

DEFAULT MORTGAGE CUSTOMERS THROUGH BANK KPR WITH BUYBACK GUARANTEE DEVELOPER FACILITY IN ISLAMIC ECONOMICS PERSPECTIVE

Djaka Suryadi

STAI Asy-Syukriyyah Tangerang
djaka.suryadi@asy-syukriyyah.ac.id

Muhammad Nurul Alim

STAI Asy-Syukriyyah Tangerang
nurul.alim@asy-syukriyyah.ac.id

Abstract: *This research aims to determine the buyback guarantee regulatory system and the buyback guarantee working mechanism until the bank makes a buyback guarantee claim to the developer. This research also aims to review buyback guarantee from Islamic perspective. The research method used is qualitative research using closed interviews and observation methods. Based on the research results, the developer has the criteria for potential partners to be able to work together and make agreement rules for both parties and the risks that will be experienced by the Customer, Bank, and Developer. The developer can make an effort before the bank makes a buyback guarantee claim to remind the customer that payment obligations at the bank are in arrears. In Islamic sharia perspective, the buyback guarantee is permitted provided that it is an option, not an obligation. The buyer may sell either to the first seller or another person. This provision is to avoid the prohibited bai' al-'inah, which leads to prohibited riba transaction. Other Islamic solutions are debt restructuring (rescheduling) and postponement of the debt payment. The research is expected to give Islamic solution before buyback guarantee is executed.*

Keywords: *Buyback Guarantee, Bank KPR, Default Customers, Bai' al-Inah, Bai' Al-Wafa*

INTRODUCTION

Home is one form of human need that is continuously developing. The importance of having a house to live in encourages many people to try to have their own house, which is one of the primary needs. This is in line with the high demand for residential houses in Indonesia, which reaches 1.2 million units per year¹. Developers are developers of buildings or land to have a higher value or value in the future. The definition of a developer is also explained in Article 5 (1) No. 5 of the 1974 Government Regulation, which states that a developer is a company engaged in mass housing construction. Developers offer products including shop houses, kiosks, and residential houses.

KPR is regulated by the Minister of Public Works and People's Housing of the Republic of Indonesia Number 21/PRT/M/2016 concerning the ease and assistance of obtaining houses for low-income people as one of the facilities to support housing finance. One of the efforts to

¹ Nugroho, "Analisis Fundraising Wakaf Uang Pada Lembaga Keuangan Syariah."

improve bank performance is to cooperate with developers in financing the construction of houses that are currently under construction. In the field of economics, financial institutions such as banks are financing institutions that are trusted by the public. Article 3 and Article 4 of Law Number 7 of 1992 concerning Banking states that "the main function of Indonesian banking is to collect and distribute funds from the public which aims to support the implementation of national development towards increasing people's welfare". The contents of Article 1 Number 2 of Law Number 10 of 1998 concerning Banking Principles, what is referred to as a Bank is: "A business entity that collects funds from the public in the form of savings and distributes them to the public in the form of credit and or other forms in increasing the standard of the lives of the people".

Based on these regulations, banks can collaborate with developers and have the authority to bridge customers so that house-buying and selling transactions can be carried out. Banks, as trusted financing institutions, can provide solutions for people to be able to own houses on credit. Procurement of credit facilities is a banking activity that benefits customers, but the bank also needs to provide quality credit, one of which is to understand credit risk. Banks also need to carry out credit analysis based on prudential banking principles. In particular, the characteristics of banks as credit distributors and business actors cannot be separated from Article 1320 of the Civil Code concerning legal terms of agreements, but on the contrary, every step of banking has a legal basis for banking and other regulations. This condition reflects when the bank will cooperate and bind the contract.

Developers will not be able to develop their businesses without a bank. Vice versa, banks cannot develop their business without developers. In particular, banks (fund distributors) and developers (dwelling house providers) as business actors cannot be separated from articles 1320, 1266, and 1267 of the Civil Code, which makes all treatment, actions, and rules positively legally bound. Both parties benefit equally so that in a cooperation agreement that is made, no party may have a stronger position. When a prospective customer is about to start participating in a mortgage program, it is necessary to make a contract to bind the parties.

