and Presentation Sharia Financial Report (KDPPLKS), namely:

1. Brotherhood (*Ukhuwah*);
2. Justice (*'Adalah*);
3. Welfare (*Mashlahah*);
4. Balance (*Tawazun*); and
5. Universalism (*Syumuliyah*).

More specifically, the following Islamic principles that must be obeyed by the Islamic banking in Indonesia is to avoid:⁷¹

1. *Usury*, namely the addition of unauthorized income (*batil*), among others, in the exchange of similar goods that are not the same quality, quantity, and delivery time (*fadl*);
2. *Maisir*, which is a transaction that is subject to an uncertain and chance situation;
3. *Gharar*, which is a transaction whose object is unclear, not owned, is not known to exist, or cannot be submitted when the transaction is made unless otherwise stipulated in sharia;
4. *Haram*, namely transactions whose objects are prohibited in sharia; or
5. *Zalim*, namely transactions that cause injustice to other parties.

⁷¹ Explanation of Article 2 of Law No. 21 of 2008 regarding Islamic Banking Law.

Based on the uniqueness above, there is a close relationship between banking and Islamic law both from the conceptual aspect that is like in the operation of Islamic banking itself must comply with applicable regulations such as fatwas made by DSN-MUI and Indonesian Islamic banking law as well as business practices. As in carrying out its banking activities in the form of offered products, it must not conflict with Islamic law, so it can be concluded that banks are required to maintain compliance with sharia principles, where sharia compliance can be a benchmark for differentiation between Islamic banking and conventional banking itself.

Huge demands towards sharia compliance often become a burden for Islamic banking. Unlike conventional banking which must pay special attention to the precautionary principle, in Islamic banking will be even tougher because in carrying out its operational activities it must comply with what is called by sharia principle. More specifically, these two aspects are equally important since they are mandatory principles that must be adhered to Islamic banking.⁷²

Furthermore, Islamic banking without the precautionary principle will certainly not be perfect and will cause Islamic banking to become an exclusive financial institution that only uses religious sentiment to conduct its business. On the other hand, if Islamic banking has implemented the precautionary principle but is not accompanied by sharia compliance, there is no distinction between conventional banks and Islamic banks because as we know the core of Islamic banking in conducting business activities is their compliance towards sharia principle itself.

⁷² Agus Triyanta, *Op. Cit.*, page 87

Shariah compliance is also one of the supervisory aspects of both the government and customers. The first level of supervision is named the Shariah Supervisory Board (DPS) and the next level of supervision at the national level is named the National Sharia Board (DSN).⁷³ The provisions regarding the Sharia Supervisory Board are contained in article 32 paragraph 3 of Law No. 21 of 2008 concerning Islamic Banking, Sharia Supervisory Body duty is to give advice and suggestions to the directors and supervise the activities of the bank to comply with sharia principles,⁷⁴ giving or revoking recommendations for names that will sit as Sharia Supervisory Board members in a sharia financial institution, issuing fatwas on types of financial activities, issuing fatwas on sharia financial products and services, overseeing the implementation of the fatwa that has been applied.⁷⁵

Supervision of Islamic banking can be through the making of fatwas that must be obeyed and can be used as guidelines for Islamic banking. These fatwas will be adopted as legal instruments that can make them have legal power, namely become regulations in the form of Bank Indonesia Regulations, for example by issuing Bank Indonesia Regulation No. 7/46 / PBI / 2005 concerning Funds Collecting and Channeling Agreements for Banks Conducting Business Activities based on Sharia Principles which although not all fatwas have been adopted but have seen efforts to overcome the problems of the legal status of the fatwa itself which can be used as a guideline for banks sharia in carrying out its economic activities.

⁷³ Didin Hafidhuddin dan Hendri Tanjung, *Manajemen Syariah dalam Praktik*, Gema Insani Press, Jakarta, 2003, page. 39.

⁷⁴ Bank Indonesia Regulation No. 11/3 / PBI / 2009 on Islamic Banks Article 35 (1) explains that Sharia Supervisory Board is also in charge of and responsible for providing advice and suggestions to the directors and oversees the activities of banks to conform with Islamic principles.

⁷⁵ Rizal Yahya, *Akuntansi Perbankan Syariah Teori dan Praktik Kontemporer*, Jakarta: Salemba Empat, 2009, page 27.

