JCIC: Jurnal CIC Lembaga Riset dan Konsultan Sosial – ISSN: 2746-5160 (e)
Vol. 4, no. 2 (September 2022), pp. 49-56, doi: 10.51486/jbo.v4i2.77

Implementation of Parate Execution on Guarantees in Islamic Financial Institutions in an Islamic Economic Perspective

Implementasi Eksekusi Parate pada Jaminan di Lembaga Keuangan Syariah dalam Perspektif Ekonomi Syariah

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ABSTRACT

One alternative in paying off debtors in Islamic banking is the Parate Execution. Parate execution is the authority to sell under his own power goods which are the object of collateral if the debtor defaults without having to ask for fiat (approval) from the Chief Justice. This study used qualitative research methods. The type of research is normative juridical research (legal research) which is research that is focused on examining the application of the rules or norms that exist in the applicable positive law and which are related to the substance in this study. Through this research, the conclusion that can be obtained by the author is that before carrying out partial execution, Islamic Banks must make rescheduling, reconditioning, restructuring and persuasive approaches to customers to find solutions and solve the causes of bad financing. If no solution is found until the last resort, the bank can withdraw the collateral in parate. the alternative despute resolution efforts carried out by banks are carried out through negotiation efforts and can be seen in rescheduling, reconditioning, restructuring and persuasive efforts. Because such efforts prioritize deliberation to reach consensus.

Key Words: *Execution, Parate, Islamic*

ABSTRAK

Salah satu alternatif dalam pelunasan hutang debitur pada perbankan syariah ialah dengan Eksekusi Parate. Eksekusi Parate adalah kewenangan untuk menjual atas kekuasaan sendiri barang yang menjadi obyek jaminan kalau debitor cidera janji tanpa harus meminta fiat (persetujuan) dari Ketua Pengadilan. Penelitian ini menggunakan metode penelitian kualitatif. Tipe penelitian ini adalah penelitian bersifat yuridis normatif (legal research) yang merupakan penelitian yang difokuskan untuk mengkaji penerapan kaidah-kaidah atau norma-norma yang ada dalam hukum positif yang berlaku dan yang berhubungan dengan substansi dalam penelitian ini. Melalui penelitian ini, kesimpulan yang dapat diperoleh penulis ialah Sebelum melakukan eksekusi secara parate, Bank Syariah harus melakukan upaya-upaya rescheduling, reconditioning, restructuring dan pendekatan persuasif kepada nasabah untuk mencari solusi dan memecahkan penyebab terjadinya pembiayaan macet. Jika tidak didapatkan solusi sampai dengan upaya terakhir maka bank dapat menarik jaminan secara parate.Ketentuan Eksekusi Parate dalam Undang-Undang tentang Hak Tanggungan tertuang pada pasal 20 ayat (1) huruf a Undang-Undang Hak Tanggungan, Al-Ishlah dalam eksekusi parate dapat ditemukan pada upaya Alternatif despute resolution yang dilakukan bank dilakukan dengan upaya negosiasi dan dapat terlihat pada upaya-upaya rescheduling, reconditioning, restructuring dan upaya persuasif. Karena upaya yang demikian lebih mengedepankan musyawarah untuk mufakat.

Kata-kata Kunci: *Eksekusi, Parate, Islam*

INTRODUCTION

Islamic banks with all their products and services in carrying out their business activities are also guided by banking regulations in general and other provisions such as arrangements regarding fiduciary guarantees regulated in Law Number 42 of 1999 concerning Fiduciary Guarantees. One of the financing that is quite developed in Islamic banks is murabaha financing, which often uses fiduciary bonds in binding guarantees because the burden is considered simple, easy and relatively fast.

