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Dispute Resolutions Mechanisms for Islamic Banks in Indonesia

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Abstract

The rapid growth of Islamic banking and finance industry demanded an improvement in terms of standards, frameworks, policies, technologies, resources, and guidelines in order to go beyond without compromising the core values of Islam itself. In the context of legal framework of Islamic banking and finance, it is most likely that this industry needs to be highly regulated in order to avoid manipulation and abuse by irresponsible parties. One of the crucial issues in the area of Islamic banks in Indonesia is regarding the dispute resolution mechanism for Islamic banks. Based on Indonesian positive law, there are two alternative dispute resolution mechanisms that can be exercised to settle disputes in the cases involving Islamic Financial Institutions (IFIs) namely through litigation or non-litigation. Litigation comes under the jurisdiction of the Religious Court. The researcher in this study is looking deeper into the dispute resolution mechanism for Islamic banks in Indonesia and going through several decided cases. And based on the study done, it was found that alternative dispute resolution mechanism is more effective to resolve Islamic bank disputes rather than litigation. In the future, researchers may conduct more researches to examine deeper about the dispute resolution mechanism for the whole Islamic economics and finance in Indonesia. Moreover, researchers need to look at the regulators' and legislators' perception towards dispute resolution and legal environment.

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I. Introduction

1.1. Background

Indonesia, as the country with the largest Muslim population in the world is witnessing the growth of Islamic banks. Initially, the Indonesian Banking Act No. 14 of 1967 did not provide any provision for the establishment of Islamic banks in Indonesia. However, in 1992 the Act was amended by the Indonesian Banking Act No. 7 of 1992. Islamic banks were formally established in Indonesia under the enactment of the same Act. The first Islamic bank in Indonesia was Bank Muamalat Indonesia, which was established on 1 May 1992. Although the amendment allowed Islamic banks to be established, there were still no detailed rules in terms of Shariah principles for banking, for example, the amendment recognized that banks operate under the "profit-sharing principle" (Masykur, 2017). According to the Indonesian Government regulation number 72 of 1992, profit sharing is in accordance with Shariah principles which are used by the bank to:

1. stipulate the compensation to be given to the community in connection with the use / utilization of public funds entrusted to them;
2. stipulate the compensation to be received in connection with the provision of funds to the public in the form of financing for both investment and working capital purposes; and
3. determine the remuneration in connection with other business activities commonly conducted by banks on a profit-sharing basis.

Further impetus and support for Islamic banks were via the Amendments of Banking Act No. 10 of 1998. Finally, in 2008, the Indonesian Government established a dedicated law for Islamic banking, the Islamic Banking Act No. 21 of 2008. According to Article 4 Paragraph 1 of the Act, Indonesia has a dual banking system. This means that the country has two banking systems running, the conventional and Islamic banking systems. It is interesting to note that in Indonesian context, the term used to refer to Islamic banking is Shariah banking. However, for the ease of discussion in this paper, the general terminology used is Islamic banking.

Islamic Banking have been growing rapidly in Indonesia since the first IB was established in 1992. As of October 2020, there are 14 Shariah Commercial Banks, 20 Shariah Business Units and 163 Shariah Rural Banks established as per data from Otoritas Jasa Keuangan (OJK). In terms of assets, as of October 2020, Islamic Banks' assets in Indonesia stood at Rp 571.177 trillion, an increase of RP 71.196 trillion from Sept 2018. In term of structure, Shariah Commercial Banks still dominate in term of share of asset by 66.85%, followed by Shariah Business Units with 33.14%. (Otoritas Jasa Keuangan, 2020)

For the growth of Islamic banks in Indonesia, the Indonesian Government has set up a target for Islamic banks to reach 10.9% market shares in 2019 (National Development Planning Agency, 2015). However, as of Sept 2019, Islamic Banks in Indonesia only managed to reach 6.01% market shares (Nordiansyah, 2019). The current growth of Islamic banks in Indonesia poses legal challenges to the current legal system. This includes laws governing both Islamic banks and dispute resolution for Islamic banks. Disputes can happen between Islamic banks and their customers such as defaults in payments or in terms of financing facilities. Dispute resolution in Islamic banks is regulated under Chapter IX Article 55 of the Islamic Banking Act No. 21 of 2008. That Act provides that:

1. Settlement of disputes of Sharia (Islamic) banking is conducted by a trial in the Religious Court.
2. In the case that the parties have already agreed with the settlement of disputes besides as considered in paragraph (1), the dispute settlement shall be according to the content of Akad (contract).
3. Settlement of disputes as considered in paragraph (2) may not be contrary to the Shariah Principles.

Article 55 provides two ways to settle disputes in Islamic banks, through the Religious Court or through other alternative dispute resolution mechanisms as long as they are not contrary to the Shariah principles. The alternative dispute resolution mechanisms that can be chosen are mutual understanding, mediation, and arbitration.

This study contributes to a better understanding of dispute resolution for Islamic banks in Indonesia. This study examines not only the laws and regulations on dispute resolution for Islamic banks in Indonesia, but also the issues and challenges faced by Islamic bank practitioners in this regard. Furthermore, this study will also analyze the trends in dispute resolution by the courts and through alternative dispute resolution for Islamic banks.

1.2. Objectives of Study

This study aims to discuss and explore dispute resolution for IBs according to Indonesian Law. Specifically, it attempts to:

1. Examine the dispute resolution mechanisms for Islamic Banks (IBs) in Indonesia
2. Identify issues faced by the Religious Court being the main platform for dispute resolution
3. Provide recommendation for effective implementation of dispute resolution

1.3. Significance of the Study

This study can benefit regulators, academics and also the public. Regulators can use the findings to help them make informed decision and formulate regulations that can further enhance dispute resolution for Islamic Banks in Indonesia. Academics can use the findings to benchmark, explore and add to literature on dispute resolution for Islamic Banks in Indonesia. The public such as Islamic Bank practitioners, stakeholders as well as customers can use this study to understand and protect their rights and obligation in disputes.

