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THE RELIGIOUS COURTS' AUTHORITY TO ADJUDICATE DISPUTES BASED ON PRINCIPAL AGREEMENTS AND SECURITY AGREEMENTS DUE TO DIFFERENT CHOICE OF LAW

Sri Widodo[1]

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Abstract

A Sharia Banking Agreement is often secured by the Deed Granting Mortgage. These two agreements are different types and have different burden of proof. However, the existence of Sharia Banking Agreements as principal agreements is not often secured by the choice of law under Deed Granting Mortgage. This research will elevate the position of the legal burden of proof between Sharia Banking Agreements and Deeds of Granting Mortgage along with the legal consequences due to different legal choices between the Sharia Banking Agreement and Deed Granting Mortgage based on a study of Court Decision No.499/Pdt.G/2021/PA YK in the Religious Court of Yogyakarta. This research applied a normative approach with the literature study method based on the court decision and regulation as primary legal materials and used secondary legal materials including books, journals, and other legal works that are related to the topic. From this research obtained that between Sharia Banking Agreement and the Deed Granting Mortgage that secures have different types of agreements and the different burden of proof. Although Deed Granting Mortgage is an additional agreement it must secure the principal agreement which is Sharia Banking Mortgage. Based on Court Decision No.499/Pdt.G/2021/PA YK, whereas the Deed Granting Mortgage regulated on the authority of the District Court in the event of a dispute but because the principal agreement is Sharia Banking Agreement, it has authority from Religious Court to examine and settle disputes.

Keywords: *authentic deed, choice of law, sharia banking agreement, deed granting mortgage*

[1] Manager Corporate Lawyer in Yogyakarta's Special Region, Indonesia. E-mail: sriwidodo83@gmail.com

A. Introduction

Indonesia is based on the rule of law, which is stated in the third amendment to the 1945 Constitution of the Republic of Indonesia in Article 1 paragraph (3). The state of law simply places the law as the highest preference in the administration of the state and government. The 1945 Constitution of the Republic of Indonesia as stated in Article 7 paragraph (1) of Law No. 15 of 2019 jo. Law No. 12 of 2011 on Legislative Drafting occupies the highest level in the hierarchy of Indonesian laws and regulations which is secured by Decree of the People's Consultative Assembly (*TAP MPR),* Laws, Government Regulations, Presidential Regulations, Provincial Regulations, and Regency or City Regional Regulations.

Indonesia is an archipelagic country consisting of 34 provinces with differences both in terms of cultures, races, ethnicities, and religions. Although there are living differences among its citizens, this does not prevent the unity and integrity of the nation which is reflected in the motto of the Indonesian nation, namely *Bhinneka Tunggal Ika* which means "different but still one." Departing from this motto, it is hoped that life of the nation can continue to coexist side by side and put aside the differences.

Differences in culture, race, ethnicity, and religion adopted by Indonesian ~~people~~ not only enrich cultural wealth but also impacts various life orders, customs, and norms that apply in society. This also affected legal norms in Indonesia itself, which is commonly known as legal pluralism. Legal pluralism according to Griffiths is a situation where two or more legal systems work side by side in the same area law, or to explain the existence of two or more social control systems in one area of social life.[2] Furthermore, Hooker emphasized that in legal pluralism there must be an interaction between the various laws.[3] This can be seen from Indonesia which adheres to 3 different legal systems, namely the national legal system, Islamic law, and customary law (*adat law*).[4] The existence of the customary law system is reflected in Law No. 5 of 1960 on Basic Regulations on Agrarian Principles, while the implementation of Islamic law in Indonesia can be seen from the existence of a religious court system which is authorized to examine and adjudicate cases for legal subjects who obey to Islamic law, while national law itself comes from the legal system which is the entire legal system that applies in Indonesia based on Pancasila as the

[2] Endri, 'Pluralisme Hukum Indonesia bagi Hakim Tata Usaha Negara: Antara Tantangan dan Peluang' (2020) 3 (1) Jurnal Hukum Peratun 19 21.
[3] Endri (n 2).
[4] Endri (n 2) 20.

preamble to the 1945 Constitution of the Republic of Indonesia. The three legal systems adopted by Indonesia itself run side by side and can be interrelated with one another.

