Islamic Banking Dispute Resolution in National Sharia Arbitration Board

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Abstract: Islamic banking dispute can be resolved through the two institutions. The first is litigation path or resolution through the court process and the second is the non-litigation path or sharia arbitration institution. Sharia arbitration authority to examine and to decide disputes in sharia banking is based on the contract agreement of the parties. Therefore, the court is not entitled to review and to determine a case of sharia banking if it has been delegated to the arbitration institution based agreement because it is the choice of the parties to resolve disputes. National sharia arbitration board is non-litigation to investigate and to decide sharia economic disputes in Indonesia including sharia banking. This committee was formed along with the development of sharia financial institutions in Indonesia. Since its establishment, the agency has examined and decided about 24 sharia economic disputes. Legally, the national authority of sharia arbitration as a dispute resolution board of sharia banking has not appointed directly by law in Indonesia. Besides, the execution of the decision of the national Islamic juridical arbitration is still ambiguous, that it causes uncertainty in law enforcement.

Keywords: dispute, islamic banking

1. Introduction

Sharia banking system in Indonesia is realized in the framework of the Indonesian economy system, in particular, according to Law No.7 / 1992 on Banking, for example, applying dual banking system (to accommodate the application of sharia banking in the conventional banking system). Then the law was revised by Law No.10 / 1998 which regulates in detail the legal basis and the types of business that can be operated and implemented by sharia banks. Then it is reinforced by Law No. 21/2008 on sharia Banking. The legal protection has strengthened the existence of sharia banking in Indonesia. The provisions of the legislation were followed by various operational regulations issued by Bank Indonesia based on the fatwa published by the National Sharia Board of the Indonesian Ulama Council (DSN-MUI) as an institution has the authority to justify sharia product of sharia financial institutions in Indonesia.

The presence of the sharia banking law confirms the existence of sharia banking in Indonesia and strengthens the basis of law setting. Therefore all matters relating to the legal base for operations of sharia banking refers to sharia banking law regarding the existence of sharia supervisory board, dispute resolution, and reference in the documentation and legitimacy, as well as the setting of sanctions in case of violations and deviations from regulations. The enactment of Law No. 3 of 2006 on the amendment of Law No. 7 of 1989 renewed in Law No. 50 of 2009 on the Religious Courts has brought significant changes in the existence of Religion Court today. One fundamental difference is the additional authority of Religious Court. It includes authority in mediating and resolving the case as disputes relating to Islamic economics.

Islamic business dispute settlement, including Islamic banking, can be reached through litigation and non-litigation. Litigation is taken by the authority of the religious courts and non-litigation is taken by Alternative Dispute Resolution and Sharia Arbitration Institution. In Indonesia,

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Sharia arbitration institutions are accommodated through one of the units the Indonesian Ulama Council. It is the National Sharia Arbitration Board (Badan Arbitrase Syariah Nasional or BASYARNAS). In the organisational structure, BASYARNAS is in the institutional structure of the Indonesian Ulama Council. it is under the MUI Decree No. Kep-09 / MUI / XII / 2003 on BASYARNAS. This decision puts BASYARNAS as the only one sharia arbitration institution in Indonesia and one organisation of MUI. However, its duties and functions are autonomous and independent.

2. Method

This research used the qualitative method. It integrated library research and field research. It also used content analysis. The study was conducted at the National Sharia Arbitration Board (BASYARNAS) located in Jakarta. This research used interdisciplinary approaches. They were a normative juridical approach, Islamic law approach, and civil law approach. The normative juridical approach examined the laws and regulations of the government relating to Islamic arbitration and alternative dispute resolution in Indonesia. The Islamic law approach analysed fiqh, fatwa, and usul fiqh. Civil law approach analysed law of agreement. Data resources included primary and secondary data. Primary data came from the field study. The data are in the form of information coming from practitioners at the National Sharia Arbitration Board (BASYARNAS), the arbitral council and BASYARNAS decisions, the National Sharia Council of the Indonesian Ulama (DSN-MUI), and academics. The data was the history of BASYARNAS, the legal basis of its formation, competence (jurisdiction), procedural procedures, and some decisions of Indonesian Muamalat Arbitration Board (BAMUI) and BASYARNAS. Besides, primary data sources were also obtained through analysis of some legal materials. They were the primary legal materials covering the provisions of legislation relating to the authority of litigation and non-litigation institutions in settlement of sharia banking disputes. Then, Secondary legal materials included explanations of primary legal materials consisting of research reports and expert opinions. This legal material was processed and analyzed utilizing legal reasoning by using authentic, grammatical, and systematic interpretations. Secondary data came from legislation, Indonesian bank regulations, jurisprudence, fatwas, books, literature, and office documents. These data were obtained through the literature study. The data is also collected through an interview process. The interview was semi-structured. It has researchers conducted interviews with sources relating to this research. Informants in this study include BASYARNAS board, sharia arbiters council, national sharia council (DSN-MUI), and academics as well as practitioners of sharia economy.

