

CHAPTER 1

INTRODUCTION

A. Background of Study

The development of business in the banking sector in the current digital era has made significant progress and competition in Indonesia. The presence of banking as a financial institution has attracted society to build and develop their business. However, in its competition there are risks and consequences faced by banks so that banks are quite selective in sorting and choosing their customers. Therefore, there are various financial institutions both bank and non-bank based as a forum for various levels of society in order to help the welfare of members and the community.

Financial institutions that are able to reach all levels of society include Savings and Loan Cooperatives (KSP), Baitul Maal wat Tamwil (BMT), Rural Banks (BPR), Pawnshops, and so on. One of the financial institutions that help the welfare of members and the community is Baitul Maal wat Tamwil (BMT) which is one of the non-bank financial institutions based on sharia. The existence of BMT is considered to encourage economic success for all classes. The easiness of people to lend or save in very small amounts and the number of transactions that can be done is able to increase public trust

in the trustworthy character (*Amanah*) of BMT as an institution and personally its management.¹ According to the Indonesian BMT Association, in 2020, there were around 7,461 BMTs operating in Indonesia with total assets of IDR 12.9 trillion. Based on data from the Financial Services Authority (OJK), in 2020 there was around IDR 11.6 trillion in financing provided by BMTs to MSMEs in Indonesia.² In its operational activities, BMT has exactly the same as Islamic banks. The difference between BMT and Islamic Bank is only in the legal entity used and the supervisory institution. BMT is a cooperative legal entity and is supervised by the cooperative department while the Islamic Bank is a Limited Liability Company (PT) and supervised by Bank Indonesia. The profit of BMT and Islamic Bank is obtained from the profit-sharing determination at the beginning of the agreement. In determining profit sharing, BMT offers Islamic financing products for the community, one of them is mudharabah financing. According to Statement of Financial Accounting Standards (PSAK) No 59, Mudharabah is a business cooperation agreement between the capital owner and the fund manager with a profit-sharing ratio according to the initial agreement. Business profits are shared according to the agreement at the beginning in the contract, and if a loss

¹ Rizky, A, “*BMT: Fakta dan Prospek Baitul Maal wat Tamwil*”. Yogyakarta: UCY Pres. (2007), p.3

² Fitriansyah, Rahmat. “*Baitul Mal Wa Tamwil dan Pertumbuhan Ekonomi Sektor Rill*”. Retizen. (2023) <https://retizen.republika.co.id/posts/213413/baitul-mal-wa-tamwil-bmt-dan-pertumbuhan-ekonomi-sektor-riil> (Accessed 27 September 2024).

occurs, it is borne by the capital owner as long as the loss does not occur due to the fund manager's negligence.³

In practice, Mudharabah financing is still not attractive enough for customers even though Mudharabah financing is quite ideal financing to use for productive activities. This is affected by the high level of risk and uncertain returns. Even though Sharia Bank has planned a good strategy, it does not necessarily guarantee its success because there is still a stage that is no less important, which is trying to prevent crimes committed by customers that can harm the bank.⁴ In carrying out this financing, the customer must have an attitude of honesty, making Mudharabah financing difficult to carry out. The lack of implementation of Mudharabah financing is also influenced by internal factors, where banks tend to avoid risks that may occur because the bank is aware of the complexity of problems and risks that will be faced. One of the risks arising from the financing is side streaming by the customer. Side streaming is a form of fraud committed by customers by using financing funds that are not in accordance with the purpose of the financing.⁵ Side Streaming can occur in all financing made by sharia-based banks or financial institutions, including mudharabah financing. Side Streaming arises because an individual

³ Triyanta, Agus, "*Perbankan Syariah: Regulasi, Implementasi dan Formulasi Kepatuhan terhadap Prinsip-prinsip Islam*", Malang: Setara Press. (2016), p.53

⁴ Muhammad Ridwan Setiawan, "*Efektivitas Pencegahan Praktik Moral Hazard Nasabah Dalam Pembiayaan Murabahah*", (Skripsi, Fakultas Syariah dan Hukum, 2008), p.19.

