REFORMULATION OF MEDIATION IN DISPUTE SETTLEMENT ON ISLAMIC BANKING

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Abstract

Purpose of the study: The general objective of this study was to explore the potential of the mediation process as a reformulation of Islamic banking dispute settlement after the Supreme Court Regulation (SCR) on mediation procedure in the court. On the one hand, this study tries to find a repositioning of mediation procedures in resolving disputes over Islamic Banking in religious courts.

Methodology: This research was normative and empirical. The data collection techniques of this literature would be done utilizing literature study and field research. Primary data was obtained through field research with interviews. The participants from Judges of Religious Court, Abdul Manan as a Judge of in the Supreme Court Institution, Islamic banking legal unit. Data were processed by a qualitative descriptive analysis technique. Secondary data used consisted of primary legal material sourced from SCR No. 1 of 2016 and the contract.

Principal Findings: The mediation process as a reformulation of Islamic banking dispute settlement especially in the Religious Court is according to Article 2 Paragraph (1) SCR No. 1 of 2016. The repositioning of mediation procedures in resolving Islamic banking disputes in the Religious Courts applied by making changes as part of the case registration process implemented through honesty, fidelity, and justice.

Applications of this study: This paper is essential for the parties to get the legal certainty in maintaining the continuing development of Islamic banking business, product development, risk management and efficiency of the bank. The study may be instrumental in helping to improve the development of the legal studies programs, notably the Islamic Economic Law. The results of this study will provide benefits for the religious court to improve its performance effectively and efficiently in dispute settlement through mediation.

Novelty/Originality of this study: Determination of the mediation as reformulation of dispute settlement on Islamic banking post-enactment or issuance of the SCR No. 1 of 2016 and to find out about repositioning of the mediation procedure and proposing changes in the position (repositioning) of the mediation process and reaffirming the roles, duties and accountability of professional mediators or non-judge mediators so that it is expected that the role of non-judge mediators can active in resolving Islamic banking disputes both in procedures in the court or outside the courts applied at the Indonesian Religious Court. The contribution of this paper will be the revision of the curriculum of legal studies and Islamic Economic Law. The importance for researchers of the study is to develop and improve the capability of researchers for developing the law study program called Islamic Economic Law.

Keywords: Dispute Settlement, Islamic Banking, Mediation, Reformulation, Religious Court, Procedures.

INTRODUCTION

Islamic Banking dispute settlement through alternative dispute settlement is interesting to study because of it as one of the recent breakthroughs in a financial institution which strongly supports the fulfillment of every Moslem need in the economic field with adhering to the Islam. That statement relevant with the opinion from Beck et al. He argues: “Islamic banking is evolving its concept among Muslims as well as in non-Muslim countries” (Beck et al, 2013). In fulfilling basic human needs, Islamic banking practices are initiated by Islamic financing contracts that have been implemented worldwide, in Muslim countries as well as non-Muslim countries such as, but not limited to Australia, Canada, England and the United State (Babar Khan et al., 2015).

In the financial agreement between Islamic bank and customer on the economic field as described above, arise a need for a fair and legal certainty to create effectiveness and efficiency in doing economic activities. Therefore, as every financial transaction will lead to a legal contract of parties, and from such contracts would arise the need for legal certainty, it is certainly proper to say that there is a tightly knit relationship between law and economy. Based on these relations, Satijpto Rahardjo noted that “the legal system as the embodiment of the economic system, and vice versa, and it is safe to assume that the economic system of a nation will be reflected in the legal system” (Rahardjo, 1993).

The Islamic banking industry in Indonesia has been growing since the enactment of Law No. 3 of 2006. In the application of the substance of Law No. 3 of 2006, as amended by Law No. 50 of 2009, requires the support of an adequate legal and judicial system to secure the establishment of a fair the pacta sunt servanda principle or legal certainty for Islamic bank
and the customer and other parties. Post the enactment of the Constitutional Court Decision Number 93 / PUU-X / 2012 (CCD No. 93 of 2012) the authority to resolve Islamic banking disputes rests with the religious court. This CCD has a legal effect on the existence of legal certainty, but on the other side of the decision, there are still injustices and uselessness. As a result of the existence of the CCD effect on the decline in the performance of Islamic banking in Indonesia, namely a slowdown in the economic aspects of growth. These events can be seen in the following data.