2. Urgencies of Sharia Compliance Principle Fulfillment in Islamic Bank

In Indonesia, the application of compliance principles is regulated specifically in PBI 13/2 / PBI / 2011 regarding arrangements regarding the bank's compliance function and adjustments to the provisions regarding the appointment of the Compliance Director. The purpose of the Compliance function is a series of actions or steps that are *ex-ante* (preventive) to ensure that policies, provisions, systems, and procedures, as well as business activities conducted by the Bank following Bank Indonesia regulations and applicable laws and regulations, including Sharia Principles for Sharia Commercial Banks and Sharia Business Units, as well as ensuring the Bank's compliance with commitments made by the Bank to Bank Indonesia and/or other authorized supervisory authorities.⁷⁶

Sharia compliance is a must for Islamic banks because it requires the application of sharia principles to guarantee economic activities following applicable regulations. Although in the application of its products, Islamic banking is often faced with various risks such as⁷⁷

1. Financing Risk

Financing risk is the risk due to the failure of customers or other parties in fulfilling obligations to banks following agreed agreements.⁷⁸

⁷⁶ Indonesia's Bank Regulation 13/2 / PBI / 2011 regarding Implementation of Commercial Bank Compliance Function.

⁷⁷ Indonesia's Bank Regulation No. 13/23/PBI/2011 Concerning Application of Risk Management for Sharia General Bank and Sharia Business Units.

⁷⁸ Dadan Muttaqien and Fakhruddin Cikman, *Penyelesaian Sengketa Bank Syariah*, Yogyakarta: Total Media, 2008, page. 40-41.

2. Market Risk

Islamic banks only manage market risk associated with changes in exchange rates which may cause the loss of Islamic banks.⁷⁹

3. Operational Risk

Operational risks can occur as a result of the non-optimal functioning of the information system and the internal supervision of Islamic banks.

4. Legal Risk

Risks caused by the weakness of the legal aspect of Islamic banking as the absence of supporting legislation and a weak contract made.

5. Liquidity Risk

Liquidity risk arises when banks are unable to meet their cash needs immediately and with appropriate costs.⁸⁰

6. Strategic Risk

Risks that occur due to inaccuracy in making and / or implementing a strategic decision and failure to anticipate changes in the business environment.

⁷⁹ Sri Indah Nikensari, *Perbankan Syariah Prinsip, Sejarah, dan Aplikasinya*, Semarang: Pustaka Rizki Putra, 2012.

⁸⁰ *Ibid.* 188-189.

7. Reputation Risk

Reputation risk is the risk that occurs as a result of a decrease in the level of stakeholder trust that comes from the negative public perception towards the Islamic bank.

8. Equity Investment Risk

Risks arising from banks taking part in the loss of business customers who are financed in financing based on profit and loss sharing or other business results.

9. Rate of Return Risk

This risk arises due to changes in the behavior of the Bank's third party customer funds caused by changes in expectations of the rate of return received from the Bank.

10. Compliance Risk

Compliance risk arises because banks do not comply or do not implement the laws and regulations and other provisions that apply in the operating system especially related to sharia principle.

In the version of Islamic bank, there was a sharia compliance, sharia compliance means that if Islamic banking does not carry out its operational activities following sharia principles as established by the National Sharia Board or Bank Indonesia Regulation, it will cause special risks which are compliance risk⁸¹. This shows the importance of the application of Shariah principles on Islamic banking in Indonesia. If sharia compliance is not fulfilled, it will result

⁸¹ Mohammad Ainun Najib, Penguatan Prinsip Syariah pada Produk Bank Syariah, *Jurisprudence*, Vol. 7 No. 1, Fakultas Ekonomi dan Bisnis Universitas Sultan Ageng Tirtayasa Serang Banten, 2017.

in will be liable for penalties and punishments which range from administrative sanctions until the termination of the bank from its operation.

The non-fulfillment of sharia compliance in Islamic banking is very closely related to reputation risk management, which is a risk that can cause customer decrease meant of trust by customers due to non-compliance by sharia banking. Nowadays, many criticisms arise related to sharia compliance which may be felt less following sharia principles, also there was a hypothesis that there is an inequality between theory and practice that raises the opinion that conventional and sharia banking is the same.

C. General Concept of Asymmetry Information

1. Asymmetry Information

In carrying out its business activities, the bank may not conduct his function properly without the existence of qualified and skillful employees or also called as an agent. But regardless of how competent these agents are, surely there is still the possibility of a problem that will sometimes put banks in a difficult position. There are theories related to agents in conducting their business activities with the bank called Agency Theory. In agency theory, agency relationships arise when one or more people employ another person to provide a service and then authorize the decision-making authority for that agent.⁸²

According to Eseinhardt⁸³ agency theory explains the organizational relationship between principles and agents. In agency theory, agents are

⁸² Sunarto, Teori Keagenan dan Manajemen Laba, *Kajian Akuntansi*, Vol. 1 No. 1, Fakultas Ekonomi, 2009, page. 13.

