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## DISPUTE RESOLUTION OF MUDHARABAH CONTRACT FINANCING THROUGH BASYARNAS

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### Abstract

*Mudharabah financing disputes in Islamic banking are generally resolved using litigation or judicial channels. As stated in Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, there are also other channels in dispute resolution, namely arbitration and alternative dispute resolution such as; mediation. As contained in the financing contract in Islamic banking Law No. 21 of 2008 states that dispute resolution will be resolved through BASYARNAS if in the agreement clause a dispute occurs it will be determined through a Sharia arbitrator in this case BASYARNAS this is the authority for BASYARNAS. The settlement of mudharabah disputes in Islamic banking is said to be a default, not only judged by the losses obtained by the creditor (Bank) but can also come from the beginning of the loss. If the customer's negligence causes the default, then this can be the customer's responsibility as the owner of the capital, and he bears the loss. In principle, there is no compensation for mudharabah because it is Amanah. Still, if the loss comes from the negligence of the Islamic Bank, it will be borne by the Islamic Bank as long as the failure or loss is not caused by the owner of the capital (mudharib). if there is a dispute between the two parties to the mudharabah financing contract agreement, the settlement will be resolved through arbitration (BASYARNAS). This statement authorizes BASYARNAS to resolve disputes for the parties to the dispute according to the agreed agreement.*

**Keywords:** *dispute resolution, mudharabah financing, basyarnas*

### A. INTRODUCTION

Humans in their life practices are always in muamalah activities or interactions with the economy. Economic activities need

rules and values that can guide humans in business practices. Allah SWT<sup>1</sup> Has sent guidance to His messengers, and this guidance includes everything in the Qur'an,

<sup>1</sup> Husain Sahatah dan Siddiq Muh Al Amin Adh Dhahir, *Transaksi Dan Etika Bisnis Islam* (Insani Publishing, 2005).

whether sharia, ahklak, or aqidah, which is a fixed principle. Since Islamic sharia is always changing according to the needs and developments of the times, it is called comprehensive because of its extensive and universal nature, covering all aspects of life, including worshipping Allah and establishing relationships with others or in social relations, but universal because it is not limited to a certain time only and not limited to a certain location to be used at any time and age. The activities of this field show the meaning of universality, and transactions, especially in the economic field.

One of the most popular activities or institutions in Islamic economics is Islamic banking. Islamic Bank is a term that is known and developed in the banking world in Indonesia. In other countries, this term is known as Islamic Banking. The mention of Islamic banks can be explained by various reasons, both legal, political, and sociological reasons. The context of the mention includes the influence of economic development in Indonesia. Islamic bank operations contain many legal risks. One of the risks of the Law is that the legal action taken by the client leads to litigation. Problems often arise due to the parties' lack of understanding of contractual issues and failure to apply regulations and standard operating procedures in Islamic banks. The most commonly used product is mudharabah or profit-sharing contract.<sup>2</sup>

The existence of Islamic banks is only part of the conventional bank development program because initially the development of Islamic banks was intended to provide services to underserved segments of society. After all, the conventional banking system was considered not compliant with the Sharia principles they believed in. The development of Islamic banking also aims to become an

alternative bank that has certain characteristics and advantages. Ethical factors are important in all business activities. Financing contracts emphasize a profit-sharing system that encourages the creation of a cooperative model (mutual investor relationship), pays attention to the precautionary principle, and tries to minimize the risk of company bankruptcy<sup>3</sup>.

The Islamic banking industry in Indonesia has progressed rapidly compared to its beginnings. In the past, there was only one Islamic bank, PT Bank Muamalat Indonesia (BMI). Now, based on OJK data, around 197 Islamic banks are operating, consisting of 12 Islamic Commercial Banks (BUS), 21 Islamic Business Units (UUS), and 164 Islamic People's Financing Banks (BPRS). Along with its development, the potential for conflict or dispute is even greater. Problems arise in financing because there are various reasons behind it. Operationally, conventional banking and Islamic banking both raise funds, channel funds, and provide institutional services needed by customers. Therefore, the problems that arise are often the same. Especially in the distribution of funds between banks to customers, defaults or failures often occur. Cases that arise in Islamic banking due to the most dominating distribution of funds, one of which is caused by a breach of promise in the contract (default).

The most common motive for customer non-performance is the customer's inability to make payments by the agreed contract. Whereas performance is an obligation that must be carried out by the customer for the rights of the bank. The inability to pay the musyarakah contract can result in losses for the bank such as the loss of principal arrears or profit sharing that should have been obtained.