⁵ Nazarudin Abdul Wahid, "*Sukuk Memahami dan Membedah Obligasi Pada Perbankan*", (Yogyakarta: Ar-Ruzz Media, 2010), p. 275

or institution is not fully consistent and is not responsible for his actions, and therefore tends to act inadvertently to release responsibility for the consequences of his actions to other parties. So, it is necessary to consider all aspects of the current and future situation as it may lead to harm and misery.

The trust that has been given by *shahibul maal* to *mudharib* is not in accordance with the results of the analysis that has been carried out by *shahibul maal*, so that when going to do financing *mudharib* does not make payments when it is due and has an impact on side streaming. This side streaming action occurs in several Islamic financial institutions, especially in Baitul Maal wat Tamwil (BMT). One of the BMTs that has handled side streaming by customers is KSPPS BMT Prima Insani. KSPPS BMT Prima Insani is an economic and financial institution with a cooperative legal entity whose operations are based on sharia principles. Its business activities include providing loan assistance in the form of business capital financing for traders and small and medium entrepreneurs and organizing savings services for its members with a profit-sharing system based on sharia economy. As a microfinance institution that aims to carry out economic empowerment for the community, KSPPS BMT Prima Insani always tries to develop its business even there are always some obstacles on its operation.

Based on the background above, the author intends to conduct research that discusses “LEGAL CONCEQUENCES OF SIDE STREAMING IN MUDHARABAH FINANCING IN KSPPS BMT PRIMA INSANI “.

B. Problem Formulation

The following is the formulation of the problem that will be analyzed by author:

1. What are the legal consequences concerning side streaming action in mudharabah financing in Baitul Maal wat Tamwil?
2. What are the legal actions for KSPPS BMT Prima Insani to overcome the side streaming carrying out by Mudharib in Mudharabah Financing?

C. Objectives of Research

The objectives of this research are as follows.

1. To analyze the legal consequences of side streaming by *Mudharib* in Mudharabah Financing in Baitul Maal wat Tamwil.
2. To find out the legal actions for *Shahibul Maal* to overcome side streaming carried out by *Mudharib* in Mudharabah financing.

D. Originality of Research

The author conducts a search with several previous studies which have similarities and also differences to determine the authenticity of the research presented in the following table:

Writer	Comparison
Lingga Damayanti ⁶	<ol style="list-style-type: none"> 1. Title: <i>“Tindakan Side Streaming Yang Dilakukan Oleh Nasabah Pada Akad Pembiayaan Musyarakah Yang Di Daftar Di Kantor Notaris”</i> 2. Problem Formulation <ol style="list-style-type: none"> a. What are the forms of side streaming actions taken by customers in the musyarakah financing contract? b. Is the Notary responsible if there is side streaming in the musyarakah financing contract registered at the Notary's office? 3. Research Results <ol style="list-style-type: none"> a) For the two cases of side streaming that occurred at KSPPS BMT Beringharjo, where the financing funds have been misused for other purposes so that the customer cannot fulfill his obligation to pay the principal installments, in this case KSPPS BMT Beringharjo is willing to do a refinancing contract with a new agreement if there is still the ability and good faith of the customer, but if it is not possible to continue, the consequence is that the collateral pledged will be withdrawn by KSPPS BMT Beringharjo.

⁶ Damayanti, Lingga, *“Tindakan Side Streaming yang Dilakukan oleh Nasabah pada Akad Pembiayaan Musyarakah yang Didaftarkan di Kantor Notaris”* (Thesis, Program Studi Ilmu Hukum, Universitas Islam Indonesia, 2023).

