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## **The Juridical Study on the Implementation of the *Ijarah Muntahiya bi at-Tamlik* Contract in the Concept of *Luzumu al-'Aqdi***

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### **Abstract**

The purpose of this study was to examine and analyze the implementation of the *Ijarah Muntahiya bi at-Tamlik* contract in the conception of *Luzumu al-'Aqdi*. The approach method used in this research was sociological juridical. The results of this study indicated that the implementation of the *Ijarah Muntahiya bi at-Tamlik* contract at Bank Syariah Indonesia (Indonesian Sharia Bank, BSI) Semarang Branch Office in the concept of *Luzumu al-'Aqdi* actually shows the occurrence of legal uncertainty. This is because the implementation of the *Ijarah Muntahiya bi at-Tamlik* contract should only be carried out through buying and selling, not grants. The implementation of the *Ijarah Muntahiya bi at-Tamlik* contract can only use a sale and purchase contract because this contract is part of the *ijarah* contract which aims to obtain profit or profit, while the grant contract is one of the *tabarru'* contracts which aims to help each other and seek the pleasure of Allah alone. Besides that, implementation of the *Ijarah Muntahiya bi at-Tamlik* contract settlement through the sale of the *Ijarah Muntahiya bi at-Tamlik* object results in legal uncertainty, so that this has the potential to harm the *mustajir* or the debtor in the event of bad

credit or default. This is because the *musta'jir* or debtor should not be said to have debt, considering that the contract that is built is *ijarah* first which will end with ownership through buying and selling or grants, not buying and selling which is required by *ijarah* because its implementation is carried out in installments.

**Keywords:** *Agreement, Contract, Implementation, Ijarah.*

## Abstrak

*KAJIAN YURIDIS PELAKSANAAN KONTRAK IJARAH MUNTAHIYA BI AT-TAMLIK DALAM KONSEP LUZUMU AL-'AQDI.* Tujuan penelitian ini adalah untuk mengkaji dan menganalisis implementasi akad *Ijarah Muntahiya bi at-Tamlik* dalam konsepsi *Luzumu al-'Aqdi*. Metode pendekatan yang digunakan dalam penelitian ini adalah yuridis sosiologis. Hasil penelitian ini menunjukkan bahwa pelaksanaan akad *Ijarah Muntahiya bi at-Tamlik* di Bank Syariah Indonesia (BSI) Kantor Cabang Semarang dalam konsep *Luzumu al-'Aqdi* justru menunjukkan terjadinya ketidakpastian hukum. Hal ini karena pelaksanaan akad *Ijarah Muntahiya bi at-Tamlik* hanya boleh dilakukan melalui jual beli, bukan hibah. Pelaksanaan akad *Ijarah Muntahiya bi at-Tamlik* hanya dapat menggunakan akad jual beli karena akad ini merupakan bagian dari akad *ijarah* yang bertujuan untuk memperoleh laba atau keuntungan, sedangkan akad hibah merupakan salah satu akad *tabarru'* yang bertujuan untuk saling membantu dan mencari keridaan Allah saja. Selain itu, pelaksanaan penyelesaian akad *Ijarah Muntahiya bi at-Tamlik* melalui penjualan objek *Ijarah Muntahiya bi at-Tamlik* menimbulkan ketidakpastian hukum, sehingga berpotensi merugikan *musta'jir* atau debitur apabila terjadi kredit buruk atau *default*. Hal ini karena *musta'jir* atau debitur tidak boleh dikatakan memiliki utang, mengingat akad yang dibangun adalah *ijarah* terlebih dahulu yang akan diakhiri dengan kepemilikan melalui jual beli atau hibah, bukan jual beli yang diwajibkan *ijarah* karena sifatnya pelaksanaannya dilakukan secara bertahap.

**Kata Kunci:** Perjanjian, Kontrak, Pelaksanaan, *Ijarah*.

## A. Introduction

The *Ijarah Muntahiya bi at-Tamlik* (IMBT) contract is one of the new contracts that fall into the *Ghairu Musamma* category. The *Ghairu Musamma* contracts are contracts that are not named

and are not determined by *syara'* laws. According to the *fatwa* of the Majelis Ulama Indonesia (Indonesian Religious Leader, MUI), the history of the emergence of the *Ijarah Muntahiya bi at-Tamlik* contract is due to the existence of lease and purchase agreements that have developed in the community. With these developments, it is necessary to stipulate the provisions of the sharia principled lease and purchase agreement. The provisions regarding the lease and purchase agreement with sharia principles are referred to as *Ijarah Muntahiya bi at-Tamlik*. Fahd al-Hasun defines the IMBT contract as a lease contract for an item within a certain period of time, accompanied by the transfer of ownership of the goods to the lessee at the end of the lease period.<sup>1</sup>

