

SHARIA LAW AS A SYSTEM OF GOVERNANCE IN INDONESIA: THE DEVELOPMENT OF ISLAMIC FINANCIAL LAW

HIKMAHANTO JUWANA^{*}
YENI SALMA BARLINTI^{**}
YETTY KOMALASARI DEWI^{***}

I. THE DEVELOPMENT OF ISLAMIC LAW IN INDONESIA

Indonesia has a population of 206,264,595 people.¹ Indonesia's population is pluralistic, both ethnically and religiously. The majority of Indonesia's population, 85.2 percent, are Moslems.² Indonesia applies three legal systems, namely *adat* (customary) law, Islamic law, and Western law.³ These three legal systems live and are developing in the Indonesian society. In the beginning, *adat* law applies to *adat* (native) society, Islamic law applies to Moslems, whereas Western law applies to Dutch and Europeans. To date, the implementation of those legal systems applies to all of Indonesians.⁴

The existence of Islamic law in Indonesia is based on the first pillar of the state philosophy, namely "Belief in God The Almighty" and Article 29 paragraph 1 of the 1945 Constitution, "The State is based on Belief in God The Almighty" and paragraph 2, "The State guarantees the

^{*} Dean and Professor of the Faculty of Law of the University of Indonesia. Prof. Juwana received his LL.B. from the University of Indonesia (1987), his LL.M. from Keio University—Japan (1992), and his Ph.D. from the University of Nottingham—England (1997).

^{**} Lecturer of the Faculty of Law of the University of Indonesia. Ms. Barlinti received her LL.B. (1998) and Master of Law (2001) from the University of Indonesia.

^{***} Lecturer of the Faculty of Law of the University of Indonesia. Ms. Dewi received her LL.B. from the University of Indonesia (1993) and her MLI. from the University of Wisconsin (2003).

¹ Statistics Indonesia, Brief Analysis, <http://www.bps.go.id/sector/population/pop2000.htm> (last visited Sept. 8, 2007).

² Republik Indonesia, Profil Indonesia [Republic of Indonesia, Indonesia's Profile], http://www.indonesia.go.id/id/index.php?option=com_content&task=view&id=112&Itemid=336 (last visited Sept. 8, 2007).

³ See Benny S. Tablujan, The Indonesian Legal System—An Overview, available at <http://www.indobizlaw.com/forms/IDLegalOverview.pdf>.

⁴ See generally SUDARGO GAUTAMA, *INDONESIAN BUSINESS LAW* (1995).

freedom of every citizen to follow their religion and to worship according to their respective religion or belief.”⁵ Under the 1945 Constitution, Islamic law is applicable to Indonesian citizens who follow the religion of Islam due to the position of Islamic law itself, not because it has been adopted by *adat* (customary) law.⁶ However, there are still certain regulations which are the legislative products of the East Indies Government during their colonial rule in Indonesia, which remain applicable to this very day, such as the Civil Code (*Burgerlijk Wetboek*) and the Civil Procedure Law (*Het Indische Reglement*).

In consideration of the fact that the majority of Indonesia’s population are Moslems and of Pancasila and the 1945 Constitution, there are several laws and regulations dealing with law related to sharia. Prior to 1980, regulations related to sharia were limited to family and *wakaf* (religious endowment). In the field of family relations, Law No. 1 of 1974 and Government Regulation No. 9 of 1975 concerning the Implementation of Law No. 1 of 1974 on Marriage, provide for, among other things, marriage, divorce and reconciliation (*rujuk*), as well as the legal relationship between children and their parents. The provisions of this Law were strongly influenced by the provisions of sharia.

In the area of *wakaf*,⁷ Indonesian Moslems have been practicing *wakaf* quite intensively, especially land *wakaf*. With the increasing number of land disputes in the community, including *wakaf* land, land related issues have been provided for in Law No. 5 of 1960 concerning Basic Agrarian Provisions. It is stipulated in Article 49 paragraph 3 that the granting of *wakaf* on land with the right of ownership is protected and regulated by the government. Provisions on the process of granting *wakaf* is further set forth in Government Regulation No. 28 of 1977

⁵ Undang-Undang Dasar Republik Indonesia 1945, UUD ‘45 [Constitution of Indonesia], ch. 11, art. 29 (translation by author). There have been four amendments to the 1945 Constitution to date, with the content of Article 29 remaining unchanged.

⁶ The application of Islamic law in Indonesia prior to independence was impeded by the application of the *Receptie Theorie* which is included in Article Pasal paragraph 2 of the IS of 1929 setting forth that in the event of a dispute between two parties, both of whom are Moslems, the dispute is to be resolved by an Islamic religious judge insofar as their *adat* (customary) law so requires and to the extent that it is not determined otherwise in a regulation. Based on the 1945 Constitution, Islamic law is applicable to Moslems. Ismail Sunny, *The Position of Islamic Law in Indonesia’s State Administration System*, in ISLAMIC LAW IN INDONESIA: DEVELOPMENT AND FORMATION 74-76 (2d ed. 1994).

⁷ *Wakaf* is a legal act undertaken by the *wakif* (the person granting *wakaf*) with the aim of separating and/or surrendering a portion of his/her property to be used for an indefinite or a determined period of time for a designated purpose for worship and/or public welfare based on *syariah*. See Law No. 41 of 2004 Concerning *Wakaf*, art. 1(1) (translation by author).

concerning the Process of Granting *Wakaf* on Land with the Right of Ownership.⁸

Indonesia has four types of courts, namely the Courts of General Jurisdiction, the Religious Court, the Military Court, and the State Administration Court. The Religious Courts are a special kind of institution with the function of settling sharia related disputes. The Religious Court has absolute competence to handle sharia related cases, namely it has the competence to settle disputes in the fields of marriage, inheritance, *wasiat* (testament), *hibah* (grants), *shadaqah* (alms), *zakat* (tithe), *wakaf* (religious endowment).⁹ This absolute competence of the Religious Court has been developing further since the amendment of the Law on the Religious Court stipulates that disputes in the field of economic sharia fall under the jurisdiction of the Religious Court.¹⁰

Since the late 1980s, there has been a growing enthusiasm among Indonesian Moslems supporting the application of sharia. This is evident from the unprecedented attention paid to the sharia compared to the previous period. This can be seen from an increasing number of Moslem women starting to wear the headscarf. Furthermore, an increasing number of Islamic political parties coming into existence. This enthusiasm has also brought an effect on financial activities. There has been a growing interest to study Islamic economics intensively, leading to a continuously increasing rate of sharia-based financial activities up to the present time. The total assets invested based on sharia principles have also shown a steadily increasing trend, from an average of 12 percent to 15 percent per year.¹¹

Sharia-based financial activities commenced in 1992, with the establishment of Bank Muamalat Indonesia, the first sharia bank open to the general public in Indonesia.¹² Other sharia banks followed suit, and their number has been growing steadily.¹³ These sharia banking activities have been regulated by the government under Law No. 7 of

⁸ ABDUL GHOFUR ANSHORI, HUKUM DAN PRAKTIK PERWAKAFAN DI INDONESIA [THE LAW AND PRACTICE OF WAKAF IN INDONESIA] 45-46 (2005) (translation by author).

