



Analysis of Gold Pawn in Indonesia: A Comparative Study between DSN-MUI and AAOIFI

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Abstrak

Perkembangan produk berbasis syariah di Indonesia semakin marak, salah satu yang paling berkembang adalah gadai rahn/syariah. Pada dasarnya, kontrak gadai adalah jenis kontrak tabarru'/sukarela yang tidak menghasilkan keuntungan, namun ada banyak lembaga keuangan syariah yang menawarkan produk gadai terutama produk gadai emas. Penelitian ini bertujuan untuk menganalisis perbandingan antara AAOIFI dan DSN-MUI dalam ketentuan mengenai kontrak gadai emas. Penelitian ini merupakan jenis studi literatur dengan menggunakan pendekatan kualitatif deskriptif. Temuan penelitian adalah terdapat persamaan dan perbedaan baik AAOIFI maupun DSN-MUI dalam ketentuan mengenai kontrak gadai emas. Perbedaan yang paling menonjol adalah bahwa Fatwa DSN-MUI memungkinkan lembaga keuangan syariah sebagai penerima hipotek untuk membebaskan kepada pemberi hipotek beberapa biaya untuk penyimpanan dan pemeliharaan aset yang digadaikan melalui kontrak ijarah, yang membuat kontrak gadai emas menjadi menguntungkan bagi penerima hipotek. Berbeda dengan Standar Syariah AAOIFI yang tidak memberikan kesempatan kepada penerima hipotek untuk mendapatkan keuntungan dari kontrak ini.

Kata Kunci: Rahn, Pion Emas, AAOIFI, DSN-MUI

Abstract

The development of sharia-based products in Indonesia have been increasingly rife, one of the most growing is rahn/Islamic pawn. Basically, a pawn contract is a type of tabarru'/voluntary contract which does not generate profit, however there are many Islamic financial institutions that offer pawn products especially gold pawn product. This research aims to analyze the comparison between the AAOIFI and DSN-MUI in the provisions regarding gold pawn contract. This research is a type of literature study using descriptive qualitative approach. The finding of research is that there are similarities and differences between both AAOIFI and DSN-MUI in the provisions regarding gold pawn contract. The most salient difference is that the Fatwa of DSN-MUI allows the Islamic financial institutions as the mortgagee to charge to the mortgagor some fees for safekeeping and maintenance of the mortgaged asset through ijarah contract, which make the gold pawn contract become profitable for the mortgagee. Unlike in the AAOIFI Shariah Standard which does not give the mortgagee a chance to obtain profit from this contract.

Keywords: Rahn, Gold Pawn, AAOIFI, DSN-MUI

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INTRODUCTION

The development of sharia-based products in Indonesia have been increasingly rife, one of the most growing is rahn/Islamic pawn. Currently, Islamic pawn becomes a promising product in many Islamic financial institutions, even a state-owned company namely Pegadaian, opens sharia branch with name 'Pegadaian Syariah'. It is interesting to study about the pawn phenomenon in Indonesia, that basically a pawn contract is a 'tabarru' (voluntary) contract which does not generate profit, however there are many Islamic financial institutions in Indonesia that offer pawn products for they can provide enough profits. One of Islamic pawn contracts that attract attention of Indonesian public is gold pawn. In this paper, the researcher tries to analyze gold pawn contracts in the perspective of AAOIFI Shari'ah Standards compared with the Fatwa of DSN-MUI.

The Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI), established in 1991 and based in Bahrain, is an Islamic international autonomous non-profit corporate body that prepares accounting, auditing, governance, ethics and Shariah standards for Islamic financial institutions and the industry. Its standards are currently followed by all the leading Islamic financial institutions across the world and have introduced a progressive degree of harmonization of international Islamic finance practices. There are 45 countries that are currently members of AAOIFI.

The National Sharia Council-Indonesian Ulema Council (DSN-MUI, Dewan Syariah Nasional-Majelis Ulama Indonesia) was formed in 1999 with aims to realize the aspirations of Muslims regarding economic issues and encourage the application of Islamic teachings in the economic and financial sector carried out in accordance with the guidance of Islamic law. The formation of the DSN-MUI is a measure of efficiency and coordination of the scholars to respond the issues related to economic and financial problems.