3. Findings and Discussion

Financial management based a contract agreement cannot be separated from the potential conflicts lead to disputes due to one party violates a promise. Therefore, to anticipate debate, both banks and customers, as well as the members of sharia banking and other Islamic financial institutions, in 1992 Indonesian Muamalah Arbitration Board (BAMUI) was planned to establish. The establishment was begun by a discussion attended by the experts from academics, legal practitioners, scholars, and practitioners of sharia banking. At the National Workshop of Indonesian Ulama Council in 1992, they recommended to establish Muamalat Arbitration Board and insisted Indonesian Ulama Council immediately realised it. Therefore, on May 4th,1992 Indonesian Ulama Council issued a decree. No. Kep. 392 / MUI / V / 1992 contain the appointment of a working group of an establishment of Indonesia Muamalat Arbitration Board. BAMUI is an independent, autonomous board ensconce in the legal status of a foundation.

The purpose of BASYARNAS establishment is to resolve disputes in civil cases by giving priority to the peace efforts and mediation. The presence of Sharia Arbitration Board also confirms the existence and enforceability of Islamic law in Indonesia because one of the legal proceedings used in the process of dispute resolution is the Islamic law and fiqh muamalat engagement. The number of dispute resolved by BASYARNAS during the period 1997 to 2016 was 24 disputes. They were sharia

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banking disputes with customers, disputes between sharia banks and other sharia banks, sharia insurance disputes, and sharia lodging disputes. The applicant is the sharia banks. It indicates that customer as a party in default or regulation deviation.

The procedural mechanism in Jakarta National Sharia Arbitration Board of pass-through litigants process. The judicial procedure in BASYARNAS, until today, still refer to the rules procedure of Indonesia Muamalat Arbitration Board (BAMUI) approved and finalised on October 21rst, 1993 in Jakarta. The Procedures are applicable in BASYARNAS as follows: (1) The submission of the arbitration process begins with the registration of application letter to organise arbitration by the secretary of BASYARNAS. The application letter at least contains full name and residence of the parties and a brief description of case and demands. The petition file must enclose some documents: (a) a copy of the agreement manuscript gives explicit authority to BASYARNAS order to check and decide the case. (b) The agreement letter contains an arbitration clause. It is provision disputes arising will be settled in BASYARNAS. (2) Application Letter submitted will be checked by BASYARNAS to determine whether BASYARNAS investigate and resolve the arbitration dispute. If the agreement and arbitration clause are considered not entirely be the basis of BASYARNAS authority to examine and to judge the argument, then BASYARNAS will inform that an application cannot be accepted as outlined in a determination issued by the chairman of BASYARNAS before the examination process begins. Conversely, if the application is approved by clause and the arbitration agreement, the chairman of BASYARNAS immediately establish and appoint a single arbitrator or a panel of arbitrators. (3) When the application is accepted, the Chairman of BASYARNAS will appoint the arbitrator selected form arbitrators members registered in BASYARNAS.

Additional terms for sharia arbitrators are: first, a Muslim, obey of his religious teaching and was not affected by the rules of law. Second, an expert in the science and has to experience at least ten years in the field. Third, states to agree and to accept all the provisions contained in the articles of incorporation, bylaws, and regulations of the judicial procedure in front of the board. Fourth, fill out and sign a questionnaire prepared by the board and will to be appointed oath.

The examination dispute arbitration dispute should be completed within 180 days from the arbitrator, or the arbitrator council is formed. This period may be extended following the conditions of the trial. And all things related to the trial cost, such as the witness summons is the responsibility of the party invoking. Limit verdict maximum 30 days after the investigation is closed. Furthermore, the parties are given 14 days after the decision is acceptable to apply mistake corrections or to add or to subtract the verdict related to administration to the arbitrator's board.

