Int. j. adv. multidisc. res. stud. 2025; 5(3):1172-1175

Received: 22-04-2025
Accepted: 02-06-2025

International Journal of Advanced Multidisciplinary Research and Studies

ISSN: 2583-049X

The Notary's Responsibility in the Creation of a Subrogation Deed of Receivables from Conventional Banks to Sharia Banks

[1] Sandi Rahmad Sholeh, [2] Dahlan, [3] Novi Sri Wahyuni

[1] Student, Faculty of Law, Universitas Syiah Kuala, Indonesia, Banda Aceh, Indonesia

[2, 3] Lecturers, Faculty of Law, Universitas Syiah Kuala, Indonesia, Banda Aceh, Indonesia

Corresponding Author: **Sandi Rahmad Sholeh**

Abstract

Subrogation based on Sharia principles can be carried out as long as it follows the provisions in Fatwa 104/DSN0MUI/X/2016. Therefore, it is necessary to reconsider whether the provisions of the subrogation fatwa can be implemented in the transfer of conventional bank credit customers to Sharia bank financing customers in order to apply Aceh Qanun Number 11 of 2018 concerning Sharia Financial Institutions (Qanun LKS). Based on the practices that have occurred in the field, the creation of subrogation deeds by notaries in the transfer of debtor receivables from Conventional Banks to Sharia Banks has not been carried out under the DSN Fatwa. Since the enactment of the Qanun LKS, notaries have been carrying out subrogation of receivables not under Sharia. This happens because there is no positive legal regulation that clearly states the subrogation of debts from conventional banks to Islamic banks. Aceh, as a region that mandates every financial institution to adhere to Sharia principles, requires that all banking activities be guided by Sharia principles. This has become an issue in terms of subrogation, even though subrogation had previously been regulated in legislation. However, the subrogation of debts from conventional banks to Islamic banks is a new matter. The research method used in the preparation of this study is the normative juridical research method. The purpose of this research is to analyze and explain the Notary's Responsibility in the Creation of a Subrogation Deed of Debt from Conventional Banks to Sharia Banks. Based on the research results, it shows that the subrogation of receivables from conventional banks to Islamic banks can be carried out based on DSN MUI Fatwa Number 104/DSN0MUI/X/2016. Thus, the creation of a subrogation deed by a Notary has legal certainty as long as it does not contradict the provisions of DSN MUI Fatwa Number 104/DSN0MUI/X/2016 and the applicable laws and regulations. Thus, it can be said that the notary's responsibility in the creation of a subrogation deed of debt from a Conventional Bank to a Sharia Bank still adheres to the provisions of the applicable laws and regulations in the general creation of deeds.

Keywords: Notary Responsibilities, Deed Creation, Debt Subrogation, Conventional Bank, Sharia Bank

Introduction

Law Number 10 of 1998 on Banking (hereinafter referred to as the Banking Law) states that a bank is a business entity that collects funds from the public in the form of deposits and distributes them to the public in the form of credit and/or other forms to improve the standard of living of the general public.

Banks are financial institutions that play an important role in the Indonesian economy. Based on the Banking Law, a Conventional Bank is a bank that conducts its business activities conventionally, providing services in payment transactions in accordance with established procedures and regulations. Meanwhile, a Sharia Bank is a bank that conducts its business activities based on Sharia Principles and, by type, consists of Sharia Commercial Banks (BUS), Sharia Business Units, and Sharia People's Financing Banks (BPRS).

Bank Syariah Mandiri (BSM) is the first government-owned bank that bases its operations on Sharia principles. Structurally, BSM originated from Bank Susila Bakti (BSM), one of the subsidiaries within Bank Mandiri (formerly BDN), which was then fully converted into an Islamic bank. Islamic banks in Aceh are not only Bank Syariah Mandiri, but there are also several other

Islamic banks such as BNI Syariah, BRI Syariah, and others. Before the enactment of Aceh Qanun Number 11 of 2018 concerning Sharia Financial Institutions (hereinafter referred to as Qanun LKS), conventional banks still operated in Aceh.

