

HYBRID CONTRACT ON ISLAMIC MORTGAGES PRODUCT USING *MURABAHAH* AGREEMENT (BANK SYARIAH MANDIRI PONOROGO)

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ABSTRACT

Islamic banking is required to innovate with hybrid contracts, as the single contract is unable to respond to contemporary financial transactions. One of the Islamic banking products adapted from conventional banking is Islamic Mortgages (KPRS) which is applied using Murabahah, Ijarah Muntahiyah Bi at-Tamlík (IMBT) and Mutanaqisah Mutanaqisah, but Murabahah contract still dominates compared to other akad. Nevertheless, Murabahah contract still raises a lot of debate because it contains hybrid contracts that are still a debate of scholars. In addition, KPRS products with murabahah schemes and IMBT are considered controversial products formulated from the Hilah method. The Murabahah Akad pattern is also often considered the same as conventional banking credit patterns. This article uses a qualitatively descriptive approach to which data sources are obtained with interviews, observations and documentation that are then analyzed inductive. Finally, this article found that KPRS products in Bank Syariah Mandiri use the Murabahah bil Wakalah contract which is hybrid contracts. Wakalah contract is a grant of power from the bank to the customer for home price negotiation to the developer not for home purchase. This is to reduce the risk of side streaming and the risk of return of goods. The merger of Murabahah contract and Wakalah contract has obeyed the sharia rules and does not contain the haraam which is forbidden because it contains a mashalah for banks and customers.

Keywords: Hybrid Contracts; Islamic Mortgages; Murabahah bil Wakalah;

INTRODUCTION

Islamic banking in keeping abreast the latest trend demands innovation (Heris, 2017: 24) in bringing up new products, because the more innovative the Islamic bank in making products, the faster its development (Musawar, 2016: 133). Islamic banking practitioners make various efforts to create new products or even make numerous adaptations to old products (conventional) (Muhammad, 2015: 89). Those adaptations resulted in the contract used in Islamic banks is more complicated (Ali, 2013: 205) because it uses more than one contract in a transaction or called a hybrid contract (Muhammad, 2015: 89). The form of a single contract is not able to respond to contemporary financial transactions (Rahmi and Noprizal, 2017: 143) which are always moving and influenced by the national, regional and international financial industries (Atep, 2017: 32).

One of the sharia banking products which is the result of the adaptation of conventional banking products is The Home-Mortgage Finance (KPR). Home is one of the basic human needs to keep himself in a safe condition. But not everyone can have a house because the price of a house that is not quite cheap and tends to always go up. The increase in prices is caused by higher population growth and increasingly narrow land (Nurma, 2017: 86). Conventional banks provide mortgage financing by lending money to customers which then customers have to return it by providing an excess called interest which is the main characteristic of conventional banks (Winda and Rifa'i, 2017: 157). This interest is the reason of Islamic banks to bring up Islamic Mortgages (KPRS) that are free of usury (Afit and Nur, 2013: 280).

In running KPRS products, Islamic banks integrate and explore contracts that are permitted in Islam with conventional KPR banking operations (Helmi, 2007: 116). Islamic banks KPRS offer 3 contracts that can be used in this financing, namely murabahah, Ijarah Muntahiyyah Bi Tamlik (IMBT), and Musyarakah Mutanaqisah (MMQ) (Afit and Nur, 2013: 281). These three contracts are part of a new contract in contemporary Islamic fiqh (Abdullah, 2010: 46). But murabaha contract still dominates compared to other contracts, because the level of risk of loss is relatively low compared to other contracts (Azharuddin, 2012: 69-70).

Murabahah offered by Islamic banks is a modified murabahah contract rather than a simple murabahah as in the previous fiqh (Erwandi, 2017: 432). Murabahah contract on KPRS products contains 2 contracts in one transaction or hybrid contract which is still being debated by the ulama regarding its validity. The majority of Hanafiyah scholars, some Malikiyah scholars, Syafi'iyah scholars, and Hanabilah argue that hybrid contract law is legal and permissible under Islamic law. The legal basis used is the basic rules of muamalat that every muamalah is allowed unless there is a proposition that forbids it (Ali, 2013: 207). Malikiyah argues that hybrid contracts are the solution and permissible as well as prescribed as long as they contain benefits and are not prohibited by religion (Raja, 2016: 43).

