

## CHAPTER III

### ASYMMETRY INFORMATION IN *MUDHARABAH* FINANCING AND ITS EFFECT ON LEGALITY OF THE CONTRACT

#### A. Asymmetry Information on *Mudharabah* Financing Infringe Sharia Compliance

Indonesian legal system upholds Islamic value as the basis of the formation of Islamic banking in Indonesia. Islamic banks function as intermediary institutions related to the relationship of trust between banks and customers so that customers have trust in banks.<sup>95</sup> The principle of trust is a principle that underlies the relationship between Islamic banks and customers. People often believe that the operation of Islamic banking in Indonesia is the same as conventional bank. However, the operational system of Islamic banking requires to comply with several main principles, including the principle of sharia.

Trust between customers and banks as intermediary institutions<sup>96</sup> is the main asset of the implementation of economic activity in Islamic banking. If there is no trust between customers and banks in economic activities, it will affect the reputation risk and compliance 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. On the other hand, if the bank violates compliance risk it will cause violation of sharia compliance.

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<sup>95</sup> Muhammad, *Bank Syariah Analisa, Kekuatan, Kelemahan, Peluang dan Ancaman*, Yogyakarta: Ekonosia. 2004. Page 99.

<sup>96</sup> Financial intermediary has the primary function of collecting funds from the public and then the funds allocated or distributed back to the society (the people who need financing of the bank).

From the explanation above, it shows that the trust of the customer is the main asset for the bank to carry out its operational activities.

*Mudharabah* financing is one of the products offered by Islamic banking in Indonesia. *Mudharabah* financing was originally a financing that emphasize the benefits for others and social activities, namely in the form of helping people who have the ability but are limited in terms of capital or even none at all. This financing is classified as a risky financing because the core of this financing is trust.

The intended trust is the trust between the agent as the recipient of capital and the principal a capital provider. However, the application of *mudharabah* financing is one of the applications of *maqashid sharia* which aims to ensure that the assets distributed can benefit the owner on an ongoing basis.<sup>97</sup>

In the process of implementing *mudharabah* financing, various problems might arise, namely asymmetry information. Asymmetry information can occur in the form of activity or information.<sup>98</sup> The problems related to information are called hidden information which lead to adverse selection. This problem occurs after *mudharib* proposes *mudharabah* financing and conducts an assessment of the financing and the contract. The problems related to activities are called hidden actions that will result in a moral hazard. This problem occurs when *mudharabah* financing is carried out, it can happen in the monitoring and verification, business implementation, bookkeeping, and reporting process.

Moral hazard as an asymmetry information happened often times in the financing implementation. Moral Hazard can be interpreted as bad behavior in

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<sup>97</sup> Ma'ruf Abdulla, *Hukum Keuangan Syariah pada Lembaga Keuangan Bank dan Non-Bank*, Yogyakarta: Aswaja Pressindo, 2016.

<sup>98</sup> Muhammad, *Konstruksi Mudharabah dalam Bisnis Islam*, Yogyakarta: BPFE, 2005.

the form of actions from the customer receiving the financing that causes losses (*mudharat*) either for himself or the bank as a capital provider. Moral hazard occurs due to the low quality of the customer's character and the limited scope of the contents of the contract which makes it easy for customers to be motivated to do moral hazard, and the monitoring system is not optimal.<sup>99</sup>

The kind of moral hazard which can be found in the implementation of *mudharabah* financing products, is violations of the agreement. It causes a misuse of funds (side streaming) conducted by the customers. They tend to use their funds not in accordance with what is stated in the agreement or contract that has been made previously.<sup>100</sup>

On the other hand, it is not possible for banks to conduct continuous supervision of financing customers. This happen because the occurrence of moral hazard and weak supervision. It creates a deviation in terms of managing the funding that have been given by banks.

Another thing that causes moral hazard problems in *mudharabah* financing is that the bank only able to supervise the funds given to customers in accordance with the agreement in the *mudharabah* financing deed.<sup>101</sup> The role of banks is also limited to being a provider of funds (*shahibul maal*) that may not interfere in businesses run by *mudharabah* financing customers.

