

THE HARMONIZATION OF 'SYARIAH' AND CIVIL LAW: A STUDY OF THE INDONESIAN SYARIAH BANKING*

Erman Rajagukguk**

I. INTRODUCTION

Indonesia has legal pluralism from the beginning. First, the customary law is a living law in the Indonesian society with their respectively-distinctive natives. The customary law is a custom of the society obeyed by its members and the custom imposes a sanction against its offenses. The realm of this customary law includes family law such as inheritance, marriage and child adoption, land right and commercial law¹. Some regions also recognize customary offense and customary crime. This customary law has developed in line with its social development. The Reform of customary law has taken place due to both the legal awareness of society and the enhancement of judicial agencies. The customary law, mostly unwritten, has then had its impacts over the court's formal decisions, leading the customary law gradually to be traced through the court's decisions. Now, the customary law is still exist in some places and often resulting problems, particularly relating with the issues of local land's rights². The customary law has also led to the pluralism of the Indonesian family law since it is quite inter-related with the culture of local people³.

In addition to the customary law, the promulgation of Islam in the archipelago also introduced the Islamic law into the Indonesian society in the past. In some regions, the Moslem people are majority, such as West Sumatra, Aceh, South Sulawesi and West Nusatenggara, the local people have also applied strictly the Islamic law in marriage and inheritance. In legal history, the Islamic law has lived harmoniously with the customary law. During the current development, the Islamic law has governed not only marriage and inheritance issues, but has also extended its influences to the sector of economic law, such as banking, insurance and stock exchange⁴. The Indonesian Banking Law, for example, has provided that a bank runs its business not only under interest rates basis, but also under other provisions⁵. For example, a profit sharing basis is adopted by Islamic banks. The domestic political development has established a regional autonomy, the special enactment of Islamic

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** Professor of Law, University of Indonesia.

¹ T.O.Ihromi. *Adat Perkawinan Toraja Sa'dan dan Tempatnya Dalam Hukum Positif Masa Kini* (The Custom of Marriage of the Toraja Sa'dan Their Position in the Existing Positive Law), (Jakarta - Jogjakarta: Gajahmada University Press dan Yayasan Obor Indonesia; 1981) p.158-188.

² "Rawan Konflik, Perebutan Hak Ulayat di Papua" (Conflict Trend, The Conflict of Hak Ulayat in Papua), *Kompas*, June 27, 2003.

³ R. Soepomo, *Bab-bab Tentang Hukum Adat* (Chapter Concerning Costumary Law) , (Jakarta: Pradnya Paramita, 1981), p.10-17.

⁴ "Pasar Modal Syariah Buat Siapa Saja?" (Syariah Stock Exchange for Whom?), *Republika*, July 11, 2003. "Pasar Modal Syariah Diluncurkan Awal Maret" (Syariah Stock Exchange Start in the Beginning of March), *Republika*, February 7, 2003. Law No.7 of 1992 concerning Bank, and Government Regulation No. 72 of 1992 concerning Bank and Based on Profit Sharing.

⁵ Law No.7 of 1992 concerning Bank, and Government Regulation No. 72 of 1992 concerning Bank and Based on Profit Sharing.

law to the Aceh region as stipulated in the Law number 18 of 2000, concerning Special Autonomy for Aceh Region⁶.

The Dutch colonialism on the Archipelago has transferred the Netherlands law which has derived from Napoleon Code, when Napoleon Bonaparte occupied Europe. Napoleon Code was mostly sourced the Roman Law⁷. The Civil Law is characterized by its codification⁸. This system is different from the Common Law, established by King Henry II in uniting the Great Britain in the 13th century. The characteristic of this law is its judge-made laws. Under the Concordance Principles, the law of the Netherlands has also applied to the citizens of the Netherlands' East Indies since 1848. During that time, the citizens of the Netherlands' East Indies were divided into three groups: Europeans, Orientals and Natives. Non-European citizens might be subject to the European law both voluntarily and silently⁹. The codification of the European law is consisted of Civil Code, Commercial Code and Penal Code. Following the Indonesian independence, various materials of the Civil Code and the Commercial Code have separated themselves, represented by the enactment of the Basic Agrarian Law, Manpower Law, Limited Liability Companies Law, Trademark Law, Trade Secret : Law, etc. In its original country, the three codes had frequently been amended. In Indonesia, the amendment has been marked through the enactment of various new laws, formerly regulated under the Civil Code, the Commercial Code and the Penal Code. The amendment has also taken place due to the court's decisions providing the interpretation over the codes.