Legal pluralism is also reflected in the implementation of civil law, particularly in contract law. Civil law regulates individual legal relationships among citizens. The legal basis of the agreement in Indonesia itself comes from Book III of the Code of Civil Law whose provisions are open or can be deviated if the parties to the agreement determine other provisions. The Code of Civil Law on *Staatsblad* No.23 of 1847 (*Burgerlijk Wetboek Voor Indonesie*) is a regulation that has been in effect since the Dutch Colonial era, which is still valid today. Aside from Code of Civil Law as a legal basis, Indonesia also applies Islamic Law that regulated civil relation among Moslem. This can be understood from the authority to adjudicate civil cases at first level by District Court[5] and the authority to adjudicate Moslem's civil cases but limited to marriage, inheritance, testament, *hibah*, waqf, *zakat*, *infaq*, and Sharia economics by the Religious Court.[6]

Contract law uses the concept of Islamic law in Indonesia has been commonly used in Islamic banking. Agreements made within the scope of Islamic banking usually result in a civil relationship between the Bank (Debtor) and Customer (Creditor), which is more commonly known as a Sharia Agreement or specifically a Sharia Banking Agreement. The establishment of a Sharia Banking Agreement is not only subject to Supreme Court Regulation No.2 of 2008 on the Compilation of Sharia Economic Law and the Fatwa of the National Sharia Council – Indonesian Ulema Council which regulates Sharia Banking Agreements, but also refers to the Code of Civil Law as the legal basis for the contract law. Code of Civil Law will be valid if the Compilation of Sharia Economic Law and the Fatwa of the National Sharia Council – the Indonesian Ulema Council, which in this case applies as *lex specialis* of Sharia Banking Agreement does not regulate these matters.

The validity of Sharia Agreements based on Islamic Law and conventional agreements according to Civil Law have different law intrinsic. However, in practice, both can link to one and other. This, among other things, also occurred in the implementation of the Sharia Banking Agreement between the Bank (Creditor) and the Customer (Debtor). That can happen because Sharia banking applies Islamic Law. The agreed agreement is in the form of a Sharia Banking Agreement secured by a collateral binding agreement in the form of land-bound with Deed Granting Mortgage. Sharia Banking Agreements that are

[5] Law No. 2 of 1986 on General Court art. 50.
[6] Law No. 3 of 2006 on Amendment of Law No.7 of 1989 on Religious Court art. 49.

subject to Islamic Law and the Deed Granting Mortgage that is made based on Civil Law according to Law No.4 of 1996 on Mortgage on Land and Objects Relating to Land.

This research was carried out by studying Court Decision No. 499/Pdt.G/2021/PA.YK which in the lawsuit for cancellation of the Deed Granting Mortgage due to the existence of a Sharia Banking Agreement. In that court decision there are exceptions or objections to the lawsuit filed by a plaintiff with the argument regarding the Exception Relative Competence and Exceptions regarding to Absolute Competence. Whereas the Exception of Absolute Competence filed by Defendant IV (Bank as Creditor) because the lawsuit filed by Plaintiff is a Lawsuit for Cancellation of the Deed Mortgage Granting which in Article 4 of the Deed Granting Mortgage No. 127/2019 itself there is a choice of law is determined by parties are in the Bantul District Court. The problem arises because differences between choice of law in Sharia Banking Agreements and Deeds of Granting Mortgage. This issue occurs because of Law No. 4 of 1996 on Mortgage on Land and Objects Relating to Land that only regulates the authority of the Head of the District Court to manage Mortgage objects if the debtor defaults.[7] The Deed Granting Mortgage is an accessory agreement that basically must secure the principle underlying agreement. In this case, the Religious Court has the authority to adjudicate if there is a dispute in the implementation of the Sharia Banking Agreement.

The problem regarding the Sharia Banking Agreement which is applied as the principal agreement and the guaranteed agreement in the form of the Deed Granting Mortgage arises because of differences in the choice of law in the jurisdiction over disputes in both. Sharia Banking Agreement which are subject to Islamic Law are the authority of the Religious Courts to examine and decide on the case, while the Deed Granting Mortgage which is valid as an authentic deed because it was made by an authorized official, namely a Notary, the authority to hear and decide on the case in the event of a dispute is under the authority from the District Court. The different application on the choice of law illustrates the disharmony in the competence to adjudicate between the Religious Court and the District Court.

[7] Law No.4 of 1996 on Mortgage on Land and Objects Relating to Land art.11.

B. Problem Formulation

There are two problem formulations to be discussed in this research:

1. What is the position of the burden of evidence between the principal agreement (Sharia Banking Agreement) as an underhand deed and the accessory agreement (Deed Granting Mortgage) which is an authentic deed?
2. What are the legal consequences due to different choices of law between the principal agreement (Sharia Banking Agreement) and the accessory agreement (Deed Granting Mortgage) based on a study of Decision No. 499/Pdt.G/2021/PA.YK in the Religious Court of Yogyakarta?