<sup>2</sup> Dadan dan Fakhruddin Cikman Muttaqien, *Penyelesaian Sengketa Perbankan Syariah* (Yogyakarta: Kreasi Total Media, 2008).

<sup>3</sup> Warsidi, *Strategi Pemasaran Produk Bank Syariah* (Yogyakarta: Zahir Publishing, 2023).

In the event of a breach of promise or default between the parties involved in Islamic banking, Law Number 21 of 2008 concerning Islamic Banking provides two settlement options, first Litigation, namely settlement through a court institution, and Non Litigation, settlement through an out-of-court institution.

This out-of-court arbitration mechanism is quite attractive to the public because the nature of this dispute resolution is fast, low cost, and produces a final decision that is legally binding final and binding.<sup>4</sup> However, in practice, Basyarnas is not well known in the community because its existence is still limited to certain areas. One of the arbitration dispute resolutions is final and binding, which means that it cannot be appealed or appealed and the decision is binding on the parties to the dispute. In contrast to negotiation, consultation, mediation, and other expert opinions that provide solutions without a decision that binds the parties to the dispute.

Dispute according to KBBI<sup>5</sup> is anything that triggers a difference of opinion, dispute, or argument. Both conflict and dispute refer to a situation where there is a

difference of opinion between two or more parties in a court case. Koentjaraningrat explains that conflict or dispute can also occur due to differences in perception, which is a conscious depiction of the environment based on one's knowledge. The environment in question can be both physical and social.

The previous studies that examined BASYARNAS dispute resolution in Islamic banking include, Mohamad Nur<sup>6</sup>, Muthia Sakti Yuliana dan Yuli Wahyuningsih<sup>7</sup>, Ridzky Adityanto<sup>8</sup>, Zaidah Nur Rosidah,<sup>9</sup> dan Moustafa Elmetwaly Kandeel<sup>10</sup>. From several studies conducted, the author wants to research to analyze the authority of BASYARNAS as the best non-litigation dispute resolution solution and analyze the settlement of default disputes through Mudharabah financing in Islamic Banking.

## B. RESEARCH METHODS

The approach used in this research uses a statutory approach based on applicable legal regulations using Law No. 21 of 2008 concerning Islamic banking, Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, Fatwas, and other

<sup>4</sup> Nilam Sari, *Penyelesaian Sengketa Perbankan Syariah Melalui Lembaga Arbitrase* (Banda Aceh: Yayasan PENA, 2016). 59.

<sup>5</sup> Sudarsono, *Kamus Hukum* (Jakarta: Rineka Cipta, 2002).

<sup>6</sup> Mohamad Nur, "Analisis Penyelesaian Sengketa Akad Murabahah (Jual-Beli) Antara Bank Syariah - X Dengan PT AS Di Badan Arbitrase Syariah Nasional -Majelis Ulama Indonesia (BASYARNAS-MUI)," *AKSARA* 06 No.02 (2020), <https://doi.org/http://dx.doi.org/10.37905/aksara.6.2.161-170.2020>.

<sup>7</sup> Muthia Sakti and Yuliana Yuli Wahyuningsih, "TANGGUNG JAWAB BADAN ARBITRASE SYARIAH NASIONAL (BASYARNAS) DALAM PENYELESAIAN SENGKETA PERBANKAN SYARIAH," *Jurnal Yuridis* 4 No 1 (2017), <https://doi.org/https://doi.org/10.35586/.v4i1.135>.

<sup>8</sup> Ridzky Adityanto, "Kedudukan Basyarnas Dalam Penyelesaian Sengketa Perbankan Syariah (Studi Putusan Mahkamah Konstitusi Nomor 93/Puu-X/2012)," *Lambung Mangkurat Law Journal* 1 No 2 (2016), <https://doi.org/https://doi.org/10.32801/lamlaj.v1i2.15>.

<sup>9</sup> Zaidah Nur Rosidah and Layyin Mahfiana, "Efektivitas Penerapan Prinsip-Prinsip Syariah Dalam Penyelesaian Sengketa Ekonomi Syariah Di Badan Arbitrase Syariah Nasional (Basyarnas)," *TAWAZUN: Journal of Sharia Economic Law* 3, no. 1 (2020): 15, <https://doi.org/10.21043/tawazun.v3i1.7529>.

<sup>10</sup> A Zakaria Moustafa Elmetwaly Kandeel, A Abouahmed, "The Premature Expiration of Arbitration Litigation in Investment Disputes," *Corporate Law and Governance* 5 No 1 (2023): 17–28, <https://doi.org/https://doi.org/10.22495/clgrv5i1p2>.

regulations and this type of research includes normative legal research.<sup>11</sup> The data sources obtained come from secondary data such as books, documents, and related journal articles.

