

RESOLUTION FORUM OF SYARIAH EKONOMY DISPUTE

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Abstract

Both No. 93/PUU-X/2012 and PERMA No. 14 Year 2016 regulate a forum of resolution for syari'ah economy disputes, particularly the dispute that arises in a contractual relationship between syari'ah banks and their customers, whether in litigation or non-litigation setting. The development of syari'ah banking is still far due to the pressure of globally financial and economy crisis. Therefore, it is the best moment to pursue the development and progress of syari'ah banking by exhibiting the advantages of Islamic economy system that has competence to compete with the conventional ones, especially in terms of customer security assurance in the process of seeking for business dispute resolution which may possibly happen. Such process, however, remains in syari'ah corridor with *kaffah* and *istiqomah* attributes. For people in syari'ah business, all the transactions they do should be under the provisions of syari'ah regulation. An appropriate forum to seek for syari'ah economy dispute resolution is through mediation, given that it is the best one and more reflecting the values of Islam.

Keywords

dispute, syari'ah economy, mediation

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Introduction

The development and progression of human civilization is followed by the increasing needs in every aspect of life. One of those aspects with increasing development and growth is banking. The global financial crisis in 2008 has successfully made syari'ah banking system more popular and brought attractiveness for non-moslem countries. Regardless to its fame, syari'ah banking has such a regulation under Islam Law to be implemented. However, it should be noted that the principle of *profit loss sharing* and the other ones that reflect fairness and transparency has been found as a more-realistic practice. Furthermore, the actual business certainty and the profit sharing that people perceive from syari'ah banking makes it more resilient during economy shock (Imam T Saptono, 2012: 4).

The potensial benefits of syari'ah banking industry for national economic prosperity have been broadly found and perceived in its track records. The development of this industry is progressively rapid and thus giving positive contribution to financial inclusion, especially or those with financial needs for their business, from cooperation up to civil people with no formally financial support.

The development of syari'ah banking, however, is currently decreasing. Its escalation falls from 5% in 2015 due to the pressure of globally financial and economy crisis. Indeed, every challenge during the process of pursuing perfection is a kind of euphoria to reach a better condition. Along with its rapid development, the more complex problems and challenges come over syari'ah banking. One of those is a challenge to compete with other conventional banking (Ryan Kiryanto, 2012: 12).

Reinforcing the development of syari'ah banking industry is not like slicing a cake. Many factors coupled with current economic condition may bring challenge to be addressed by syari'ah banking. The challenges may come from its less implementation of syari'ah principles, an "assumption" on pricing term that it has no competitiveness and limited product variety, and any financial dispute resolution by syari'ah banking.

Ahmad Jauhari argues that the success of a business, especially those with cash transactions, should concern on some essential factors, including: (1) the object selection for business (corresponding to syari'ah terms); (2) completeness on making contract/agreement; and (3) defining the method and forum of dispute resolution in prudent, fair, and efficient way (Ahmad Jauhari, 2017:4).

Problem

Forum of business dispute resolution in syari'ah banking

Discussion

The rapid development of syari'ah banking, particularly in Indonesia, is not apart from practical issues. Regarding to disputes in syari'ah banking, it differs from those in conventional ones, as each of them has specific characteristics and legal base.

Izzudin, in a legal rubric of Bank and Management magazine, argues that a common banking issue is usually about collateral execution (Izzudin, 2012: 49). In particular to the disputes on syari'ah banking, as previously discussed, it differs from those in conventional banking as they have different legal base and standard operational procedures. Thus, the resolution should be *kaffah* by applying the principles of syari'ah within (Abd. Shomad and Trisadini, 2016:16).

There are many factors that evoke financial disputes in syari'ah banking (Christopher W. Moore, 1996:256), including (1) data, (2) interest, (3) relationship, and (4) trust. Those sources of conflict; simplified and classified by Christopher W. Moore, may be useful to analyze the collateral issue in both conventional and syari'ah banking. Although similar issues may arise between them, syariah banking encounters more specific problems as it has its own concept of loan within (Ahmad Fahmi Shahab, 2010:2). In this case, the dispute resolution forum in Islamic economy setting is classified into two types; litigation and non-litigation.

Resolution of Syari'ah-Based Agreement Disputes through Litigation

In general, the official instances to seek for dispute resolution through litigation setting are as follow.

- a. **Public Court.** It is an official courts with an authority to bring resolution (i.e., conducting verification and judgment) for both common civil and criminal cases.
- b. **Religion Court.** It is one of juridical upholder for justice seekers, especially for Moslems, on particular cases. In this setting, the principle of Islamic personality is applied (Ahmad Jauhari, 2017:4).

Both public and religion courts are independent from whether or not the case to solve. It is different from arbitrase body which existence depends on whether or not a written agreement among the disputing parties who seek for resolution through arbitration.