Meanwhile, Islamic Banks can use the findings as a source of information to provide better customer protection. Through this, they can build customer loyalty, instill customer trust and grow their business further.

1.4. Organization of Study

This study consists of five chapters. Chapter 1 introduces the study and consists of Introduction, Background, Problem Statements, Research Objective, Research Questions, Significance of the Study, the Organization of Study.

Chapter II covers the literature review of the study. It provides an overview of disputes faced by Indonesian Islamic Banks, dispute resolution from the Islamic perspective as well as dispute resolution for IBs in Indonesia.

Chapter III covers the research methodology of the study. This chapter discusses about the research method applied for the study. It also provides the description of the data and the method of analysis.

Chapter IV discusses the findings of the study. The findings are from library research, interviews on dispute resolution for Islamic Banks in Indonesia.

Chapter V provides overall conclusion and recommendation of the study on dispute resolution for Islamic Banks in Indonesia.

II. Literature Review

2.1. Islamic Banking Disputes

A dispute refers to a conflict between a party and another that has something to do with a valuable right, such as money or venture (Kolopaking, 2013). Furthermore, Ali (2004) stated that a dispute or conflict is a situation where there are two or more parties fighting for their own position, each of the party

pressuring the other party and each of them failing to come to a consensus but still fighting for their own goals.

Meanwhile, in the context of Islamic Banks, Suadi (2018) defined that Islamic Banks dispute as a business dispute. Islamic Banks disputes can happen before or after the Akad is agreed to by the parties. For example, the dispute could be due to the price of the goods in the contract, or because of the object of the Akad in the respective contract being used.

2.1.1. Types of Islamic Banking Disputes in Indonesia

In the previous section, Suadi (2018) defined that Islamic Banks dispute is a business dispute and the dispute can happen before or after the Akad are agreed to by the parties. Furthermore, he identified there are five types of disputes or conflicts involving Islamic Banks namely:

1. Data Conflict
This conflict could happen because there is lack of information, or misinformation, or differences in interpreting the information.

2. Interest Conflict
This conflict could happen because of several issues, such as:

i. There exist competitive feelings
ii. There is substantial interest involving the parties
iii. There is procedural interest
iv. There is psychological interest

3. Relationship Conflict
This conflict could happen because there is strong emotion, poor communication, miscommunication and repeated negative behavior.

4. Structural Conflict
This conflict could be happen because there is a pattern that destroys the behavior or interaction, unequal control, unequal distribution of resources or any other factors from the environment that could hinder cooperation.

5. Value Conflict
This conflict could happen because one party judges using their own values without considering the values of the other party.

2.1.2. Factors that cause Islamic Banking Disputes

Suadi (2018) mentioned that there are two main factors that often cause disputes involving IBs. The two factors are:

1. The process of Akad formation is based on a misunderstanding in the business process because the business is driven is driven purely by profit
2. The Akad is hard to implement, because:
   i. Parties were careless during negotiations
   ii. Both parties lack expertise in coming up with the terms of the Akad
   iii. Not expecting risks that could arise in the future
   iv. Both of parties weren't honest during the negotiation of the Akad

Furthermore, there are some Akads that can potentially lead to disputes in the future such as:

1. One of the party discovering a fact that there is a requirement in the Akad that cannot be fulfilled by the party
2. One of the party terminating the contract without the consent of the other party
3. One of the party not getting rewarded as already agreed
4. There is act against the law
5. There is *force majeure* when making the Akad

Other examples of disputes involving IBs are:

1. Banks neglected to return customers' funds in *Wadiah* contract
2. Bank unilaterally decreased customers' share of profit in Mudharabah contract
3. Customers commit fraud by failure to disclose truthfully their business when they request for financing from IBs. For example, telling the bank that they are running a coffee shop, although they are actually operating a brewery.

Perwanataatmadja (1992) stated that there are four factors that could lead to disputes in *Murabahah* contracts like:

1. Customer's negligent or customer's default
2. Most courts cases are caused by customers defaulting or unable to pay back their financing to IBs. These may arise due to various factors, e.g. customers can default in their payments because their business has failed because of natural disasters. Customers fail to understand the *Murabahah* contract

   Some customers do not understand the *Murabahah* contract that they sign up for. IBs may have failed to explain the contract clearly and in detail prior to customers taking up the facilities.
3. *Murabahah* contract is *fasid*

Disputes in *Murabahah* can also arise due the contract or *Akad* being made based on fraud or trickery resulting in the contract being considered *fasid*. A *fasid* contract is null and void, meaning the contract is illegal from the beginning and there is no contract.

2.2. Dispute Resolutions for Islamic Banks in Indonesia

Sufiarina (2013) stated that dispute resolution is a way, method or mechanism selected by the disputing parties to obtain a solution to settle disputes. Dispute resolution involving Islamic banks is regulated under Chapter IX Article 55 of the Islamic Banking Act No. 21 of 2008. It states that:

1. Settlement of disputes of Shariah (Islamic) banking is conducted by a trial in the Religious Court.
2. In the case that the parties have already agreed with the settlement of disputes besides as considered in paragraph (1), the dispute settlement shall be according to the content of Akad (contract).
3. Settlement of disputes as considered in paragraph (2) may not be contrary to the Shariah principles.

