



Mushārahah Mutanāqīshah in Indonesia and Malaysia: Fatwa Institution, Regulation, and Recent Practice

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ABSTRACT

Mushārahah Mutanāqīshah (MMQ) is one of the developments of Musyarakah's contract-based products. MMQ can be applied as an Islamic banking financing product where the portion of the share of one of the partners is diminished due to the gradual purchase or commercial transfer to the other partner. The articles aims to investigate the regulatory frameworks pertaining to MMQ in Indonesia and Malaysia. It also compares the associated institutions with the authority to issue regulations and policies surrounding the practice of MMQ. Furthermore, it analyzes and investigates a number of critical issues concerning the implementation of MMQ in both countries. This study is doctrinal legal research. It comprises on principle of law, legal systematic, synchronization of law, and legal history. The author also used statutory, conceptual, and comparative approaches. The result of the study shows that the regulatory framework in both countries was quite sufficient to accommodate the needs of MMQ costumers and practitioners. Therefore, The study's novelty lies in its comprehensive comparative analysis of the regulatory frameworks and practices surrounding MMQ in Indonesia and Malaysia.

Keywords: comparative study, fatwa institution, MMQ, islamic financial institution

INTRODUCTION

The growth of Islamic finance and banking is currently one of the main topics of the international financial system.¹ Current competition and market demands urge Islamic banking to improve services and develop products which are competitive and can meet the needs of the community.² The facts show the development of products as one of the core facilities to meet the needs of the community for sharia banking transactions and to improve services to the public

¹ Nafis Alam and Syed Aun R Rizvi, *Islamic Banking: Growth, Stability and Inclusion* (Springer, 2016).

² Hussain Gulzar Rammal and Ralf Zurbruegg, *Awareness of Islamic Banking Products among Muslims: The Case of Australia* (Springer, 2016).

has not been running optimally, especially partnership-based products that have not been widely developed by sharia banking.³

MMQ is one of the featured products and is promoted by most Islamic financial institutions.⁴ Indonesia Financial Services Authority (OJK) reported that MMQ product has been implemented by several Sharia Banks including Sharia Commercial Banks (SCB) and Sharia Business Units (SBU) so as to encounter the public demands to have a certain asset through financing partnership based on profit sharing concept between the financial institution and customer wherein at the last objective of the agreement all assets financed are the property of the Customer.⁵ Transfer of ownership of these assets is by means of the Customer taking over the portion of capital (hishshah) from the Bank in installments based on a certain payment method during the contract period agreed upon. MMQ products can be done for the purpose of financing ownership of assets such as houses and vehicles. The structure of the product based on the MMQ contract is made in multi-contract (hybrid), which in addition to the Musyarakah contract consists of an *istisna* (manufacturing) contract, *ijarah* (leasing) contract, *bai al musawamah* (sales) or *ijarah mawsufah fi zimmah* (advance/forward lease).

Meanwhile, in Malaysia, MMQ was historically introduced by the International Islamic University of Malaysia (IIUM) through Koperasi Belia Islam (KBI) Malaysia Berhad under the KBI Musyarakah Housing Project on January 1, 1989. It has been successfully implemented in several districts in the state of Selangor Darul Ehsan. However, the authors were not able to find any data and information on the performance and achievements of the project except for a summary of a meeting between KBI and potential buyers on April 2, 1989, at the ABIM Training Center, Sungai Ramal Dalam, Selangor. The report explores the concept of MMQ, the purpose of the project, the cost of the project, the price, and the specification of the house to be built.⁶

The Sharia Advisory Council (SAC) of Bank Negara Malaysia holds the greatest power in resolving the Sharia issues in Islamic finance. It also plays a vital role in ensuring that Sharia decisions are made with wisdom and integrity. Islamic financial communities will refer their business activities to SAC as the agency supports Sharia goals (*maqasid*). It preserves its purity through the results of in-depth discussions and careful consultation processes, which

³ Munawar Iqbal and Philip Molyneux, *Thirty Years of Islamic Banking: History, Performance and Prospects* (Springer, 2016).

⁴ M Kabir Hassan, Salman Ahmed Shaikh, and Selim Kayhan, *Introduction to Islamic Banking and Finance: An Economic Analysis* (World Scientific, 2020).

⁵ Ivan Rahmat Santoso et al., "Risk Management of Musyarakah Mutanaqisah Contract in Sharia Banks in Indonesia: Legal and Operational Issues," *International Journal of Applied Business and International Management (IJABIM)* 5, no. 3 (2020): 41–50.

⁶ Khairul Hafidzi Mohd Subky et al., "The Implication of Musharakah Mutanaqisah in Malaysian Islamic Banking Arena: A Perspective on Legal Documentation," *International journal of management and applied research* 4, no. 1 (2017): 17–30.

contribute significantly to the effectiveness of the Sharia governance framework in Malaysia.⁷

MMQ, a property financing concept in the realm of sharia banking, presents differences in its implementation between Indonesia and Malaysia. In Indonesia, the regulations governing it come from the Financial Services Authority and the Sharia Supervisory Agency (Bapepam-LK), while in Malaysia, the regulations are harmonized by Bank Negara Malaysia (BNM). Nevertheless, both Indonesia and Malaysia have well-established sharia banking markets, where MMQ has become one of the products that is well received by people seeking property financing in accordance with sharia principles. Leading sharia banks such as Bank Muamalat Indonesia, Bank Syariah Mandiri in Indonesia, and Maybank Islamic, CIMB Islamic, and Bank Islam Malaysia Berhad (BIMB) in Malaysia, actively offer MMQ products to their customers. The concept of partnership between banks and customers in property ownership is a hallmark of MMQ, and although the details of its implementation may vary between the two countries, the aim remains the same: to provide alternative property financing that complies with sharia principles for the people of Indonesia and Malaysia.

