

# Sharia Arbitration as Alternative Settlement of Sharia Insurance Disputes

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## ABSTRACT

The concept of sharia insurance has existed since the time of Rasulullah S.A.W. however, the institution has increasingly developed due to changes in the culture of Indonesian society in its economy, which continues to seek renewal to avoid conventional economic concepts that do not favor justice. In fact in Islam the principle of justice is a basic foundation in all business of life and is not abstract and cannot be carried out, however, it is not easy to implement the principles of justice included in Islamic insurance, Along with the increasing number of sharia insurance products that are always developing, many factors cause disputes, such as differences in understanding between consumers and companies about a product or negligence either from the consumer or the company in carrying out the obligations set forth in the agreement. Remembering, Islamic insurance is operated based on sharia principles, disputes that arise should be resolved in ways that are based on sharia principles by institutions that have the authority to resolve sharia disputes through Sharia Arbitration.

**Keywords:** *sharia arbitration, sharia insurance, dispute resolution*

## 1. INTRODUCTION

A sharia insurance becomes an alternative for Muslims in Indonesia to meet the needs of Muslims in insurance that is clearer free of *maysir*, *gharar* and *usury* [1]. Given that sharia insurance is operated based on sharia principles, disputes that arise should be resolved in ways that are based on sharia principles by institutions that have the authority to resolve sharia disputes. Since the enactment of Law No. 3 of 2006 on the Amendment of Law Number 7 of 1989 concerning the Religious Courts, which was later amended by Law No. 50 of 2009 regarding the Second Amendment to Law Number 7 of 1989 on the Judiciary, authority of the settlement to the case of sharia economy including islamic insurance under the authority of the religious. These provisions are regulated in Article 49 and Article 50 and their explanations.

The authority of the court in the religious court environment in examining, deciding, and resolving cases is clarified by the issuance of Supreme Court Regulation (Perma) Number 2 of 2008 concerning Compilation of Sharia Economic Laws. Article 1 Paragraph (1) The Perma affirms that judges in the religious court environment who examine, try and settle cases relating to sharia economics, use as a guideline for sharia principles in the compilation of sharia economic law. The next verse states that by using as sharia principles in the Compilation of Sharia Economic Laws, it does not reduce the responsibility of judges to explore and find laws to guarantee fair and correct decisions. While the details regarding the procedures for dispute resolution in sharia economic cases including sharia insurance through the courts in the religious court

environment are regulated in the Supreme Court Regulation No. 14 of 2016 concerning Procedures for Settling Sharia Economic Cases. The substance of the Perma is a simpler, faster and less costly dispute settlement procedure, especially in simple laws, especially disputes that are bound in agreements that use sharia contracts. In addition to going through judicial institutions, Islamic insurance disputes which are civil cases can be resolved outside the judiciary or non-litigation institutions. The legal basis for resolving non-litigias disputes is Law Number 48 of 2009 concerning Judicial Power. Settlement of disputes outside the court is regulated separately in Chapter XII starting from Article 58 to Article 61. The Judicial Power Act provides an alternative settlement of civil disputes outside the state court through arbitration or alternative dispute resolution. Arbitration in the history of Islamic law is more identical to the term *takhim*, which literally means to appoint as a referee or jury of peace [2]. While the definition of arbitration is based on Law no. 30 of 1999 concerning Arbitration is a way to settle a civil dispute outside the general court based on an arbitration agreement made in writing by the parties to the dispute. Whereas alternative dispute resolution is a dispute resolution agency or dissent through a procedure agreed by the parties, namely settlement outside the court by means of consultation, negotiation, mediation, conciliation, or expert judgment. Meanwhile, Law Number 40 of 2014 concerning Insurance which also regulates sharia insurance, directs the settlement of sharia insurance disputes to mediation institutions. Although the Insurance Act was drafted long after Law No. 3 of 2006 concerning Religious Courts, then the second amendment

to Law Number 50 of 2009 concerning Religious Courts, but in terms of dispute over Islamic insurance disputes, it does not refer to the Law, which refers to religious court institutions but rather directs dispute resolution to mediation institutions .