## C. RESULTS AND DISCUSSION

### 1. Authority of BASYARNAS Dispute Resolution Solution Outside the Court

The dispute resolution process through litigation takes a lot of time, dispute resolution can be done through alternative dispute resolution methods. As explained in Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. The law explains that extrajudicial dispute resolution is an institution that resolves disputes through means agreed upon by the parties, such as peaceful settlement, including consultation, negotiation, conciliation, or specified arbitration. If in the mudharabah financing contract, the bank and the customer agree to be bound in dispute resolution by including an arbitration agreement clause submitted to BASYARNAS. Therefore, BASYARNAS has the right to resolve the dispute.<sup>12</sup>

Indonesia has a regulation on arbitration, namely Law Number 30 Year 1999 on Arbitration and Alternative Dispute Resolution. Arbitration institutions are chosen by the disputing parties to make decisions and provide binding opinions in certain legal relationships. Arbitration is often chosen in Islamic banking transactions because it has many advantages over the litigation process. The advantages of arbitration can be agreed upon at the end of the agreement (*pactum de compromittendo*)

or at the time the dispute occurs (*the act of compromittendo*).

In line with the vision and mission of the BASYARNAS platform, as an Islamic arbitrator, of course, based on Islamic values and religion to resolve Islamic banking disputes and other disputes also based on Islam, the application of BASYARNAS in Islamic Bank Resolution, which is popular so far, must continue to prioritize the principle of peace and reflect a sense of justice for the parties to the dispute. In this case, the procedure at BASYARNAS lasts for a maximum of 6 (six) months and must be completed entirely through arbitration/Hakam taking a decision that is final and binding/binding and cannot be stopped. Therefore, the decision of the Arbitrator / Judge has permanent legal force. Therefore, the solution of using Arbitrators in BASYARNAS is one of the quick solutions to resolve Sharia disputes other than in court.<sup>13</sup>

The arbitrator/judge must be able to create an atmosphere in the arbitration process that is clean, clear, and free from legal arguments. He/she must be able to evaluate the evidence presented about the dispute to be resolved. The arbitrator must also have regard to the facts of the dispute and his decision must be based on something factual or objective, reasonable and fair. In addition, he or she must have a basic knowledge of arbitration procedures, law, evidentiary procedures, an understanding of contract law, property law, and of course, in particular, the law of arbitration itself. The parties to the dispute have the right to assess the dispute from the beginning of the hearing and have the right to assess whether the

<sup>11</sup> Aminudin Dan Zainal Hakim, *Pengantar Metode Penelitian Hukum* (Jakarta: Rajawali Pers, 2013).

<sup>12</sup> Andria Luhur Prakoso, “Tinjauan Terhadap Arbitrase Syariah Sebagai Alternatif Penyelesaian Sengketa Di Bidang Perbankan Syariah,” *Jurnal*

*Jurisprudence* 7 No. 1 (2017): 59–67. <https://doi.org/10.23917/jurisprudence.v7i1.4356>.

<sup>13</sup> Sakti and Wahyuningsih, “TANGGUNG JAWAB BADAN ARBITRASE SYARIAH NASIONAL (BASYARNAS) DALAM PENYELESAIAN SENGKETA PERBANKAN SYARIAH.”

arbitrators acted by the agreed authority according to the provisions of laws and regulations. Therefore, BASYARNAS is responsible for resolving all Sharia banking-related disputes and other Sharia-related disputes, especially those related to Arbitration/Hakam. Since its inception until now, as many as 20 (20) banking disputes related to Sharia law have been seized and resolved by BASYARNAS.

The authority of the National Sharia Arbitration Board (BASYARNAS) is regulated in Article 1 of the Rules of Procedure of the National Sharia Arbitration Board (BASYARNAS), including:

- a. BASYARNAS helps resolve Sharia economic disputes fairly and quickly. BASYARNAS resolves various disputes relating to trade, finance, industry, services, and others. These disputes must be subject to the applicable laws and regulations, and the parties involved must agree in writing to submit their resolution to Basyarnas. Basyarnas will resolve such disputes by following its established procedures.
- b. Provide final and binding solutions to parties who request them, without dispute, regarding issues arising in an agreement.