Whereas the prohibition of using hybrid contracts refers to the three hadiths of the Prophet Muhammad SAW which outwardly show the prohibition of multi-akad, such as combining *bai* and *salaf*, ban on *bai'atani fi bai'atin*, and ban on *shafqatani fi shafqatin* (Hasanuddin, 2011: 157, Burhanuddin, 2016: 204). These three hadiths are referred to in the prohibition of merging two contracts in one transaction or two in one contract (Ali, 2013: 206). The prohibition of two in one transaction is because the contract will cause usury and gharar.

Islamic mortgages products with murabahah contract schemes and IMBT contract schemes are considered as controversial products formulated from the hilah legal method or legal manipulation. Although the KPR product contains a hilah method that contains debates, in fact, the product has become a superior product and dominates the portfolio of Islamic financial distribution (Izzatul, 2017: 20). Many researchers conclude that Islamic banking innovation products only convert interest into Ujroh or the like by fabricating the contract (hilah) its formation. Sharia banking products are considered to still have similarity to conventional and seem mirroring which distinguishes only on the labeling side using the term sharia, but in substance, the spirit remains conventional (Ijang, 2017: 2). Murabahah contract patterns are also often considered the same as conventional banking credit patterns (Lely, 2014: 245).

RESEARCH METHODS

This research used a qualitative approach, where this approach is used to obtain in-depth and extensive data that may not be used utilizing a quantitative approach. This research was conducted at Bank Syariah Mandiri Sub-Branch Office (KCP) Ponorogo. Data obtained by observation, interview, and documentation. The way of thinking model in this research is inductive. Inductive is a process where researchers collect data and then researchers develop a theory of that data. Data collected in this study include data on the concept of hybrid contract, the concept of murabahah contract, and the application of Murabahah KPRS.

RESULT AND DISCUSSION

Hybrid Contract

The multi-contract (hybrid contract) in Arabic is called al-'Uqud al-Murakkabah. Al-'uqud al-murakkabah consists of two words' uqud jama of the word aqdun which means binding (Louis, tt: 518), and murakkabah meaning gathering (Imam, 1999: 296). Whereas al-uqud al-murakkabah means the unity or grouping of various covenants or financial contracts that are covered by the combination, in which all rights and obligations are together in one akad (Abdullah, 2010: 46).

According to al-'Imrani, the types of hybrid or multi-contract contract is divided into 5 types: (Abdullah, 2010: 46)

1. The Dependent/ Conditional Covenant (*al-'uqud al-mutaqabilah*)

Al-'uqud al-mutaqabilah is multiakad in the form of the second covenant responds to the first, where the perfection of the first covenant depends on the other.

2. The Collected Covenant (*al-'uqud al-mujtami'ah*)

Al-'uqud al-mujtami'ah multi covenants is gathered in one contract. Two or more covenants are grouped together in one akad.

3. The Opposite Covenant (*al-'uqud al-mutanaqidhah wa al-mutadhadah wa al-mutanafiyah*)

The three terms above have similar meanings to differences, but all three have different implications. Existing covenants do not support each other but break each other, so hybrid contracts containing differences cannot be as a group.

4. The Distinct Covenant (*al-'uqud al-mukhtalifah*)

Al-'uqud al-mukhtalifah contract is being gathered two or more differences between the two all the legal consequences of the contract or in part.

5. The Akin Covenant (*al-'uqud al-mutajanisah*)

Al-'uqud al-mutajanisah-contract is a contract that may be collected in a single contract, with no influence on the law and legal consequences.

Scholars have different perceptions of hybrid contract law. The first opinion stating that the law of hybrid contract is possible, this opinion was expressed by scholars of the Hanafi, Maliki, Shafi'i, and the Hanbali sect. The permission on running the hybrid contract according to the scholars of the sect returned to the basic rules of muamalah that all forms of muamalah are possible and valid unless there is a proposition that prohibits and cancels it (Abdullah, 2010: 46).

Nazih Hammad argues that the law of incorporating the covenants becomes valid or invalid merely depending on the agreements in it (Nazih, 2001: 249). The scholars of the Hanafi, Shafi'i, and Hanbali sects affirmed the law of the merger with the law of the covenant if they were independent (Abi Ishaq, 1997: 43). If the treaty itself is lawful then the merger of the covenant may also allowed, unless there is a proposition that prohibits it (Haiah al-Muhasabah, 2017: 270).

While Zahiriyah scholars say that the law of the hybrid contract is void and not allowed. This scholar's opinion refers to the surah of al-Baqarah verse 229 stating that any person who performs the conditions and covenants which have not been performed by Allah then he violates the law of Allah. From this verse, Zahiriyah concludes that the basis of muamalah is illegal (Abdullah, 2010: 73).

