

## **The Role And Position Of Basyarnas In The Settlement Of Islamic Banking Disputes**

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### **ABSTRACT**

In Islamic banking disputes, the institution authorized to resolve disputes is the Religious Court which is the litigation route, while there are several non-litigation routes such as deliberation, mediation, and sharia arbitration. The purpose of this study is to analyze the position of Basyarnas in resolving Islamic banking disputes. The research method uses a juridical approach that uses secondary data in the form of books, journals and laws and regulations that are analyzed qualitatively. The National Sharia Arbitration Board (Basyarnas) is an arbitration institution based on Islamic law. The National Sharia Arbitration Board was established by the Indonesian Ulema Council. The reason for the establishment of the National Sharia Arbitration Board is the idea of Sharia Economics which is characterized by the development of Islamic banking, with the example of the birth of Islamic banks which of course have disputes that must be resolved with sharia, for this reason the need to include other parties for mediation in resolving sharia disputes.

**Keywords:** Dispute Resolution, Basyarnas, Islamic Banking

### **ABSTRACT**

In sharia banking disputes, the institution authorized to resolve disputes is the Religious Courts which are the channels of litigation, while in the non-litigation channels there are several such as deliberation, mediation, and sharia arbitration. The purpose of research is to analyze the position of Basyarnas in dispute solution sharia banking The National Sharia Arbitration Board (BASYARNAS) is an arbitration institution based on Islamic law. The National Sharia Arbitration Board was formed by the Indonesian Ulema Council. The reason for the formation of the National Sharia Arbitration Board with the idea of Islamic Economics is marked by the development of Islamic banking, with the example of the birth of Islamic banks which of course have disputes that must be resolved with Sharia, for this reason the need to involve other parties to mediate in resolving sharia disputes.

**Keywords:** Dispute Resolution, Basyarnas, Islamic Banking

## A. INTRODUCTION

Since the birth of Bank Muamalah Indonesia on November 1, 1990 which was initiated by the Government, MUI, and ICMI, the rate of development of banks with sharia nuances is quite significant. The development of the Islamic banking and finance industry in Indonesia has recently experienced very rapid progress. Among them are Islamic banking, Islamic insurance, Baitul Mal wa Tamwil (BMT). Likewise, sharia business activities in the real sector such as sharia hotels, sharia swimming pools, sharia multilevel marketing and so on. In its latest development, although when compared with conventional banks it is very unbalanced,<sup>1</sup> but the public interest to get acquainted with banks whose jargon is usury-free is getting higher. Especially after the economic turmoil with the liquidation of large banks before and after the reformation, Islamic banks showed their existence.

The general provisions governing the operations of these Islamic financial institutions are Law No. 7 of 1992 as amended by Law No. 10 of 1998 on Banking and Law No. 23 of 1999 as amended by Law No. 3 of 2004 on Bank Indonesia. Specific references and provisions for the operation of these financial institutions are mostly regulated in the form of Bank Indonesia Circular Letters. In terms of legal theory, the provisions in the form of circular letters actually have weaknesses in terms of their binding force, because a regulation will give rise to rights and obligations to the Indonesian people. Therefore, on July 21, 2008, Law Number 21 of 2008 on Islamic Banking was passed.<sup>2</sup>

After the enactment of Law No. 21 of 2008 on Islamic Banking, which was issued on July 16, 2008, the development of the national Islamic banking industry has an adequate legal basis and will encourage its growth even faster.<sup>3</sup>

One of the intermediary functions of Islamic banking is an institution that can channel funds received to people in need in the form of credit. Credit in the Law of the Republic of Indonesia Number 21 of 2008 concerning Islamic Banking

(hereinafter referred to as the Islamic Banking Law) is defined as follows:

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<sup>1</sup> Arief R. Permana and Anton Purba '*Overview of the Syariah Banking Law*', in *Banking and Banking*

Law Bulletin 1, Volume 6, Number 2, August 2008.

<sup>2</sup> Dewi Utami Sari, *Settlement of Islamic Banking Disputes in Indonesia*, *Al-Muqkidz: Journal of Islamic*

*Studies*, Vol: 8 No. 2 (May-August 2020), pp. 158.