The legal basis for gold pawn practices in Indonesia has been regulated in the Fatwa of DSN-MUI No. 25/2002 Concerning Pawn, the Fatwa of DSN-MUI No. 26 concerning Gold Pawn, and provisions of the Financial Services Authority (OJK) in 2015 which issued OJK Circular Letter No. 36/SEOJK.03/2015 concerning products and activities of Islamic banks and sharia business entities. Specifically for loan-financing product through gold pawn is not intended for investment purposes. Gold pawn are not investment products but are made for those who are currently in financial trouble. Hence, pawn gold is meant to provide solutions to people who need financing.

According to AAOIFI Standard, to mortgage (to pawn) means to make a financial asset tied to a debt so that the asset or its value is used for repayment of the debt in case of default. According to the Indonesian Civil Law, article 1150, pawn is defined as a right obtained by the creditor

on a movable asset handed over to him by the debtor. The debtor gives authority to the creditor to use the movable asset that has been handed over to pay off the debt if the debtor cannot fulfill the obligations at maturity.

In practice, especially in Indonesia, gold pawn in Islamic banks is almost the same as in conventional banks. The difference is that conventional pawns impose the interest on loan, while Islamic banks use marhun fee, or fee of maintenance of the asset used as mortgage or collateral. In gold pawn (rahn) there are three contracts, namely: qardh, rahn, and ijarah. Qardh means giving a loan to other people that can be billed or requested back without expecting anything in return. Meanwhile, rahn functions as collateral on the loan of those who are in debt (the mortgagor). However, renting of marhun (the mortgaged asset) maintenance services can be done with an ijarah contract. Ijarah is a contract for the transfer of usufructuary rights over goods and services through payment of rent (ujrah), without being followed by a transfer of ownership of the goods.

The implementation of gold pawn financing is that a customer guarantees a mortgaged asset in form of gold to an Islamic bank to obtain financing. Then the Islamic bank and the customer agree on a pawn contract. This contract includes the loan amount, the charging of safekeeping service fee and administration fees, the maturity of repayment of financing is 120

days (4 months). Islamic banks provide financing or services needed by customers according to agreements through qardh, rahn, and ijarah contracts. Customers redeem the mortgaged asset after due date of the contract. Otherwise in case the customers cannot repay the loan at the due date, then it can be extended one time, then so on. If the customer cannot repay the loan and does not extend the pawn contract, the bank can conduct an auction by selling the mortgaged asset to repay the loan.

The researcher finds some related research that can be used as literature review. A paper titled 'Dasar Hukum Pegadaian Syariah dalam Fatwa DSN' (the legal basis of Islamic pawn in the fatwa of DSN) written by Yuyun Juwita Lestari. This paper focused on describing legal basis of Islamic pawn in Indonesia. However, it did not compare fatwa of pawn in Indonesia namely DSN with fatwa of pawn in other country. A paper titled 'Studi Implementasi Akad Rahn pada Lembaga Keuangan Syariah' (Study on the implementation of rahn contract in Islamic Financial Institution) written by Surepno. This paper focused on analysis of the implementation of pawn contract in Islamic financial institution through the accepted legal basis in Indonesia namely fatwa of DSN on pawn contract. This paper did not compare fatwa of pawn in Indonesia with fatwa of pawn in other country.

The researcher is interested to compare the provisions issued by a state-level institution which is DSN-MUI (Indonesia)

with that by a multi-state institution namely AAOIFI where its standards are followed by many countries and jurisdiction either fully, partially or as guidance. As far as he observed, there is not any research which compares between provisions of DSN-MUI and AAOIFI especially in gold pawn issue. Hence, the researcher will try to fill this literature gap. This research will focus on comparison of the provisions regarding gold pawn in the perspective of AAOIFI and that of DSN-MUI, to view the extent of accordance of the provisions from both institutions. The problem statements of this research are 1) to describe the provision of AAOIFI and DSN-MUI regarding gold pawn, 2) to analyze the comparison between the provision of AAOIFI and DSN-MUI regarding gold pawn.