Based on this definition, IMBT is a joint contract consisting of leasing an item with a promise to transfer ownership of the goods at the end of the lease term through a sale and purchase agreement or a grant.<sup>2</sup> The purpose of the formation of this contract is not only limited to a lease contract, but also requires a transfer of ownership at the end of the lease period. Efforts to transfer ownership after the end of the lease period are included in the category of *mudlaf* conditions (additional conditions) that must be agreed upon by the parties. The provisions regarding the *mudlaf* requirements in this contract are explicitly stated in the *fatwa* of Dewan Syariah Nasional (National Sharia Council, DSN) and the statutory provisions which state that the transfer of ownership at the end of the lease period is a *wa'd* (promise) to enter into a new contract through sale and purchase or a grant.

The construction built on the IMBT contract is basically carried out through an *ijarah* (lease) agreement accompanied by a *wa'd* (promise) to transfer ownership through a sale and purchase

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<sup>1</sup>Fahd bin Ali al-Hasun, *al-Ijarah Muntahiya bi at-Tamlik fi al-Fiqhi al-Islami* (Cairo: Maktabah Misykah al-Islamiyah, 2005), 17.

<sup>2</sup>Sutan Remi Sjahdeni, *Perbankan Islam dan Kedudukannya dalam Tata Hukum Perbankan Indonesia* (Jakarta: Pustaka Utama Grafiti, 2007), 71.

agreement or a grant. The legal consequences of *wa'd* refer to the DSN *fatwa* Number 85/DSN-MUI/XII/2012 concerning Promises (*Wa'd*) In Islamic Financial and Business Transactions are *mulzim* and must be fulfilled by *wa'id* by following the provisions contained in this *fatwa*. Based on this, the implementation of the IMBT contract requires a transfer of ownership from the *mu'jir* (the party who rents out) to the *musta'jir* (the lessee).

Bank Syariah Indonesia (Indonesian Sharia Bank, BSI) is one of the Islamic financial institutions that use IMBT. Implementation of the IMBT contract is a financing from banks for home ownership aimed at individuals to meet housing needs through a *murabahah* or *ijarah* contract by means of payment in monthly installments. The implementation of the IMBT contract is basically carried out in accordance with the agreement of the parties. Efforts to implement the IMBT contract at BSI are basically in accordance with the provisions contained in the Sharia Economic Law Compilation. In fact, dispute resolution is also carried out with a financing restructuring mechanism. If the financing restructuring does not resolve the problem between *mu'jir* and *musta'jir*, the banking system will conduct a sale mechanism for the IMBT object. The implementation of the sales mechanism for the IMBT object is offered to the closest relatives of the *musta'jir* who want to make the purchase. It was only when the closest relatives did not want to purchase the IMBT object, then an auction mechanism was implemented.

The implementation of dispute resolution or non-performing loans in the IMBT contract is actually in accordance with Article 283 Paragraph (2) Compilation of Sharia Economic Law. In the article it is explained that the settlement as referred to in Paragraph (1) can be resolved through peace and/or court. Furthermore, Article 284 states that the court may determine to sell the object of IBMT which cannot be repaid by the tenant at the market price to pay off the debt of the tenant. However, with the existence of such a dispute

resolution mechanism, it creates legal uncertainty, considering that the first contract made is *ijarah*, not buying and selling. Meanwhile, efforts to transfer ownership using either grants or buying and selling are *wa'd* which can only be implemented when the *ijarah* contract is completed. Based on such provisions, then the consequence that should arise when there is a default or bad credit on the IMBT contract is *ijarah*, not buying and selling.

Previous research discussing the implementation of the *Ijarah Munlik* contract is the research of Nilatus Slamah and Miftahur Rohman which states that the completion of the *Ijarah Munlik* contract is related to the settlement of civil matters related to the contract IMBT resolved as a settlement in an anonymous agreement as Article 1338 of the Civil Code.<sup>3</sup> In addition, Iwan Mulyana's research in this case discusses contract implementation IMBT in Bank Syariah Mandiri (Mandiri Syariah Bank, BSM) Branch of Bandung. The research results obtained explained that the implementation of the *Ijarah Munlik* contract at BSM Branch of Bandung was applied in the form of the Griya Berkah Program Kredit Pemilikan Rumah (House Ownership Credit, KPR), which if the debtor experiences late payments, then monitoring and coaching will be carried out on the customer through a warning letter and if not able to coaching can be carried out asset confiscation.<sup>4</sup>

The implementation of the IMBT contract with legal consequences that have no certainty as described above has the potential to fulfill the formulation of the embezzlement offense as referred to in Article 372 of the Criminal Code. In the article, it is explained that "any person who intentionally and unlawfully owns something which wholly or partly belongs to another person, but which is in his control not because of a crime, is threatened with

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<sup>3</sup>Nilatus Salmah and Miftahur Rohman, "Analisis Akad *Ijarah Muntahiya bi at-Tamlik* dalam Praktik Perbankan Syariah", *an-Nawa: Jurnal Studi Islam* 4, No. 1 (2022): 1.