Several studies have made on the issue of MMQ in both countries. Nurhayati and Hasan show that MMQ products can be developed as an alternative to housing finance based on Sharia principles.⁸ However, in practice, Islamic banking is still not optimal in the use of MMQ due to a number of factors, including the availability of human resources and information technology.⁹ On the other hand, Malaysian financial institutions also faced challenges in introducing MMQ such as the issue of legal documentation of the MMQ agreement, the question of legal ownership of the MMQ assets and legal constraints in contexts where one or both of the MMQ partners is a foreign legal entity.¹⁰ Therefore, Lung proposes a significant recommendation for Islamic banks to introduce certain approaches to improve the implementation of MMQ in particular in regards of terms and conditions stipulated in the MMQ agreement so that it can protect and preserve the interests and rights of stakeholders.¹¹

⁷ Hichem Hamza, "Sharia Governance in Islamic Banks: Effectiveness and Supervision Model," *International Journal of Islamic and Middle Eastern Finance and Management* (2013).

⁸ Yuli Nurhayati and Asyari Hasan, "Analysis of the Mutanaqishah Musyarakah Contract as a Solution for Home Ownership Financing in Islamic Banking," *Indonesian Interdisciplinary Journal of Sharia Economics (IIJSE)* 5, no. 1 (2022): 390–408.

⁹ Muh Turizal Husein, "Telaah Kritis Akad Musyarakah Mutanaqishah," *Al Maal: Journal of Islamic Economics and Banking* 1, no. 1 (2019): 79–88.

¹⁰ Mohd Zakhiri Md Nor et al., "Legal Challenges of Musharakah Mutanaqishah as an Alternative for Property Financing in Malaysia," *Journal of Legal, Ethical and Regulatory Issues* 22, no. 3 (2019): 1–8.

¹¹ Lee Ching Lung, "Musharakah Mutanaqishah Partnership in Malaysia's Islamic Bank: A Comparison between Theory and Practice," *American Journal of Economics and Business Administration* 5, no. 3 (2013): 95–106.

Despite of the fact there were numerous studies conducted on the issue of MMQ. However, the authors are unable to find any comparative study that discusses the issue of regulatory framework between Indonesia and Malaysia which spesifically focuses on MMQ. As in order to fill the gap, this study aims to elaborate the regulatory frameworks related to the MMQ implemented in Indonesia and Malaysia. Furthermore, this research will also explore related institutions that have the authority to issue regulations and policies regarding the practice of MMQ. Besides, it also analyzes and explores several important issues on the implementation of MMQ in both countries.

METHODS

The study is being conducted using library research and data collected from secondary sources obtained through library research and the internet. The purpose is to collect and thoroughly examine data in order to develop a framework focused on the scope of the study. This study employs a doctrinal legal research technique that incorporates legal ideas, systematic legal analysis, legal synchronization, and legal history. The author uses legislative, conceptual, and comparative methods. Inductive and deductive approaches are utilized to understand conceptual conceptions such as legal frameworks and laws controlling MMQ in both countries. Meanwhile, the comparative method is being utilized to analyze Malaysia's and Indonesia's legislative and regulatory frameworks, as well as to evaluate current MMQ practices.

RESULT AND DISCUSSION

MMQ in Indonesia

Authorized Fatwa Institution

The National Sharia Council (DSN) fatwa under the Indonesian Ulama Council (MUI) is one form of positive National law whose existence is binding on practitioners of sharia economics.¹² The existence of a Sharia Council institution is essential to ensuring that the activities and operations of Islamic financial institutions throughout the world run in accordance with Islamic standards and values. In Indonesia, this role is carried out by the DSN formed by the Indonesian MUI. Starting with the development of sharia economy in Indonesia, MUI held an DSN Formation team meeting on October 14, 1997.¹³ This is a series of Ulama Workshop on Sharia Mutual Funds held by the Indonesian Ulama Council on 29-30 July 1997 in Jakarta, which recommended the need for a specialized institution to address issues related to Islamic Financial Institution (IFI) activities. In 1999, this institution was established through the MUI Board's Decree on February 10, 1999, in document No. Kep-754/MUI/II/1999,

¹² Sigit Pramono and Yasushi Suzuki, *Growth of Islamic Banking in Indonesia: Theory and Practice* (Routledge, 2020).

¹³ Angga Syahputra and Reni Ria Armayani, "Conversion of DSN-MUI's Fatwa on Islamic Banking to Be the National Law: A Comparative Study in Muslim Countries," *Jurisdictie: Jurnal Hukum dan Syariah* 11, no. 2 (2020): 262–285.

concerning the establishment of the National Sharia Council.¹⁴ One of the main tasks of the National Sharia Council regards to the fatwa issuance on products and services of sharia financing. With the presence of DSN, it is intended to promote the application of Islamic teachings in economic practice.