LITERATURE REVIEW

Definition of Pawn/Mortgage

Pawn transaction in Islamic jurisprudence is called rahn, which in Arabic etymology means al-thubut wa al-dawam (fixed and eternal). Technically, pawn means to make an object having economic value as a trust for the repayment of debts, so that enabling the mortgagee (murtahin) to get all or part of the debts from the object. Based on the term of Indonesian Positive Law, rahn is defined as an asset that is used as collateral for a debt so that it can be paid by the value of that asset, in case the debtor fails to pay off his debt. According to the Indonesian Civil Law item 1150, pawn is defined as a right that is obtained by the creditor over a movable asset handed over

to him by the debtor as collateral for the debtor's debt, which authorizes the creditor to take the loan repayment through that asset by preceding other creditors, with the exception of selling expenses, as the implementation of a decision on claims regarding possession, and except expenses for maintaining the asset incurred after being handed over.

Meanwhile, according to the Compilation of Islamic Economic Law, Rahn is possession of the debtor's property by the lender/creditor as collateral. Gold pawn is defined as handing of authority over property or valuable goods in the form of gold from a customer (rahin) to the bank (murtahin) to be managed with rahn principle, as collateral (marhun) for the loan (marhun bih) given to the customer. Islamic gold pawns in Indonesia are held by sharia pawnshops and sharia commercial banks or sharia business institutions.

Legal Basis of Pawn/Mortgage

Regarding the permissibility of pawn transaction, the majority of fiqh scholars are on the opinion that it is permissible, and they have never disagreed on this matter. Pawn according to them is prescribed when not traveling or when traveling, based on the actions of the Prophet Muhammad SAW in the hadith which explains that the Prophet SAW pawned his armor to get food from a Jew. The Muslims community have also agreed (ijma') regarding the permissibility of rahn. In the reality of community life, rahn is very common, because borrowing

money using collateral will make it easier to repay debts.

Rahn in the Compilation of Islamic Economic Law has been regulated in articles 329-369. Likewise, the rules of Islamic gold pawn refer to Fatwa of DSN-MUI No. 25/2002 concerning Rahn and Fatwa No. 26/2002 concerning Gold Rahn. Positive law and the Fatwa of DSN-MUI are the references relating to Islamic pawn, which state as follows

- a. Indonesian Law No. 21/2008 Concerning Islamic Banking
- b. Article 36 Bank Indonesia Regulation No. 6/24/PBI/2004
- c. Bank Indonesia Regulation No. 9/19/PBI/2007
- d. DSN-MUI Fatwa No. 25/DSN-MUI/III/2002 Concerning Rahn
- e. DSN-MUI Fatwa No. 26/DSN-MUI/III/2002 Concerning Gold Rahn

The positive legal basis of pawn is explained in article 19 paragraph (1) of Law no. 21 of 2008 concerning Islamic Banking, that the activities of Islamic Commercial Banks include carrying out other activities commonly carried out in the banking sector and in the social sector if they do not conflict with sharia principles and comply with the provisions of Indonesian laws and regulations. In addition, relating to pawnshop, it is explained in the Government Regulation of the Republic of Indonesia No. 51 of 2011 regarding the transform of a 'Pegadaian' public company legal entity into a limited liability company.

Pillars and Conditions of Pawn Contracts

According to the majority of fiqh scholars, there are 4 pillars of rahn, the first is shigat (expression of offer and acceptance). Second, rahin (who mortgages/pawns) and murtahin (who receives the mortgaged asset). Third, marhun (the assets used as collateral). Fourth, marhun bih (the debt). In every contract, the elements and pillars must meet the requirements. The conditions for the parties to the contract are the same as conditions in other contracts, which are that the parties must be sanity, mature, and not under force or coercion. Article 330 of Compilation of Islamic Economic Law states that the parties who conduct a pawn contract must be legally competent. Legal competence here means sanity, mature or puberty and not under coercion.

The conditions that must be met in these pillars are as follows.

- a. Sighat (expression of offer and acceptance).

