

LEGAL REFORM ON THE DISPUTE RESOLUTION MECHANISM IN ISLAMIC BANKING AND FINANCE IN INDONESIA: ISSUES AND CHALLENGES*

Abdul Rasyid, MCL

Ph.D Researcher
Ahmad Ibrahim Kuliyah of Laws
International Islamic University Malaysia
Gombak, Selangor, Malaysia
ochids2001@yahoo.com

Sonny Zulhuda, Ph.D

Assistant Professor
Ahmad Ibrahim Kuliyah of Laws
International Islamic University Malaysia
Gombak, Selangor, Malaysia
sonny@iiu.edu.my

ABSTRACT

Nearly fifteen years after the establishment of the first Islamic bank Indonesia, a new law was introduced in 2006 that in effect empowers the Religious Court in the country to oversee, hear and decide on disputes relating to matters of Islamic finance and Islamic economics. In its way to the enactment, the Parliament preferred the word 'Islamic economics' than the word 'Islamic banking' which was initially put in the draft law. This law (which amends the older 1989 Act on the Religious Court) has resulted in two things: first, depriving the power of conventional courts over disputes relating to Islamic economics activities and, secondly, expanding the jurisdiction of a considerably inferior Religious Court that was restricted on areas of Muslim matrimonial and personal property matters. While many applauded the passing of this new law, the Law No. 3 of 2006 may have at the same time raised the eye-brows of many in the industry and campuses. When Islamic banking professionals and scholars are awaiting a more fundamental and substantive law on Islamic banking, the passing of 2006 law is rather an unexpected gift.

This regulatory reform had in many ways upgraded the Religious Court in Indonesia; this is what makes everyone happy. But this reform surely requires those in legal fraternity (judges, attorneys, legal practitioners and academia) to prepare lots of things in order to make the law works. Issues such as human resource development and capacity building, harmonization of legal and regulatory frameworks especially in the dispute resolution matters, jurisprudential development and many more will need to be identified and responded in quick and professional fashion. Otherwise, the 2006 legal reform may become like a posh car which is left untouched in a garage. With a strong view that this 'unexpected gift' should not be wasted, this paper seeks to explore and investigate those potential issues and challenges resulting from the enactment of this law (Law No. 3 of 2006). In addition to this Court, an alternative institution for resolution of Islamic banking and finance disputes such as BASYARNAS (National *Shar'iah* Arbitration Body) is also established. In order to achieve its objective, this paper employs an analytical and comparative studies as well as observing through some empirical case studies. This paper hypothesizes that this identification would help Religious Courts and BASYARNAS uphold an effective reform to better improve the Islamic financial institutions in Indonesia.

Keywords: Islamic banking, Islamic finance, dispute resolution, legal reform, Religious Court, BASYARNAS

1. Introduction

After a long journey, the wish of the Muslims in Indonesia to have a bank which operates based on Islamic principles was finally achieved in 1992 with the establishment of Bank Muamalat Indonesia (BMI), established based on Law No. 7 of 1992 on Banking which provides opportunity for the development of interest-free banking.¹

In order to provide a stronger legal foundation for Islamic banking operations, the Law No. 7 of 1992 was further amended in 1998 by Law No. 10 of 1998. A notable change brought about by this law was the permission it gave to the conventional banks to open Islamic banking units. However, these laws appeared inadequate for the regulation of Islamic banking; thus in 2008 a Law No. 21 of 2008 on Islamic Banking was enacted and passed by the Indonesian Parliament. This law provided better legal basis for the development of Islamic banking in Indonesia. Since that time, the growth of Islamic banking in Indonesia has been developing rapidly. Currently, the number of banks conducting business activities based on *shar'iah* principles are represented by 11 Islamic commercial banks, 23 Islamic business units and 150 Islamic rural banks and the total number of offices was 1,763 spreading over thirty-two provinces.²

In order to maintain the pace of this fast development, legal support is necessary, covering not only the functioning but also the resolution of disputes which might arise between banks, customers and policyholders. Like in any other business, disputes in Islamic banking are inevitable. As Islamic banking is *shar'iah* based, hence their disputes resolution techniques must also be based Islamic principles.

In Indonesia, prior to 2006, the resolution of Islamic banking disputes was under the jurisdiction of the Civil Courts. A Religious Court, at that time, had no authority to settle such disputes, as its jurisdiction was confined to personal matters only such as marriage, inheritance, *wassiyah* (testament), *hiba* (gifts), *sadaqah* (alms), *zakat* (tithe), and *waqf*.³ However, after Law No. 7 of 1989 relating to Religious Court was amended by the Law No. 3 of 2006, significant changes were brought in by extending the jurisdiction of the Religious Court to cover Islamic economic matters, including Islamic banking. This expansion has arguably enhanced the position and authority of the Religious Court as a dispute resolution institution within the Indonesian legal system. Later on in 2008, the jurisdiction of Religious Court to settle Islamic banking disputes was further consolidated in section 55 (1) of Law No. 21 of 2008.⁴

*The authors would like to gratefully acknowledge for the valuable contribution and revision provided by Prof. Dr. Syed Khalid Rashid in preparing this paper.

¹This law implicitly allowed a bank to operate based on profit-sharing. However, the expression related to Islamic bank was not clearly mentioned in this law, as it only used the expression "profit sharing" as a legal provision for the operational basis of an Islamic bank. The term of profit sharing is only mentioned in a few sections, namely in section. 1(12), section 6(m) and section 13(o).

² Islamic Banking Statistics of Bank Indonesia, March 2011. It can be accessed on www.bi.go.id.

³ See, section 49 of Law No. 7 of 1989 concerning Religious Court.

⁴ According to this section, it is stated that the "settlement of disputes of *Shar'iah* (Islamic) Banking is conducted by a court in the Religious court".

Besides the Religious Court, an alternative institution which has the authority to resolve Islamic banking and finance disputes is the National *Shari'ah* Arbitration Body (*Badan Arbitrase Shari'ah Nasional* – or 'BASYARNAS'). This Islamic arbitration body in Indonesia was established in 1993 by the initiative of the influential Indonesian *Ulama* Council (MUI) with the objective of resolving *muamalat* disputes.

This paper attempts to discuss the role of the aforementioned institutions in resolving Islamic banking disputes and also to examine the effectiveness of those institutions in resolving such disputes.