The establishment of the arbitration of Islam in Indonesia means to resolve disputes of Islamic financial institutions, both Islamic banking, Islamic insurance, Islamic pledegation and other businesses that are formal, such as the hospitality sharia.Sharia arbitration institution is a form of non-litigation dispute resolution that takes paths of mediation and peace. Law forum selection (choice of forum) in the field of civil dispute resolution has a very significant contribution to reducing the level of cases in litigation institutions. Independent and confidential nature are making it an alternative dispute resolution institutions in the field of business and commerce. Therefore BASYARNAS has a role, including, the first, providing a fair and speedy settlement of the disputes arising mu'amalah and civil cases in the fields of trade, industry and services. Second, at the request of the parties to an agreement, can give a binding opinion on a matter in respect of such contracts.

BASYARNAS jurisdiction competence regulated in BAMUI procedure that includes: (1) Settlement of disputes arising concerning commerce, industry, finance, services and others (2) Provide a binding opinion in the absence of a debate regarding an issue concerning the agreement at the request of the parties. Competence BASYARNAS jurisdiction contained in BASYARNAS procedure under the provisions outlined in Law No. 30/1999 About the Arbitration and Alternative Dispute Resolution Section 2, namely: "These laws regulate the settlement of disputes or differences of opinion between the parties in a particular legal relationship. This has entered into an arbitration

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agreement that expressly states bring all disputes or differences of opinion that arise or which may arise from a particular legal relationship will be settled by way of arbitration or through alternative dispute resolution ". And Article 5 (1) "the dispute can be resolved by arbitration only in trade disputes and the rights according to the legislation and fully controlled by the parties to the dispute".

Act No. 21 of 2008 concerning Islamic Banking Article 55 (2) states that "If the parties have foretold dispute settlement other than those referred to in paragraph (1), the settlement of disputes conducted under the contents of the Agreement". In the explanation of Article 55 (2) states that the definition of "settlement of disputes conducted under the terms of the Agreement" is an effort to, (a) meetings, (b) banking mediation, (c) through Arbitration National Sharia (BASYARNAS) or institution other arbitration, (d) through the courts in the General courts.

Law No. 3 of 2006 on the amendment of Law No. 7 of 1989 On the Religious Courts Religious Courts authorises agencies, among others in the field of Islamic economics. According to Article 49 letter (i), Act No. 3 of 2006 on the Religious Courts Religious Courts confirmed that the duty and authority to examine, hear and resolve cases, including disputes relating to Islamic economics. The sound of the article: "(1) The court of religious duty and authority to examine, decide and resolve cases at the first level between people who are Muslims in the field; (A) marriage. (B) the message. (C) a will. (D) grants. (E) endowments. (F) charity. (G) infaq. (H) Sadaqah. (I) and Islamic economics.

At first glance, there has been a dispute settlement authority dualism Islamic banking. The dualism of authority makes Islamic banking dispute resolution process does not have legal certainty, but one aspect of law enforcement can work well if a legal substance in the form of legislation has legal certainty. Norms conflict is resulting in uncertainty. It is also contrary to Article 28 D (1) of the Law of the Republic of Indonesia Year 1945 which reads: "Everyone has the right to recognition, security, protection and legal certainty and equal treatment before the law".

Legislation Hierarchically, legislation that inferior should not be contrary to the constitution. The theory of the hierarchy of norms proposed by Hans Kelsen asserts that the establishment of a lower legal standard determined by the higher legal norms whose facility is defined by other higher norms, i.e. norms supreme or constitutional basis [8]. Conflicts of this norm can be solved through the Constitutional Court Decision No. 93 / PUU-X / 2012 verdict stated that, first, the elucidation of Article 55 paragraph (2) of Law No. 21 of 2008 concerning Sharia Banking (State Gazette of the Republic of Indonesia Year 2008 Number 94, Supplement to State Gazette of the Republic of Indonesia Number 4867 is contrary to the Constitution of the Republic of Indonesia Year 1945. Second, elucidation of Article 55 paragraph (2) of Law No. 21 of 2008 concerning Sharia Banking (State Gazette of the Republic of Indonesia Year 2008 Number 94, Gazette of the Republic of Indonesia Number 4867 does not have binding legal force.