⁹ Law No. 7 of 1989 Concerning Religious Court, art. 49 (translation by author).

¹⁰ Law No. 3 of 2006 Concerning Amendment of Law No. 7 of 1989 concerning Religious Court, art. 49 (translation by author).

¹¹ See Rahmat Bastian & Satrya Wijaya Teja, Structuring *Sharia* Finance in Indonesia, available at www.btpartnership.com/download/Structuring%20Sharia%20finance%20in%20Indonesia2.pdf.

¹² Ahmad Riawan Amin, Tak Ada Alasan Untuk Menghindar, http://www.republika.co.id/cetak_berita.asp?id=245623&katid=105&edisi=Cetak (last visited Feb. 19, 2008) (translation by author).

¹³ *Id.*

1992 concerning Banking which was subsequently amended by Law No. 10 of 1998 concerning the Amendment of Law No. 7 of 1992 concerning Banking.¹⁴ Between 1997-1998, when the monetary crisis hit most Asian countries, including Indonesia, Bank Muamalat Indonesia proved itself to be a bank which was able to withstand the crisis.¹⁵ This increased further the confidence of the public and the government in sharia-based banking activities.¹⁶

Islamic economic studies and activities do not stop at, and are not limited to, the banking sector, but are expanding to other Islamic economic activities such as insurance, *zakat* (tithe), *wakaf* (religious endowment) in the form of cash, pawn, and capital market instruments. Some of the Islamic economic activities have been further supported by specific laws, such as Law No. 38 of 1999 concerning the Management of *Zakat* and Law No. 41 of 2004 concerning *Wakaf*. As for other areas, the absence of specific regulations to date does not affect the uninterrupted implementation of these Islamic economic activities. These Islamic economic activities continue to be based on currently applicable regulations. However, endeavors continue to be made for the improvement of regulations dealing with these Islamic economic activities.

II. ISLAMIC FINANCIAL LAW IN INDONESIA

A. SHARIA BANKING

The development of a sharia banking system in Indonesia was driven by public demand—especially by Moslems who accept interest as a forbidden transaction. Most of Moslems in Indonesia consider the Islamic banking system as not merely a commercial transaction system, but rather as part of the Islamic economic concept implementing the Islamic system of values and ethics in economic activities.¹⁷ Hence, for most Indonesian Moslems, financial transactions, including banking, are part of a religious duty. The ability of Islamic financial institutions to

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Zainul Arifin, *Produk Perbankan Syariah dan Prospek Pasarnya di Indonesia* [*Syariah Banking Products and Its Market Prospects in Indonesia*], 20 J. HUKUM BIS. 67, 72 (2002).

successfully attract investors does not only depend on such institutions to make a profit, but also on the perception that such institutions genuinely follow the religious restrictions prescribed by Islam. Therefore, the purpose of the establishment of sharia banks is to promote and develop the implementation of Islamic principles in financial transactions, banking and other business transactions, based on the following main principles: (i) the prohibition of *riba* (interest) in various types of transactions; (ii) Conducting business and commercial activities generating profits in a manner permitted by Islamic principles; and (iii) causing *zakat* to grow and develop.¹⁸ In order to meet the community's need for financing, Islam provides that this can be done based on profit and loss sharing *akad* (contract)¹⁹ with the aim of meeting the need for equity financing, and based on sale and purchase *akad* (contract) in order to meet the need for debt financing.²⁰

At the beginning, the development of Islamic banking came as a surprise to international conventional banking observers, including those in Indonesia, where Islamic banks have been operating for the past 20 years now. Sharia banking was officially launched in 1992 with the enactment of Law No. 7 and amended by Law No. 10 of 1998. In Law No 7/1992 the term 'sharia bank' or 'Islamic bank' is not used yet, it is only stipulated that banks may conduct business activities based on the *profit and loss sharing principle*, without giving more detailed provisions concerning the implementation of such business activities by the bank based on the profit and loss sharing principle.²¹ This was further supplemented by Law No. 10/1998 which expressly classifies banking business activities into two categories, namely banks conducting conventional business activities and banks conducting their business based on the sharia principle.²² This marked the beginning of the use of the term sharia banking.²³ This Law also makes it possible for

¹⁸ IBRAHIM WARDE, ISLAMIC FINANCE IN THE GLOBAL ECONOMY 5 (2000). See also Tan Sri Datuk Ahmed Mohamed Ibrahim, Legal Issues in the Implementation of Islamic Banking and Finance (presented at Labuan International Summit on Islamic Financial & Investment Instruments) (June 16-18, 1997) (on file with author).

¹⁹ *Akad* (contract) is a written agreement. This is a common term used in Islamic economic law.

²⁰ Mulya E. Siregar, *Perbankan Syariah di Indonesia: Evaluasi dan Prospek* [*Syariah Banking in Indonesia: Evaluation and Prospects*], 20 J. HUKUM BIS. 55, 55-56 (2002) (translation by author).

²¹ Law No. 7 of 1992 Concerning Banking, art. 6(m) (translation by author).

²² Law No. 10 of 1998 Concerning Banking, art. 1(3) (translation by author).