2. Islamic Banking Dispute in the Religious Court

At its roots, Indonesian legal system is pluralistic. It has adopted Dutch civil law and also changes in it brought by the influx of time.⁵ In addition, it has also been influenced by the customary (*adat*) law and Islamic law. These systems exist in tandem and are developing. However, in recent years, the Indonesian legal system has also been affected by the common law system, particularly in commercial and business matters.⁶

Indonesian judicial system has four types of courts: General Court, Religious Court, Military Court and State Administrative Court. These are supervised by the Supreme Court which is as the highest judicial institution. Indonesian courts do not apply the principle of precedent which is commonly found in common law jurisdictions. With regard to the Religious Court, it is a special kind of judicial institution for settling *shar'ah*-related disputes. It is regulated by Law No. 50 of 2009 concerning the Second Amendment on Law No. 7 of 1989 on Religious Court.⁷

The hierarchy of the Religious Court can be divided into two levels i.e., the Religious Court as the court of first instance and the Religious High Court as the second appellate court. The Religious Court of first instance is a court which examines and decides any petition or lawsuit at the lowest level. In other words, it acts as a court which accommodates and adjudicates at the first instance all cases filed therein seeking justice. A case cannot be brought directly to the Religious High Court. This court is located in the capital city of called *Kabupaten* or *Kota*. However, the Religious High Court, as an appellate court, acts and authorizes the re-examination of decisions of Religious Court at the first instance, if the disputing parties file an appeal. In other words, in the event one or both parties to the dispute are unsatisfied with the decision of the Religious Court, they may file an appeal against such decision in the Religious High Court to review the case. Therefore, all decisions of the Religious Court can be appealed to and be reviewed by the Religious High Court. As such, the decision of the Religious Court may be cancelled,

⁵Karen Mills, "Indonesia", in *Dispute Resolution in Asia*, edited by Michael Pryles (The Hague: Kluwer Law International, 2002), 155.

⁶*Ibid.* See also, Benny S. Tabalujan, "Features - The Indonesian Legal System: An Overview", <<http://www.indobizlaw.com/forms/IDLegalOverview.pdf>> (accessed May 24, 2010)

⁷The Law No. 50 of 2009 concerning the Second Amendment on Law No. 7 of 1989 concerning Religious Court was enacted on October 29, 2009. Prior to that, the Law No. 7 of 1989 was amended by Law No. 3 of 2006. However, in this second amendment, there are no significant changes, particularly in an absolute competence of the Religious Court.

revised and re-affirmed by the Religious High Court.⁸ The position of this court is located in the capital city of each province. In addition, the decision of the Religious High Court may be appealed to the Supreme Court which can also order review if, for instance, new evidence is found justifying a fresh hearing.

3. The Jurisdiction of the Religious Court: Development and Views

The jurisdiction of the Religious Court is either relative or absolute. The relative jurisdiction is closely related to the local law, i.e. based on local legislations.⁹ The absolute jurisdiction, on the other hand, is based on the type of case and level of court.¹⁰ The absolute jurisdiction of the Religious Court has experienced a significant change with the coming of Law No. 3 of 2006. It saw an expansion to cover the matters not only confined to the areas of marriage, inheritance, testament, grant, *wakaf* and *sadaqah* (alms), but also to resolve disputes regarding Islamic economics.

However this development is not without resistance. To the critics, the Religious Court does not have enough experience in resolving Islamic economic matters. It is argued here, that while the worry is understandable, it is wrong to underestimate the capability of the Religious Court in resolving Islamic banking disputes. This paper argues that this new development is an appropriate step that will enable the harmonization of Islamic principles and modern dispute settlement methods. Judges of Religious Court are arguably Muslims who have good knowledge of Islamic law.¹¹

It is worthy to note that during 2006-2010, out of 3,390 judges in Religious Court,¹² more than 500 have enrolled in Masters and PhD programmes in the field of business law and Islamic economics and this number may visibly increase in the future. In addition, a variety of seminars and training in Islamic economics have also been conducted by the Supreme Court in order to increase the understanding of the Religious Court judges. The incapability of the Religious Court in handling Islamic economy matters, including Islamic banking, is therefore ill-founded.¹³

In addition, it is important to note that the Law No. 3 of 2006 has introduced a new principle which is explained in the elucidation of section 49 of Law No. 3 of 2006¹⁴

⁸M. Yahya Harahap, *Kedudukan, Kewenangan dan Acara Pengadilan Agama UU No. 7 Tahun 1989*, (Jakarta: Sinar Grafika, 2nd ed., 2001), 112-114.

⁹Cik Hasan Bisri, *Peradilan Agama di Indonesia*, (Jakarta: PT. Raja Grafindo, 2nd., 1998), 203.

¹⁰*Ibid.*, 206.

¹¹Abdul Mannan, "Penyelesaian Sengketa Ekonomi Syariah: Sebuah Kewenangan Baru", <www.badilag.net> (accessed 9th September 2008), 26.

¹²Profile of Religious Court 2010. www.badilag.net/english

¹³Interview with Wahyu Widiana, Director General of Religious Courts Body, the Supreme Court of Indonesia, Jakarta, April 6, 2010.

¹⁴According to section 49 (i) of Law No. 3 of 2006 "A Religious Court has tasks and authority to examine, hear and adjudicate cases at first level *among Muslims* in the fields of: 1. Marriage, 2. Inheritance, 3. Testament, 4. *Hibah*, 5. *Wakaf*, 6. *Zakat*, 7. *Infraq*, 8. *Sadaqah*, 9. (i) *Shar'ĒÑah* (Islamic) economy." The meaning of *shar'ĒÑah* (Islamic) economy as provided in the elucidation of this section is "any act or business activity which is carried out in accordance with Islamic principles which consists of *Shar'ĒÑah* bank, *ShariÑÉh* insurance, *Shar'ĒÑah* reinsurance, *Shar'ĒÑah* mutual fund, *Shar'ĒÑah* bond and Med-term

which says that the meaning of ‘*among Muslims*’ is “consisting of a person or a legal entity which (may be a non-Muslim or a company having no religion) voluntarily binds himself/itself to Islamic law in respect of matters which are under the competence of the Religious Court in accordance with the provision of this section.” By virtue of this elucidation, it can be understood that the Religious Court has competence in settling disputes between Muslims and non-Muslims as long as they voluntarily agree to adopt the rules of Islamic principles. Based on the above principle, the issue regarding the jurisdiction of the Religious Court with reference to Islamic economy disputes involving non-Muslims or legal entity stands resolved.

In 2008, the government of Indonesia issued a new Islamic Banking Law No. 21. This law re-emphasized the competence of the Religious Court in resolving Islamic banking disputes. It is clearly mentioned in section 55 of Law No. 21 of 2008:

- (1) Settlement of Islamic banking disputes is carried out by a court in the Religious Court.
- (2) In the case that the parties have already agreed to the settlement of disputes other than that considered in paragraph (1), the settlement of dispute shall be carried out according to the *akad* (contract) content.
- (3) Settlement of disputes as considered in paragraph (2) may not be contrary to the *Shari’ah* principle.

Section 55 (1) above clearly stipulates the competence of the Religious Court in the settlement of Islamic banking disputes. However, Paragraph 2 of this section gives a chance to disputing parties to choose another forum besides the Religious Court to settle their dispute based on their agreement in the contract. The meaning of “the settlement of dispute shall be carried according to the *akad* content” is defined in the elucidation of section 55 (2) as: a) *Musyawah* (consensus by deliberation), (b) banking mediation, (c) through the National *Shar’iah* Arbitration Body (BASYARNAS) or other arbitration institutions and/or (d) through the court within the General Court/Civil Court.

