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Sharia Banking Dispute Settlement through the Litigation Process

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Abstract

This research aims to find out the way to resolve disputes in Islamic Banking through a litigation process. Normative legal research is the method used in this research. This method is to collect the secondary data through literature study by reading the Act, literature book, and the documents that are relative to the topic of this study discussed. The data obtained from the processing of library data was analyzed qualitatively. The treatment of Islamic economic cases, in a simple way, is based on the Regulation of the Supreme Court Number 2 of 2015 concerning the Procedure for a Simple Claims Court. The trial for examining Islamic economic cases at the Court is open to the public unless otherwise stipulated by law. This is based on the provisions of Article 19 paragraph (1) of Law Number 4 of 2004 that has been changed in Article 13 of Law Number 48 of 2009 concerning Judicial Power. This provision applies to the hearing of the Islamic banking dispute examination, also. In the common trial examination, this Islamic economic dispute occurs when both parties to the dispute or through their proxies are present at the first trial and/or subsequent trial. Before holding the trial, mediation is firstly conducted to find a solution, then the next stage was the examination of the subject matter and the opportunity to answer between the Applicant and Respondent. Based on the provisions of Article 178 HIR / Article 189 RBg, when the case examination is completed, the Panel of Judges, based on their position, conducts deliberation to make a decision to be applied. For the decision of Islamic Banking stating that the Applicant's claim is accepted, the Respondent can apply to the Appeal before Cassation or Judicial Review..

Keywords: Dispute Resolution, Islamic Banking, Litigation

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Introduction

The development of the Islamic banking and finance industry in Indonesia in the past decade has progressed very rapidly. Among them are sharia banking, sharia insurance, *Baitul Mal wat Tamwil* (BMT). Likewise, sharia business activities in the real sector, such as sharia hotels, sharia swimming pools, sharia multilevel marketing, and so on. According to data from Bank Indonesia, the development of Islamic banking has made spectacular progress. Prior to 1999, the number of Islamic banks was very limited, in fact there was only one Islamic bank, namely *Bank Muamalat Indonesia* with several branch offices. Through a report by the *Bank Indonesia* Team that as of January 2008 showed that the number of Sharia Commercial Banks (BUS) was 3 units, namely Bank Muamalat Indonesia (BMI), Bank Syariah Mandiri (BSM), and Bank Syariah Mega Indonesia (BSMI). The number of Sharia Business Units (UUS) from conventional banks is 26 units, Sharia Rural Banks (BPRS) are 114 units, and a network of sharia bank service offices is 711 units (Rika Delfa Yona, 2014)

This calculation does not include the number of Baitul Mal wat Tamwil, sharia hotels, sharia pawnshops, and others which are also starting to mushroom in this country. Furthermore, based on data from BI as of February 2011, Indonesia now has 11 BUS, 23 UUS, and 115 BPRS (YS, 2011). Of the total Islamic banks above, there are 6 million customers who have successfully partnered with them. The number of workers (HR)

absorbed to work at these Islamic banks reaches more than 20 thousand people. Total assets of all Bank Syariah Mandiri, as of December 2010 and then have reached Rp. 100.26 trillion, or about 3% of the market share (YS, 2011).

Seeing the development of Islamic banking and financial institutions is so fast, but in terms of law or legislation that regulates it is still far behind. One of them is the regulation related to the settlement of sharia banking business disputes. In this case, there are still juridical problems, namely the dualism of judicial authority in the settlement of sharia banking disputes. This authority is still a matter of controversy both in academia and practice. That this authority becomes a conflict between the Religious Courts and the General Courts (Material of the National Seminar on the Association of Sharia Scholars and Scientists, 2011). Such conditions have the potential for legal uncertainty in the Islamic Banking industry, to the disputing parties, both Islamic banks and their customers, will face their own dilemma in choosing between the two judicial institutions. The formulation of the problem in writing this research is how to resolve disputes in Islamic banking through the litigation process.