²³ "Syariah bank" in this paper refers to *Syariah* Commercial Banks and *Syariah* People's Credit Banks. *Syariah* Commercial Banks are subject to Bank Indonesia Regulation (PBI) No. 6/24/PBI/2004, available at <http://www.bi.go.id/NR/rdonlyres/02D40791-FFF6-4517-BF11->

conventional banks to open *Syari'ah* Branch Offices, which subsequently became known as dual system banks, namely allowing a bank to implement two different systems, namely, the conventional and the sharia system.²⁴ In response to Law No.7/92, the Moslem community established the first sharia bank in Indonesia, namely PT Bank Muamalat Indonesia, Tbk.²⁵ However, in the subsequent period, the development of sharia banks was not as expected, in the absence of other regulations supporting the operational activities of sharia banks. Sharia banking has revived since the amendment of Law No.7/1992 by Law No. 10/98 providing for a clearer operational platform for sharia banks. Ever since then, sharia banks have been growing at a relatively high rate. Endeavors for the development of sharia banking in Indonesia are part of the efforts to revitalize the banking system, with the aim of achieving a stronger and more resilient national economy. This was proven when sharia banks demonstrated a stronger ability to survive amidst the Indonesian economic crisis in 1997 compared to conventional banks.²⁶

The main difference between the sharia banking system and the conventional banking system is the prohibition of paying and receiving interest (*riba*) in sharia banking, avoiding non-transparent and speculative transactions. In addition, sharia banks apply the principle of lending and borrowing in the context of commercial activities, because any lending or borrowing of money is done based on specific terms or the provision of compensation which does not include *riba* (interest).

The general business activities of sharia banks can be classified into three types of activities: fund raising; distribution of funds; and services.²⁷

FB1DC51071DD/2572/pbi62404eng.pdf. *Syariah* People's Credit Banks are subject to PBI No.6/17/PBI/2004, available at <http://www.bi.go.id/NR/rdonlyres/69BC8E4C-1025-4F36-9F12-1BC62B697ED8/1206/pbi61704a1.pdf>.

²⁴ Law No. 10 of 1998 Concerning Banking, art. 1(3). See also Bank Indonesia Regulation No. 8/3/PBI/2006, available at <http://www.bi.go.id/NR/rdonlyres/710DF430-53FB-4FA7-BC0B-06F95F616B48/3743/pbi8306eng.pdf> (concerning the conversion of conventional commercial bank business activities to those based on *Shari'ah* principles).

²⁵ See Sutan Remy Sjahdeini, *Perbankan Syariah Suatu Alternatif Kebutuhan Pembiayaan Masyarakat* [*Syariah Banking An Alternative in Meeting the Community's Financing Needs*], 20 J. HUKUM BIS. 11 (2002) (translation by author).

²⁶ Siregar, *supra* note 20, at 56.

²⁷ Bank Indonesia Regulation No.6/24/PBI/2004, art. 36, available at <http://www.bi.go.id/NR/rdonlyres/02D40791-FFF6-4517-BF11-FB1DC51071DD/2572/pbi62404eng.pdf>.

1. FUND RAISING

Clearing or savings accounts based on the *Wadi'ah* principle are principally an *akad* (contract) for the safekeeping of property or cash between the owner and the entrusted party with the aim of maintaining the safety, security, and the integrity of such property or money.²⁸ The bank can use and manage the money deposited by its customers and, consequently, the bank takes responsibility for all profits and losses, while customers do not suffer any losses because their funds are protected. Thus, in the case of clearing account products, the following elements need to be taken into account:²⁹ (1) the funds deposited at the bank are deposited for safekeeping; (2) these funds can be collected at any time; and (3) there is no requirement for compensation, except for a voluntarily determined amount by the bank. Meanwhile, the following elements need to be considered in the context of Savings Accounts:³⁰ (1) the funds deposited at the bank are savings; (2) these savings can be collected any time or as agreed; (3) it is not required to provide compensation, except for a voluntarily determined amount by the bank.

Clearing, deposit, or savings accounts based on the *Mudharabah* principle are principally an *akad* (contract) between the owner of capital with the fund manager aimed at obtaining revenues or profits to be shared based on *nisbah* (ratio) mutually agreed upon at the beginning of the *akad* (contract, agreement).³¹ Thus, the customer's funds deposited at the bank are managed by the bank in such a manner as to generate profits and such profits must be shared between the bank and the customer concerned based on the *nisbah* (ratio) they had agreed upon at the initial stage of their agreement.³²

²⁸ TIM PENYUSUN, *BANK DAN ASURANSI HUKUM ISLAM DI INDONESIA [ISLAMIC BANKING AND INSURANCE IN INDONESIA]* 103 (Wirdyaningsih ed., 2005).

²⁹ *Fatwa* [Edict] of the Dewan Syariah Nasional [National Sharia Board] No.01/DSN-MUI/IV/2000, available at http://www.mui.or.id/mui_in/product_2/fatwa.php (translation by author).

³⁰ *Fatwa* [Edict] of the Dewan Syariah Nasional [National Sharia Board] No.02/DSN-MUI/IV/2000, available at http://www.mui.or.id/mui_in/product_2/fatwa.php (translation by author).

³¹ H. KARNAEN PERWATAATMADJA & H. MUHAMMAD SYAF'I ANTONIO, *APA DAN BAGAIMANA BANK ISLAM* 105 (1992) (translation by author).

³² *Fatāwā* [Edicts] of the Dewan Syariah Nasional [National Sharia Board] No.1, 2 and 3 /DSN-MUI/IV/2000, available at http://www.mui.or.id/mui_in/product_2/fatwa.php (translation by author).

2. DISTRIBUTION OF FUNDS

A. The Murabahah Sale and Purchase System.

Sale and Purchase based on the *Murabahah* system is a form of financing offered to customers for purchasing certain goods under the condition that the customer concerned must repay the total amount loaned by the bank with an additional profit margin³³ to the bank at maturity date.³⁴ The provisions that need to be taken into account in this type of finance include the provision that the bank and the customer must enter into a *murabahah akad* (contract) free of *riba* (interest), the goods being purchased should be goods not prohibited based on Islamic sharia and the bank can ask for guaranty from the customer concerned.³⁵

B. Profit Sharing Principle based on the Musyarakah system

Profit Sharing based on the *Musyarakah* system is a form of partial financing the need for capital of a business for a determined period of time based on an agreement. The net profits are shared between the bank as the provider of funds and the management of the business concerned based on their agreement, however, it is normally determined based on the percentage of their respective contributions, and at the end of the financing period the funds are returned to the bank.³⁶

C. Profit Sharing Principle based on the Mudharabah System

Profit Sharing based on the *Mudharabah* system is a form of total financing of the capital requirements of a business for a certain period of time, based on an agreement, where net profits are shared between the bank as the fund provider and the manager of the business concerned, in accordance with their agreement. However, the manager

³³ The profit margin is generated from the difference between the purchase price obtained from the supplier and the bank's selling price to the customer.

³⁴ KARNAEN & ANTONIO, *supra* note 31, at 106 (translation by author).

³⁵ *See Fatwa* [Edict] of the Dewan Syariah Nasional [National Sharia Board] No.04/DSN-MUI/IV/2000, available at http://www.mui.or.id/mui_in/product_2/fatwa.php (translation by author).