Moral hazard can occur in the form of deviations in the funds management. The profit sharing will be different from what has been predicted by the bank. *Mudharabah* financing customers will experience a shrinkage due to the high risk of *mudharabah* financing with an uncertain profit income system

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<sup>99</sup> Andy Fathur Rahman, "Analysis of Factors That Cause Moral Hazard for Mudharabah Financing Customers". (Thesis of Islamic Studies Master's Program at Sunan Kalijaga State Islamic University, Yogyakarta, 2010), p. 114.

<sup>100</sup> Friyanto, *Op. Cit*, p. 116.

<sup>101</sup> Article 139 (2) Compilation of Sharia Economic Law.

and there is a possibility of lack of information obtained by the bank as the provider of funds (*shahibul maal*).

From the illustrations and explanations regarding asymmetry information that can be found in *mudharabah* financing, it can be concluded that asymmetry information both in the form of moral hazard or adverse selection are included in violations of Islamic principles. Asymmetry information violates Shariah compliance because of the element of asymmetry information, especially in the form of moral hazard itself, is taking actions outside the knowledge of the capital giver and considered as dishonesty which leads to non-transparency.

Dishonesty and non-transparency caused by asymmetry information in the form of moral hazard contained in the process of implementing *mudharabah* financing is a concrete act of violations towards sharia compliance as enforced by Law No. 21 of 2008. Asymmetry information is also one of the forbidden financial practices which can be classified as a business tort. Business tort is an improper act committed by a businessman which violates other businessmen.<sup>102</sup>

Asymmetry information violated the sharia principle that is *Azh-Zhulum*. *Azh-Zhulum* or *alim* means putting something out of place, injustice, persecution, oppression, arbitrary actions, and darkness.<sup>103</sup>

*Zalim* is contradict to the values of Islam (sharia principles) in carrying out the operational system of Islamic banking. Al-Qur'an mentioned the prohibition of being unjust in conducting business and daily activities. The legal basis for prohibiting being wrongful towards others is contained in the *Surah An-Nisa* verse 279:<sup>104</sup>

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<sup>102</sup> Thomson Reuters, *Business Torts*, 2019, [website], <https://smallbusiness.findlaw.com/business-laws-and-regulations/business-torts.html>, Accessed (November 14, 2019 time 10:25 WIB)

<sup>103</sup> Mardani, *Hukum Sistem Ekonomi Islam*, Jakarta : Raja Grafindo, 2015.

<sup>104</sup> Abdullah Yusuf Ali, *Loc. Cit.*

فَإِنْ لَمْ تَفْعَلُوا فَأْذَنُوا بِحَرْبٍ مِّنَ اللَّهِ وَرَسُولِهِ ۗ وَإِنْ تُبْتُمْ فَلَكُمْ رُءُوسُ  
 أَمْوَالِكُمْ لَا تَظْلِمُونَ وَلَا تُظْلَمُونَ

“And if you don't, then be informed of a war [against you] from Allah and His Messenger. But if you repent, you may have your principal - [thus] you do no wrong, nor are you wronged.”

From the above explanation and also the Qur'an verses which contain a prohibition against being unjust, the result of asymmetry information tends to give damage to one party, especially if it is applied to *mudharabah* financing. The damage might be in form of losses suffered by one party (usually the *shahibul maal* as a capital provider).

Asymmetry information on Islamic banking also violates one of sharia principles in conducting their business activities, Islamic banking must avoid transaction which contains *gharar*. *Gharar* is also known as uncertainty. The meaning of uncertainty in *muamalah* transactions itself can be illustrated as hidden agenda which causes injustice and mistreatment to the other party. The prohibition of *gharar* as stated by Rasulullah SAW in the hadith of Abu Hurairah:

"The Prophet *sallallaahu'alayhi wa sallam* forbid buying and selling *al-hashah* and buying and selling *gharar*"<sup>105</sup>

Based on Hadith above, in conducting the business activities especially in performing a *mudharbah* financing, Islamic bank must avoid *gharar*. Then, asymmetry information can be categorized as *gharar* because there was a secret action conducted by *mudharib* in managing the capital to enrich themselves or

<sup>105</sup> HR Muslim, *Kitab Al-Buyu*, Chapter: *Buthlaan Bai Al-Hashah wal Bai Alladzi Fihi Gharar*, 1513.

giving the benefit for their interests. The action is usually conducted without the acknowledgement and consent. They did something beyond what already stated in contract which made previously by *shahibul maal*. Most of the results of these actions tend to harm the capital provider, and cause profit loss. So it can be concluded that the practice of asymmetry information is prohibited by Islam since it is a violation towards sharia principle in which it avoids *gharar* and create more damage to *shahibul maal*.