	<p>b) Notaries do not have the obligation to be responsible for waarmeding in musyarakah financing contracts regarding the side streaming action by customers. The authority of the Notary is only to register the formal letter (under the hand) and the notary is only a witness when the letter has been registered at the Notary's office as evidence for the parties, but in practice the Notary has an obligation to provide legal education to the parties who will carry out legal actions.</p> <p>4. Differentiate of Research</p> <p>The research conducted by Lingga Damayanti refers to side streaming actions that occur in musyarakah financing while the author discusses side streaming actions in mudharabah financing. In addition, research by Lingga Damayanti concerns the role of notaries in side streaming actions by customers while researchers focus on the role of Islamic financial institutions according to the law in resolving side streaming actions by customers.</p>
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Siti Nur Azizah ⁷	<ol style="list-style-type: none"> 1. Title: <i>“Prosedur Pencegahan Tindakan Side Streaming Pada Pembiayaan Di Bank Muamalat Kota Palangka Raya”</i> 2. Problem Formulation: <ol style="list-style-type: none"> a. How is the procedure to prevent side streaming in financing at Bank Muamalat Palangka Raya? b. How is the impact of side streaming prevention procedures on financing at Bank Muamalat Kota Palangka Raya? 3. Research Results <ol style="list-style-type: none"> a) The procedure for preventing side streaming actions in financing carried out by internal parties of Bank Muamalat has been carried out starting from the application of prudential principles by ensuring the correctness of the Budget Plan given by prospective customers, then conducting surveys of goods and also asking for some personal documents belonging to prospective customers. Furthermore, conduct a 5C analysis, (character, capacity, capital, condition, collateral). Then the bank conducts controlling when before the funds are disbursed then the bank conducts a field
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⁷ Azizah, Siti Nur, *“Prosedur Pencegahan Tindakan Side Streaming pada Pembiayaan di Bank Muamalat Kota Palangka Raya”*. (Thesis, Program Studi Perbankan Syariah, Institut Agama Islam Negeri Palangka Raya, 2020).

	<p>visit, then followed by reporting evidence of the use of funds which is carried out every 3 to 6 months.</p> <p>b) There is a need for the application of other principles such as the application of the 7P analysis principle (Personality, Party, Purpose, Prospect, Payment, Profitability, Protection), 3R (Return, Repayment Capacity, Risk Bearing Ability) and also in-depth education of customers regarding contracts in financing.</p> <p>4. Differentiate of Research</p> <p>The research conducted by Siti Nur Azizah refers to the efforts of the bank's internal parties in minimizing the occurrence of side streaming by customers, while the research conducted by the author pays more attention to the legal consequences of side streaming actions and their prevention according to applicable laws.</p>
<p>Indrianawati, Nisful Lailah, Dewi Karinsa⁸</p>	<p>1. Title: <i>“Manajemen Risiko Pembiayaan Mudharabah Pada Perbankan Syariah”</i></p> <p>2. Problem Formulation:</p> <p>a. What are the factors causing the low of Mudharabah financing?</p>

⁸ Indrianawati, I., Lailah, N., & Karina, D. *“Manajemen Risiko Pembiayaan Mudharabah Pada Perbankan Syariah”*. Journal of Innovation in Business and Economics, 6 No. 1, (2015).

	<ul style="list-style-type: none"> b. What are the types of risks in Mudharabah Financing? c. How to Manage Risk in Mudharabah Financing? <p>3. Research Results</p> <ul style="list-style-type: none"> a) The Financial Report of BMI, BSM, and BNIS, the assets owned through mudharabah financing have a quite low amount compared to Murabaha financing, this is because the distribution of funds through mudharabah financing has a considerable risk, namely the risk of loss, especially on the income that will be received by the bank. b) The type of risk that often arises in mudharabah financing is non-performing financing caused by side streaming. The result is the loss of ability to pay installments and profit sharing to the bank due to customer negligence. c) The efforts made by banks in managing problematic financing, namely by rescheduling, reconditioning, and restructuring if the customer is considered to still have the intention to pay. Otherwise, collateral execution is carried out. For losses that arise due purely to business risks not the, Banks
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	<p>deliberately provide multi-layered security for public funds used as financing funds by cooperating with insurance parties to cover these losses.</p> <p>4. Differentiate of Research</p> <p>The difference in this research refers to the factor of risks that arise in mudharabah financing, one of which is side streaming. The author's research will more specifically discuss the act of side streaming itself and its consequences in mudharabah financing.</p>
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Based on the description in the table above, it can be concluded that the research conducted by the author is original. This research has not been reviewed by other parties. Research originates from thoughts, so that its authenticity can be accounted for.