³⁶ *See Fatwa* [Edict] of the Dewan Syariah Nasional [National Sharia Board] No.08/DSN-MUI/IV/2000, available at http://www.mui.or.id/mui_in/product_2/fatwa.php (translation by author).

of the business concerned usually gets a greater share compared to the fund provider (the bank).³⁷ Upon the expiration of the financing period, the fund manager must repay the money to the bank.

D. The Lease Principle based on the Ijarah system

The Lease Principle based on the *Ijarah* system is a form of financing where the bank extends a loan needed by the customer to purchase certain goods or to obtain certain services, but the customer only leases such goods or services for a specific period of time, and it is only at the end of such *akad* (contract) that the bank grants the goods or services concerned to the customer, following which the customer becomes the owner of such goods or services.³⁸ In such case, the ownership of the goods concerned is transferred from the bank to the customer only at the end of the financing period, whereas the bank obtains profits from the difference between the purchase price obtained from the supplier and the bank's sale price to the customer.

E. The Lease Principle based on the Ijarah Muntahiya Bittamlik (lease purchase)

Business activities based on this principle are in the form of a lease contract between the bank and the lessee, based on a promise that at the determined time the ownership of the goods concerned are to be transferred to the lessee.³⁹ If this type of contract is applied, it should be agreed upon at the time the *ijarah* is signed, thus all provisions of the *ijarah* contract are also applicable to this type of contract.⁴⁰

³⁷ *Fatwa* [Edict] of the Dewan Syariah Nasional [National Sharia Board] No. 7/DSN-MUI/IV/2000, available at http://www.mui.or.id/mui_in/product_2/fatwa.php (translation by author).

³⁸ See *Fatwa* [Edict] of the Dewan Syariah Nasional [National Sharia Board] No. 9/DSN-MUI/IV/2000, available at http://www.mui.or.id/mui_in/product_2/fatwa.php (translation by author).

³⁹ *Fatwa* [Edict] of the Dewan Syariah Nasional [National Sharia Board] No. 27/DSN-MUI/III/2002, available at http://www.mui.or.id/mui_in/product_2/fatwa.php (translation by author).

⁴⁰ *Fatwa* [Edict] of the Dewan Syariah Nasional [National Sharia Board] No.27/DSN-MUI/III/2002, General Provisions, available at http://www.mui.or.id/mui_in/product_2/fatwa.php (translation by author).

3. SERVICES

Sharia banking also provides various types of services by charging a fee. These various types of services include the following:

1. *Al Kafalah*: the service of providing guarantee by the bank acting as guarantor to third parties for the second party's liabilities (the party being guaranteed)⁴¹ or issuing bank guarantee.
2. *Al Hiwalah*: the service of assigning the debt liabilities of a debtor to another party.⁴² This service can also be provided for sharia factoring or debt rescheduling where the sharia bank obtains profits from the sale and purchase of assets used as collateral.⁴³
3. *Al Wakalah*: the service of taking certain action or performing certain work on behalf of the customer (as the authorizing party). This is usually applied for issuing Letter of Credit (L/C), Export L/C as well as for transferring the customer's funds to another party.⁴⁴
4. *Ar Rahn*: the service of cash loan extended based on guaranty in the form of movable assets for a certain period of time. It is usually used as additional guaranty for high-risk financing or for serving the needs of customers for services or for consumer purposes such as education or health services.⁴⁵

In addition, sharia banking can also provide foreign currency conversion services (*Sharf*) or in specific services upon their customers' request (*Ju'alah*).

The main challenge for sharia banking in Indonesia is that sharia banks run their business operations in an environment which applies the dual banking system, where conventional banks' interest rates normally exceed the profit rates achieved in the real economic sector. Sharia

⁴¹ See *Fatwa* [Edict] of the Dewan Syariah Nasional [National Sharia Board] No. 11/DSN-MUI/IV/2000, available at http://www.mui.or.id/mui_in/product_2/fatwa.php (translation by author).

⁴² See *Fatwa* [Edict] of the Dewan Syariah Nasional [National Sharia Board] No. 12/DSN-MUI/IV/2000, available at http://www.mui.or.id/mui_in/product_2/fatwa.php (translation by author).

⁴³ PENYUSUN, *supra* note 28, at 132.

⁴⁴ See *Fatwa* [Edict] of the Dewan Syariah Nasional [National Sharia Board] No. 10/DSN-MUI/IV/2000, available at http://www.mui.or.id/mui_in/product_2/fatwa.php (translation by author).

⁴⁵ *Fatwa* [Edict] of the Dewan Syariah Nasional [National Sharia Board] No. 25/DSN-MUI/III/2002, available at http://www.mui.or.id/mui_in/product_2/fatwa.php (translation by author). See also Arifin, *supra* note 17, at 73.

banks must continue to improve their efficiency in order to achieve profits which are acceptable to fund owners. In addition, community members do not fully understand yet the way sharia banking operates. Therefore, continued and comprehensive efforts must be made for dissemination, not only to business circles, but also to all stakeholders. Eventually, with sharia banking and conventional banking existing side by side, public funds will be mobilized more intensively, especially in segments untouched by conventional banking.

At the present time, there are three Commercial Sharia Banks, eleven Sharia Business Units of Conventional Commercial Banks, fourteen Sharia Business Units of Regional Bank Representative Offices and three Sharia Custodian Banks, whereas there are over one hundred Sharia People's Credit Banks all over Indonesia.⁴⁶

B. SHARIA INSURANCE

Following the establishment of Bank Muamalat Indonesia in 1992, the first sharia bank in Indonesia, the idea to establish a sharia insurance company began to develop. On February 24, 1994 the first Indonesian sharia insurance company was established, PT Syarikat Takaful Indonesia as the holding company of PT Asuransi Takaful Keluarga and PT Asuransi Takaful Umum.⁴⁷

To date, the establishment of a sharia insurance company is subject to Law No.2/1992 concerning the Insurance Business—although this Law does not specifically provide for sharia insurance. However, in running their business operations, sharia insurance companies refer to the *Fatwa* (Edicts) of the *Dewan Sharia Nasional* (National Sharia Board or “DSN”) ⁴⁸ and the Decree of the Minister of Finance of the Republic of Indonesia.⁴⁹ As for equity financing, sharia insurance companies, just like other general insurance companies, must possess a capital of Rp. 2.5 billion.

⁴⁶ Sekilas Tentang Kami, http://www.mui.or.id/mui_in/about/php (last visited Feb. 15, 2008) (translation provided by author).