Table 1: “Islamic Banking Development”

<table>
<thead>
<tr>
<th>Indicator</th>
<th>Des 2018</th>
<th>Jan 2019</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Number of Islamic Bank</td>
<td>14</td>
<td>14</td>
</tr>
<tr>
<td>The Number of UUS-Conventional Bank</td>
<td>20</td>
<td>20</td>
</tr>
<tr>
<td>The Number of BPRS</td>
<td>165</td>
<td>165</td>
</tr>
<tr>
<td>Total Office Network (BUS+UUS)</td>
<td>477,327</td>
<td>466,800</td>
</tr>
<tr>
<td>Total Aset (IDR Trillion)</td>
<td>2,229</td>
<td>2,260</td>
</tr>
<tr>
<td>Total Earning Assets</td>
<td>154,342</td>
<td>149,378</td>
</tr>
<tr>
<td>DPK</td>
<td>257,606</td>
<td>257,052</td>
</tr>
<tr>
<td>Total Financing</td>
<td>202,766</td>
<td>200,746</td>
</tr>
<tr>
<td>NPF (Gross)</td>
<td>2,15</td>
<td>2,30</td>
</tr>
<tr>
<td>CAR</td>
<td>20,39</td>
<td>20,25</td>
</tr>
<tr>
<td>FDR</td>
<td>78,53</td>
<td>77,92</td>
</tr>
</tbody>
</table>

Sources: Sharia Banking Statistik, 2019.

According to these data, specifically related to asset growth, there is a decline. Based on the data above, there appears to be a decrease in the total aspects of financing. Therefore, to improve the growth of Islamic banking performance to become stronger, the existing problems must be addressed. When viewed internationally the position of Indonesia is seen to have great strength and potential in the development of sharia banking in particular and Islamic financial institutions globally. Tampubolon said: “Indonesia ranks on 9th out of 10 countries that have developed Islamic finance” (Tampubolon, 2015). Nationally, Idhat said: “the development of the Islamic banking industry is still growing, but the growth is slowing down” (Idhat, 2015).

The management of Islamic banking is an urgent issue which currently requires concentration and constructive thinking. “There is an urgency this issue which requires attention, especially after the CCD No. 93/PUU-X/2012, on August 29th, 2013, related to the judicial review of Article 55 Paragraph (2) and (3) of Law Number 21 of 2008 on Islamic banking. Based on the ruling the Constitutional Court to restore the competency of Islamic banking dispute settlement to the Religious Courts. It gives a positive correlation that absolute competence in dispute settlement in the Islamic banking affairs becomes the sole responsibility of the Religious Courts” (Setyowati, 2013). This becomes very important for the parties, especially for Islamic banks and customers to obtain legal certainty in maintaining the continuity of business fund business growth in Islamic banking practices. Another consideration is to obtain legal certainty in the development of their businesses in the future. Legal certainty is also needed to provide certainty in terms of products, the development of Aqad, minimizing risks, preventing greater losses. In other words, guaranteeing legal certainty is sought in the context of efficiency and effectiveness of services from Islamic banks to customers or the public.

Another impact with the presence of the CCD is that there needs to be a revision of Law No. 21 of 2008 (hereinafter referred to as Sharia Banking Law), especially concerning respect to Article 55 of the Sharia Banking Law. Amendments to Article 55 of the Sharia Banking Law also gives consequences to several implementing regulations of the Sharia Banking Law. This is related to the implementation and technical guidelines especially relating to the mediation of dispute resolution. During its development SCR No. 1 of 2016. Other consequences are related to the institutional readiness that will play a role in the settlement of Islamic banking disputes. This is also related to the availability of human resources and readiness and ability in terms of proceedings and other related documents. Especially for judges, clerks, advocates, the legal section of Islamic banks, the Sharia Supervisory Board as well as for managers and directors. As a consequence during the transition period, the role of alternative dispute resolution and encouraging the operation of Islamic arbitration institutions as an option to resolve Islamic banking disputes.

The technique of Arbitrase and ADR is an alternative model among others: arbitration, mediation, conciliation, mini-trials, private adjudication, final offer arbitration, court-annexed ADR, and summary jury trials. Krishna Agrawal said: “There is the no better option to strive to develop an alternative model of disputes settlement (ADR). With the advent of ADR, their new avenue for people to settle their dispute” (Agrawal, 2014). Among the options stated in Law No. 30 of 1999 on Arbitrase and Alternative Dispute Settlement (Law of Arbitrase and ADR), the research mainly focusses on Mediation.
In the practice of justice in Indonesia, in particular, the resolution of disputes through mediation included in the process of settlement in court is intended so that the resolution of disputes through mediation can be one of the most effective instruments to prevent the accumulation of dispute resolution. Problems that have occurred since the issuance of SCR No. 2 of 2003 to SCR No. 1 of 2016 concerning procedures for institutionalizing mediation into the justice system. Until this research was carried out the achievement of dispute resolution through mediation was not optimal. This is related to the roles, duties, and responsibilities of judges not yet optimal in resolving disputes. Besides that, the cause of the dispute resolution process which is not yet optimal through mediation in the court because the judicial institution has not yet given the role of the non-judge mediator who should have been given the opportunity by SCR No. 1 of 2016.

The disputes settlement through mediation in the courts uses the civil procedural law currently in force in Indonesia. The intended procedural law is sourced from Article 130 of the Het Herziene Indonesisch Rechtsreglement (HIR) and Article 154 of the Bufferengewesten Rechtsreglement (Rbg). The provision provides provisions for the parties to settle peacefully through justice. Specifically for the dispute settlement of Islamic banking after the enactment of CCD No. 93 of 2012 then these provisions should also apply which are strengthened by the existence of SCR No. 1 of 2016. However, in the practice according to Article 130 HIR, 154 Rbg, or Supreme Court Letter (SCL/SEMA) No. 1 of 2002 was never used and in practice began to cause problems.