Materials and Methods

This research is a normative legal research, namely an approach based on applicable laws and regulations (Marzuki: 2017). The specifications of this research are included in the category of legal research that is descriptive analytical, namely a study that seeks to describe legal problems, the legal system and examine or analyze them according to the needs of the research. (Soekanto, 1986) The method of collecting data using secondary data through literature study is reading from the applicable legislation, literature books and documents related to the problems to be discussed. Data processing based on the obtained literature data is then analyzed qualitatively so that conclusions will be obtained from the problems that have been determined

Results and Discussion

In Islamic banking activities, disputes can occur between Islamic banks and customers. In general, the main factor in the occurrence of disputes is due to the non-fulfillment of the contract that has been agreed between the Islamic bank and the customer or the non-fulfillment of sharia principles in the contract (Mujahidin, 2010). In relation to the contract (contract), according to (Suadi, 2017), there are several forms of contracts that can cause disputes so that they must be wary of, the forms of these contracts are as follows:

a. One of the parties found the fact that the conditions of a contract, both subjective and objective conditions, were not fulfilled, thus demanding the cancellation of the contract;
b. The contract is terminated by one of the parties without the consent of the other party, and there are differences of opinion in the interpretation of the contents of the contract by the parties so that it creates a legal dispute;
c. Because one of the parties does not fulfill the performance as agreed;
d. The occurrence of an unlawful act (onrechtmatige daad); and
e. There is an unexpected risk at the time of making the contract/force majeure /overmach.

The resolution of Sharia banking disputes The Constitutional Court's decision is essentially expected to provide legal certainty. Judges of the Constitutional Court must be careful and wise in issuing a decision. The decision of the Constitutional Court Number 93/PUU-X/2012 regarding the authority to settle disputes over sharia banking is deemed appropriate, deciding that the settlement of sharia banking disputes must go through a religious court in accordance with its absolute competence,

As regulated in Law Number 3 of 2006 concerning Religious Courts. In other words, the decision of the Constitutional Court has eliminated the dualism of sharia banking dispute resolution, and strengthened the existence of the religious courts as the only judicial institution authorized to resolve sharia banking disputes. But on the other hand, the decision of the Constitutional Court gave rise to a new interpretation. The decision of the Constitutional Court only abolished the Elucidation of Article 55 paragraph (2) of Law Number 21 concerning Sharia Banking, but did not abolish the article. So that it opens up opportunities for the disputing parties to continue to settle their disputes in the district court. (Abdul Rasyid & Tiska Andita Putri, 2019)

Settlement of Sharia Banking disputes In the litigation process based on Supreme Court Regulation Number 14 of 2016 provides two possibilities for handling sharia economic cases, the simple way and the usual way. The handling of sharia economic cases in a simple way refers to the Supreme Court Regulation Number 2 of 2015 concerning Simple Lawsuit Procedures. HM. Hatta Ali said that a simple lawsuit or the term Small Claim Court was adopted from the judicial system, one of which was implemented in London, England (Irawan et al, 2018).

The principle of a simple, fast and low cost trial consists of three elements, namely simple, fast and low cost, in this paper the author will examine each of these elements through a study of the views of experts. The first element that the author will examine through this paper is a simple element. According to Sudikno Mertokusumo, what is meant by simple is an event that is clear, easy to understand and not complicated (Mertokusumo: 2006). Ridwan Mansyur and D.Y. Witanto, explained that the principle of simple justice implies that a stage of the process is carried out through a simple and uncomplicated mechanism, easy to understand and also easy for people from any group background to live (Mansyur and Witanto, 2017).

These reasons then motivated the Supreme Court to issue a new regulation that was more accommodating and more fulfilled the principles of fast, simple and low-cost justice. According to John Baldwin, the Small Claim Court is an informal, simple and low-cost court, and has less binding legal force. In this case, litigants are expected to present their own cases without the assistance of a lawyer and judge, encouraged to take a more intensive approach. (Fakhriah, 2012).

Sharia economic disputes are basically caused by two things: First, because one of the parties breaks a promise (default) or problems related to pure debt disputes. Second, because of an unlawful act against the agreed agreement. The purpose of dispute resolution on these two matters is to enforce the law which contains the value of legal justice, the value of legal certainty, and the value of legal benefits. (Ihwanudin, 2016). The Religious Courts is one of the pillars of judicial power which has the duty and authority to examine, hear and settle certain cases based on Islamic law (Sutomo et al, 2016).

In The legal system theory, there are three divisions of the legal system. Lawrence M. Friedman argues that the effectiveness and success of law enforcement depends on three elements of the legal system, namely the legal structure, legal substance and legal culture (Friedman, 2009). The simple, fast and low cost judicial principle contained in the Small Claim Court system is actually an implementation of a legal principle that has been explicitly regulated in Article 58 paragraph (2) of Law Number 7 of 1989 in conjunction with Law Number 3 of 2006 concerning Religious Court. This law requires judges to assist justice seekers and strive to overcome all obstacles and obstacles in order to achieve a simple, fast and low cost trial.