According to Article 55, there are generally two ways to resolve Islamic bank disputes in Indonesia, through litigation on non-litigation (alternative dispute resolution). For litigation, the jurisdiction is with the Religious Court.

Meanwhile, for alternative dispute resolution, the Act states that Islamic banks can resort to the following alternative dispute resolution mechanisms:

a. Mutual understanding
   Antonio (2001) stated that the first choice to settle dispute in Islamic banks is through mutual understanding. This process can occur when the disputing parties sit in the same forum to resolve the dispute and agree to choose the best solution for settling the dispute. In mutual understanding, there is no third-party involvement in the dispute. The session only involves the Islamic bank and the party that has the dispute with the bank. Mutual understanding is only effective when both parties act in good faith to settle the dispute.
b. Mediation
   Another type of alternative dispute resolution that can be taken to settle Islamic bank disputes is via mediation.
c. The National Sharia Arbitration Board (*Basyarnas*) or other arbitration institution
   Basyarnas is an institution established to examine Islamic bank disputes via arbitration. Initially, it was meant to facilitate Bank Muamalat Indonesia to settle its disputes.

d. A commercial court
One of the options of alternative dispute resolution above is considered contentious i.e. the possibility of choosing a commercial court to settle Islamic bank disputes. This contradicts Article 55 paragraph (1) that places dispute resolution for Islamic banks under the jurisdiction of the Religious Court. To resolve this issue, on 19 October 2012, Dadang Achmad (Director of CV. Benua Enginering Consultant) filed a case in the Constitutional Court of Indonesia to conduct a judicial review about this matter. The judicial review conducted by the Constitutional Court held that commercial courts does not have the jurisdiction to handle any Islamic bank disputes (Constitutional Court Proceedings, case No.93/PUU-X/2012).

III. Methodology

3.1. Type of Study

This study is mainly based on qualitative research. This approach describes a phenomenon in which data is usually gathered through open-ended questions, focus groups, or more commonly by conducting interviews. Qualitative research usually involves a small number of participants due to limited time and resources (Oloyo, 2001). Small number of participants usually consists of non-representative cases where the respondents are chosen to achieve a pre-set quota (Mertens, 2008). For data analysis, qualitative approaches do not involve statistics, while statistics is vital for the analysis of data collected using the qualitative approach, since findings are descriptive in nature (Weber, 1990).

3.2. Data Collection

Since this study is a qualitative research, it is primarily a library research where data is collected from both primary and secondary sources. According to Kothar (2004), library research includes analysis of recorded notes, content analysis, tape and film reviews and analysis. Library research also includes analysis of documents such as statistical compilations and manipulations, references and abstract guides. In this study, primary sources of data are gathered from statutes, especially all statutes related to Islamic Banks and dispute resolution mechanisms in Indonesia and case laws, such as the proceedings of the Constitutional Court No. 93/PUU-X/2012. Books and articles are used as secondary sources of data.

The study also tries to empirically find out and confirm several aspects related to IB and dispute resolution mechanisms that could not be attained from

literature, regulations and documentaries. Interviews were conducted to collect data from experts like judges, lawyers and arbitrators involved in the resolution of Islamic Banks related disputes in Indonesia.

3.3. Data Analysis

The method of data analysis applied in this study was analytical and/or interpretative analysis. The collected data were classified proportionally into theories and framework related to Islamic Banks in Indonesia as well as data related to dispute resolution mechanisms in Indonesia. Having classified these, the data were legally interpreted and analyzed.

3.4. Justification for the Methodology

This study investigates and examines the legal framework for dispute resolution for IBs in Indonesia in order to ascertain a comprehensive position on its advantages and disadvantages. A deep understanding of the legal framework related to dispute resolution involving IBs in Indonesia enables the researcher to assess and draw the proper conclusions for the study.

4. Analysis

4.1. Dispute Resolution for Islamic Banks through Litigation

4.1.1. Jurisdiction

Dispute resolution through litigation is a mechanism to solve a dispute through a court proceeding (Fuady, 2005). Article 55 Paragraph (1) of the Islamic Banking Act No. 21 of 2008 recognized the jurisdiction of the Religious Court to examine and decide Islamic bank disputes. In response to this, the Government then amended the Religious Court Act in 2006 by Act No. 3 of 2006 to strengthen the authority of the Religious Court to handle Islamic bank cases. The same Act was amended again for the second time in 2009 by Act No. 50 of 2009. Article 49 of Religious Court Act No. 3 of 2006 stated that the Religious Court has the competence to check, decide and resolve any disputes in the matter of:

1. Marriage
2. Inheritance
3. Will
4. *Hibah*
5. Waqf
6. Zakat
7. *Infaq*

8. *Shadaqah*
9. Shariah Economics

Three new competencies were added for the aforementioned amendment compared to the previous Religious Court Act No. 7 of 1989 in the areas of Zakat, *Infaq* and Shariah economics. The Religious Court Act stated that Shariah economics covers:

1. Islamic Banking
2. Islamic Microfinance
3. Islamic Insurance
4. Islamic Reinsurance
5. Islamic Mutual Funds
6. Islamic Bond or Sukuk
7. Islamic Medium-Term Securities
8. Islamic Securities
9. Islamic Funding
10. Islamic Pawn
11. Islamic Pension Fund
12. Islamic Business

Undoubtedly, this provision has clarified and expanded the jurisdiction of the Religious Court which now covers the resolution of disputes in Islamic economics, including Islamic banks (Masykur, 2017). The amendments give the Religious Court more authority and legal certainty to handle Islamic bank disputes.

