

## **LEGAL ANALYSIS ON THE POLICY OF HOME OWNERSHIP REQUIREMENTS FOR FOREIGNERS IN THE CONSUMER CREDIT AGREEMENT OF SYARIAH BANK IN INDONESIA\***

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### **Abstract**

*The study examines the normative policy on the ownership rules of residential homes for foreigners in the credit agreement consumption of Syariah banks in Indonesia. This policy has existed since 2005. However, it does not make all Syariah banks in Indonesia provide credit facilities to foreigners since there is no specific implementing regulation and legal protection for the banks in the case of finance arrears caused by the practice which can disrupt their liquidity and profitability. Considering this, the article analyses the legal protection for Islamic banks, both in preventive and repressive context, in providing credit facilities for foreigners, so that they all can facilitate loans without any fears and risks. This becomes necessary as it can contribute to Indonesia's economic growth. It argues that the law should cover this matter, through both preventive and restrictive measures, in which the law should prevent the practice from causing finance arrears through musyārahah contract. The results of this study confirm that there is legal protection that has been regulated by Bank Indonesia for Syariah Bank in giving credit to a foreigner.*

**Keywords:** *Legal Policy, syariah bank, foreigners, consumer credit agreement*

### **Abstrak:**

*Artikel ini mengkaji secara yuridis normatif tentang kebijakan aturan kepemilikan hunian orang asing dengan perjanjian kredit konsumsi bank syariah di Indonesia. Kebijakan ini sudah ada sejak tahun 2005, namun tidak cukup membuat semua bank syariah yang ada di Indonesia memberikan fasilitas kredit terhadap orang asing, dengan alasan belum adanya aturan secara spesifik*

*mengenai kredit bagi orang asing dan minimnya perlindungan hukum bagi bank syariah di Indonesia. Permasalahan yang sering muncul dari penyaluran pembiayaan adalah adanya kasus penunggakan pengembalian pembiayaan yang dapat mengganggu likuiditas dan profitabilitas lembaga keuangan. Maka, studi ini mengkaji perlindungan hukum bagi bank syariah di Indonesia dalam memberikan fasilitas kredit kepada orang asing, baik preventif maupun represif. Hal ini perlu karena dapat berkontribusi secara langsung dalam memajukan perekonomian Indonesia yang masih berkembang. Artikel ini menemukan pentingnya hukum yang mengatur pemberian fasilitas kredit kepada warga negara asing melalui Bank Syariah, secara preventif dan represif yang dapat menghindarkan dari kredit macet, yaitu melalui akad musyarakah*

**Kata Kunci:** Kebijakan, bank syariah, perjanjian kredit konsumsi

## A. Introduction

In Islam, the property ownership is related to the property right which is legally protected by Islamic law. The concept of ownership in Islamic perspective implies the specific right which acquired by the owner, therefore he has the right to use as long as in line with Islamic norms.<sup>1</sup> Syariah financial institution in Islam thus becomes the important institution because it leads the business and economic activities work in the legality of Islamic norms. In Indonesia, the effort in pioneering syariah financial institution began in late 1980s. The concept of financial institution has formed legally when the birth of *Bank Muamalat* in 1991.<sup>2</sup>

The Syariah Bank was applied in Indonesia since 1992, it was regulated in Law number 7 year 1992 about Banking which was revised by Law Number 10 Year 1998, however as the world development, there was the specific law that regulate the syariah Bank; Law Number 21 year 1998 about Syariah Banking.<sup>3</sup>

Syariah banking regulation aims at ensuring legal certainty for stakeholders and provides confidence to the community in using

<sup>1</sup> Muhammad Sadi, *Konsep Pola Hubungan Hukum Perbankan Syariah Sebagai Institusi Perantara Dan Agen Investasi* (Malang: Cita Intrans Selaras, 2015), 3.

<sup>2</sup> Wardah Yuspin, *Aspek Hukum & Kelembagaan Syariah* (Yogyakarta: Genta Publishing, 2016), 3.

<sup>3</sup> Yuspin, 7.

products and services by syariah banks. The regulation of syariah banking in syariah banking law covers business type, syariah implementation provisions, business feasibility, fund distribution, and prohibition for syariah bank and *Unit Usaha Syariah*, (UUS, Syariah Business Unit) which is part of conventional commercial bank.<sup>4</sup>

The Syariah financial institutions have some regulation in running their business. They are not only focused on profit orientation but also have to be based on the rules which contained in Article 2 Paragraph (3) of Bank Indonesia Regulation Number 10/16/PBI/2008 concerning Amendment to Bank Indonesia Regulation Number 9/19/PBI/2007 Implementation of Syariah Principles in Fundraising Activities and Fund Distribution and Services of Islamic Banking. It is used in order to maintain the compliance of Syariah Banks principles.