Based on the above overview, there research problem of this article are how are the positive law dan islamic economics perspective on the buyback guarantee agreement. Previous studies regarding buyback guarantee were done by Randy (2022) which conclude that The legal force of the Buy Back Guarantee Agreement as an alternative for resolving problematic credit in KPR Sejahtera financing, namely the Buy Back Guarantee Agreement in the guarantee legal system, is no different from other notarial deeds used by guarantee institutions. However, the

Buy Back Guarantee Agreement does not have executive force so that the good faith of the parties in implementing the contents or clauses of the deed really determines the intention of holding the guarantee institution as an alternative guarantee. The Buy Back Guarantee Agreement functions as an accompanying/complementary agreement (*accessoir*) to the credit agreement. In general banking practice, the Buy Back Guarantee Agreement is only regulated in the Prosperous KPR Financing Cooperation Agreement (PKS) clause between the implementing bank and the developer.² The thesis research by Tredi Wibisaka (2022) with the results show that the position of the developer in the relationship between buying and selling housing units with the provision of a buyback guarantee is a guarantor when a consumer or customer of a banking or financial institution defaults on the mortgage agreement. A buyback guarantee is a guarantee by a third party which is not identical with a guarantee agreement (*borgtoch*) as regulated in Article 1820 of the Civil Code, because a guarantor by a third party in a *borgtocht* is not limited in other words, the third party may be anyone as long as they are willing to guarantee the debtor's debt, while in a buyback guarantee the specific guarantor is only the developer. The implementation of the buyback guarantee stated in the a cooperation agreement really depends on the good faith of the parties themselves without real execution of the developer.³ Another research was done by Dominika et al (2017) which concluded that The legal relationship between the Bank and the debtor/buyer who purchases a housing unit with a Home Ownership Credit facility from the Bank is regulated in a credit agreement and/or debt recognition agreement with collateral and the Creditor/Bank's responsibility is to provide KPR facilities to the debtor and the debtor's responsibility is to pay installments or paying off debts, while the legal relationship between the bank and the developer is regulated in a buy back guarantee agreement, where the bank and the developer have made and signed a cooperation agreement which stipulates that the developer is fully responsible and binds himself as a guarantor for the installment payments and/or the entire amount of money owed. owed by the debtor/buyer to the bank if the debtor/buyer has neglected his obligations to the bank, then between the developer and the debtor/buyer the legal relationship that arises does not bind the

² Randy, "Tinjauan Yuridis Buy Back Guarantee Sebagai Alternatif Terhadap Penyelesaian Debitur Bermasalah Atas Kredit Pemilikan Rumah Bersubsidi Pada Bank (Studi Pada Bank Di Sumatera Utara)," 105.

³ Wibisaka, "Pelaksanaan Buyback Guarantee Yang Dilakukan Pengembang (Developer) Terhadap Perjanjian Kredit Pemilikan Rumah (KPR) Antara Nasabah Dengan Lembaga Pembiayaan Konsumen."

Debtor to pay the developer because the position of the third party in the buy back guarantee does not replace the position of the creditor.⁴

This research is hoped that past sales transaction data can provide new information about the approach to the concept of individual buyback guarantee, so it will be hazardous for the developer because, in this case, the bank is required to apply the precautionary principle in establishing cooperation with the developer. Usually, the bank will see the developer's development in supporting the business of selling the houses it produces with infrastructure that can attract customers to buy houses in the developer's location. This can be reviewed based on the developer's track record in selling his house. The hope is that the buyback guarantee approach is only used as a solution as a last resort for mortgage sale and purchase transactions through bank credit, which is caused by a mismatch of the customer's ability to pay so that the role and purpose of the buyback guarantee can run effectively and maximally for all parties.

THEORETICAL FRAMEWORK

The parties involved in the credit agreement for the credit agreement are (1) the Developer as the seller, (2) The customer as a home buyer, and (3) the Banks as credit distributors. The legal relationship is as follows: (1) The customer relationship with the developer is a buying and selling relationship (in this case, the buying and selling of land and buildings); (2) The relationship between the customer and the bank is funding for repayment of the house purchased by the customer on a mortgage facility; and (3) The relationship between the developer and the bank is the guarantor for the house based on the buyback guarantee agreement written by the developer in the form of a statement containing if the customer whose installments go to the bank in the future is in default, then the buyback guarantee agreement for the KPR buying and selling facility will be activated by the bank.

Based on the amount of credit ceiling and credit period, the Bank, in this case, as a creditor, only disburs funds as a credit ceiling. The customer then deposits installments during the predetermined period. Cooperation between the developer and the Bank can be carried out through a credit financing agreement by the Bank. The credit agreement regulates the rights and obligations of the parties. In addition to the credit agreement, the Bank and developer also make an additional agreement in the form of a buyback guarantee separate from the credit agreement.

⁴ Dominika and Kawuryan, "PERJANJIAN BELI KEMBALI (BUY BACK GUARANTEE) YANG DIBUAT ANTARA PENGEMBANG DAN BANK DALAM PENYELESAIAN MASALAH KREDIT MACET | Lex Journal," 24.