Arrangement of mediation as one of the ways in a peaceful resolution of disputes begins with the issuance of SCL No. 1 of 2002. The reason for the issuance of the SCL (SEMA) is to overcome the lack of ness in the judiciary in Indonesia. The existence of SCL is seen as a concrete step to optimize efforts to resolve peacefully through justice. If an amicable dispute resolution is not found through the SCL, the SCR can be used. In its history, the SCR on mediation began with SCR No. 2 of 2003. In 2008, SCR No. 2 of 2003 amended by SCR No. 1 of 2008 concerning Mediation Procedures in the Court. This SCR was later changed by SCR No. 1 of 2016 concerning Mediation Procedures in the Court.

Research on mediation in the religious court after the enactment of SCR No. 1 of 2016 does not yet exist. Based on the author's searches through library research, it was found that research on existing mediation was written by (Fricillia N Lomban (2013). The results of this study explain “the dispute settlement through mediation outside the judiciary and the judiciary but based on the SCR Number 1 of 2008”. The mediation research based on SCR No. 1 of 2008, also written by (Ainal Mardhiah (2013). Another study was conducted by Revy SM Korah about mediation in resolving international trade disputes. This research found about “the types of mediation, the positive and negative sides of mediation culture” (Korah, 2013). Based on the results of several previous studies, the researchers were interested in researching the reformulation of mediation in the religious court post the enactment of SCR No. 1 of 2106. The research problem of this research is how to explore the potential of the mediation process as a reformulation of mediation in the dispute settlement after the enactment of SCR No. 1 of 2016 and how is the repositioning mediation procedures in resolving Islamic Banking disputes in religious courts.

This paper is expected to contribute to the understanding of the mediation as a reformulation of dispute settlement on Islamic banking and understanding the repositioning of the judicial procedure for dispute settlement through the mediation of Islamic banking in the Religious Courts. The Urgency of the study is to determine the mediation as a reformulation of dispute settlement on Islamic banking post-enactment or issuance of SCR No. 1 of 2016. The study also to know of the repositioning of the juridical process of mediation in Islamic banking dispute settlement in the religious courts. The importance for researchers of the study is to develop and improve the capability of researchers for developing the legal studies programs that sound of Islamic Economic Law.

LITERATURE REVIEW

Muamalah as the legal relationship

The legal basis of the legal cooperation between Islamic banking and customers is categories in muamalah. Hendi Suhend said, “Muamalah in Islamic law in the broadest sense are the rules (laws) of Allah to organize man concerning worldly affairs in social intercourse” (Suhendi, 2002). Hendi Suhendi has an opinion that “Muamalah activities concerning economic aspects include activities to improve the welfare and quality of life, such as purchase, savings, and loans, debts, joint ventures as well as others” (Suhendi, 2002: 8). The Aqad is the legal sources of the parties relating in the Islamic banking practices. “Aqad is part of tasharruf. Tasharruf is every decisions and consent given by a man within his consent and personality, and Islamic Law establishes some rights arising from such” (Suhendi, 2002: 44). The implementation of muamalah in the practice of Islamic banking is implemented in the finance agreement between customers and sharia banks, as stated in the agreement (Aqad). The terminology of the contract is “a promise or set of promises to which the law attaches a legal duty and also provides a remedy for breach of that duty. One of the elements that the law requires in establishing a contract is the intention of the parties to create legal relations” (Ibrahim, 2015).
The Principles of Contract (Akad)

In the implementation of providing financing to customers, banks maintain liquidity by trying to resolve the problems they face. The transactions between Islamic banks and customers begin with a contract. For the implementation of the contract carried out using the principle of legal certainty. The principle of legal certainty in the implementation of a contract means that the agreement made by the parties applies as a law for the parties that made it. This means that the agreement made applies and binds the parties as law. In the contract dispute settlement clauses in Islamic banking, there are stages of settlement including settlement by deliberation and consensus, settlement through ADR, among others: Mediation, Arbitration, Conciliation and dispute settlement through the Religious Courts.

The Definition and Regulation of Mediation

Understanding mediation is a process that is approved through negotiation or a consensus of the parties, agreed by the mediator who does not have the authority to decide or force approval. The mediation process is ultimately the same process as negotiation or consultation. The existence of respect between mediation, negotiation, and consultation then in the mediation process there is no compulsion for the parties to accept or reject ideas or complete during the mediation process in the mediation process, the agreement of the parties. This is based on the consensus principle.

Based on the provisions in Article 7 paragraph (1) SCR No. 1 of 2016, stated that: "The Parties and/or their attorneys are required to mediate in good faith". Based on the contents of Articles 7, 22 and 23 SCR No. 1 of 2016 it can be seen that good faith becomes an important principle to be carried out by the parties so that the implementation of mediation can run effectively efficiently.