4.1.2. Processes involved in Examining Islamic Banking Disputes by the Religious Court

Even though Islamic bank disputes are being examined in the Religious Court, the processes in the court are still subject to Indonesian Civil Procedural Law (Latief, 2015). Interestingly, it is observed that the provisions in the Civil Procedural Law do not contravene too much against Shariah principles. There are some grey areas such as the issue of penalty deemed as Riba in the Shariah, but generally it is still in line with it. The processes involved in the Religious Court to examine Islamic bank disputes are as follows:

1. Hearing of the plaintiff's claim.
2. Answering process. The defendant responses to the plaintiff's claim.
3. Plaintiff's replication.
4. Defendant's rejoinder.
5. Submission of proof. Both the plaintiff and defendant submit their evidences to support their claims.
6. Conclusion. The case proceeds to conclusion from both the plaintiff and defendant.
7. Judge's decision. The judges will do their duty to decide.
8. Judge's verdict. The judges give their verdict about the case.

The illustrative explanation of the process is provided in the Figure 1.

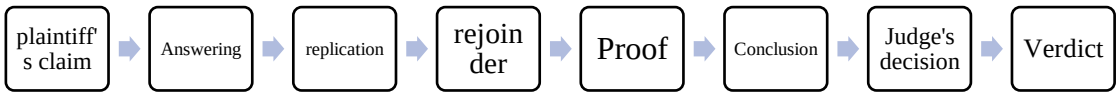

Figure 1. Process in the Religious Court

The responsibility to determine a proper law to be applied to a case being examined in a trial remains a difficult task. Manan (2005) stated that a judge is expected to understand all the laws available (ius curia novit). However, in reality, a judge cannot be expected to understand all the laws available because laws come in many forms and types.

This can also happen to judges in the Religious Court. Some judges may not properly understand Islamic banking, for example about the details of types of Akad that are used in Islamic bank facilities or agreements. Nonetheless, the law provides a solution to this since judges are allowed to refer to DSN-MUI to get better insight and understanding about Islamic banking. They may invite a member of DSN-MUI to come to the court as an expert witness. DSN-MUI is responsible to help judges by giving their expert opinion. This responsibility is mentioned in their establishment, Act No. Kep-754/MUI/II/1999. DSN-MUI has also actively trained judges based on a collaboration program between DSN-MUI and Ministry of Justice and Human Rights.

Konradus (2016) stated that the whole testimony from the expert witness in the court will help a judge to understand more about the case and these testimonies are not binding on them. This means that a judge is not bound to deliver a verdict according to the testimony from the experts.

4.1.3. Advantages and Disadvantages of Litigation

Hasan (2010) stated that there are at least five advantages of empowering the Religious Court in Indonesia to handle Islamic banks cases, which are:

1. The judges in the Religious Court are able to understand Shariah disputes.
2. The Religious Court has adequate substantive law, especially in the case of Shariah economics.
3. The Religious Court has branches all over Indonesia.
4. The Religious Court has the peoples' support, especially from Muslims who make up the majority in Indonesia.

5. The Religious Court has full political support from the Government proven by the enactment of the Religious Court Act No. 3 of 2006.
6. The Religious Court has support from the central bank and also from IFIs in Indonesia.

In terms of disadvantages, Hasan (2010) mentioned two things that affect the ability of the Religious Court to handle Islamic bank cases, i.e.:

(i) There is no clear regulation or act that regulates Shariah economics in Indonesia. Supriyatni (2010) stated that in such absence, the Religious Court is dependent on books in *Fiqh Muamalat* in deciding cases.
(ii) Judges in the Religious Court may have good understanding pertaining to Shariah disputes, but they lack understanding and knowledge of economics, especially about Islamic bank activities.

Besides the disadvantages above, Arto (2015) cited five juridical constraints, namely:

(i) Limitation of laws and regulations, which especially govern the competency of the Religious Court and the availability of procedural law.
(ii) Laws and regulations that conflicts with each other.
(iii) Incomplete laws and regulations that are difficult to implement.
(iv) A gap between the competencies provided by the law to the Religious Courts and the competencies that are required by a developing society.
(v) Absence of legislation that governs certain issues being brought to the Court.

Based on those disadvantages, Fariana (2015) and Manan (2012) found that the Religious Court faces two further issues in handling Islamic bank cases, which include:

(i) Because of the absence of procedural law for the Religious Court, it still uses the same civil procedural law applicable in the General Court.
(ii) There is no strong awareness amongst the judges in the Religious Court that they act as the organ in the court of law.

4.2. Dispute Resolution for Islamic Banks through Arbitration

4.2.1. Jurisdiction

According to Article 55 Paragraph (2) of the Islamic Banking Act No. 21 of 2008, arbitration can be utilized to resolve any Islamic bank disputes. These disputes can be handled by the National Shariah Arbitration Board (*BASYARNAS*) or any other arbitration body as long as it does not go against the Shariah principles. All Islamic bank disputes can go to arbitration as long as the parties in the contract allow for its use in case of disputes (Ka'bah, 2013).

The main reason behind the establishment of *BASYARNAS* is to handle all disputes between the first Islamic bank in Indonesia, Bank Muamalat, and its customers. *BASYARNAS* was established on 21 October 1993 under the name of Indonesian Muamalat Arbitration Board (*Badan Arbitrase Muamalat Indonesia – BAMUI*). The name has changed into *BASYARNAS* since 24 December 2003. The change was meant to accommodate other Islamic banks besides Bank Muamalat due to the industry's rapid growth. The renamed body is called the National Shariah Arbitration Board.