<sup>4</sup>Iwan Mulyana, "Praktik Pembiayaan KPR dengan Akad *Ijarah Muntahiya bi at-Tamlik* di Bank Syariah Mandiri Cabang Bandung: Tantangan dan Solusinya", *Banking and Management Review* 10, No. 2 (2021): 1.496.

embezzlement, with a maximum imprisonment of four years or a maximum fine of nine hundred rupiahs”.

Based on this background, the authors are interested in conducting a study the juridical study on the implementation of the *Ijarah Muntahiya bi at-Tamlik* contract in the concept of *Luzumu al-‘Aqdi*. The type of this study used field research. While the approach method used in this research is a sociological juridical approach. The sociological juridical approach is an empirical legal research method, namely research that refers to observations, interviews, and taking real samples as empirical examples.<sup>5</sup> The sources of data needed in this study are primary data and secondary data. Primary data is data that can only be taken from the original or first source.<sup>6</sup> While secondary data is data obtained from library materials. The secondary data used in this study is legal material. By definition, legal materials are materials, materials or elements used to form a legal provision.<sup>7</sup> The legal materials used in this study are primary legal materials, secondary legal materials, and tertiary legal materials.

## **B. Discussion**

### **1. Implementation of the *Ijarah Muntahiya bi at-Tamlik* Contract at Bank Syariah Indonesia**

Elucidation of Article 19 of Act Number 21 of 2008 concerning Islamic Banking states that the *Ijarah Muntahiya bi at-Tamlik* (IMBT) contract is a contract for the provision of funds in order to transfer the usufructuary rights or benefits of an item or service based on a lease transaction with the

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<sup>5</sup>Hono Sejati, *Rekonstruksi Pemeriksaan Perkara di Pengadilan Hubungan Industrial Berbasis Nilai Cepat* (Jakarta: Citra Aditya Bakti, 2018), 62.

<sup>6</sup>Agung Fakhruzi, *Mediasi Penal dalam Penyelesaian Tindak Pidana Kekerasan dalam Rumah Tangga: Teori dan Implementasi* (Jakarta: Duta Media Publishing, 2019), 22.

<sup>7</sup>R. Amin, *Pengantar Hukum Indonesia* (Yogyakarta: Penerbit Deepublish, 2019), 32.

option of transferring ownership of the goods. Transfer of ownership of the goods at the end of the lease term using a sale and purchase agreement or a grant.<sup>8</sup> According to Abdul Aziz Khalifah al-Qishar, the IMBT contract is:

عقد بين طرفين يؤجر فيه احدهما لآخر سلعة معينة مقابل اجرة معينة يدفعها المستاجر على اقسط خلال مدة محددة، تنتقل بعدها ملكية السلعة للمستاجر عند سداهه لآخر قسط بعقد جديد.

A contract entered into between two parties, where one party rents a commodity of goods to the other in exchange for a certain fee paid by the tenant in installments over a certain period, after the last payment is made, ownership occurs with a new contract.<sup>9</sup>

The IMBT contract is one of the new contracts that fall into the *'uqudu al-murakkabah* category. According to al-Imrani, *'uqudu al-murakkabah* is a collection of several material contracts contained in a contract both jointly and reciprocally so that all rights and obligations arising from it are seen as legal consequences of one contract.<sup>10</sup> The inclusion of the IMBT contract in the *'uqudu al-murakkabah* category is due to the fact that this contract is built from the merger of the *ijarah* contract which ends with a promise to transfer ownership through a sale and purchase agreement or a grant.

The implementation of the IMBT contract at the Bank Syariah Indonesia (Indonesian Sharia Bank, BSI) Main Branch Office Semarang which is currently the BSI was first started

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<sup>8</sup>Wangsawidjaja, *Pembiayaan Bank Syariah* (Jakarta: Gramedia Pustaka Utama, 2012), 267-268.

<sup>9</sup>Abdul Aziz Khalifah al-Qishar, *al-Ijarah Ma'a Wa'du bi at-Tamlik li adl-Dlihabi wa al-Fidldlah* (Kuwait: Kulliyah asy-Syariah Jami'atul Kuwait, 2011), 4.