C. Methodology

This research employed a doctrinal or normative approach. Furthermore, in this study, the researcher used primary legal materials in the form of court decisions and statutory regulations. The Court Decision No. 499/Pdt.G/2021/PA.YK became interesting to discuss because The Panel of Judge gives their considerations clearly that describes the position of Deed Granting Mortgage as an accessory agreement would always pursue the principal agreement, although the Deed Granting Mortgage is an Authentic Deed which has perfect evidentiary burden[8] and the Plaintiff could not authenticate the Sharia Banking Agreement as Principal Agreement in the trial.

D. Discussion and Results

1. The Position Burden of Evidence Between Sharia Banking Agreement and Deed Granting Mortgage

Agreements based on Islamic legal principles are often referred to as Akad. The agreement or contract comes from the Arabic *al-'Aqd* which means a bond or conclusion, both visible (*hissiyy*) and invisible (*ma'nawy*) bonds[9]. A*l-Mawrid's* dictionary translates *al-'Aqd* as a contract and agreement.[10] According to Tahir Azhary, Islamic Law of engagement is a set of legal rules sourced from the *Qur'an*, *as-Sunnah*, and *ar-ra'yu* (*ijtihad*) which regulates the relationship between two or more people regarding an

[8] Dedy Pramono, 'Kekuatan Pembuktian Akta yang Dibuat oleh Notaris Selaku Pejabat Umum Menurut Hukum Acara Perdata di Indonesia' (2015) 12 (3) Lex Jurnalica 248 251.

[9] Dahrul Muftadin, 'Dasar-Dasar Hukum Perjanjian Syariah dan Penerapan dalam Transaksi Syariah' (2018) 11 (1) Jurnal Al-'Adl 100 101.

[10] Dahrul Muftadin (n 9).

object which is permitted to be the object of a transaction.[11] Islamic Law of engagement as part of Islamic Law in the field of *muamalah*, also has an "open" nature which means that everything in the field of *muamalah* may be modified or allowed if the parties to the agreement determine other provisions provided that the agreed terms do not conflict or violate the prohibitions that have been determined in the *Qur'an* and the *Sunnah* of the Prophet Muhammad SAW.[12] In terms of *Fiqh*, in general, the contract means something that is someone's determination to carry out, whether it arises from one party such as *waqf*, divorce, and oath, or that arises from two parties such as buying and selling, renting, *wakalah*, and pawning.[13] If defined briefly, a Sharia Agreement is an agreement made between the parties based on Islamic Law.

There are 3 (*three*) principles in a Sharia Agreement according to Ascarya's point, specifically:[14] 1) Parties; 2) Agreement Object; 3) *Sighah* or statement of agreement's parties. The parties to an agreement must be a person who can carry out the contents of agreement for himself (*ahliyah*) and has the Sharia authority given to someone to realize the agreement as a representative of another (region).[15] The second principle is the object of the Sharia Agreement, which is the target to be achieved by the parties that have been determined.[16] The object of a contract can be an entity, the benefit of an entity, a service or a job, and something else that does not contradict with the conditions of Sharia Agreement's principle.[17] Finally, *sighah* which is *ijab* and *qabul* that should be able to define the intention of permission, sincerity, agreement between parties of Sharia Agreement for the consequences of rights and responsibilities.[18]

Sharia Agreements also have four requirements which are characteristics that must exist in every agreement's principle but not the fundamental matters [19], namely:[20] 1) Validity of agreement (*In'iqod*); 2) Legally of agreement (*Shihah*); 3) Realization of agreement *(Nafadz*); and 4) Common requirement (*Lazim*). The validity of agreement

[11] Gemala Dewi, *Aspek-Aspek Hukum dalam Perbankan dan Perasuransian Syariah di Indonesia* (5th edn, Prenadamedia Group 2017) 8.

[12] Dewi (n 11).9.

[13] Ascarya, *Akad dan Produk Bank Syariah* (6th edn, Rajawali Pers 2017) 35.

[14] Ascarya (n 13) 35.

[15] Ascarya (n 13) 35.

[16] Urbanus Uma Lau, 'Akad dalam Transaksi Ekonomi Syariah' (2014) X (1) Tahkim 48 57

[17] Lau (n 16).

[18] Dery Ariswanto, 'Analisis Syarat In'Iqod dari 'Adidain dan Shighat dalam Pembentukan Sebuah Akad Syariah' (2021) 4 (1) Tahkim Jurnal Peradaban dan Hukum Islam 59 71.

[19] Nurul Ichsan Hasan, *Perbankan Syariah Sebuah Pengantar* (1st edn, GP Press Gorup, 2014) 194.