⁴⁷ See Omar Fisher & Dawood Y. Taylor, *Prospects for Evolution of Takaful in the 21st Century*, TAKAFUL TA'AWUNI, <http://www.takaful.com.sa/m4sub3.asp> (last visited Mar. 20, 2008).

⁴⁸ See *Fatwa* [Edict] of the Dewan Syariah Nasional [National Sharia Board] No.21/DSN-MUI/X/2001, available at http://www.mui.or.id/mui_in/product_2/fatwa.php (translation by author).

⁴⁹ Decree of the Minister of Finance of the Republic of Indonesia No. 426/KMK/06/2003, art. 3, 4 (on file with author). Decree of the Minister of Finance of the Republic of Indonesia No. 424/06/2003 art. 15-18 (on file with author).

According to the DSN's *Fatwa* (edict), sharia insurance is the business of providing mutual protection and assistance among several individuals or parties through an investment in the form of assets and or *tabarru*⁵⁰ with a pattern of returns for anticipating certain risks based on an *akad* (contract) based on sharia.⁵¹ Thus, the insurance *akad* (contract) generally applies the concept of *mudharabah*, namely an agreement between participants and the insurance company in the form of a partnership to jointly bear business risks based on the profit sharing principle and proportionately to the mutually agreed share; whereby the insurance company receives the mandate to invest and to provide financing services in various projects in the form of *musyarakah*, *mudharabah*, *murabahah*, and *wadiah* which are permitted under the Islamic sharia.

In general, sharia insurance is classified into two types, family Sharia Insurance (*Takaful Keluarga*) and General Sharia Insurance (*Takaful Umum*).⁵² Under the Family Sharia Insurance, there are two insurance fund management systems: with savings and without savings. In the system with savings, *takaful* premium is combined with the collective funds of participants and are further invested in various financing projects based on the profit sharing system.⁵³ At the same time, the fund management system without savings is comparable to the fund management system applied in the General Sharia Insurance—the premium received is deposited in a special account designated for alms/*tabarru*, and are used to pay claims to participants if their property suffers damage or their life is harmed.⁵⁴ The participants' share of profits are returned to participants not making claims, proportionate to their participation, whereas the company's portion of profits is used to cover the company's operational costs.

⁵⁰ *Tabarru* is whenever a person spends money for a good purpose.

⁵¹ *Fatwa* [Edict] of the Dewan Syariah Nasional [National Sharia Board] No.21/DSN-MUI/X/2001, Gen. Provisions, sub. 1, available at http://www.mui.or.id/mui_in/product_2/fatwa.php (translation by author).

⁵² Keputusan Direktur Jenderal Lembaga Keuangan Nomor: Kep.4499/LK/2000 [Decision of the Director General of Financial Institutions No. 4499/LK/2000], available at http://www.djlk.depkeu.go.id/asuransi/Peraturan/3_SDJLK00-4499.pdf. See also PENYUSUN, *supra* note 28, at 214.

⁵³ *Id.*

⁵⁴ *Id.* at 216.

C. SHARIA CAPITAL MARKET

The Sharia capital market has started developing in Indonesia since 2000 when PT Bursa Efek Jakarta (“BEJ”) in cooperation with PT Danareksa Investment Management issued a list of companies on the capital market meeting the requirements of sharia.⁵⁵ It was only in 2003 that the sharia capital market became officially recognized by signing a memorandum of understanding between the National Sharia Board of the Indonesian Ulemas’ Council (“MUI”) and the Capital Markets Supervisory Agency (“BAPEPAM”).⁵⁶ However, at present, there are no specific regulations which accommodate the application of the sharia principle in the field of capital markets in Indonesia. Indeed, in principle, the structure of the sharia capital market is not substantially different from the conventional capital markets, including the concepts of bond issuance or mutual funds. The only main difference lies in the type of business activities, where in the sharia capital market, every economic activity must be *halal* (allowed by religion), both in terms of products as well as in terms of the object, the manner of acquiring and using such products or objects.

According to the *Fatwa* (edict) of the National Sharia Board, the capital markets and their entire activity mechanisms, type of securities traded and the trading mechanism can be considered compliant with the sharia if they follow the sharia principles as proven by a written statement by the National Sharia Board.⁵⁷ These principles include the absence of the elements of *riba* (interest), being non-fraudulent or *gharar*,⁵⁸ being based on the profit sharing system, transparency and not constituting an irregular transaction or a transaction which is contradicts the sharia.⁵⁹

⁵⁵ PT Danareksa Investment Management is the company which has launched the Jakarta Islamic Index. See <http://www.idx.co.id/MainMenu/TentangBEI/OurProduct/SyariahProducts/tabid/142/language/en-US/> (last visited Feb. 20, 2008).

⁵⁶ *Pasar Modal Syariah Resmi Diluncurkan [The Sharia Capital Market Officially Launched]*, REPUBLIKA, March 15, 2003, available at <http://www.republika.co.id> (translation by author).

⁵⁷ *Fatwa* [Edict] of the Dewan Syariah Nasional [National Sharia Board] No. 40/DSN-MUI/IX/2003, art. 2 (concerning Capital Markets & Guidelines for the Application of the Sharia Principle in the Field of Capital Markets), available at http://www.mui.or.id/mui_in/product_2/fatwa.php (translation by author).

⁵⁸ *Gharar* is an ambiguity, fraud or action intended to cause harm to another person.

⁵⁹ See *Fatwa* [Edict] of the Dewan Syariah Nasional [National Sharia Board] No. 40/DSN-MUI/IX/2003, art. 1(7), available at http://www.mui.or.id/mui_in/product_2/fatwa.php (translation by author).

D. SHARIA PAWNING

Pawning is a transaction involving the submission of property as guaranty for obtaining a loan. Pawning related practices have been applied for a long time by customary communities in Indonesia using forms of transactions which are suitable for the local traditions. During the rule of the Dutch colonial government in Indonesia, *Bank Van Lening* engaged in pawning transactions and extended loans to community members. Subsequently, in 1901 by promulgation in *Staatsblad* (State Gazette) 1901 Number 131, the Pawn House was established, which was under the sole management authority of the Government. Furthermore, in *Staatsblad* (State Gazette) 1930 Number 266, the Pawn House received the status of Pawn Service as a State-Owned Company.⁶⁰ Ever since that time, this pawn company has had the status of a state-owned company with the right of monopoly on pawning activities in Indonesia.⁶¹

After Indonesia gained independence in 1945, the Pawn Service experienced several changes in the form of its legal entity becoming State Pawn Company (*Perusahaan Negara Pegadaian*) in 1960, then Pawn Bureau Company (*Perusahaan Jawatan Pegadaian*) in 1969, and based on Government Regulation No. 10 of 1990, it became Pawn Public Company (*Perusahaan Umum Pegadaian*) in 1990.⁶² In 2000, the Public Pawn Company became one of the State-Owned Companies within the Department of Finance of the Republic of Indonesia, based the provisions of Government Regulation No. 103 of 2000 concerning the Public Pawn Company.