METHODOLOGY

This research used a qualitative approach (Muhadjir, 2002). The operation was done according to with constructive paradigm. The research use literature and field research. This study uses the socio-legal studies (Simarmata, 2007), that is the understanding of the law. Secondary data was obtained through the Library Research, which includes Primary Legal Material, including Law No. 30 of 1999, Law No. 50 of 2009, SCR No. 1 of 2016, CCD No. 93/ PUU-X/2012, SCR No. 1 of 2016, SCL and Financing Aqad/Contract. Secondary Legal Materials were obtained within books about the dispute settlement, legal system, the legal theory, the legal principles, the Aqad, Islamic banking, legal research methodology, and article of journals. The primary data was obtained through field research with observations and interviews. The participants: Judges of the Religious Court, Abdul Manan as a judge of in the Supreme Court Institution, Islamic banking legal unit. Data were processed by descriptive qualitative analysis technique.

DISCUSSION/ANALYSIS

The Potential of The Mediation Process as a Reformulation of Islamic Banking Dispute Settlement.

Islamic banking in Indonesia is part of Islamic financial institutions which are currently increasingly in demand by the public and show increasing performance development. But on the other hand, the practice of Islamic banking has the potential for conflicts to arise among the parties that are conducting transactions increasingly high. Andri Soemitro said that “Financial Institutions are all entities whose activities in the fields of finance include the conduction and the collection and distribution of funds to the public, especially to finance preferred financial institutions, which support finance investment companies, but by no means limiting the financing activities of financial institutions” (Soemitro, 2010). The transaction in Islamic banking arises from aqad (contract). Aqad (contract) in the Islamic private law is a category of the muamalah. Hendi Suhendi said: “Muamalah in Islamic law in the broadest sense are the rules (laws) of Allah to organize man concerning worldly affairs in social intercourse” (Suhendi, 2002: 2).

The operationalization of Islamic banking as an Islamic institution is based on Islamic principles based on the Qur'an and Hadith. Therefore, in Islamic banking practices, some financing transactions are carried out based on profit sharing and avoid usury. This is a consideration so that in practice it does not deviate from Shariah compliance. To realize sharia compliance in Islamic banking operations, in every Islamic banking there are only bank managers and leaders who understand the principles of Islamic muamalah, besides that there must also be a Sharia Supervisory Board (DPS) whose job is to oversee the operations of sharia banks following with sharia principles.

Islamic banking activities as described above in their application, especially in financing transactions, have shown very positive prospects and are increasingly developing. The global position, Indonesia is seen as reliable and has great potential in the application of global Islamic finance. As explained above, Indonesia's position is ranked 9th out of 10 countries that have significantly developed the Islamic finance sector as the data described from OJK Islamic Banking Roadmap 2015-2019: “1. Malaysia (423,285); 2. Saudi Arabia (338,106); 3. Iran (323,300); 4. UAE (140,289); 5. Kuwait (92,403); 6.
Based on the results of library research sourced from SCR No. 1 of 2016 that mediation is a necessity conducted by a Judge before examining the subject matter. The legal basis for doing mediation in the previous court was SCR Number 1 of 2008 concerning Mediation Procedures in the Court, which was the result of the revision of SCR Number 2 of 2003. In SCR Number 2 of 2003, there were still many normative weaknesses that prevented the SCR from reaching the maximum target, which is desired. Likewise, there were some inputs from the judges about the problems in the SCR

Based on the SCR mentioned above, the mediation process is part of the procedural procedure. The results of research conducted in 2012-2016 by the research team in 7 (seven) Religious Courts, namely the Religious Courts of Yogyakarta, Sleman, Bantul, Gunung Kidul, Temanggung, Purbalingga, Bandung by conducting interviews with Judges and Registrars note that the success rate of the mediation process by 18%. This data shows a better success rate when compared with the results of previous studies conducted in the District Court by Benny Riyanto, Hapsari Tunjung Sekartaji and Dewi Nurul Musjtari undertaken in 2016 showed a 10% success rate. Potential mediation process as a reformulation of sharia banking dispute settlement after the enactment of SCR No. 1 of 2016 if based on the results of library research sourced from SCR No. 1 of 2016 that mediation is a necessity conducted by a Judge before examining the subject matter.

Table 2: The Dispute Settlement of Islamic Banking Through Mediation in Religious Court on 2012-2016

<table>
<thead>
<tr>
<th>Location</th>
<th>Number of Islamic Economics Cases</th>
<th>Mediation Process</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yogyakarta</td>
<td>6</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>Sleman</td>
<td>12</td>
<td>2</td>
<td>16.66%</td>
</tr>
<tr>
<td>Bantul</td>
<td>6</td>
<td>2</td>
<td>33%</td>
</tr>
<tr>
<td>Gunung Kidul</td>
<td>20</td>
<td>18</td>
<td>90%</td>
</tr>
<tr>
<td>Temanggung</td>
<td>3</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>Purbalingga</td>
<td>27</td>
<td>10</td>
<td>37%</td>
</tr>
<tr>
<td>Bandung</td>
<td>10</td>
<td>1</td>
<td>10%</td>
</tr>
<tr>
<td>Total</td>
<td>84</td>
<td>33</td>
<td>39.3%</td>
</tr>
</tbody>
</table>


Achievement of 18% dispute settlement through mediation that has been carried out by the religious court has not been encouraging for academics, researchers, observers and users, and practitioners of Islamic banking. Therefore, one of the objectives of this research is to find obstacles to the achievement of the dispute settlement process of Islamic banking through the mediation of up to 50%. Furthermore, on the findings of existing constraints the researcher proposes a change in dispute settlement procedures through arbitration in the religious court which will be discussed in the results of the study to answer the second problem of this study.