[20] Ascarya (n 13) 35.

(*In'iqod*) consists of general requirements and particular requirements.[21] General requirements are conditions that must be contained in an agreement, for example, the parties of the agreement, the object of the agreement, and the *shigah* of the agreement as stated in the agreement's principles.[22] In addition, the agreement must not be forbidden and something that is agreed upon in the contract is useful and does not cause harm. While particular requirement are the conditions that exist according to each agreement, such as the minimum requirement of two witnesses in the marriage contract.[23] Furthermore, the legally of agreement (*Shihah*), namely the conditions required by Sharia has an effect such as in a trading or buying and selling contract which must be free from any defects.[24] The realization of agreement or *Nafadz* are divided into 2 (*two*) namely ownership (goods owned by the perpetrator and entitled to use it) and territory.[25] The last condition is the *Lazim* condition, which means that the contract must be carried out if there are no defects.[26]

Sharia Agreement in Indonesia has been commonly used in Sharia Banking practice. This is because Indonesia itself recognizes the concept of Islamic banking which was originally regulated through Article No.1 point 12 and 13 of Law No.10 of 1998 on Banking which began to provide elaborating explanations regarding the understanding and principles contained in the concept of Sharia banking,[27] then the legal basis regarding Islamic banking is regulated separately based on Law No. 21 of 2008 on Sharia Banking. Hence, the implementation of the agreements that occur between the Customer and the Islamic Bank, is subject to these laws and regulations and other relevant laws and regulations as well as the provisions contained in Islamic Law.

The implementation of the Sharia Banking Agreements is often secured by an additional or accessory agreement in the form of binding guarantees, in the form of Deed Granting Mortgage. The guarantee binding agreement is held to provide a sense

[21] Hasan (n 19) 194.
[22] Hasan (n 19).
[23] Hasan (n 19).
[24] Ascarya (n 13) 35.
[25] Ascarya (n 13) 35.
[26] Ascarya (n 13) 36.
[27] Financing based on Sharia principles is the provision of money or invoices or anything compared with it based on an agreement between the bank and another party that requires the financed party to return the money or invoices after a certain period in exchange or profit-sharing. Whereas Sharia principles are rules of agreement based on Islamic Law between banks and customers to store funds and or finance business activities or any activities that secure Sharia (Article No.1 point 12 and 13 Law No.10 of 1998 on Banking).

of security to the creditor against the objects guaranteed by the debtor. If the debtor defaults, the creditor can use his rights stated in the guarantee binding agreement to carry out executions. J. Satrio's opinion regarding collateral law is a regulation that regulates the guarantees of a creditor's receivables against a debtor.[28] According to the provisions in Article 1131 of the Code of Civil Law itself, guarantees are defined as all indebted property, both movable and immovable, both existing and new ones that will exist later, become dependents for all individual engagements. The position of the Deed Granting Mortgage which is an Authentic Deed made by an authorized official of Public Notary has an executorial title.

This illustrates the position of the Sharia Banking Agreement that appears as the principal agreement. The accessory agreement arises because of the underlying agreement. Due to accessory agreement was born from the principal agreement, then if principal agreement is discharged the accessory agreement is also discharged, but if the accessory agreement is discharged, the main agreement is not necessarily also discharged.[29]

The principal agreement which is a Sharia Banking Agreement is underhand agreement, while accessory agreement as collateral binding agreements, such as a Deed Granting Mortgage which is an Authentic Deed made by Notary. Both Sharia Banking Agreement and Deed Granting Mortgage have different legal consequences, which is under the law of evidence in civil procedural law both have different burden of proof.[30]

The law of evidence in the realm of litigation is an important but complex process to find the truth of a case. The truth that is sought and realized in the civil justice process is not absolute or ultimate truth but is relative truth or even quite probable, but to seek such truth still raises complexity.[31] Through evidence, the parties to litigation are given equal opportunities to prove the arguments and rebuttals previously stated.

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[28] Amran Suadi, *Eksekusi Jaminan dalam Penyelesaian Sengketa Ekonomi Syariah*, (2nd edn, Prenadamedia Group 2019) 3.

[29] Rose Panjaitan, 'Pengaturan dan Pelaksanaan Parate Eksekusi di Luar Hukum Acara Perdata' (2018) 1 (1) Notaire 135 136.

[30] Burden of proof must be owned by the evidence that is submitted to the trial. The evidence can support the argumentation. If the evidence does not reach the minimum limit of proof, then the evidence does not have sufficient burden of proof to prove what is postulated. As an example, the meaning of the word authentic has perfect burden of proof that can also determine that whoever is bound with the deed, if you could not prove otherwise based on the verdict a court that has the force of law permanent. Fernando Kobis, 'Kekuatan Pembuktian Surat Menurut Hukum Acara Perdata' (2017) VI (5) Lex Crimen 105 109.