The Sharia Banking business activity (Roszkowski, Mark E., 1989) that is most utilized by the public is financing. Financing is based on agreements and agreements between Islamic banks as creditors and debtors as recipients of financing which are then set forth in a sharia financing agreement. The sharia financing agreement will contain provisions for the maximum amount of financing, the financing period, the purpose of using the financing, the financing interest rate, the method of withdrawing financing funds, the financing repayment schedule and other provisions that are no less important such as provisions regarding guarantees for financing (M. Bahsan, 2007) or also known as collateral (See Article 1 paragraph 23 of the Banking Law).

Financing activities carried out by Islamic banks have a very large role in the implementation of development because they aim to improve the welfare of people's lives (Adiwarman A. Karim, 2010). The large role is proportional to the risks faced by Islamic banks, so that Islamic banks need to receive protection through a strong collateral institution and can provide legal certainty to guarantee the provision of debts given to recipients of financing or debtors. Sharia Banking in Indonesia in serving the needs of the public who want banking services with sharia principles based on law in Law Number 21 of 2008 concerning Sharia Banking, so that Sharia Banks in providing financing facilities must follow government regulations, namely in accordance with Article 23 of the Law Number 21 of 2008, that this provision requires additional collateral in every high-risk financing such as mudarabah financing. (Adrian Sutedi, 2006) The rules that can be used relate to the issue of additional collateral in Islamic banks as stipulated in Law Number 10 of 1998 concerning Banking which states:

> *"In providing credit, or financing based on sharia principles. Commercial banks are required to have confidence based on an in-depth analysis of the intentions and abilities of the debtor customer to pay off his debts or return the said financing in accordance with what was agreed".*(See Article 8 of Law Number 10 of 1998 concerning Banking)

The banking law itself has actually determined that what can be used as collateral is one of the elements of the guarantee, problems will arise if the recipient of the financing cannot return the financing while the guarantee consists of projects. Therefore, it is necessary to provide additional guarantees in the form of objects dependent on personnel and corporate quaranty (insurance company). (Thomas Suyatno et.al, 1995)

The consideration for the permissibility of an Islamic bank as a provider of funds to ask for additional collateral for the mudharabah financing provided is because the funds provided by a third party which are used as capital by the bank are a trust, and the bank must maintain the trust. given to the bank is a wish for many people (3rd parties) so automatically the additional collateral used as collateral also becomes a necessity for the contract. (Muhammad, 2004)The objective of reducing moral hazard and ensuring that the mudarib actually implements all the terms agreed in the contract are also part of the reasons for allowing the provision of additional collateral by managers for high-risk financing provided by Islamic banks (Adrianne Krikorian, 2017).

The collateral submitted must have a nominal value that exceeds the amount of financing provided by the lender to the debtor or at least has sufficient value to pay off the debtor's debt to the creditor. The process of executing collateral by Islamic sharia banks is the last resort made by Islamic sharia banks, meaning that the execution of collateral will only be carried out when the debtor is no longer able to pay and complete his financing payment obligations as well as other sharia obligations as agreed upon and included in the financing agreement. It is a last

resort because the execution of guarantees does not only require a fairly long process to implement, but also costs a lot to handle (Martono, 2007).

After the issuance of Law no. 4 of 1996 concerning the Mortgage Law, in which there is an execution parate which has the same power as a court decision. In the case of guarantees with Mortgage Rights, creditors are indeed given the right to execute themselves/directly the collateral object on their own power. This is confirmed in article 6 in conjunction with article 20 paragraph (1) of Law no. 4 of 1996 concerning Mortgage Rights on Land and Objects Related to Land (the Mortgage Law). This execution is known as direct execution or parate execution (Muhammad Maulana, 2014).

One alternative in paying off debtors in Islamic banking is the Parate Execution. Parate execution is the authority to sell under his own power goods which are the object of collateral if the debtor defaults without having to ask for fiat (approval) from the Chief Justice.(R. Subekti, 1978) Under the Mortgage Law (Law Number 4 of 1996) and the Fiduciary Guarantee Law (Law Number 42 of 1999), each has regulated this Parate Execution.