The juridical competence on dispute resolution is under Regulation of Religion Court, particularly in Article 49 of Act No. 3 Year 2006 about the Amendment of Act No. 7 Year 1989 that religion court is authorized to solve syariah economy disputes. Article 49 of Act No. 3 Year 2006 mentions that Religion Court is authorized to verify, judge, and solve first-level cases among Moslems in (1) marriage; (2) heir; (3) testament; (4) grant; (5) waqf; (6) *zakat, infaq, shodaqoh*; and (7) syari'ah economy.

However, Religion Court Regulation does not furtherly set syari'ah economy, which is actually one of its competences. Many experts agree that the issue related to civil disputes in syari'ah banking is classified into religion court's scope, while any crime of syari'ah banking remains on public court's absolute competence (Izzudin, 2012:50).

Toward the juridical competence in solving syariah banking cases, it reveals many criticisms for a while due to inconsistency on regulation established. For instance, the provision of Article 59 subsection (1) and (3) of Act No. 48 Year 2009 mention that

when the resolution through arbitration is not implemented, it will no longer under religion court, and thus, it will be implemented based on the order of chairman of public court or on request of one of the disputing parties. This provision omit the absolute competence of religion court as the provision of Article 49 subsection (1) of Act No. 7 Year 1989 as amended by Act No. 3 Year 2006 *jo.* Act No. 50 Year 2009.

The inconsistency on religion court's absolute competence is apparent in the explanation of Article 55 subsection (2) of Act No. 21 Year 2008 as well. Dispute resolution based on "the content of contract" is an attempt to seek for resolution through (1) forum; (2) banking mediation; (3) National Syariah Arbitration Department or another arbitration instance; and/or (4) Public Court.

With two authorized bodies (i.e., Religion Court and Public Court), uncertainty may arise and thus injuring people constitutional rights, in case of syariah economy disputes (Haeruddin, 2017:1). The ambiguity on defining a forum of syari'ah dispute resolution is clearly addressed through Constitutional Court Decree based on the result of material test submission for the explanation of Article 55 subsection (2) letter (d) of Act No. 21 Year 2008. The Decree No. 93/PUU-X/2012 mentions that Article 55 subsection (2) of Act No. 21 Year 2008 is found against the Constitution 1945, and thus, it has no binding legal power.

It is similar to what the Supreme Court has mentioned in PERMA No. 14 Year 2016 about the Resolution Procedures of Syari'ah Economy Dispute. Article 1 subsection (6) of this Act mentions that the court this PERMA refer to is Religion Court. Furthermore, Article 1 subsection (7) of this Act mentions that the judges are on the first-level in Religion Court with syari'ah economy certification. In addition, Article 13 subsection (1) states that the implementation of verdict for syari'ah economy disputes, collateral rights, and fiduciary with syari'ah-based agreement is executed by Religion Court. Therefore, the competence of Religion Court is absolutely as a forum for business and syari'ah banking dispute resolution between the bank and customers.

Resolution of Syari'ah-Based Agreement Disputes through Non-Litigation Way

The Regulation of Bank Indonesia has required the process of dispute resolution through non-litigation setting. This is as mentioned by a clause in Article 4 subsection (3) PBI 9/19/PBI/2007 about the Implementation of Syari'ah Principles in Fund Collecting and Distribution Activities as well as the Services by Syari'ah Bank. This Article defines Syari'ah Arbitration as the subsequent process when neither mediation nor forum reaches any resolution. Therefore, it may be inferred that the process of banking dispute resolution by non-litigation setting should go through several stages, including: (1) forum; (2) mediation, including banking mediation; and (3) syari'ah arbitration (i.e., *Basyarnas*). In fact, people in syariah banking prefer having the process of dispute resolution through non-litigation setting rather than through litigation process.

A. Forum

Dispute resolution through forum is basically having a dialogue / discussion between two disputing parties by prioritising the principle of kinship. Islam does suggest its followers to solve any disputes through forum for consent. By organizing a forum to seek for dispute resolution in business, it may reveal a good relationship among the disputing parties, as well as saving much time and cost (Mardani, 2013:25).

B. Syari'ah Arbitration (BASYARNAS)

In order to anticipate the likelihood of disputes in Syari'ah Economy/ Islam-based economy business, Indonesia Ulama Council (i.e., *Majelis Ulama Indonesia*), in 1414H/1993M organized *BAMUI* (i.e., Indonesia Muamalat Arbitration Department), or currently known as *BASYARNAS* (i.e., National Syariah Arbitration Department). It is a permanent and independent department as means of Indonesia Ulama Council (i.e., MUI). Following Mariam Darus Badruzaman, the organization of *BASYARNAS* is very appropriate, since businesses with Islam-based operation system may use this department to solve their disputes through arbitration. It is a legal instrument that solves disputes in the scope of both Syariah and another setting in needs.