<sup>10</sup>Yosi Aryanti, "Multi Akad (*'Uqudu al-Murakkabah*) di Perbankan Syariah Perspektif Fiqh Muamalah", *Jurnal Ilmiah Syariah* 15, No. 2 (2016): 179-180.

in 2016. The implementation of this contract relates to the object of assets in the form of land and buildings which are summarized in the iB Syariah KPR product. The iB Syariah KPR is a financing from banks for home ownership aimed at individuals to meet housing needs through a *murabahah* or *ijarah* contract by means of payment in monthly installments. The requirements for applying for the implementation of the iB Syariah KPR product through the IMBT contract are as follows Application ID Cards, Spouse's ID Card (if married), Family Card, Marriage Certificate (if already married), Personal Taxes, Copy of Sertifikat Hak Milik (Freehold Title, SHM), Latest Pajak Bumi dan Bangunan (Property Tax, PBB), Fixed Asset Guarantee, and the guarantee must be in the name of the customer or partner.

Based on an interview with Muis Hidayat, the IMBT contract implementation mechanism at the BSI Branch Office Semarang is carried out in two ways, namely refinancing and buying and selling. Refinancing is an asset that already belongs to the customer at the beginning, then ownership is transferred to the bank where the bank will buy the asset and then lease it back to the customer, at the end of the day, a sale and purchase option is given or a grant. While the sale and purchase is carried out by means of the asset not yet belonging to the customer, then the bank buys the asset from another party, then the bank buys the IMBT object and leases it to the lessee. At the end of the lease term, the lessee is given the option to own the IMBT object through a sale and purchase agreement or a grant using *wa'd*. The process of implementing the IMBT contract begins with the customer submitting an application to finance the IMBT contract. The application must also be accompanied by documents related to the requirements for the application for financing as described above. After that, the BSI conducts an analysis



of the submitted application and makes a decision whether the *musta'jir* candidate has met the requirements to obtain financing or not. The analysis generally concerns the 5C principle as one of the requirements for credit to financing from banks. The explanation of the 5C principle is as follows: BSI conducts an analysis of the submitted application and provides a decision whether the prospective *musta'jir* has met the requirements to obtain financing or not. The analysis generally concerns the 5C principle as one of the requirements for credit to financing from banks. The explanation of the 5C principle is as follows Character, Capacity, Capital, Conditions, and Collateral.<sup>11</sup>

After the analysis is complete, BSI submits the financing decision and notifies the applicant to fulfill all the required conditions, when the requirements are not yet complete. The applicant fulfills all the requirements for financing the IMBT contract according to the provisions and signs the contract. After signing the agreement on the *wa'd* (promise) to transfer ownership at the end of the lease period. After the signing of the *wa'd*, the documents related to the legality of the assets are kept by the Indonesian Islamic Bank as a guarantee or collateral for the IMBT financing. The customer makes monthly installment payments. After the installment payment is paid off, a grant contract or sale and purchase agreement is signed. After the signing of the transfer of ownership.

The implementation of the IMBT contract at BSI from the beginning has distinguished between rent and purchase money. The difference between rent and purchase is agreed upon from the beginning of the signing of the contract by both parties. Although it has been differentiated, the monthly

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<sup>11</sup>Dora Kusumastuti, *Perjanjian Kredit Perbankan dalam Perspektif Welfare State* (Yogyakarta: Penerbit Depublish, 2019), 123.

payment process is carried out simultaneously. Furthermore, the implementation of the transfer of ownership in the IMBT contract from the beginning had an agreement in the form of signing the *wa'd* (promise) to transfer ownership after the lease period ended. *Wa'd* in the IMBT contract is carried out according to the agreement at the beginning of the contract. If both parties from the beginning want a transfer of ownership at the end of the lease period, then a signing is made to transfer ownership through a grant or sale and purchase agreement.

The legal construction of *wa'd* in the IMBT contract is binding, because the transfer of ownership is carried out based on mutual agreement at the time the IMBT contract will be executed. However, BSI also provides concessions, if at the beginning of the contract *wa'd* has been made to carry out the transfer of ownership at the end of the lease period, but the customer wishes not to transfer the ownership, then BSI allows not to *wa'd* provided that the object of IMBT is still belong to the bank.