<sup>3</sup> Ephin Apriyandanu, *The Position of Basyarnas in Handling Sharia Banking Insolvency in Review of*

*Law No. 21 of 2008 concerning Sharia Banking*, *Journal of USM Law Review* Vol 1 No 1 of 2018, p.

32. 32.

"Financing is the provision of funds or bills equated to it in the form of profit sharing transactions, leasing and hire purchase transactions, sale and purchase transactions, lending and borrowing transactions, and service leasing transactions based on agreements or agreements between Sharia Banks and / or UUS and other parties that require the party being financed and / or given a funding facility to return the funds after a certain period of time in exchange for ujah, without reward, or profit sharing."

Based on the definition of Islamic banking above, it can be seen that a legal relationship will be born between the debtor (customer) and the creditor (bank), namely the creation of legal consequences in the form of rights and obligations. One of the obligations of the debtor is to make payments and repay the financing that has been given by the creditor. If one day the debtor defaults, then dispute resolution will be carried out based on Article 55 of the Sharia Banking Law.

Regarding Article 55 of Law No. 21 of 2008 concerning Islamic Banking, it is considered that there is an overlap of judicial authority in resolving Islamic Banking disputes. This can be seen in Article 55 paragraph (1) of the Islamic Banking Law, which emphasizes that the authority to resolve Islamic banking disputes is resolved by the Religious Court. Contrary to the contents of Article 55 paragraph (1), Article 55 paragraph (2) of the Syariah Banking Law also provides an opportunity for the District Court to resolve Syariah Banking disputes. Thus, if examined further, there are two judicial domains that can resolve Islamic Banking disputes.

Based on this, Article 55 of the Syariah Banking Law is considered contradictory between Article 55 paragraph (1) which authorizes the Religious Court to resolve Syariah Banking disputes. When viewed from another perspective, Article 51 paragraph (2) of the Banking Law provides another option to parties who do not want their cases resolved in the Religious Court. The other option is to submit the dispute settlement to the District Court. This shows that there are 2 (two) Courts that can resolve Sharia Banking disputes, namely the Religious Court and the District Court.<sup>4</sup>

Dispute resolution in the banking world can be resolved through two resolution channels, namely litigation (court) and out of court (non-litigation). Dispute resolution outside the court channel is the National Sharia Arbitration Board (Basyarnas), the Indonesian National Arbitration Board (BANI), the Consumer Dispute Resolution

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<sup>4</sup> Dhaniar Eka Budiastanti, *Juridical implications of the Constitutional Court's decision Number 93/PUU-X/2012 related to the settlement of Sharia banking disputes*, Journal of Legal Horizons, Volume 11 No. 1 April 2020, p. 1. 1.

Agency (BPSK), the Indonesian Mediation Agency (BMI) and many other alternative institutions, each of which has its own advantages and disadvantages.<sup>5</sup>

The National Sharia Arbitration Board (Basyarnas) is an alternative out-of-court (non-litigation) forum in the settlement of disputes or cases in Islamic banking and other Islamic Financial Institutions (LKS). The existence of Basyarnas is currently needed by Indonesian Muslims, especially with the increasing prevalence and development of Islamic banking and financial companies in Indonesia today. The rapid and complex growth of the Islamic economy and business as it is today inevitably gives birth to various forms of cooperation or business transactions. In this regard, Basyarnas which was previously named the Indonesian Muamalat Arbitration Board (BAMUI), which marked the presence of the first Islamic arbitration institution in Indonesia and Basyarnas itself is one of the tools of the MUI organization.

## **B. RESEARCH METHODS**

This research uses a normative juridical approach that uses secondary data in the form of books, journals, research results and applicable laws and regulations. Data is obtained using documentation study techniques or *library research* which is analyzed using a theoretical approach. Data analysis techniques are carried out qualitatively without using formulas and certain numbers to find answers to research questions.

### C. RESULTS AND DISCUSSION

The National Sharia Arbitration Board (Basyarnas) is an institution that offers arbitration services for the business sector of the Islamic economy or sharia-based businesses. This arbitration institution carries out procedures based on Islamic law. As an arbitration body, Basyarnas aims to resolve civil disputes with the principle of prioritizing peace. In the Supreme Court (MA), it is only at the stage of study and the possibility of applying arbitration methods based on sharia principles, as stated by Supreme Court Justice Meike Komar. The application of this method can be carried out in cases related to sharia issues, for example disputes related to Islamic banking.