The occurrence of asymmetry information is also a violation to the main principle of trust in the implementing *mudharabah* financing. Meanwhile, Muslim are obliged to be honest in order to maintain the trust between the business partner. Honesty and trust are the main principles in the implementation of sharia-based business just as what has been exemplified by Rasulullah SAW. However, if trust is no longer present in the implementation of *mudharabah* financing, it will lead to the questioning of Islamic elements in the *mudharabah* contract itself. Then if banks proven to neglect sharia principle, it will put the bank in a dangerous position because it can affect compliance risk and reputation risk.

## **B. Legal Effect of Sharia Compliance Fulfillment on *Mudharabah* Financing Performance Through Asymmetry Information on Islamic Banking**

Islam gives the widest opportunity for their *ummah* to carry out economic activities in accordance with their capabilities and expertise, unless they neglect their obligations to the state such as paying taxes and complying

with existing regulations and they take care of the surrounding environment such as paying *zakat*.<sup>106</sup>

As explained in the previous sub-chapter, compliance with sharia principles is something important and must be obeyed by Islamic banking. Compliance with Islamic principles is obligatory because this is the basic reason for the existence of Islamic banks. In addition, compliance with Islamic principles is seen as the strength of Islamic banks such as consistent with the basic norms and principles of sharia, welfare in the form of system stability, fairness in contracting and the realization of good governance can be reached.<sup>107</sup>

Considering that if Islamic banking does not comply with Islamic principles, it will cause a variety of risks for the banks such as a reputation risk. It then will affect the level of customer trust and make customers hesitate to conduct banking activities. If information asymmetry in the form of moral hazard or adverse selection cannot be handled by the banks, it is resulted in compliance risks for the bank. It will question the Islamic elements of the banking itself.

The importance sharia compliance is also the reason for the enactment of Bank Indonesia Regulation 13/2 / PBI / 2011 concerning the Implementation of the Compliance Function of Commercial Banks. What is meant by Compliance Function is *ex-ante* (preventive) action to ensure the policies, regulations, systems and procedures, as well as business activities carried out by banks are in accordance with Bank Indonesia regulations and applicable laws and

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<sup>106</sup> Aunur Rohim Faqih, *Bank Syariah, Kontrak Bisnis Syariah dan Penyelesaian Sengketa di Pengadilan*, Yogyakarta: FH UII PRESS, 2017

<sup>107</sup> No Author, *Perbankan Syariah dan Kelembagaannya*, 2017, [website], <https://www.ojk.go.id/id/kanal/syariah/tentang-syariah/Pages/PBS-dan-Kelembagaan.aspx>, (Accessed November 14, 2019 time 19:11 WIB)

regulations, including the Principle Sharia for Sharia Commercial Banks and Sharia Business Units.<sup>108</sup>

On the other hand, failure in implementing sharia principles also shows the lack of performance of the Sharia Supervisory Board existed in every Islamic bank. As the board supervises the implementation of compliance with Islamic principles in Islamic banking in Indonesia. In *mudharabah* financing mechanism, the Sharia Supervisory Board can examine the transaction documents from the customer to find out the fulfillment of the Sharia Principles in the form of the complete evidence of the results of the customer's business financing that is financed as a basis for calculating profit sharing for *mudharabah* financing.<sup>109</sup>

The Sharia Supervisory Board has a job to supervise the sharia bank. It deals with a case or problem regarding sharia compliance and responsible for reporting sharia compliance issues to the National Sharia Board. Based on the report, the National Sharia Board requests to Bank Indonesia or the Financial Services Authority to conduct an investigation related to the reported issue.<sup>110</sup> The legal basis for the establishment of the Sharia Supervisory Board is stated in Law Number 21 of 2008 concerning Sharia Banking, Article 32 paragraph (1) as this following:

“Sharia Supervisory Board must be formed in Sharia Banks and Conventional Commercial Banks that have Sharia Business Units.”