A buyback guarantee is an agreement to buy back the unit that the customer has purchased. The mechanism, in practice, is a form of the debt-debt legal relationship that occurs between the customer and the bank, a form of house collateral for the repayment of customer debt to the developer. A buyback guarantee is made for the bank as a guarantee of the house as long as the Sale and Purchase Deed has not been executed, as a form of guarantee if the credit risk that has been analyzed occurs.

A buyback guarantee is given to the bank based on the name and unit of the customer as a form of individual guarantee made by the developer. A buyback guarantee is given at the time of signing the credit agreement agreed upon by the customer, the bank, and the developer as outlined in the PK (credit agreement). Buyback guarantees can be executed if the customer experiences payment that is not smooth (default) and has been sent a warning through warning letters 1, 2, and 3 by the bank, but there is no response whatsoever.

In implementing a credit contract agreement based on a formal or legally binding guarantee (customer, bank, and developer), the customer then pays installments or installments to the bank. The process of the initial credit contract up to the buyback guarantee provided by the developer is as follows: (1) The customer submits a credit ceiling to the bank; (2) The bank analyzes the feasibility of granting credit based on the 5 C principles, namely character, collateral, capacity, capital, and condition of the economy; (3) Furthermore, the bank issues an SPK (credit notification letter) on behalf of the customer and states the amount of credit ceiling that the bank has approved; (4) The developer makes and prepares a credit contract file containing a developer cover note and buyback guarantee in the form of a statement letter, SKL, disbursement of funds, and building progress on the unit to be collateralized; (5) Implementation of a credit contract based on collateral that contains the parties, including the customer, the bank, and the developer, as well as the complement in the credit contract, is a notary partner (if any). The developer officially signs the buyback guarantee as the board of directors, which is made in the form of a statement letter as a form of guarantee submission to the bank which has an execution function if the customer in the bank has difficulty paying, unable to pay (default), the developer will return the unit. A buyback guarantee issued by the developer to the bank aims to accommodate credit facilities or provide convenience for customers in channeling home credit funds to repay the house they have bought.

The provision of credit based on the buyback guarantee by the developer is only found in the KPR facility. It is intended that the buyback guarantee has no function in the type of working capital credit (KMK), investment credit, and so on. With a buyback guarantee, the

disbursement process can be carried out because the developer selling the unit is still in the design of the picture/prototype, so the bank does not have a guarantee in the form of a physical building. The mortgage disbursement process is carried out several times depending on the development progress. The process of disbursing funds to the developer is partially liquid 100% in one period. Buyback guarantees begin to be applied if customers default on installment payments to the bank and customers declare that they can no longer pay installments to the bank. Buyback guarantees begin in the event of a mortgage process that the bank has approved by the credit ceiling of the customer's application. The conditions that allow the potential for buyback guarantee claims to occur are due to customers who default in the sense that they are unable to pay installments due to economic conditions as well as specific factors experienced by the customer due to the impact of the COVID-19 pandemic, thus affecting financial conditions. Based on the explanation above, if the bank requests a buyback guarantee claim, the developer's payment is a settlement of the customer's debt at the bank. The buyback guarantee is the right solution to the current problem. In overcoming the problems of role, purpose, and regulation in connection with the buyback guarantee that exists in the Developer who has collaborated with the bank in the sale of the house, the author needs to explain the position of buyback both in regulation and practice that occurs in the field.

Buyback guarantee of mortgage sale and purchase facility according to positive law

A Bank guarantee is a guarantee given by the bank in the implementation of obligations if the guaranteed ⁵, the bank guarantee is a written statement that the bank binds itself to the recipient of the guarantee by a predetermined time limit if, in the future, the recipient of the guarantee cannot fulfill its obligations ⁶. The legal basis of the bank guarantee is the borscht guarantee according to Articles 1820 to 1850 of the Civil Code. In general, the provisions of the bank guarantee refer to the BI Board of Directors Decree No.23/88/KEP/DIR dated March 18, 1991, and SE (circular letter) No.23/7/UKU and March 18, 1991 (No.23/88/KEP/DIR, 1991).

Banks give buyback guarantees to customers to buy land and buildings from developers in the condition that the house is under construction. At the time of the implementation of the credit agreement between the bank, the customer, and the developer, part of the funding by the bank will be disbursed to the developer. As for the disbursement of funds made by the bank in

⁵ S Gozali Djoni, *Hukum Perbankan*, 134.

⁶ Laurensia, "Pelaksanaan Pemberian Bank Garansi Di PT Bank Ekonomi Raharja."

the disbursement process, not all funds will be disbursed to the developer's account. However, some funds are frozen by the bank in the form of an LTV deposit, which can only be disbursed by the developer based on the development progress in the field. In detail, the funds that the bank will disburse to the developer are ⁷ (a) 90% disbursed upon execution of the credit agreement; (b) 5% LTV Bank deposit disbursed after BAST (news of handover); (c) 5% LTV Bank deposit is disbursed after the signing of the sale and purchase deed (AJB) in front of a Notary / PPAT.