In its working mechanism, DSN is closely connected with the Daily Supervisory Body (DPH) and the Sharia Supervisory Board in Islamic financial institutions that have their own duties and authorities.¹⁵ The relation between DSN-MUI and DPS is given that the history of the formation of DSN is a consequence of the growing amount of Sharia Institutions besides the increasing amount of DPS in each of these institutions. This has led to the emergence of different fatwas between DPS of one institution and the others so that it is feared that it will disconcert the community. Therefore MUI considered that it is necessary to establish a national Sharia Council, which supervises Sharia Financial Institutions under one umbrella of a national organization, which is finally known as the National Sharia Council (DSN). The task and function of establishing fatwas related to sharia economy in Indonesia is the responsibility of DSN-MUI.¹⁶ This is in accordance with Appendix II of MUI Board Decree No. Kep-754/MUI/I/1999 concerning the Formation of DSN. The role and function of DSN-MUI include issuing fatwas on sharia economics to be used as guidelines for practitioners and regulators, also issuing recommendations, certifications, and Sharia approvals for sharia financial institutions and businesses, and overseeing sharia aspects of products/services in Islamic financial / business institutions through DPS.¹⁷

Referring to Article 1 paragraph (12) of Law on Islamic Banking No. 21 of 2008, the law mandates MUI and DSN-MUI to oversee all types of Islamic banking activities. The article also explains that only national fatwa institutions in the sharia field can determine the validity of sharia banking activities. And it is obvious that the principles of Sharia law referred to in the preceding explanation are the principles of Sharia law issued and laid down by the MUI. This is set out in detail in paragraph (2) of Article 26. In addition, the authority of the MUI also appears to be very vital in appointing the Sharia Supervisory Board for Islamic Banks and Financial Institutions. It can be seen from the provisions of Article 32 paragraph (2) that the MUI has the authority to provide recommendations on the appointment of the Sharia Supervisory Board by the

¹⁴ Abdurrohman Kasdi, "Contribution of National Sharia Council Fatwa of Indonesian Council of Ulama (DSN-MUI) in The Islamic Economic Development in Indonesia," *IQTISHADIA: Jurnal Kajian Ekonomi da Bisnis Islam* 1, no. 1 (2018): 47–64.

¹⁵ Devid Frastiawan Amir Sup and Ifandi Suhendi, "The Concept of Muqasah on Murabahah Financing in the Perspective of Fatwa DSN-MUI," *Kodifikasia: Jurnal Penelitian Islam* 16, no. 1 (2022): 53–73.

¹⁶ Bambang Hermanto, "The Role of DSN-MUI to Ensure Shariah Compliance of Islamic Financial Transactions in Indonesia (A Political Ambiguity Perspective)," *Journal of Islamic Banking and Finance* 6, no. 1 (2018): 37–44.

¹⁷ Dewi Angggraini, "Indonesian Supreme Court Judicial Decision on Sharia Economic Disputes," *Indonesian Supreme Court Judicial Decision on Sharia Economic Disputes* (n.d.).

General Meeting of Shareholders.¹⁸ DSN is a body fully responsible for identifying and responding to the legitimacy of Islamic economic activity, in particular the application of Sharia banking in Islamic banks or Islamic financial institutions. And if observed in a hierarchical context, the MUI simply controls the DSN. The problem of cooperation and productivity in Islamic banking is one of the reasons for the establishment of the DSN. This is further compounded by the fact that many Islamic financial institutions do not abide by the rules of Sharia law in the conduct of their business. This may be due to a lack of knowledge with regard to Islamic banking principles.¹⁹

In connection with the development of Islamic financial institutions, the existence of DSN-MUI and its legal products has the legitimacy of Bank Indonesia which is a state institution holding authority in the banking sector, as stated in Bank Indonesia Board of Directors Decree Number 32/34/1999, where Article 31 states that in carrying out its business activities, Islamic commercial banks are required to pay attention to the DSN-MUI fatwa. Furthermore, the Decree also states that likewise in the case of banks going to carry out activities as intended in Article 28 and Article 29, if it turns out that the intended business activities have not been given a fatwa by DSN, then it is obligatory to request DSN approval before carrying out such business activities. Whereas if the Conventional Bank intends to expand its business field into Islamic banking, then based on Law No. 21 of 2008 concerning Islamic Banking, sharia business units of conventional banks are required to form a Sharia Supervisory Board that is appointed and approved by a general meeting of shareholders with reference to recommendations issued by the MUI. The establishment of the Sharia Supervisory Board aims to provide guidance and supervision over all its business activities so that it is in accordance with Islamic values and principles.

However, since December 31, 2013, Bank Indonesia and the Financial Service Authority (OJK) signed the Minutes of Handover of the transfer of the regulatory and supervisory functions of the Bank from Bank Indonesia to the Financial Services Authority which was signed directly by the Governor of Bank Indonesia, Agus D.W. Martowardojo and Chairman of the Board of Commissioners of the Financial Services Authority, Muliaman D. Hadad. At the handover ceremony, BI also submitted a Report on the Implementation of Bank Indonesia's Duties in the Field of Regulation, Licensing and Bank Supervision as an illustration of the implementation of the functions and duties of bank supervision by BI so far.²⁰

¹⁸ Guno Prayitno and Ro'fah Setyowati, "The Existence of Sharia Supervisory Board in Sharia Fintech: Legal Basis and Problematic in Indonesia," *Syariah: Jurnal Hukum dan Pemikiran* 20, no. 2 (2020): 135-144.