The characteristics of an Islamic bank are:<sup>5</sup>

1. Contract (*Akad*); the agreement between two or more parties, especially that written and executed by law. *Akad* is a written agreement between syariah bank or Syariah Business Unit and other party which contains the rights and obligations for each party through the syariah principles.
2. Profit Sharing (Islamic bank concept of profit sharing); customer funds distributed through the financial scheme. The financing income will be divided according to the customer and bank contracts. The financing is the provision of funds or invoices in the form of:
  - a. Shared transaction in term of *mudaraba* and *musharaka*;
  - b. The Lease transactions in term of *ijara* or lease purchase in the form of *ijārah muntahiya bittamlīk*;
  - c. Sale and purchase transactions in term of *murābahah*, *salām*, and *istitsnā* receivables;
  - d. Lending and borrowing transactions in term of *qardh* receivables; and
  - e. The Lease services transactions in term of *ijārah* for multilateral transactions based on approval or agreement

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<sup>4</sup> Jundiani, *Pengaturan Hukum Perbankan Syariah Di Indonesia* (Malang: UIN Malang Perss, 2009), 33–34.

<sup>5</sup> Abdul Ghofur Anshori, *Hukum perbankan syariah: (UU No. 21 tahun 2008)* (Bandung: Refika Aditama, 2009), 5.

between syariah bank and/or syariah business unit and other party that require the financed party to refund the fund after a certain period through the *ujrah* reward, without *ujrah* rewards or profit sharing.

3. The Financing Target; banks are limited by Islamic principles in terms of distribution of funds. Financing should not be distributed to sectors of business that against the Islamic law, such as gambling, drinking and forbidden food. "Collateral is also an additional guarantee, whether in the form of moving objects or immovable property submitted the collateral owner to syariah bank in order to guarantee the repayment of the obligations of the beneficiary customers".
4. Customers are business partner to syariah bank; they do not considered as customers who need funds and save their funds in the bank. Therefore, business can be run based on the shared needs.
5. Profit is oriented and prospered; in terms of business continuity of syariah bank.

In Indonesia, the growth of syariah banking is larger than conventional banking, however there are many challenges that have be considered and resolved to ensure the development of syariah banking in the future. Nevertheless, some challenges should be faced by syariah regarding; Stock Market is relatively small; it can hinder and limit the operation of Islamic banking activities in the Islamic finance market, and the industry's contribution to economic progress. The other challenge is Lack of trained employee; the banks have difficulties to fulfil their educated and skilled employee's needs. Besides, Lack of product development to facilitate various Islamic financial transactions becomes a challenge which needs considerable caution from practitioners of Islamic economics. Islamic banks in Indonesia are more dependent on contracts/transactions based on classical teachings or books and require a lot of product innovation. The product innovation is the key of Islamic banking, that enabling this sector to be more competitive and feasible. The syariah banking will be success in the future if they are able to provide the attractive and competitive products that make the customer easier

to do many kinds of transactions. The existing products of syariah banks tend to be more static because they are only limited to savings, deposits, demand deposits, *murābahah*, *mudhārabah* and *musyārahah*. The syariah bank implements the profit sharing if the business income is small, the profit share will be small as well, and vice versa.<sup>7</sup> Furthermore, the syariah bank have to create the newest innovation. There are many contracts that mentioned in the theory of Islamic law, however the authors analyse about the financing agreement through *musyārahah mutanāqishah* that usually made in syariah banking credit agreement.