To provide an alternative mechanism to disputing parties to settle their disputes in Islamic banking such as deliberation (*musyawarah*), mediation and arbitration are considered very good way out because through such alternative mechanisms, disputes of Islamic banking can be settled in a speedy and friendly manner. However, serious problem appears when the Civil Court is also conferred the same authority as the Religious Court in the resolution of Islamic banking disputes.

Practitioners of Islamic banking have different opinions in respect of this matter. Dadan Mutaqien, in his petition for judicial review regarding the elucidation of section 55 (2) (d) of Law No. 21 of 2008 filed in the Constitutional Court, is of the opinion that such provision is clearly contrary to the competence of the Religious Court as stipulated in

negotiable paper, *Shar’ah* security market, *Shar’iah* financing, *Shar’iah* pawnbroker, *Shar’iah* pension fund financial institution and *Shar’iah* business and *Shari’ah* micro financing institution.”

section 49 (i) of Law No. 3 of 2006. Furthermore, he argues that the existence of choice of forum in the resolution of Islamic banking disputes, based on section 55 (2) (d) of Law No. 21, has proved the inconsistency of lawmakers in formulating the rule of law.¹⁵ Similarly Abdul Ghani Abdullah, a judge of the Supreme Court, has also admitted that section 55(2) created *contradictio in terminis* (opposite meaning). On one side, it stipulates that disputes of Islamic banking are to be resolved by the Religious Court; on the other hand, it also gives a chance to the Civil Court to resolve such disputes. He predicts that in the future this problem may create conflict of jurisdiction between the Religious Court and the Civil Court. However, he is of the view that the stakeholders of Islamic banking should not panic because this problem will be ultimately settled by the Supreme Court. In the event that there is a dispute of competence between these two judicial institutions, the Supreme Court can issue a decision as to which court is apt to handle such matter.¹⁶

In contrast to the above arguments, Amin Suma is of the opinion that section 55 (2) should not be seen as a problem as it does not conflict with the competence of the Religious Court. The resolution of Islamic banking disputes through the Civil Court will only come in if disputing parties agree to do that in their contract. However, it is important to note that although the Civil Court is allowed to handle Islamic banking disputes, section 55 (3) strictly stipulates that these disputes should be resolved based on Islamic principles. That is to say, the Civil Court could only adjudicate such disputes if it agrees to apply Islamic law. Therefore, there is not much to worry; what we do have to worry about is when the dispute is referred to the Civil Court but is decided not based on Islamic principles.¹⁷ Rifyal Ka'bah also has a similar opinion. According to him, section 55 (2) of Law No. 21 of 2008 was a political product because until then there were still a number of people who opposed the settlement of Islamic banking disputes in the Religious Court. However, in principle, there is no problem if Islamic banking cases are settled in the Civil Court, provided the judges have good knowledge of Islamic law as well as Islamic business law and could make decisions based on Islamic principles.¹⁸

Based on the above arguments, it can be concluded that even though section 55 (2) Law No. 21 of 2008 allows the Civil Court to resolve Islamic banking disputes, section 55 (3) requires it to apply Islamic principles. It is strictly prohibited to refer to other laws which may be contrary to Islamic principles. However, the writer is more inclined to the first argument because giving a parallel authority to two courts which have absolutely different competence may generate serious problems in the future and uncertainty in the legal system. Both the Religious Court and the Civil Court have different competences as is clearly stipulated in Law No 48 of 2009 concerning Judicial Power. They have no authority to examine disputes which are beyond their competence.

¹⁵“Dualisme Penyelesaian Sengketa Perbankan Syariah Dibawa ke MK”, 1st March 2010, <<http://www.hukumonline.com/berita/baca/lt4b8bc050105d5/dualisme-penyelesaian-sengketa-perbankan-syariah-dibawa-ke-mk>> (accessed 25th May 2010).

¹⁶Ibid.

¹⁷Interview with Prof. Dr. Amin Suma, SH, MM, Dean Faculty of Syariah and Law, Islamic University of Sharif Hidayatullah, Jakarta, November 18, 2008

¹⁸Interview with Prof. Dr. Rifyal Ka'bah, Judge of Indonesian Supreme Court, Jakarta, November 20, 2008

According to Yahya Harahap, the main objective of the creation of delimitation of court competence is to orderly build the implementation of judicial power within court environments. Each court must function within their area which has been provided for in accordance with the prescribed jurisdiction. This construction will make synchronization, legal certainty and provide specific direction for people who want to seek justice in the appropriate court in compliance with its jurisdiction.¹⁹ Therefore, to avoid conflicting jurisdiction between Religious Court and Civil Court in resolving Islamic banking disputes in the future, the competence given to the Civil Court in resolving Islamic banking disputes has to be deleted because such provision is in conflict with the competence of the Religious Court as prescribed in Law No. 3 of 2006. Pending a legislative correction of this anomaly, the Supreme Court, as the highest judicial institution in Indonesia, should determine which court has the jurisdiction in this area.

4. BASYARNAS (National *SharĒĤah* Arbitration Body)

BASYARNAS (*Badan Arbitrase SharĒĤah Nasional* – National *SharĒĤah* Arbitration Body) is the only Islamic arbitration body in Indonesia. It was established on October 21, 1993 with the initiative of MUI (*Majelis Ulama Indonesia* – Indonesian *Ulama* Council).²⁰ Actually a desire of Muslims in Indonesia to have a body/institution which can resolve civil matters in a fair and quick manner based on *musyĒwarah* (deliberation) has existed for long time. It increasingly received a boost with the establishment of Bank Muamalat Indonesia and Islamic Rural Bank.²¹ According to HS. Prodjokusumo, the former MUI General Secretary, the idea of the establishment of BAMUI in Indonesia could not be separated from the context of social and economic developments of Muslims' life. This is closely related to the establishment of Bank Muamalat Indonesia, Syari'ah Rural Banks and the planning of the setting up of Islamic Insurance at that time.²² Like other financial institutions, it has been predicted that the operation of Islamic banking and Islamic insurance institution may face various challenges such as disputes with their customers. In order to ensure that their activities are in compliance with *sharĒĤah* principles, their dispute should be settled within an appropriate body using Islamic principles as guidelines.

¹⁹Harahap, 102.

²⁰BASYARNAS previously was known as BAMUI (*Badan Arbitrase MuĤĒmalat Indonesia* - Indonesian MuĤĒmalat Arbitration Body). The establishment of this Islamic arbitration forum was initiated by MUI (*Majelis Ulama Indonesia* – Indonesian *Ulama* Council) based on the decision of *Rakernas* (Rapat Kerja Nasional – National Working Meeting) of MUI on November 24-27, 1992. It has a legal status as a Foundation (*Yayasan*). Furthermore by virtue of a Decree of MUI No: Kep-09/MUI/XII/2003 dated 30 *syawal* 1424 H / December 2003, the name of BAMUI was changed to BASYARNAS and its legal entity was also changed from Foundation (*Yayasan*) to a body which comes under MUI and constitutes as one of its arms organization. However, it is important to note that although its status now comes under MUI, in carrying out its duties and function, it enjoys an autonomous status. See, Ahmad Dimiyati, "Sejarah Lahirnya BAMUI," in *Arbitrase Islam di Indonesia*, edited by Abdul Rahman Saleh *at all*, (Jakarta: BAMUI & Bank Muamalat, 1994), 191. Ahmad Djauhari, *Arbitrase Syari'ah di Indonesia* (Jakarta: BASYARNAS, 2006), 38-44.

