

STRENGTHENING OF SHARIA PRINCIPLES AMONG NATIONAL SHARI'AH ARBITRATION BOARD ARBITRATORS IN THE SETTLEMENT OF SHARIA ECONOMIC DISPUTES

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ABSTRACT

This paper is intended to examine the proliferation of economic dispute resolution Shari'ah after amendment to the Constitution 1945. Before the change, the Religious Courts (PA) as the top judiciary are authorized to settle disputes Shariah economy. Now, the judiciary as an institution of Shariah economic dispute resolution experience proliferation, because the General Court entitled to handle economic disputes Shari'ah under Article 55 paragraph (2) of Law No. 21 of 2008 concerning Islamic Banking. Due to the proliferation of a completion of economic disputes Shari'ah raises choice of forum which in the case of the same substance, the same object, then given the freedom to choose, so that will give rise to legal disorder (chaos law). In addition, the decision would lead to disparities, are also likely to occur strangeness, because maybe when sentence born of religious courts, while the verdict b born of a general court for the same case, or there are two cases that have similar or even the same same, there will be oddity for the party receiving.

Key words: Disputes, Syari'ah Economics and Justice.

INTRODUCTION

The rapid and complex economic growth will give birth to various forms of cooperation in doing business. Considering that business activities are recognized as increasing from day to day, it is impossible to deny the occurrence of disputes between the parties involved, both bilateral and multilateral. In definitive, the term dispute comes from English, which means conflict and dispute, which means conflict or dispute. Both contain an understanding of the difference in interests between the two or more parties, but the two cannot be distinguished.

In a business relationship or agreement, there is always the possibility or in other words a business transaction has the potential to create problems, namely cross dispute. Shari'ah business disputes originate from a feeling of dissatisfaction from one party because there are other parties who do not fulfill the achievements as agreed upon or there is default from one of the parties so that they are required to be asked for compensation without cancellation of the agreement such as: not carrying out any achievements at all, carrying out achievements but not in accordance with what was agreed upon, carrying out achievements but late or not on time, and carrying out things that are prohibited in the agreement. From that it is necessary to have a business dispute settlement arrangement that can reconcile, provide solutions and provide a sense of justice to the disputing parties, so that the disputing parties can be resolved properly.

Cross disputes that need to be anticipated in business relations or agreements, regarding how to implement agreement clauses, whether the contents of the agreement or due to other things are unexpected due to overmacht; force majeure. For this reason, it is very necessary to find a solution (problem solving) to resolve disputes, usually there are several alternatives or options in the context of dispute resolution that can be pursued, either through litigation or non-litigation channels, such as through arbitration or alternative dispute resolution. It can be by way of consultation, negotiation, mediation, conciliation, or expert judgment. In the provisions of Article 5 of Law Number 30 Year 1999 it is stated that disputes that can be resolved through arbitration are only disputes in the field of trade and rights which according to the laws and regulations are fully controlled by the disputing parties.

Thus, the arbitration institutions in Indonesia, both the Indonesian National Arbitration Board and the National Syari'ah Arbitration Board, cannot be applied to matters within the scope of family law (al-ahwalu as syaksyiah). Shari'ah arbitration can only be applied to matters of shari'ah economic disputes. For employers, arbitration is the most attractive law choice in order to resolve disputes according to their wants and needs. In many sharia civil agreements in Indonesia, arbitration clauses are widely used as an option for dispute resolution. The legal opinion given by the shari'ah arbitration institution is binding because the opinion given will be an inseparable part of the main agreement (whose opinion is requested at the arbitration institution). Any opinion that is contrary to the legal opinion given means a breach of contract (breach of contract). Therefore, resistance in any form of legal remedy cannot be applied. Arbitration decisions are independent, final and binding, such as decisions that have permanent legal force so that the head of the court is not allowed to examine the reasons or legal considerations of the decision of the National Syari'ah Arbitration Board.