E. Literature Review

1. Side Streaming

Side streaming is basically a term used in economic studies to describe the misuse of contracts that fail to fulfill their intended purpose. In economic financing. Side streaming is defined as a use of financing that is not in accordance with its designation by the customer. The customer

does not use the credit or financing facilitated to him as previously agreed.⁹

Side streaming is an important issue to be aware of for banks. Side streaming is the use of funds that are not in accordance with the contract (*aqd*), therefore side streaming is categorized as deviation. The main cause of side streaming is the negligence of the bank in analyzing the customer in approving a credit or financing. Side streaming in banking has the risk of decreasing the collectability of returning payment obligations by customers so that it can lead to non-performing loans/credit.¹⁰ In terms of muamalah fiqh, the act of side streaming in Islamic banks is included in a form of violation of the agreement written in the financing contract. Every written agreement is binding on each other with the existence of this binding agreement giving rise to a law between the two parties. Side streaming has also violated the principle of trust because the customer does not have good faith in the transaction by misusing the agreement.

2. Mudharabah Financing

Mudharabah is one of the financings provided by Islamic banks and other Islamic financial institutions. Article 1 (25) Law Number 21 Year 2008 on Islamic Banking states that Mudharabah is a business cooperation

⁹ Rahman, Hasanuddin, “*Aspek-Aspek Hukum Pemberian Kredit Perbankan di Indonesia*”. Citra Aditya Bakti. (1995), p. 110

¹⁰ Diah Dwi Ammarwati. “*Side Streaming*”. (2024)
<https://www.slideshare.net/DAMmarwati/side-streaming> (Accessed 6 October 2024).

agreement between two parties in which the first party (*Shahibul Maal*) provides all the capital, while the other party (*Mudharib*) becomes the manager, and the business profits are divided between them according to the agreement of the contract, while losses are borne by the owner of the capital as long as it is not due to negligence or fault of the manager. This is also supported by Fatwa DSN-MUI No. 07/DSN-MUI/IV/2000 concerning Mudharabah Financing which governs that if the business manager is negligent, deviates from the agreement, or takes harmful actions, then he is obliged to bear the losses that have been caused.¹¹

In mudharabah financing the bank provides full investment or working capital financing (trusty financing), while the customer provides the project or business complete with management. The profits and losses experienced by the customer are shared or borne together. Furthermore, at the time of the due date, the customer is obliged to return the capital to the bank, either in installments or in full repayment. The application of the profit-sharing principle between the customer and the bank takes place as long as the capital provided by the bank is returned in full.¹²

¹¹ Pramudya, Ady Wena, and Puji Sucia Sukmaningrum. "Implementasi manajemen resiko pembiayaan mudharabah pada koperasi jasa keuangan syariah (studi kasus pada koperasi jasa keuangan syariah al abrar)." *Jurnal Ekonomi Syariah Teori Dan Terapan* 7, no. 1 (2020): 162-172.

¹² Yadi Janwari, *Lembaga- Lembaga Perekonomian Syariah*, (Bandung: Pustaka Mulia, 2000), p. 18.

In its application, Mudharabah in Islamic financial institutions are not only in the form of financing but can also take the form of deposits. In mudharabah deposits, the customer acts as *shahibul maal* and the Islamic financial institution acts as *mudharib* which the customer will receive profit sharing according to the agreed ratio (*nisbah*).