The enactment of the Foreign Investment Law in 1967 had encouraged the Indonesian international trade into the global market, and sought foreign loans from developed countries and international financial agencies. The Common Law has, either directly or indirectly, influenced the Indonesian legal system. The law has been introduced through international agreements and conventions in which Indonesia is a member, the agreements between businessmen, the establishments of new financial institutions and the influence of Indonesian law school graduates from the Common Law countries such as the United States, England and Australia. First, the flow of foreign investments has led Indonesia to be a members of various international conventions where the Common Law is dominant. The late agreement quite affecting the economic law included GATT (General Agreement on Tariff and Trade) or WTO (World Trade Organization), TRIMs (Trade Related to Investment Measures) and o TRIPs (Trade Related to Intellectual Property Rights)¹⁰. They have really influenced the areas of property rights and investments law in Indonesia. Secondly, the introduction of joint venture agreements, franchise agreements, commercial paper and all of these have derived from the Common Law system, previously unknown in Indonesia. The international establishments, dominated by the Common Law, have without notice brought elements of that legal system into the Indonesian national law. "Class Action" has been introduced in a lawsuit against the environmental protection case¹¹. "Derivative Action" is now a common sight in an action of the minority shareholders on behalf of the company against the company's board of directors and board of commissioners¹². Earlier, such cases have never been seen in the Indonesian Civil Code Procedures originating from the Civil Law system. The Indonesian post graduates studying Master of Law in the Common Laws

⁶ State Gazette Year 1999 No. 172 .

⁷ John Henry Merryman. *The Civil Law Tradition: an Introduction to the Legal System of Western Europe and Latin America* (Stanford: Stanford University Press, 1985) p.1-2.

⁸ John Henry Merryman, *ibid.*, p.26-20.

⁹ R. Supomo, *Sistem Hukum di Indonesia Sebelum Perang Dunia Ke II (Legal System in Indonesia Before World War II* (Jakarta: Pradnya Paramitha, 1972) p.15.

¹⁰ Indonesia Ratified The GATT.

¹¹ Supreme Court Regulation No. 1 of 2002 Concerning the Class Action Procedure Dated April 20, 2002.

¹² Law No.1 of 1995 Concerning the Limited Liability Company.

countries, like the United States, England and Australia, have encouraged the Common Law influence in the Indonesian law. Unavoidably, in line with the globalization of economy there has also been a globalization of law¹³.

ISLAMIC LAW IN INDONESIA

Marco Polo visited the Islamic Kingdom first in Samudera Pasai in 1292. The history tells that a Chinese Moslem traveller named Ma Huan, during his journey escorting a high-ranking official from China, arrived in Tuban, Gresik and Surabaya early 1451. He discovered already Moslem settlements in the northcoast of Java at that time. Falatehan, a hundred years later, developed Islam from Demak to the West and conquered Sunda Kelapa in 157. The development of Islam had also produced a progress of the Islamic law, mainly sourcing from Koran and the Prophet's Deeds. VOC (Verenigde Oost Indische Compagnie) found a reality in the society that the Moslem people in the archipelago have obeyed the Islamic law¹⁴. The Dutchmen during their colonialism period then tried to reduce the influence of the Islamic law. Snouck Hurgronye introduced the Reception Theory, that is the Islamic law only applies whenever it has been adopted by the customary law¹⁵. This theory is opposed by, among others, Prof. Dr. Hazairin, SH and H. Sayuti Thalib, SH. Both lecturers of the Islamic law at the Faculty of Law, University of Indonesia, oppose the theory, reasoning that the Reception Theory is against the Holy Koran and the Prophet's Deeds. Meanwhile, Sayuti Thalib has developed 'Theori Receptio a Contrario,' arguing that the customary law is applicable as long as it is not against the Islamic law. He takes the Minangkabau community in West Sumatra as an example where their customary law is also the Islamic law. Minangkabau society applies a principle that "*Adat bersendikan Syaria, Syaria bersendikan Kitabullah.*"¹⁶

