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The Sharia Banking Dispute Settlement Forum as the Principle of Freedom of Contract Post Decision of the Constitutional Court No. 93/PUU-X/2012

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Abstract

The resolution of disputes in Islamic banking saw significant changes through the judicial review of Article 55 of Law no. 21 of 2008 in Indonesia. Before this review, Islamic banking disputes were typically handled in courts based on the contract terms. Article 55, paragraph (2), allowed parties to settle disputes in accordance with the contents of the contract using alternative methods, creating confusion. Some banks chose district courts instead of religious courts, which had exclusive jurisdiction. This interpretation, extending freedom of contract to forum selection, created ambiguity. Constitutional court decision No. 93/PUU-X/2012 aimed to clarify matters and reinforced religious courts' authority in Sharia banking dispute resolution. However, the principle of freedom of contract still plays a role in forum selection, albeit with limitations. This raises two key questions: First, does Constitutional Court Decision No. 93/PUU-X/2012 align with the principle of freedom of contract? Second, what are the legal consequences regarding Islamic banking dispute resolution? According to the judicial review, religious courts now unequivocally have the authority to resolve sharia banking disputes. Any agreement to settle disputes in general courts is considered null and void as it contradicts existing laws and regulations.

Keywords

Islamic Banking, Dispute Resolution, Judicial Review, Religious Courts, Legal Framework

1. Introduction

Banking plays a crucial role in a country's economic development. Economic activities are inherently linked to the banking sector, particularly in modern economies. Among various financial institutions, banking stands out as one of the most influential in contemporary economic activities (Bonciani & Roye, 2016). Islamic banking, specifically, is a vital component of the economy, significantly impacting asset flows and overall economic growth (Lebdaoui & Wild, 2016). It's undeniable that banking, serving as a financial intermediary, holds a pivotal role in society's economic well-being. The banking industry functions as a cornerstone for a nation's economy (Pramudita, 2022). It gathers and intermediates funds, facilitating both domestic and international trade transactions (Niepmann & Schmidt-Eisenlohr, 2017). This role is akin to the lifeblood of economic development, elevating living standards and supporting the nation's economic growth.

The development of the economy and the improvement of living standards cover the whole, including the sharia economy. Public awareness, especially for followers of the Islamic religion, to *muamalah*, thus supporting the birth of financial institutions in the field of Islamic finance, namely Islamic banking. Islamic banking has experienced quite significant and rapid development (Baktiar & Aedy, 2017; Pamuji et al., 2022). The existence of Islamic banking is part of the Islamic economy which functions as a financial intermediary institution that stores and distributes based on Islamic law. Islamic bank is a financial institution that applies the principles or rules of Islamic teachings, both regarding products and in carrying out its operations (Ahmed, 2014). Like conventional banking, basically Islamic banking also has an intermediary function. The intermediation function is a function of collecting funds from people who have excess funds and channeling them back to people who need funds (Lisa, 2016). One of the Islamic banks to collect funds in the form of savings and distribute them to people who need funds in the form of financing.

With the continuous growth of Islamic banks in Indonesia, the potential for disputes between these banks and their customers is on the rise. When addressing potential business conflicts that may arise within Islamic banking, the primary recourse is to follow procedures and substantive law in accordance with Islamic Sharia. The resolution of these disputes essentially falls within the domain of contract law, and therefore, the principle of freedom of contract applies. This principle grants the parties involved the liberty to select the applicable law and the forum for dispute resolution in the event of a civil dispute between them. In Islamic banking transactional activities, disputes between customers and Islamic banks can be triggered by three primary factors: First, differences in the interpretation of the agreed-upon contract. Second, disputes that arise during a transaction. Third, losses incurred by one of the parties leading to a default situation. When a debtor defaults, the resolution of such disputes is conducted in accordance with Article 55 of Law No. 21 of 2008 concerning Islamic Banking.

The overlapping laws and regulations contained in Article 55 of Law no. 21 of 2008 concerning Sharia Banking is considered not to provide legal certainty to the parties in the dispute. Legal uncertainty in sharia banking dispute resolution is also contrary to Article 28 D paragraph (1) of the 1945 Republic of Indonesia Law. Article 28 of the 1945 Republic of Indonesia Law mandates that every Indonesian citizen has the right to receive recognition, guarantees, protection and legal certainty and equal treatment before the law. On August 29, 2013, the Constitutional

Court decided regarding the resolution of sharia banking disputes, known as Decision No. 93/PUU-X/2012. This decision found that Article 55, paragraphs (2) and (3) of Law No. 21 of 2008 concerning Sharia Banking were in contradiction to Article 28D, paragraph (1) of the 1945 Republic of Indonesia Constitution. It was also declared that the explanation provided in Article 55, paragraphs (2)(a) to (d) does not have binding legal force. This decision eliminated legal dualism in resolving sharia banking disputes and reinforced the absolute competence of the Religious Courts.