The National Sharia Arbitration Council (BASYARNAS) is the only Islamic arbitration institution in Indonesia. Formally, the existence of this organization is based on a solid legal foundation in the Indonesian legal structure. In Indonesia, there is an option for disputing parties to resolve their problems outside the court through an independent institution. This is stated in Law No. 30/1999 on Arbitration and Alternative Dispute Resolution and Law No. 48/2009 on Judiciary. The Judiciary Law in Article 58 also emphasizes that the settlement of civil disputes can be pursued outside the court,

either through arbitration or other means. BASYARNAS is an organization authorized to resolve banking and financial disputes according to Sharia law, because the main purpose of establishing this organization is to resolve muamalat disputes in the fields of commerce, finance, banking services, and others quickly and fairly, based on Sharia principles.

Dispute resolution through BASYARNAS is confidential. Before starting to consider a dispute, the arbitrator must first reconcile the parties to the dispute. If peace (Islah) is reached, the arbitrators will record it as a binding mutual agreement that must be respected by the disputing parties. However, if peace is not restored, the hearing will continue by the applicable rules. The dispute must be resolved within 6 (six) months. The enforcement of the decision of the Sharia National Arbitration Board (BASYARNAS) is the same as the rules applicable to the Indonesian National Arbitration Board (BANI) which is based on Articles 59-64 of Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. The parties must implement the award voluntarily so that the arbitration award can be enforced, the award must be submitted and registered with the Registrar of the District Court.

The award given by the arbitrator is final has permanent legal force and is binding on the parties to the dispute (by Article 60 of Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution) so that the Chief Justice is not allowed to examine the reasons or considerations of the arbitration award. The authority to examine the Chief Justice is limited to the formal examination of the arbitral award rendered by the arbitrator or

panel of arbitrators. The BASYARNAS award, by Article 59 paragraph (1) of Law Number 30 Year 1999, shall be registered by the arbitrator or his legal representative with the Registrar of the District Court. If one of the parties to the dispute is reluctant to execute the arbitration award voluntarily, then the other party may file a request for execution to the Chief Justice of the District Court by filing a request for execution to the Chief Justice of the District Court by registering the request with the Registrar of the District Court (by Articles 61 and 62 of Law No. 30/1999 on Arbitration and Alternative Dispute Resolution).<sup>14</sup>

## 2. Implementation of *Mudharabah* Financing in Islamic Banking

*Mudarabah* comes from the word *al-Harb fi al-Ardh*, which means a business trip. This word is used because the *amil* and *mudharib* put *mudharabah* to trade (*tijarah*) and seek profit (*rab al-mal*) at the request of the capital owner. In terms of terms, *mudharabah* means that a capital owner hands over capital to an *amil* to trade with that capital, where the profit is shared between the two of them with a portion of the share according to what is required in the contract. So *Mudharabah* is a type of cooperation between a capital owner and a capital manager in which the parties agree to share profits and losses.

The legal basis of *Mudharabah* is explained in the Qur'an surah An-Nisa verse 29 which reads:

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَأْكُلُوا أَمْوَالَكُمْ بَيْنَكُمْ بِالْبَاطِلِ إِلَّا أَنْ تَكُونَ تِجَارَةً عَنْ تَرَاضٍ مِّنْكُمْ<sup>٢٩</sup>

“O you who believe! Do not eat (take) each other's wealth by unlawful means, except by

*way of a voluntary trade among yourselves...*” (QS AN NISA: 29)

It is also found in the Hadith:

“Narrated Hasan ibn Ali al-Khallal, narrated Bisri ibn Tsabit al-Bazzar, narrated Nashar ibn Al-Qasim from Abdurrahman ibn Daud, from Shalih ibn Shuhaib r.a. that the Messenger of Allah (SAW) said: ‘Three things in which there is blessing are sale and purchase by *Tanggung*, *muqaradhah* (*mudharabah*), and mixing wheat with flour for home use, not for sale’. (Ibn Majah no. 2280, Kitab *Tijarah*).

The scholarly consensus is that some of the Companions handed over the property of orphans as *mudharabah* and no one disputed them. Hence, it is regarded as *ijma*. According to the National Sharia Council - Indonesian Ulema Council (DSN - MUI), the contract was issued to avoid usury. The goods or type of business chosen are also not prohibited by the teachings of Islamic Sharia.