Hendi Suhendi has an opinion that “Muamalah activities concerning economic aspects include activities to improve the welfare and quality of life, such as purchase, savings, and loans, debts, joint ventures as well as others” (Suhendi, 2002: 8). The activities of the parties in Islamic banking are categories of Aqad. Suhendi said that: “Aqad is part of tasharruf. Tasharruf is every decisions and consent given by a man within his consent and personality, and Islamic Law establishes some rights arising from such” (Suhendi, 2002: 44).

In implementing muamalah, there are uses legal principles. It should be noted that legal principles are not concrete, but only as a means of consideration in settling disputes that is or may happen. The legal principles are the basis of thinking in
the formation of positive regulation, and such beliefs are not eternal/fixed in its nature. Based on Sudikno Mertokusumo opinion, “the legal principle is fundamentals or directions in the formation of positive law” (Mertokusumo, 2007: 32). Such principles could be used in the creation of an agreement (in this case Islamic contract), the principles are like a deal among others: “consensual, the principle of freedom of contract and the principle of good faith in the subjective sense”. And otherwise, the implementation of the contract use legal certainty and the good faith principle in the objective sense or contractual step.

In Islamic banking transactions apply the principles in making contracts that can affect the status of contracts made by the parties. Failure to fulfill any of these principles will result in the cancellation or invalidation of the agreement. Therefore at the time of making the contract, there must be carefulness and accuracy in applying each of these principles. Some legal principles that are appropriate in the contract are as follows: "Al-Hurriyah (Freedom), Al-Musawah (Equality or Equality), Al-'Ts (Justice), Al-Ridha (Rahmat), Ash-Shidq (Honesty and Truth ), Al-Kitabah (Written) ".

Implementation of muamalah in Islamic banking practices uses finance contract. The terminology of the contract is “a promise or set of promises to which the law attaches a legal duty and also provides a remedy for breach of that duty. One of the elements that the law requires in establishing a contract is the intention of the parties to create legal relations” (Ibrahim, 2015). Several types of contracts that become one of the sources of law and are of concern in this study are Islamic banking contracts, especially on financing products. Contracts in Islamic law must meet the terms and conditions of the contract. This is different from contracts on conventional banking practices which only rely on conditions and do not recognize the terms of the agreement. Pillars are something that must exist before a contract on Islamic banking products is made. While the conditions are something that complements harmony. If the terms of the agreement are not fulfilled, the contract/contract cannot be made or carried out. While if the conditions do not yet exist or are incomplete, the contract/contract can be carried out based on the consent of the parties.

In carrying out their Ijtihad, the ulama had different opinions in formulating the terms of the Aqad. Differences arise in terms of the essence of the contract itself. The Reasoning of Jumhur by Wahbah Zuhaili, it states that "harmony is one important element in the agreement with the addition of other elements. The elements are as follows: sighat al-aqad (statement of binding), Al-ma'qud alaih/considering al-'aqd (contracted object), Al-muta'aqidain/al-'aqidain (contracted party (aqad)), Maudhu'al-aqad (the purpose of the contract) ".

According to (Hendi Suhendi (2002: 44), “The requirements of Aqad consist of general and special conditions”. The implementation of financing contract in of Islamic banking requires legal certainty for the parties to have justice and reap the benefit. According to Sudikno Mertokusumo, “legal certainty is a guarantee that the law is enforced, that the rightful party according to the law would obtain its rights and that the rightful decision could be implemented. Although legal certainty is closely related to justice, the law is not synonymous with justice. The law is general, binding to everyone, is generalized, while justice is subjective, individualistic, and not generalized” (Mertokusumo, 2007).

E. Fernando M. Manullang argues that “legal certainty is the implementation of the law as provisioned so that the public could ensure that the law is implemented properly”. Definition of legal certainty that something that has to be considered if the value has a close relationship with a favorable legal instrument and the decisive role of the state in the implementation of positive law. In Fernando's opinion (Manullang, 2007), “the legal certainty is a question that could only be answered normatively, not sociologically. Normative legal certainty is when a rule is created and enacted as it is clearly defined and logical. Clearly, in the sense that there is no doubt (multi-interpretation) and logical in the sense that it becomes a system of norms with other norms so as not to clash or cause a conflict of norms. The norm conflicts arising from the uncertainty of the rules may be normative contestation, norm reduction or norm distortion”.