Based on the description above, what is interesting for the author to serve as the title of the research is regarding the Parate Execution Implementation Mechanism in Islamic banking in the perspective of Legislation and Sharia Economic Law.

RESEARCH METHODS

This study used qualitative research methods. The type of research is normative juridical research (legal research) (Sugiyono, 2013) which is research that is focused on examining the application of the rules or norms that exist in the applicable positive law and which are related to the substance in this study (Peter Mahmud Marzuki. 2011).

RESULT AND DISCUSSION

Parate Execution Mechanism

Parate execution is the implementation of achievements carried out by creditors (receivable) without going through a judge. So parate execution or direct execution, occurs when a creditor sells certain goods belonging to the debtor without having an executive title. (Effendy Hasibuan, 1997)

Basically, a creditor who wants the implementation of an agreement from a person who does not fulfill his obligations, must seek court assistance. To carry out the real execution, one condition must be met, namely permission from the judge. This is as a result of the enactment of a legal principle, namely that people are not allowed to be judges themselves.

However, with the parate of execution, it provides certainty and the creditor's position will be more protected if the debtor breaks his promise, because it seems as if the debtor has set aside part or all of his material assets to pay off his debts at a later date.

After the enactment of Law no. 4 of 1996 concerning Mortgage Rights, the regulations governing the imposition of land rights are Chapter 21 Book II of the Civil Code, which relates to mortgages and creditverbands in the Staatsblad 1908-542 as amended by the Staatsblad 1937-190 which is no longer valid. Formally the imposition of land rights applies the provisions contained in the LoGA, but materially the provisions contained in Chapter 21 Book II of the Civil Code and Credit Verband apply (Djabar Chadijah Iriantim. 2008).

Non-performing financing is a risk that cannot be avoided by every bank in providing financing. These things can be caused by non-fulfillment of achievements to the bank, such as the debtor experiencing business failure, resulting in a decrease in the debtor's business income, even the debtor is deliberately not willing to pay for financing in accordance with the agreement because of the debtor's bad character. Achievement is an obligation that must be fulfilled by the parties in the agreement.

According to the provisions of Article 1234 of the Civil Code, there are three kinds of achievements that can be agreed upon for each engagement, namely to give something, to do something, and not to do something. Meanwhile, a default is a condition where a person does not fulfill an obligation based on a contract or agreement. In Sharia Banks, execution of

collateral is the last resort in dealing with stalled financing, previously Sharia Banks have made efforts, namely: (1) Islamic Banks reschedule (rescheduling), namely legal efforts to make changes to several terms of the financing agreement with regard to the repayment schedule or financing period. (2) Second, through reconditioning, the bank makes changes to part or all of the terms of the financing agreement. (3) Third, through restructuring, where the bank changes the terms of the financing agreement in the form of providing additional financing. (4) Banks take persuasive actions to debtor customers to find solutions and solve the causes of non-performing financing. (5) Banks provide warning letters and first summons to debtor customers. (6) If after one week of the first warning there is no response and response, the bank will issue a second and third warning letter. (7) If the bank has fulfilled the administrative requirements and procedures and the customer remains uncooperative, the bank will execute the guarantee. (8) The bank will send a guarantee auction letter to the debtor and the State Assets and Auction Service Office (KPKNL). (9) The KPKNL will then follow up with a letter to the debtor stating that the guarantee will be auctioned on the specified day.

Meanwhile, based on the provisions of Article 22 paragraphs (1) and (2) of PMK No.93/PMK.06/2010 concerning Instructions for Implementation of Auctions, the auction of land or land and buildings must be accompanied by a Land Certificate (SKT) from the local Land Office. The request for the issuance of SKT to the Head of the local Land Office is submitted by the Head of the KPKNL whose management fees are the responsibility of the Bank as the bid applicant. If the day and place of the auction has been determined by the head of the KPKNL, it will be stated in the auction announcement, because the auction announcement must at least contain the following: (1) The identity of the seller; (2) The day, date, time and place of the auction; (3) Type and quantity of goods; (4) Location, area of land, types of land rights, and presence/absence of buildings, specifically for immovable property in the form of land and or buildings; (5) The number and types of specifications, specifically for movable goods; (6) Auction bid security deposit, including the amount of time period, method and place of deposit, in the event that a bid bid security deposit is required; (7) Payment term for the auction price; (8) Price limit, as long as it is required in the laws and regulations at the will of the seller who owns the goods.