The provisions of the *mudharabah* contract are listed in the DSN - MUI fatwa Number: 07/DSN/MUI/IV/2000. Business profits will be divided between the owner of the capital and the capital manager based on the ratio or profit sharing agreed upon during the contract. In the concept of Islamic banking according to the Financial Services Authority (OJK) applying the *mudharabah* principle, the bank acts as *shahibul maal* (capital owner) and the customer as *mudharib* (manager). The funds are used by the bank to conduct *murabaha* or *ijarah* as explained earlier. The bank can also use the funds to conduct a second *mudharabah*. The results of this business will be shared based on the agreed ratio. If the bank uses it to conduct a second *mudharabah*, then the bank is fully

<sup>14</sup> Ahmad Mujahidin, *Prosedur Penyelesaian Sengketa Ekonomi Syariah Di Indonesia* (Bogor: Galia Indonesia, 2010).

responsible for the losses incurred. The pillars of *mudharabah* are all fulfilled (there is a *mudharib* there is a fund owner, there is a business to be shared, there is a ratio, and there is *ijab Kabul*). This *mudharabah* principle is applied to term savings products from time deposits. Based on the authority given by the depositor, the *mudharabah* principle is divided into two, namely: *Mudharabah mutlaqah* and *Mudharabah Muqayyadah*<sup>15</sup>

Specifically in Islamic banking, there is a form of *musyarakah* that is popular in Islamic banking products, namely *mudharabah*. *Mudharabah* is a form of cooperation between two or more parties where the owner of the capital is the manager (*mudharib*) with a profit-sharing contract. This format emphasizes cooperation in the combination of 100% cash capital contribution from the expertise of *Shahib al-maal* and *Mudharib*. This type of transaction does not require the presence of a representative of *Shahib al-maal* in the management of the project. As a trustworthy person, the *mudharib* must act prudently and be responsible for any losses resulting from his negligence. A representative of the capital owner (*Shahib al-maal*) in *mudharabah* has the responsibility to manage the capital in a certain way to generate optimal profits. The main difference between *mudharabah* and *musyarakah* lies in the level of contribution of the parties in terms of management and finance.

In *mudharabah*, the capital comes entirely from one party, while in *musyarakah* the capital comes from two or more parties. *Mudharabah*, in fiqh literature, is categorized as a trust agreement (*uqud al-amanah*) that demands a high level of honesty and fairness. Therefore, all parties must maintain honesty for the sake of mutual interests. Any attempt

to commit fraud and injustice in the distribution of profits will undermine the teachings of Islam.

The implementation of *mudharabah* in Islamic banking is divided into two parts, namely at the time of directing funds and at the time of distribution or distribution of funds. The mobilization of funds emphasizes the entry of funds from customers to the bank, while the distribution of funds is the release of funds from the bank to customers. At the time of directing *mudharabah* funds are implemented in the form of *mudharabah* savings and deposits. *Mudharabah* savings and deposits are deposit products in Islamic banks with a profit-sharing system. *Mudharabah* savings allow customer funds to be managed by the bank for profit with a mutually agreed ratio. While deposits, customer funds are stored for a certain period and customers are entitled to profits and bear losses with the bank. Whereas in *mudharabah* financing, the bank acts as a full funder for the project or business proposed by the customer. Profits and losses are shared or borne together based on the agreement.

*Mudharabah* contract financing in Islamic banking occurs when both capital owners and capital managers agree to work together in financing a business, both agree that if there is profit or risk, it will be borne together. If in practice the debtor cannot pay for the facility that has been promised to the creditor, and the creditor feels disadvantaged due to dissatisfaction with not implementing the contract according to the agreement. Then the debtor makes a default, the main factor of default through this *mudharabah* contract is caused by deliberate or negligent factors from the customer who does not carry out his performance, the deliberate factor here is if the losses borne by the bank are intentional

<sup>15</sup> Otoritas Jasa Keuangan, "Konsep Operasional Bank Syariah," Tentang Syariah, 2024,

<https://www.ojk.go.id/id/kanal/syariah/tentang-syariah/Pages/Konsep-Operasional-PBS.aspx>.

by the customer not to fulfill the obligation to pay for the facilities that must be repaid<sup>16</sup>

According to J. Satrio, to determine whether the debtor made a mistake, intentional or not, it cannot be demanded that he (the debtor) intended to harm the creditor because most likely when the debtor made a mistake, he had no intention of harming the creditor. Therefore, even if the debtor did not intend to harm the creditor, but instead caused losses and intended to eliminate them, it can be said that the debtor did this intentionally. The element of intentionality in conducting mudharabah financing can be in the form of the customer's intent to use his funds for bank transfers, in this case, the funds will be used in the form of a business or partnership. However, it is deliberately used for financing outside the contract agreed upon by both parties in the *mudharabah* contract. For example, a customer and a bank enter into a mudharabah financing contract. The agreement explains that this form of cooperation between the customer and the bank is used to finance a restaurant business. The customer does not use the money to finance his restaurant business, but uses it for other purposes, causing losses to the bank (creditor).