Etymologically, *musyārahah* is merging, mixing or union. *Musyārahah* means cooperation partnership or in english called partnership.<sup>6</sup> As terminologically, *musyārahah* is a business cooperation between two or more parties for a particular business, in which each party contributes to the agreement that the benefits and risks will be borne together in accordance with the agreement. According to Law Number 21 Year 2008 concerning syariah banking, *musyarakah* is a cooperation contract between two or more parties for a certain business which each party provides a portion of funds provided that the profit will be divided according to the agreement, while the loss in liability according to the portion of each fund.<sup>7</sup>

The implementation of the *musyārahah mutanāqishah* principle in the framework of *akad* constitutes a unity of activities which comprises; procurement of Goods, arrangement and transfer of ownership of the Parties, the *ijārah* transaction, the distribution of *ujrah* on the *Ijarah* transaction and the management of Goods shall be executed based on Syariah Principles and governed by the provisions enforced.<sup>8</sup> Unfortunately, the application of *musyārahah mutanāqishah* contract would certainly be problematic if applied to foreign customers living in Indonesia. The application of *musyārahah mutanāqishah* contract does not have strict rules yet that guarantee the interests of syariah banks if the customer fails to carry out its obligations in the form of land and house as required for foreigners.

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<sup>6</sup> Mardani, *Hukum Ekonomi Syariah* (Jakarta: Prenadamedia Group, 2014), 142.

<sup>7</sup> Mardani, *Hukum Ekonomi Syariah*.

<sup>8</sup> Musyarakah Agreement Mutanaqisah Bank Maybank. Tbk.

Indeed, Syariah banks would not provide yet the credit for foreigners. Indeed, having the policy of home ownership by consumer credit in syariah bank, especially the Bank Indonesia Regulation No. 18/19/PBI/2016, should not utterly protect banks in giving the home purchase credit for foreigner. Therefore, there are no syariah banks in Indonesia provide the facility of home purchase credit for foreigner. Syariah banks in Indonesia could give home purchase credit for foreigners, which is legally not contrary to the positive law in Indonesia.

Various reasons for Islamic banks in Indonesia have not given home purchase credit for foreigners due to a number of risks; the risk of use rights, the risk of administrative difficulties for foreigners. And the other risk is regarding the Default which consists of death, termination of employment, and escaping from Indonesia.

Some studies that discuss the policy of home ownership for foreigners have not comprehensively analyzed the related regulations, and its dynamic relationship with the objectives of Islamic banks to provide benefits for all sides along in the corridor of circumspection. Moreover, this article examines the rules that are able to protect syariah bank in giving the consumer credit to foreigners. The next sub-titles would analyse some rules which give a pathway to the analysis of protection of syariah bank in providing consumer credit for foreigners.

## **B. Government Regulation Number 103 Year 2015 on the Ownership of Shelter or Residential House by Foreigner Based in Indonesia.**

In the framework of implementing the provisions of Article 42 of Law Number 5 Year 1960 on Basic Regulations of Agrarian Principles, and to further provide legal certainty of the ownership of residential houses or occupancy by foreigners domiciled in Indonesia, the Government Regulation No. 41 of 1996 on Ownership of Shelter domiciled in Indonesia needs to be replaced by Government Regulation Number 103 Year 2015 concerning Ownership of Shelter by Foreigner Based in Indonesia. The foreigner who are based in Indonesia, and then called as a

foreigner is a person who are come from other country that gives advantages, doing business, working, or investing in Indonesia.<sup>9</sup>

Residential ownership or residential house which may be owned by a foreigner who has residence permit in Indonesia is regulated in Article 2 of Government Regulation no. 103 of 2015, a self-contained house built on the parcels of land on state land, controlled under agreements with holders of land rights, and the composition of flats built on the plot of Right to Use on State land, "there is a legal relationship between Foreigners and foreign legal entities with the right to use as contained in Article 42 of UUPA".<sup>10</sup>

According to those regulations, foreigners only allowed to have the land right in term of the right to use, either the use of country right or the right the right of ownership, based on the agreement with the stakeholder of the land rights.

**C. The Regulation on foreign ownership of occupancy, set forth in the Regulation of the Minister of Agrarian Affairs and Spatial Planning/National Land Agency issues Number 29 of 2016 on Procedures for the Granting, Release or Transfer of Rights of Ownership of a Shelter or Foreign Resident's Residence domiciled in Indonesia.**

The principle and purpose of the granting, disposal and transfer of the right to the ownership of a foreign resident's residence is based on the principle that "The right of land which a person may possess shall be subject to the status of the subject of his / her right in accordance with the provisions of the law" The objectives are to:<sup>11</sup>

1. Provide legal certainty on the ownership of a residential house by a foreigner; and
2. Prevent the transfer of rights that are not in accordance with the provisions of legislation or outside the legal

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<sup>9</sup> Article 1 Paragraph 1 "Peraturan Pemerintah Nomor 103 Tahun 2015 Tentang Kepemilikan Rumah Hunian Atau Rumah Singgah Oleh Orang Asing Yang Berbasis Di Indonesia" (2015).