Bank Indonesia regulation Number 23/2/PBI/2021 regarding the third amendment to Bank Indonesia Regulation Number 20/8/PBI/2018 regarding Loan To Value (LTV) Ratio for property loans. A buyback guarantee is issued by the developer as a condition of the bank in the process of providing credit financing buy back guarantee issued by the developer, which is the principle of prudence in credit facilities between the bank, customer, and developer buyback guarantee is made/issued by the developer as a guarantee submitted by the developer to the bank which contains the developer's promise if in the future the customer defaults or is unable to pay (default), the developer agrees and binds himself to the bank to pay off all customer obligations by buying back (buyback guarantee) of the land and building on it.

Buyback guarantee claims occur because there are customers who cannot perform their obligations in terms of paying installments to the bank (default); buyback guarantee claims can only be made if the developer agrees and the bank cannot execute based on the buyback guarantee statement given by the developer without the developer's consent so that with the buyback guarantee statement both parties (namely the bank and the developer) have the same legal force.

Flow concept of the implementation of a buyback guarantee between the bank and the developer:

Figure 1. Flowchart of Buyback Guarantee Treatment



⁷ Ristanto, *Jangan Salah Memilih KPR*, 13.

Source: the Authors' Review (2024)

The developer, as the owner of the house, in achieving the target of selling houses to customers, is necessary to cooperate with the bank when the customer purchases through homeownership credit financing; the bank provides credit facilities based on the terms and conditions and bank analysis before financing is given to prospective customers determined by the bank and the bank asks the developer to issue a buyback guarantee with the condition that: (1) The unit purchased by the customer from the developer is not fully repaid by the customer, so most of the payments there are funds paid by the bank, (2) The certificate for the unit is still in the master certificate and in the process of splitting per unit, (3) The legal relationship between the developer and the customer is still in the binding of sale and purchase (PPJB), which cannot be made a deed of sale and purchase by a Notary / PPAT.

The term default is often referred to as breaking promises or breaking promises comes from the Dutch language, namely from the word 'wan', which means nothing, and the word 'achievement' which means achievement/obligation. So, default means poor performance or not fulfilling obligations as promised. In addition, it can also mean the absence of achievement⁸. The sale and purchase agreement itself is an agreement made between the seller and the buyer. In the agreement, the seller is obliged to hand over the object of sale and purchase to the buyer and is entitled to receive the price, and the buyer is obliged to pay the price and is entitled to receive the object. As is known that an agreement arises at the time of an agreement on the subject matter of the agreement, but apart from that, other things must be considered, namely the conditions for the validity of the agreement as stipulated in Article 1320 of the Civil Code⁹.

The default is contained in article 1243 of the Civil Code, which states that: "reimbursement of costs, losses and interest due to the non-fulfillment of an obligation, will only begin to be required, if the debtor, after being declared negligent in fulfilling his obligation, continues to neglect it, or if something that must be given or made can only be given or made within the time limit that has been exceeded"¹⁰. The default is not fulfilling the obligations that must be stipulated in the obligation, both from agreements and from the Law¹¹. According to article 1234 of the Civil Code, what is meant by achievement is someone who gives up something, does something, and does not do something; otherwise, it is considered default if

⁸ Assal, *Al-Nizam al-Iqtisadi Fi al-Islam Mabadi'uhu Wahdafuhu*, Alih Bahasa Abu Ahmadi, 18.

⁹ Miru, *Hukum Kontrak Perancangan Kontrak*, 31.

¹⁰ Ahmadi Miru, *Hukum Perikatan*.

¹¹ Muhammad, *Hukum Acara Perdata Indonesia*.

someone: (a) Does not do what he promised to do, (b) Carries out what he promised, but not as promised, (c) Does what is promised but late, (d) Does something that, according to the contract, should not be done.