[31] M. Yahya Harahap, *Hukum Acara Perdata tentang Gugatan, Persidangan. Penyitaan, Pembuktian, dan Putusan Pengadilan* (2nd edn, Sinar Grafika 2017) 566

For the Panel of Judges, evidence is important because the Panel of Judges could weigh the evidence presented by the parties on behalf of the fairest decision.[32]

The burden of proof (*bewijslast*) is a critical part of the legal system in civil procedural law. Civil procedural law in Indonesia adheres to the principle of *actori incumbit probatio* which places the burden of proof on those who postulate it.[33] This principle is in line with the provisions of Article 163 HIR (*Herzien Inlandsch Reglement*) / Article 283 RgB (*Rechtsreglement voor de Buitengewesten*) which reads: "Whoever claims to have a right or presents an act or event to confirm that right, or to dispute the rights of another person must prove the existence of that right or the existence of such an act."

The article before was strengthened by the Jurisprudence of the Supreme Court No.540/K/Sip/1972, dated September 11, 1972, which stated that: "Because Plaintiff's claim is denied by the Defendant, then according to Article 163 HIR, Plaintiff must be burdened with the obligation to prove his claim."

Civil procedural law recognizes that each piece of evidence has a minimum limit of evidence that differs from one evidence to another. The difference also applies to the value of the burden contained in each piece of evidence.[34] Legal evidence according to the Civil Procedural Law Code has been regulated in Article 164 HIR / Article 284 RgB which consists of: 1) written evidence (letters); 2) witness evidence; 3) presupposition; 4) confession; and 5) oath. If it is related to the problem raised by the author, Sharia Banking Agreement and Deed Granting Mortgage which are included in the classification as written evidence. According to Sudikno Mertokusumo, written evidence or letters are anything that contains punctuation marks and devote or convey the parties' ideas that can be used as evidence.[35] As it is known that the Sharia Banking Agreement and Deed Granting Mortgage are known as agreements that arise from consensus of parties in written form. If a dispute arises, it can be used as evidence.

Furthermore, as specified by Yahya Harahap, written evidence can be classified into 3 (*three*) types, as secures:[36] 1) Authentic deed; 2) Underhand deed; and 3)

[32] Harahap (n 31) 590.

[33] Melinda Putri Kumalasasi, 'Kajian Yuridis Asas Pembalikan Beban Pembuktian dan Actori Incumbit Probatio' (2021) 06 (02) Jurnal Keislaman, Sosial, Hukum, dan Pendidikan 272 237.

[34] Kumalasasi (n 33).

[35] Efa Laela Fakhriah, 'Perkembangan Alat Bukti dalam Penyelesaian Perkara Perdata di Pengadilan Menuju Pembaruan Hukum Acara Perdata' (2015) 1 (2) Jurnal Hukum Perdata ADHAPER 135 139.

[36] M. Yahya Harahap (n 31) 618.

Unilateral deed or unilateral concession. From these three written evidence's types, it will be explained further regarding to the differences as secures:

a. Authentic Deed

An authentic deed is a deed whose form is determined by regulations and made by or in the presence of public officials who oversee where the deed made take place. The value burden of proof attached to the Authentic Deed (*bewijskracht*) is regulated in Article 1870 of the Code of Civil Law and Article 285 RgB which according to the two articles that the Authentic Deed burden of proof is perfect (*volendig bewijskracht*) and binding (*bindende bewijskracht*).[37] This means that if the written evidence in the form of an Authentic Deed submitted fulfils the formal and material requirements and the opposing evidence presented by Defendant does not reduce its existence, it is at the same time attached to the burden of proof that is perfect and binding (*volendig en bindende bewijskracht*). The position of Authentic Deed according to the previous explanation is sufficient evidence, this means that presenting Authentic Deed as evidence in the litigation trial has proven perfectly and it does not need additional proof anymore.[38] The value burden of proof and its minimum limit can change into evidence at the beginning of writing, this happens if the value of the burden of proof is perfect and binding and the minimum limit of the Authentic Deed changes due to if the evidence is submitted against the Authentic Deed (*tegenbewijs*) and the opposing evidence submitted by the opposing party is of an equal and perfect level to be able to shake the existence of the relevant Authentic Deed.[39] However, Authentic Deed is made by or in the presence of public officials. Thus, submitting opposing evidence should be difficult because the parties would also face the public officials who have competent authority.

b. Underhand Deed

Underhand Deed is a deed that is intentionally made for evidence by interested parties without assistance from the competent authority.[40] The validity of the Underhand Deed is regulated in the provisions of Article 1875 of the Code of Civil Law and Article 288 RgB. For the Underhand Deed to attach to the burden of proof,

[37] Harahap (n 31).