²¹Speech of Abdul Rahman Saleh in *Badan Arbitrase Muamalat Indonesia*, (Jakarta: BAMUI, 1994), 1.

²²HS. Prodjokusumo, in *Badan Arbitrase Muamalat Indonesia*, (Jakarta: Majelis Ulama Indonesia, 1993), 3, cited in Ahmad Dimiyati, 192.

In relation to this, the BASYARNAS is considered suitable forum for the resolution of Islamic banking and finance disputes because its main objective is to provide a quick and fair resolution, based on *sharĒĒah* principles, in matters of *muamalat* disputes arising in the field of trade, commerce, financial industry, service, etc.²³

Based on the explanation above we can see that BASYARNAS, as one of the recognized legal bodies in Indonesia, stands independently in undertaking its duty. It is quite useful for the resolution of Islamic banking and finance disputes. Non-Muslims may also refer their disputes to BASYARNAS which is obliged to accept and solve their disputes fairly and in equitable manner without exception as long as they are convinced of its credibility and capability.

The procedures of BASYARNAS for the resolution of disputes are clearly mentioned in the Procedural Rules, which are considered as guidelines to be followed by the arbitrators and parties to a dispute. If need be, the substance of these Rules can be revised for improvement and perfection. With regard to the jurisdiction of BASYARNAS, section 1 of its Procedural Rules clearly says:

- a. Resolving in fairly and quickly a *muĒĒmalat* / civil dispute arising in trade, finance, industry, services and others in which pursuant to law and regulation are fully controlled by the disputing parties, and the parties agree in writing to submit a resolution to BASYARNAS in accordance with the Procedural Rules of BASYARNAS.
- b. Giving a binding opinion at the request of the parties without any dispute about an issue in an agreement.

From the above the role of BASYARNAS in the Indonesian legal system is found to be well recognized. It plays an important position where its jurisdiction covers *muĒĒmalat* disputes in respect of trade, industry, finance, service, etc. When parties to the dispute agree to settle their dispute through BASYARNAS, they must make an agreement in writing indicating that they agree to do so and also follow its Procedural Rules.

5. Dispute Resolution in Practice

5.1. Cases in the Religious Court

Since the enactment of Law No. 3 of 2006 concerning the Religious Court in 2006 and up to now, only nine cases of Islamic banking disputes have reached the Religious Court,²⁴

²³A. Rahmat Rosyadi and Ngatino, *Arbitrase dalam Perspektif Islam dan Hukum Positif*, (Bandung: PT. Citra Aditya Bakti,), 55-56.

²⁴Those cases among others are as follows: are: 1) No: 1047/Pdt.G/2006/PA.Pbg, 2) No: 1044/Pdt.G/2006/PA.Pbg, 3) No: 1045/Pdt.G/2006/PA.Pbg, 4) No: 1046/Pdt.G/2006/PA.Pbg, 5) No: 1165/Pdt.G/2010/PA.Pbg, 6) No: 0518/Pdt.G/2011/PA.Pbg, 7) No: 284/Pdt.G/2006/PA.Bkt, 8) No: 01/Pdt.G/Eks/07/PA. Bkt, 9) No: 02/Pdt.G/Eks/08/PA.Bkt

and out of these, two cases are brought to the Supreme Court for cassation and case review.²⁵

Case 1: *H. Effendi bin Rajab & Drs. Fitri Effendi binti Munir v Bank Bukopin Syariah & Ors*

The earliest case pertaining to Islamic banking received by the Religious Court since the enactment of Law No. 3 of 2006 concerning the Religious Court in 2006 is the case No: 284/Pdt.G/2006/PA.Bkt. This case was decided by the Religious Court of Bukittinggi in respect of '*Akad Murabahah*' carried out by *H. Effendi bin Rajab & Drs. Fitri Effendi binti Munir v Bank Bukopin Syariah & Ors*, both as the plaintiffs and defendant respectively.

Prior to this case decided in 2004 by the Religious Court, a defendant (at that time, as a plaintiff) filed a lawsuit against the plaintiffs (at that time as defendants) at a District Court (*Pengadilan Negeri*) in Bukittinggi.²⁶ The plaintiffs defaulted to pay an installment as agreed in the *murabahah* contract. The District Court of Bukittinggi accepted a lawsuit of defendant and it subsequently applied for an auction at the District Court. By virtue of the Determination of Chief of District Court of Bukittinggi No: 03/PDT.EKS/2006/PN-BT dated July 4, 2006, the District Court issued an order to execute auction towards the plaintiffs' collateral.

However, along with the enactment of Law No. 3 of 2006 which extended the jurisdiction of the Religious Court in hearing and adjudicating cases of Islamic economic including Islamic banking, the customers then filed a lawsuit against PT. Bank Bukopin Shari'ah to the Religious Court of Bukittinggi. The main issue raised by the plaintiffs in their lawsuit was related to the validity of *murabahah* contract. The plaintiffs just realized that a *murabahah* contract which they carried out with the defendant (Bank Bukopin Shari'ah) was invalid and contrary to *shari'ah* principles.

In the *murabahah* contract it was mentioned that the defendant seemed to have purchased the goods needed by plaintiffs amounting to Rp500 million and then seemed to have sold such goods to the plaintiffs at a price of Rp794.816.460 by taking a profit of Rp294.816.460. However, in practice, no goods were bought and sold by the defendant to the plaintiffs.²⁷ Similarly, this method got repeated in the second *murabahah* contract also where the defendant seemed to have bought goods ordered by the plaintiffs in the amount of Rp350.000.000 and sold the goods to the plaintiffs at the price of Rp581.230.044. In this second *murabahah* contract, the defendant obtained a profit of Rp231.230.044.²⁸ Therefore a liability of the plaintiffs was to pay Rp1.376.046.504, based on the two *murabahah* contracts.

²⁵Case No: 284/Pdt.G/2006/PA.Bkt and case No: 1047/Pdt.G/2006/PA.Pbg. These two cases will be discussed in detailed.

²⁶Case Registration No: No: 08/PDT.BTH/2004/PN-BT.

²⁷See a copy of decision No: 284/Pdt. G/2006 PA. BKT, 5.

²⁸Ibid., 8-9.

After carefully examining the practice of such *murabahah* contracts, the plaintiffs realized that it was absolutely invalid and contrary to *sharĒĤah* principles because no real goods were bought or sold by the defendant to the plaintiffs. In the Islamic law perspective, one of the important requirements that should be fulfilled in the *murabahah* contract is that the goods should actually be sold. Because these *murabahah* contracts contained legal defects, they should be deemed as void. In addition, their relationship with defendant must also be considered as a lending and borrowing relationship with immovable property as collateral and payment that had been paid in installment by the plaintiffs to the defendant must also be regarded as a loan payment because providing a profit or an additional payment outside the principal loan amount is firmly prohibited and unjustified in *sharĒĤah*.