As a result of the default, sanctions can usually be imposed as compensation, contract cancellation, risk transfer, or paying court costs. For example, if a debtor (the debtor) is accused of committing an unlawful act, negligent or intentionally not performing according to the agreed sound in the contract, if proven, then the debtor must compensate for losses (including compensation + interest + court costs). However, the debtor may defend themselves on the grounds of: (a) Force majeure, (b) The creditor's negligence, (c) The creditor has waived his right to claim compensation. In such cases, the debtor does not have to compensate. Therefore, we should include risks, defaults, and force majeure in every business contract. Force majeure is absolute, for example, in natural disasters such as floods, earthquakes, landslides, etc. While those that are not absolute (relative), for example, in the form of a situation where the contract can still be carried out, but at a higher cost, for example, a sudden high price change due to government regulation of certain products, an economic crisis that causes product exports to stop temporarily, and others¹². Dispute settlement through the court in consumer disputes here is limited to civil disputes. Law Number 8 of 1999 concerning consumer protection dispute resolution is divided into two: dispute resolution within the court and dispute resolution outside the court. The entry of a dispute or case before the court is not due to the judge's activities but because of the initiative of the party in the dispute, in this case, the plaintiff, be it a producer or consumer. The court provides a solution to civil law that cannot work between the parties voluntarily; in this connection, Satjipto Rahardjo said, "Talk about the operation of the law concerning the judicial process conventionally involves talk about judicial power, trial procedures and so on."¹³

View of the Buyback guarantee of the KPR sale and purchase facility, according to Islamic economics law.

Islam is a complete religion covering all aspects of human life, specifically about buying and selling. Buying and selling is one form of muamalah, which is a relationship between humans and other humans¹⁴. In this case, Muslims must consider and pay attention to whether the sale and purchase transaction follows the basic Islamic law principles. DSN (National Sharia

¹² Saliman., *Hukum Bisnis Untuk Perusahaan*, 52.

¹³ Kristiyanti, *Hukum Perlindungan Konsumen*, 175.

¹⁴ Karim, *Bank Islam: Analisis Fiqih Dan Keuangan*, Edisi 3, 7.

Council) MUI (Indonesian Ulema Council) Decree No.94 regulates the practice of buying and selling according to Sharia law with the right to repurchase a stock buyback (current assets). In contrast, the KPR buyback guarantee has not been regulated (fixed assets), while in this study is a buyback guarantee of KPR products (home ownership credit), so no fatwa rule specifically regulates the buyback guarantee of fixed assets (KPR). However, this transaction can be compared to *bai 'al-wafa*. *Bai 'al-Wafa* in muamalah fiqh is usually used to refer to a sale and purchase contract carried out, where the seller or owner of the goods sold when carrying out the sales transaction still maintains a guarantee of the return of the goods sold. If he wants, take, or buy back the goods during the specified time with a consideration that is sometimes the same as the purchase price of all or can be different prices.

Bai' al wafa contains a promise between the two parties to the contract that the seller or the party in debt fulfills or pays off the debt within the agreed deadline. Likewise, the buyer will return the goods he bought (as collateral for debt) when the money has been returned. According to the majority of scholars other than the Zahiriyah scholars, the parties to a contract are free to determine the terms of a contract. However, the freedom to determine the contract is absolute, without limits, as long as there is no prohibition in the Qur'an and as-Sunnah. The problem of the buyback is contemporary today with the development of *bai' al-wafa*, which, according to the opinion of the Hanafiyah scholars, is permissible so that in this problem, a law can be taken from the legal provisions of *bai' al-wafa*, which *bai' al-wafa* is the best solution for the people of Bukhara and Balkh. At that time the owners of funds (investors) no longer wanted to lend their money to people who needed it for their daily activities because there was no return from the borrowers of these funds.

The mechanism of *bai al-wafa* was originally agreed upon as a sale and purchase, so the buyer is free to utilize the goods. It's just that there is an agreement from both parties that the buyer may not sell the item to other than the novice owner because the item is a guarantee of debt that must be returned within the agreed period. By looking at the conditions at that time, a terminology for buying and selling, *bai' al-wafa*, was created to advise the economic situation of the people of Bukhara and Balkh. What is essential in this term is that the sale and purchase were created to avoid the practice of usury. This is the basis for the scholars in the permissibility of *bai' al-wafa*. However, some prohibit the sale and purchase of these.

Islamic Sharia has a fundamental provision in ties and agreements, namely by giving freedom to the parties involved to take the form of the kinds of contracts they choose. This is one of the main provisions of Islamic law, which is the principle that 'contracts can be concluded