In Law Number 21 of 2008 concerning Islamic Banking, in article 55 paragraph

(1), it is explained that Islamic banking disputes are resolved in the Court of Religious

<sup>5</sup> Tengku Rahmah Ramadhani, Andri Brawijaya, Imam Abdul Aziz, *The Role of the Indonesian Banking Dispute Resolution Alternative Institution (LAPSPI) in Resolving Financing Disputes in Islamic Banks*,



Courts. Article (2) explains that in addition to settlement through the Court there are also other alternative solutions, namely through deliberation, mediation, or arbitration institutions, in this case the National Sharia Arbitration Board, as an arbitration institution based on Sharia principles.

In Law Number 48 of 2009 concerning Judicial Power, Article 58 states that arbitration is an effort to resolve civil disputes outside the court. Article 59 paragraph (1) states that arbitration is an out-of-court dispute resolution based on an arbitration agreement made in writing by the parties to the dispute. In the explanation of article 59 paragraph (1), what is meant by "arbitration" in this provision also includes sharia arbitration.

From the above explanations, it is known that Basyarnas' position as a dispute resolution institution in Indonesia is very strong. This is also evidenced by the support of several laws and regulations as well as the support of the Indonesian Ulema Council through its many fatwas that recommend sharia arbitration as an Islamic civil dispute resolution institution in Indonesia.

Currently, Basyarnas has 17 branches/representatives located in provincial capitals in Indonesia. In the event of a dispute in an area where a branch/representative of Basyarnas has not been established pursuant to Article 30 of the Rules of Procedure of the National Sharia Arbitration Board, further handling will be regulated by a decision of the Chairman of the National Sharia Arbitration Board. However, usually the parties have the right to choose where the dispute will be resolved. This is based on the agreement of the parties to the dispute.<sup>6</sup>

The process of resolving disputes through litigation, which has been known for

a long *time*, essentially has a tendency to produce new problems because of its *win-lose* nature, which is unresponsive, *time consuming process* and open to the public.<sup>7</sup> while the process of resolving through non-litigation channels or alternative dispute resolution channels that are closed in nature produce *win-win* solutions.

The connection between this litigation institution is the Judiciary in general, while related to this sharia dispute resolution is the National Sharia Arbitration Board

as a non-litigation institution. Whereas between these two institutions both have the

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<sup>6</sup> Amanda Tikha Santriati, *Resolution of Sharia Banking Disputes through the National Sharia Arbitration Board*, El Wasathiya, Vol. 9 No. 1 June 2021, p. 48. 48.

<sup>7</sup> Frans Hendra Winarta, *Dispute Resolution Law, Indonesian National and International Arbitration*. Jakarta: Sinar Grafika, 2011, p. 9

authority to resolve sharia disputes that occur between sharia banks and customers or users of sharia banks themselves.<sup>8</sup>

By Authority, we mean the formal power granted by the law that Basyarnas has the following powers:

- 1) Resolving fairly and quickly muamalah (civil) disputes arising in the fields of trade, finance, industry, services, and others which according to the laws and regulations are fully controlled by the disputing party, and;
- 2) Providing a binding opinion at the request of the parties in the absence of a dispute regarding issues relating to an agreement.

In fact, sharia arbitration is a settlement of disputes between parties to a contract in sharia economics, outside the courts to reach the best settlement when deliberation efforts do not produce consensus. This arbitration is carried out by appointing and authorizing an arbitration body to provide justice and propriety based on Islamic law and applicable legal procedures. Sharia arbitration decisions are final and binding, this is in accordance with Article 60 of Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. settlement through Basyarnas can be done if a clause is made in the contract regarding dispute resolution through Arbriter. This refers to the provisions of Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution.

Related to the implementation of the Arbitration award, the parties must voluntarily implement the award, but in order to enforce the implementation of the arbitration award, the award must be submitted and registered with the Registrar of the District Court. Regarding the examination by the Chief Justice, the Chief Justice is not allowed to examine the reasons or considerations of the arbitration award.<sup>9</sup> The examination is limited to a formal examination of the arbitration award rendered by the arbitrator or panel of arbitrators.