Furthermore, the plaintiff also argued that the District Court of Bukittinggi did not have the authority to settle Islamic banking dispute since the time of the enactment of Law No. 3 of 2006, when the jurisdiction to settle Islamic banking disputes had been handed over to the Religious Court. As a result, the execution of the auction as mentioned above was also unacceptable.²⁹

However, the defendant refuted the plaintiffs' arguments mainly on the ground that the Religious Court did not have jurisdiction to adjudicate the case because it had been decided by the District Court of Bukittinggi and had permanent legal force with case No: 08/PDT.BTH/2004/PN.BT.³⁰

Based on the arguments given by both the plaintiffs and defendant, the panel judges, in their consideration, countered the defendant's argument and said that they have jurisdiction to hear, investigate and decide the case based on the provision of section 49 Law No. 3 of 2006. Furthermore, the object of lawsuit submitted to the Religious Court and Civil Court was dissimilar. The object of lawsuit submitted to the Religious Court was related to Islamic economic disputes for the reason that it contained a legal defect, while the object of lawsuit decided by the District Court was related to the defendant's application in issuing an auction order upon the collateral of the plaintiffs. Since the object lawsuit was different, there was no reason for the Religious Court to reject the case. With regard to the decision of the Civil Court above, the Religious Court should not have intervened and re-examined it again because it would have contravened the principle of *nebis in idem*.

The judges further found that the two *murabahah* contracts carried out by the plaintiffs and defendant were invalid because of the absence of goods. The existence of goods is compulsory in a *murabahah* contract; it is in line with the *fatwa* of NSC-MUI No. 04/DSN-MUI/IV/2000 concerning *Murabahah*. Because the *murabahah* contract procedure was null and void, the money provided by the defendant to the plaintiffs should be considered as *al-qard* and the plaintiffs became the borrower. In Islam a lender is strongly prohibited from placing any additional charge on the borrower since it is considered as *ribĒ*. Allah S.W.T says in *Surah al-BaqĒrah* verse 275: "But God hath

²⁹Ibid., 12.

³⁰Ibid., 18.

permitted trade and forbidden usury”. Furthermore *fiqh* norm also says that “any debt that brings benefit to a lender or creditor is *ribÉ*”.

By virtue of the above considerations, the panel judges decided *inter alia*:³¹

1. Accepted the suit of the plaintiff.
2. Declared that the *murabahah* contract conducted by the plaintiffs and defendant was null and void according to law.
3. Declared that the relationship between the plaintiffs and the defendant was a money borrowing relationship according to *al-qard* contract in Islam.

Despite the decisions of the panel judges above, both the plaintiffs and defendant were not satisfied. They therefore appealed to the Religious High Court concurrently with case registration No: 32 and 33/Pdt.G/2007/PTA.Pdg. In this appeal, the defendant through its lawyers propounded similar exceptions submitted at the Religious Court dated December 13, 2006. Those exceptions were:

1. That the principal case filed by the plaintiffs was decided by the Bukittinggi District Court with case Number:08/Pdt.BTH/2004/PN.BT on December 24, 2004;
2. That the objects of the case were a piece of land and building on which a certificate of property No. 311/Village *Belakang Balok* was auctioned based on Memory of Auction No:161/2006 on Augustus 16, 2006.

The panel judges of the Religious High Court were of the opinion that the above exceptions can be accepted. They disagreed with the decisions of the panel judges of the Religious Court in the first instance. They considered that since both the customer (debtor) and bank have mutually agreed to conduct *murabahah* contract with all its conditions, thus such agreement shall be in effect as *Nash SharÉÑah* for those who made and must be obeyed. It is in line with *Surah Al-Maidah ayat 1*: “O ye believe! Fulfill (all) obligations”. Furthermore, in section 17 of the two *murabahah* contracts mentioned that all legal consequences happened in it should be referred to the Indonesia Muamalat Arbitration Body (BAMUI). Therefore, in accordance with such contract, a body which is entitled to settle this dispute is a BAMUI, not a Religious Court. In addition, the Religious Court should declare itself as having no authority to settle such a case since such agreement was made before the enforcement of Law No. 3 of 2006.³²

By virtue of the above considerations, the panel judges of the Religious High Court considered that the decisions by the Religious Court in the first instance were indefensible and must be cancelled. Therefore, they decided to reject a lawsuit of the plaintiffs and accepted the appeal of the defendant (PT. Bank Bukopin Shari’ah) and cancelled the decisions of the Bukittinggi Religious Court No. 284/Pdt.G/2006/PA.Bkt.

³¹Ibid., 88.

³²Ibid.

The panel judges of the High Religious Court decided that “the Religious Court in the first instance did not have authority to decide this case”.

The plaintiffs challenged and then appealed the decision of the High Religious Court by mean of cassation to the Supreme Court with case registration No: 292/K/AG/2008. The plaintiffs submitted a number of legal grounds stated in their cassation memory (*memori kasasi*) to dispute the decision of the High Religious Court *inter alia*, as follows: 1) The High Religious Court was wrong in implementing the law because besides receiving the defendant’s exception, it also examined or gave consideration to the case principle, therefore it appeared inconsistent, 2) Based on sections 1320 and 1335 of the Civil Code, the *murabahah* contract No. 2 dated July 2, 2003 and the *murabahah* contract No. 43 dated August 27, 2003 were null and void because they were made with false or dishonest cause. In addition, they were also contrary to the principles of a *murabahah* contract where the goods that are bought and sold must exist and belong to the creditor or bank, and 3) The panel judges of the Religious High Court, in their consideration, mentioned that the agreement conducted by the plaintiffs and defendant in this case was made prior to the enactment of Law No. 3 of 2006; therefore the Religious Court should declare it incompetent to settle such case.

The Supreme Court had overruled the defendant’s cassation. It was of the opinion that the above reasons cannot be justified. Those reasons were related to the appraisal of result verification which was regarded as the appreciation of a reality which cannot be considered in the examination on cassation level. The Supreme Court can overrule a lower court’s decision if it in question lacked jurisdiction or acted beyond its jurisdiction; it applied law incorrectly or violated prevailing law and neglected to satisfy certain requirements imposed by law. These requirements are stipulated in section 30 of Law No. 14 of 1985 as amended by Law No. 5 of 2004.³³ However, the Supreme Court was further argue that the injunction of the High Religious Court must still be corrected based on the following considerations: 1) Since the case subject matter was auctioned by the Office of Government Credit Service and Auction (*Kantor Pelayanan Piutang dan Lelang Negara - KP2LN*) of Bukittinggi according to the Minutes of Auction (*Risalah Lelang*) No. 161/2006 dated August 16, 2006 based on the instruction of the Head of District Court of Bukittinggi with Determination No: 03/PDT.EKS/2006/PN.B dated July 4, 2006, the lawsuit of the plaintiffs should be affirmed unacceptable, and 2) The lawsuit of the plaintiffs was affirmed unacceptable because their case had been settled by the District Court of Bukittinggi, not because of the principle of retroactivity. Based on these considerations, the Supreme Court then decided to reject the cassation of the plaintiffs.³⁴

The plaintiffs tried again to challenge the decision of the Supreme Court on cassation by means of a case review (*peninjauan kembali*) in the Supreme Court itself with case registration No. 48 PK.AG.2009. However, in this last remedy, the plaintiffs’ application for a case review was also overruled by the Supreme Court because the plaintiff’s reasons did not comply with one of the requirements for the application of a case review, for instance new evidence discovered after the cassation was decided (*novum*) or deliberate mistakes performed by the panel of judges at the cassation level, as defined in section 67

³³The Supreme Court’s decision on cassation with case registration No. 292 K/AG/2008, 19.