3. Baitul Maal wat Tamwil

Baitul Maal wat Tamwil (BMT) is an integrated independent business center with activities to develop productive and investment businesses in improving the quality of economic activities of small entrepreneurs to encourage saving activities and support the financing of their economic activities.¹³ In running their business, BMT as a non-bank Islamic financial institution uses the principles of Islamic muamalah, including the principle of cooperation (*syirkah*) and the prohibition of usury. It is intended in order to improve the welfare of society, especially the lower middle class. BMT can be a forum for small communities to improve their welfare with various facilities provided by BMT such as financing, savings, social assistance, and others. Basically, BMT provides facilities or products that are more or less the same as Islamic banks. However, the difference between BMT and Islamic Banks is in the object

¹³ Madjid, Baihaqi Abd, and Syaifuddin A. Rasyid. "Paradigma Baru Ekonomi Kerakyatan Sistik Syariah: Perjalanan Gagasan dan Gerakan BMT di Indonesia." Penerbit Inkubasi Bisnis Usaha Kecil. Kalibata (2000).

of funds. Islamic banks can withdraw funds from the community without certain conditions, while to withdraw funds at BMTs need to become members or potential customer members.¹⁴

Apart from being a non-bank financial institution, however, after the issuance of Law Number 1 Year 2013 concerning Microfinance Institutions, all BMTs are required to have a cooperative legal entity if they want to continue operating legally. Until now, BMTs are in the form of sharia cooperatives, namely Sharia Savings and Loan and Financing Cooperatives (KSPPS).

F. Operational Definition

According to the focus and formulation of the research problem, the descriptions of the definitions of terms in this study are as follows.

1. Legal consequences are the result of actions that directly or indirectly affect substantive legal rights or obligations, including by subjecting regulated parties to potential liability for non-compliance.¹⁵
2. Side streaming is defined as a use of financing that is not in accordance with its designation by the customer who does not use the credit or financing facilitated to him as previously agreed.¹⁶

¹⁴ Ridwan, Muhammad. *"Sistem dan Prosedur Pendirian Baitul Mal wat-Tamwil (BMT)."* Yogyakarta: Citra Media (2006).

¹⁵ Law Insider. (n.d.). *Legal Consequence*. <https://www.lawinsider.com/dictionary/legal-consequence> (Accessed 17 Oktober 2024)

¹⁶ *ibid*

3. Mudharabah is a contract based on trust, where one party is the provider or owner of capital (*shahibul maal*) and the other party is the manager of the business (*mudharib*) on behalf of both parties, and the profits are divided according to the agreement stated in the contract.¹⁷
4. KSPPS or Sharia Financing Saving and Loan Cooperative is a type of cooperative business form that runs on sharia principles which functions as a business institution and carries out social services, including managing zakat, infaq, sadaqah, and waqf (ZISWAF).¹⁸
5. Baitul Maal wat Tamwil (BMT) is a microfinance institution which in its operational activities is based on the principle of profit sharing, helping to grow MSMEs and small businesses in the community in order to improve the status and help those in need of help.¹⁹

G. Research Method

1. Type of Research

This study uses normative research which examines the study of documents. Normative legal research involves identifying legal rules, principles, and doctrines to address specific legal issues to solve problems.²⁰

¹⁷ *ibid*

¹⁸ Peraturan Menteri Negara Koperasi dan Usaha Kecil dan Menengah Republik Indonesia No. 11/Per/M.KUM/XII/2017 Tentang Pelaksanaan Kegiatan Usaha Simpan Pinjam dan Pembiayaan Syariah oleh Koperasi.

¹⁹ Sofhian, Sofhian. "Baitul Maal wat Tamwil (BMT) Berbasis Kearifan Lokal Gorontalo." *Al-Ulum* 17, no. 1 (2017): 166-182.

²⁰ Marzuki, Peter Mahmud. *Penelitian Hukum*, Prenada Media Group, Jakarta. 2008.