From the above opinion, the main idea is the opinion that the hybrid contract is valid, based on the basic principle of the rule is that all forms of muamalah are valid unless there is a prohibition against it. While there is no argument that clearly states that a hybrid contract is lawful, it is not the basis that hybrid contract law is illegal and violates the terms of God.

Scholars who allow hybrid contracts do not always allow it freely but have set limits that must be met. These restrictions become standard to consider that a hybrid contract is lawful or unlawful. The limitations are:

1. The hybrid contract is not prohibited by the sharia
Rasulullah prohibits the merger of sale and loan (*bai and salaf*) (Ahmad, 1995: 203), the prohibition of 2 sales in 1 covenant (*bai'iniini fi bai'atin*) (Abi Isa, 1996: 513), and the prohibition of 2 akad in one transaction (*actsshafqataini fi shafqatin*) (Muhammad, 2013: 249).
2. Hybrid contracts are not intermediaries for illegal transactions
Mergers between one and the other cannot be intermediaries for illegal transactions such as usury (Abdullah, 2010: 185). An example of an illegal contractual merger is the combination of a sale and a loan that can cause usury. The prohibition of the merger on sale and loan transactions led to the prohibition of mergers between lending and selling, lending, and leasing because it was in fact a merger of sale and lending (Nazih, 2001: 261).
3. The Hybrid contract does not consist of the covenants which the impact of its law is a contradiction
Malikiyyah scholars said that any contracts which contrary and opposite as the impact of its law cannot be combined (Abi Bakar, 1992: 843). Whereas clerics other than Malikiyyah scholars allow the merger of a legal contract as opposed to a single agreement if the object is more than one with one price or two prices, it also allows the merger of covenants which have the same object at the same price but at different times. However, prohibit the consolidation of covenants whose objects are at the same price and at the same time (Acts: 2001: 183).

In addition to the three restrictions above the hybrid, contract must also be free from *hilah* that is forbidden by sharia. *Hilah* is all ways that are appropriate or not in accordance with sharia to replace a law into another law with the aim of realizing the *maslahah* and eliminating difficulties (Isa, 2015: 21). *Hilah* that is forbidden is *hilah* which is contrary to *maqashid sharia*, which imposes mandatory laws, justify the

unlawful, and change the right to be false. If the hilah does not contain these things, then the hilah is included in the hilah which is permitted by sharia (Riyadh, 2013: 42).

Murabahah Agreement

Murabahah was taken from the word *ribhun* which means gain or growth in trade (Imam, 1999: 103). While murabahah according to the term is the sale and purchase of goods on condition that the seller discloses the original price, the amount of costs incurred and the profits taken (Abi Muhammad, 1997: 266, 135). Murabahah in Islamic banking is a sale and purchase agreement where the bank sets the selling price of goods, namely the cost of goods acquired plus a number of bank profit margins agreed between the bank and the customer and cannot be changed during the validity of the contract (Yenti, 2016: 158).