⁸³ Aswadi Lubis, Agency Problem dalam Penerapan Pembiayaan Akad Mudharabah pada Perbankan Syariah, *Jurnal Al Qalam*, Vol. 33, No. 1, Januari-Juni 2016, p. 52.

expected to fulfill the principal's interests, but agents in this case often make decisions and carry out decisions that are not following the principal's interests. Principal-agent relationships occur when the actions taken by someone have an impact on others or when someone is very dependent on the actions of others.

In the case of business activities, agents as the party given the mandate to manage capital and carry out business activities from the principal must take responsibility for what has been mandated. On the other hand, the principal as the capital provider will provide wages to agents that can be in the form of money or various kinds of facilities.

On the other hand, agents are still ordinary people who sometimes prioritize personal interests. In the end, the relationship between principal and agent can lead to asymmetry information. Asymmetry information has long been a problem for the banking sector. Asymmetry information has a close relationship with the performance of agents or employees in carrying out economic activities either in the form of contracts or others that are directly related to banking.

Asymmetry information is a condition where one party in conducting banking business such as financing or other contracts receives a lot of information than the other party and it's more about the performance of the agents itself.⁸⁴ In a financing contract, for example, usually, the party that has a lot of information is the recipient of capital as a person who runs a business activity and knows better the actual conditions of the business activities carried out. However, it does not release the possibility under certain circumstances in buying and selling, for example, the seller who has more information about the

⁸⁴ Slamet Haryono, Asimetri Informasi dalam Transaksi Perbankan Syariah di Indonesia, *Ijtihad: Jurnal Wacana Hukum Islam dan Kemanusiaan*, Vol. 15 No. 1, 2015, page 106.

product being sold than the buyer. In these asymmetry information conditions, agents can do things that can harm the other parties in the form of influencing accounting numbers presented in financial statements and others. The asymmetry information is divided into two namely:⁸⁵

1. Adverse Selection

Adverse selection is a type of asymmetry information in which one or more parties who carry out a business transaction has more information on other parties. Adverse selection occurs because some people such as recipients of capital and other insiders are more aware of the present conditions and prospects for the future of a company than the investors.

2. Moral Hazard

Moral hazard occurs if the activities carried out by the recipient of capital are not entirely known by the giver of capital. So that the recipient of capital can take action outside the knowledge of the giver who violates the contract and ethically or norms may not be appropriate to do.

B. The perspective of Islamic Law towards Asymmetry Information

The practice of asymmetry information does not only occur in conventional banks but also occurs in Islamic banking, especially in a contract of product which offered by banks such as financing, funding or services. Whereas, the asymmetry information is an agency problem that may occur due to the

⁸⁵ William R. Scott. 2000. Financial Accounting Theory. 2nd Edition Prentice Hall Inc. Ontario. Canada.

imbalance of information received by the owners of capital and capitals receiver. On another hand, asymmetry information can also occur because of the personal interests of the agent. The agent does something outside of his knowledge, acceptance, and instructions of the funder.

Of course, in carrying out its economic activities, actions taken by principals and agents must be based on applicable contracts, such as contracts on *mudharabah* financing, contracts on leases or contracts made following the principles of the products offered by Islamic banking. In making the initial contract, several things can affect the validity of the contract itself, such as having to fulfill conditions such as⁸⁶

1. Parties (*Al-'Aqidain*)
2. The object of Contract (*Mahal al-'Aqd*)
3. Offer and Acceptance (*Sighah al-'Aqd*)
4. Purpose of Contract (*Maudhu' al-'Aqd*)

Also must uphold the principle of contract making, mentioned as follows:

1. Freedom of Contract (*Al-Hurriyah*)
2. Compliance (*Al-Ridha*)
3. Justice (*Al-'Adalah*)
4. Equality (*Al-Musawah*)
5. Honesty (*As-Shidq*)
6. Written (*Al-Kitabah*)

⁸⁶ Article 22 of the Compilation of Sharia Economic Law.

Contracts in Islamic banking will be valid if it has met the four elements and also the principle above. In another hand, there here are also examples of contracts that are invalid according to Islamic law, namely:⁸⁷

1. Gambling (*Maisir*);
2. Fraud or obscurity (*Gharar*);
3. Additional withdrawal from main assets or capital (*Riba*);
4. Sale-purchase and exchange where one party is in a state of emergency (*Ba'I Al-Mudtarr*);
5. The transaction under pressure and coercion which can erase the free consent (*Ikrah*);
6. Offer prices above the average market price (*Ghabn*);
7. The consumer creates fake demand (*Ba'I Najash*);
8. Stockpiling inventory (*Ihtikar*);
9. Hiding the facts that should be known by the parties involved in the contract (*Ghish*);
10. Hide information from the other party with the intent to committed a fraud (*Tadlis*);
11. Stopping the farmer/trader which yet to arrive at the market in a condition of the farmer/trader didn't know the exact price of goods in the market (*Talaqqi Ar-Rukban*);
12. Being a scalper for villagers (*Ba'I Hadir lil Baad*);
13. Bribery (*Riswah*).