Based on the decision of the Constitutional Court Number 93 / PUU-X / 2012 regarding testing norm of Article 55 paragraph (2) Oops some things can be inferred. (a) Elucidation of Article 55 paragraph (2) Oops opening forum selection (choice of form) the settlement of disputes, either through litigation institutions, namely the district court and religion, as well as through non-litigation under the terms of the contract. Based on the empirical fact that the choice of the form has a lot of legal uncertainty which may be detrimental to the parties to the dispute, and also contrary to the 1945 Constitution of Article 28 paragraph (1), for the Article 55 paragraph (2) shall not have binding force. (b) Under the provisions of the DSN-MUI fatwa and Bank Indonesia Regulation recommend any contract agreed upon between Islamic banking and the customer always include a clause dispute resolution forum, both litigation and non-litigation. (c) The contract agreementdoesnot state explicitly and concretely dispute resolution forum, it fully into its jurisdiction. (d) In law hirerakis choice dispute resolution forum based contract agreement is the second option if the parties include them in the contract clause of the agreement and do not give authority over Islamic Court. Because the agreement

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is the law for those, who made it as the provisions of Article 1338 of the Civil Code (principle of pactasuntservanda).

Litigation dispute resolution has a clear legal basis, namely the absolute authority of the religious courts. While the dispute settlement non-litigation Islamic economics is based on the agreement of the parties, either through pactum de compromettendo or acte compromise, commonly referred to as submission agreement, i.e. an agreement concerning a dispute that has been going on. While the verdict execution BASYARNAS delegated to the district court according to Law No. 30/1999 About the Arbitration and Alternative Dispute Resolution Section 61 "in case the parties do not implement voluntary arbitration decision, the decision is implemented based on the command Chairman of the Court at the request of the parties to the dispute".

Act No. 48 Year 2009 concerning Judicial Authority Article 59 states that: (1) Arbitrase is how to settle a civil dispute out of court based on the arbitration agreement made in writing by the parties to the dispute, (2) The arbitration decision shall be final and have permanent legal force and binding on the parties, (3) In the event that the parties do not implement voluntary arbitration decision, a decision carried out by court order at the request of the chairman of one of the parties to the dispute.

In the explanation of Article 49 paragraph (1) states that: "what is meant by" arbitration "in this provision, including sharia arbitration.".Legally, the execution verdict BASYARNAS the authority of the District Court. Therefore, there is no dualism related to the execution of the judgement BASYARNAS. This is what happened in the case of PT. Atriumasta Sakti against PT. Bank SyariahMandiri has been completed by the National Sharia Arbitration Board (Basyarnas) on 16 September 2009 No. 16 / Year 2008 / Basyarnas. Basyarnas against the decision has been filed for cancellation to the Religious Court of Central Jakarta by PT. Bank Syariah Mandiri on 10 November 2009 with the provisions of Article 70 and the general explanation Chapter VII of Law - Law No. 30 In 1999, Jo Act - Act No. 3 of 2006 on the Religious Courts Jo SEMA No. 8 of 2008 concerning Arbitration Decision Execution Sharia. Then SEMA 8 of 2008 dated October 10, 2008 is revoked as contrary to article 59, paragraph 3 of Law - Law No. 48 of 2009 on judicial power. Therefore, SEMA No. 8 Year 2008 was declared invalid by SEMA No. 8 of 2010 dated May 20, 2010.

4. Conclusion

Islamic banking dispute resolution can be reached through two institutions, namely (1) litigation. In this case its jurisdiction at all hierarchical levels. (2) The non-litigation or alternative dispute resolution and sharia arbitration. Dispute resolution through sharia arbitration was resolved in the National Sharia Arbitration Board (BASYARNAS). BASYARNAS dispute resolution mechanisms based on the rules of procedure of the National Sharia Arbitration Board (BASYARNAS) and Law No. 30 Year 1999 on Alternative Dispute Resolution and Arbitration. Competence and Authority BASYARNAS in examining and deciding the case in non-litigation Islamic economics is based on the agreement of the parties either through treaties or agreements pactum de comprometindo or acte compromise. Disputes can be settled by arbitration only in trade disputes and the rights according to the legislation and fully controlled by the parties to the debate.

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