Muhammad Sholikul Hadi views this Public Pawn Company as a non-bank financial institution. This view is based on the arguments that: (1) financing transactions offered by the pawn company are similar to bank credit based on pawning law, rather than on the rules of ordinary lending and borrowing; and (2) the pawning business in Indonesia is legally monopolized by a single business entity, namely the Public Pawn Company.⁶³

Parallel to the development of Islamic economy in Indonesia, pawning has become the subject of study by Islamic economy and law experts, as pawning is provided for under the sharia, namely in the Holy

⁶⁰ MUHAMAD SHOLIKUL HADI, PEGADAIAN SYARIAH [SHARIA PAWNING] 18, 19 (2003).

⁶¹ *Id.*

⁶² *Id.* at 19.

⁶³ *Id.* at 15-16.

Quran, Al Baqarah verse 283. Endeavors need to be made in order to ensure that pawn, known as *ar rahn* in Islam, is applicable and useful for the community. The purpose of this is to accommodate the needs of community members, enabling them to fully exercise the teachings of Islam. Thus, Moslems are able to avoid practices involving *riba* (interest) (which is prohibited by Islam), frequently occurring in pawning practices. For that purpose, the Public Pawn Company has opened a new special division for conducting pawning transactions based on sharia.

In Islam, *ar rahn* or pawning transactions are based on the Holy Qur'an (al Baqarah verse 283) and the *Hadis* of the Prophet Muhammad as recounted by Bukhari. In the Holy Qur'an, Al Baqarah verse 283 translated as:

If you are on a journey, and cannot find a scribe, a pledge with possession (may serve the purpose). And if one of you deposits a thing on trust with another, let the trustee (faithfully) discharge his trust, and let him fear his Lord. Conceal not evidence; for whoever conceals it,—his heart is tainted with sin. And God knoweth all that ye do.⁶⁴

Whereas in HR Bukhari it is mentioned that the Prophet Muhammad had given his armor as guaranty for obtaining food owed to a Jew.⁶⁵

Up to the present time, regulations on pawning are still based on the Civil Code or *Burgerlijk Wetboek* which is a legislative product of the Dutch Colonial government in Indonesia. Provisions on pawning are set forth in Articles 1150 to 1160 of the Civil Code. Article 1150 of the Civil Code sets forth:

Pawn is a right obtained by a creditor on a movable asset, submitted to him or her by a debtor or another party on the debtor's behalf, and which grants the authority to the said creditor to collect payment from such asset with priority right among other creditors; with the exception of the costs related to auctioning such assets and the costs expended for rescuing such assets after having been pledged, and these costs must be given priority.

In the sharia, in principle it is forbidden to make a profit in lending and borrowing money. The National Sharia Board of the Indonesian Ulemas Council has issued *Fatwa* (Edict) No. 25/DSN-MUI/III/2002 concerning *Rahn* and *Fatwa* (Edict) No. 26/DSN-MUI/III/2002 concerning Gold *Rahn*.

⁶⁴ ABDULLAH YUSUF 'ALI, THE HOLY QUR'AN: TEXT AND TRANSLATION 42 (2003).

⁶⁵ HADI, *supra* note 60, at 40.

In *Fatwa* (edict) No. 26/DSN-MUI/III/2002 concerning *Rahn* it is stipulated that the *murtahin* (pledgee) is entitled to retain the *marhun* (the pledged asset) until such time that the *rahin* (pledgor) repays his debt. In principle, the *murtahin* is not allowed to use the *marhun* unless the *rahin* permits him to do so, without reducing the value and the usage of the *marhun*. The costs related to the maintenance and safekeeping of the *marhun* are borne by the *rahin* and the amount of such costs may not be determined based on the amount of the loan. The *murtahin* has the right to sell or auction the *marhun* upon maturity and if the *murtahin* has given notice to the *rahin* to pay his debt, but the *rahin* fails to do so.

In *Fatwa* (edict) No. 26/DSN-MUI/III/2002 concerning Gold *Rahn* it is stipulated that an *ijarah* contract is entered into for gold *rahn* transactions, as an agreement to lease the place for safekeeping such gold, with the costs and expenses being charged to the *rahin* (pledgor) based on actual cost.

In Article 3 of Government Regulation No. 103 of 2000 concerning the Public Pawn Company it is stipulated that the Public Pawn Company is a State-Owned Company assigned with the task and authority to organize business activities for the funneling of loan funds based on the law on pawning. In 2001, the Public Pawn Company opened a Sharia Pawn Service Unit Division for implementing pawning practices based on the sharia.⁶⁶ The legal basis for the implementation of these sharia pawn practices is Article 7 of Government Regulation No. 103 of 2000 stipulating the objective and purposes of the Public Pawn Company, namely:

1. Participate in the enhancement of the people's welfare, especially of the middle-lower class, by providing funds based on the law on pawning, and services in other financial areas based on prevailing laws and regulations.
2. Keep community members away from illegal pawning, practices involving *riba* (interest), and other irregular loans.

The *akad* (contract) used in the implementation of the sharia pawning are the *akad ar rahn* and the *akad ijarah*. *Akad ar rahn* is an agreement for borrowing money providing certain goods as guaranty by the pledgor (customer) to the pledgee (Public Pawn Company) for the

⁶⁶ Regional Ar-Rahnu Secretariat, Ar-Rahnu di Indonesia, <http://www.ar-rahnu.org/ar-rahnu-indonesia.htm> (last visited June 6, 2007) (translation by author).

money being borrowed. Under this contract, the pledgor (customer) has the obligation to repay the amount of money borrowed, without any addition whatsoever, to the pledgee (Public Pawn Company). At the same time, the *akad ijarah* implemented in such pawn transaction is an agreement for leasing a place for keeping the pledged goods and paying rental for the same. In the above mentioned *akad* (contract), it is the Public Pawn Company that provides the place for keeping the pledged assets which belong to the pledgor. Thus, the Public Pawn Company obtains profits only in the form of a *fee* as rental for the place used for safekeeping the pledged assets and to cover the costs of maintaining these pledged assets while in safekeeping.⁶⁷

III. THE GOVERNANCE

The implementation of sharia financial activities in Indonesia has certainly not been problem free, especially in the context of law. Considering that these economic activities are based on the sharia, and are relatively new in Indonesia, there has been a need for the oversight of these sharia economic activities in order to ensure that they are indeed compliant with the sharia. In addition to that, certain legal issues have come up, especially related to the legal framework (laws and regulations) and dispute resolution institutions (at the time sharia banking activities were introduced in 1992) which have not been able to fully accommodate these activities. As a result of the above, the Indonesian Ulemas' Council (MUI) established a body within its organizational structure in order to accommodate such need, namely the National Sharia Board.