In practice, this limit price must be stated in the auction announcement with the intention that prospective bidders can find out the price limit of the goods to be auctioned. Announcement of auction is the obligation of the Bank as the seller so that the Bank is obliged to bear the cost of the announcement of the auction that has been published in the newspaper. Based on the provisions of PMK No. 93/PMK.06/2010 concerning Instructions for Auction Implementation, Auction announcements are made 2 (two) times 15 (fifteen) days apart, for the first announcement it is imposed by means of an easy-to-read sticker or through daily newspapers and the second announcement must carried out through daily newspapers and carried out lapse of 14 (fourteen) days prior to the auction. After the seller makes an auction announcement, the seller is obliged to notify the debtor who is in default and the parties related to the goods to be auctioned, that the debtor's property will be auctioned. Auction notices are also made to building occupants and property owners.

If the above has been done by the seller, the auction can be carried out according to the specified schedule. On the day of the execution of the auction as determined, the execution of the auction shall be carried out by the auction officer appointed by the Head of the KPKNL. Auction bids will be made in increments starting from the specified auction limit price. For the highest bid from the auction participant, the Auction Officer will appoint and determine the highest bidder as the legal winner of the auction. No later than 3 (three) days after the date of the auction. The auction winner must make a payment in accordance with the price formed at the auction after deducting the value of the auction guarantee that he had previously deposited.

After receiving the deposit from the auction winner, the treasurer of the KPKNL will hand over the auction proceeds to the Bank after deducting the Auction Seller Tax of 5% (five percent) and the Seller's Auction Fee of 1% (one percent) each calculated from the auction value sold. Furthermore, the Bank will take into account the proceeds from the auction sale of the object of the debtor's guarantee for the settlement of all debtor's obligations to the Bank, which

consist of the loan principal, interest, fines and fees. For this settlement, if there is still an excess from the sale proceeds, the Bank must return the excess proceeds from the sale to the debtor.

Based on the description above, the author can find out that in the execution of mortgage guarantees the thing that can be done is if the customer defaults or is unable to carry out the obligation to make payments, the bank has the right to execute the sale by means of an auction. However, if this does not work, then you can ask for assistance with an executorial title or ask for assistance from the authorities to secure collateral with mortgage rights that are in the control of the defaulting customer (Dewi, Gemala, et.all, 2006).

Islamic banks have assessed the auction fees at the beginning when debtor customers apply for financing at Islamic banks. The amount of the auction fee is regulated in Article 28 to Article 34 of the Decree of the Minister of Finance of the Republic of Indonesia No. 337/KMK.01/2000 concerning Auction Implementation Guidelines. After the auction process has been carried out, the distribution of the auction proceeds is used to pay off the principal debt and the outstanding margin. It is mandatory to take precedence because these two things are the right of the creditor as the provider of financing funds and the debtor's obligation to fulfill it, if the auction results are not sufficient to repay the debt, the bank will apply for additional guarantees, the shortage is removed or billed through a lawsuit to the Bandung District Court.

The difference between the execution process of Islamic banks and other conventional banks lies in the approach to debt collection, Islamic banks act more tolerantly to debtors who have not been able to pay off their debts, then take persuasive actions first and give warnings with indefinite breaks. Although the legal umbrella is clear and organized in accordance with what is stated in the law, sometimes it is from the customer or creditor who does not understand the applicable law in the financing agreement process, because according to the legal section of Islamic Banks what is meant by execution is an act. which is done by force, so of course Obstacles arise when the customer does not accept and fights against the bank, because he feels it is not in accordance with the procedure, besides that the debtor delays the auction so that the execution process is hampered, even some goods that are executed have not met the amount owed debtors, and debtors running away are not responsible (Muhammad Djumhana, 2006).