in any way, whether by words or actions that indicate the intention of the contract'. For this reason, any method that indicates the existence of *ijab* and *qabul* can be considered a contract, and this contract has effect as long as it is executed by them and meets the conditions of its execution.¹⁵ Direction and guidance that is useful for those who make contracts/agreements in the form of *ijab* and *qabul*, then further Islamic law recommends that the agreement be strengthened by writing and witnesses with the aim that the rights of each can be guaranteed. Allah says in the Quran chapter al-Baqarah verse 282: "*Hi you who believe, when you do business not in cash for a specified time, you should write it down*". Every agreement must be carried out correctly and honestly and free from elements of fraud, forgery, and violation so that the practice of *muamalah* in Islam becomes a bright path that is far from defective after agreeing. Hakim bin Hisham narrated that Prophet Muhammad pbuh. said: *Two people who buy and sell have the right to khiar (bargaining) while not yet separated, so if they are honest and straightforward, bless them in their trade, but if they lie and are not straightforward, the blessing of their trade is removed* (Imam Muslim). The meaning contained in the Hadith, among others, prohibits buying and selling defective due to dishonesty, breach of promise, and other things that are prohibited because such things do not provide any benefit but instead harm. If a person does such a thing after an agreement is made, it can be said that they have made a default; namely, they do not perform the performance that should be done, or there is an element of negligence in their performance after an agreement or contract is made. The concept of *khiyar* is prescribed as the best way to make the contract more legitimate and ideal, accompanied by the achievement of benefits between the parties.¹⁶

The problem of *muamalah* with fellow humans, Islamic law emphasizes the seriousness of fulfilling the agreements they have made so that those who are negligent or violate these agreements are categorized as hypocrites. Abu Hurairah narrated that Prophet Mohamed said: *There are three characteristics of a hypocrite, namely, when speaking, he lies, when promising, he reneges; and when trusted, he betrays*. Taking into account the said hadith, it can be understood that those who make defaults with an element of intent him given the predicate as someone who is hypocritical, namely that these people do not perform or do not fulfil the mandate imposed on them, however, in cases of negligence due to overmatch (force majeure).¹⁷

¹⁵ Assal, *Al-Nizam al-Iqtisadi Fi al-Islam Mabadi'uhu Wahdafuhu*, Alih Bahasa Abu Ahmadi, 184.

¹⁶ Nurjaman, Januri, and Nuraeni, "Eksistensi *Khiyar* Dalam Perkembangan Transaksi Jual Beli," 71.

¹⁷ Madani, "Pembinaan Nilai-Nilai Kejujuran Menurut Rasulullah Saw," 152.

RESEARCH METHOD

This research method is carried out qualitatively through a literature study approach, opinions of field studies of practices that occur in the field of buyback guarantees, and opinions of experts based on the topic of research conducted by the author. Furthermore, the analysis of the theoretical aspects is associated with other studies, such as The foundation of the Qur'an and Hadith, Fatwa of the Ulama Council, existing regulations, mapping, and comparison of previous research results related to the topic of discussion, including its derivatives. Furthermore, the author analyzes the gap (regarding the mechanism of buyback guarantee rules between banks and developers).

The specification in this research is descriptive analysis, namely by providing data that summarises researchers regarding an existing situation or symptom¹⁸. Research Location Developer PT Sinarwijaya Ekapratista (banjar Wijaya project) at Ruko Azores (Management Office) Banjar Wijaya Blok B.7C N0.6 to 8, located in Poris Plawad Indah, Cipondoh, Tangerang City,

According to Basrowi & Suwandi (2008), through qualitative research, researchers can recognize the subject and feel what the subject experiences in everyday life. Qualitative research is a research procedure that can produce descriptive data in the form of speech, writing, and behavior of the people observed. Through this qualitative research, it is possible to obtain an understanding of reality through an inductive thinking process.¹⁹ Qualitative research methods are research methods based on the philosophy of postpositivism, used to research natural object conditions (as opposed to experiments) where the researcher is the key instrument, data collection techniques are triangulated (combined), data analysis is inductive/qualitative, and qualitative research results emphasize meaning over-generalization.²⁰

Researchers chose Qualitative Research because of the nature of the problem under study, namely regarding the mechanism of the buy-back guarantee rules issued by the Banjar Wijaya developer as an individual guarantee if the customer defaults. It can be concluded that qualitative descriptive research is a method that describes a phenomenon through descriptions in the form of sentences and language using natural methods.

¹⁸ Soekanto, *Penelitian Hukum Normatif Suatu Tinjauan Singkat*, 15.

¹⁹ Suwandi, *Memahami Penelitian Kualitatif*.

²⁰ Sugiyono, *Metode Penelitian Kuantitatif Dan Kualitatif*, 18.

RESULTS AND DISCUSSION

According to the results of research by developer Banjar Wijaya, the emergence of term development of indent houses is now a trend and fashion in the community because of several things, namely: (1) Guarantee the validity and efficiency of time and the certainty that the bank can approve the prospective buyer's mortgage application; (2) If the bank does not approve the mortgage application (guarantee), the problematic indent house can be sold to other parties to be more competitive, meaning that when the condition of the houses in the area has been sold and the construction of 50% (fifty percent) of the number of units sold, the price will rise sharply; (3) There is no need to maintain the condition of the building (maintain the construction) regularly or routinely, which increases developer costs; (4) Expand home sales faster without additional capital to build first.