<sup>10</sup> Maria S.W. Sumardjono, *Kebijakan Alternatif Tentang Penyusunan Hak Atas Tanah Dan Bangunan Untuk Orang Asing Dan Badan Hukum Asing* (Jakarta: Kompas, 2008), 2.

<sup>11</sup> Article 2 "Peraturan Menteri Agraria Dan Tata Ruang / Badan Pertanahan Nasional Nomor 29 Tahun 2016 Tentang Tata Cara Penyediaan, Pelepasan Atau Pengalihan Hak Kepemilikan Rumah Hunian Atau Warga Negara Asing Yang Berdomisili Di Indonesia" (n.d.).

system of land administration in Indonesia by foreigners with Indonesian citizens.

Restrictions on residential houses for Foreigners set forth in Article 5 paragraphs with the following provisions:

1. 1 (one) parcel of land per person/family;
2. The widest land area is 2,000 (two thousand) square meters; and
3. Under certain circumstances which have a tremendous positive impact on the growth of the Indonesian economy, the provision of residential houses may be granted with an area of more than 2,000 (two thousand) square meters, with the minister's permission.

Foreigners who hold a residence permit in Indonesia in accordance with legislation may have a home for residence or occupancy with right to use. The transfer of right to use may be from rights to land of property rights, building rights, management rights and property rights to apartment units as stipulated in Article 6 *Peraturan Menteri Agraria* (PMA, The Regulation of Minister of Agraria) no. 29 Year 2016 by:

1. Sale and Purchase;
2. Grants;
3. Inheritance;
4. Swap; and
5. Auction.

The main contents of *Peraturan Menteri Agraria* (PMA, The Regulation of Minister of Agraria) no. 29 Year 2016 Article 7, Article 8 and Article 9 are about the period and right of uses.

<b>KIND OF RIGHTS</b>	<b>TIME PERIOD</b>
Right of ownership	Given 30 Years
	Extended 20 Years
	Renewed 30 Years
Building rights	Given for remaining period of time
	Extended 20 Years
	Renewed 30 Years
Management rights	Given for remaining period of time
	Extended 20 Years
	Renewed 30 Years
Ownership rights of	Given 30 Years



apartment units	Extended 20 Years Renewed 30 Years
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Table 1. Duration of right to use for foreigners according to PMA no. 29 of 2016

The kinds of right to land which written in the table can be downgraded to the right of use, among others, as follows:<sup>12</sup>

1. Property Right

The right to use to the property owned by giving or by agreement by the holder of the property with the deed made by the Land Deed Officer. The granting of land right to use shall be registered in a land book at the land office. Therefore, the right to use proprietary rights of land binds a third party from the time of its registration to the Land Office.

2. Building Use Rights

The right to use building shall be granted by a decree awarded by the minister or official appointed and registered at the Land Office.

3. Right of Management

Management rights are granted by decision of minister or appointed official, based on the proposal of the right holder of management. The management rights have occurred since registered in the Land Office in the land book, as a proof of right to the holder of the right to use then granted a land title certificate.<sup>13</sup>

4. Ownership of apartment units

The right to use apartment units, hereinafter referred to as *sarusun*, is a flats unit whose main purpose is used separately with its main function as a dwelling place. Foreigner is granted the right to Sarusun above right of use for new unit purchase sarusun. The right to use the apartment unit shall be registered at the Land Office.

<sup>12</sup> Article 2 Peraturan Menteri Agraria dan Tata Ruang / Badan Pertanahan Nasional Nomor 29 Tahun 2016 tentang Tata Cara Penyediaan, Pelepasan atau Pengalihan Hak Kepemilikan Rumah Hunian atau Warga Negara Asing yang berdomisili di Indonesia.

<sup>13</sup> Supriadi, *Hukum Agraria* (Jakarta: Sinar Grafika, 2012), 119.

The requirements to apply for Use Rights for foreigners are as follows:<sup>14</sup>

1. Application forms already filled and signed by the applicant or their proxies on stamp duty;
2. Copy of applicant's identity and authorization if authorized, Permanent Stay Permit / Permit Card (KIM) issued by the Immigration Office, which has been matched to the original by the counter officer;
3. Power of Attorney if authorized;
4. Land Acquisition Proof / Alas Hak;
5. Photocopy of SPPT PBB of the current year which has been matched against the original by the counter officer, the submission of evidence of SSB (BPHTB) and proof of payment of income (at the time of registration of rights);
6. Attach proof of SSP / PPh in accordance with the provisions.