[38] Deasy Soeikromo, 'Proses Pembuktian dan Penggunaan Alat-Alat Bukti pada Perkara Perdata di Pengadilan' (2014) II (1) Jurnal Hukum Unsrat 124 130.

[39] Harahap (n 31) 618.

[40] Fakhriah (n 35) 140.

the Underhand Deed must first fulfil the formal and material requirements such as being created unilaterally or in the form of parties (at least two parties) without the intervention of the competent authority, signed by the maker or the parties who made it and the contents and signatures are acknowledged by the parties who made it.[41] Thus, if the material and formal requirements are fulfilled, the burden of proof attached to it is perfect and binding (*volledig en bindende bewijskracth*).[42] But the value of burden and minimum limits could change of the Underhand Deed, namely if the evidence submitted against the Underhand Deed and the contents and signature are denied or not recognized by the opposing party. This condition makes Underhand Deed could stand alone as evidence, so it needs additional evidence to support it.

c. Unilateral deeds or unilateral concessions

The provisions regarding the unilateral deed are regulated in Article 1878 of the Code of Civil Law and Article 291 RgB, with a note that for a unilateral deed to be valid as evidence, it must meet the securing formal and material requirements. The unilateral deed must secure formal requirements such as being created or handwritten by the signer himself, containing the signature of the maker of the unilateral deed. Besides, for the material requirement unilateral deed must accommodate an acknowledgment of debt or delivery of goods and a certain amount or a certain item. The burden of proof of Unilateral deed would be perfect and binding or equivalent with Authentic Deed and Underhand Deed if the material and formal requirements are fulfilled.[43]

Set out from the three types of written evidence, the value of the burden of evidence contained in each are different. Thus, even though a piece of evidence is classified as written evidence, the burden attached to each deed may differ from one another based on the classification of the type of written evidence. However, it is possible that these three types of written evidence have the same burden of proof of certain conditions are fulfilled. [44]

Underhand Deed which is regulated in Article 1857 of the Code of Civil Law states "*a handwritten document which is acknowledged as true by the person who is brought*

[41] Harahap (n 31) 618.
[42] Harahap (n 31) 618.
[43] Harahap (n 31) 618.
[44] Harahap (n 31) 618.

*before him or legally deemed to have been justified by him, gives rise to complete evidence such as an authentic deed for the people who signed it....***"** But for Authentic Deed, regulated in Article 1870 of the same regulation said that "*an authentic deed is given to the parties who make it a perfect proof of what is contained in it."* From these two articles, a statement can be drawn that if the Authentic Deed has perfect evidentiary burden, on the other hand, the Underhand Deed must be acknowledged by the parties and if Underhand Deed's material and formal requirements are fulfilled, the burden of proof attached to it is equivalent to the Authentic Deed.

2. Legal Consequences due to Different Choice of Law

The Religious Court is one of the judicial bodies under the Supreme Court. According to Article 1 of Law No.50 of 2009 on the Second Amendment to Law No.7 of 1989 on Religious Courts, it is stated that "Religious Courts are courts for people of the Muslim faith". The burden of the Religious Courts based on Law No.7 of 1989 on the Religious Courts is limited to having the duty and authority to examine, decide, and settle cases at the first level between people of various Islam in the fields of a) marriage; b) inheritance, testament, and *hibah* made under Islamic law; and c) *waqf* and *sadaqah.* Set out from its regulation can be said that the authority to examine and adjudicate from the Religious Courts is the realm of Islamic civil law which is limited to family and inheritance law.

The existence and function of banking in Indonesia, whether for the society or industries, has a very significant role and influence on the economy.[45] In anticipating community needs and providing a sense of security and comfort in banking transactions, the presence of Islamic Banks is one solution to increase public confidence in banking activities, especially in Indonesia.[46] Departing from this, coupled with the majority of Indonesia's population who are Muslim, the initiative to establish a bank with the basics of Islam as a pillar of Islamic economics with the concept of eliminating usury began to be voiced in 1980.[47] This development also affected the Religious Courts. The provisions in Article 49 of the Law No.7 of 1989 was amended through Law No.3 of 2006 on Amendments to Law No.7 of 1989 to secure

[45] Agus Marimin and others, 'Perkembangan Bank Syariah di Indonesia' (2015) 01 (02) Jurnal Ilmiah Ekonomi Islam 75 76

[46] Marimin (n 45).