In handling Small Claim Court cases or simple lawsuits, it also has distinctive characteristics as regulated in Supreme Court Regulation Number 2 of 2015 concerning

Procedures for Settlement of Simple Lawsuits. Some of the distinctive characteristics of the Small Claim Court or Simple Lawsuit are as follows:

1. The case settlement time is limited to a maximum of 25 working days from the first day of trial;
2. The case is processed by a single judge;
3. There are no cases concerning disputes over land rights and cases whose settlement has been regulated through special courts based on statutory regulations;
4. Only covers cases concerning default or unlawful acts;
5. The amount of the lawsuit cannot be more than Rp. 200,000,000 (two hundred million rupiah);
6. The plaintiff and the defendant must be in the jurisdiction of the same court;
7. In the simple lawsuit procedural law, the plaintiff can register his claim by using a blank or claim form available at the court clerk's office;
8. The number of plaintiffs and defendants cannot be more than one person, unless they have the same legal interest;
9. The Defendant must clearly know the address of his place of residence;
10. The plaintiff and the defendant must be present in person in every trial process;
11. In the procedural law of a simple lawsuit, prior to the determination of the trial day, a preliminary examination is carried out by the judge, in order to determine whether the lawsuit filed is classified as a simple lawsuit;
12. In the Small Claim Court or a simple lawsuit, reconciliation efforts must still be made, but the implementation of the reconciliation is excluded from the provisions of the Supreme Court Regulation which regulates mediation;
13. Simple lawsuits do not recognize appeals, cassation and judicial review. The available legal remedies are objections, which are carried out at the court of first instance with the examination of the panel of judges.

By observing the views of the experts as described previously and comparing them with the characteristics of the Small Claim Court, it can be concluded that the Small Claim Court is a form of embodiment of the principle of justice which is simple, fast and low cost. The relative authority or to determine which Religious Court is authorized to handle the sharia banking dispute that occurs can be used in two ways. First, the lawsuit can be submitted to the Religious Court which is in charge of the place of residence or residence of the plaintiff, or Second, the lawsuit can be submitted to the Religious Court which has jurisdiction over the residence or residence of the defendant (Widiana, 2001) If the defendant is more than one person or several people the defendant, the lawsuit can be submitted to the Religious Court where the defendant is the main debtor. Based on Article 118 paragraph (2) HIR, this exception can also be deviated if in the agreement it has been determined by the parties who are litigating about their domicile or which court has the right to handle the cases of the parties (Sarwono, 2011).

In making a lawsuit, the parties must fulfill the provisions of the formal requirements of the lawsuit, so that it fulfills a clear formulation of the lawsuit. A lawsuit can be filed either in writing or orally (Bambang, 2013). According to Article 118 of the HIR, a lawsuit must be filed with a written lawsuit signed by the Plaintiff or his Representative and in Article 120 of the HIR, a lawsuit for those who are illiterate is filed verbally to the Chief Justice of the Court who is authorized to adjudicate the lawsuit. The formal requirements are as follows:

1. Identity of the parties The identity of the parties shall include names and titles or aliases or nicknames, bin/bint, age, religion, occupation, last place of residence and status as Plaintiff/Defendant, if cumulative is subjective; Plaintiff 1, Plaintiff 2 and so on. If there is a power of attorney, the identity of the power holder must be stated. (Rashid, 1991)