4.2.2. The Process of Arbitration in Examining Islamic Banking Disputes

The process of arbitration is regulated under the Arbitration Rules and Procedures issued by Badan Arbitrase Nasional Indonesia (BANI) or Indonesian National Arbitration Center (Badan Arbitrase Nasional Indonesia, 2018). The process consists of the following steps:

1. Registration
   After receiving the request for arbitration and documents as well as the registration fee required, the Secretariat shall register the petition in the BANI register.
2. Arbitration Review
   The Board of BANI shall review the request for arbitration to determine whether or not the arbitration agreement or arbitration clause in the contract is adequate to provide a basis of authority for BANI to examine the dispute.
   a. Response of Respondent
      i. If the Board determines that BANI is authorized to examine the dispute, then after registration of the request for arbitration, one or more Secretaries of the Tribunal shall be designated to assist in the administration of the arbitration case.
      ii. The Secretariat shall give a copy of the request for arbitration and the attached documents to the respondent, and request the respondent to submit his written response within a period of no longer than thirty days.
      iii. Within a period of no longer than thirty days after receiving the submission of petition for arbitration, the respondent shall be obliged to submit its reply. In the reply, the respondent may designate an arbitrator or hand over the designation to the BANI Chairman. If, in the reply, the respondent does not designate an arbitrator, then it shall be considered that the designation has absolutely been handed over to the BANI Chairman.
      iv. The BANI Chairman shall be authorized, at the request of the respondent, to extend the period for submission of reply and or the

designation of an arbitrator by the respondent with legitimate grounds on the condition that the extension of period may not exceed fourteen days. The BANI Chairman shall be authorized at the request of the respondent, to extend the time limit of the Reply of the Respondent at the latest by the first arbitration hearing.

b. Arbitration Proceedings

i. Authority of Tribunal

After the formation or designation, the Arbitration Tribunal shall examine and rule on the dispute between the parties on behalf of BANI and therefore, may exercise all of the authority possessed by BANI in connection with the examination and passing of resolutions on the dispute in question. Before and during the proceeding period, the Tribunal may make a legitimate effort to encourage amicable resolution of dispute between the parties. The effort to achieve amicable resolution shall not affect the deadline of examination in the proceeding.

ii. Confidentiality

All proceedings shall be conducted closed to the public, and all matters related to the arbitral reference, including documents, reports/notes on sessions, testimonies of witnesses and awards, shall be kept in strict confidence among the parties, the arbitrators and BANI, except to the extent required by law or otherwise as may be agreed by all parties in the dispute.

iii. Natural Justice

Subject to these rules and applicable law, the Arbitration Tribunal or the sole arbitrator may conduct the arbitration in any manner as it considers appropriate provided that the parties are treated equally and that at any stage of the proceedings, each party is given a fair and equal opportunity of presenting its case.

iv. Place of Hearings

Hearings shall be conducted at a place determined by BANI and the agreement of the parties but may also be at another place if the Tribunal deems necessary with the agreement of the parties. The Arbitration Tribunal may request that meetings be held to examine assets, other goods, or documents at any time and at the required place, with notice as required to the parties, to allow them to be able to attend the examination. Internal meetings and sessions of the Tribunal may be held at any time and place, including over the internet, if the Tribunal deems appropriate.

c. Execution of Arbitration Award
   Execution of arbitration award must be conducted according to the command of the Chairman of the Court. Since the dispute involves Islamic banks, according to the Religious Court Act No. 3 of 2006, it falls under the jurisdiction of the Religious Court. Therefore, any arbitration award in any Islamic bank dispute must get the approval from the Chairman of Religious Court if the parties want to execute the arbitration award.

Similar to the Religious Court, if the arbitrators in the arbitration do not have adequate knowledge regarding Shariah matters in Islamic banking, they can refer to DSN-MUI and may invite a member of the DSN-MUI to become an expert witness. The expert witness must ensure that confidentiality of the dispute must be observed. This is based on Article 49 of the Arbitration Act No. 30 of 1999 which stated that the arbitrators are allowed to get an expert witness to give testimony about the case, based on the request of the parties.

4.2.3. Advantages and Disadvantages of Choosing Arbitration

Umar and Kardono (1995) and Suadi (2017) stated that arbitration is advantageous for both parties as:

1. Arbitration provides predictability and certainty in dispute resolution.
2. If the arbitrator is competent enough in handling the case, then the parties can have trust in arbitration to settle their dispute.
3. Both parties can have privacy in settling disputes through arbitration. Privacy is the most important reason for parties to choose arbitration.
4. Any result of arbitration is final and binding on both parties and the results must be executed.
5. Arbitration can be cheaper and faster than litigation when settling disputes.
6. Both parties can freely choose their “choice of law”, the process and the place to settle their dispute.

In term of disadvantages, Prakoso (2017) stated that one of the main problems of arbitration in Indonesia is that any outcome of an arbitration cannot be legally enforced, and if an agreement is to be legally enforced, it must be registered first with the court. The court may disagree with the agreement rendering it null and void. Nonetheless, the Religious Court cannot be just freely canceling any of arbitration outcomes. Widjaja and Yani (2003) stated that the Religious Court can cancel the decision made in the arbitration if it does not satisfy the following requirements:

1. The arbitrators who are examining and deciding the dispute are opted and agreed upon the will and wishes of the parties.

2. The disputes which are settled by the arbitration are legally allowed to be examined and decided by the way of arbitration.
3. Any outcome that comes out of the arbitration process is according to the law and not against the public order.

Based on the analysis above, arbitration process is considered simpler and more effective than litigation. The most important advantage of arbitration that is preferred by Islamic banks is that arbitration process is carried out confidentially. Therefore, Islamic banks still can protect their reputation from the risks that arise by having a dispute.