The Islamic law has developed mainly on the field of family law, that is the marriage and inheritance law. Ther Moslem people have often also asked for the decision of Islamic courts on heirs and the right portions of the inheritance¹⁷. This court in its development has got a place through a law number 7 in 1989. Article 49 paragraph (1) of the law stipulates that the Religious Affairs Court on duty is authorized to exercise, decide and conclude cases at a first stage among the Moslem people in the areas of marriage, inheritance, will and grant, under the Islamic law. This court has also an authority to exercise and decide proprietorships and *zakat*. Paragraph (3) stipulates that the inheritance as meant by paragraph (1) on the provision of eligibility of becoming heirs, the provision of estate, the provision of heirs' portion, and the execution of the estate. Further, Article 52 paragraph (1) stipulates that the Religious Affairs Court has an authority to give statement, consideration, and advise on the Islamic law to the government agencies in its jurisdiction, if requested¹⁸.

Furthermore, there has also been a compilation of the Islamic law. Its composition has commenced with a list of authorities in the Islamic to be extended to the Religious Affairs Court. After conducting researches and completing with other materials sourced from

¹³ Richard C. Breeden, "The Globalization of Law and Business in the 1990's", *Wake Forest Law Review* Vol 28 No.3 (1993) p.509.

¹⁴ P.A.Hoesein Djajadiningrat, "Islam di Indonesia" (Islam in Indonesia) in Kenneth W. Morgan, *Islam Djalan Mutlak* (Islam is the Absolute Way) translated by Abusalamah, Chaidir Anwar & Harun al Rasjid (Jakarta: PT. Pembangunan Jakarta, 1963) p. 119.

¹⁵ Sajuti Thalib, "Receptio in Complexu, Theory Receptie and Receptio A Contrario", in Hazairin. *Pembaruan Hukum Islam di Indonesia (The Reform of Islamic Law in Indonesia)*. (Jakarta: Yayasan Penerbit Universitas Indonesia, 1976), p.46.

¹⁶ Sajuti Thalib, *Ibid*.p.53.

¹⁷ Daniel S. Lev, *Peradilan Agama Islam di Indonesia (Islamic Court in Indonesia)*. Translated by H.Zaini Ahmad Noeh (Jakarta:PT.Intermasa, 1980 h. 247-253.

¹⁸ Law No. 7 of 1989 Concerning The Court for Religious Affairs.

interviews, court decisions, the data collection from fiqh books, a Presidential Instruction was issued in 1991 under Number 1/1991 in order to introduce that Islamic Law Compilation. Since then, the Islamic Law Compilation has been an applicable law at the Religious Affairs Court¹⁹.

Further, the Islamic law has been imposed not only to the marriage and inheritance law, but also enlarging to the economic sector. This is marked by the establishment of the Islamic banking, Islamic insurance, Islamic bonds²⁰. The Islamic bank does not impose an interest rate basis to its customers, but profit sharing instead. So does the Islamic insurance, distinct from the system of general insurances. In the state administration, the state has extended a special autonomy of the province of Nangroe Aceh Darussalam through the issuance of Law Number 18 in 2001. The specialty of this province is the imposition of the Islamic law on the Special Autonomy for the Province of Aceh Special Region. The law is followed by the establishment of Mahkamah Syariah in Aceh under the a Presidential Decree Number 11 in 2003 Concerning the Syariah Court and Provincial Syariah Court in the Special Province of Nangroe Aceh Darussalam.