2. Research Approach

In this research, the author will use several approaches such as:

- a) Statute Approach. The statutory approach is research based on law or legislation products.²¹ In this approach, the author will examine all laws and regulations related to the research to be studied based on Indonesian law.
- b) Conceptual Approach. Legal Research with this Conceptual Approach departs from the doctrines and views that develop in legal science.²² By studying these theories, the author will find ideas, and can produce legal terms, legal concepts, and legal principles that are relevant to the issues at hand.

3. Research Object

The object of research is the legal consequences of side streaming on mudharabah financing in KSPPS BMT Prima Insani.

4. Research Legal Material

Since this research applies normative legal analysis, the data source used is secondary data, namely documents or libraries, by collecting and examining or tracing documents and libraries that can provide the information researchers need for legal materials used in this research area.

²¹ Bahder Johan Nasution, *Metode Penelitian Ilmu Hukum*, Bandung, Mandar Maju, 2008, p.92.

²² Muhaimin, *Legal Research Methods*, Ctk. First, Mataram University Press, Mataram, 2020,

a) Primary Legal Sources

Primary legal sources are data materials consist of law and regulations regarding the application of mudharabah financing in Indonesia and legal consequences of side streaming according to applicable laws in Indonesia, including:

- 1) Code of Civil Law
- 2) Fatwa DSN-MUI No. 07/DSN-MUI/IV/2000 concerning Mudharabah Financing
- 3) Law Number 21 Year 2008 on Islamic Banking

b) Secondary Legal Sources

Secondary legal sources are data materials that provide an explanation of primary data legal materials. For examples are interviews, research results, scientific works from scholars and so on.

c) Tertiary Legal Sources

Tertiary legal sources are data materials that provide information about primary and secondary law. For examples are dictionaries, encyclopedias, magazines, mass media, and the internet.

5. Collecting Material Method

The method of collecting legal materials can be done in the following ways:

- a) Library research, which is done by reviewing books and journal, which may be related to research problems.

b) Document study, which is a method of understanding various official institutional documents related to the subject matter, documents can be in the form of important information, records or archives or the results of expert research in the form of reports.

6. Data Analysis

This research was normative legal research and used conceptual approach, namely in the form of norms that become the basis of reference for analyzing. Furthermore, from the results of the analysis the author will connect with the problems in this study to produce an objective assessment to solve the problems in the research.

The data analysis has conducted by understanding the law and regulation regarding Baitul Maal wat Tamwil (BMT), mudharabah, and side streaming in Indonesia. The analysis would be started understanding the meaning of each object of research until found the legal basis of each object, The researcher also analyses the legal case regarding the topic in order to provide the example of legal case that occurs in the community. After that, researchers define the law or find the legal consequences that occur from side streaming violations in mudharabah financing at BMT. The next step is to find a legal settlement in the Indonesian legal system.

H. Structure of Writing

This research is structured by dividing into 4 (four) chapters, as follows: CHAPTER I is an Introduction consisting of the Background of the Study,

Problem Formulation, Research Objectives, Originalities of Research, Literature Review, Operational Definitions, Research Methodology, and Structure of Writing.

CHAPTER II is a Theoretical Review. This chapter will focus on the theories relevant to the issue formulations in this research, namely the Legal Consequences of Side Streaming in Mudharabah Financing in KSPPS BMT Prima Insani.

CHAPTER III is Finding and Results. This chapter will analyze the two problem formulations. First, to analyze the problem formulation about the legal consequences regarding the side streaming by *mudharib* in Mudharabah Financing in Baitul Maal wat Tamwil. Second, to analyze the problem formulation about legal actions by *shahibul maal* to overcome side streaming in mudharabah financing in Baitul Maal wat Tamwil.

CHAPTER IV is the Conclusion and Recommendation. In this chapter, the conclusion will be drawn from a summary of the answers to two problem formulations. After studying and determining the solutions to the two problem formulations, recommendations will be given based on the author's ideas.