Apart from this, if on the way the customer experiences bad loans or defaults, then there are two options made by BSI for the implementation of the agreement. The two options are to restructure the financing or sale of the IMBT object. Referring to Article 1 Point 7 of Bank Indonesia Regulations Number 10/18/PBI/2008 concerning Financing Restructuring for Sharia Banks and Sharia Business Units states that financing restructuring is an effort made by banks to assist customers in completing all their obligations, including.<sup>12</sup> Rescheduling is a change in the customer's payment schedule or time period. Reconditioning is a

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<sup>12</sup>Sutan Remi Sjahdeni, *Perbankan Islam dan Kedudukannya dalam Tata Hukum Perbankan Indonesia*, 76.

change in part or all of the financing requirements, including changes in the payment schedule, number of installments, time period and/or giving discounts as long as it does not add to the remaining customer obligations that must be paid to the bank.

The other side of that, dispute resolution when there is a default or bad credit is the sale of the IMBT object. The sales mechanism for the IMBT object was initially offered to close relatives of the customer who might want to make a purchase. However, if there is none, then the mechanism used is by auctioning the IMBT object.

## **2. The Juridical Analysis of the Implementation of the *Ijarah Muntahiya bi at-Tamlik* Agreement in the Conception of *Luzumu al-Aqdi***

The implementation of the *Ijarah Muntahiya bi at-Tamlik* (IMBT) contract is basically in accordance with the provisions contained in the Sharia Economic Law Compilation. The implementation of the IMBT contract uses the *wa'd* principle (promise) to transfer ownership through a sale and purchase agreement or a grant at the end of the lease term. The implementation of the IMBT contract using *wa'd* in the IMBT contract is basically based on Article 279 of the Sharia Economic Law Compilation which states that in the IMBT contract an object between the *mu'jir* (the party who leases) and the *musta'jir* (the lessee) ends with the purchase *ma'jur* (object of *ijarah*) by *musta'jir*. In line with that, the DSN and MUI *fatwa* Number 27/DSN-MUI/III/2002 concerning *Ijarah Muntahiya bi at-Tamlik* also states that the party performing IMBT must first carry out the *ijarah* contract. Transfer of ownership contract, either by buying or selling or giving can only be done after the *ijarah* period is over. Based on this, in

principle, the causes of ownership in Islamic law are divided into four parts: *ihrazu al-mubahat*, *al-'aqd (al-bai'u and hibah)*, *al-khalafiyah*, and *at-tawadlu' min al-mamluk*.<sup>13</sup>

With regard to the causes of ownership, the transfer of ownership of the IMBT contract uses a sale and purchase contract or a grant. The form of the IMBT contract based on a promise made at the end of the lease period is divided into two parts, IMBT which contains a promise to donate goods at the end of the lease term and IMBT which contains a promise to sell the goods at the end of the lease term.<sup>14</sup>

The option to make a grant at the end of the lease period is generally exercised if the financial capacity of the *mu'jir* is greater at the time of paying the rent, so that the accumulated total rent is sufficient to purchase the price of goods and the profit that has been determined by the *musta'jir*. The accumulation of rental prices that can cover the entire purchase price of goods and the profit of the lessor causes the lessor to grant the object of the lease at the end of the lease period. As for the option to make a sale, it is generally taken if the accumulated value of the entire rental payment is not sufficient for the purchase price of the goods, because the financial capacity of the lessee is relatively small. There is a shortage to cover the purchase price of the item resulting in the tenant having to buy the item so that it can be owned.<sup>15</sup>

Based on such a division, although the sale and purchase contracts and grants have consequences that cause the transfer of ownership, the two contracts certainly have

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<sup>13</sup>Gemala Dewi, *Aspek-aspek Hukum dalam Perbankan dan Perasuransian Syariah di Indonesia* (Jakarta: Kencana, 2017), 10.

<sup>14</sup>Binti Nur Asiyah, *Manajemen Pembiayaan Bank Syariah* (Yogyakarta: Kalimedia, 2015), 217.

<sup>15</sup>Adiwarman A. Karim, *Bank Islam: Analisis Fiqh dan Keuangan* (Jakarta: Rajawali Pers, 2011), 156.

different principles. The transfer of ownership in the IMBT contract should only use a sale and purchase agreement, not a grant contract. This is because the grant contract is classified as a *tabarru'* contract, while the implementation of the IMBT contract requires a purchase payment or profit taking (*tijari* contract) of the IMBT object. *Tabarru'* contract is a contract that is intended to help and is purely purely for the sake of expecting the pleasure and reward of Allah swt. and there is no element of seeking motive and profit.<sup>16</sup> While the *tijari* contract is a contract used for commercial purposes.<sup>17</sup> The implementation of the transfer of ownership should only use a sale and purchase contract, considering that the *tabarru'* contract is given voluntarily without any profit-seeking element. Furthermore, the legal consequences that arise between the grant contract and the sale and purchase contract certainly have differences. In this case, Sayid Sabiq defines a sale and purchase contract or *bai'* as:

مبادلة مال بمال على سبيل التراضي، او نقل ملك بعوض على الوجه  
الماءذون فيه.