THE DEVELOPMENT OF SYARIAH BANK IN INDONESIA

Islamic Banking has been in operation for 10 years with the establishment of bank Muamalat Indonesia in 1992. Syariah banking in Indonesia continues to grow, in its institutional perspective as well as market penetration. Until the end of February 2003, according to Syariah Banking Development Quaterly Report, Bank of Indonesia – Syariah Bureau, two syariah general banks have been in operation, six conventional syariah bank business units, and 85 Syariah People Credit Banks (BPRS). Their asset segment reaches 0.40 percent of the total national bank.

The development is followed by its increase of Third Party's Fund (DPK) amounting to Rp.3.151 trillions and financing reaches to Rp.3.484 trillions. The good point is, its financing ration (FDR) to DPK that reaches to 110.6 percent, is reflecting that syariah banking has been quite reliable as intermeiation institution and able to stimulate the real sector. Whereas Loan to Deposit Ratio (LDR) – FDR in Syariah banking- conventional banking only reaches 49,2 percent in the same period²¹.

However, if we refer to the assumption that profit sharing system is the icon of syariah banking, this achievement has not yet stakeholders' expectatiob. Because until February 2003, the financing portfolio of profit sharing is only 16.19 percent consisting of musyarakah is 1,96 percent, mudharabah 14,23 percent; and non profit sharing is 83.81 percent consisting od mudarabah 71.52 percent, isthisma 6,66 percent, and others 5,63 percent²².

There has been very little publication that discloses why profit sharing based financing has not yet developed. Mulya E.Siregar, a senior researcher in Bank of Indonesia Syariah Banking Bureau, mentions that sale purchase based financing is more dominant becauseit is easier in calculations. While the difficulty in profut sharing is, bank's low confidence to customer²³.

Its financing that has problem is also low, only 4.3 percent. It is much lower compared to the same aspect in national banking that reaches to 11.4 percent.

¹⁹ Rifyal Ka'bah, "Kompilasi Hukum Islam di Indonesia" (Compilation of Islamic Law in Indonesia) Bogor, August 20, 2001. p.163-164.

²⁰ Bank Syariah Mandiri Akan Terbitkan Obligasi Rp. 200 Miliar" (Bank Syariah Mandiri Will Issue Bonds of 200 Billion Rupiah), *Bisnis Indonesia*, July 11, 2003.

²¹ *Republika*, April 29, 2003.

²² *Republika*, April 29, 2003.

²³ *Republika*, March 29, 2003.

Its office network nowadays is not only concentrated in Java (island). At present syariah banking offices have been distributed in 29 cities in four islands, namely Java, Sumatera, Sulawesi and Kalimantan. Meanwhile syariah BPR (People's Credit Bank) has spread in 44 cities in all over Indonesia including in Irian Jaya. According to the latest data per October 2003, the number of branch office, auxiliary branch office and cash office of general syariah banks is recorded as 121 offices. This number has increased into three folds compared to the number in the end of 1999.

The Central Bank has asked the Islamic bank to increase the financing of profit sharing whose portion is still relatively low. The reasons are that the financing of profit sharing constitutes a comparative advantage of the Islamic banking area compared with the conventional banks since it has adopted a partnership and just principle and led a larger advantage to the real sector. This was said by Harisman, head of the Central Bank Bureau for the Islamic Banking Sector, in Jakarta recently.

Earlier, the Central Bank Deputy Maulana Ibrahim said that the challenge of the Islamic bank development lies, among others, on the relatively-low portion of profit sharing financing.

There are two kinds of profit sharing financing, that are 'musyarakah' and 'mudharabah' basis. Under the 'musyarakah' basis, the bank along with its customers have mutually extended capitals and endeavors for the business progress. Under the 'mudharabah' basis, meanwhile, the bank completely provides funds, but not engaged in the business management.