If reviewed against the fatwas of the National Syari'ah Council of the Indonesian Ulama Council (DSN-MUI). Obtained a section on dispute resolution in shari'ah economic practice. The entire fatwa states, only the National Syari'ah Arbitration Board (Basyarnas) has the authority to resolve disputes that arise in the field of shari'ah economics. If we look at the provisions of Law Number 7 of 1989 concerning the Religious Courts it is clear that the settlement of shari'ah economic disputes through Basyarnas, however, when the Law has been revised by Law Number 3 of 2006, in the provisions of Article 49 letter (i) Law Number 3 of 2006 and its elucidation, the Religious Courts have the duty and authority to examine, decide, and resolve cases at the first level between people who are Muslim, among which it is mentioned in the field of shari'ah economics. As for what is meant by syari'ah

economics in accordance with the explanation of the Law is business activities carried out according to the principles of syari'ah. Includes syari'ah banks, shari'ah microfinance institutions, shari'ah insurance, shari'ah reinsurance, shari'ah mutual funds, syari'ah bonds and shari'ah medium-term securities, shari'ah securities, shari'ah financing ' ah, shari'ah pawning, pension funds for shari'ah financial institutions, and shari'ah businesses.

Law Number 3 of 2006 was promulgated on March 20, 2006 and 3 days later, the MUI National Syari'ah Council launched a new fatwa, namely: Fatwa Council Syari'ah Number: 51 / DSN-MUI / III / 2006 concerning Musyarakah Mudharabah Agreement on Syari'ah Insurance, Syari'ah Council Fatwa Number: 52 / DSNMUI / III / 2006 concerning Akad Wakalah bil Ujrah on Shari'ah Insurance and Reinsurance and Syari'ah Council Fatwa Number: 53 / DSN-MUI / III / 2006 concerning Tabarru 'Agreement on Sharia Insurance and Reinsurance. The fatwa states in the fifth dictum the closing provisions number 2 is stated; if one of the parties does not fulfill its obligations or if there is a dispute between the parties, then the settlement will be done through the Syari'ah Arbitration Board after there is no consensus agreement, even though in article 49 letter (i) of Law Number 3 of 2006 jo. The explanation clearly states that sharia economic disputes are under the authority of the Religious Courts as a settlement through litigation.

Meanwhile, Basyarnas' authority in resolving syari'ah banking disputes was limited to resolving it through non-litigation, this was strengthened by the passing of Law Number 21 of 2008 concerning Syari'ah Banking. In the elucidation of Article 55 paragraph (2) the Law provides other alternatives for dispute resolution adjusted to the contents of the contract or agreement and even the opportunity for settlement of a senketa through the General Court. The emergence of these alternative solutions raises various problems, including confusion for the parties, therefore it is necessary to be explicit about the authority to settle sharia economic disputes so that there is legal certainty.

With the new authority obtained by the religious court and the choice of a forum to resolve shari'ah economic disputes through Basyarnas, it will lead to legal conflicts, in several decisions at the arbitration level or the courts hearing the same case. Some of the decisions by these different institutions clearly create legal uncertainty and injustice. With its legal considerations, the Constitutional Court acknowledges that a contract is an agreement that must be obeyed in accordance with the law. Akad has binding legal force as law (*pacta sun servanda*) for those who make it. However, the contents of the contract still have signs that cannot be violated, which must be in accordance with the law. The law in this case has confirmed the absolute competence (absolute power) of the Religious Courts to resolve these disputes. Therefore, clarity in drafting the agreement is a must, including the legal forum that is chosen in the event of a dispute. The Constitutional Court was of the opinion that the elucidation of article 55 paragraph (2) of the Syari'ah Banking Law in several concrete cases opened room for a choice of forum for resolution. As a result, constitutionality issues arise which in the end can lead to legal uncertainty that can cause losses not only to customers, but also to the syari'ah business unit. It is time for the law to provide certainty for customers and syari'ah business units in resolving syari'ah banking disputes.