With the buy-back guarantee financing facility, the bank, as the distributor of KPR funds, will get benefits as follow (1) Avoidance of credit and legal risks; (2) Protecting consumers/customers from rogue developers; (3) Streamline the mortgage process. At the same time, Prospective buyers have the flexibility and freedom to make models and house plans according to their tastes. The rules for the floor plan and appearance of the house that is changed remain the same as the floor area and type of house to be purchased. However, prospective buyers should not change the house's appearance because the house's exterior is the hallmark of a house in a residential area. Potential buyers have the flexibility and freedom to change the color of the interior wall paint and building specifications according to the tastes of potential buyers. Prospective buyers can change the floor plan or appearance of the house resulting in a larger floor area and type of house than the standard, and change the building specifications to be higher. Prospective buyers will be charged an additional fee based on the difference in building specifications provided by the developer. The price difference for the addition of building specifications. The scale of the additional fee for adding the building area or type of house can be negotiated between the buyer and developer.

The cost of increasing the floor area or type of house can be included in the bank's mortgage application or can be paid in installments step by step to the developer as agreed upon and agreed between the potential buyer and the developer. The buyer can also directly supervise the implementation of the construction of the house he buys so that the quality of the building remains following what was agreed at the beginning of the agreement. The buyer does not have to wait long to be able to occupy the house in a ready-to-occupy state for the mortgage process first. Challenges for customers in the down payment of KPR, customers must have

prepared finances before the KPR process occurs because they intend to pay on time or even not pay / default. The obstacles are when the customer cannot pay the down payment, has an unstable income, and has a poor credit history.

With the buyback guarantee facility, developers as property sellers will get the following benefits: (1) Buyers have more confidence; (2) Become a marketing gimmick so that prospective buyers are interested; (3) Streamline business deals with prospective property buyers and banks; (4) Provide convenience for customers in owning a house even though funds are minimal. The challenge for developers to be able to complete the separation of the master certificate, making IMB, and issuing PBB before two years (ie before the implementation of the sale and purchase deed) is carried out. The obstacle is that in building the bank in disbursing mortgage money per progress based on BI regulations, the developer must be able to complete the construction following the agreement.

A buyback guarantee is issued by the developer as a substitute for the customer's position if the customer defaults on the bank. The developer makes a buyback guarantee at the time of issuance of the bank's SPK, which is the bank's information on prospective customers who have been approved for the mortgage facility sent by the bank via the developer's email. After that, the developer makes a buyback guarantee along with a cover note, transfer order, certificate of completion, building progress, and building photos (if any). The developer arranges a schedule with the bank and the customer for the execution of a credit contract based on the buyback guarantee (based on the developer's statement letter and interview results with Notary Staff Bambang Suwondo, SH Monday, March 28 2022 at 17:00, 2022).

Regarding the material form of financing security rights based on the buyback guarantee of the developer's statement regarding personal guarantees as referred to in Bank Indonesia Regulation Number 17/10/PBI/2015, which explains the regulation of credit financing explains the importance of payment guarantee instruments from the principle of cooperation sourced in Article 3, it can be seen that Paragraph 15 (2) letter (b) and letter (c) explains the need for a partnership agreement between the bank and the developer, namely the developer who covers the developer's ability to complete the construction or work as stated in the land and building sale and purchase agreement (PPJB). Explains the need for a partnership agreement between the bank and the developer, namely the developer who covers the developer's ability to complete the construction or work as outlined in the agreement binding the sale and purchase of land and buildings (namely PPJB) further that the guarantee for buyback guarantee financing must be given to the bank issued by the developer as the developer.

The occurrence of a buyback guarantee occurs when the customer no longer can pay installments (default), based on an agreement that has been agreed between the bank and the customer, wherein the financing agreement, there is an additional clause that occurs between the bank and the developer (namely the buyback guarantee) which is stated in the form of a cooperation agreement, which is an integral part of the homeownership financing agreement. As for the marketing of houses using financing to customers through the bank, of course, it must have fulfilled the financing requirements owned by prospective customers before obtaining a home ownership financing facility, which includes feasibility in the 5 C analysis, namely (character, collateral, capacity, capital, condition of economic). The impact that occurs if a buy-back guarantee claim is described below:

Tabel 2. The impact of a buy-back guarantee claim

No.	Developer	Bank
1.	Customers have difficulty applying for credit from banks within five years. They experienced material losses because they had to pay the rest of the customer's debt.	The bank's credibility decreases because there is a red record of bank customers with insufficient payments.
2.	If it goes to court, the customer loses the installment of money that has been paid to the bank and the house asset that is being purchased using the credit system. The developer must find new prospective customers so that the housing unit is sold again to cover the losses experienced.	Bank cash income is hampered due to late payments made by customers.