In reference to its name, the profit of businesses is divided under an agreement made previously. If the business progresses, the profit will be higher and vice versa. This is really different with conventional banks, which do not consider the size of customers' profit.

Of the 16.5 percent profit sharing financing, the portion of 'mudharabah' is 14.5 percent. According to Harisman, the profit sharing financing requires the well-preparation of the bank and can not be forced. Such a scheme also needs tight supervision and has bigger risks.

For example, the bank has to observe routinely the customers' financial statement to get well-informed about the extent of their respective profits.

Meanwhile, its risks constitute that an unfair customer will present disguised financial statements featuring smaller profits.

HARMONIZATION OF 'SYARIAH' AND CIVIL LAW

The following paragraphs will explain example of harmonization between 'Syariah' and the Civil Law related to a contract between a 'Syariah' Bank and its customers.

Further, we also discuss the harmonization of Syariah and the Civil Law related to Arbitration as a forum for the dispute settlement. The harmonization of the syariah and Civil Law between the Islamic bank and its customers in contract can be seen from two aspects: the validity of the contract and its provisions.

Generally, the conditions of a contract's validity (as stipulated in Sayyid Sabiq, 11, 1987: 178-179) are as follows²⁴:

1. Not contrary to the existing Syariah law;
2. Mutual consent and selection; and,
3. Obvious and explicit.

²⁴ H.Chairuman Pasaribu and Suhrawardi K.Lubis, *Hukum Perjanjian Dalam Islam (Contract Law in Islam)*, Jakarta :Sinar Grafika, 1994) p. 3-4.

First not contrary of the existing syariah law. It means that the contract between the two parties is not an illegal act or unlawful against the Islamic law since any contract against the Islamic law has been considered invalid, and consequently no obligation of the respective parties to place and execute the contract, or in other words, whenever contents of the contract constitute illegal undertakings (in accordance to the Islamic law), the existing contract is null and void.

The legal principles of an annulment over any unlawful contract are referred to legal provisions contained in the Rasulullahdeeds, reading as follows: *“Any form of conditions not contained in the Koran is invalid, even though a thousand of conditions.”* (Sayid Sabiq, 11, 1987: 178).

Secondly, mutual consent and selection. It means that the existing contract of both parties has to be based on their consent to agree, in other words, the contract has been made under their respective own wills voluntarily. In this matter, it means that there is no pressure from each other, thus, there will be no legal contract without law enforcement and as long as not based on the free will of both parties concerned.

Thirdly, obvious and explicit. The contract should be obvious and explicit on its contents, preventing from misunderstanding between both parties in the future since the Koran says, in Al-Maidah, Paragraph 1, among others, *“Disciples, let you follow covenants.”* (The Koran committee of translation/interpretation council, 1990, 156).

The purpose of the covenants represents the self-obedience to God the Almighty and also covers inter-human contracts in their daily life. From the above legal viewpoints, there are seen whatever illegal act, and whenever one has conducted the illegal offense, so as a sanction would be imposed against its offender. Such a punishment against any contract offense is termed ‘wanprestasi’.

The Law of Contracts in Indonesia is laid down in Book III of the Civil Code, which was promulgated in the year 1848, together with a Commercial Code.

Under the legal order of the Dutch colonial time the Civil Code and the Commercial Code were applicable only for the European and the Chinese population. The indigenous people were left to live under their original customary law, but to them was given the opportunity to choose voluntarily European (Western) civil law. This state of law is still the same, but we can say that in the field of contracts the Indonesian people has adapted themselves to the western originated Civil and Commercial Code, while decisions of the courts show a trend to stimulate the application of the Law of Contracts of the Civil Code for the whole people.

The freedom to make contracts of whatever kind is derived from article 1338 paragraph 1 of the Civil Code, that says: *“All contracts legally concluded shall apply as acts to those who have concluded them.”*

A contract is legally concluded when it fulfills the conditions or requisites as mentioned in article 1320 of the Civil Code, that are capacity of the parties:

- a free consensus (capacity of the parties);
- a certain subject matter;
- a legal cause.