The definition of arbitration, as mentioned in Act No. 30 Year 1999 about Arbitration and Alternative Resolutions of Dispute, is a resolution method for civil cases through non-litigation setting and based on an arbitration agreement the disputing parties have made in written. Following Sayid Sabiq, SYARIAH ARBITRATION, known as *tahkim* in Islam Law, is an agreement to settle any dispute between two parties (Ahmad Jauhari, 2017:4). On the other hand, Satria Effendi M Zen defines that *tahkim* is a dispute resolution by *hakam* the disputing parties have selected in order to settle their disputes, and they should follow any resolution the *Hakam* has set for (Ahmad Jauhari, 2017:4).

Dispute resolution through arbitration system/through Arbitration Body should be based on the written agreement among the disputing parties. With such agreement, the disputing parties have agreed to nullify their rights to not file the dispute to either Public Court or Religion Court. The result of Syariah Arbitration is final and binding.

Further progress on the position and recognition of *BASYARNAS* after the enactment of PBI 9/19/PBI/2007 is the establishment of Circular Letter of the Supreme Court No. 8 Year 2008 about the execution of the final result from Syariah Arbitration Department. In number (4) of the Circular Letter, it is clearly mentioned that, in case that the result of Syari'ah Arbitration is not voluntarily implemented, and at request of one of the disputing parties, the chairman of authorized Religion Court enjoins on the execution of that result. SEMA No. 8 year 2008 is no longer available due to the revision of Act No. 4 Year 2004 into Act No. 48 Year 2009 about Judicial Power. The explanation of Article 59 mentions that the arbitration result on Syariah Arbitration is executed under mandate of the chairman of Public Court.

On May 2010, the Supreme Court established SEMA No. 8 Year 2010 about the confirmation of NO LONGER APPLYING the Circular Letter of the Supreme Court No. 08 Year 2008 about the Execution of the result of Syariah Arbitration. Some

criticisms on the inconsistency of those regulations reveal. In 2016, PERMA No. 14 Year 2016 about the Resolution Procedures for Syariah Economy Disputes established. As mentioned in Article 13 subsection (2) and (3), the PERMA has legitimated the legal assurance for the existence and obligation of using BASYARNAS as a non-litigation alternative resolution for Islamic economy business disputes. The *Fatwa* of Syariah Committee of MUI recommends that it is beneficial to use arbitration for solving any non-cash business disputes.

Mediation (*Ishlah*)/*Shulh*/Reconciliation)

Another alternative resolution for syariah business dispute is through mediation (i.e., *ishlah* or reconciliation). Etimologically, the term 'mediation' derives from Latin '*mediare*' that refers to 'in between.' This meaning refers to the role of the third party as a mediator to conduct his task as one mediating the disputing parties to reach a resolution. "Standing in Between" refers that the mediator should be neutral, not partial, in solving the dispute. he should fairly consider the interest of both disputing parties, and thus evoking trust from the disputing parties (Christopher W. More, 1996:253).

In the concept of partnership in *muamalah* relationship, the element of *trustee* is very dominant and functioned as means for people to implement the agreement they made. Islam highly appreciates and upholds the principle of mutual trust and good faith. Therefore, non-litigation setting is considered as an appropriate way to solve any disputes. The process of non-litigation resolution needs to be put on consideration in order to reach the expected resolution, and another benefit of this method is the final result with full of peacefulness and family-alike.

Therefore, when the disputing parties have selected another forum that does not fit the principles of Islam Law, although the agreement is recorded in a contract between the customer and the syariah bank, the agreement that injure the principle of Islam Law is neither justified nor applied. Although the principle of *freedom of contract* is the primary base in Contract Law, it indicates that the contracting parties are free to determine the content, type, and settlement mechanism of their agreement (Christopher W. More, 1996:250). The freedom of contract in case of selecting the institution for dispute resolution in syariah banking remains non-absolute (Abd. Shomad and Trisadini P usanti, 2006:8).

It is similar to the provision of Article 55 subsection (3) of Syariah Banking Law No. 21 Year 2008 that (3) dispute resolution as mentioned in subsection (2) is not allowed against the principle of syariah." This provision is absolute that whatever agreed in a contract, even in a standard agreement, remains in syariah corridor.

Conclusion

Having material test on Article 55 subsection (2) of Act No. 21 Year 2008 about Syariah Banking to Constitutional Court under the Decree No. 93/PUU-X/2012, it defines that Religion Court is the only official department with an authority to give resolution for

syariah economy dispute, whether through litigation or non-litigation setting. It is supported by PERMA No. 14 Year 2016.

Suggestion

It is important for every individual in relation to syariah banking to see the actual purpose of the presence of syariah banking as a syariah-oriented business entity. For its dispute resolution, it is expected to use clear clauses about non-adjudicative resolution methods, including negotiation and mediation. Therefore, it needs to be clarified on the procedures and stages of its implementation.

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