[47] Otoritas Jasa Keuangan, 'Sejarah Perbankan Syariah' <https://www.ojk.go.id/id/kanal/syariah/tentang-syariah/pages/sejarah-perbankan-syariah.aspx> accessed on 21 February 2022.

developments in the Indonesian economy through the law which stated that "Religious Courts have the duty and authority to examine, decide, and settle cases at the first level between people who are Muslims in the fields of: a) marriage; b) inheritance; c) testament; d) *hibah*; e) *waqf*; f) *zakat*; g) *infaq*; h) *sadaqah*; and i) sharia economy."

Sharia Banking Agreements are agreements between the Bank (Creditor) and the Customer (Debtor) within the scope of Sharia Banking. The Sharia Banking Agreement is subject to the provisions of Islamic Law or more specifically the provisions of Sharia economic law. Moreover, when referring to Law No.3 of 2006 on Amendments to Law No.7 of 1989 on Religious Courts, if there is a dispute in the implementation of the Sharia Banking Agreement, the Religious Court is authorized to examine, decide, and resolve the case because the dispute is included in the Sharia economic dispute.

This provision does not apply to conventional agreements that are not subject to Islamic Law. According to Article 50 of Law No.2 of 1986 on General Courts *jo.* Law No.8 of 2004 *jo.* Law No.49 of 2009, it is stated that "The District Court has the duty and authority to examine, decide, and settle criminal cases and civil cases at the first level." Conventional agreements that are not subject to the provisions of Islamic Law are included in the realm of civil law. Then, in the event of a dispute, the court that has the right to judge and decide is the District Court.

Based on Court Decision No.499/Pdt.G/2021/PA YK at the Religious Court of Yogyakarta, the Panel of Judges rendered an interim decision in the Sharia Economics case based on the Claim for Cancellation of Deed Granting Mortgage filed by the Plaintiffs. Plaintiffs then filed a lawsuit for the cancellation of the Deed Granting Mortgage to the Registrar of the Yogyakarta Religious Court. The plaintiff in the decision is the owner of a plot of land on which a house/store stands in Bantul Regency, Yogyakarta Special Region Province, where the land has been bound as collateral based on the Deed Granting Mortgage by Defendant I (which has a family relationship with Plaintiffs) and Defendant II without the knowledge of from the Plaintiffs.

The result of lawsuit filed by Plaintiffs, Defendant IV (Bank as Creditor) filed an exception regarding relative competence and an exception regarding absolute competence. The argument of Defendant IV filing an exception regarding relative competence is that the Plaintiffs have made a mistake in choosing the place to settle the lawsuit for the cancellation of the Deed Granting Mortgage through the Religious Court of Yogyakarta. Plaintiff's claim is not securing the principle of *actor sequitur forum rei*,

which refers to this principle, which has the authority to adjudicate this case is the Bantul Religious Court, based on provisions regarding the relative competence of the Religious Courts based on Article 118 paragraph (1) HIR, or Article 142 RgB in conjunction with Article 73 of Law No.7 of 1989 on Religious Courts.

Defendant IV argued about the exception of absolute competence according to Article 4 in the Deed Granting Mortgage No.: 127/2019. It has been regulated regarding the legal domicile by the parties in Registrar's Office of the Bantul District Court. If the Plaintiff files a lawsuit to cancel the Deed Granting Mortgage, Plaintiff should file a lawsuit to District Court of Bantul Regency, this is because the lawsuit that the Plaintiff never mentions nor bring the Sharia Banking Agreement as evidence which is the principal agreement of the Deed Granting Mortgage.

Based on that case, there are differences in the choice of law between the Sharia Banking Agreement and the Deed Granting Mortgage which is an additional or accessory agreement. In the Sharia Banking Contract, because it is within the scope of sharia economics, in the event of a dispute, the authority to examine and decide the case is the Religious Court. Meanwhile, the binding of collateral which is made in the form of a Deed Granting Mortgage based on Law No.4 of 1996 on Tenure Rights on Land and Objects Related to Land, is the authority of the District Court.

A guarantee binding agreement in the form of a Deed Granting Mortgage is an additional or accessory agreement that cannot stand alone. Its position or existence depends on the principal agreement. If the principal agreement is cancelled, then the additional agreement is deleted.[48] However, if the additional agreement is cancelled the provisions of the principal agreement do not immediately become invalid and remain binding on the Parties who agreed.