¹⁹ Indah Purbasari and Encik Muhammad Fauzan Murni, "Consumers Protection on the Musyarakah Mutanaqisah Contract of Indonesian Islamic Banking," *ICETLAWBE 2020* (2020): 419.

²⁰ Ahmadi; Borahima Marwah; Miru Anwar; Said, Nurfaidah, "The Role of Bank Indonesia in Protecting Debtors Credits of House Ownership after the Establishment of Financial Services Authority Institution," *JL Pol'y & Globalization* 63 (2017): 217.

In accordance with the mandate of Law Number 21 of 2011 concerning the Financial Services Authority, effective December 31, 2013, marked by the signing of the Minutes of Handover between Bank Indonesia and the Financial Services Authority, the task of banking regulation and supervision was transferred from Bank Indonesia to the Financial Services Authority. Since December 31, 2013, supervision of individual banks (microprudential) has been carried out by the Financial Services Authority. However, macroprudential supervision is still carried out by Bank Indonesia, in coordination with the Financial Services Authority.

Regulatory Framework of MMQ in Indonesia

The provisions of the National positive law regarding the financing of MMQ are set explicitly in DSN Fatwa No. 73/DSN MUI/XI/2008 concerning MMQ. The issuance of the fatwa was based on the request from Bank Muamalat Indonesia (BMI), Bank Tabungan Negara Syariah (BTN), and the Sharia Economic Communication Center (SECC).²¹ However, the DSN-MUI fatwa No. 73/DSN-MUI/XI/2008 concerning MMQ is understood in a variety of ways by the public, including sharia financial practitioners and authorities, so that it creates an uneven implementation in sharia financial and banking products. On the other hand, the community also needs clear and clear guidelines for implementing the fatwa. Based on these considerations, DSN-MUI then in 2013 issued decree No. 01/DSN-MUI/X/2013 concerning Guidelines for Implementing MMQ in Financing Products.

In addition, DSN Regulation No. 01/DSN-MUI/X/2013 specifically regulates for MMQ business activities that use the principle of renting (*ijarah*) where the object being financed is still in the process of making (*indent*), this type of *aqad* is called *ijarah maushufah fi dzimmah*. The availability of objects must be agreed upon and clearly stated, both quantity and quality (*ma'luman mawshufan mundhabithan munafiyān lijljhalah*). The period of transfer of the MMQ financing object must also be explicitly stated. Although the transfer of the entire object is carried out in the future, however, a large portion of the MMQ object in the form of a building/property must have existed at the time of the contract. The certainty of the existence of the MMQ object must be clear and fully owned by the developer/supplier and precisely is free from any disputes.

According to DSN Fatwa 101/DSN-MUI/X/2016, the requirements for conducting *ijarah maushufah fi dzimmah* namely the specifications of goods must be known by the parties (*ma'lum*) in order to avoid disputes (*al-niza'*), the benefits must be in the form of benefits that can be legally and physically transferred, the use period of the benefits shall be arranged at the period of the contract, and the benefits must be permissible under sharia. Furthermore, provisions related to indenting housing finance are then regulated in DSN Fatwa No: 102/DSN-MUI/X/2016. The fatwa regulates the provisions regarding leased

²¹ M Arif Al Kausari, "Telaah Fatwa DSN-MUI No. 73/DSN-MUI/XI/2008 Tentang Musyarakah," *SANGAJI: Jurnal Pemikiran Syariah dan Hukum* 5, no. 1 (2021): 81–94.

goods, which is the criteria for leased goods described must be measurable in specifications. Also, the leased goods described may not yet be the property of the lessor at the time of the contract. The availability of leased goods must be clearly known, and some of the leased properties are existed at the period of the contract. In addition, the form of leased goods must be clear, ready to be built, owned by the lessor or developer in cooperation with the lessor, and free of dispute.²²

The Recent Significant Issues in Practice

Identified that in the MMQ contract, the status of ownership of assets is collectively owned between the Islamic Bank and the customer.²³ This is a consequence of MMQ financing, where both parties involved funds for the purchase of goods. Consequently, in relation to the object-matter of MMQ, particularly in the form of property, the transfer of ownership is a formal agreement that must be proven by certificate. The position of the bank and the customer is a partner in MMQ contract, so it is not appropriate to use a collateral mechanism, in particular the mortgage, which gives the creditor the right to execute the MMQ object if it is used as a collateral object, given that the Bank and Customer relationship is not likely regarded the same as debtor and creditor relationship in the mortgage. Also, the agreement is a partnership agreement that cannot be equated with debt because this contract has a different concept from debt/qard.²⁴

The DSN Fatwa and OJK Regulations are not yet complete enough to regulate the substance of Islamic banking agreements required by notaries or Islamic banks. The rules contained in the Fatwa and OJK Regulations are still general and not very different from those of conventional banks. The issue of the customer's obligation to buy the whole object when an event of default occurs has deviated from the principle of profit-loss sharing as adopted by musyarakah. This is because MMQ is a derivative of the syirkah contract, which means that if it gains a profit, then the profit must be shared in accordance with the agreed ratio. Still, the portion of capital must be shared in equal once the reverse situation occurred. So, in the case of the customer is required to pay as the situation of default occurs, it will make the syirkah contract is not in accordance with the substance of the existing agreement.