A. THE INDONESIAN COUNCIL OF ULAMAS

The Indonesian Council of Ulamas ("MUI"), which was established in 1975, is the largest Islamic societal organization in Indonesia. This organization is a forum for ulamas and Moslem scholars in Indonesia coming from various Islamic organizations in Indonesia. The Function of MUI is to act as a consultation forum for ulamas, *zuama*

⁶⁷ Bagus Prasetyo TW, Pelaksanaan Akad Rahn dan Akad Ijarah di Pegadaian Syariah Cabang Margonda Depok [The Implementation of *Rahn* Contract and *Ijarah* Contract at the *Syariah* Pawn House Margonda Depok Branch] (2006) (thesis, *Sarjana* Program of the Faculty of Law Universitas Indonesia).

and Moslem scholars in providing guidance to Moslems and to develop the Islamic way of life; to serve as a forum for friendship among ulamas, *zuama* and Moslem scholars in developing and sharing the teachings of Islam and to build *ukhuwah Islamiyah*; and as a forum representing Moslems in inter-faith relations and consultations; and to issue *fatwa* (edicts) to Moslems and the government, regardless of whether or not it is requested to do so.⁶⁸

Sharia banking activities, which commenced in 1992, are inseparable from the role of MUI which has helped to materialize them, namely through workshops and seminars focusing on Islamic economy studies. It has been due to the efforts of experts in the field of Islamic economic and Islamic law studies that these activities have been introduced.

In order to ensure that sharia based economic activities are truly compliant with the sharia, MUI through its Leadership Board established an autonomous institution, the National Sharia Board (“DSN”). For the proper implementation of its functions, the DSN has the authority to form a Sharia Oversight Board (“DPS”) which is to exercise direct oversight of each sharia financial institution appointed by it.

1. DEWAN SYARI’AH NASIONAL (NATIONAL SHARIA COUNCIL)

The National Sharia Council was formed in 1999 under the organization of the Indonesian Council of Ulamas, based on the Decision of DSN No. 01 of 2000 concerning the Guidelines of the Indonesian Council of Ulamas. The following tasks of the DSN are stipulated in the above mentioned decision.

1. Develop the application of sharia values in economic activities in general, and specifically in financial activities.
2. Issue edicts concerning the types of financial activities.
3. Issue edicts concerning sharia financial products and services.
4. Oversee the implementation of the edicts issued.

The following authorities of the DSN are also stipulated in the above mentioned decision.

⁶⁸ Guidelines of the Indonesian Council of Ulamas (MUI), art. 4 (based on the Decision of the VIIth National Consultation (Munas) of MUI No. Kep-02/Munas-VI/MUI/VII/2005 concerning the Amendment/Supplementing of the Scope, Basic Guidelines, and Rules of Association of MUI).

1. Issue edicts which are binding on the DPS at every respective Sharia Financial Institution (“LKS”) and serve as a basis for related legal actions.
2. Issue edicts to serve as a basis for provisions/regulations issued by the relevant authorities, such as the Department of Finance and Bank Indonesia.
3. Giving recommendations and/or revoking recommendations for names of members of the DPS at an LKS.
4. Invite experts to provide explanation about certain issues in discussions on sharia economy, including domestic as well as overseas monetary authorities/financial institutions.
5. Issue reminders to LKS in order to cease violation of edicts issued by the DSN.
6. Giving recommendation to the relevant authorities to take action if such reminders are disregarded.

From 2000 up to this year 2007, DSN has issued 54 edicts. These edicts form the legal and operational basis for activities conducted by Sharia Financial Institutions.

In sharia banking activities, DSN is recognized and needed by Bank Indonesia (“BI”). In Bank Indonesia Regulation No. 6/24/PBI/2004 Article 1 Sub-article 9 it is stipulated that DSN is a board formed by the Indonesian Council of Ulama which has the task and authority to ensure that there is compliance of banking products, services and activities with the sharia principle. DSN and BI are conducting external supervision of sharia banking activities. DSN focuses on the supervision of and the issuance of edicts for sharia banking products, while BI focuses on banking management in general and it does not deal with issues related to sharia.⁶⁹

B. DISPUTE SETTLEMENT INSTITUTIONS

1. RELIGIOUS COURT

Religious Courts have existed in Indonesia ever since the spread of Islam in Indonesia prior to colonial times. These Religious Courts

⁶⁹ PENYUSUN, *supra* note 28, at 82.

were initially very simple, without a formal establishment, appointing individuals deemed knowledgeable in sharia and capable of resolving legal issues in the field of sharia arising in the community. These individuals, nowadays referred to as judges, were appointed by the people themselves or by the King of the region concerned. The names of these courts reflect the numerous kingdoms at the time as well as the vast territory of Indonesia, such as the Court of Surambi in Jawa, the Council of Ulamas in West Sumatra,⁷⁰ and the Court of Kadi or the Assembly of Kadi in Kalimantan⁷¹.

During the Dutch colonial times in Indonesia, the institution of Religious Courts received special attention from the Dutch Colonial Government. The status of Religious Courts was formally and juridically affirmed by *Staatsblad* (State Gazette) 1882 No. 152 under the name *Priesterraad*.⁷² After Indonesia gained independence, religious courts on Java and Madura were treated differently from religious courts outside Java and Madura.⁷³ However, with the introduction of Law No. 7 of 1989 concerning Religious Courts, these regulations were declared void. Hence, all religious courts in Indonesia are now subject to the said Law and the by-laws which have subsequently taken effect following the said Law.

The hierarchy of courts within the Religious Courts consists of Religious Courts, Religious High Courts, and the Supreme Court. The Religious Courts are the first instance courts and the Religious High Courts are the appeals courts (Article 6 of Law No. 7 of 1989). The Supreme Court is the highest court in the country out of the four jurisdictions, including the religious courts (Article 11 Law No. 4 of 2004 concerning Judicial Authority).

As mentioned above, the institution of Religious Courts has undergone a long history. The history of Religious Courts is closely related to the absolute competence of religious courts in the respective historical periods.