A negligence factor is an event where a person should objectively know that the action or actions taken will result in loss. Negligence conditions are conditions that can have legal implications for a person's actions that can be said to be in default. The negligence factor in the mudharabah financing contract is when the customer has passed the deadline for submitting payments for the financing facility that has been mutually agreed upon. This means that the performance that should have been carried

out by the debtor has passed the agreed time. Article 1238 of the Civil Code (KUHPerdata) states that an act cannot be said to be negligent if it only relies on achievements that are not submitted even though the agreement has passed the time limit unless the agreement that has been made includes a limit where the debtor must be considered negligent if the time limit has passed.

### 3. Dispute Resolution of Default in Mudharabah Financing in Islamic Banking

Agreements in Islamic banking are the basis for creating a relationship between debtors and creditors, where debtors are obliged to fulfill their obligations to creditors. This achievement can be in the payment of a sum of money or other things agreed upon. Debtors in banking are customers and creditors are banks. The agreement made by the two parties will give rise to the law. In practice, the implementation of agreements in Islamic banking does not always run smoothly in the agreements made. Agreements or contracts can often lead to disputes or breaches of promise (default) between customers or banks, where one of the other parties feels harmed by the violated performance. Default is a legal term that refers to the failure of one party to fulfill its obligations in an agreement. This can occur due to negligence, incompetence, or willfulness. According to Article 1238 of the Civil Code, a debtor is considered to be in default if he fails to fulfill his obligations after receiving a warning or the passage of time specified in the agreement. As a result of default, the injured party is entitled to compensation, costs, and interest. This is regulated in Article 1239 of the Civil Code.<sup>17</sup> So in the concept of banking, default is the non-fulfillment of obligations that have been

<sup>16</sup> Dadan dan Fakhruddin Cikman. *Muttaqien, Penyelesaian Sengketa Perbankan Syariah* (Yogyakarta: Kreasi Total Media, 2008).

<sup>17</sup> Rosidah and Mahfiana, "Efektivitas Penerapan Prinsip-Prinsip Syariah Dalam Penyelesaian Sengketa Ekonomi Syariah Di Badan Arbitrase Syariah Nasional (Basyarnas)."



agreed upon in an agreement between the creditor (Bank) or debtor (Customer).<sup>18</sup> Article 36 of the Compilation of Sharia Economic Law (KHES) regulates default which is an act of negligence. Parties that can be considered in default, namely: First, not doing what he promised to do. This means that the debtor does not fulfill his obligations that he has been able to fulfill in the agreement, the debtor does not carry out the agreement which can be caused by his inability to fulfill the performance that should be fulfilled or does not intend to carry out his performance.<sup>19</sup> Second, achieving what was promised but not as promised. This means that the debtor makes a mistake or neglects to do what has been promised. According to the creditor, the debtor's performance is not what was promised. Third, he kept his promise but it was too late. too late. The debtor has carried out his obligations but the implementation of the decision exceeds the agreed time limit. Fourth, doing something that according to the agreement should not be done.<sup>20</sup>

Islamic banking disputes can be resolved through two channels, namely litigation (court) and non-litigation (out of court). According to sharia law, dispute resolution in religious courts is regulated in Law No. 3/2006 on Religious Courts. Religious courts are authorized to resolve cases of first instance among Muslims related to marriage, inheritance, wills, waqf, zakat, and sharia economy. This is reinforced by Law No. 21/2008 on Sharia Banking which states that religious courts are authorized to resolve Sharia banking disputes involving

Sharia law. In addition to dispute resolution through the courts, Article 55 paragraph (2) explains that Islamic banking dispute resolution can resolve Islamic banking disputes by the contents of the agreement clause. The interpretation of Article 55 paragraph (2) shows that dispute resolution can be resolved through deliberation, bank conciliation, the National Sharia Arbitration Board (BASYARNAS), arbitration institutions, or court decisions within the general judicial environment. Article 55 paragraph (3) confirms the implementation mechanism to implement the former must avoid things that are prohibited or must not be contrary to Sharia principles.<sup>21</sup>

Arbitration, according to Article 1 of Law Number 30 Year 1999, is a method of resolving civil disputes outside the public courts. This settlement is based on a written arbitration agreement made by the parties to the dispute. The definition of arbitration can be summarized from several important elements that can show the characteristics of arbitration (tahkim). (1) arbitration is a form of dispute resolution, (2) the dispute concerns civil matters, (3) the settlement is non-litigation, (4) based on a written agreement from the parties, (5) the settlement is carried out by arbitrators appointed by the parties themselves.<sup>22</sup> The method of dispute resolution through arbitration has advantages compared to settlement in court. Arbitration is seen as one of the out-of-court dispute resolutions that requires time, and relatively cheaper costs compared to settlement through litigation which requires a very long time and

<sup>18</sup> Ridwan Khairandy, *Hukum Kontrak Indonesia Dalam Perspektif Perbandingan (Bagian Pertama)* (Yogyakarta: FH UII Press, 2013).