⁸⁷ Budi Darmawan, *13 Transaksi Terlarang dalam Islam*, 2015, [website], <https://ekonomi-islam.com/transaksi-yang-dilarang-dalam-islam/> (Accessed 23 November 2019 time 14:55 WIB)

There was also another contract that can be categorized as invalid based on Islamic law:⁸⁸

1. Sale a prohibited thing.
2. Saller did not allow the buyer to see, check or touch the

Things that being sell (*Munabadzah*);

3. Sale of an animal which unborn yet, and will be born immediately (*Habab Al-Habala*);
4. Sale of fruits before ripening (*Mukhadarah*);
5. Exchange of dry fruits with fruits in a way of the quantity of fresh fruit not measured, and fresh fruit is measured (*Muzabanah*);
6. Sale of goods before obtaining their possession (still under uncertain ownership such as an inheritance);
7. Forward selling (*Mu'awamah*);
8. Stopping the farmer/trader which yet to arrive at the market in a condition of the farmer/trader didn't know the exact price of goods in the market (*Talaqqi Ar-Rukban*).

In Islamic banking prohibition of *Talaqqi Ar-rukban* is part of an effort to achieve *Maqashid Sharia*⁸⁹ (objective goals) of Islamic law which is solely targeted at maximizing the welfare of society (*Falah*).⁹⁰ *Talaqqi Ar-rukban* is an example that can be taken in the application of asymmetry information whether in the form of adverse selection also moral hazard. There were such actions that can be equated as application of asymmetry information in the form of one of

⁸⁸ Sayyid Sabiq, *Jilid Fikih Sunnah*, translation Mahyudin Syaf, Volume 12,13,14, Bandung: PT. Al Maarif, 1996.

⁸⁹ *Maqashid Sharia* is the goal to be achieved by the Shari'a to realize the welfare of mankind.

⁹⁰ Oni Sahroni, and Adiwarman A. Karim, *Maqashid Bisnis dan Keuangan Syariah*, Jakarta: Raja Grafindo Persada, 2015.

the parties (buyers who know more information in the market regarding the price of the standard applicable to an item) from the other party (the seller that in the course of carrying item and had no time to know or consider the intended market price) and harm another parties. The prohibition against the practice of asymmetry of information contained in the hadith of Abu Hurairah RA:⁹¹

*"Rasulullah SAW has forbidden city residents from selling merchandise to villagers."*⁹²

Therefore, the *hadith* of the Prophet Muhammad above prohibit the existence of asymmetry information in *Muamalah*. In the case above the asymmetry information referred to information about prices in the market, where this information is known to one-sided by the buyer in the city but not by the villagers. Asymmetry information among *muamalah* like this is prohibited in Islamic teachings.

Hadith narrated by Talha bin Ubaidillah RA. One time there was an Arabian coming to him carrying merchandise. Then Talha ibn Ubaidillah RA said to him:

*"Indeed, the Prophet (SAS) has forbidden city residents from buying and selling with villagers. But you go to the market and pay attention to who you sell to and then consult with me until I can rule you and forbid you."*⁹³

Besides *Talaqqi Ar-Rukban*, asymmetry information is also can be acknowledged as a form of *tadlis* and *ghish*. As explained above that the core of *tadlis* and *ghish* both emphasize the imbalance of information received by the

⁹¹ This hadith has textually forbidden city residents from trading with villagers. But this forbidden is caused by an *illat* (the reason for establishing the law), that is the villager (trader) market does not know the price.

⁹² Hadith *Shahih*, Bukhari HR No. 1996, Muslim No. 2532, Abu Dawud No. 2982, Tirmidzi No. 1143, Nasa'i No. 3187, Ibn Majah No.2166, Ahmad No.1330.

⁹³ Ibn Hajar Al-Asqalani, *Fathul Bari*, Juz VI p. 482.

contracting parties. The imbalance of information can be caused either by hiding a fact or information from one party or even intentionally not to inform the information relating to the object of the agreement. Those kinds of actions are taken to protect their interest also to achieve their secret goals which are to take maximum advantage or profit without considering the damage that will be borne by the business partner.

As mentioned above, the point of asymmetry information is dishonesty or non-transparency made by one of the parties in banking, both in product contracts offered by banks such as financing, fund-raising or services. This non-transparency can result in the invalidity⁹⁴ of the contract itself which is also prohibited by Islamic law because it is detrimental to one party. These actions must be avoided because they can also affect bank compliance with the values of Islamic economic principles that apply.

⁹⁴ of Article 26 (a) of the Compilation of Sharia Economic Law.