4.3. Dispute Resolutions for Islamic Banks through Mediation

4.3.1. Jurisdiction

Mediation is a mechanism to solve disputes through a third party from a neutral standpoint. The third party is called a mediator. According to Spencer & Brogan (2006), there are five principles of mediation namely:

1. Confidentiality
   Everything that occurs in mediation must remain confidential between the parties and mediators. Mediators must preserve the confidentiality of the mediation. Hence, they cannot share any of its results with the media, and/or anyone not involved in the mediation.
2. Volunteer
   All the parties in the dispute must voluntarily choose to settle their dispute through mediation. Mediation will not work if there is force or coercion from/on any party.
3. Empowerment
   This principle assumes that anyone seeking mediation has the ability to settle the dispute and reaches an agreement independently and as desired. The parties must be empowered to settle and accept any solutions pertaining to the dispute.
4. Neutrality
   The mediators should only act as facilitators for the parties in the dispute. The mediators must be neutral and cannot side with any party in the dispute. Mediators cannot act like judges in litigation because they cannot decide whether a party is right or wrong. Therefore, the parties in the dispute remain responsible to obtain the solutions and settle the dispute.
5. A Unique Solution
   Solution for a dispute from mediation need not be according to the rulebook or a legal standard, and it can be a creative solution. Consequently, a solution from mediation will generally be more suitable with the desires of the parties in the dispute.

In addition to the five principles above, Rahmadi (2010) stated that there are three essential elements of mediation namely:

1) Mediation is a way to settle a dispute by the way of negotiation in order to find a win-win solution for all the parties in the dispute.
2) All the parties in the dispute are asking for help from a neutral third-party as a mediator.
3) Mediators do not have the authority to decide. Their authority is only to assist all the parties in the dispute to find solution/s to settle their dispute.

In Indonesia, mediation is governed under the Supreme Court Regulation No. 1 of 2008 concerning mediation. According to the regulation, mediation can be utilized inside court proceedings or outside court proceedings. The regulation stipulates that every judge must order all parties to go through mediation before court proceedings start. However, Basir (2009) stated that there are 3 disputes that cannot be resolved through mediation namely inheritance disputes, *hibah* disputes and disputes over someone's status.

Based on that Supreme Court Regulation, it was stated that the requirements to be a mediator are:

1) If a judge wants to be a mediator, then he cannot be the judge who is handling the case.
2) A mediator must be an advocate or law practitioner.
3) Non-legal practitioners must have the expertise in the area of the dispute.
4) It can be a mixture of the above.

All of the parties above can become mediators as long as they are able to obtain a mediator certificate from training hosted by the Supreme Court. The responsibilities of a mediator include:

1) Arranging the date for the mediation process to begin;
2) Advising the parties to be active during the mediation;
3) Advising the parties to explore more about their dispute and find the most effective ways to settle their dispute;
4) Facilitating the parties to prepare an agreement to settle their dispute.; and
5) Making a written report to the judge if the mediation process fails.

As for banking mediation, it is regulated under the Central Bank Circular Letter No. 10/1/PBI/2008 dated 30 January 2008. The Letter states that mediation for Islamic bank disputes can be carried out inside or outside the court. Mediation can be chosen as the way to settle disputes only if the dispute involves financial loss with the maximum value of Rp 500,000,000 (five hundred million Rupiah).

After the induction of the Financial Services Authorities (OJK) in January 2014, banking mediation implements the Circular Letter No. 1/POJK.07/2014 on Alternative Dispute Resolution in Financial Sector. This Letter does not cancel the previous Letter from the Central Bank (the Circular Letter No. 10/1/PBI/2008 dated 30 January 2008), and the rules about mediation from the Letter are still relevant. By virtue of this Letter, an institution called *Lembaga Alternative Penyelesaian Sengketa Perbankan Indonesia* (Institution of Alternative Dispute Resolution for Banking) was established. Any mediation for Islamic banks outside the court is examined by this institution.

4.3.2. The Process of Mediation in Examining Islamic Banking Dispute

Mediation can be conducted inside or outside the court. If the mediation is done inside the court, it means that the case has already been examined in the court and the mediator is usually the same judge. On the contrary, if the mediation is carried out outside the court, it means that the parties do not bring their case to the court and chose mediation to solve it.

4.3.2.1. Process of Mediation Inside the Court

Figure 2 will show the process of mediation inside the court.

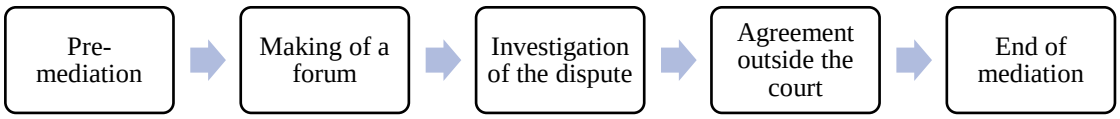

Figure 2. Process of Mediation Inside the Court in Examining Islamic Banking Disputes
Source: Makarim, 2018

1) Pre-Mediation
   Parties in the dispute register their case with the court. The Head of the Religious Court chooses the judges to handle the case. On the first day at the court, the judges will command that the case go through mediation. In this pre-mediation, the parties will choose a mediator. Usually, the court already has a list of names of persons who can mediate. If in two days the parties cannot choose the mediator, the judges will select one for them.
2) Making of a Forum
   In five days after the parties choose the mediator, the mediator will choose a date to invite the parties to make a forum. In the forum, the mediator and the parties will sit together and discuss the case. The mediator commands that the parties come without their lawyers. This forum is held in order for the mediator handling the case to gain the trust from the parties.