Basically, the existence of arbitration institutions has existed since long ago and has been practiced by the Greek community before Christ. In fact, the arbitration institution has existed since the Dutch era, even when the Dutch Government formed

three arbitrations, namely the first Arbitration Board for the Export of Indonesian

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<sup>8</sup> Atin Meriati Isnaini, *The Limit of Authority for Sharia Dispute Resolution Between the National Sharia Arbitration Board (BASYARNAS) and the Religious Courts*, Unizar Law Review, Volume 3 Issue 2, December 2020, p. 245. 245.

<sup>9</sup> Ahmad Mujahidin, *Procedures for Settlement of Sharia Economic Disputes in Indonesia*. Bogor: Galia Indonesia, 2010, pp. 150-151.

Produce. The second is the Arbitration Board on fire and the third is the Accident Insurance Arbitration Board. During the Japanese Government, the arbitration institution used was the arbitration institution established by the Dutch but the Raad van Justitie and Residentiegerecht courts were abolished. Japan established a court that could apply to everyone. The court was called the Tihoo Hooin. This judicial body was a continuation of the Landraad. The arbitration institution in Indonesia has been recognized by the public as an alternative to dispute resolution through non-litigation channels because the arbitration institution is the most preferred institution by business actors because it is considered the most harmonious way with the needs in the business world.

Arbitration is an out-of-court settlement of a civil matter or dispute. Arbitration resolves disputes outside the public courts based on a written arbitration agreement between the parties to the dispute, as stipulated in Article 30, Article 1 (1) of the 1999

Law on Arbitration and Alternative Dispute Resolution.<sup>10</sup> Based on Article 4 of the

Basyarnas Bylaws (ART), the main objective of the establishment of Basyarnas is firstly to provide a fair and fast settlement in disputes arising from Islamic economic muamalah activities in the fields of banking, trade and other Islamic financial institutions. The second is to receive requests submitted by the parties to an agreement in the absence of a dispute, providing a binding opinion on a matter relating to the agreement.<sup>11</sup>

This arbitration institution is a non-litigation institution in contrast to the Religious Court which is a litigation institution. The arbitration institution mediates the parties with a fast time in contrast to the Religious Courts which require time and bureaucracy.<sup>12</sup>

The role of Basyarnas is not only to resolve disputes in the field of muamalat / civil arising in the fields of business, finance, industry, services based on sharia principles but also to provide binding legal opinions at the request of the parties without

any dispute in an agreement (contract). In order to support its role and authority in

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<sup>10</sup> Elman Johari, "*Settlement of Sharia Business Disputes through the Sharia Arbitration Board*

(BASYARNAS)," JOURNAL AGHNIYA 2, No. 1 (August 13, 2020), pp. 68-81

<sup>11</sup> Hasyim Sofyan Lahilote and Moh Fitri Adam, "*The Existence of Basyarnas in Resolving Islamic*

*Banking Disputes in Indonesia*," Al-'Aqdu: Journal of Islamic Economics Law 1, no. 2

(December 10,

2021), pp. 96- 103, <https://doi.org/10.30984/ajiel.v1i2.1808>.

<sup>12</sup> Ummi Uzma, "*Implementation or Execution of the Decision of the National Sharia Arbitration Board*

(*Basyarnas*) as the Authority of the Religious Court," Journal of Law & Development 43, no. 3

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2017): 362–80, <https://doi.org/10.21143/jhp.vol43.no3.1496>.

resolving disputes and disagreements, as of January 2021, Basyarnas has 20 (twenty)

representative offices spread across each province in Indonesia.

The role of Basyarnas in dispute resolution has not been optimal due to several obstacles encountered. One of them is that dispute resolution through the arbitration institution must be preceded by an agreement of the parties in writing to settle using the arbitration institution. This means that if the parties do not agree in the agreement clause related to dispute resolution by the National Sharia Arbitration Board then there is no dispute resolution at Basyarnas. The absolute competence of the arbitration institution is determined by whether or not there is an agreement containing an arbitration clause either before a dispute occurs (*pactum de compromittendo*) or after a dispute occurs (*actacompromis*).<sup>13</sup> In addition, there are difficulties in the execution of decisions due to the overlapping authority between the Religious Courts and the District Courts.