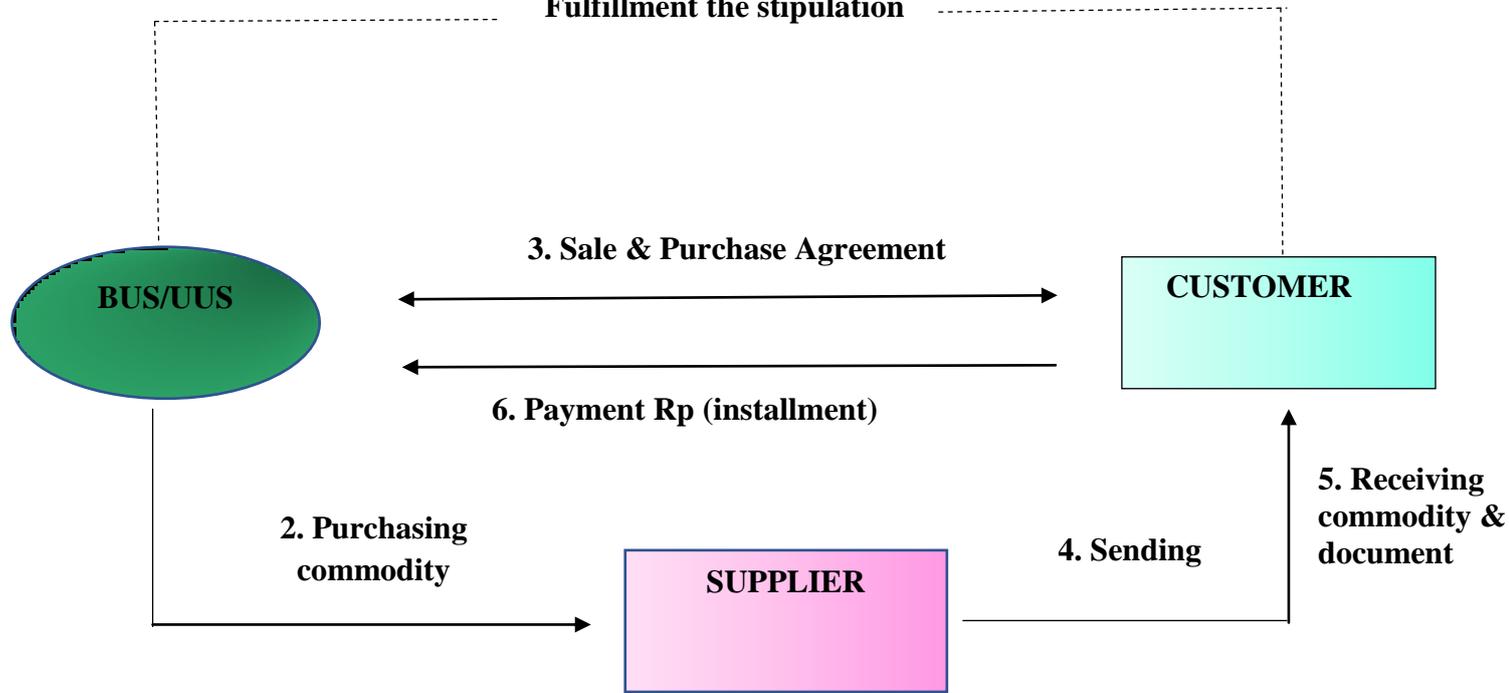
The murabahah contract is permissible as in Surah al-Baqarah verse 275 where Allah allows trading and forbidding usury. This verse shows that Allah permits profit taking or additional in buying and selling and forbids any additional in accounts of debts and receiveables (Abi Ja'far: 2001: 43). Ibn Qudamah also stated that the murabaha contract was legal and there were no differences notion about it, because the initial price and profit were known by both parties (Abi Muhammad, 1997: 266, Syamsuddin, 1997: 201).

Murabahah contract on Islamic banks is applied in 2 ways, simple murabahah and murabahah orders (Yusuf, 2002: 276). A simple murabahah is buying and selling goods at the original price and agreed profits as defined by fiqh experts. This simple murabahah is very rarely applied in Islamic banks because banks do not have the goods that are desired by customers. While murabahah orders are buying and selling between the customer and the bank where the bank buys the goods desired by the customer to a third party and then the customer buys the goods from the bank at an agreed profit. This murabahah order is also called murabaha lil amri bi al syira 'which is widely applied by Islamic banks (Sa'duddin, 2002: 307, Abdullah, 2010: 257). The murabahah schemes in Islamic banks can be described as follows:

Figure 1. MURABAHAH SCHEME

Banking & Financing Technical Application

1. Negotiation & Fulfillment the stipulation



Gloss:

1. The bank and the customer negotiate the goods to be purchased by the customer, as well as the price agreed between the customer and the bank.
2. After the customer and the bank agree on the goods and the price, the bank buys the goods desired by the customer to a third party (seller).
3. After the bank has the full items desired by the customer, the bank and the customer enter into a sale and purchase agreement at an agreed price and payment system.
4. The seller sends the goods to the customer on the bank's orders.
5. The customer receives goods and documents related to the goods.
6. The customer pays the goods in installments or in cash.

The Implementation of Murabahah Agreement on Islamic Mortgages

Islamic mortgages according to Bank Syariah Mandiri are short, medium, or long-term financing to finance the purchase of residential (consumer) housing, whether new or used in a developer environment with a murabahah system. The *Hybrid Contract on Islamic Mortgages Product using Murabahah Agreement (Bank Syariah Mandiri Ponorogo)*