Buying and selling is the exchange of property for property based on mutual pleasure, or transferring ownership with a justifiable exchange.

The grant according to Article 171 of the Compilation of Islamic Law states that a grant is a voluntary gift of an object without compensation from someone to another living person to own it.

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<sup>16</sup> Haqiqi Rafsanjani, "Akad *Tabarru'* dalam Transaksi Bisnis", *Jurnal Ekonomi dan Perbankan Syariah* 1, No. 1 (2016): 106.

<sup>17</sup> Md. Faruk Abdullah Asmak Ab. Rahman, "Is *Wa'd* Any Different *Muwa'adah*? Empirical Evidence from Malaysia", *Emerald Insight International Journal of Islamic and Middle Eastern Finance and Management* 8, No. 3 (2015): 2.

The implementation of payments in the IMBT contract has basically provided certainty, considering that from the beginning there has been an agreement on how much rent and purchase money must be paid by *musta'jir* to *mu'jir*. Even though they have been differentiated, the rental and purchase payments are paid together every month for a period that has been determined by both parties. The difference between rent and purchase money will certainly provide certainty regarding the price that *musta'jir* will later pay to *mu'jir*. The implementation of such price payments is also based on Article 282 of the Sharia Economic Law Compilation which states that the price of *ijarah* in the IMBT contract is included in the payment of objects in installments.

In connection with such provisions, the IMBT contract implementation has indeed complied with the provisions contained in the Sharia Economic Law Compilation. It's just that, despite fulfilling these provisions, the dispute resolution carried out actually creates legal uncertainty. This is because the dispute resolution efforts in the IMBT contract are carried out through restructuring and selling the IMBT object.

The implementation of restructuring to resolve disputes in the IMBT contract certainly provides certainty for both parties. However, the implementation of the sale of the IMBT object will certainly provide uncertainty considering the legal consequences that occur in fact the implementation of the IMBT contract is not an *ijarah* contract which ends with the transfer of ownership, but rather a sale and purchase contract which has conditions to carry out an *ijarah* contract first, because it is carried out without cash. It is undeniable that such dispute resolution is based on Article 283 and Article 284 of the Sharia Economic Law Compilation. In Article 283 of the Sharia Economic Law Compilation it is stated that:

1. The *mu'jir*/leasing party can settle the *Ijarah Muntahiya bi at-Tamlik* contract for the *musta'jir*/tenant who is unable to pay off the financing in accordance with the agreed time period;
2. The settlement as referred to in Paragraph (1) can be settled through reconciliation and/or court.

Article 284 states that the court may decide to sell the object of *Ijarah Muntahiya bi at-Tamlik* which cannot be repaid by the tenant at market prices to pay off the debt of the tenant. Furthermore, at Article 285 of the Sharia Economic Law Compilation stated that:

1. If the selling price of the object of *Ijarah Muntahiya bi at-Tamlik* exceeds the remaining debt, then the party who leases it must take the rest to the tenant;
2. If the selling price of the object of *Ijarah Muntahiya bi at-Tamlik* is less than the remaining debt, then the remaining debt must still be paid by the lessee;
3. If the borrower as referred to in Paragraph (2) is unable to pay off the remaining debt, the court may release it with the permission of the lessor.

In connection with the settlement of such a dispute, it certainly creates uncertainty, considering that the IMBT contract is a combination of contracts that begins with an *ijarah* contract and ends with the transfer of ownership through sale and purchase or grants. Moreover, Article 280 Paragraph (2) explicitly states that the transfer of ownership contract can only be carried out after the *Ijarah Muntahiya bi at-Tamlik* period is over. Likewise, the DSN *fatwa* Number 27/ DSN-MUI/III/2002 concerning *Ijarah Muntahiya bi at-Tamlik* which states that the party performing *Ijarah Muntahiya bi at-Tamlik* must carry out the *ijarah* contract first, regarding

the transfer of ownership, either by buying or selling or giving, can only be done after the *ijarah* period is over.