2. Fundamentum Petendi, means the basis of the lawsuit or the basis of the claim (*grondslag van de lis*). In judicial practice, there are several terms that are familiarly used, namely: positum or posita of a lawsuit, and in Indonesian it is called the argument of a lawsuit. Posita or argument of the lawsuit is the basis for examination and settlement of cases. Examination and settlement must not deviate from the argument of the lawsuit. Regarding the formulation of posita, there are two theories:
   a. Substantierings Theorie, which teaches that the argument of a lawsuit is not enough to only formulate the legal event that forms the basis of the claim, but also must explain the facts that preceded the legal event that caused the legal event to arise.
   b. Individualisering Theorie, which explains the legal events or events presented in the lawsuit, must clearly show the legal relationship (rechtsverhouding) on which the claim is based. The merging of the two theories in the formulation of the lawsuit, to avoid the formulation of vague arguments for the lawsuit or Obscuur Libel or dark lawsuits (Harahap, 2004)
3. Petitum Lawsuit Petitum is the subject matter of the lawsuit, which is filed. This claim is based on the arguments of the lawsuit (posita), in other words, the petitum and the posita must match (synchronous) and the petitum and posita must not be compatible, let alone contradict each other. The submission of a lawsuit that has been submitted by the parties is then processed by the Religious Courts in the following order:
4. Pre-trial stage of case registration The party who has made a lawsuit can file a lawsuit to the Registrar of the Religious Courts where the defendant lives or where the plaintiff lives according to the agreement in the contents of the agreement.
5. Registration can be done by coming directly to the Registrar of the Religious Courts, which will then be entered in the case register book and given a case number after the party who submits has paid the down-payment of court fees that have been estimated by the Religious Court Officer, or registration through electronic registration, as per the Court Regulations Agung Number 1 of 2019 which is the first regulation that accommodates the possibility of filing cases by utilizing the internet in the Religious Courts environment through the e-Court application.
6. Determination of the Panel of Judges The appointment of the Panel of Judges who will examine a case submitted to the Religious Court is the right and authority of the Head of the Religious Court.
7. Determination of the Appointment of the Session Registrar/Substitute Registrar of the Substitute Registrar/Senior Registrar appointed by the Chairperson of the Assembly ordered by the Chairperson of the Religious Court. The function of the Substitute Registrar is to assist the judge, record the proceedings, make the minutes of the trial, determination, decision and carry out all orders of the Judge in terms of resolving the case.
8. Determination of Session Day (PHS) and Summons of the Parties When determining the trial day, the Panel of Judges should consider the distance between the residence or residence of both parties from the place of the Religious Court session. The first session that has been determined, the Chairperson of the Assembly instructs the bailiff of the Religious Court to summon the parties to attend at the time and place that has been determined. The time between the summons of the parties and the day of the trial shall not be less than three days. When the letter meets these conditions, the summons is categorized with proper and official terms.

The trial stage The trial of the case examination in the Court is open to the public, unless otherwise stipulated by law. This is in accordance with the provisions of Article 19 paragraph (1) of Law Number 4 of 2004, which has been amended in Article 13 of Law Number 48 of 2009 concerning Judicial Power. This provision also applies to the trial of the examination of sharia banking disputes, because there are no provisions found in the Law or Regulations relating to sharia banking or the procedures for their settlement which regulates the closing of the hearing of the examination of sharia economic disputes in the Religious Courts.

Special Trial Examination Procedure A special examination procedure can be carried out by the Religious Court if it occurs in three possible cases in the case, namely: First, with respect to the case being aborted In Article 124 HIR, it is explained that if the Plaintiff has been properly summoned, he is not present at the trial without representing him, then the lawsuit is dismissed and the Plaintiff is sentenced to pay court fees, but the Plaintiff has the right to submit his lawsuit again after paying the court fees. It is said to be a special event in this fall case because the decision to fall is taken by the panel of judges without going through the stages of further examination. Second, the case is canceled. The case can be canceled by the panel of judges, if the plaintiff has been present at the first trial, but at the trial -the next trial never came again. It is said to be special because the panel of judges has issued a decision in the form of annulment without any further examination of the main case. So that in the contents of the decision, the panel of judges has not entered into the main considerations of the case, Third, with respect to the verstek case in Article 125 HIR/149 RBg, a special event in this verstek case is carried out if in the following days the defendant is never present, even though the defendant has been summoned. officially and properly.

Ordinary Trial Examination Procedure The ordinary trial examination procedure in this sharia economic dispute occurs when both parties to the dispute or through their proxies are present at the first trial and/or subsequent trial. Prior to the trial, an attempt was made to make peace through mediation, which is regulated in PERMA Number 1 of 2008 concerning Mediation Procedures in Courts, with the PERMA, mediation which was originally an alternative form of dispute resolution outside the Court (Non-Litigation) turned into a method of dispute resolution that is integral to the litigation settlement process in the Court.

The mediation procedure according to the PERMA is in the following stages: Pre-mediation based on Article 7 paragraph (5), regarding the obligation to postpone the first trial for mediation efforts Article 1 paragraph (6) of Perma Number 1 of 2008 concerning Mediation Procedures in Court. Parties are given the freedom to choose a mediator outside the Court (advocates, legal academics), the cost of services is borne by both parties. If the chosen mediator is from the Court, then there is no service fee.

If within 2 (two) days no agreement is reached to choose a mediator, then in accordance with the provisions of Article 11 the Chairperson of the Assembly shall immediately appoint a judge who is not the examiner of the dispute to be the mediator. Mediation Process The time limit regarding the mediation process in this Court is 40 days from the time the mediator is chosen by the parties or appointed by the Chairperson of the Assembly and this time limit can be increased to 4 days upon agreement of the disputing parties.