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<sup>108</sup> Article 3 of Indonesia's Bank Regulation No. 13/2/PBI/2011

<sup>109</sup> Bank Indonesia Circular Letter No. 15/22 / DPBs on Guidelines for Duties and Responsibilities of the Sharia Supervisory Board of Bank Financing Sharia.

<sup>110</sup> Agus Triyanta, "Implementation of Sharia Compliance in Islamic Banking (Sharia): Comparative Study Between Malaysia and Indonesia", Legal Journal of Ius Quia Iustum, Special Edition Vol. 16 No. 4, October, 2009, page. 223.



The existence of the Sharia Supervisory Board is also confirmed in Law Number 40 of 2007 concerning Limited Liability Companies, Article 109 paragraph (1) stated that:<sup>111</sup>

“Companies that conduct business activities based on sharia principles in addition to having a Board of Commissioners must have a Sharia Supervisory Board.”

Furthermore, Indonesian Bank Regulation No. 2/13/2011 Article 2 stated that:<sup>112</sup>

- 1) The Board of Directors must foster and realize the implementation of a Compliance Culture at all levels of the Bank's organization and business activities.
- 2) The Board of Directors must ensure the implementation of the Bank's Compliance Function.
- 3) The Board of Commissioners is required to supervise the implementation of the Compliance Function.

The Indonesian Bank Regulation shows that the responsibility of fulfilling sharia principles is not only the main task of the Sharia Supervisory Board, but all employees of sharia banking must actively participate in creating a work environment that conducts operational activities in accordance with Islamic economic values and applicable fatwas. According to Law Number 21 Year 2008 Article 24 (a) stated that:

“Islamic banks are prohibited from conducting business activities that are contrary to Islamic Principles.”

So if an Islamic bank carry out its operational activities such as *mudharabah* financing and proved conducting violation towards sharia principles in the form of asymmetry information in the form of moral hazard or

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<sup>111</sup> Law Number 40 of 2007 regarding Limited Liability Company

<sup>112</sup> Indonesia's Bank Regulation Number 13/2/2011

adverse selection, it will be subject to sanctions in the form of administrative or criminal sanctions. In Law Number 21 Year 2008 Article 56 and 58 stated that:

“Bank Indonesia imposes administrative sanctions on Sharia Banks or UUS, members of the board of commissioners, members of the Sharia Supervisory Board, directors, and / or employees of Sharia Banks or Conventional Commercial Banks that have UUS, which obstruct and /or do not implement Sharia Principles in carrying out their business or duties. Or does not fulfill its obligations as specified in this Law.”

“Administrative sanctions referred to in this Act are:

- a. Fine;
- b. Written warning;
- c. Downgrading of Islamic Bank and UUS;
- d. Prohibition from participating in clearing activities;
- e. Coagulation of certain business activities, both for certain branch offices and for Sharia Banks and UUS as a whole;
- f. Dismissal of management of Sharia Banks and Conventional Commercial Banks that have UUS, and subsequently appoint and appoint temporary replacements until the General Meeting of Shareholders appoints permanent replacements with the approval of Bank Indonesia;
- g. Inclusion of members of management, employees, and shareholders of Islamic Banks and Conventional Commercial Banks that have UUS in the list of disgraced people in the banking sector; and / or
- h. Revocation of business license.”

Referring to the articles mentioned above regarding the legal effect of sharia principles fulfillment on *mudharabah* financing, it can be concluded that Islamic banking law in Indonesia has clearly stipulated the administrative sanctions that can be received by the bank. Criminal penalties can also be imposed on people who hold important positions or are directly responsible for carrying out economic activities in Islamic banking, but it must be accompanied by evidences related to violations of Islamic principles applied in Islamic banking. In practice, the penalty for Islamic banks employee who violated

Shariah compliance is used bank regulations in order to improve the implementation of good corporate governance.<sup>113</sup>

Furthermore, legal effect that must be borne by *mudharib* if they prove conducted an asymmetry information on performing *mudharabah* financing as contained in article 205 and 207 of the Compilation of Sharia Economic Laws is:

“*Mudharib* is obliged to be responsible for the risk of loss and or damage caused by its business that exceeds the permitted limit and or is not in line with the provisions specified in the contract.”