According to the description above, what is meant by legal certainty is guaranteed about the rule of law. Legal certainty in the dispute settlement of Islamic banking is not certainty related to the actions or actions of the parties following the rule of law. Because in its application law enforcers or actors in Islamic banking transactions have difficulty in understanding the legal certainty that will be applied to the behavior of the parties in dispute.

Legal certainty in the transactions between Islamic banks and customers is also based on the certainty of the existence of aqad/contract made by the parties that are not in conflict with applicable laws and regulations in Indonesia. The contract between the Islamic bank and the customer begins with the making until an agreement is reached between the two parties. Contracting by the parties is intended so that the objectives of the parties can be carried out following with the plans and objectives in obtaining financing. If the contract made by the parties does not run as originally intended, one of the reasons is the error of one of the parties. In civil law is called default. Other causes are due to overmacht/force majeur or illegal acts.

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The contract in the application of Islamic banking between the parties begins with the making up to the consent of the parties in Aqad that will apply to them. The making of the contract is intended so that the objectives of the parties can be realized but in practice, not all contracts go according to plan. One of the reasons for not achieving the objectives of the contract is due to problems that arise between the parties. According to Mahmoeddin, “the problem is the existence of difficulties that need to be solved or obstacles that interfere with goals or optimal results”. Problems can also occur due to a mismatch between the planning and its implementation, causing side streaming.

The problems in the practice of Islamic banking, especially financing products between Islamic banks and customers arise from aqad / financing contracts made by them. The problems that arise in this financing product are one of the five main problems faced by the national banking system. To find out the meaning of a troubled bank in a financing product, it must be seen from the customer’s collectibility in installment payments. If the customer’s collectibility in payments has exceeded 180 (one hundred eighty) days, the financing can be classified as non-performing financing. In Islamic banking practices it is known as Non-Performing Finance (NPF). "According to Saba, NPL or NPF is a very serious problem so that the survival of banks will depend very much on the process of settling the NPF” (Saba et al., 2012). Kumar and Woo said that “NPLs mark the beginning of banking or Financial Crisis” (Kumar, 2010). In the event of problems in the implementation of the contract, the bank will try to maintain liquidity by making efforts to resolve the problems it faces. In the process of resolving disputes arising between the parties, based on the principle of legal certainty, the contract made by the parties will be a reference in resolving the problem. Based on the principle of legal concern, since the contract was made, dispute settlement clauses should be established with several dispute settlement options, including deliberation and consensus, and there are several alternative dispute settlement mechanisms through dispute settlement mechanisms and institutions, including mediation, sharia arbitration, conciliation and through the Religious Court.

One of the settlements through ADR will explain is the mediation. Like the definition above, mediation is defined as “a dispute settlement process through a process of negotiation or consensus of the parties, assisted by a mediator who has no authority to decide or impose a settlement”. In the mediation process as one dispute settlement, everything must obtain and according to the consent of the parties. It is based on the consensual principle.

Based on an interview with Abdul Manan, one of Supreme Judges in the Supreme Court of the Republic of Indonesia explained that the background of the Supreme Court of the Republic of Indonesia (MA-RI) required the parties to mediate before the case was decided by a judge. One of them was explained that the mediation process was carried out to reduce the accumulation of cases of injustice. Another reasons put forward by Abdul Manan, as follows:

1. “The mediation process is expected to overcome the problem of the accumulation of cases. If the parties could resolve their disputes without the need to be tried by a judge, the number of cases to be examined by the judge will decline”;

2. “The mediation process is viewed as a means of dispute settlement that is faster and cheaper than the litigation process. In Indonesia, there has been no research to prove the assumption that mediation is a process that is faster and cheaper than litigation”;

3. “The implementation of the mediation is expected to expand access for all parties to gain a sense of justice”.

4. “The institutionalization of mediation into the judicial system could strengthen and maximize the functions of the judiciary in resolving disputes, until recently, judicial institutions functions mostly to adjudicate, and with the release of SCR on the mediation process, it is hoped that the adjudication functions of court and mediation could go hand in hand on matters concerning disputes”.

The latest developments related to dispute settlement through mediation are according on SCR No. 1 of 2016 on Mediation Procedures in the Court. Based on library research and interviews with several judges both in the Yogyakarta District Court and Judges in the Religious Court in Yogyakarta, the difference between SCR No. 1 of 2008 and SCR No. 1 of 2016 as follows:

1. “The mediation schedule is shorter than 40 days to 30 days from the date the order to carry out mediation;

2. Obligations for the parties (in persons) to attend the mediation process directly at the mediation meeting, whether carried out with or without the assistance of an attorney, unless there are several valid reasons, including:

   a. The existence of medical conditions that do not allow attendance at mediation meetings based on a doctor's certificate;

   b. Under support;

   c. Having a residence, residence or domicile abroad;

   d. Carry out state duties, professional demands or jobs that cannot be abandoned;
3. There are rules regarding good intentions in the mediation process and the legal consequences for Islamic banking and customer who do not have good intentions in the mediation process. This is the most recent provision”.