3) Investigation of the Dispute
   A caucus can be used by a mediator to investigate the case. Caucus means that a mediator holds a meeting with one of the parties in the dispute. In the meeting, each party in the dispute will reveal everything about the case which cannot be revealed in the forum. After that meeting, the mediator will process any facts and data, develop information, explore the parties, and make a judgement about the case as well as finally try to solve the dispute.
4) Final Completion
   In this phase, the parties in the dispute will state their interests in an agreement. The mediator will accommodate all the interests from both parties and put them inside the agreement. According to Article 23 verse (3) of the Supreme Court Regulation about Mediation, the things provided inside the agreement must:
   a) accommodate all the parties' interest;
   b) be in accordance with the law and regulation;
   c) not be harmful to the third party;
   d) be able to be executed; and
   e) be with good consent.
5) Agreement Outside the Court
   Any agreement reached through mediation can be registered with the court for the purpose of legitimizing the agreement. If they reach a mediation agreement, they will not continue with the court proceedings.
6) End of Mediation
   The mediation can be declared as completed once it reaches either one of the two situations namely:
   a) The parties reach an agreement to settle their dispute; or
   b) The mediation process fails and the parties continue with the court proceedings.

4.3.2.2. The Process of Mediation Outside the Court

Harun (2010) stated that mediation outside the court begins with the mediator asking for the parties in the dispute to explain all the facts pertaining to their dispute. This can be carried out in writing or orally. If the parties in the dispute agree with all the terms and conditions explained by the mediator, they will have to sign an agreement of mediation. This agreement of mediation contains statement from the parties to obey all the terms and conditions of the mediation and to obey all the results coming from the mediation. All the results from the mediation will be written in the form of deed of agreement.

This process will take a maximum of thirty days. This period starts when the parties sign the agreement of mediation until they sign the deed of agreement. This period can be extended for maximum another thirty days as long as all the parties agree to extend the mediation period.

4.3.3. Advantages and Disadvantages of Mediation

Lestari (2013) and Korah (2013) stated that mediation has the following advantages:

1. Mediation is private and confidential;
2. Mediation is cheaper than settling the dispute in the court;
3. Mediation is faster and easier compared to the court proceedings; and
4. The solution will be fair to both parties because the mediator will facilitate the parties in the dispute to find a "win-win solution" for both.

Harahap, Runtung, Azwar, and Barus (2014) stated that there are two main disadvantages for choosing mediation namely (i) the parties need not be properly equipped with procedural laws; and (ii) people still do not believe in mediation. Until now, there is no specific law in Indonesia which governs mediation for general cases. For settling Islamic bank disputes, mediation is governed by the Supreme Court Regulation No. 1 of 2008.

A lot of people still believe that mediation will not effectively settle a dispute. People still believe that mediation is costly and they cannot enforce the resolution because it does not have a legal standing like a court ruling. This could be due to the fact that there are not enough mediation experts in Islamic banks and lack of publicity and information regarding mediation. Public in Indonesia are still not accustomed to mediation (Ichsan, 2015). In view of this, more resources and active publication are necessitated to support mediation in light of the rapid development of Islamic banks in Indonesia.

V. Conclusion and Recommendation

5.1. Conclusion

According to Article 55 of the Islamic Banking Act No. 21 of 2008, disputes can be resolved by way of litigation conducted in the Religious Court. If the Akad allows the parties to settle their dispute through alternative dispute resolution, it must not go against any Shariah Principles. Alternative dispute resolution mechanisms that are allowed to be employed by Islamic banks are through:

a. Mutual understanding;
b. Banking mediation;
c. The National Sharia Arbitration Board (*Basyarnas*) or other arbitration institution.

Based on the result of this study, alternative dispute resolution mechanisms, especially arbitration and mediation, are better and more efficient compared to litigation in handling Islamic bank disputes. Alternative dispute resolution can expedite cases compared to litigation whilst maintaining privacy and confidentiality. However, people in Indonesia still prefer litigation over alternative dispute resolution because people still trust litigation more than alternative dispute resolution.

Most of the disputes involving Islamic banks are cases of default by customers in their payments to Islamic banks. After the default, Islamic banks will issue three warnings to a Debtor. If the debtor fails to respond at all, then the Islamic banks will realize the debtor's collateral through an auction. Disputes can arise if the debtor feels that the auction by the Islamic banks is unfair and unlawful.

Table 1, Table 2, and Table 3, shows the differences between Litigation, Arbitration and Mediation in handling Islamic bank disputes:

Table 1. Differences between Litigation, Arbitration and Mediation in handling Islamic bank disputes (Definition, Process, Regulation)

	Litigation	Arbitration	Mediation
Definition	The process of settling a dispute by taking the case to a court of law so that judgement can be made in order to settle the dispute.	The way of settling a dispute by an impartial person (called arbitrator) without resorting to the court.	The attempt to settle a legal dispute through active participation of a third party (mediator) who works to find points of agreement and make those in conflict agree on a fair result.
Process	a. Hearing of the plaintiff's claims. b. Answering process. The defendant responses to the plaintiff's claim. c. Plaintiff's replication. d. Defendant's rejoinder. e. Submission of proof. Both the plaintiff and defendant submit their evidence to support their claims. f. Conclusion. The case proceeds to conclusion from both plaintiff and defendant. g. Judge's decision. The judges will do their duty to decide h. Judge's verdict. The judges give their verdict about the case.	a. Registration b. Response of Respondent c. Arbitration Proceedings d. Execution of Arbitration Award	a. Pre-Mediation b. Making of a Forum c. Investigation of the Dispute d. Final Completion e. Agreement Outside the Court f. End of Mediation
Regulation	a. Article 55 Paragraph (1) of the Islamic Banking Act b. The Religious Court Act in 2006 (Act No. 3 of 2006). c. The Religious Court Act (Act No. 50 of 2009).	a. Article 55 paragraph (2) of the Islamic Banking (Act No. 21 of 2008) b. The Arbitration and Alternative Dispute Resolution Act (Act No. 30 of 1999) c. The Circular Letter No. 1/POJK.07/2014 regarding Alternative Dispute Resolution in Financial Sector	a. Article 55 paragraph (2) of the Islamic Banking Act No. 21 of 2008 b. The Arbitration and Alternative Dispute Resolution Act No. 30 of 1999 c. The Supreme Court Regulation No. 1 of 2008 concerning mediation d. The Circular Letter No. 1/POJK.07/2014 regarding Alternative Dispute Resolution in Financial Sector