Furthermore, with regards to DSN Regulation No. 01/DSN-MUI/X/2013 concerning Guidelines for Implementing MMQ in Financing Products. The regulation stipulates that in the case of MMQ business activities using the principle of leasing (ijarah), it is permissible that the object of MMQ financing

²² Ahmad Syaichoni, "Al-Ijarah Al-Maushufah Fi Al-Dzimmah in the Study of Islamic Financial Economics," *Economica: Jurnal Ekonomi Islam* 11, no. 2 (2020): 309-328.

²³ Lastuti Abubakar and Tri Handayani, "Telaah Yuridis Terhadap Pembiayaan Perumahan Melalui Akad Musyarakah Mutanaqisah (MMQ) Sebagai Alternatif Pembiayaan Perumahan Dalam Upaya Pengembangan Produk Perbankan Syariah," *Jurnal Hukum Ekonomi Islam* 1, no. 1 (2017): 194-219

²⁴ Abubakar "Telaah Yuridis: 194-219.

immediately named on behalf of the customer upon the approval of the Sharia Bank/Sharia Financial Institution. The provision to stipulate whether such activity is permissible or not is deemed less appropriate if regulated in regulatory instruments in the form of regulation. It will be more relevant and accurate if such provision regulated in fatwa instead of regulation as the authority and scope of the fatwa is to determine the matter of sharia law on a certain issue. Fatwa determines whether one activity is permissible or not under sharia law.²⁵ On the other hand, the regulation has the role to technically stipulate the mechanism and method to implement the fatwa.

MMQ in Malaysia Authorized Resolution Institution

In order to support the development of Islamic banking in Malaysia, in 1997 the Sharia Advisory Board (SAC) was established which has the main task of making fatwas and overseeing compliance with sharia principles in relation to the Islamic financial sector.²⁶ This Majlis is an advisory body formed in accordance with the regulatory needs of companies and Islamic-based financial institutions in Malaysia. This Majlis has a higher position compared to the sharia committees of other commercial banks. If there is a difference of opinion between SAC-BNM and the Sharia Committee of other banks, then all of the decisions of this institution serve as the final binding guidelines.²⁷ This institution is one of the agencies that have authority in making regulations and Islamic economic fatwa in Malaysia in addition to the National Fatwa Majlis, the Fatwa Majlis of States, and the Sharia Advisory Council Suruhanjaya Sekuriti. In accordance with statutory provisions, this institution is considered as the leading authority in cases relating to Islamic finance in Malaysia. In contrast to the decisions of the National Fatwa Majlis and the Fatwa Majlis of States that use the term fatwa for decisions issued, SAC and Sharia Advisory Council Suruhanjaya Sekuriti use the term resolution. SAC is staffed by economists who are experts in the field of sharia and have broad experience and knowledge in the system of financial and banking transactions, economics, laws, and the implementation of sharia principles.

SAC-BNM is the highest referral body in the Islamic banking system based on Part VII, Chapter 1, Sections 51-58 of the Central Bank of Malaysia Act 2009. It has the authority to establish sharia rules and regulations in the field of Islamic

²⁵ La Jamaa, "Fatwas of the Indonesian Council of Ulama and Its Contributions to the Development of Contemporary Islamic Law in Indonesia," *Indonesian Journal of Islam and Muslim Societies* 8, no. 1 (2018): 29–56.

²⁶ Fathullah Asni, "Management of Fatwa Standardisation on the Practice of Bay'Inah Contract in Malaysia: An Analysis According to Usul Al-Fiqh and Mura'Aht Al-Khilaf Method," *Qualitative Research in Financial Markets* 13, no. 1 (2020): 118–139.

²⁷ Rosli Abdul Aziz, Aisyah Abdul-Rahman, and Ruzian Markom, "Best Practices for Internal Shariah Governance Framework: Lessons from Malaysian Islamic Banks.," *Asian Journal of Accounting & Governance* 12 (2019).

finance in Malaysia, which are binding all Islamic financial institutions under it.²⁸ Although structurally, this body is under BNM, yet in fact, it is independent in terms of formulating the legal provisions and decisions-making. The decision made by SAC is known in the form of sharia resolution, which was first issued on July 8, 1997. According to Section 52, The Sharia Advisory Council has the functions to determine Islamic law on any financial matter and to issue a decision when referred to it, to provide guidance to banks on compliance with Islamic principles in performing Islamic financial transaction operations, and also advise Islamic financial institutions or others to ensure that all elements are consistent with Islamic values. Also, certain duties can then be delegated by the Bank to SAC.²⁹

In particular, the details of the roles played by the Sharia Advisory Council as set out in Section 52 of this Act are:

- 1 The Sharia Advisory Council will review the validity of conventional instruments used by banking and takaful institutions based on Sharia's perspective. The study focuses on the structure, mechanism, and use of the instrument as to whether there are principles that are in conflict with Sharia principles. Subsequently, Islamic banking institutions will design and develop new Sharia-compliant instruments as advised by the Sharia Advisory Council.
- 2 One of the main functions of the Sharia Advisory Council is to advise financial institutions such as commercial banks seeking to issue a new banking product whether or not it complies with Sharia requirements.
- 3 Providing a structured reference source to determine whether a banking product meets Sharia-compliant requirements, the Sharia Advisory Council will issue a manual that has been developed through discussion among Sharia advisory council members.
- 4 Among his duties are to advise and monitor the operation of takaful funds so that they are invested in Sharia-compliant instruments only. Therefore, in the event of any payment to a participant in need, the money is must be from a lawful source and not from an investment containing *riba* or any other prohibited element in Islam.

On the other hand, SAC is also given the mandate to develop and determine Sharia standards for Islamic banking, takaful, Islamic finance, Islamic financial development or other business based on the provisions of sharia principles which are under the supervision of Bank Negara Malaysia. SAC, as the referral and advisory body of Bank Negara Malaysia in connection with Sharia cases, is also responsible for authorizing all Islamic banking and takaful products to ensure that these products comply with Sharia principles. In addition, SAC

²⁸ Zuhaira Nadiah Binti Zulkipli, "Late Payment Penalty: Ta'widh and Gharamah Imposed to Debtor from the Shariah Perspective," *Yuridika* 35, no. 1 (2020): 187-210.

²⁹ Engku Rabiah Adawiah Engku Ali and Umar A Oseni, "Towards an Effective Legal and Regulatory Framework for Islamic Financial Transactions: Major Initiatives of the Central Bank of Malaysia," *International Journal of Law and Management* (2017).

also acts as an adviser to Bank Negara Malaysia dealing with issues relating to business management or Islamic financial management of Bank Negara Malaysia and other related bodies.³⁰ Furthermore, based on the designation of the Central Bank of Malaysia Act 2009, the role and function of SAC have been strengthened as the highest authority in determining Sharia issues relating to Islamic banking, takaful and Islamic finance. The SAC decision is not only valid for Islamic financial institutions, but also for the court and arbitration body which must refer to the SAC decision for any proceedings relating to Islamic business and finance, and must acknowledge that the SAC decision is valid and binding.³¹

Regulatory Framework of MMQ in Malaysia

At the 56th SAC Meeting, February 6, 2006, the SAC decided that the MMQ was included in the syirkah al-inan. Meanwhile, at the 63rd SPS Meeting, December 27, 2006, the SAC decided that the MMQ for housing financing was included in the syirkah al-milk. Furthermore, at the SAC 135 Meeting, May 28, 2013, the SAC decided that the MMQ could be arranged based on the two takyif fiqh, which is syirkah al-milk and syirkah al-aqd based on the objective of the MMQ. MMQ, which aims for the purchase of assets, should be carried out based on syirkah al-milk.³² In contrast, MMQ, which aims at business venture and investment, must be carried out based on syirkah al-aqd. The SAC resolution at the 135th meeting regarding the provisions of MMQ was then set forth in the Policy Document referred to BNM/RH/STD028-7 regarding Musyarakah issued on April 20, 2015, by Bank Negara.

According to BNM/RH/STD028-7, MMQ, which aims to conduct asset acquisition can have several types of contracts as an option such as advance lease (ijarah mawsufah fi zimmah), manufacturing (istisna`), leasing (ijarah), and selling (bai` musawamah). Third parties, together with partners, can purchase complete assets under the MMQ scheme. When this happens, one of the partners will rent out the properties on the basis of the portion they have to the others through the ijarah mechanism. In fact, the lessor 's partner will eventually take over the shares of the partner who leases the asset, so that the investor can eventually have the complete property. On the other hand, the MMQ could also be performed by means of an istisna mechanism.³³ The purpose of this process is to take over the ownership of properties which under construction owned by

³⁰ Muhammad Shahrul Ifwat Ishak and Fathullah Asni, "The Role of Maqasid Al-Shari'ah in Applying Fiqh Muamalat into Modern Islamic Banking in Malaysia," *Journal of Islamic Accounting and Business Research* (2020).

³¹ Ho Wen Hui, Azwina Wati Abdull Manaf, and Asfarina Kartika Shakri, "Fintech and the Transformation of the Islamic Finance Regulatory Framework in Malaysia," in *Emerging Issues in Islamic Finance Law and Practice in Malaysia* (Emerald Publishing Limited, 2019).

³² Akhmad Affandi Mahfudz et al., "Restructuring Rental Rate Components to Be More Innovative Sharia Compliance Product in Islamic Home Financing," *European Journal of Islamic Finance*, no. 5 (2016).