How good a law is, its usefulness to society will depend on its implementation. Theoretically, the Mortgage Law has clearly and in detail regulated, but in practice there are still many obstacles that can hinder the execution. So to deal with obstacles in the execution process, sometimes efforts are made by banks, including filing a lawsuit to the Court with a legal representative and involving the police if it is necessary, it could even be with coordination between the Village Head and related officials before the execution is carried out so that the object of execution is secured. from the possibility of the executed parties obstructing the execution. Conducting socialization of execution issues to the community and related institutions so that the community knows what their rights and obligations are.

Legislative Provisions Regarding Parate Execution in Islamic Banking

Parate execution or the right to make sales on one's own power can be found in several material guarantee institutions, namely Pawn, Mortgage, Mortgage, Fiduciary. Article 1155 Paragraph (1) of the Civil Code stipulates the right to parate execution in pawning institutions where if the parties have not agreed, then the debtor is entitled, if the debtor or the pawnbroker breaks the promise after a predetermined grace period has passed, or if it has not been determined. a period of time after a warning has been issued, to pay, to order the sale of the goods as a pledge in public according to local customs and on conditions that are generally applicable with a view to taking the amount of the debt in full as well as interest and fees from the sales income.

Article 1178 Paragraph (2) of the Civil Code stipulates the right of parate execution for mortgage institutions, but it is permissible for the first mortgage debtor to, at the time the mortgage is given, expressly ask for an agreement that, if the principal is not repaid properly or if the interest owed is not paid, he will not pay it in full. will absolutely be empowered to sell

parcels that are tied up in public to take payment of principal and interest as well as expenses from the sales revenue. The promise is recorded in the general registers while the auction sale must be carried out according to the method as regulated in Article 1211."

Article 6 of Law Number 4 of 1996 concerning Mortgage Guarantees states that if the debtor is in breach of contract, the holder of the first Mortgage has the right to sell the object of the Mortgage on his own power through a public auction and take repayment of his receivables from the proceeds of the sale.

Article 15 Paragraph (3) of Law Number 42 of 1999 concerning Fiduciary states that if the debtor is in breach of contract, the Fiduciary Recipient has the right to sell the object that is the object of the Fiduciary Guarantee on his own power.

If we look at Article 1155 Paragraph (1) of the Civil Code above, then actually the legislators have determined that every holder of a pledge by law will always have the authority to parate execution, unless from the beginning the parties have agreed otherwise. This means that even if it is not agreed upon, it is considered that the right to sell on its own power is always agreed upon. We can understand this considering that the collateral object is controlled by the creditor, so that with the transfer of control (over movable objects) the guarantee holder should have the right to make sales on his own power when the debtor defaults.

In contrast to the principle that the law provides for mortgage institutions, the law requires that the right to be able to make sales on its own power is expressly stated in the agreement. This principle is followed by the Mortgage Guarantee in Law No. 4 of 1996. While the fiduciary guarantee has the same characteristics as the pledge guarantee where the parties do not need to agree that there will be parate rights, the execution of the law has automatically given these rights to the creditor (Laurence Bolle, 2009).

Al-Iṣhlah As The Basis For Execution Of Parate In Islamic Economic

All human beings naturally want comfort and peace in all aspects of life. Thus the institution of peace is part of human life. The judiciary is not the only institution that is expected to resolve disputes. The thought of the need for a sulh (peace) institution in modern times is certainly not a discourse and an ideal that is still utopian, but has entered the practical area. This can be seen in the rise and popularity of Alternative Dispute Resolution (ADR). (Rachmadi Usman, 2013)

Dispute resolution through deliberation in the terminology of Islamic law is known as Al-Iṣhlah (peace). Literally, Al-Iṣhlah contains the meaning of breaking up quarrels/disputes., (Gunawan Wijaya, 2002) In the sense of shari'a, it is formulated as a type of contract to end resistance/disputes between two opposing people (Jimmy Joses Sembiring, 2011).