³⁴*Ibid.*, 22.

(a to f) of Law No. 14 of 1985 as amended by Law No. 5 of 2004 and Law No. 3 of 2009 concerning the Second Amendment of Law No. 14 of 1985,³⁵ and moreover there was no real mistake of *judex juris* or *judex facti*.³⁶

The above case is very interesting. It, at least, contains two important issues which can be taken as a valuable lesson. The first issue is the validity of the *murabahah* contract, whether it was implemented properly in accordance with Islamic principles. Although the High Religious Court overruled the decision of the Religious Court in the first instance which stipulated that the *murabahah* contract conducted by the plaintiffs and defendant was null and void, its decision may be considered a correct decision because it gave more focus to the enforcement of the material law rather than the enforcement of the procedural law. However, the High Religious Court had a different view. It focused more on the implementation of the procedural law rather than on the material law. Consequently, the High Religious Court rejected the decision of the Religious Court because its decision was contrary to the principle of non-retroactivity. Thus it should have refused to examine the case, not otherwise.

The second issue is pertaining to the competency of resolving Islamic banking disputes. Which institution really has the absolute competency in the resolution of such disputes: Religious Court or Civil Court? As explained above, this case was decided by Bukittinggi District Court, but along with the enactment of Law No. 3 of 2006 which gives power to the Religious Court in settling Islamic economic disputes including Islamic banking dispute, the plaintiffs perceived it as a another chance to take the case again to the Religious Court with a different subject matter. The Religious Court accepted the case and said that it had jurisdiction to examine the case. However, according to the High Religious Court, the Religious Court did not have competency to settle such dispute because, as agreed by the disputing parties in the agreement of the *murabahah* contract, if dispute occurs between them, such dispute will be settled by BAMUI (Indonesian MuñÉmalat Arbitration Body). It is in line with Law No. 30 of 1999 concerning Arbitration and Alternative Dispute resolution.³⁷ Supposedly, this provision should not only be applied to the Religious Court, but also be applied to the District Court of Bukittinggi.

By virtue of the above case, conflict of jurisdiction may also take place when Religious Court and Civil Court are given similar competency in the resolution of Islamic banking disputes. The irresponsible parties may use this opportunity to bring the case from one court to another. It is important to note that the resolution of Islamic banking disputes with protracted manner is unfavorable to the development of Islamic banking in the

³⁵See a decision of the Supreme Court No: 48 PK/AG/2009.

³⁶In essence *judex facti* refers to a court which examines the legal facts put forward by the parties and then applies the applicable law to those facts. In Indonesia, the district and high courts are tryers of fact. Meanwhile, *judex juris* refers to a court which examines the enforcement of law carried out by *judex facti*. In Indonesia the Supreme Court is exclusively a *judex juris* because it does not determine factual issues. Its main function is to determine whether the law applied to a particular case should legally have been applied. In common law countries most superior courts have both appeal (tryer of law - *judex juris*) and trial (tryer of facts - *judex facti*) divisions. See, <http://hukumpedia.com>

³⁷See section 3 and 11 (1 & 2) of Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution.

future. In order to create a legal certainty in dispute resolution, section 55 (2) of Law No. 21 of 2008 concerning Islamic Banking must be deleted and stipulated that the Religious Court is the only court that has jurisdiction in the resolution of Islamic banking dispute.

Case 2: *PT. BPR Syariah Buana Mitra v. Herman Rasno Wibowo bin Sodirin and Harni binti H. Ahmad Sudarmo*

Another case occurred in the Religious Court of Purbalingga with case registration No. 1047/Pdt.G/2006/PA.Pbg concerning *musyarakah* financing between *PT. BPR Syariah Buana Mitra v. Herman Rasno Wibowo bin Sodirin and Harni binti H. Ahmad Sudarmo*, both as the plaintiff and defendants respectively. In this case, the plaintiff filed a lawsuit against the defendants to the Religious Court of Purbalingga because the defendants had breached the agreement of *musyarakah*. Based on the contract No. 123/MSA/VII/2005 conducted on July 20, 2005 the plaintiff agreed to give a capital to the defendants' business of brown sugar and grocery (*kelontong*) to the amount of Rp30.000.000. But the defendants were dishonest, using that capital to another business without the plaintiff's permission. Consequently, the plaintiff suffered a loss. The plaintiff wanted to withdraw its money, but the defendants refused to do so. It then filed a lawsuit to the Purbalingga Religious Court, asking it to issue an order which required defendants to return the money. If they failed to do so, the court was also asked to issue an order to conduct a seizure upon the defendants' collateral and auction it off.

Based on the above application, the court then called defendants to come to court. Unfortunately they did not come even though had been called several times. As a result, the panel judges decided the case by *verstek vonnis* (judgment in absentia), accepting some of the plaintiff's request and rejecting others.

The judges, in their legal considerations,³⁸ were of the opinion that the defendants were in default where they had deliberately used the capital from the plaintiff not in accordance with the agreement of *Musyarakah* Financing No: 123/MSA/VII/2005. The defendants also did not have good faith to settle their obligations. The panel judges referred to the opinion of Prof. Dr. Subekti SH who said that, "a debtor can be considered in default/negligent if cannot fulfill his obligation or delayed to fulfill it or fulfilled it but not in accordance with the previous agreement".

In addition, the plaintiff in its application letter only requests its money to be return by the defendants, but it did not request to cancel the *musyarakah* contract. According to panel judges, in an early step the plaintiff should ask to cancel the contract first which then was followed by the repayment request. The judges understood this because of the lack of understanding of the plaintiff. The panel judges referred to the Wahbah Zuhaili's opinion in his book entitled *Al-Fiqhul Al Islami Waadillatuhu* Juz IV P. 277, which explains that the contract agreement which is not applied (*liNadami tanfEd*) or its implementation diverted from one business to another (*aw intiqEluhu min harfatan ila harfatin*), as in this case, such contract can be cancelled (*fasakh*) and with the

³⁸See Case No: 1047/Pdt.G/2006/PA.Pbg, 3-5.

cancellation of the contract, it has ended. This argument was also referred to al-Qur'án *Surah al-M'Éidah ayat* (1) which says:

“O, you who believe! Fulfil (all) obligations.