³³ Mohd Faisal Ibrahim and Rosila Kamarudin, "The Islamic Home Financing in Malaysia Istisna'base on Debt: Qualitative Approach," *Labuan e-Journal of Muamalat and Society (LJMS)* (2014): 27-38.

third parties. Each of the partners will then use the *ijarah mawsufah fi zimmah* process to lease out the ownership of its shares to other partners until the asset is completed. At the same time, the lessee, who is also a contract partner, will become the sole owner of the asset by paying the shares in stages. Under MMQ a partner can rent his share of the *musyarakah* asset to other partners. At the time of completion of the contract, a partner may require another partner to make a commitment (*wa'ad*) to gradually purchase the former's share of the asset at rate which publicly prevailed in a fair manner or any rate to be decided upon by the parties at the time of the agreed contract.³⁴

The regulation also stipulates that when signing a *musyarakah* contract, the partner can sell the asset to another partner or to a third party in the event that the partner breaks the promise to take over the asset or fails to pay in stages for the promised asset in accordance with the agreed *musyarakah* contract.

In addition, in the case of a partner who has agreed to take over the asset, he refuses to pay the asset's lease or violates his pledge to take over the completed asset. The promisee may then sell the properties to other partners or third parties while still complying with the terms of the *Musyarakah Agreement* decided upon by the parties.³⁵ On the other hand, there are several conflict settlement procedures in the event that the agreed properties have not yet been finalized, as follows:

- a. The Promisee may request fulfillment of the agreed promise and force the Promisor to pay the promised interest by taking into account the conditions stated in the *musyarakah* agreement.
- b. Aligning the interest value of the purchase of the asset calculated by the promisee with the lease cost paid by the promisor with the *ijarah mawshufah fi dzimmah* mechanism.

The Recent Significant Issues in Practice

There are a number of issues that arise in the MMQ for housing finance. Md Nor elaborated that one relevant issue will be the identification of the MMQ asset's ownership. It is a fundamental truth that the MMQ partners undoubtedly own the assets, and that is regarded as the beneficial ownership of the asset. It implies that the MMQ partners are the beneficiaries of the property's benefits. Nevertheless, the question now arises as to who should be the legal owner of the property. It inevitably becomes an issue as the Malaysian land law adopts the "torrens system" which simply means "system by registration." Consequently, the name that is registered as owner on the title is the property's actual owner. The research showed that Islamic banks had used various approaches to record the names of the registered owner at the Malaysian land offices. Some banks would prefer to have their own names listed as the owner on the title, and some other

³⁴ Audia Syafa'atur Rahman et al., "Gap Analysis between BNM Regulation and Application of *Musharakah Mutanaqisah* in Islamic Banking," *Journal of Islamic Finance* 7, no. 1 (2018): 38–50.

³⁵ Alam Asadov et al., "*Musharakah Mutanaqisah* Home Financing: Issues in Practice," *Journal of Islamic Accounting and Business Research* 9, no. 1 (2018): 91–103.

banks would prefer to have the customers' names on the title. In any event, this does not, in fact, reflect the true intention of the MMQ that the property is co-owned by the MMQ partners. And it gets more complicated as the diminishing nature of an MMQ contract will potentially allow the percentage of ownership of the property's shares to fluctuate up and down, making it much more challenging to collect the property's legal ownership through the land registry system.³⁶

Md Nor also highlighted the issue of the properties under construction. In fact, its implementation reveals a number of legal issues, in particular the diminishing portion of the MMQ agreement, which can only be sold and purchased once the asset has been completed.³⁷ The Sharia forbids the selling and purchase of land if the land is not yet in existence or if the property is still under construction.³⁸ In order to resolve this situation, Islamic banks must have entered into a different contract during the construction of the property, called the forward lease agreement *Ijarah maushufah fi dzimmah*, which is basically a lease of the land, which must typically have been concluded when the construction of the property has not yet been completed.³⁹ Furthermore, another significant issue resulting from the MMQ financing facility is the maintenance and major repair of the MMQ asset. Minor repairs are obviously under the duty of the property's occupant, i.e., the customer, however, under the Sharia, the MMQ partners should be jointly liable for the maintenance and major repairs, since they are co-owners of the MMQ assets. It is not acceptable for the bank to throw overall maintenance and significant repairs to the customer on its own. Research data has shown that some banks would explicitly state in their contract that the maintenance and major repairs will be carried out by the MMQ partners instead of the customer individually. Unfortunately, at the time, this really isn't the situation for many other Islamic banks, which still classify MMQ as a financing facility and, therefore still require the customer to handle all the expenses.⁴⁰

In addition, another critical issue that needs to be highlighted and received attention is the application of *wa'ad* in the MMQ. In order to guarantee payment of the properties promised by the partners, the parties shall use *wa'ad* under such circumstances. Banks or customers in many cases utilize unilateral *wa'ad* in MMQ practices. This practice shows that customers gradually buy shares owned by the Bank, and vice versa the Bank also sells its shares to the Customer.⁴¹ *Wa'ad* is very useful to prevent and anticipate the risk of loss that will be experienced

³⁶ Nor et al., "Legal Challenges of Musharakah Mutanaqishah as an Alternative for Property Financing in Malaysia."

³⁷ Nor. Legal Challenges of Musharakah...

³⁸ Asep Bagja Nugraha and Raden Aswin Rahadi, "Problem Analysis on Sharia Property Business and Its Proposed Solution," *Eqien-Jurnal Ekonomi dan Bisnis* 9, no. 1 (2022): 13-32.

³⁹ Rega Felix and Lastuti Abubakar, "Application of Al-Ijarah Al-Maushufah Fi Al-Dzimmah for Infrastructure Project Financing in Indonesia," *Yuridika* 35, no. 1 (2020): 129-152.