The duration of the process of registration of rights to use for foreigners is as follows :<sup>15</sup>

1. 38 (thirty eight) days for an area of not more than 2,000 m<sup>2</sup>
2. 57 (fifty seven) days for an area of more than 2,000 m<sup>2</sup> up to 150,000 m<sup>2</sup>
3. 97 (ninety seven) days for an area of more than 150,000 m<sup>2</sup>

Description of the application form to load:<sup>16</sup>

1. Identity
2. Area, location and use of the requested land
2. Land statement is not disputed
3. Statement of land is physically controlled

In PMA No. 29 Year 2016 (the Regulation of the Minister of Agrarian Affairs) it is regulated regarding the minimum price of residential houses or occupancy that can be owned by foreigners as follows :

#### I. Single House

<b>NO.</b>	<b>LOCATION / PROVINCE</b>	<b>MINIMUM PRICE</b>
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<sup>14</sup> "Hak Pakai Perorangan WNA," accessed February 14, 2018, <http://site.bpn.go.id/o/Beranda/Layanan-Pertanahan/PELAYANAN-PEMELIHARAAN-DATA-PENDAFTARAN-TANAH/PEMBARUAN-HGB---HP-DAN-PEMBERIAN-HGB---HP-DI-ATAS-/HAK-PAKAI/HAK-PAKAI-PERORANGAN-WNA.aspx>.

<sup>15</sup> See "Hak Pakai Perorangan WNA."

<sup>16</sup> See "Hak Pakai Perorangan WNA."

		<b>(RUPIAH)</b>
1.	DKI jakarta	10 Billion
2.	Banten	5 Billion
3.	West Java	5 Billion
4.	Central Java	5 Billion
5.	DI Yogyakarta	5 Billion
6.	East Java	5 Billion
7.	Bali	5 Billion
8.	NTB	3 Billion
9.	North Sumatera	3 Billion
10.	East Kalimantan	2 Billion
11.	South Sulawesi	2 Billion
12.	Other Regions / Provinces	1 Billion

## II. Apartment units

<b>NO.</b>	<b>LOCATION / PROVINCE</b>	<b>MINIMUM PRICE (RUPIAH)</b>
1.	DKI jakarta	3 Billion
2.	Banten	2 Billion
3.	West Java	1 Billion
4.	Central Java	1 Billion
5.	DI Yogyakarta	1 Billion
6.	East Java	1.5 Billion
7.	Bali	2 Billion
8.	NTB	1 Billion
9.	North Sumatera	1 Billion
10.	East Kalimantan	1 Billion
11.	South Sulawesi	1 Billion
12.	Other Regions / Provinces	750 million

Table 2. Minimum Price List of Residence House that can be owned by a Foreigner.<sup>17</sup>

### **D. Bank Indonesia Regulation No. 18/19/PBI/2016 concerning Transaction of Foreign Exchange against Rupiah between Banks and Foreign Party.**

<sup>17</sup> Peraturan Menteri Agraria dan Tata Ruang/Badan Pertanahan Nasional Nomor 29 Tahun 2016 tentang Tata Cara Penyediaan, Pelepasan atau Pengalihan Hak Kepemilikan Rumah Hunian atau Warga Negara Asing yang berdomisili di Indonesia.

The Bank as a profit-making Financing Institution, Bank of Indonesia shall issue a regulation concerning the provision of credit for foreigners contained in Bank Indonesia Regulation No.7/14/PBI/2005 concerning Restrictions on Rupiah Transactions and foreign currency lending by banks, this rule is revoked and replaced by Bank Indonesia Regulation No.18/19/PBI/2016 concerning Transaction of Foreign Exchange Against Rupiah against Banks with Foreign Parties hereinafter referred to as PBI No:18/19/PBI/2016. In Article 16 which reads:

- a. Credit or Non-Cash financing or warranty related to investment activities in Indonesia that meet the following requirements:
  1. obtain counter guaranty from Prime Bank which is not:
    - a) a branch office of a Bank abroad; and
    - b) a branch office of a bank within or outside the country; or
  2. a deposit guarantee of 100% (one hundred percent) of the value of the warranty provided.
- b. Credit or Financing in the form of syndication meeting the following requirements:
  1. to include Prime Bank as a lead bank meeting the following requirements:
    - a) has an investment rating given by a rating agency at least:
      - i. BBB- from Standard & Poors rating agency;
      - ii. Baa3 from Moody's rating agency;
      - iii. BBB- from Fitch ratings agency; or
      - iv. equivalent to points i, number ii, and / or point iii based on the valuation of other leading rating agencies designated by Bank Indonesia;based on an assessment of the Bank's long term outlook; and
    - b) possesses the total assets included in the world's 200 (two hundred) major based on information contained in Banker's Almanac.
  2. granted for project financing in the real sector for productive enterprises located in the territory of Indonesia; and

3. the contribution of foreign banks as members of syndication is greater than the contribution of banks in the country.
- c. credit card;
- d. Credit or consumption Financing used in the country;
- e. *Cerukan intra-hari*<sup>18</sup> (*intra-hari* overdraft) in Rupiah or foreign currency backed by an authenticated document indicating confirmation of the funds coming into the relevant account on the same day and meeting the requirements stipulated in Bank Indonesia Circular Letter;
- f. overdraft in Rupiah or foreign currency due to imposition of administrative costs; and
- g. the acquisition of claims from a government-appointed body to manage the Bank's assets in the context of the restructuring of Indonesian banks by Foreign Parties whose payments are guaranteed by Prime Bank.

According to the regulation, explicitly in article 16, reveals that foreigners or foreign citizens are given convenience in the provision of services and permission to obtain land rights for residential houses or occupancy through credit by the bank, known as consumer credit. Loans consumption are the provision of credit or financing for domestic consumption, among others, to buy and rent, including credit or financing of the ownership of houses, apartments, shop houses and houses, as well as Credit or Financing of purchases of vehicles.

Syariah banks should anticipate in giving credit or so-called *musyārahah*. Syariah banks also should always use The Five Principles of Credit Analysis (5 C Principle; Character, Capacity, Capital, Collateral, Condition), which requires careful research on the nature and ability of the debtor's business, what capital he has, what guarantees can be provided and the state of the economy of the State in general which if it could support the debtor's business.

Legally, foreigners are allowed to own land rights for residential houses by way of credit in the bank, but not enough to make all banks in Indonesia provide such facilities. The gap in the

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<sup>18</sup> *Cerukan intra-hari* (*intra-hari* overdrafts) Is the provision of a bank overdraft at the end of the day (before cash closure) so that the customer's account balance at the end of the day does not exceed the credit limit or does not cause the debit balance on the checking account.

number of banks to provide credit facilities to foreigners one of them caused by risk factors in case of failure or default. It can be proved by some statement from some Consumer Directors in some Banks in Indonesia. For example, The Consumer Director of PT Bank Negara Indonesia (Persero) Tbk. (BNI) Anggoro Eko Cahyo also argues:

*“The bank is actually does not anti-mortgage cultivation work for foreigners. Instead, we are more concern to save existing regulations”.*

Moreover, The Finance and Treasury Director of PT Bank Tabungan Negara (Persero) Tbk. (BTN) Iman Nugroho Soeko emphasized that his company did not interested in working on it in the short term since the government banks are focused in the first house for the middle to lower class. Meanwhile, SVP Consumer Loan Group of PT Bank Mandiri (Persero) Tbk. Harry Gale and Head of Retail Banking Product of PT Bank CIMB Niaga Tbk Budiman Tanjung also stated that the policy that makes foreigners able to have their own house in Indonesia will become the opportunity to increase the development of KPR industry in the future. However, Mandiri Bank will continue to obey the rules from the government regarding the procurement of KPR for foreigners. In addition, he certainly is doing the internal studies for business models, starting from the acquisition process, underwriting, until collecting.<sup>19</sup>

Considering the debtor is a foreigner, while *ijārah maushūfah fi al-dzimmah* (it is popularly called by IMFZ, an acronym of *ijārah maushūfah fi al-dzimmah*) is a lease agreement on the benefit of an item (*a'in*) or service (charity) that is only mentioned its properties, quantity and quality, (specification) when the agreement is implemented. In addition, IMFZ is a contemporary contract applied to syariah financial institutions. The *ijārah maushūfah fi al-dzimmah* is one of fatwa that was published by The Indonesian Council of Ulama (MUI). The fatwa related to *ijārah maushūfah fi al-dzimmah* is the Fatwa of DSN-MUI No:101/DSN-MUI/X/2016 About Akad Al-Ijārah Al-maushūfah Fi Al-Dzimmah and Fatwa DSN-MUI No:102/DSN-MUI/X/2016 About Al-Ijārah Al-