For example, there is an obstacle regarding the cancelation of the Basyarnas decision in a case between PT Atriumasta Sakti as the plaintiff and PT BANK Syariah Mandiri as the defendant. In Decision Number: 16/2008/BASYARNAS/Ka.Jak, dated September 16, 2009. The decision contains that the plaintiff's request has been granted because the defendant has broken the promise, and in the decision states that the murabahah contract is null and void, and will further punish the defendant to return funds to the plaintiff in the amount of Rp. 878,791,366. this decision has been registered with the Central Jakarta Religious Court (hereinafter written PA. Jak.Pus) with Number: 01/BASYARNAS/2009/PA.JP dated October 12, 2009.

After the decision was registered, the Defendant filed an annulment of the Basyarnas decision to PA. Jak.Pus, and PA. Jak.Pus granted the Defendant's request and annulled the Basyarnas decision. Subsequently, the Plaintiff filed an appeal regarding the decision of PA. Jak. Pus to the Supreme Court, then the Supreme Court issued Decision No. 188 K/AG/2010 dated June 09, 2010 on this case and stated that it annulled the decision of PA. Jak.Pus, stating that PA. Jak.Pus did not have the authority to examine and try the case, and rejected the request to

annul the Basyarnas decision. The annulment of the decision issued by Basyarnas is due to several reasons such as the appointment of a single Arbitrator or a panel is not in accordance with the provisions stipulated in the Basyarnas rules of procedure, the decision exceeds the authority of

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<sup>13</sup> Syams Eliaz Bahri, "*Settlement of Sharia Economic Disputes Through Basyarnas in View of the Principles of Legal Certainty, Justice and Benefit*," Tamwil 3, no. 1 (July 17, 2020), pp. 41, <https://doi.org/10.31958/jtm.v3i1.1075>



Basyarnas, there is misconduct among one of the Arbitrators, the decision deviates significantly from the main provisions of the Basyarnas rules of procedure, the decision does not contain the basic reasons on which the decision is made without prejudice to the applicable provisions.<sup>14</sup>

The arbitral award will be rendered after the resolution of the dispute by the arbitral institution. Pursuant to Law No. 30 of 1999, the arbitrator or arbitral tribunal shall render a decision within 30 days after the arbitrator's consideration of the dispute is completed. If there is an administrative error in the decision issued, a party has the right to request correction of the decision within 14 days after the decision is issued. The award is final and binding on both parties. The award may be executed after the entry of the award in the district court register by the arbitrator or his representative. The presiding judge may issue an order to enforce the arbitral award within 30 days of registration.

#### **D. CONCLUSIONS**

The role of Basyarnas in dispute resolution is very important because Basyarnas resolves disputes in accordance with the competence of its Arbitrators. Basyarnas dispute settlement is a sharia economic dispute which includes business, sharia trading, sharia insurance, sharia banking, sharia fintech / P2P Sharia so that the right institution to resolve disputes in non-litigation channels is Basyarnas. This body is an organizational tool under the Indonesian Ulema Council (MUI) which is independent in carrying out its role as an institution for resolving economic disputes based on Islamic law (sharia). Broadly speaking, the mechanism for resolving Islamic banking disputes through Basyarnas is almost the same as the settlement through a judicial institution (Religious Court). The difference is that the settlement through Basyarnas requires the existence of a basis or contract or arbitration clause which states that if a dispute arises, the parties agree to settle it through the National Sharia Arbitration Board. Basyarnas has advantages that make it the choice of dispute resolution for business people. This is because arbitration has a closed nature that keeps the privacy of the company or customer (in the case of Islamic banking disputes) well maintained.

Arbitration also presents a more favorable legal decision for both parties.

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<sup>14</sup> Habibi Habibi, "The *Dynamics of Regulations for the Implementation and Cancellation of Sharia Arbitration Awards*," *Multidisciplinary Studies: Journal of Islamic Studies* 6, no. 1 (October 4, 2019), pp. 104–24, <https://doi.org/10.24952/multidisipliner.v6i1.175>

BASYARNAS decisions are final and binding so that both parties can immediately comply and be executed by the Religious Court.

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