Based on the description above, the settlement of sharia insurance disputes is regulated in several laws and regulations, namely the Judicial Power Act, the Religious Courts Act, the Insurance Act, the Arbitration Law, and the OJK Regulations. Likewise, institutions that can resolve/facilitate dispute resolution are quite diverse, namely courts in the environment of religious courts, mediation institutions, Islamic arbitration, and the Financial Services Authority. Several regulations governing the settlement of Islamic insurance disputes provide several options for the parties to the dispute to choose the path of settlement. In general, insurance companies prefer to settle disputes by way of a peace agreement (*ex gratia*), because settlement of the dispute through court trials will be published to the general public, so that the public will tend to conclude that the company often rejects claims for compensation submitted by its customers. In connection with this, whether the alternative settlement of Islamic insurance disputes outside the absolute authority of the religious court that has been regulated in the legislation considers the Islamic insurance philosophy that was unearthed from the Quran and the Sunnah, namely mutual responsibility, working together to help each other, and protecting each other from all hardships [3]. So what are the obstacles and solutions faced by the National Sharia Arbitration Board in solving Sharia Insurance Disputes?

## 2. SHARIA INSURANCE

Insurance comes from the Dutch language, *assurantie*, which in Dutch law is called *Wrzekering* which means coverage. From the terminology *assurantie* then arises the terms *assurateur* for the guarantor, and *geassureerde* for the insured. Many definitions of insurance (conventional). According to Robert L. Mehr insurance is "a device for reducing risk by combining a sufficient number of exposure units to make their individual losses collectively predictable. The predictable loss is then shared by or distributed proportionally among all units in the combination [1].

Insurance in Indonesia has been established in the Law No. 2 of 1992 on Insurance Business, "Insurance or the Insured is an agreement between two or more parties, in which the binding to the insured, the premiums insurance, to provide compensation to the insured because of the expected loss, damage or loss of profits. Or, legal liability to third parties that may be suffered by the insured, arising from an uncertain event; or to provide a payment based on the death or life of an insured person." Meanwhile, the scope of the Insurance Business, namely the financial service business which, by collecting public funds through the collection of insurance premiums, provides protection to members of the public who use insurance services

against possible loss due to an uncertain event or life or death of a person.

According to the Encyclopedia of Islamic Law, insurance or *at-ta'min* is an agreement transaction between two parties; one party is obliged to pay dues and the other party is obliged to provide full guarantees to the contribution payers if something happens to the first party according to the agreement made. According to the Sharia Economic Law Compilation, *ta'min/nsurance* is an agreement between two or more parties, for which the insurer binds itself to the insured by receiving a *ta'min* premium to receive compensation to the insured due to loss, damage or loss of expected profits , or legal liability to third parties that may be suffered by the insured arising from an uncertain event. Sharia Insurance has few parallels in the Arabic language , which is *takafu* , *at- ta'min*, and *adh-Dhaman (tadhamun)*. But in everyday life, the most popular terms used term for Islamic insurance in several countries including Indonesia are *takaful*. *Takaful* in Arabic comes from the base *kafala*, *yakfulu*, *takafala*, *yatakafalu*, *takaful*, which means to bear or endure together [4]. *Takaful* in the sense of fiqh mu'amalah is a mutual risk between fellow Muslims so that one another bears the risk of the other.

According to the National Sharia Board, sharia insurance (*ta'min*, *taka ful*, or *tadhamun*) is an effort to protect each other and help one or several people through investments in the form of assets and/or *tabarru* 'which provides a pattern of return to face certain risks in a contract in accordance with sharia. The purpose of the contract in accordance with sharia is that it does not contain fraud (*gharar*) , gambling (maisir), usury, persecution, corruption (risywah), illicit goods and immorality (Fatwa DSN N0. 21 / DSN-MUI / X / 2001 concerning General Sharia Insurance Guidelines.). *Takaful* is mutual protection and mutual help called *ta'awun*, namely the principle of mutual protection of life and saling help on the basis *ukhuwah* among members of Islamic *Takaful* participants in the face of risk [5]. According to Burhanuddin S. insurance in Islam or referred to as *takaful*, which is *borne* by one another so that one person bears the risk of the other. To get insurance, each person is subject to a premium, which is the obligation of the insurance participant to provide an amount of funds to the insurance company in accordance with the agreement in the contract, the participant of insurance, then someone will have a claim, that is, the right that must be given by the insurance company in accordance by agreement [6].

On another definition, *takaful* insurance is a group of people who face the same risk. Each member pays a predetermined fee, the fee is used to compensate the loss befalling the member. If the total contribution is excessive after compensation is given to the members: those affected by the loss, then the remaining contribution is distributed to the members and if the total contribution is less than the amount of the compensation money, then additional contributions are drawn from all members to cover the deficit or compensation compensation ratio is reduced. Its members do not intend to seek profit, but rather a goal

of cooperation and solidarity to reduce losses that befall some members. And, each member is the guarantor and the insured [6].