The Qanun LKS, which contains regulations governing the activities of Financial Institutions, to realize a just and prosperous economy for the people of Aceh under the auspices of Islamic law. Since its official enactment on January 4, 2019, the Qanun LKS has become an important breakthrough for financial transactions in Aceh. In line with Aceh's special status, the issuance of these regulations was implemented as a follow-up to Aceh Qanun Number 8 of 2014 concerning the Principles of Islamic Sharia, where every financial institution operating in Aceh must adhere to sharia principles. As a result, conventional banks operating in Aceh are no longer present, leading to the merger of several Islamic banks in Aceh into Bank Syariah Indonesia.

As a result of this conversion, there are obstacles, especially in the process of transferring credit from conventional banks to Islamic banks. One of the mechanisms that has not yet been fully completed is the process of transferring receivables. One of the parties that plays an important role in this process is the Notary. The Central Board of the Indonesian Notary Association provided guidance to the Aceh Notary Association, as stated in letter INI No. 71/3-IV/PP-INI/2020 regarding the Conversion of Conventional Banking, that the transfer of debt based on non-Sharia transactions to Sharia transactions cannot be carried out using a subrogation scheme.

In line with this, the National Sharia Council (hereinafter referred to as DSN) states that the transfer of receivables can only be conducted under the same principle, namely, sharia with sharia. The transfer must be conducted in cash through subrogation and can only be carried out on debts that are valid according to Sharia and applicable laws and regulations [1].

Based on Sharia principles, the conversion of conventional bank credit customers to Sharia financing customers cannot be carried out by referring to DSN MUI Fatwa Number 104/DSN-MUI/IX/2016 on Transition Based on Sharia Principles. The practice of notarial services requires notaries to bridge the desires of the parties in creating a deed without violating any legal regulations.

Based on this, subrogation according to Sharia principles can be carried out as long as it follows the provisions in the fatwa 104/DSN0MUI/X/2016. Therefore, it is necessary to re-evaluate whether the provisions of the subrogation fatwa can be implemented in the transfer of conventional bank credit customers to Sharia bank financing customers to apply the Qanun LKS.

Based on the practices that have occurred in the field, the creation of subrogation deeds by notaries in the transfer of debtor receivables from Conventional Banks to Sharia Banks is not carried out based on DSN Fatwa. Since the enactment of the Qanun LKS, notaries have been carrying out subrogation of receivables not under Sharia.

This happens because there is no positive legal regulation that clearly stipulates the subrogation of debts from conventional banks to Islamic banks. Aceh, as a region that requires every financial institution to adhere to Sharia principles, mandates that all banking activities must be guided by Sharia principles. This has become an issue in terms of subrogation, even though subrogation had previously been regulated in the legislation. However, the subrogation of receivables from conventional banks to Islamic banks is a new matter. Based on the above explanation, the purpose of this research is to explain the notary's responsibility in the creation of a debt subrogation deed from a Conventional Bank to a Sharia Bank.

Research Method

The type of legal research used is normative legal research, which is a scientific research procedure to find the truth based on scientific logic from its normative side [2]. This research uses three types of approaches: The statute approach, the case approach, and the conceptual approach. The data sources used in this research come from legal research reports, which are obtained through library research [3]. This research is primarily based on secondary data. Secondary data for this research uses primary, secondary, and tertiary legal sources. The method used for analysis is both descriptive and qualitative.