Based on the description in the above discussion, it can be seen that mediation of one way of resolving Islamic banking disputes also applies in religious courts. This is based on Article 2 (1) SCR No. 1 of 2016 states that "the provisions of the mediation procedure in the Supreme Court Regulations apply to litigation in courts, both in general courts and religious courts”.

However, the problem is the limitations and skills of judges who understand Islamic banking disputes. Existing obstacles should be overcome by providing opportunities for independent mediators or non-judge mediators. This is in accordance with Article 1 paragraph (2) SCR No. 1 of 2016 stated "the mediator is a judge or other party who has a Mediator certificate as a neutral third party that helps the parties in the negotiation process for various possibilities for dispute resolution without using a way to decide or force a dispute resolution”.

According to Article 1 SCR No. 1 of 2016, the presence of mediation through a religious court is intended to increase public confidence in conducting Sharia Banking dispute resolution. The results achieved through mediation in the religious court will also provide a peaceful settlement process between the parties to the dispute, in this case, Islamic banks and customers. The process of resolving Islamic banking disputes through mediation puts forward similarities and avoids differences. If a peace process is established, legal certainty will be realized and the dispute resolution process will provide justice and benefits.

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To find answers to the second problem must consider the contents of Article 7 SCR No. 1 of 2016. The contents of Article 7 SCR No. 1 of 2016 is "The parties and parties involved must apply the principle of good faith’’.

The Defendant was declared to have carried out a legal process by applying bad faith in the mediation process as referred to in Article 7 Paragraph (2). Furthermore, according to Article 23, the claim cannot be accepted by the Investigating Judge. Based on Article 22 SCR No. 1 of 2016: Defendants who are not in good faith are required to pay mediation fees. The mediator will then submit the bad faith report to the examining judge and in the same report will be attached to the Based on the contents of Article 22 SCR No. 1 of 2016 in paragraph (1) states that if the plaintiff is declared not in good faith in the Mediation process as referred to in Article 7 paragraph (2), the claim is declared unacceptable by the Judge Examiner.

Furthermore, based on Article 22 Paragraph (2) SCR No. 1 of 2016 states that the Plaintiff who was declared not in good faith as referred to in Paragraph (1) shall also be subject to the obligation to pay Mediation Fees. The mediator submits a report that the plaintiff has no good intention to the Case Investigating Judge accompanied by recommendations on the imposition of Mediation Fees and the calculation of the amount in the report of failure or the mediation cannot be carried out. This is based on Article 22 Paragraph (3) SCR No. 1 of 2016.

Based on the report from the Mediator as referred to in Paragraph (3), the Case Inspector Judge will issue a decision which is the final decision stating that the lawsuit cannot be accepted accompanied by a penalty for payment of the Mediation Fee and the case fee. Furthermore, the mediation fee as a punishment to the plaintiff can be taken from the advance of the court fee or a separate payment by the plaintiff and submitted to the defendant through the court clerk. To make the peace decision legally binding, this can be corrected by applying to the judge who checks to issue a decision on the case calculation of the amount of money as a result of the failure of the mediation process.

Based on the description in the discussion that the mediation dispute resolution in the religious court is based on Articles 7, 22 and 23 SCR No. 1 of 2016. By applying the principle of good faith the mediation process will be carried out effectively and efficiently. If examined further based on the contents of Article SCR No. 1 of 2016 reaffirms the existence of independent mediators or non-judge mediators to be active in resolving disputes in court or outside the court. To increase the power of execution of the object of the dispute, the application of the agreed mediation can be submitted to the Court. This is intended so that there is coordination between the community and the judge as well as the mutual coordinator between the mediator and the judge.

The results of the study indicate that the success of mediation through the religious court as above data reached 26.7 percent. The success of the mediation process based on these achievements still requires a concerted effort so that in the future the success of mediation in religious affairs primarily related to Islamic Banking dispute settlement can continue to be improved.
The following will be presented data from field research results from data gathered in 2012–2016.

### Tabel 3: Sharia Banking Dispute Settlement Through Mediation in Religious Court 2012-2016

<table>
<thead>
<tr>
<th>Location</th>
<th>Number of cases of Islamic Economic Disputes</th>
<th>Mediation Process</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yogyakarta</td>
<td>6</td>
<td>0</td>
<td>0 %</td>
</tr>
<tr>
<td>Sleman</td>
<td>12</td>
<td>2</td>
<td>16.66 %</td>
</tr>
<tr>
<td>Bantul</td>
<td>6</td>
<td>2</td>
<td>33 %</td>
</tr>
<tr>
<td>Gunung Kidul</td>
<td>20</td>
<td>18</td>
<td>90 %</td>
</tr>
<tr>
<td>Temanggung</td>
<td>3</td>
<td>0</td>
<td>0 %</td>
</tr>
<tr>
<td>Purbalingga</td>
<td>27</td>
<td>20</td>
<td>37 %</td>
</tr>
<tr>
<td>Bandung</td>
<td>10</td>
<td>1</td>
<td>10 %</td>
</tr>
<tr>
<td>Total</td>
<td>84</td>
<td>33</td>
<td>39.3 %</td>
</tr>
</tbody>
</table>

Data as of November 2016, processed by Dewi Nurul Musjtari

Source: Research Results Fundamental Grant, from the Ministry of Research and Technology, Republic of Indonesia.