“The capital owner may fire the party who violated the agreement in the *mudharabah* agreement. *Mudharib* is obliged to return capital and profits to *shahibul maal* which became the rights of *shahibul maal* in *mudharabah* contract.”

Another legal effect that will be borne by the *mudharib* which proven conducted violation towards sharia principle by doing an asymmetry information in carrying out *mudharabah* financing is not only what already mentioned in article 205 and 207, but it can be more fatal towards the validity of contract. Due to the implementation of the *mudharabah* financing contract, *Mudharib* is required to maintain and implement the provisions stipulated by the capital owner in the contract.<sup>114</sup> Actually, in Islam there are *fiqhiyah* rules about freedom of contract which can be a reference in order to decide whether the contract is valid or not based on Islamic law:<sup>115</sup>

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<sup>113</sup> Interview with Mr. Catur Heri, as a Head of Sharia National Bank of Indonesia Office Branch Surabaya

<sup>114</sup> Article 204 of Compilation of Sharia Economic Law

<sup>115</sup> Zainuddin bin Ibrahim bin Muhammad Ibn Nujaym, *Al-Asybab wa al-Nadza'ir 'ala Mazhab Abu Hanifah Al-Nu'man*, Beirut: Dar al-Kutub al-ilmiyah, 1999, p. 66.

"Basically, the legal basis for the contract and *muamalat* is that the law may be (valid), so there is an argument (*shari'i*) that cancels or prohibits it"

*Fiqhiyah* rules explain that as long as the contract does not contradict with the Qur'an and Hadith, does not harm one party or even both and has a goal for common prosperity, the contract is valid. But not only the *fiqhiyah* rules that became guidance on deciding the validity of the contract, there were also an Article 28 (1) of Compilation of Sharia Economic Law which stated that:

"A valid contract is a contract that has been fulfilled in pillars (*rukun*) and requirement (*syarat*)"

Then if there were asymmetry information on performing *mudharabah* financing contract whether it's in form of moral hazard of adverse selection, where the asymmetry information is an act that violates shariah compliance and is give damage to another parties. Then it can be concluded that the *mudharabah* financing contract is invalid because there are elements that violate Islamic sharia principles in Islamic banking such as fraud, dishonesty, and other bad influences. This statement accordance with Article 26 and 193 of Compilation of Sharia Economic Law:

"An agreement is invalid if it conflicts with:

- a. Islamic Sharia;
- b. legislation;
- c. public order; and / or
- d. decency;"

"*Mudharabah* agreements that do not qualify are null and void."<sup>116</sup>

If we look at the implementation side, based on interviews conducted by researchers with the Head of Bank Negara Indonesia Surabaya Branch Office,

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<sup>116</sup> Article 193 of Compilation of Sharia Economic Law.

Mr. Catur Heri, explained that in making *mudharabah* financing agreements, the bank as *Shahibul Maal* needs to know information about cooperation with customers as *Mudharib* in order to avoid asymmetry information. The current breach of contract often result in unhealthy management in which shows the bank does not comply with sharia principles.<sup>117</sup> So it is necessary to submit complete information in the contracts and use it as a reference in the provision of decisions.<sup>118</sup>

As what mentioned above, asymmetry information often becomes the background of breach of contract when implementing financing contract in Islamic banks. Breach of contract usually occur because *mudharib* often make mistakes in the implementation of financing contracts especially in *mudharbaah muqayyadah* contract.

In *mudharabah muqayyadah* financing contract, the use of capital will be mentioned in specific way. But in the reality, *mudharib* often has a conflict of interest and leads to use the capital not as what being agreed in the contract and tends to give damage to *shahibul maal*.

According to Article 36 of Compilation of Sharia Economic Law, those kind of act categorized as breach of contract specifically Clause (a) of Article 36 of Compilation of Sharia Economic Law mentioned as follows:

- a. Not doing what is promised to be done;
- b. Doing what was promised, but not exactly like what promised;
- c. Do what already promises, but too late; or
- d. Doing something which in the agreement should not be done.