<sup>19</sup> Pusat Pengkajian Hukum Islam dan Masyarakat Madani (PPHIMM), *Kompilasi Hukum Ekonomi Syariah* (Jakarta: Kencana, 2009).

<sup>20</sup> Rosidah and Mahfiana, "Efektivitas Penerapan Prinsip-Prinsip Syariah Dalam Penyelesaian Sengketa Ekonomi Syariah Di Badan Arbitrase Syariah Nasional (Basyarnas)."

<sup>21</sup> Murthado Ridwan, "Penyelesaian Sengketa Perbankan Syariah Di Indonesia," *MALIA: Journal of Islamic Banking and Finance* 1 No. 1 (2018): 45–46, <https://doi.org/https://doi.org/10.21043/malia.v1i1.3983>.

<sup>22</sup> Rahmadi Indra Tektona, "Kepastian Hukum Terhadap Perlindungan Hak Anak Korban Perceraian," *Muwazah: Jurnal Kajian Gender* 4 No. 1 (2012): 42–57.

a lot of money. The arbitration dispute resolution system is conducted in a closed manner so that the confidentiality of the parties to the dispute and the disputed material is not known by other parties. Parties to a dispute, for example in the business world, will choose a law that is favorable to them, by avoiding dispute resolution through the courts where the results of the settlement are usually made public. In addition to the confidentiality of the dispute resolution process, the process of resolving disputes through arbitration is faster than that of the religious courts. Therefore, if the dispute settlement is resolved immediately, it can minimize the emergence of new problems that are increasingly complicated.<sup>23</sup>

Disputes regarding the non-funding of mudharabah are a form of default of the parties. Therefore, if the problem is considered a default, then the aggrieved party can send a request for dispute resolution by the contents of the contract. MUI's identification of dispute resolution forums, especially Sharia economic issues, from several regulations that have been issued, regulates dispute resolution through Sharia arbitration.<sup>24</sup> DSN-MUI Fatwa No. 08/DSNMUI/IV/2000 concerning Mudharabah Financing the last point explains that if there is a dispute or one of the parties fails to fulfill its obligations, then the settlement is carried out through the Sharia Arbitration Board after no agreement is reached.<sup>25</sup>

The agreement to choose a default dispute resolution in a financing contract in Islamic banking, in this case in a mudharabah

financing contract, is a legal choice for the parties to the dispute. Every agreement made by the parties is a freedom for them to choose how to resolve disputes is a way to reconcile the problems that occur to the parties, which is expected to restore business relations, legal relations, and brotherhood that can still be established. In the mudharabah financing agreement, the provisions for dispute resolution have been regulated in the agreement contract agreed upon by the parties. The article in the dispute resolution agreement explains how to resolve disputes in the event of a dispute in cooperation between the parties (debtor and creditor) in the future. The settlement of default in mudharabah financing has similarities with the settlement of other Sharia economic disputes.

By Sharia principles, the settlement of default disputes in mudharabah financing contracts must be resolved by prioritizing dispute resolution methods through deliberation and consensus. This has been explained in the Sharia Banking Law, article 55 paragraph 2 which prioritizes dispute resolution through deliberation and consensus. However, if the settlement of the default dispute is unsuccessful, further settlement can be resolved through out-of-court channels such as dispute resolution through BASYARNAS. Dispute settlement through arbitration is a settlement that already exists in the agreement clause. That is, if in the clause of this agreement it has been agreed that when there is a dispute in writing, it will go to BASYARNAS. The agreement includes a choice of law to resolve

<sup>23</sup> Ani Yunita, "Efektifitas Penyelesaian Sengketa Ekonomi Syariah Melalui Badan Arbitrase Syariah Nasional Daerah Istimewa Yogyakarta," *Jurnal Hukum Progresif* 9 No. 1 (2021): 25–36, <https://doi.org/https://doi.org/10.14710/jhp.9.1.25-36>.