Source: the Authors' Review (2024)

Buyback guarantee is permitted by in Islamic shariah law provided that it is an option, not an obligation. Thus, the buyer may sell to another person or may also sell to the first seller. This provision is a requirement to avoid prohibited *bai' al-'inah*, namely someone selling on the condition that they buy it back. The terms of must be ensured that the buyback guarantee complies with sharia principles. The closest prohibited transaction to this is *bai' al-'inah* i.e someone who buys goods without cash with the agreement that they will resell them to the first

seller at a lower price in cash²¹. Prophet Muhammad pbuh prohibits *bai' al-'inah* by saying, "If people are stingy with dinars and dirhams, buy and sell 'inah, follow the tails of cows (busy farming so they neglect jihad) and abandon jihad fi sabilillah, then Allah SWT will bring down calamities and not will appoint them again unless they return (commitment) to their religion." Hadith narrated by Imam Ahmad from Ibn Umar (Musnad Imam Ahmad, al-Muktsirin min ash-Shohabah, Chapter Musnad Abdullah ibn Umar al Khattab ra, No 4593). According to the scholars, the buyer's motivation in this transaction is not goods, but money. Therefore, the prospective seller offered to buy the goods he owned at a non-cash price and then bought them back with cash. Part of it is used to fulfill the first installment to the seller and the rest to meet his needs. Meanwhile, the seller takes the difference between the buying and selling prices.

This is confirmed by the majority of companions (*shahabah*), tabi'in, Hanafiyah, Malikiyah, and Hanabilah. Al Mirginani (a scholar of the Hanafi school of thought) explains, "Whoever buys a servant for 1,000 dirhams, either cash or non-cash, after receiving it, then sells it back to the seller (first) for 500 before the first contract price is paid in cash, then "The second sale and purchase agreement is legally prohibited." (al-Marghinani, Fath al Qadir, 5/207). The main characteristic of *bai' al-'inah* is engineering, where the buyer and seller agree that once purchased it will be resold, there is no transfer of ownership, there is only the wording of the *ijab qabul* or what is stated on the paper, but in reality what is what happens is usurious credit is lent with a smaller nominal value than what is paid. However, if the buyback is not required to be sold to the owner but is optional, then this is not *bai' al-'inah* which is forbidden as in the hadith and main characteristics above.²²

Islamic sharia also offer solutions before an assets is buybacked i.e by debt restructuring (rescheduling). Allah forbids any type of addition taken from a loan²³. If the debtor is facing difficulties in repaying the debt, debtor can request the creditor to reschedule or extend the repayment period. This is permissible in Islam to provide relief to the debtor. Allah says: "And if someone is in difficulty, grant them respite until a time of ease." (Quran 2:280). If the difficulty is temporary, the creditor can provide relief by postponing the debt payment until the debtor is able to repay. Otherwise, the creditor can write off a portion of the debt if the debtor is genuinely unable to repay the full amount, as Allah says: "And if someone is in difficulty,

²¹ Alim et al., "Improving Literacy of Forbidden Selling and Buying in Contemporary Transactions Through Service-Learning Method," 4.

²² Republika ID, "Bagaimana Hukum Syariah Atas Praktik Buyback?"

²³ Alim, "Tinjauan Fikih Muamalah Atas Produk Jasa Berbasis Ujrah (Fee Based Services) Bank Konvensional (Sampel Produk Bank Mandiri Dan BCA)," 149.

grant them respite until a time of ease. But if you remit it by way of charity, that is better for you, if you only knew." (Quran 2:280)

CONCLUSION

In positive law perspective, the buyback guarantee is the solution for all parties as long as the rule of thumb can be made as well as possible; the strategy of imposing a buyback guarantee in the agreement between the bank and the developer is a last resort strategy amid the protracted settlement needs of all parties involved, which will undoubtedly reduce the performance of all parties, but if all parties can maintain the credibility of performance in recruiting mortgage customers who are potential customers, of course, the execution of buyback guarantees will never happen. In Islamic sharia perspective, the buyback guarantee is permitted provided that it is an option, not an obligation. The buyer may sell either to the first seller or another person. This provision is to avoid the prohibited *bai' al-'inah*, which leads to prohibited riba transaction. Other Islamic solutions are debt restructuring (rescheduling) and postponement of the debt payment.

Suggestions for further research are to examine forms of buyback guarantees that can be combined with other sharia contracts such as musyarakah, mudharabah, or other investment contracts to create integrated products.

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