According to Hanafiyah scholars, pawn cannot be related to certain conditions or be related to the future because a pawn contract is the same as sale contract. Meanwhile, according to scholars of Malikiyah, Shafi'iyah, and Hanabilah, if the condition is a condition that supports the running of the contract, then the condition is valid, but if the condition is contrary to the rahn contract, then the condition is invalid.

- b. Rahin and murtahin (the mortgagor and the mortgagee)

The condition for a person who

is in a contract must be legally capable, according to the majority of scholars the legal capable is one who is mature and sanity. Meanwhile, according to Hanafiyah scholars, both parties are not required to be mature, but sufficiently sound minded.

c. Marhun (the assets used as mortgage or collateral).

The assets that are used as collateral according to fiqh scholars are required as follows: 1) the mortgaged asset may be sold and the value is in accordance with the amount of the debt, on condition that it has passed the maturity date agreed in the contract, 2) the mortgaged asset must have a beneficial value, 3) the mortgaged asset must be clear and specific, 4) the mortgaged asset is the legal property of the person who mortgages it, 5) the mortgaged asset does not belong to another person (still in dispute), 6) the mortgaged asset may be handed over either the object or the certificate of ownership. In addition to the conditions above, there is one more condition that absolutely must be met, that the mortgaged asset must be durable and not easily damaged, such as gold, silver, precious metals, vehicles, and the likes.

d. Marhun bih (debt)

The conditions of the debt borne by the debtor are 1) the debtor is obliged to return the number of money/goods that are his responsibility, 2) the debt may be paid with collateral, 3) the amount of the debt must be clear.

Implementation of Pawn Contract in Islamic Financial Institutions

In Indonesia, rahn which is also called Islamic pawn is a product made as an alternative to the conventional pawn, especially to help the community/customers fulfilling their urgent needs in daily lives. In the practice of Islamic banks, the bank does not derive any benefits from the rahn contract except maintenance and security fees for the mortgaged assets. The rahn contract can also be applied to fulfill a bank's request for additional guarantees for providing financing facilities to customers. The rahn contract is used in banks in the following two cases:

a. As complementary product of another contract

Rahn is used as the complementary product, it means as the additional agreement for another product such as bay' murabahah financing contract. The bank can keep the customers asset as the consequence of the contract.

b. As independent product

In some Islamic countries such as Malaysia, rahn contract has been used as the alternative of the conventional pawn. The difference from both is that in Islamic pawn, the bank charges some amount of fee of safekeeping, maintenance, preservation, and estimation of the mortgaged asset. The main difference between a rahn fee and pawn interest is the nature of the interest which can be accumulated and multiplied, whereas the rahn fee is only once and is set in advance.

RESEARCH METHODOLOGY

This research is a type of literature study by looking for theoretical references that are relevant to the cases or problems found. The theoretical references obtained by means of research of literature studies and then used as the foundation and main tool for analyzing the data.

The type of data used by the researcher in this study is secondary data obtained from journals, books, documentation, and the internet. The approach used in this research is a qualitative research approach. The descriptive analysis method is carried out by describing the facts which are then followed by analysis, not limited to describing, but also providing understanding and explanation of the problems found. After the data obtained has been collected, then the researcher clarifies it according to each problem and then analyzes it qualitatively.

Qualitative research aims to gain a general understanding of a social reality, this opinion is obtained after an analysis of the social reality which is the focus of the research. This research is inductive in nature, where the results of the analysis obtained used to draw the conclusion in the form of a general understanding that is abstract in nature about existing social reality.

RESULTS AND DISCUSSIONS

After reviewing the AAOIFI Shari'ah Standard and Fatwa of DSN-MUI regarding pawn issue, the researcher found that there

are similarities as well as differences in several respects. Especially in the terms of gold pawn, AAOIFI has not issued a standard specifically discussing gold pawn, but the provisions regarding pawn contract through gold are included in the standard of pawn in general, namely Shari'ah Standard No. 39 on Mortgage and its Contemporary Applications. Meanwhile, the DSN-MUI has issued a fatwa discussing pawn in general and a fatwa on gold pawn in particular. In this section, will first be explained the perspective of AAOIFI Standard No. 39/2017, followed by perspective of Fatwa of DSN-MUI No. 25/2002 on Rahn and Fatwa No. 26/2002 on Gold Rahn, then a comprehensive comparison will be carried out and conclusions will be drawn.