<sup>24</sup> Amanda Tikha Santriati, "Penyelesaian Sengketa Perbankan Syariah Melalui Badan Arbitrase

Syariah Nasional," *El- Wasathiyah: Jurnal Studi Agama* 9, No. 1 (2021): 38–54.

<sup>25</sup> Riska Fauziyah Hayati and Abdul Mujib, "Dispute Resolution on Muḍārabah Musyarakah Contract on Sharia Insurance in Indonesia: Between Regulation and Practice," *El-Mashlahah* 12 No. 1 (2022): 14–36, <https://doi.org/https://doi.org/10.23971/elma.v12i1.3795>.

disputes agreed upon in the provisions of the law applicable to the parties, which expressly states that “in the event of a dispute between the two parties to the mudharabah financing contract agreement, the settlement will be resolved through arbitration (BASYARNAS). This statement authorizes BASYARNAS to resolve disputes that occur for the parties to the dispute.

Disputes that occur due to the inability to pay for *mudharabah* financing facilities cannot be fully classified as acts of default. DSN-MUI Fatwa Number 07/DSN MUI/IV/2000 concerning Mudharabah Financing, says that “losses in a *mudharabah* contract must be borne by the owner of the capital. Basically in mudharabah, there is no compensation because basically, this contract is Amanah (*yad al Amanah*), except due to the fault of Islamic Banking related to the failure of the food project will be borne by Islamic Banking. The fatwa explains that if there is a loss obtained by the debtor in running a business or cooperation project, the creditor as part of the capital owner must bear the loss. If the loss incurred by the debtor does come from the debtor himself, then this is the result of intentional or negligent actions so that he cannot fulfill his obligations. Therefore, the arbitrator will assess whether the act is an act of default. In default disputes in *mudharabah* financing, if one party is negligent in the implementation of the fulfillment of performance, then that party must be responsible for the actions he has taken. This is part of the legal consequences that have been violated from what has been agreed in the agreement.

The arbitrator in reconciling the parties must continue to make every effort to reconcile the dispute by deliberation and consensus before the arbitration award expires. If the peace effort is successful before the arbitration award is issued, the

arbitrator will make a deed of peace. However, if it is unsuccessful, it will continue with the implementation of the settlement process through arbitration. The arbitrator as the arbiter of mudharabah financing dispute resolution has the authority to carry out his duties in seeing the suitability of the contents of the mudharabah financing contract. The arbitrator can review the suitability of the contents of the agreement with the provisions in the DSN-MUI fatwa regarding mudharabah financing. If there is a clause that is not by the provisions, the arbitrator will offer an amendment to the clause that does not harm either party. This is to avoid disputes over the content of the agreement that can lead to interpretation.<sup>26</sup>

The Shari'ah Standard for Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) explains in number 6.2 that dispute resolution between the parties is about permissible rights, agreement to accept the arbitrator's decision and accept the arbitrator to carry out his duties in mediating the case being resolved. This means that if the parties have mutually agreed to settle the dispute through an arbitration forum, then the agreement on the implementation of dispute resolution by the arbitrator and the award given by the arbitrator must be accepted by the parties. The arbitration award is final and binding on the parties, meaning that the award cannot be contested and must be obeyed. This is reinforced by Law Number 30 Year 1999 which states that arbitration awards have permanent and binding legal force. The parties need to register the arbitration award with the court to obtain execution if necessary.

#### D. CONCLUSION

The authority of BASYARNAS to resolve disputes outside the court or non-

<sup>26</sup> Rosidah and Mahfiana, “Efektivitas Penerapan Prinsip-Prinsip Syariah Dalam Penyelesaian

Sengketa Ekonomi Syariah Di Badan Arbitrase Syariah Nasional (Basyarnas).”

litigation if in the agreement clause between contract makers in the event of a dispute. This choice is explained by the many advantages of final and binding arbitration. This is the best solution when there is a dispute in banking, economics, or business. The settlement of mudharabah disputes in Islamic banking is said to be a default, not only judged by the losses obtained by the creditor (Bank) but can also come from the beginning of the loss. If the default is caused by the negligence of the customer, then this can be a responsibility that must be borne by the customer in accepting the legal consequences of what he does as the owner of the capital,

and the loss is borne by him. In principle, there is no compensation for mudharabah because it is Amanah, but if the loss comes from the negligence of the Islamic Bank, it will be borne by the Islamic Bank as long as the failure or loss is not caused by the owner of the capital (mudharib). "If there is a dispute between the two parties to the mudharabah financing contract agreement, the settlement will be resolved through arbitration (BASYARNAS). This statement authorizes BASYARNAS to resolve conflicts for the parties to the dispute according to the agreed agreement.

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