Table 2. Differences between Litigation, Arbitration and Mediation in handling Islamic bank disputes (Advantages & Disadvantage)

	Litigation	Arbitration	Mediation
Advantages & Disadvantage	Advantages: (i) The judges in the Religious Court are able to understand Shariah disputes. (ii) The Religious Court has adequate substantive law, especially in the case of Shariah economics. (iii) The Religious Court has branches all over Indonesia. (iv) The Religious Court has the peoples' support, especially from Muslims who make up the majority in Indonesia. (v) The Religious Court has full political support from the Government proven by the enactment of the Religious Court Act No. 3 of 2006. (vi) The Religious Court has the support from the central bank and also from IFIs in Indonesia. Disadvantages: (i) There is no clear regulation or act that clearly regulates Shariah economics in Indonesia. (ii) Judges in the Religious Court may have good understanding pertaining to Shariah disputes, but they lack understanding and knowledge of economics, especially about Islamic bank activities.	Advantages: (i) Arbitration provides predictability and certainty in dispute resolution. (ii) If the arbitrator is competent enough in handling the case, then the parties can have trust in arbitration to settle their dispute. (iii) Both parties can have privacy in settling disputes through arbitration. Privacy is the most important reason for parties to choose arbitration. (iv) Any result of arbitration is final and binding on both parties and the results must be executed. (v) Arbitration can be cheaper and faster than litigation when settling disputes. (vi) Both parties can freely choose their "choice of law", the process and the place to settle their dispute. Disadvantages: (i) Any outcome of an arbitration cannot be legally enforced, and if an agreement is to be legally enforced, it must be registered first with the Court.	Advantages: (i) Mediation process is private and confidential. (ii) Mediation is cheaper than settling in the court. (iii) Mediation is faster and easier compared to the court proceedings. (iv) Solution will be fair to both parties because the mediator will facilitate the parties in the dispute to find a "win-win solution" for both. Disadvantages: (i) There are not enough experts in Islamic banks. Hence, more resources are required to support mediation in light of the rapid development of Islamic banks in Indonesia. (ii) There is lack of publicity and information regarding mediation. In addition, people in Indonesia are still not accustomed to mediation.

Table 3. Differences between Litigation, Arbitration and Mediation in handling Islamic bank disputes (Outcomes)

	Litigation	Arbitration	Mediation
Outcomes	The judgment comes with the power to execute. The judgment is made by judges in the Religious Court. Only one party wins. All of the outcomes are final and legally binding to all parties in the dispute.	The judgment needs to be endorsed by Chief of the Religious Court to be legally executable. The judgment is made by an arbitrator selected by the parties. The outcome is a "win-win" solution.	The solution for settling a dispute is agreed by the parties with the assistance from a mediator. All the outcomes from mediation are more like suggestions to both parties and are not legally binding them. The outcomes must be a "win-win" solution for all the parties in the dispute.

5.2. Recommendation

Based on the result of this study, there are some recommendations that can improve dispute resolution involving Islamic banks in Indonesia such as:

1. For both litigation and alternative dispute resolution, more resources should be allocated, especially for judges, arbitrators and mediators through better training in Islamic bank matters.
2. For alternative dispute resolution, especially for *BASYARNAS* in arbitration and/or any other mediation form, they should do more public awareness and training programs for both the people and legal practitioners, so that they will be able to understand more and get used to alternative dispute resolution to settle disputes
3. For litigation, based on the interviews with Mr. Amran Suadi (Saudi, 2019), the author of the book entitled Litigation as A Method to Settling Islamic Bank Dispute, published in 2019, there are various efforts needed to enhance the capability of the Religious Court to handle Islamic bank disputes better such as:
    a. Improving judges' capability in Islamic economics, especially their Islamic bank knowledge through:
        i. Holding certification training for the judges in Islamic economics in partnership with the central bank, Islamic banks, Ministry of Finance and the Otoritas Jasa Keuangan;
        ii. Sending judges for short courses, especially to Middle Eastern countries with more developed Islamic finance industry;
        iii. Holding regular legal and academic discussions with well-known Islamic banks and Islamic finance scholars, stakeholders and practitioners; and
        iv. Providing technical guidance to the Religious Court in handling Islamic bank issues.

b. Setting up formal and material legal rules for Islamic banks.
   v. In terms of material legal rules, the Supreme Court issues the "Kompilasi Hukum Ekonomi Syariah" as a guidance for Religious Court judges to help them decide Islamic bank disputes;
   vi. In terms of practical guidance, the Supreme Court on 22 December 2016 introduced the Supreme Court Regulation No. 14 covering the procedures in handling Islamic economics disputes;
   vii. The decided cases are compiled to serve as a guidance or reference for judges in handling Islamic bank disputes; and
   viii. All fatwa, guidelines and regulations from DSN-MUI, the Central Bank and OJK pertaining to Islamic Bank are collected.

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