⁷⁰ A. BASIQ DJALIL, PERADILAN AGAMA DI INDONESIA [RELIGIOUS COURTS IN INDONESIA] 35, 43 (2006).

⁷¹ DANIEL S. LEV, ISLAMIC RELIGIOUS COURTS IN INDONESIA 47 (2d ed. 1986).

⁷² DJALIL, *supra* note 70, at 50.

⁷³ See *Staatsblad* (State Gazette) 1882: 152 and *Staatsblad* (State Gazette) 1937: 116 and 610 for Religious Courts in Java and Madura; *Staatsblad* (State Gazette) 1937: 638 and 639 for Assembly of Kadi and Assembly of Great Kadi for certain parts of the South and East Kalimantan Residencies; Government Regulation No. 45 of 1957 concerning the Establishment of Religious Courts /Sharia Court outside Java and Madura (translations by author).

During the Dutch Colonial Government, a change took place in the authorities of religious courts in dispute settlement. In *Staatsblad* (State Gazette) 1882 No. 152 the authorities of the *Priesterraad* were not specifically spelled out, but the court itself determined the types of disputes handled by it, namely disputes related to marriage, inheritance and *wakaf* law.⁷⁴ Following that, as a result of Christian Snouck Hurgronje's *teori receptie*,⁷⁵ the provisions on religious courts' authorities set forth in Article 134 IS:2 and announced in *Staatsblad* (State Gazette) 1937: 116 were affected. These provisions stipulate that the Religious Courts no longer have the authority to hear inheritance disputes based on Islamic law.⁷⁶

With the enactment of Law No. 7 of 1989 concerning Religious Courts the religious courts' absolute competence was expanded. It is set forth in Article 49 paragraph 1 that Religious Courts have the function and authority to hear, decide and resolve disputes at the first level among Moslems in the fields of marriage, inheritance, testaments, grants, *wakaf*, and alms (*sedekah*).

The development of Islamic economic activities in Indonesia was naturally followed by certain legal developments and the need for certain legal aspects in the community, particularly the Moslem community.⁷⁷ These conditions brought about a change in the form of an even broader expansion of the absolute competence of religious courts, as provided for in Article 49 of Law No. 3 of 2006 concerning the Amendment of Law No. 7 of 1989 concerning the Religious Courts, namely by adding the authority of the Religious Courts to hear, decide and resolve disputes in the field of sharia economy. In the elucidation on Article 49 sharia economy is defined as business acts or activities conducted based on the sharia principle, including, among other things the following: sharia banks, sharia micro-financing institutions, sharia insurance, sharia reinsurance, sharia mutual funds, sharia bonds, and

⁷⁴ The provisions of *Staatsblad* (State Gazette) 1882: 152 were influenced by the opinion of Lodewijk Willem Christiaan van den Berg in his *teori receptio in complexu* namely that Indonesian Moslems have adopted Islamic law in its entirety as a whole, so that the law follows the religion adhered to by a person. MOHAMMAD DAUD ALI, HUKUM ISLAM DAN PERADILAN AGAMA [ISLAMIC LAW AND THE RELIGIOUS COURT] 227 (1997).

⁷⁵ The *receptie* theory of Christian Snouck Hurgronje differs from the opinion of LWC van den Berg in his *receptio in complexu* theory. According to Hurgronje, the law applicable to Moslems is not Islamic law, but rather customary law, because Islamic law can be considered as law only after it is accepted by and become customary law. *Id.*

⁷⁶ *Id.* at 227-228.

⁷⁷ General Elucidation on Law No. 3 of 2006 concerning the Amendment of Law No. 7 of 1989 concerning the Religious Courts.

mid-term sharia negotiable papers, sharia securities, sharia financing, sharia pension fund financial institutions, and sharia business. The parties (*personalitas*) who can bring their disputes to the Religious Court are *among Moslems*, namely including individuals or legal entities voluntarily submitting to Islamic law related to matters which fall under the jurisdiction of the Religious Court (Elucidation on Article 49). In other words, these parties are not limited to Moslems, but can also include non-Moslems, including legal entities, voluntarily submitting to sharia provisions.

2. THE NATIONAL SHARIA ARBITRATION BOARD

Conflict or dispute settlement in the sharia banking business can be conducted through deliberation for consensus or through arbitration.

Sharia arbitration is an out-of-court dispute settlement between parties who have entered into an *akad* (contract) in the field of sharia economy, aimed at reaching the most favorable settlement after all efforts for amicable settlement or deliberations fail. Arbitration is conducted by referring to and authorizing the arbitration board to serve justice and ensure that there is compliance based on the Islamic sharia and the applicable law of procedure. The decisions of the sharia arbitration are final and binding.

In Indonesia, sharia arbitration was introduced concurrently with the establishment of Bank Muamalat Indonesia in 1992. The objective was to handle disputes between customers and the above mentioned first sharia bank, namely under the name *Badan Arbitrase Muamalat Indonesia* (“BAMUI”).⁷⁸ With the growing sharia banking practices in Indonesia, in 2003 BAMUI became the National Sharia Arbitration Board (*Badan Arbitrase Sharia Nasional* or “BASYARNAS”).⁷⁹ However, BASYARNAS was not immediately functionable, because in order to be able to use this forum, the parties had to include a clause on dispute settlement through this board in their contracts first.⁸⁰

Although it has been in existence for almost seventeen years amidst a growing sharia industry, only a small number of disputes have

⁷⁸ Decision of the Indonesian Council of Ulama No.392/MUI/IV/1992.

⁷⁹ Decision of the Indonesian Council of Ulama No.09/MUI/XII/2003.

⁸⁰ Law No. 30 Concerning Arbitration and Alternative Dispute Resolution (1999) (Indon.), unofficial translation available at <http://www.bi.go.id/NR/rdonlyres/5E728C68-C3AE-4CDE-9018-2DF10257D7D8/3497/UU30th99concerningthe ArbitrationandAlternative.pdf>.

been filed with the BASYARNAS so far.⁸¹ Following are some of the obstacles standing in the way of a more optimal and adequate development of this institution in handling disputes:

1. the limited number of BASYARNAS, namely this institution has not been established in all provinces in Indonesia;
2. in general, this arbitration institution does not possess the legal basis for determining seizure, auction or other forms of forced action.

⁸¹ Sukuk Atasi Defisit Akibat Harga Minyak, http://www.republika.co.id/koran_detail.asp?id=311710&kat_id=375 (last visited Nov. 7, 2007) (translation by author).