Based on the illustration above, the practice of a violation towards sharia compliance is found as a result of asymmetry information actions, especially in

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<sup>117</sup> Interview with Mr. Catur Heri, as a Head of Sharia National Bank of Indonesia Office Branch Surabaya

<sup>118</sup> Interview with Mr. Aji SP, as a Head of Bank Tabungan Negara Office Branch Gresik

the form of breach of contract, the legal consequences to be borne by the parties based on Article 38 of Compilation of Sharia Economic Law:<sup>119</sup>

- a. Pay compensation;
- b. Cancellation of the contract;
- c. Risk transition;
- d. Fine; and / or
- e. Pay the court fee.

### **C. Case Study of Asymmetry Information Between Dapenda, Bank Syariah Mandiri and PT. Sari Indo Prima**

In banking business activities, it is common for Islamic banking to have various problems caused by both internal and external parties. Settlement of Islamic banking disputes in Indonesia is generally settled at the National Arbitration Board hereinafter referred to as BASYARNAS. Previously, BASYARNAS was originally referred to Muamalat Indonesian Arbitration Board. The name was changed at the 2003 Indonesian Ulama Council National Working Meeting.<sup>120</sup> BASYARNAS stands independently as one of the non-litigation legal instruments that settles problems in the Islamic banking both on Islamic insurance, Islamic banks or other parties who need it.

Settlement through BASYARNAS can be done if an agreement is made and stated in the contract from the beginning before the dispute (*pactum compromittendo*)<sup>121</sup> or made when a dispute occurs (compromise deed). The legal basis for the existence of BASYARNAS as an alternative institution for resolving Islamic banking disputes is found in Article 20 of Bank Indonesia

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<sup>119</sup> Article 38 of Compilation of Sharia Economic Law.

<sup>120</sup> Decision of the Chairman of the Indonesian Ulama Council Leadership Meeting Number: Kep-09 / MUI / XII / 2003

<sup>121</sup> Edi Hudiata, *Penyelesaian Sengketa Perbankan Syariah Pasca Putusan MK Nomor 93/PUU-X/2012 : Litigasi dan Non Litigasi*, Yogyakarta : UII PRESS, 2015.

Regulation Number 7/46 / PBI / 2005 concerning Funds Collecting and Distribution Channels for Banks Conducting Business Activities Based on Sharia Principles, namely: <sup>122</sup>

- 1) In the event that one of the parties does not fulfill their obligations as agreed in the Agreement or if there is a dispute between the Bank and the Customer, the settlement effort is carried out by amicable resolution.
- 2) In the case of amicable resolution as referred to in paragraph (1) does not reach an agreement, then further settlement can be done through alternative dispute resolution or Sharia arbitration bodies;

There were a case on 2003 between Dapenda, Bank Syariah Mandiri and also PT. Sari Indo Prima regarding breach of contract on *Mudharabah Muqayyadah* Financing performance<sup>123</sup>. The case began when Bank Syariah Mandiri submitted a proposal for a *Mudharabah Muqayyadah* financing agreement to Dapenda, December 2003. In the financing proposal it was stated that the financing would be giving to PT. Sari Indo Prima and the financing would be used as the cost to develop a sack making business.

At that time, Dapenda assumed the financing scheme was the same as the placement of deposits in Islamic banks. Therefore, Dapenda agreed to place the funds at Bank Syariah Mandiri. On January 23, 2004, Bank Syariah Mandiri, PT. Sari Indo Prima and Dapenda made an agreement of *Mudharabah Muqayyadah* No. 006 / MoU / DPAPII / I / 2004, No.103 / 0110 / MoU-SIP / I / 2004, and No. 05/1393/017. At the same time, Dapenda transferred funds to Bank Syariah Mandiri with letter No. 045 / DPAP II / KI / I / 2004 concerning issuance of deposits amounting to Rp. 5 billion. A month later, Dapenda

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<sup>122</sup> Indonesia's Bank Regulation No. 7/46/PBI/2005 regarding Agreement on Collecting and Distribution of Funds for Banks Conducting Business Activities Based on Sharia Principles

<sup>123</sup> No Author, *Bank Syariah Mandiri Terbelit Akad Mudharabah Muqayyadah*, [website], 2009, <https://www.hukumonline.com/berita/baca/hol21873/bank-syariah-mandiri-terbelit-akad-mudharabah-muqayyadah/> (accessed 17 November 2019 19:33 WIB)

transferred funds to Bank Syariah Mandiri in the amount of Rp. 5 billion through letter No.115 / DPAP II / KI / II / 2004 dated February 27, 2004.