RESULTS AND DISCUSSION

1. Strengthening of Sharia Principles Among National Shari'ah Arbitration Board Arbitrators in the Settlement of Sharia Economic Disputes

Since the growth and development of syari'ah banking activities in 1998, the settlement of syari'ah banking disputes on average was carried out through the Arbitration process by the Indonesian Muamalat Arbitration Agency (BAMUI) which later changed to the National Syari'ah Arbitration Board (BASYARNAS) because on average the contract (agreement) between Bank Syari'ah and its customers always includes an arbitration clause and usually any decision from BASYARNAS is final and binding or a small part through the litigation process in court.

However, since the birth of Law Number 3 of 2006 concerning Amendments to Law Number 7 of 1989 concerning the Religious Courts, a dispute settlement option has emerged (new dispute settlement options, because Article 49 letter (i) of this law assigns resolution tasks and authorities. Shari'ah economic disputes including syari'ah banking to courts within the Religious Courts. At a time when discussions were still heated about the new authority of the Religious Courts including the handling of Syari'ah Banking disputes, Law Number 21 of 2008 concerning Sharia Banking was born which in one of its chapters and articles, namely Chapter IX Article 55, creates a dispute resolution mechanism if there is a dispute between the syari'ah bank and the customer.

The contents of Article 55 paragraph (2) above are provided with an explanation in the Article-by-Article explanation. "What is meant by dispute settlement carried out in accordance with the contents of the contract is the following efforts: (a) Deliberation, (b) banking mediation, (c) through BASYARNAS or other arbitral institutions and / or (d) through courts within the domain of general courts". The emergence of article 55 paragraph (2) including the explanation and paragraph (3) provides space for the parties to make a choice of forum in resolving their syariah banking disputes apart from going through the litigation process at the Religious Courts either through the litigation process at the Court. State or through non-litigation processes through deliberation, banking mediation and arbitration processes through Basyarnas or other arbitration institutions as long as this is agreed in the contract provided that the dispute resolution mechanism is in accordance with the principles of shari'ah.

In reality Muhammad Syafi'i Antonio stated that with the choice of forum which was opened by the provisions of Article 55 paragraph (2) of Law Number 21 of 2008 and an explanation of the incidents of conflict regarding the conflict of dispute settlement institution Dozens or even tens of times have occurred either between Basyarnas and the District Court or between Basyarnas and the Religious Courts or between the Religious Courts and the District Courts which may arise because the interests (wishes) of the parties are not fulfilled or the result of each party's interpretation of the provisions of Article 55 paragraph (2) Law Number 21 of 2008 and its explanation.

2. Strengthening of Sharia Principles Among National Shari'ah Arbitration Board Arbitrators After the Constitutional Court Decision Number 93/PUUX/2012

This Constitutional Court decision is an answer to the judicial review of Article 55 paragraph (2) and (3) of Law Number 21 of 2008 concerning Sharia Banking to Article 28 paragraph (1) of the 1945 Constitution filed by Dadang Achmad (Director of CV. Benua Engineering Consultant) who was registered at the Registrar's Office of the Constitutional Court on 19 October 2012 with case number 93 / PUUX / 2012, the applicant for judicial review is a customer of Bank Muamalat Indonesia Bogor Branch by entering into an agreement with the bank on July 9, 2009 and renewing the contract. with a musyarakah financing agreement on March 8, 2010. The Petitioner submitted a judicial review of Article 55 paragraph (2) and (3) of Law Number 21 of 2008 concerning Syari'ah Banking against Article 28 paragraph (1) of the 1945 Constitution with several main reasons, namely:

1. Article 28 paragraph (1) of the 1945 Constitution mandates that every person has the right to recognition, guarantee, protection and legal certainty that is just and equal treatment before the law, but legal certainty is not found in the provisions of Article 55 paragraph (2) of the Law Law Number 21 of 2008 concerning Sharia Banking because it allows parties to choose a judicial institution (choice of forum) in resolving shari'ah banking disputes in cases of the same substance and the same object, especially Article 55 paragraph (3) of the Law This law states that "Dispute Resolution as referred to in paragraph (2) must not contradict the principles of shari'ah", thus raising the question whether the dispute settlement institution chosen by the parties in accordance with the provisions of Article 55 paragraph (2) has met the provisions of shari'ah? whereas other paragraphs in this shari'ah banking law are precisely Article 55 paragraph (1) of the law which clearly determines which court (read: Religious Court) should be used in resolving shari'ah banking disputes, then with freedom choosing this will lead to various interpretations from various parties and legal uncertainty,
2. There is a contradiction between the provisions of Article 55 paragraph (1) of Law Number 21 of 2008 which explicitly states "Courts within the Religious Courts that resolve Sharia Banking Disputes" with the provisions of Article 55 paragraph (2) and (3) which release to the parties to choose which judicial institution will adjudicate in the event of a dispute in syari'ah banking which according to the petitioner can be assumed to be allowed to choose a general court even in another judicial environment that has been agreed by the parties, the result is very clear that it will give birth to separate interpretations and absolutely not there is legal certainty that is guaranteed.
3. That the legal uncertainty is seen by the loss of the applicant as a customer of Bank Muamalat Indonesia, Bogor Branch, where the case is currently in the process of going to the Supreme Court to resolve disputes over the authority to judge between judicial institutions. paragraph (2) and (3) Law Number 21 of 2008 concerning Sharia Banking contradicts the provisions of Article 28 paragraph (1) of the 1945 Constitution and also states that it does not have binding legal provisions. 28 March 2013 regarding the application for judicial review of Article 55 paragraph (2) and paragraph (3) of Law Number 21 of 2008 concerning Islamic Banking against Article 28 paragraph (1) of the 1945 Constitution, the Assembly The judges of the Constitutional Court have made their decision number 93 / PUU-X / 2012 read out by the Panel of Justices of the Constitutional Court on August 29, 2013, whose amendment reads.

Based on these reasons, the Constitutional Court partially granted the Petitioners' petition; Elucidation of Article 55 paragraph (2) of Law Number 21 of 2008 concerning Sharia Banking (State Gazette of the Republic of Indonesia of 2008 Number 94, Supplement to the State Gazette of the Republic of Indonesia Number 4867) contradicts the 1945 Constitution of the Republic of Indonesia. Article 55 paragraph (2) of Law Number 21 of 2008 concerning Islamic Banking (State Gazette of the Republic of Indonesia of 2008 Number 94, Supplement to the State Gazette of the Republic of Indonesia Number 4867) does not have binding legal force;

The idea of establishing an Islamic arbitration institution in Indonesia began with a meeting of experts, Muslim scholars, legal practitioners, kyai and scholars to exchange ideas about the need for an Islamic arbitration institution in Indonesia. This meeting was led by the MUI Leadership Council on April 22, 1992. After holding several meetings and after several refinements of the organizational structure design and procedural arrangements, finally on 23 October 1993 the Indonesian Muamalat Arbitration Board (BAMUI) was inaugurated, now it has changed its name. became the National Syari'ah Arbitration Board (BASYARNAS) which was decided in the 2002 MUI National Meeting. Kep-09 / MUI / XII / 2003 dated December 24, 2003 as an arbitrator institution that handles dispute settlement in the shari'ah economy.

There are two aspects in the proliferation of sharia economic dispute resolution related to this issue. First, the absolute authority of the religious court. Second, the settlement of syari'ah banking disputes outside the religious court in accordance with the contents of the contract agreed upon by the parties. First, the administration of judicial power by the judiciary environment under the Supreme Court in accordance with Article 24 paragraph (2) of the 1945 Constitution is divided and separated based on competence or jurisdiction (separation court system based on jurisdiction) of each judicial body, namely the general court environment, the environment of the judiciary. religion, military court environment, and state administrative court environment. The division of the four jurisdictions shows that there is a separation of jurisdiction between the jurisdictions of the judiciary which results in a division of absolute authority (power) or attributive power (attributive competence or attributive jurisdiction) that is different and certain in each judicial environment. So that certain types of cases which are the absolute jurisdiction of one court environment cannot be examined by another court.