The mediation process can run effectively and efficiently if it is carried out in good faith. This is based on Article 1338 paragraph (3) of the Civil Code and Article 7 Paragraph (1) SCR No. 1 of 2016. The application of good faith principles that are applied both in the subjective sense and in the sense of objectivity which means honesty, propriety, and justice. In the end, the mediation solution can be solved by a win-win solution and the parties will receive justice with peace and mutual support in the achievement of each business.

If examined more deeply the contents of SCR No. 1 of 2016 reaffirms the role, duty and the accountability of the independent mediators active in resolving disputes in court or outside the court. The mediation results agreed by the parties to be able to give an executorial power or title can be submitted by applying to the court. The output from the judge in the form of determination. This method of settlement is seen as providing an effective and efficient settlement process and can increase the achievement of the mediation settlement process by up to 50% as expected by the researcher. Finally, the researchers get the hope for the future could the repositioning of the mediation process. The following are the scheme of the mediation process.

**CONCLUSION**

This research concludes that the potential mediation process as a reformulation of the settlement of Islamic banking disputes through religious courts based on Article 2 Paragraph (1) SCR No. 1 of 2016. According to the contents of the article, the potential for a realignment in the process of resolving Islamic banking disputes related to the problem of limited human resources (HR). The still limited number of judges who understand the process of dispute resolution, especially through mediation. Besides the HR issue, another problem is the limitations and skills of the judges in understanding Islamic banking disputes. To overcome these problems, the solution that can be given is to allow independent mediators (other than judges) who have competence or certification as mediators to replace the role of judges in the settlement of Islamic banking disputes through mediation. According to SCR No. 1 of 2016 the presence of mediation is expected to increase public confidence in the religious court in carrying out its mandate in resolving Islamic banking disputes. The results achieved through the mediation of the religious court will also provide a peaceful settlement process between the two parties and will realize mutual understanding in resolving conflicts.

Settlement of Islamic banking disputes through mediation in the Religious Courts must be done efficiently and effectively. This can be done by applying the good faith principle both, subjectively in the sense of honesty and the principle of good faith objective in the sense that both parties must be based on propriety and justice. The implementation of the principles of good faith subjectively and objectively it is hoped that the win-win solution will be realized and both parties will receive justice and mutual peace. At the end of the dispute resolution, the parties will support or cooperate. At this stage, the Religious Court can reaffirm the role, duty and the accountability of independent mediators active in resolving disputes in court or outside the court.

Repositioning dispute resolution procedures through mediation so that it is more effective and efficient and can achieve a target of up to 50% success. Initially, the mediation process became part of the formal procedural law or included in the procedural procedure, the findings of this study allow the procedure of dispute resolution through mediation in religious courts placed outside justice procedure. This is related to the psychological condition of the parties and related to the culture of the parties. Someone who has been sued will have feelings of guilt and the other side of the party who filed the
lawsuit feels right and wants to always win. This condition is a consideration that the repositioning of the mediation process is very important for changes.

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This research contributes to the development of Islamic Economic Law, especially in the subjects of religious justice and education programs and dispute resolution exercises, especially in the mediation process in resolving Islamic banking disputes through religious courts. For Judges in religious courts, the results of this study can consider Judges and the Supreme Court in evaluating and changing the procedure for making mediation processes more efficient and effective. The final result is expected, for the future, the success rate of solving Islamic banking disputes through mediation in the religious court will increase by 50%.

LIMITATION AND STUDY FORWARD

The limitations and gaps that exist in this study are based on the results of research in several religious courts, which are the target of the investigation. There is no available list of mediators other than judges and professions mediators other than judges. It also causes that the success rate of sharia banking dispute settlement cannot reach up to fifty percent. Future research will focus on mediator professional opportunities and opportunities in Islamic banking dispute settlement through various dispute settlement institutions in Indonesia.
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REFERENCES

13. Muhajir, Noeng, 2002, Qualitative Methodology Research, Yogyakarta, Publisher Rakesarasin.

Official Documents/Regulation
Law No. 3 of 2006 on The first amendment to Law No. 7 of 1989 on Religious Court.
Law No. 21 of 2008 on Islamic Banking.
Law No. 48 of 2009 on Judicial Power.
Law No. 50 of 2009 on The second amendment to Law No. 7 of 1989 on Religious Court.
Law No. 10 of 1998 on Amendment to Law Number 7 of 1992 on Banking.
Law No. 30 of 1999 on Alternative Dispute Settlement.
Supreme Court Regulation Number 1 of 2016 on Mediation Procedure in The Court.