The agreement was then outlined in the *Mudharabah Muqayyadah* financing deed of Rp. 10 billion on January 28, 2004. The agreement was valid for three years until January 23, 2008, with the provision for revenue sharing of 13.5% annually and Bank Syariah Mandiri received a fee of one percent per year.

Six months later, Dapenda did not get a profit sharing ratio because PT. Sari Indo Prima and Bank Syariah Mandiri did not pay installments, both the main installment and profit sharing margin. Since the beginning of the financing process, Dapenda considered that Bank Syariah Mandiri was not transparent.

The non-transparency proven by early financing of PT. Sari Indo Prima amounted to Rp 6.5 billion in October 2003, before the contract was made. Meanwhile, in the financing agreement No. 108, it mentioned that PT. Sari Indo Prima not in debt to other parties.

In that case, it shows that in performing *mudharabah* financing there is a possibility of breach of contract in the form of side streaming conducted by PT. Sari Indo Prima. Side streaming conducted by using Dapenda funds to pay loan installments of PT. Sari Indo Prima to Bank Syariah Mandiri. The action also shows the non-transparency and dishonesty conducted by *Mudharib* in managing capital provided by *Shahibul Maal*.

Non-transparency and dishonesty conducted by *Mudharib* in this case can be categorized as asymmetry information called moral hazard. The non-transparency and dishonesty which indicate the occurrence of moral hazard is a concrete event that shows the possibility of asymmetry information in Islamic



bank. It put the Islamic banking in dangerous position as it will be questioned for its sharia compliance and can affect the validity of the contract.

On the other hand, if trust is no longer served in performing *mudharabah* financing because of the non-transparency and dishonesty caused by asymmetry information specifically moral hazard that committed by *Mudharib*. it will causes the termination and give impact towards the validity of the contracts itself.<sup>124</sup>

As what already mention above, both parties must obey the basics requirement of contract in performing *mudharabah* contract.<sup>125</sup> Therefore, if Islamic bank infringes principle of honesty and justice that must be contain in implementing the contract, it can make contract acknowledge as a *bathil* or void contract.<sup>126</sup>

Also, in conducting their business activities, Islamic banking must fulfill sharia compliance. However, in this case, Bank Syariah Mandiri infringed sharia compliance and proven conducted two kinds of transactions that must be avoided by Islamic bank, that were *zalim* and *gharar*.

At the first of making the *Mudharabah Muqayyadah* Financing contract, there was an article stated that PT. Sari Indo Prima was not under the debt with other parties. While in 2003, Bank Syariah Mandiri already gave a financing to PT. Sari Indo Prima. The existence of this article proved the breach of contract because here Syariah Mandiri did what they promised, but not as promised in the contract.<sup>127</sup>

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<sup>124</sup> Article 38 of Compilation of Sharia Economic Law.

<sup>125</sup> Article 204 of Compilation of Sharia Economic Law.

<sup>126</sup> Article 193 of Compilation of Sharia Economic Law.

<sup>127</sup> Article 36 (2) of Compilation of Sharia Economic Law.

Furthermore, It also became the indicator of non-fulfillment of sharia principle which was avoiding fraud (*Gharar or Taghrir*)<sup>128</sup> conducted both by Bank Syariah Mandiri also PT. Sari Indo Prima in making of contract. Fraud (*Gharar or Taghrir*) can also be a reason of termination of the contract<sup>129</sup> as mentioned in article 33-34 of Compilation of Sharia Economic Law:

“Fraud is to influence other parties by deception to form a contract, based on that the contract is for the benefit, but in reality the opposite.”

“Fraud is the reason for canceling a contract, if the deception is used by one party, it is such that it is clear and obvious that the other party does not make the contract if no deception is made.”

Furthermore, PT. Sari Indo Prima was dishonest to Dapenda because the financing which already given by Dapenda was used by PT. Sari Indo Prima to pay the installment to Bank Syariah Mandiri, which was not mentioned in the contract since it was stated that financing will be used for sack making business.