When fulfilling the conditions as mentioned above, a contract is perfect. The validity of a contract is, as a rule, not bound to formalities. Only by exception the Law prescribed formalities for a certain number of contracts.

First, capacity of the parties. Everybody is capable to conclude a contract, except those who are declared incapable by law.

According to Article 1330 of the Civil Code, are incapable to conclude contracts: minors, those who are under guardianship.

In case an incapable person has concluded a contract, his legal representative has the right to demand before the court the annulment of the contract. The person himself can also demand the annulment, at the moment that he has become capable or has regained his capability. It is understood that the other party (that means the party who is capable) has never the right to demand the annulment of the contract.

Secondly, by a free consensus is meant that both parties have voluntarily given their consent or have voluntarily agreed in the contract. According to article 1321 of the Civil Code the consent is not valid when it is the result of error, coercion or deceit.

Error or mistake has to go about the substance, the quality or the character of the subject matter of the contract. For example: A wants to buy an original painting of a famous painter, but it turns out that he has bought a copy. Another example, wants to buy a ring of gold, but it turns out that he has bought a ring of copper. It is necessary that the other party knows that his counterpart is in error and nevertheless does not warn him.

By coercion or violation is meant not a physical but a psychological pressure or intimidation. The person undergoing the intimidation must have been in fear that there is an immediate threat which will harm this person or his property and because of that he has given his consent. For example, The counterpart threatens that when A does not sign the contract, his family will be in danger or a personal secret will be made public.

The action which the counterpart threatens to take, must be a wrongful action. If that action is a legal one, then the intimidation cannot be qualified as coercion. For example: the counterpart threatens that when A does not sign the contract, he will sue A before the court to pay his debts.

In this connection it has been mentioned the Usury Act of 1938, giving the possibility to one of the parties to demand the annulment of a contract before the Judge, in case there is an extravagant difference between the mutual duties of the parties and the injured party has unthoughtfully or in emergency agreed to the contract.

Thirdly, by a "certain subject matter" is meant a clear description of what is agreed to. This is necessary to enable the Judge to determine the duties of each party, when there arises a dispute. For example: a contract of sale of "rice for the price of one hundred dollars," shall be declared null and void for the reason of lacking a certain subject-matter, because it is not clear what quality of rice is sold, moreover, nothing is said about the quantity.

Finally, by a legal cause is meant that what has to be performed by either party is not contravention to the law, the public order or the public morality. A contract whereby one of the parties has to commit a crime, is null and void because it has an illegal cause.

From what is related above, we can draw the conclusion that, in case of incapability of one of the parties or in case of lack of a free consensus, the injured party has to demand the annulment of the contract to the Judge. In those cases the contract is voidable. On the other hand, in case of unclarity of the subject matter or in case of an illegal cause, the contract is null and void. In these cases the Judge shall ex-officio declare the contract null and void. In case of incapability of one of the parties or in case of absence of a free consensus, the Judge has to be informed by the parties of the imperfectness of the contract, whereas in the case of unclarity of the subject or in the case of an illegal cause he is supposed to know the imperfectness of the contract at the first sight.

The action of annulment of a voidable contract shall be brought within five years. This period shall begin: in case of incapacity of one of the parties from the time that the incapable person has become capable or has regained his capability: in case of error, coercion or deceit, from the moment of detection or discovery of the error or the deceit or from the moment the coercion has ceased (Article 1454 Civil Code).

Ratification of voidable contract is possible. Such ratification may be effected expressly or tacitly. There is a tacit ratification if, with knowledge of the reasons which

render the contract voidable and such reasons having ceased, the person who has a right to demand the annulment of the contract should execute an act which necessarily implies an intention to waive its rights.

Article 1338 paragraph 3 of the Civil Code says, that all contract shall be carried out in good faith.