Results and Discussions

Legal responsibility in civil law is in the form of an individual's accountability for legal actions that have been taken (breach of contract or unlawful acts) [4]. In a legal dictionary, responsibility is "an obligation for someone to carry out what has been mandated to them”. [5] According to the law, responsibility is "an outcome of the consequences of a person's freedom regarding their actions, which are related to ethics or morals in performing an act”. [6]

According to Black’s Law Dictionary, liability has three meanings: Liability is an obligation that is binding or to achieve justice, responsibility for actual loss, and obligation for future loss [7]. According to Hans Kelsen, "a concept related to the concept of legal obligation is the concept of legal liability." Someone is said to be legally responsible for a certain act if they can be subjected to a sanction in the case of the opposing act. Normally, in cases where sanctions are imposed on the perpetrator, it is because their own actions make them responsible [8].

A notary is someone who holds rights and obligations as a public official in civil matters related to the creation of authentic deeds concerning legal acts in the field of civil law [9]. A notary is a person appointed and authorized (by the Department of Justice, now the Ministry of Law and Human Rights) to authenticate and witness various agreements, deeds, and determinations required by legislation and/or the desire of an interested party to be stated in an authentic deed [10]. The creation of a subrogation deed for receivables from a Conventional Bank to a Sharia Bank is also an authority of a notary.

Subrogation occurs due to payments made by a third party to the creditor, either directly or indirectly through the debtor. The payment referred to is a voluntary fulfillment of an obligation and results in the extinguishment of the obligation between the creditor and the debtor. Furthermore, this third party replaces the position of the old creditor, becoming the new creditor towards the debtor [11].

In general, subrogation can be defined as the replacement of a creditor's rights by a third party who pays the creditor. From that definition, it can be seen that subrogation arises as a result of a payment made by a third party to the creditor. The payment can be made directly or indirectly, namely through the debtor who borrows money from a third party.

The regulation of subrogation in general is governed by the Civil Code, and more specifically, subrogation can also be conducted based on Sharia principles as outlined in the National Sharia Council-Indonesian Ulema Council Fatwa Number 104/DSN-MUI/X/2016 on Subrogation Based on Sharia Principles. Based on Sharia principles, subrogation is the replacement of the rights of the old creditor by the new creditor because the debt of the old creditor is paid off by the new creditor. Meanwhile, subrogation based on Sharia principles is the replacement of the rights of the old creditor by the new creditor because the debt of the old creditor is paid off by the new creditor according to Sharia principles. The compensation or reward received by the parties (the old creditor and the new creditor) in subrogation accompanied by the exchange of performance can be something beneficial or not. The creditor referred to is the party that holds the right to collect (debt). Based on DSN MUI Fatwa Number 104/DSN0MUI/X/2016, subrogation based on sharia principles is permissible and must follow the provisions outlined in that fatwa.

Based on the DSN-MUI Fatwa Number: 104/DSN-MUI/IX/2016, subrogation based on Sharia principles can be carried out through three mechanisms that can be used, including:

1. Mechanism of Subrogation Without Compensation *(‘Iwadh)*
2. Subrogation Mechanism with Compensation *(‘iwadh)* and Without Wakalah for Purchasing Goods
3. Subrogation Mechanism with Compensation *(‘Iwadh)* and Wakalah Purchase of Goods.

Based on the mechanism explained in the fatwa, in principle, the subrogation mechanism with Sharia principles can be used for the transfer of conventional bank credit customers to Sharia bank financing customers in the context of Qanun LKS. However, Fatwa 104/DSN-MUI/IX/2016 further regulates specific provisions, one of which states that subrogation may only be carried out on debts that are valid according to Sharia and applicable laws and regulations.

Basically, subrogation based on Sharia principles for converting conventional bank credit customers into Sharia bank financing customers can be done with the first mechanism. Special provisions stipulate that subrogation may only be carried out on debts that are valid according to Sharia and applicable laws for the transfer of debts using the sale and purchase mechanism, namely the second and third mechanisms. However, the transfer of debts using the first scheme does not clarify whether the transaction is Sharia-compliant or not. The second and third mechanisms are implemented for the commodity market (buying and selling receivables with goods), which are not applicable in banking because there are no existing products for them.