The construction of the IMBT contract refers to such provisions requiring the implementation of the *ijarah* contract first. Only after the *ijarah* contract is completed can the transfer of ownership through a new contract in the form of a sale and purchase or a grant be carried out. By doing the *ijarah* contract first, then the consequences that arise when there is a default or bad credit is an *ijarah* contract, not a sale and purchase. The consequences arising from the *ijarah* contract should not require the sale of the IMBT object, but the IMBT object should be returned to the *mu'jir* considering that the rental period which is renewed every month has expired. Furthermore, it certainly cannot be said that *musta'jir* have debts to *mu'jir* as mentioned in Article 285 of the Sharia Economic Law Compilation. This is because payments to IMBT objects are made in installments, while in the payment it has been specified between the rent and purchase money. Especially in the implementation of the transfer of ownership in the IMBT contract is *wa'd*, which can only be done after the *ijarah* period is over. Standardization provisions compiled by the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) in Bahrain define a promise or *wa'd* as notification of a person to another party about his strong desire to perform an action in the future to do something for the benefit of the other party.<sup>18</sup> Furthermore, Syaif Rajab al-Muqazil also stated that the meaning of *wa'd* is:

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<sup>18</sup>M. Pudjihardjo and Nur Faizin Muhith, *Fikih Muamalah Ekonomi Syariah* (Malang: UB Press, 2019), 9.



الوعد هو الاتفاق الذي يعد بموجبه كلا المتعاقدين او احدهما بابرام عقد معين في المستقبل.

A promise is an agreement where one or both of the contracting people promise to perform a certain contract in the future.<sup>19</sup>

In relation to the *wa'd* law, it is undeniable that there are differences in the views of scholars regarding whether or not it is obligatory to perform *wa'd*. However, DSN *fatwa* Number 85/DSN-MUI/XII/2012 concerning Promises (*Wa'd*) in Sharia Financial and Business Transactions states that promises in sharia financial and business transactions are *mulzim* and must be fulfilled by *wa'id* by following the provisions contained in in this *fatwa*. However, although the *wa'd* provisions in sharia business and financial transactions are binding, the implementation of *wa'd* in the IMBT contract requires that it be implemented after the *ijarah* implementation first. This is in line with the rules of *fiqh* based on the words of Umar r.a. which states that:

مَقَاطِعُ الْحَقُوقِ عِنْدَ الشُّرُوطِ وَلَكَ مَا شَرَطْتَ

The provisions of rights are conditions.<sup>20</sup>

In line with that, the Prophet Muhammad also stated that:

الْمُسْلِمُونَ عَلَى شُرُوطِهِمْ

All Muslims are above the conditions they made.

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<sup>19</sup> Syaif Rajab Qazamil, *al-Wa'd bi at-Ta'qid: Dirasah Muqaranah baina asy-Syari'ah wa al-Qanun*, 5.

<sup>20</sup> Tengku Muhammad Hasbhi ash-Shiddieqy, *Pengantar Fiqh Muamalah* (Semarang: Pustaka Rizki Putra, 2012), 54-55.

The other side of that, if the implementation of the IMBT contract is associated with the theory of *Luzumu al-'Aqdi*, then the implementation of the IMBT contract does not have legal certainty. In this case, Tengku Muhammad Hasbhi ash-Shiddieqy stated that *Luzumu al-'Aqdi* is one of two people who have a contract who cannot break away from the bond of the contract as long as they both have not agreed to *iqalah* or *taqayul*, because the contract that has been carried out is a bond between the two parties so that the will of one party does not damage the other. Obviously, a contract that has fulfilled all the conditions and pillars is binding, so the parties concerned are not allowed to withdraw their consent unilaterally without the agreement of the other party. Based on this, the construction of the theory of *Luzumu al-'Aqdi* is built from two things, namely:<sup>21</sup>

- a. Contract which can lead to an *iltizam* for people who have a contract (a contract *mulzim*);
- b. It is impossible for a person who has a contract to revoke his contract by his own will.

The implementation of the IMBT contract is not in accordance with the theory of *Luzumu al-'Aqdi*. This is because there is a change in the construction of the IMBT contract made by the *mu'jir*, when there is bad credit or default. By not attaching the *ijarah* contract when there is a default or bad credit, in the end this will cause the *musta'jir* to suffer greatly. Losses to *musta'jir* are caused because in an effort to resolve disputes in this contract, it is necessary to sell the IMBT object. Efforts to resolve disputes on IMBT objects certainly create legal uncertainty, because the legal consequences that occur should be *ijarah* contracts, not buying and selling.

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<sup>21</sup>Ash-Shiddieqy, 56.

Efforts to resolve the dispute by selling the IMBT object resulted in this contract not being in accordance with *Luzumu al-Aqdi*, considering the provisions in Article 280 Paragraph (2) explicitly state that the ownership transfer contract can only be carried out after the IMBT period is completed, so that *musta'jir* cannot be said to have debt as referred to in Article 285 of the Sharia Economic Law Compilation, because the transfer of ownership can only be carried out after the *ijarah* period is completed.