In the exercising of his rights a creditor has in certain circumstances to take into account the interests of his debtor. A creditor who claims his rights at the most unfavorable moment for the debtor, while he knows it, shall be considered to act in bad faith.

When Article 1338 paragraph 1 Civil Code guarantees the protection by law of the rights of the creditor in a legally concluded contract, on the other hand the provision of Article 1338 paragraph 3 should be considered as assuring to the debtor protection against arbitrary exploitation by the creditor, who makes abuse of the literal text of the contract. By this provision the Judge is given the competence to intervene in the performance of a contract.

The following example is term and condition one of *Mudharabah* Contract in Indonesia

‘Mudharabah’ Contract

Under a ‘Mudharabah’ (profit sharing) contract, the contracting parties are clearly stipulated, like whatever contracts anywhere. The second element is that a word “agree” is also obviously indicated.

“‘Bank Syariah and ‘Mudharib’ (customers) have shared a same view that for that purpose both parties will sign and execute a contract based on the terms and conditions indicated below.”

The ‘Mudharabah’ Contract has clearly indicated matters to be prevailed as important.

- ‘Bank Syariah and ‘Mudharib’ haved agreed that a profit-sharing financing based on a contract constitutes a profit recorded in the first year will be shared with a ratio of% for ‘Bank Syariah’ and% for ‘Mudharib.’ In the second year, the profit will bed shared with a ratio of% for ‘Bank Syariah’ and% for ‘Mudharib’ before tax and costs.

Losses

- 2.3.1 ‘Bank Syariah’ will be born any loss, except due to the omissions of ‘Mudharib’ as regulated under Article 7 or due to the offense against the contract’s conditions as shown in Article 8.
- 2.3.2 ‘Bank Syariah’ will accept and acknowledge such a loss after an acceptance, re-evaluation and delivery after it accepts, evaluate and deliver its evaluation in writing to ‘Mudharib.’

Contract Signing

Whereas those who represent in the name of and on behalf of ‘Mudharib’ and obtain the power of attorney from ‘Mudharib’ are qualified and authorized and without pressure.

The events of omission and defects

Whereas ‘Mudharib’ is termed as omissions or defects if proved to have offended and/or misled one or all of the provisions stipulated in the contract.

1. If ‘Mudharib’ is late in fulfilling repayment already due three times consecutively without due reasons.
2. If statements and collaterals made by Mudharib in the contract are incorrect either partly or whohelly.

3. If documents or licences and/or issued by the competent authorities are proved to be fake or elapsed and not extended by the ‘Mudharib.’
4. If ‘Mudharib’ have offended and/or misled or violated the Islamic law principles.
5. If a part or all of ‘Mudharib’ property is seized by the judicial agency.

Offenses against the contract’s conditions

Whereas ‘Mudharib’ are termed as having offended conditions of a contract if their offenses are proved and/or misled one or all of the provisions stipulated under this article and/or this contract.

1. If ‘Mudharib’ have misused the loans acquired from ‘Bank Syariah’ to ‘Mudharib’ for other purposes outside their needs and interests.
2. If ‘Mudharib’ have transformed their business through whatever means, including a merger, consolidation or acquisition with other party.
3. If ‘Mudharib’ have performed their business not in the conformity of technical specifications obliged by ‘Bank Syariah’ as shown in the Offering Letter.
4. If ‘Mudharib’ have filed a bankruptcy petition to the court or declared to be bankrupt.
5. If ‘Mudharib’ have failed to meet their obligations to other party.

Article 9 Arbitration

Any dispute arising from or under whatever means related to this contract and not settled amicably will be decided in accordance with the procedures of BAMUI (the Indonesian Agency for ‘Syariah’ Arbitration). The awards of BAMUI are final and binding and applicable to all courts with their respective jurisdictions.

Article 10 The Governing Law

This contract is organized and subject to the law of the Republic of Indonesia. The signing, delivery, issuance and the execution of this contract does not or will mislead any determination of rules applicable in Republic of Indonesia.