### 3. FIQH REGARDING SETTLEMENT OF DISPUTES

*Fiqh* Islam, the equivalent of arbitration is *tahkim* and the verb is *hakkama*, which literally means to make someone as a mediator for the dispute. *Abdul Karim Zaidan* stated that *tahkim* was the appointment or voluntary appointment of two people in dispute with someone they trusted to resolve their dispute / dispute [7]. Shari'ah Arbitration in QS. Al-Hujurat: 9 or known as *tahkim*, in Islamic law, stated by several experts including *Sayid Sabiq* [8] said that *tahkim* was a contract / agreement to end the fight / quarrel between two people in dispute. According to Abu al-'Ainain Abdul Fattah Muhammad, *Tahkim* is the reliance of two people who are in conflict with someone they are *dissenting* about their decision to resolve their dispute [7]. Satria Effendi M Zein in *fiqh* study of *tahkim* is a dispute resolution carried out by hakam chosen / appointed voluntarily by two disputants to end their dispute and they will obey the settlement of the hakam they appoint [7]. The word *al-qadla* etymologically has a meaning in law that refers to a decision on something in all aspects, both in words and deeds [9]. Many words of *al-qadla* are found in the Qur'an QS Fushshilat: 12, QS Maryam: 21, QS Thahaa: 72, QS Al-Israa: 23, QS Joseph: 41, QS Al-Imran: 47 and al-Qashash: 44 which refers to various meanings, also determined in as-Sunnah. Islam recognizes two paradigms in dispute resolution, namely the litigation and non-litigation paradigms. The litigation paradigm is a fundamental view and belief that the only appropriate institution for resolving disputes is through the courts. In contrast, the non-litigation paradigm departs from the basic assumption that dispute resolution does not have to go through law and court. Methods outside the court are far more effective in resolving disputes without leaving an injury to the opponent's heart. The Islamic spirit shows that dispute resolution should be carried out in a non-court manner, as implicitly explained by Umar bin Khaab; "*Radd al-qadha 'baina dzawi al-arham haa yashthalihu fa inna fashla al-qadha' yuritsu al-dhagain*" (return the settlement of the case to relatives so that they can make peace because the actual settlement of the court can cause discomfort) [10].

Arbitration which in Islam is known as *al-tahkim* is part of *al-qadla* (justice). As stated by Muslim scholars, namely Ibn Farhun said "The territory of *tahkim* is the territory obtained from individuals [11]. This is a part of *al-qadla* which is related to property, not to *al-hudud* and *al-qishas*. Ibn Nu'jaim also once said: "*Al-tahkim is part of al-qadla*" [11]. The legal basis for allowing arbitration, whether sourced from the Qur'an, Sunnah or *ijma*, if examined carefully, in principle contains recommendations for resolving disputes by peaceful means. The way of peace is the most important way

according to Islamic teachings. However, if a peaceful path has been taken and failed to find a solution or each party is still in its stance, then they can ask the third party to resolve the dispute between them (*Hakam*). The insurance industry actually has an Indonesian Insurance Mediation Board as an institution that functions to resolve disputes submitted by general insurance and life insurance customers. As is known, disputes or disputes have the potential to occur between policyholders and insurance companies, which are generally caused by compliance with problems (such as claim) to the customer. settlement can be done if one party does not carry out its obligations. The National Sharia Council of the Indonesian Ulema Council encourages the settlement of insurance disputes through the National Sharia Arbitration Board, specifically sharia insurance, and can be done through the Sharia Arbitration Board domiciled in Indonesia after no agreement is reached through consultation (*musyawarah*).

### 4. CONCLUSION

The regulation of the authority to settle Islamic insurance disputes in Indonesia is still a discourse that leaves both normative and practical issues. To get an implication of law enforcement in the settlement of sharia insurance disputes that better guarantee legal certainty based on Islamic principles, the parties who are bound to mutually modify it in the form of a contract or a business entity that runs sharia insurance in accordance with sharia principles. Considering the prospect of sharia insurance in Indonesia is very promising even though it is still supported by socialization and education for Indonesian Muslim communities and must be supported by regulations that can provide legal certainty by meeting Islamic economic principles.

The existence of Islamic mediation and arbitration institutions is an alternative for the parties to the dispute on the basis of volunteerism to settle it peacefully outside the court. The scope and authority of mediation and arbitration institutions are limited by law based on the type of dispute. Sharia insurance dispute settlement must be based on Islamic values, where dispute resolution is based on an agreement with the intention of ending a dispute between two disputing people who end in peace and win-win solution. For this reason, not all mediation and arbitration institutions can be given the authority to settle disputes over sharia insurance, except sharia mediation or arbitration institutions that are subject to Islamic sharia rules.

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