<sup>19</sup> “Soal Properti Bagi WNA, Bank Tunggu Beleid Pelaksanaan,” beritasatu.com, accessed March 19, 2018, <http://www.beritasatu.com/ekonomi/361530-soal-properti-bagi-wna-bank-tunggu-beleid-pelaksanaan.html>.

maushūfah Fi Al-Dzimmah For Household Financing Products (PPR) -Inden .<sup>21</sup> The *ijārah maushūfah fi al-dzimmah* should be done by these rules, can be handed over, either in an intrinsic or legal manner, agreed upon the time of surrender and its *ijarah* period and accordance with the principles of syariah Moreover, *ijārah maushūfah fi al-dzimmah* is a land with limited use right, as an example of crediting case from PT. Bank Mandiri Tbk Medan Branch where the Bank has already lend to foreign citizen who asked some credit, but the foreigner fled abroad without any responsibility, so that the Mandiri Bank Tbk Medan Branch suffered a big substantial losses. Finally the bank solved the problem with the execution process of mortgage auction.

The reasons for not being able to use the right are :

1. Temporary Period  
Right to use itself has a time period set out in Article 7, Article 8 and Article 9 PMA No. 29 of 2016, which is described in detail at the beginning.
2. Less Interest  
The Land Office Agency in Indonesia is the place where all related to the land in Indonesia, whether it is licensing and disposal of land certificates. The author analyzed the lack of interest in use rights compared with the right to use the building can be seen from the report Volume Issuance of Certificates that have been registered in BPN Branch East Jakarta, Dr. Sumarno Pulogebang East Jakarta, the following attached:
3. Increase Right to Use to other land rights for too long  
Below is the statistical data on the volume of application for the certificate, building rights and property rights in East Jakarta. The authors retrieve data in East Jakarta based on the largest volume of demand from cities across Indonesia..

No.	Year Issue	Right of ownership (HM)	Building rights (HGB)	Right to Use (HP)	Rights Management (HPL)	Right of Waqf (HW)
1	2014	7,703	1,048	146	0	10
2	2015	6,494	1,561	119	1	9
3	2016	6,041	1,335	113	0	17

<b>4</b>	2017	15,913	2,831	156	1	3
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Table 3. Volume on the Issuance of Certificate of East Jakarta BPN Office

Bank preventive law protection can be through Musharaka contract whilst reprenstive law protection after the failure or wanprestasi is by the process specified by each bank rules either in Musyarakah contract or outside musyarakah contract and can be done through Religious Court. Other efforts in dispute settlement are through deliberation, banking mediation, arbitration institution, or through courts within the general judiciary, as long as agreed in the contract by the parties.<sup>20</sup>

The Foreign party according to Article 1 number (2) of PBI No. 18/19/PBI/2016 are mentioned below:<sup>21</sup>

1. "Foreign nationals;
2. Foreign legal entity or other foreign institution;
3. Indonesian citizens who have permanent resident status of another country and are not domiciled in Indonesia;
4. The Bank Offices overseas from Banks that have a head office in Indonesia;
5. The Overseas company offices of companies incorporated as Indonesian legal entities”

### **E. How the Regulations Protect?**

Some of the regulations above illustrate the regulatory protection pattern regarding three dynamic inter-relation among bank protection, credit agreement and foreigners in Indonesia, especially after the issuance of Bank Indonesia Regulation No. 18/19/PBI/2016 concerning Transaction of Foreign Exchange against Rupiah between Banks and Foreign Party. The Existing regulations have two systemic patterns; preventive and repressive.

Firstly, the preventive legal protection. The preventif legal protection is the protection of law before the occurrence of default, the bank is able to perform the legal protection through the credit agreement applied in articles which regulate the rights and obligations of foreigners and creditors in order to better non-default guarantee.

<sup>20</sup> Jundiani, *Pengaturan Hukum Perbankan Syariah Di Indonesia*, 34.