Gold Pawn in the Perspective of AAOIFI Standard No. 39

In terms of the mortgaged asset type, it can be found in the item 3/2/2 stating that: "In principle, the mortgaged asset should be a tangible asset, yet the asset can be a debt, a cash amount, a fungible asset, or consumable commodity. Perishable objects can also be mortgaged as they can be sold and replaced by their value. Moreover, the mortgaged asset can also be a share of common property which can be identified and sold separately." Hence, it can be concluded that the gold which is included in category of tangible asset is implicitly permissible to be used as mortgaged asset.

In case the mortgage asset is damaged in the hands of the mortgagee,

it can be found in item 3/2/4 which states: "...When the mortgaged asset perishes in the hands of the mortgagee, the notary or the agent, for a reason other than transgression or negligence, no responsibility shall rest with him and the debt shall still remain valid...". Here, it can be concluded that if the damage is due to transgression or negligence of the mortgagee, he shall be held responsible for compensation, while if the damage is not due to it, the mortgagee shall not be responsible for compensation.

In terms of utilizing the mortgaged asset, it can be found in the item 3/2/9 which states: "The mortgagor can benefit from the mortgaged asset on permission of the mortgagee, whereas the mortgagee has no right to enjoy free of charge benefit from it. However, on permission of the mortgagor, the mortgagee can utilize the asset with the normal pay for similar assets." The difference here is that the mortgagor is not charged for utilizing the mortgaged asset, while the mortgagee when receives a permission from the mortgagor to utilize the mortgaged asset, he is charged for utilizing it.

In terms of maintenance of the mortgaged asset, the item 3/2/10 states: "The mortgagor should bear all actual expenses relating to reparation of the mortgaged asset and its preservation against decay..... The mortgagee should bear all the expenses relating to safekeeping, documentation and selling of the mortgaged asset, except when the two parties agree that the mortgagor should bear such expenses". Based on this

item, there are two different conditions regarding responsibility of maintenance of the mortgaged asset, which one of them emphasizes the mortgagor to bear the expenses, and the other one emphasizes on the mortgagee to bear.

Gold Pawn in the Perspective of Fatwa of DSN-MUI

DSN-MUI has issued two fatwas in 2002, first is fatwa No. 25 concerning pawn contract in general and the second one is fatwa No. 26 which specifically discusses gold pawn. Based on fatwa No. 25 item 1, gold is explicitly permissible to be used as mortgaged asset. In case if the mortgaged asset is damaged, there is no specific explanation of that in both two fatwas.

In terms of utilization of the mortgaged asset, the fatwa No. 25 item 2/2 states: "The mortgaged asset and its benefit is the right of the mortgagor. In principle, the mortgaged asset cannot be utilized by the mortgagee except on permission of the mortgagor without reducing the value of the asset and the utilization is just meant as compensation for expenses of maintenance". Hence, it can be concluded that the mortgagee although has the right to keep the mortgaged asset, however he has no right to utilize it except on the permission of the mortgagor.

In terms of maintenance of the mortgaged asset, it can be found in the Fatwa No. 25 item 2/3 stating: "The maintenance and safekeeping of the mortgaged asset is in principle the obligation of the

mortgagor, however it can also be carried out by the mortgagee, while the expenses of maintenance and safekeeping remain the obligation of the mortgagor.” From this item, all expenses used for reparation of asset can be included in category of maintenance. However, there is no a specific explanation regarding expenses of other than safekeeping and the likes, such as expenses of documentation and selling of the mortgaged asset. Based on this item, there is no difference between expenses relating to safekeeping and expenses relating to reparation, documentation and selling of the mortgaged asset, unlike in AAOIFI Standard.