And also *hadith* of the Prophet Muhammad S.A.W:

“The Muslims are bound to the contract agreement they made” (HR. Abu Dawud, Ahmad, Tirmidzi and Daruqutni)

By virtue of the above considerations, the panel judges then decided among others: 1) Declared that the defendants had made a default, 2) Cancelled the contract of *Musyarakah* Financing No: 123/MSA/VII/05, dated July 20, 2005.³⁹ This decision then was informed to the defendants on January 31, 2007.

However, on September 5, 2009 the defendants through their proxy filed a Case Review (*peninjauan kembali*) to the Supreme Court against the decision of the Purbalingga Religious Court. The main reason presented by the defendants was that according to section 12 of Contract Agreement of *Musyarakah* Financing No: 123/MSA/VII/05 dated July 20, 2005 it was clearly stipulated that if there was a dispute between the plaintiff and defendants, such a dispute should be brought to the Syari'ah Arbitration Body in Jakarta or the District Court of Purbalingga or/and Affairs Committee of State Receivable (*Panitia Urusan Piutang Negara/PUPLN*) / Office of Government Credit Service and Auction (*Kantor Pelayanan Piutang dan Lelang Negara - KP2LN*) in Semarang and not the Purbalingga Religious Court. In addition, unfortunately, that agreement was not shown at all by the plaintiff in court proceedings, thus it can be categorized as new evidence (*novum*). Hence, based on these reasons, it was evident that the Purbalingga Religious Court did not have authority to resolve the dispute.⁴⁰

After examining the above reasons, the Supreme Court argued that those reasons cannot be justified because according to section 49 of Law No. 3 of 2006 the Religious Court has competency to resolve Islamic economic disputes including Islamic banking disputes. In addition, those reasons did not include one of the reasons for the application of Case Review as referred to in section 67 a – f of Law No. 14 of 1985 as amended by Law 5 of 2004 and the Second Amendment by Law No. 3 of 2009. For that reason, the Supreme Court decided to overrule the application of the Case Review of the defendants.⁴¹

The above case is similar to the first case related to which institution was competent to resolve Islamic banking disputes. In the former case, the High Religious Court of Padang had overruled decision of the Religious Court of Bukittinggi since in was clearly mentioned in *murabahah* contract the disputing parties agreed to settle their dispute at BAMUI (Indonesian Muamalat Arbitration Body). Therefore the High Religious Court decided that the Religious Court had no authority to resolve the dispute. The Supreme Court also agreed with such decision. However, in the latter case, the Supreme Court

³⁹Ibid., 6

⁴⁰Decision No: 86 PK.AG/2009, 5-6.

⁴¹Ibid., 6-7

decided that the Purbalingga Religious Court has the right to settle a dispute, while it rejected a request of defendants' Case Review even if in contract has clearly pointed out that the disputing parties agreed to settle their dispute through Islamic arbitration in Jakarta (BAMUI / BASYARNAS). If we see carefully, the decision of the Supreme Court in the above two cases was inconsistently. Supposedly, in the latter case, the Supreme Court should also consider defendants' reason and decide that the Religious Court of Purbalingga had no authority to settle the dispute because incompliance with sections 3 and 11 (1 & 2) of Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution which stipulates that if there is an arbitration clause in the agreement agreed by the disputing parties, the District Courts or Religious Court does not have the authority to resolve such dispute.

Therefore it is important to note that in order to avoid a conflict of law and competency as well as to ensure whether the Religious Court in the first instance has competence to examine the Islamic banking case; it is required to verify all documents of disputing parties. If an arbitration clause is found in the contract of disputing parties, it should deny the examination of the case.

5.2. The Performance of BASYARNAS

With the rapid development of Islamic banking and finance, BASYARNAS, as a recognized Islamic arbitration body in Indonesia, is playing an important role in the resolution of Islamic banking and finance disputes. From its establishment in 1993 until 2010, only 18 cases have been resolved by this body. All of these cases are related to BBA (*Al-Bai Bith'aman 'Ajl*) and *murabahah* financing except one case which was related to a claim in Islamic insurance.⁴² On the basis of the small number of cases resolved by the BASYARNAS it should not be perceived that it is unpopular among Islamic banks or the *takaful* industry and their customers. This situation should be seen in a positive perspective as many cases are apparently settled internally within such institutions.⁴³

BASYARNAS, does not start acting on its own, but waits of a complaint to be made. Thus it starts working when it receives a request from a disputing party. The proceedings are conducted in a confidential manner which is in line with the Islamic teachings where Muslims are enjoined to cover up a fault of others. Mostly disputes are resolved in amicable manner, satisfactorily and take no more than six months.⁴⁴ However, although

⁴²This information was obtained by the writer directly from Mrs. Euis Nurhasanah, Treasury Deputy of BASYARNAS and she is one of BASYARNAS' staff, among two, who usually stand by in BASYARNAS' Secretariat, Jakarta, November 27, 2008 and April 7, 2010 respectively.

⁴³Interview with Achmad Djauhari, Secretary General of BASYARNAS, Jakarta, November 27, 2008. Also interview with Euis Nurhasanah on the same date.

⁴⁴According to Achmad Djauhari, it is too difficult to assess the satisfaction level of disputing parties towards decisions of Basyarnas, because it is very relative. After the arbitrator has given his decision to disputing parties and they accept such decision, usually the communication between them does not exist anymore. However, most disputing parties accept the Basyarnas' award. Similarly, according to Euis Nurhasanah, sometimes the disputing parties are represented by lawyers and most of these lawyers say that the dispute resolution in Basyarnas is not complicated, fast compared to other arbitration bodies and law suits. Ibid.

the decisions of BASYARNAS are final and binding, there are two cases which brought to the court after one of the disputing parties refused to follow BASYARNAS' decision. These two cases are *PT. Dana Pensiunan Angkasa Pura II v Bank Syariah Mandiri*⁴⁵ and *PT. Atrium Masta Sakti v PT. Bank Syariah Mandiri*.⁴⁶ It is noteworthy that the arbitrators utilized Islamic principles as the main source in resolving the dispute.

As mentioned earlier, the central office of BASYARNAS is located in Jakarta. Unfortunately, the office is small and consists of only one room for arbitration sessions. It has only a few members of staff who appear to be busy with other activities. Similar is the case of the arbitrators.⁴⁷ This is because all of them work on voluntarily basis and are not paid any salary. Arbitrators are paid when they conduct arbitration.