Regulations regarding the absolute authority of each judicial environment are also regulated in laws that govern each judicial body. In Law Number 2 of 1986 concerning General Courts, the General Court has the duty and authority to examine, decide, and resolve criminal cases and civil cases [vide Article 50 and Article 51 paragraph (1)]. Meanwhile, the State Administrative Court based on Law Number 5 of 1986 concerning State Administrative Courts has the duty and authority to examine, decide and resolve State Administrative disputes (vide Article 47). As for the Military Court in accordance with Law Number 31 of 1997 concerning Military Courts, it is only authorized to adjudicate criminal cases committed by TNI Soldiers, Armed Forces Administrative Disputes, and cases of claims for compensation in the criminal case concerned (vide Article 9 paragraph (1) , paragraph (2), and paragraph (3)).

The Religious Courts based on Article 49 paragraph (1) of Law Number 7 of 1989 concerning the Religious Courts have the authority to examine, decide, and resolve cases at the first level between people who are Muslim in the fields of: marriage, inheritance, will and grants carried out based on Islamic law, waqf and shadaqah. The authority of the Religious Courts was expanded based on Article 49 letter i of Law Number 3 of 2006 concerning Amendments to Law Number 7 of 1989 concerning the Religious Courts with the authority to examine, decide, and resolve shari'ah economic cases. Furthermore, the regulation on the absolute authority of the religious court to handle shari'ah economic cases, especially in the shari'ah banking sector, is clearly stated in Article 55 paragraph (1) of the Shari'ah Banking Law. Thus, the authority to examine, decide, and resolve sharia banking disputes is the absolute authority of the courts within the Religious Courts which cannot be resolved by other courts because it would violate the principle of absolute jurisdiction.

Second, basically the settlement of every civil dispute in the trade sector and regarding civil rights disputes is possible to be resolved outside the state court, either through arbitration or through alternative dispute resolution [Article 58 of Law Number 48 of 2009 concerning Judicial Power and Article 5 paragraph (1) Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution]. This can be done through an agreement or written agreement / contract agreed by the parties, both before the dispute (pactum de compromittendo) or after the dispute occurred (compromise deed) in accordance with the principle of pacta sunt servanda. The contract or agreement is binding law for the parties who carry out the contract or agreement (vide Article 1338 of the Civil Code).

CONCLUSION

In jurisprudence, the first and second conditions are classified as subjective conditions attached to the person making the agreement, which if not fulfilled causes the agreement to be canceled (vernietigbaar, voidable), while the third and fourth conditions are categorized as objective conditions related to the object of the agreement. which if not fulfilled causes the agreement to be null and void (nietig, null and void). Furthermore, in order for an agreement or contract to meet the fourth requirement, which is "a lawful cause", the cause of the agreement or agreement being made must be in accordance with the provisions of Article 1337 of the Civil Code which states that "A cause is prohibited, if prohibited by law, or if it is contrary to good morals or public order". Agreements or contracts that do not meet these conditions are null and void. Likewise, the agreement or contract regarding the settlement of shari'ah banking disputes must also comply with the provisions of Article 1320 of the Civil Code with the threat of being null and void based on Article 1337 of the Civil Code. In addition to the philosophical basis of the main proliferation that is at issue in the substantial law of shari'ah economic dispute resolution is article a quo paragraph (2) and paragraph (3) of Law Number 21 of 2008 concerning Sharia Banking, in terms of Islamic law it will cause what called ta'arudh al-adillah, the contradiction of the two rules when verse (2) and verse (3) still exist. Furthermore, in relation to Article 2 and Article 3 of Law Number 21 of 2008, it is actually contradictory if it is still stipulated in the Law, namely Article 1 paragraph (3) which states in the 1945 Constitution that the state of Indonesia is a constitutional state. because one of the characteristics of a rule of law is the existence of legal certainty and it is also contrary to Article 28D which states that one of the human rights, including customers, is guaranteed legal certainty.

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