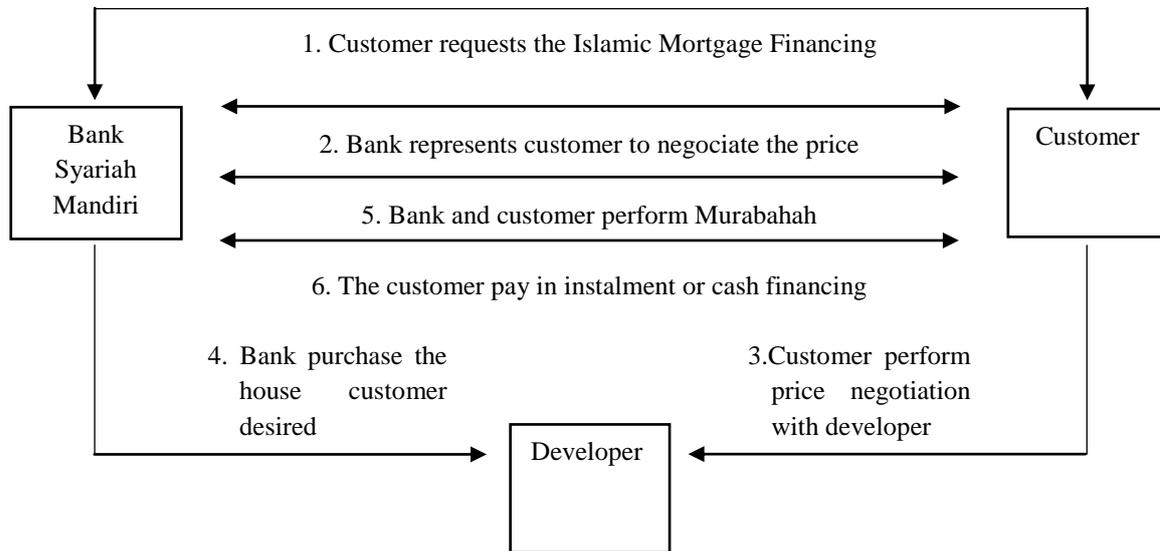
benefit of this financing is to finance the needs of customers in terms of procurement of new and used residential homes by way of monthly payment. The development of Islamic mortgages (KPRS) products at Bank Syariah Mandiri KCP Ponorogo is fairly rapid. The number of customers of this product reaches 14 customers, and this number covers a third of the total consumer financing customers at Bank Syariah Mandiri KCP Ponorogo.

Islamic Mortgage Financing at Bank Syariah Mandiri KCP Ponorogo begins with the submission of financing from customers to buy the desired house and bring the complete documents that are required to apply for financing. The next step is the customer is tested for eligibility using the 5C principle, namely *Character, Capacity to Repay, Capital, Collateral, and Condition*. The stage after the customer is considered feasible is a field survey conducted by the bank to ensure the correctness of documents. This feasibility testing is very important for banks before accepting financing requests from customers to avoid bad debt.

The murabahah contract application that is in the Islamic mortgages (KPRS) product at Bank Syariah Mandiri KCP Ponorogo by using the murabahah bil wakalah agreement. Although Islamic mortgages (KPRS) products can be applied with other contracts, yet Bank Syariah Mandiri KCP Ponorogo only applies with murabahah contracts on the grounds that the essence of Islamic mortgages (KPRS) products is buying and selling new as well as old homes.

In applying the murabahah bil wakalah contract, the bank realizes that giving the power to the customer to buy the house he wants can lead to fraud or *side streaming*. Bank Syariah Mandiri KCP Ponorogo uses wakalah agreement not to represent the purchase but to represent the price negotiation to the developer. Representatives in the price negotiation are intended so that customers get and know the initial price of the house. Bank Syariah Mandiri KCP Ponorogo requires developers to open accounts because financing funds will be directly transferred from the bank to the developer account and there is no transfer of funds to the customer's account to avoid misuse of funds. The implementation can be described through the following scheme:

Figure 2. The Implementation in Bank Syariah Mandiri KCP Ponorogo



Source: Bank Syariah Mandiri KCP Ponorogo

Gloss:

1. The customer submits Islamic mortgages (KPRS) financing to Bank Syariah Mandiri KCP Ponorogo and brings the documents which are required for this financing.
2. After the bank conducts the feasibility testing for customer and receives a request for financing from the customer, the bank authorizes the customer to negotiate a price with the developer.
3. The customer comes to the developer to negotiate and agree on the price of the house the customer wants.
4. The bank buys the house that the customer wants the developer.
5. After the official ownership of the house becomes the property of the bank, the bank and the customer enter into a murabahah agreement and agree on the price and method of payment to be chosen by the customer.
6. The customer repays the financing to the bank in cash or in installments.