In order to improve the performance of BASYARNAS and to increase the confidence and trust of the parties, it is suggested that it must have its own building which is separate from MUI's building⁴⁸ and must be equipped with good infrastructure such as separate

⁴⁵This case is concerning the contract of *mudh'Erabah muqayyadah* financing. It was decided at the end of August 2008. In this case, BASYARNAS has decided that the PT. Bank Syariah Mandiri and PT Sari Indoprima were required to pay compensation to PT. Dana Pensiunan Angkasa Pura because of default. However PT. Bank Syariah Mandiri did not follow this decision. PT. Dana Pensiunan Angkasa Pura then asked the Religious Court of Central Jakarta to seize the assets of PT. Bank Mandiri. The implementation of writ of execution upon such assets was postponed several times. Finally, on September 15, 2009, the Religious Court of South Jakarta seized two assets of PT Bank Syariah Mandiri. See, "Bank Syariah Mandiri Terbelit Akad Mudh'Erabah Muqayyadah", in <<http://www.hukumonline.com/berita/baca/ho121873/bank-syariah-mandiri-terbelit-akad-mudharabah-muqayyadah>>, "Eksekusi Terhadap Aset Bank Syariah Mandiri Kembali Tertunda", in <<http://www.hukumonline.com/berita/baca/ho121915/eksekusi-terhadap-aset-bank-syariah-mandiri-kembali-tertunda>>, accessed September 9, 2010. See also, "Pengacara Keberatan Aset Bank Syariah Mandiri Disita", in, <<http://news.okezone.com/read/2009/09/15/1/257773/1/pengacara-keberatan-aset-bank-syariah-mandiri-disita>>, (accessed September 9, 2010).

⁴⁶In this case, PT. Bank Syariah Mandiri could not accept BASYARNAS' decision and the bank requested for cancellation of such decision to the Religious Court of Central Jakarta. The bank's reasons for cancellation of such decision, among others were as follows, 1) substantially, the content injunction is unreasonable and contradictory to each other, 2. The content injunction is contrary to section 70 of Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution because it was taken by means of deception committed by one party in the investigation of dispute. The Religious Court of Jakarta Central, in its decision No. 792/Pdt. G/2009/PA.JP has accepted the request of Bank Syariah Mandiri and then annulled the decision of BASYARNAS. Both the PT. Atriumasta Sakti and arbitral tribunal of BASYARNAS refused decision of Religious Court and brought it to the Supreme Court for Cassation. Based on the latest information obtained the Supreme Court has rejected the decision of the Religious Court of Jakarta Central.

⁴⁷It can be understood why this situation happened because the staffs and the arbitrators in undertaking their duties and functions are voluntary. They are not paid, except two staffs as mentioned above. The arbitrators will only get payment if they handle a case.

⁴⁸A special secretariat for BASYARNAS which is separate from MUI (*Majelis Ulama Indonesia* – Indonesian *Ulama* Council) building is really important to maintain its independence and neutrality. There was a case when one of the members of National *Shar'Ēnah* Board (NSB) who was also a member of the *Shar'Ēnah* Supervisory Board in one of the Islamic banks could not accept a decision of BASYARNAS against an Islamic bank in which he was a member of the *Shar'Ēnah* Supervisory Board. He then reported this matter to the MUI leader. After that the arbitrators who handled the case were called by that MUI leader to be asked with respect to their decision in the case. The MUI leader finally could understand after hearing the explanation of the arbitrators. This is one form of indirect intervention which may impede the freedom and neutrality of BASYARNAS in carrying out its duty and function. Interview with Hidayat

rooms for staff and arbitrators as well as for holding mediation and arbitration sessions. It must also be managed professionally by qualified staff and arbitrators who are available at all times in the secretariat. Their salary must also be given appropriately in accordance with their respective tasks and duties. In the globalized era, Internet is very important as a means of information and communication. Therefore, it should have internet connectivity which provides all information related to all its activities. On top of that, full support from the Government is necessary, so it can work effectively and efficiently.

Currently, BASYARNAS has 15 branches spread in several provinces such as Riau, Yogyakarta, East Java, Lampung, West Kalimantan, Cirebon city, South Sulawesi, South Sumatra, Central Sulawesi, Central Kalimantan, East Kalimantan, North Sumatra, Bengkulu and Banten.⁴⁹ The effort to set up a branch of BASYARNAS in all provinces continues to be done. It is hoped that such effort can be materialized as soon as possible.

Based on the explanation above, we can see that BASYARNAS provides significant support to the development of Islamic bank and finance industry by helping to solve their disputes in an amicable, fair, uncomplicated, and quick manner.

6. Conclusion

For financial institutions which are based on Islamic principles, entire activities of Islamic banking and finance must be in compliance with such principles. In line with this, an important point to be taken into consideration is the use of dispute resolution. Both the court institution and alternative forum such as arbitration and mediation are strongly required to utilize Islamic principles as the primary rule in the resolution of Islamic banking and finance disputes. The utilization of these principles is necessary. However, based on experience it is found that the courts do not refer to Islamic principles in the resolution of Islamic banking and finance disputes. Instead, they utilize other laws. Consequently, the decisions given by them are not in compliance with *shar'iah* principles.

In Indonesia, since Law No. 7 of 1989 was amended by Law No. 3 of 2006 concerning Religious Court, the settlement of Islamic banking and *takaful* as well as other Islamic financial institutions comes under the jurisdiction of the Religious Court. It is re-emphasized in section 55 (1) of Law No. 21 of 2008. Giving the authority to resolve Islamic banking and finance disputes to the Religious Court is an appropriate step because by doing so the cases of Islamic banking and finance can be decided in compliance with Islamic law. But serious problems appear when section 55 (2) of this law stipulates that the disputing parties, by virtue of their mutual agreement, are allowed to choose Civil Court for settlement of their disputes. This step is retrogressive step, because when two different courts of different competency are given the authority of resolving a particular dispute it will certainly lead to confusion and ambiguity. Their jurisdiction must be properly spelled out. In addition, section 55 (2) of Law No. 21 of

Achyar, the arbitrator of BASYARNAS and also a Senior Partner in Ihza & Ihza Law Firm, Jakarta, April 8, 2010.

⁴⁹ Interview with Mrs. Euis Nurhasanah, April 7, 2010.

2008 is also contrary to section 49 of Law No. 3 of 2006 which earlier had stipulated an absolute jurisdiction of the Religious Court in the resolution of Islamic banking and finance disputes. In relation to this, the Government itself has showed its inconsistency in making the law and is still influenced by the old mindset by seeing that the purpose of the Religious Court is just to resolve marriage and divorce disputes only not Islamic banking and finance disputes. Therefore, it is strongly recommended that the provision of No. 55 (2) of Law No. 21 of 2008 must be deleted.

In order to provide an alternative out-of court dispute mechanism in the resolution of Islamic banking, *takaful* and other Islamic institutional disputes in Indonesia, BASYARNAS was established. The main reason for the establishment of this Islamic arbitration was that at this early stage of the development of Islamic banking and finance, none of the existing courts were considered competent to resolve Islamic banking and finance disputes. With the establishment of Islamic arbitration, it is expected that such disputes can be resolved on the basis of Islamic principles.

Since it commenced operations in 1993, not many cases have come to it, but this does not mean that it is not viable and workable or is unable to resolve disputes quickly, informally and satisfactorily.

As the only recognized Islamic arbitration in settling disputes in respect to Islamic business, it plays an important role and has a very good prospect in the future. Therefore, it should be managed professionally by professional staff with first-rate remuneration. It must have its own building with good facilities such as proper rooms for holding arbitration proceedings, rooms for staff and arbitrators, proper library and supporting infrastructure. Bank Indonesia must give its full support to BASYARNAS.