In the mediation process, the mediator is a neutral and impartial party. Results of Mediation If the mediation is successful, then the disputing parties formulate and make the contents of a written peace agreement signed by both parties and the mediator, which is strengthened in the form of a peace deed, and the parties are required to implement the contents of the peace deed. If the mediation fails, based on Article 18 PERMA Number 1 of 2008 the mediator must state in writing that the mediation process has failed and notify the judge of this, then the trial will continue with the usual procedure.

The next stage in an ordinary trial is an examination of the subject matter and the opportunity to answer and answer between the parties. The existence of an answer-and-answer event and replicas in the Religious Courts aims to provide equal legal treatment rights to the parties in the trial examination process. Then proceed with the proving procedure, in this case the proof of the arguments of the lawsuit, if the lawsuit is denied by the opposing party, then the opposing party is obliged to provide evidence against the rebuttal.

Evidence in sharia economic disputes is regulated in Article 1866 of the Civil Code and Article 164 HIR, namely: Written evidence or letters; Witness; conjecture; Confession; Oath. The end of the examination at the Religious Court is that both parties provide conclusions (conclusions) and final opinions in accordance with the views of each party regarding the main points of the case that have been examined in the claim or application submitted. The provisions of Article 178 HIR / Article 189 RBg, that when the case examination is completed. The Panel of Judges, because of their position, conducts deliberations to make decisions that will be handed down (Harahap, 2004).

The decision on the resolution of the sharia economic dispute with this ordinary procedure consists of, First, the decision stating that the Plaintiff's claim is granted, whether it is fully or partially granted. The decision was handed down by the Panel of Judges, because the arguments put forward by the Plaintiff are proven, both through evidence and acknowledged by the opposing party. . Second, the decision stating that the Plaintiff's claim is rejected. The decision handed down by the Panel of Judges if the Plaintiff is unable to prove the argument of the lawsuit because the evidence submitted does not meet the minimum limit of evidence or the evidence submitted by the Plaintiff is paralyzed by opposing evidence (Tegen Bewijs) submitted by the Defendant. There are no legal remedies for the decision of reconciliation, the decision in the examination of special proceedings (the decision is annulled or the decision is annulled), there are no legal remedies for appeal, cassation, or judicial review. Furthermore, in the verstek decision, verzet legal action, where the Defendant is given a grace period of 14 days from the date of notification of verstek to file a verzet

Legal remedies for decisions in examinations are carried out in an ordinary procedure, where the parties can file appeals, and the parties are not allowed to directly use the legal remedies of Cassation or Judicial Review of sharia economic dispute decisions. The legal remedy for the appeal, with the provisions, namely, First, if both parties are present when the decision is pronounced, then the grace period given to take legal action is 14 days from the day the decision is pronounced. Second, if at the time the decision is pronounced there is one party who is not present, then an appeal against the decision can be made within a grace period of 14 days from the day the decision is submitted to the party who is not present. Based on the provisions of Article 178 HIR / Article 189 RBg, that when the case examination is completed. The Panel of Judges, because of their position, conducts deliberation to make decisions that will be handed down. The decision stating that the Plaintiff's claim is granted, either fully or partially granted. The decision is handed down by the Panel of Judges, because the arguments put forward by the Plaintiff are proven, both through evidence and acknowledged by the opposing party. Second, the decision stating that the Plaintiff's claim was rejected.

Thus, the presence of a dispute resolution mechanism through a religious court forum or a sharia court can be pursued through an ordinary civil lawsuit mechanism or using the Small Claim Court mechanism or a simple lawsuit. The existence of the Small Claim Court mechanism in the Religious Courts is actually a manifestation of a fast, simple and low-cost trial that can provide benefits for justice seekers.

Conclusion

The trial for examining sharia economic cases at the Court is open to the public, unless otherwise stipulated by law. This is based on the provisions of Article 19 paragraph (1) of Law Number 4 of 2004, which has been amended in Article 13 of Law Number 48 of 2009 concerning Judicial Power. This provision also applies in the hearing of the Sharia banking dispute examination. In the ordinary trial examination, this sharia economic dispute occurs when both parties to the dispute or through their proxies are present at the first trial and/or subsequent trial. Prior to holding a trial, peace efforts are made through mediation, then the next stage in an ordinary trial is an examination of the subject matter of the case and an opportunity to answer questions between the litigants. Based on the provisions of Article 178 HIR / Article 189 RBg, when the case examination is completed, the Panel of Judges because of their position conducts deliberation to make a decision to be handed down. The decision stated that the Plaintiff's claim was granted, either fully or partially granted. Legal remedies for decisions in ordinary proceedings, the parties can file appeals, and the parties are not allowed to directly use cassation or judicial review against sharia economic dispute decisions.

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