Regarding the use of subrogation based on Sharia principles, further regulation is needed concerning the parties involved in subrogation. This is because, according to Fatwa 104/DSN-MUI/IX/2016, the implementation of subrogation based on Sharia principles follows a non-compensatory mechanism where the creditor is the active party. However, in practice, the customer plays a role in deciding whether they want to switch to an Islamic bank or remain a customer of a conventional bank.

Based on the above description, regarding the responsibility of the Notary in the creation of subrogation deeds of receivables from Conventional Banks to Sharia Banks, it is still necessary to pay attention to the provisions of the laws and regulations in the creation of deeds in general. Notaries have the obligation to act honestly, independently, impartially, trustworthily, diligently, and with a sense of responsibility. Based on Article 65 of the Notary Public Law regarding the responsibilities of notaries, it states that "notaries, substitute notaries, and interim notaries are responsible for every deed they create, even if the notary's protocol has been handed over or transferred to the party storing the notary's protocol." Furthermore, in carrying out their duties and responsibilities as a Notary, the Notary must be able to provide legal certainty and professional service as a form of dedication to the community and the state.

If viewed from the relationship of the Notary to material truth, the Notary's responsibilities are distinguished into 4 categories, namely:

1. The civil responsibility of a Notary for the material truth of the deed made.
2. The Notary's criminal liability for the material truth of the deed made.
3. The Notary's responsibility based on their official regulations regarding the material truth of the deed made.
4. The Notary's responsibility in carrying out their duties is based on the Notary's code of ethics.

Conclusion

To sum up, based on the discussion above, it can be concluded that the subrogation of receivables from Conventional Banks to Sharia Banks can be carried out based on DSN MUI Fatwa Number 104/DSN0MUI/X/2016. Thus, the creation of a subrogation deed by a Notary has legal certainty as long as it does not conflict with the provisions of DSN MUI Fatwa Number 104/DSN0MUI/X/2016 and applicable laws and regulations. Thus, it can be said that the notary's responsibility in the creation of a subrogation deed of receivables from a Conventional Bank to a Sharia Bank still adheres to the provisions of the applicable laws and regulations regarding the creation of deeds in general.

References

1. Fatwa Dewan Syariah Nasional tentang Subrogasi Berdasarkan Prinsip Syariah dalam Ketentuan Khusus huruf g, 2016, 9.
2. Abdulkadir Muhammad. Hukum dan Penelitian Hukum, Bandung: Citra Aditya Bakti, 2004, 134.
3. Mukti Fajar ND, Yulianto Achmad. Dualisme Penelitian Hukum Normatif dan Empiris, Yogyakart: Pustaka Pelajar, 2010, 42.
4. Komariah. Hukum Perdata, UMM Press, Malang, 2001, 42.
5. Andi Hamzah. Kamus Hukum, Ghalia Indonesia, Bogor, 2005, 412.
6. Soekidjo Notoatmojo. Etika dan Hukum Kesehatan, Rineka Cipta, Jakarta, 2010, 73.
7. Henry Campbell Black. Black’s Law Dictionary, West Publishing Co, St Paul Minn, 1979, 1043.
8. Asshiddiqie, jimly, Ali Safa’at M. Teori Hans Kelsen Tentang Hukum, Skretariat Jenderal dan Kepaniteraan MK RI, Jakarta, 2006, 61.
9. Bachrudin H, *et al*. Hukum Kenotariatan Membangun Sistem Kenotariatan Indonesia Berkeadilan, Bandung: PT Refika Aditama, 2019, 13.

10. Indrajaya Rudi, *et al*. Notaris dan PPAT Suatu Pengantar, PT Refika Aditama, Bandung, 2021, 27.
11. Suharnoko, Endah Hartati. Doktrin Subrogasi, Novasi, dan Cessie, Kencana Prenada Media Group, Jakarta, 2005, 1.