Based on Court Decision No.499/Pdt.G/2021/PA YK at the Yogyakarta Religious Court, the Panel of Judges gave legal considerations regarding the absolute exception and relative exception authority proposed by Defendant IV. According to the evidence which is Deed Granting Mortgage as an Authentic Deed, it has fulfilled the formal requirements and the evidence has not been disputed by the Defendants making the evidence has perfect and binding proving burden (*volendig en bindende bewijskracht*), both for the parties to the litigation as well as for the Panel of Judges to serve as a

[48] Lukman Santoso Az, *Aspek Hukum Perjanjian: Kajian Komprehensif Teori dan Perkembangannya* (1st edn, Penebar Media Pustaka 2019) 26.

perfect and sufficient factual basis for deciding on the dispute as under Article 165 HIR in conjunction with Article 19875 of the Code of Civil Law.

Panel of Judges however considered even though an agreement had been made by the Parties in the Deed Granting Mortgage to have legal domicile at Registrar's Office of the Bantul District Court, the Panel of Judges considered based on Article 1388 paragraph (1) of the Code of Civil Law which confirms that all agreements made legally apply as laws for the Parties who made them. However, in this case, the Plaintiffs are not parties to the Deed Granting Mortgage. Thus, the Plaintiffs have no obligation to comply with the existing provisions in the Authentic Deed. In addition, the Panel of Judges also based its decision on Article 49 letter (i) of Law No.3 of 2006 on Amendments to Law No.7 of 1989 on the Religious Courts which with the intention that even though in Article 4 of the Deed Granting Mortgage, the parties agreed on the legal domicile at the Bantul District Court, but because the issuance of Deed Granting Mortgage was based on the Sharia Banking Agreement. It was related to Sharia economic cases, the clause from *"... at the Bantul District Court Registrar's office"* must be interpreted as *"... at the office of the Registrar of the Bantul Religious Court"*. Based on these considerations, the Panel of Judges in Case No.499/Pdt.G/2021/PA YK stated that they had no relative or absolute authority to examine and decide this case.

The existence of a Sharia Banking Agreement which is the principal agreement is an agreement that can stand alone. While the Deed Granting Mortgage which is an additional agreement that only can appear from the principal agreement, this has also been explained on Article 10 Law No.4 of 1996 on Tenure Rights on Land and Objects Related to Land and its explanation which states “Deed Granting Mortgage is preceded by a promise to provide granting mortgage as collateral for debt repayment certain, which is in and is an integral part of inseparable from the debt agreement in question or other agreements that give rise to the debt.” Despite that the Deed Granting Mortgage is accessory agreement, its existence is a secure-up to the principal agreement, namely an agreement that creates a legal relationship between debts that are guaranteed to be paid off.

Although the Deed Granting Mortgage has regulated the choice of law in District Court to resolve disputes but the position of Deed Granting Mortgage as an accessory agreement makes it cannot stand alone without any principal agreement. Therefore, the Court Decision No.499/Pdt.G/2021/PA YK states that Religious Court has the

competency to adjudicate the Cancellation of Deed Granting Mortgage because of the principal agreement. This illustrates although an Authentic Deed has perfect evidentiary burden if it is an accessory agreement, its existence must comply with the principal agreement.

E. Conclusion

Sharia Banking Agreement is an agreement based on Sharia economic law which in its implementation often secured by a guarantee, as Deed Granting Mortgage. The Deed Granting Mortgage as an Authentic Deed has perfect evidentiary burden according to Article 1870 of the Code of Civil Law, while the burden of proof's Sharia Banking Agreement which is an Underhand Deed according to the Article 1875 the Code of Civil Law can be equivalent to an Authentic Deed if the material and formal requirements are fulfilled and it is recognized by the parties who made it.

The position of the Deed Granting Mortgage which is an additional or accessory agreement cannot stand alone, so it will always secure the principal agreement. According to Court Decision No.499/Pdt.G/2021/PA YK in Religious Court of Yogyakarta, although the Deed Granting Mortgage has regulated the choice of law which is District Court of Bantul Regency. However, the Deed Granting Mortgage does not necessarily appear just like that, but it appears because there is a principal agreement, specifically Sharia Banking Agreement. So, if there is a dispute in the implementation of the Deed Granting Mortgage, the choice of law that applies is according to the choice of law that has been regulated in the principal agreement, whereby Religious Court as having the authority examine, decide, and settle sharia economy disputes. The development of Islamic banking also intersects closely with guaranteed agreement. Therefore, Law No.4 of 1996 on Tenure Rights on Land and Objects Related to Land is no longer relevant and should be changed by adding authority for Religious Courts if the principal agreement underlying the guaranteed agreement is a Sharia agreement.

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