The Analysis of Hybrid Contract Implementation on Islamic Mortgages Product using Murabahah Agreement in Bank Syariah Mandiri Branch Office Ponorogo

Mortgage products offered by Bank Syariah Mandiri branch office Ponorogo using murabahah contract preceded by the wakalah contract or commonly known as murabahah bil wakalah. Murabahah bil wakalah is an agreement allowed as well as there is no postulate against it. The merger of murabahah and wakalah is not included in the discussion of prohibition the *baiataini fi baiatin* because customers who request bank financing undertake the purchase by installments so that there are no 2 prices in 1 contract and therefore there is no gharar (hazard) in it

Fatwa DSN-MUI (Islamic law) No. 04 / DSN-MUI / IV / 2000 concerning murabahah at point 9 makes it clear that "if a bank wants to delegate to a customer to purchase goods from a third party, the sale of murabahah should be done after the goods, in principle, belong to the bank". Based on the point of this rule, it is known that the DSN-MUI allows for the existence of wakalah in the purchase of goods prior to the murabahah.

The implementation of murabahah bil wakalah often leads to dishonesty and misuse of funds (Mufti and Richa, 2016: 11), if the wakalah contract is used to represent purchases accompanied by the transfer of financing funds from banks to customer accounts. Murabahah bil wakalah contract which formerly *masyru* (allowed) becomes *mahdzur* (forbidden) due to the deceit of the customer. Therefore to avoid it, wakalah contract in Bank Syariah Mandiri Ponorogo used to represent the customer in negotiating the price rather than buying the goods. In addition, the bank also asks the developer to have an account in Bank Syariah Mandiri so that the funding will go straight to the developer's account without going through the customer's account.

The wakalah contract according to fuqaha (Islamic jurists) does not include 6 covenants that cannot be combined with bai or murabahah contract. While according to Abdulhanaa the wakalah is an additional treaty that can be accompanied by other contracts and can be modified according to its development (Abdulhanaa, 2014: 120). In practice, the wakalah is performed separately from the murabahah contract because the wakalah is performed before the murabahah. The wakalah contract must be done prior to the murabahah contract so that the goods are principally owned by the bank and there is no *bai 'ma'dum* or sale of the goods which aren't owned yet.

Thus, as the scheme of murabahah bil wakalah has been described, murabahah bil wakalah contract is a kind of *uqud mujtamiyah* because it combines two different legal terms in one contract with one object with one different payment. According to nazihi hamadad the merger between two different legal agreements in one agreement with one object and one payment at a different time is possible.

The existence of wakalah is an obstacle to facilitating the customer in fulfilling his/ her homeownership requirements through installment and reducing the risk of repatriation due to the incompatibility of goods with the specifications required by the customer. Thus the murabahah contract combined with the wakalah contract is a *hilah* which allowed because it has *maslahah* for each party and does not contradict the sharia *maqashid*. Moreover, the *hilah* of this treaty does not do anything that may or may not be contrary to sharia.

CONCLUSION

The hybrid contract is one of the most innovative forms of shariah bank products that are required in the development of Islamic banking. The Shariah-compliant in banking which dominates all financing is murabahah bil wakalah contract that also contains a hybrid contract. One of the shariah-compliant banking products that use the Islamic law of murabahah bil wakalah is the Islamic mortgages product (KPRS).

Bank Syariah Mandiri implement the KPRS products using murabahah bil wakalah contract because the essence of this product is selling and purchasing houses whether new or old house. The wakalah contract was performed before the murabahah contract so that the goods were in principle owned by the bank and will not cause *bai 'ma'dum*. The wakalah contract in Bank Syariah Mandiri Ponorogo is a bank authorization for the customer to negotiate on the house price to the developer. Bank Syariah Mandiri does not authorize a customer to purchase a home to reduce the risk of *side-streaming* that may result from transferring funds from a bank account to a customer's account for a home purchase.

The merger of the wakalah and murabahah contract on the KPRS products at Bank Syariah Mandiri does not violate Islamic rules as there is no prohibition on the

merger of the two covenants. Fatwa DSN-MUI No. 04 / DSN-MUI / IV / 2000 on murabahah allows for representation in the sale of murabahah. In addition, according to fuqaha (Islamic jurists), wakalah contract is not included in the six covenants that cannot be combined with the sale and purchase agreement. The wakalah is also a hilah/ tool to facilitate customers in meeting their basic needs of homeownership and reducing the bank's risk of return. Therefore, the merger of wakalah and murabahah is not part of the banned because it raises *maslahah* (goodness) for customers as well as banks.

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