The dishonest action taken by PT. Sari Indo Prima and non-transparency conducted by Bank Syariah Mandiri can be catagorized as a violation towards sharia compliance called *zalim*. These two actions taken by both Bank Syariah Mandiri and PT. Sari Indo Prima tend to give damage to Dapenda as a *shahibul maal*.

The legal effect of this asymmetry information is stated in the decision which made by BASYARNAS that is Bank Syariah Mandiri and PT. Sari Indo

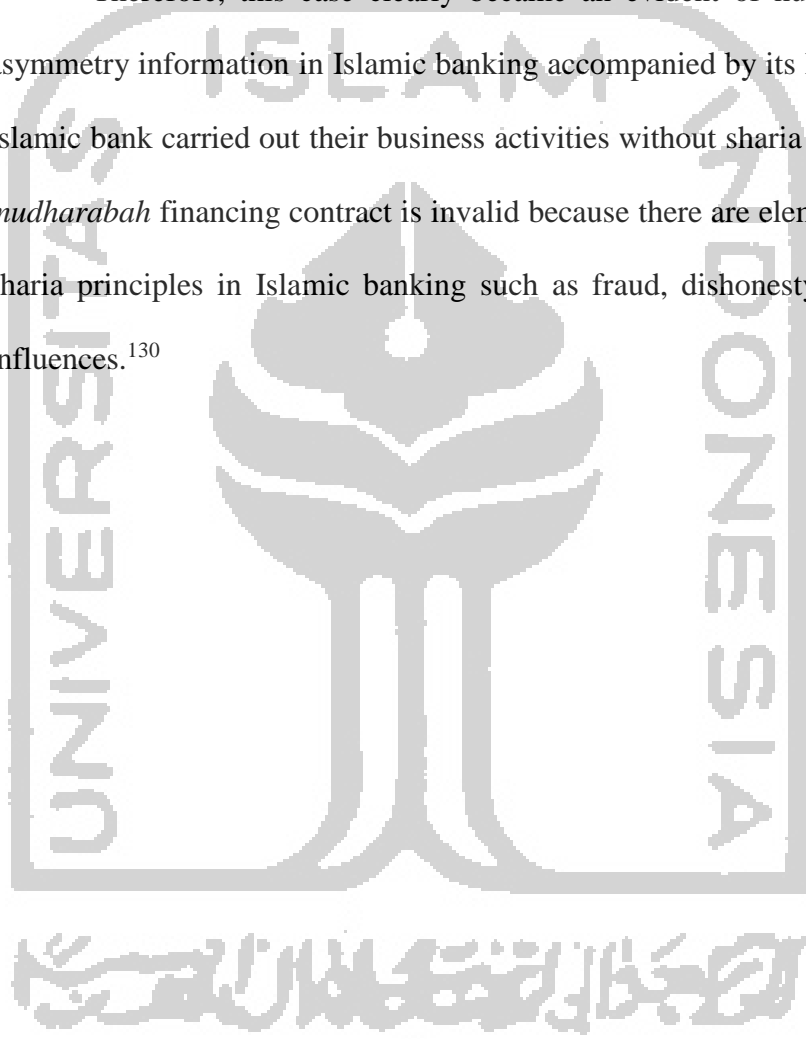
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<sup>128</sup> Article 33 of Compilation of Sharia Economic Law.

<sup>129</sup> Article 34 of Compilation of Sharia Economic Law.

Prima must pay the main contract cost of *Mudharabah Muqayyadah* financing to the Angkasa Pura II Pension Fund (Dapenda) in the amount of Rp. 10 billion and also the cancellation of the contract. This decision is already suitable with what mention in Article 38-39 of Compilation of Sharia Economic Law regarding breach of contract.

Therefore, this case clearly became an evident of huge possibility of asymmetry information in Islamic banking accompanied by its legal effect if the Islamic bank carried out their business activities without sharia compliance. The *mudharabah* financing contract is invalid because there are elements that violate sharia principles in Islamic banking such as fraud, dishonesty, and other bad influences.<sup>130</sup>



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<sup>130</sup> Article 26 and 193 of Compilation of Sharia Economic Law.