<sup>21</sup> Article 1 Paragraph 2 “Peraturan Bank Indonesia No. 18/19/PBI/2016 Tentang Transaksi Valuta Asing Terhadap Rupiah Antara Bank Dengan Pihak Asing,” Pub. L. No. 184, Tambahan LN No. 5927 (2016).



Practically, the banks have to conduct the credit analysis in order to avoid the bad credit. The bank loans also have some risks, furthermore, in the implementation of credit, the bank should pay attention to the principles of good credit. There are four characteristics of good credit principles such as;<sup>22</sup> bank are not allowed to give credit without any written agreement, bank are not allowed to give credit to any company that do not have a good credibility, bank are not allowed to give credit to buy some share and capital in order to buy any share and bank are not allowed to give credit more than to extend credit beyond the maximum lending limit (legal lending limit). The preventive law protection can be strengthened by *musyarakah* contract.

The preventive legal protection after the failure is according the process from the rules of each bank either in *musyarakah* contract or outside the *musyarakah* contract, and the related legal case could be filed through Religious Court. Other efforts in resolving the dispute are through the deliberation, banking mediation, arbitration institution, or courts within the general judiciary, as long as agreed by the parties.<sup>23</sup>

The legal repressive protection is legal protection after a default (*wanprestasi*), which is divided into two forms, those are; repressive Legal Protection inside the Credit Agreement, it is mentioned that the bank may exercise legal protection such as terminate the credit agreement, reduce the limit on the number of credit facilities and the bank collects the entire debt from the debtor without notice of warning letter; and the Bank shall directly sell the assets pledged by the debtor to the bank either under hand or in public or on auction basis.

Second form is repressive legal Protection outside the Credit Agreement is by way of credit management (credit) in arrears, the bank has a team of collection teams. The collection team implements a billing strategy aimed at maintaining relationships with customers to minimize losses, such as, the service approach to initial arrears and the aggressive approach to future arrears.

According to the result of this study, the revision of the Laws and Regulations is needed since it is used to strengthen the legal

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<sup>22</sup> Ifa Latifa Fitriani, "Jaminan Dan Agunan Dalam Pembiayaan Bank Syariah Dan Kredit Bank Konvensional," *Jurnal Hukum & Pembangunan* 47, no. 1 (March 31, 2017): 134–49, <https://doi.org/10.21143/jhp.vol47.no1.138>.

<sup>23</sup> Jundiani, *Pengaturan Hukum Perbankan Syariah Di Indonesia*, 34.

protection for syariah banks that will provide a credit for foreign citizens. For example, the Minister of Agrarian Affairs and Spatial Planning/Head of National Land Agency of the Republic of Indonesia Number 29 of 2016 Concerning Procedures for the Provision, Release or Transfer of Right to Ownership of Shelter Or Residence by Foreigners Based in Indonesia, especially on the attachment of minimum housing price list or occupancy that can be owned by a foreigner, the author provides a solution to the applicable price limits can be derived; and Bank Indonesia Regulation no. 18/19/PBI/2016 concerning Transaction of Foreign Exchange against Rupiah between Banks with Foreign Parties, especially in Article 16 concerning the allowance of consumption credit for foreigners, but less protective for the Bank as the creditor.

The syariah concept must be able to give a sense of justice for banks and customers in the development of the Indonesian banking system through every transaction or contract or financing agreement in syariah bank using profit-sharing system. It must be distributive and equity that is the participatory-emancipatory business partnership relationship, not a discriminatory subordinate relationship.<sup>24</sup>

## **F. Conclusions**

Based on the discussion above, it can be concluded that Legal protection of the Bank on Consumption Credit Agreement for Foreigners after the issuance of the policy of PBI Regulation No.18/19/PBI/2016 concerning Transaction of Foreign Exchange Against Rupiah against Banks with Foreign Party is through two legal protection; the repressive legal protection, and the preventive legal protection.

Hence, it is recommended that all syariah banks should provide consumer credit facilities for foreigners without fear of risks arising, because by providing these facilities the bank is able to directly contribute in increasing the Indonesian economy which is still developing and establishing, moreover it is also for having an international relationships.

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<sup>24</sup> Renny Supriyatni Bachro, "Perjanjian Bagi Hasil dalam Pembiayaan Syariah yang Berkeadilan Sebagai Salah Satu Upaya Pengembangan Bank Syariah," *Sosiohumaniora* 12, no. 3 (November 2, 2010), <https://doi.org/10.24198/sosiohumaniora.v12i3.11554>.

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