### **3. The Implementation of the *Ijarah Muntahiya bi at-Tamlik* Contract Has the Potential to Meet the Elements of the Crime of Embezzlement?**

According to Moeljatno, criminal law is part of the overall law that applies in a country, which establishes the basics and regulates the provisions of actions that should not be carried out, prohibited, accompanied by criminal threats for anyone who commits them.<sup>22</sup> Meanwhile, according to Simons, a criminal act is an act that is threatened with criminality by law, is against the law and is carried out in error by a person who is capable of being responsible.<sup>23</sup>

The implementation of the *Ijarah Muntahiya bi at-Tamlik* (IMBT) contract with this settlement method does not yet fulfill the elements of the crime of embezzlement as referred to in Article 372 of the Criminal Code. In the article, it is explained that whoever intentionally and unlawfully owns an object wholly or partly belongs to another person, which is in his control not because of a crime, is punished for embezzlement with a maximum imprisonment of four years

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<sup>22</sup>E.O. Hiariej, *Prinsip-prinsip Hukum Pidana* (Yogyakarta: Cahaya Atma Pustaka, 2016), 17.

<sup>23</sup>R. Amin, *Pengantar Hukum Indonesia*, 32.

and a fine of IDR 900.<sup>24</sup> The elements of the criminal act of embezzlement as referred to in Article 372 of the Criminal Code are: whoever, purposely, against the law, have an object, wholly or partly belongs to someone else, and what is in his power is not because of crime.

From the elements mentioned above, the implementation of the IMBT at the BSI Branch Office Semarang is associated with the crime of embezzlement as referred to in Article 372 of the Criminal Code when a default occurs, all of which fulfill the formulation of a criminal offense, except for the element of unlawfully. This is because the implementation of the settlement of the IMBT contract is guided by Articles 283, Articles 284, and Articles 285 of the Compilation of Sharia Economic Law. It's just that, even though it does not fulfill the crime of embezzlement, the implementation of the IMBT contract based on the Compilation of Sharia Economic Law does not provide justice for the debtor. Considering that the transfer of ownership through buying and selling or grants has never happened, the transfer of ownership can only be carried out when the *ijarah* period has ended. So that the debtor should not be able to have debt as referred to in Article 285 of the Compilation of Sharia Economic Law.

Efforts to resolve disputes by selling the IMBT objects in this way, of course, are very detrimental to the debtor, so they do not provide justice. Even though Article 285 Paragraph (1) of the Compilation of Sharia Economic Law states that "if the selling price of the object of *Ijarah Muntakiyah bi at-Tamlik* exceeds the remaining debt, the party who rents it must return the remainder to the lessee", but the existence of this

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<sup>24</sup>Anhar, "Tinjauan Yuridis terhadap Tindak Pidana Penggelapan dengan Pemberatan yang Dilakukan Secara Berlanjut: Studi Kasus Putusan Pengadilan Negeri Palu No. 12/Pid.B/2009/PN.PL", *Ilmu Hukum Legal Opinion* 2, No. 1 (2014): 3.

regulation does not provide justice to the debtor, because one of the elements in a contract must *Luzumu al-'Aqdi*.

### C. Conclusion

The implementation of the *Ijarah Muntahiya bi at-Tamlik* contract in the concept of *Luzumu al-'Aqdi* actually shows the occurrence of legal uncertainty. The implementation of the IMBT contract does not have legal certainty because this contract requires an effort to transfer ownership at the end of the lease period through buying and selling or grants. Efforts to transfer ownership of the IMBT object should only be able to use a sale and purchase contract, considering that the grant contract is part of the *tabarru'* contract whose purpose is to seek the pleasure of Allah swt. without requiring a profit motive. While the implementation of the IMBT contract requires the occurrence of profit received by the *mu'jir* for the implementation of the contract. In addition, the implementation of the IMBT contract using the dispute resolution method as referred to in Article 283, Article 284, and Article 285 of the Compilation of Sharia Economic Law also has the potential to cause legal uncertainty. The implementation of the settlement of the *Ijarah Muntahiya bi at-Tamlik* contract through the sale of the *Ijarah Muntahiya bi at-Tamlik* object results in legal uncertainty, so that this has the potential to harm the *musta'jir* or the debtor in the event of bad credit or default. This is because the *musta'jir* or debtor should not be said to have debt, considering that the contract that is built is *ijarah* first which will end with ownership through buying and selling or grants, not buying and selling which is required by *ijarah* because its implementation is carried out in installments.

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