⁴⁰ Siti Fariha Muhamad and Azira Hanani Ab Rahman, "An Evaluation on Musharakah Mutanaqishah Based House Financing by Islamic Banks in Malaysia" (2013).

⁴¹ Syahidawati Shahwan, Mustafa Omar Mohammad, and Zaharuddin Abdul Rahman, "Home Financing Pricing Issues in the Bay' Bithaman Ajil (BBA) and Musharakah Mutanaqishah (MMP)," *Global Journal Al-Thaqafah* (2013).

by the Bank. In addition, the use of wa'ad can confirm the commitment of the parties in complying with the provisions agreed in the musyarakah contract. And if the parties have disputed, a solution to the problem of partnership cooperation can be made with or without the use of a wa'ad mechanism.⁴² When the parties agree with the settlement without wa'ad, the promised assets will be sold to the public and the proceeds from the sale will be paid or divided according to the share ownership ratio and after deduction of outstanding expenses and other expenses, such as legal and administrative costs. On the contrary, customers are required to buy the remaining shares owned by the bank if the dispute resolution uses wa'ad mechanism. Wa'ad demands customers to fulfill all payments such as rental fees, and also requires customers to take ownership of bank shares. In addition, MMQ also uses the shirkat al-milk mechanism in asset acquisition, so in the event of a loss, each party must bear it based on the portion of their share ownership.⁴³

CONCLUSION

To conclude the study, the regulatory system was generally regarded adequate to meet the demands of MMQ practitioners and users in both countries. However, concerns in the real situation demonstrate that some areas need to be recovered by all parties involved, especially when it comes to regulation, relevant fatwa institutions, MMQ development, and sharia compliance. In Indonesia, DSN and SAC have a very vital role in setting a fatwa on Islamic banking activities. Both institutions are the highest authority body in making fatwas and the establishment of sharia in relation to the Islamic financial sector. It has the authority to establish sharia rules and regulations in the field of Islamic finance, which are binding all Islamic financial institutions.

In terms of legal provisions relating to MMQ practices, both countries have provided guidelines regarding MMQ implementation. DSN has issued fatwa and regulation such as DSN Fatwa No. 73 / DSN MUI/XI/2008, DSN Decree No. 01/DSN-MUI/X/2013, and DSN Fatwa No. 8/DSN-MUI/IV/2000. On the other hand, in Malaysia, the provision of MMQ and its arrangement with wa'ad, ijarah maushufah fi dzimmah, and istisna was set forth in the Policy Document referred to BNM/RH/STD028-7 regarding Musyarakah issued on April 20, 2015, by Bank Negara Malaysia.

Nevertheless, there are a number of issues in practice that every regulator, scholar, and the consumer must be aware of and try to improve it. In Indonesia, the issue to identify the ownership of asset which is collectively owned between the Islamic Bank and the customer, the issue of Bank Indonesia

⁴² Md Faruk Abdullah and Asmak Ab Rahman, "Is Wa'dan Any Different to Muwa'adah? Empirical Evidence from Malaysia," *International Journal of Islamic and Middle Eastern Finance and Management* (2015).

⁴³ Azwina Wati Abdull Manaf, Siti Marshita Mahyut, and Asfarina Kartika Shakri, "Analysis on Islamic Home Financing in Malaysia," *Journal of Contemporary Islamic Studies* 3, no. 2 (2017): 1-15.

Regulations which are not yet complete enough to regulate the substance of Islamic banking agreements, the issue on regulatory instruments used, and the slow MMQ development are all the sectors which hinder the practice of MMQ in Indonesia. Furthermore, various issues also faced by Islamic banking practitioners and consumers in Malaysia. It explored that one relevant issue will be the identification of the MMQ asset's ownership. It inevitably becomes an issue as the Malaysian land law adopts the "torrens system" which simply means "system by registration." The study also highlighted the issue of the properties under construction. In addition to that, the utilization of wa'ad in MMQ also became a critical issue to be discussed and needs to be addressed by every Islamic Banking practitioner and regulator.

While the regulatory framework in both Indonesia and Malaysia appears adequate on paper for meeting the demands of MMQ practitioners and users, there are significant practical challenges that need to be addressed collaboratively by regulators, scholars, and consumers. Recommendations include enhancing clarity on asset ownership in MMQ arrangements, refining regulatory instruments to better govern Islamic banking agreements, accelerating MMQ development efforts, and addressing specific issues such as property ownership under the "torrens system" in Malaysia and the utilization of wa'ad in MMQ. Collaboration and continuous improvement efforts among all stakeholders are essential to ensure the effective implementation and growth of MMQ practices in both countries.

Author's Contribution

Rizaldy Anggriawan: Contribute to formulating research ideas, collecting data, processing data, and interpreting data.

Ahmad Fanani: Contributing to writing systematics, research methods.

Istianah Zainal Asyiqin, Muhammad Khaeruddin Hamsin: Contributing to analyzing interpretation results, the language proofread.

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The author declares that there is no conflict of interest.

Ethical Approval

Ethical approval No patient-identifying parts in this paper were used or known to the authors. Therefore, no ethical approval was requested.

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