In peace there are two parties, which previously had a dispute(Frans Hendra Winarta, 2011). Then the parties agreed to waive some of their demands. It was intended that the dispute between them could end. Each party who makes peace in Islamic law is termed muṣālih, while the issue in dispute is called mushālih anhu, and the actions taken by one party to the other to end the dispute/quarrel are called muṣālih alaihi or also called badal al- ulh.

The legal basis for the suggestion of holding peace can be seen in the provisions of the Qur'an, Sunnah and ijma'. The Qur'an states, if two groups of believers quarrel, reconcile them. But if one of the two groups persecutes the other, then fight the persecutors until they return to the commandments of Allah. But if he has returned, reconcile the two with justice, and act righteously. Indeed, Allah loves those who do justice." (Surat al-Hujurat: 9). Similarly, the letter al-Nisa' verse 126 which means "*Peace is a good deed*".

In the Sunnah, the suggestion of peace can be found in the hadith which has also become a rule of fiqh: Peace among Muslims is permissible except for peace that forbids what is lawful or makes lawful what is unlawful (M. Yahya Harahap, 2006).

Reconciliation between the plaintiff and the defendant is good and permissible, except for peace that aims to justify what is unlawful or forbid what is lawful. This rule needs to be done first by the judge, namely reconciling between the disputing parties (Suhardjono, 2011).

There are several opinions regarding alternative dispute resolution. First, alternative dispute resolution is a dispute resolution mechanism outside the court. In this context, the

dispute resolution mechanism outside the court can be in the form of dispute resolution through arbitration. Second, alternative dispute resolution is a forum for dispute resolution outside the court and arbitration. Out-of-court dispute resolution and arbitration forums can take the form of negotiation, mediation, conciliation, and others. This is considering that dispute resolution through alternative dispute resolution is not carried out by third parties. Alternative dispute resolution here is only limited to cooperative dispute resolution techniques, such as negotiation, mediation, and conciliation, as well as other cooperative dispute resolution techniques. Third, alternative dispute resolution is all dispute resolution that does not go through the courts but is also not limited to arbitration, negotiation, and so on. In this context, what is meant by alternative dispute resolution includes dispute resolution regulated by laws and regulations, but outside the court, such as the Tax Dispute Settlement Agency (BPSP), the Business Competition Supervisory Commission (KPPU), and so on (Rachmadi Usman, 2013).

CONCLUSION

In the research entitled Parate Execution Implementation Mechanism in Islamic banking in the perspective of Legislation and Sharia Economic Law, several conclusions can be drawn in this study, including: Parate execution mechanism by Sharia Banks for collateralized goods is the last resort in dealing with non-performing financing or defaulting customers. Prior to parate execution, Islamic Banks undertake rescheduling, reconditioning, restructuring and persuasive approaches to customers to find solutions and solve the causes of non-performing financing. If no solution is found until the last resort, the bank can withdraw the guarantee on a parate basis. The Parate Execution Provisions in the Law on Mortgage are contained in Article 20 paragraph (1) letter a of the Mortgage Law, which states that if the debtor is in breach of contract, the holder of the first Mortgage to sell the object of the Mortgage Rights as referred to has the right to sell the object of the Mortgage on its own power through a public auction and take the settlement from the proceeds of the sale.

Al-Ishlah in parate execution can be found in the alternative despute resolution efforts carried out by banks carried out by negotiating efforts and can be seen in rescheduling, reconditioning, restructuring and persuasive efforts. Because such efforts prioritize deliberation to reach consensus.

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