In terms of expense amount, the Fatwa No. 25 item 2/4 clearly states that “The expense of maintenance and safekeeping of the mortgaged asset cannot be determined based on amount of the loan”. And the Fatwa No. 26 item 1/3 states that “The amount of fee and expenses of safekeeping (of the mortgaged asset) is based on the actual necessary expenses”. Hence, the expense amount is determined by the estimated value for maintaining the mortgaged asset, not by the amount of the loan. This means, for example, if there are two mortgagors who mortgage gold with the same estimated value, but differ in the loan amount they request, then they will be charged with the same amount.

The provision to charge a fee or expense to the mortgagor is stipulated based on Fatwa No. 26 item 1/4 which states: “The fee of safekeeping of the mortgaged asset is

carried out based on Ijarah/Lease contract”. The contract of ijarah here means, the mortgagor who mortgages the mortgaged asset is considered as mu’ajjir, while the mortgagee who keeps the mortgaged asset is considered as ajjir. Therefore, the ajjir will be given a fee for the service of keeping the asset of the mu’ajjir.

Based on fatwa of DSN-MUI mentioned above, it can be concluded that there is a chance for the mortgagee to charge some amounts of fees to the mortgagor under the name ijarah contract, which make the gold pawn contract become profitable for the mortgagee. Unlike in the AAOIFI Standard where the mortgagor is only charged for expenses of reparation and the likes, and the mortgagee should bear all expenses relating to safekeeping, documentation and selling of the mortgaged asset, which does not give the mortgagee a chance to obtain profit form this contract. Given that the mortgagee in pawn contract is the loan giver or the creditor, and the mortgagor is the debtor, charging some fees to the debtor will make this contract closer to the usury.

Comparison between AAOIFI and DSN-MUI Provisions on Gold Pawn

In the fatwa of DSN-MUI, the responsibility for the safekeeping and maintenance of mortgaged asset is prioritized to be borne by the mortgagor. Whereas in the AAOIFI Standards, the responsibility for the maintenance and care of the mortgaged asset is borne by the

mortgagee. From here, Islamic financial institutions in Indonesia can charge some fees and get benefits through ijarah contracts by safekeeping the gold as the mortgaged asset. Furthermore, applying a combination of rahn/pawn contract and ijarah contract in a contract agreement is still considered controversial, for it is contrary to the rule that prohibits two contracts in one contract. The differences can be seen in the following table:

Table 1.
Differences between MUI and AAOIFI

Category	AAOIFI Standards	Fatwa of DSN-MUI
Permissibility of gold pawn contract	Permissible	Permissible
Provision of permissibility	Implicitly mentioned	Explicitly mentioned
In case of mortgaged asset damage in hands of the mortgagee	The mortgagee is responsible if the damage is due to his negligence	Not specified
Right of utilizing the mortgaged asset	The mortgagor has right to utilize without any charge, the mortgagee has the right to utilize with charge	The mortgagor has the right to utilize with charge, the mortgagee (on the mortgagor's permission) has the right to utilize as compensation of maintenance service
Maintenance responsibility	The mortgagor bears expenses of reparation and preservation, the mortgagee bears expenses of safekeeping, documentation and selling	The mortgagor bears all expenses of maintenance and safekeeping, while the mortgagee does not bear any expense
Determination of maintenance fee	Not specified	Based on the estimated value for maintaining the mortgaged asset, not based on debt amount
Contract type of maintenance fee	Not specified	Ijarah contract
Possibility of financing through gold pawn contract	No	Yes

CONCLUSIONS

Based on the discussion presented previously, it can be concluded that there are similarities between the AAOIFI Shari'ah Standards and the Fatwa of DSN-MUI in the provisions regarding gold pawn contract, as well as differences in some respects. The most salient difference is that the Fatwa of DSN-MUI allows Islamic financial institutions in Indonesia to charge fees for safekeeping and maintenance to the debtor. This fee is charged through ijarah contract which make the gold pawn contract become profitable for the mortgagee. Unlike in the AAOIFI Standard which does not give the mortgagee a chance to obtain profit from this contract. Given that the mortgagee in pawn contract is the loan giver or the creditor and the mortgagor is the debtor, charging some fees to the debtor will lead this contract closer to the usury. Furthermore, applying a combination of

rahn contract and ijarah contract in a contract agreement is still considered controversial, for it is contrary to the rule that prohibits two contracts in one contract.

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