The terms and condition above are clauses generally applied in any contract under the Indonesian Civil Code. Under the independent contractual principles and the Indonesian Banking Law, such a profit sharing contract is lawful. Although, the profit sharing is under Syariah, but the profit sharing contract is governed by the Civil Code.

SETTLEMENT OF DISPUTES

Arbitration or more widely known as “al-tahkim” in Islamic law constitutes a part of al qadla (judiciary system).

The legal ground which enables arbitration, that is taken from Al-Quran, Sunnah Rasulullah (Prophet’s Deed), as well as ijma’ (consensus opinion among scholars), if it is scrutinized thoroughly, in principle contains recommendation to settle a dispute in peaceful way. The peaceful way is the most fundamental method according to Islamic teaching. To materialize the peace/settlement, the highly dependant on hakam (judge), and the parties in conflict, it is necessary to have awareness/understanding and their compassions, because from each party at one occasion is requested their willingness to submit some of their rights

voluntarily. The relationship of settlement conducted by hakam with his/her policy as mentioned above can create misunderstanding on this settlement, because it might generate an impression as if the settlement conducted by hakam is only based on his/her policy, without taking into account religious guidance. That aspect can give rise to, a hakam for the sake of his policy to settle, violate Allah religion limitations. To prevent this wrong impression Rasulullah in a hadis (traditional collection of stories relating words or deeds of Mohammed) of Abu Daud's life affirms that: "Peace/settlement is allowed among the Moslems, except the settlement which causes forbidding the legal/right and justifying/authorizing the forbidden one."

Such hadis contains knowledge that someone who will provide settlement (hakam) should be a person who understands Allah law concerning the item he/she is going to settle. It is important, because with that quality someone can avoid his decision against the things forbidden by syariat.

To settle a conflict peacefully, is based on willingness of both parties to end their conflict. Islamic religion praises such action, as confirmed in Surah An-Nisa, verse 128 which means: "Peace/settlement is a good deed," Such verse is one of the reasons that allows peaceful settlement.

Arbitrage is an alternative legal institution for dispute settlement outside the court. Some people prefer to settle the dispute arising among them through arbitration rather than going to court because of some reasons.

Firstly, people prefer to settle a dispute through arbitration because they think local legal system and the court is strange/unfamiliar to them.

Secondly, the parties think judges do not fully understand trade disputes.

Thirdly, dispute settlement through court will take a long time and high cost, because the prolonged court process starts from the first level until the one at the Supreme Court.

Fourthly, unwillingness of the parties to settle dispute before the court is based on the assumption that the court will tend to have subjective standpoint to them, because the judges examine and resolve the dispute not based on their (the parties') law.

Fifthly, dispute settlement in court will find out who is right and who is wrong, and the result will be able to further loosen the ties of trade relationship between them. Dispute settlement through arbitration is assumed to create compromised decision that can be accepted by the parties in conflict.

During its five-year establishment of Badan Arbitrase Muamalat Indonesia-BAMUI (the Indonesian Agency for 'Muamalah' Arbitration), there have been 12 disputes already settled by this Agency, where the respective parties have accepted its awards.

The implementation of Arbitration Award is subject to Law Number 30 of 1999 on the Arbitration and the Alternatives of Dispute Resolutions. BAMUI in the settlement of disputes issues awards under Syariah, but, if one of the parties refuses to obey the awards, therefore, the Court under the Law Number 30 of 1999 will enforce the arbitration's awards. The awards of arbitration are final and binding, meaning that there is no appeal to the court.

Conclusion.

In an agreement or contract between Bank Syariah and its customers in Indonesia, their transaction relationship is under Syariah. However, the implementation of the contract itself is subject to the Civil Code. So does in settling the dispute through arbitration. The awards of arbitration are based on Syariah. But, the implementation of those awards, if one of the contracting parties refuses to obey the awards, the court will enforce the awards against the party concerned under the Law Number 30 of 1999. In conclusion that Syariah and Civil Law have supported each other in the development of Islamic banking in Indonesia.