The research gap in this study stems from the aftermath of the Constitutional Court's Decision No. 93/PUU-X/2012, which reshaped the landscape of sharia banking dispute resolution in Indonesia. While the decision resolved legal dualism and clarified the competence of Religious Courts, it raises questions about its practical implications on the principle of freedom of contract within Islamic banking transactions. This research aims to explore how the post-decision scenario affects the application of the principle of freedom of contract in sharia banking disputes. Specifically, it seeks to analyze the extent to which parties can exercise their contractual freedom, including selecting applicable law and dispute resolution forums, considering the constitutional court's decision. Furthermore, it aims to evaluate whether this legal development provides the desired legal certainty and equal treatment as mandated by the Indonesian Constitution, Article 28D, paragraph (1), within the context of sharia banking dispute settlement.

2. Research Methods

The research methodology employed to gather and analyze data involves a focus on literature-based research. This approach entails the examination of written theories, ideas, and thoughts presented in various sources such as books, journals, articles, papers, and other relevant materials. Additionally, a normative legal research method is utilized as a legal approach in this study. This approach, categorized as a type of doctrinal legal research or library research, serves the systematic purpose of presenting an exposition of legal rules within a specific field. Furthermore, it is instrumental in analyzing the interplay between these legal regulations and other laws, as well as clarifying intricate aspects of the law. The primary objective of this research is to scrutinize the regulations governing dispute resolution procedures in the realm of Islamic banking, with a particular focus on the implications of Decision No. 93/PUU-X/2012.

3. Results and Discussion

3.1 Previous Studies on Dispute Resolution

This research was conducted to study dispute resolution as the principle of freedom of contract in the Constitutional Court Decision 93/PUU-X/2012 and the legal consequences after the Constitutional Court's decision on dispute resolution in Islamic banking. There are several studies that the authors found as material for differences in this writing (Table 1).

The differences in the research mentioned above revolve around alternative dispute resolution methods resulting from two distinct laws and regulations that have varying points of intersection. This discrepancy has led to the dualism of Sharia economic dispute resolution institutions. Notably, the research diverges primarily in its subject matter. One study delves into the role of the competent institution in resolving Sharia banking disputes, omitting an in-depth exploration

of the principle of freedom of contract as a mechanism for selecting a legal forum. Instead, it briefly discusses the forum selection, which should be aligned with the contractual agreement, presenting the selection of legal forums as an alternative if the disputing parties opt not to pursue resolution through a specified litigation forum.

Table 1. The Linguistic Data

No.	Author	Research Title	Research Result
1.	Ahmad Baihaki, M. Rizhan Budi. P	The Absolute Authority of the Religious Courts in Settlement of Sharia Economic Disputes After the Constitutional Court Decision No. 93/PUU-X/2012	The study findings unveiled that prior to the Constitutional Court Ruling, there existed a dualism of institutional authority to adjudicate Sharia economic disputes at the Religious Courts. However, after the issuance of the Constitutional Court Decision, it brought about legal clarity regarding the absolute jurisdiction of the Religious Courts in settling disputes within the sphere of Sharia economics. This jurisdictional authority of the Religious Courts carries normative implications for all aspects of Sharia economics as a whole.
2.	Gunawan Raka	Dualism of Judicial Authority in Sharia Banking Disputes After Constitutional Court Decision No. 93/PUU-X/2012	The examination and in-depth analysis of Constitutional Court Decision No. 93/PUU-X/2012 have yielded several conclusions. Firstly, the authority to settle disputes in Islamic banking has been definitively assigned to the Religious Courts. Secondly, the parties involved have the freedom to select their preferred dispute resolution mechanisms, should they opt not to engage in litigation. Lastly, the rights and obligations outlined in agreements must align with established legal regulations. In connection with the issuance of Constitutional Court Decision No. 93/PUU-X/2012, it is notable that (a) this decision firmly establishes that Islamic banking disputes can exclusively be adjudicated in the Religious Courts and is irrevocable, and (b) during legal proceedings, parties also have the option to resolve their cases via the National Sharia Arbitration Board or other arbitration bodies.
3.	Ulumil El Qudsie, Ro'fah Setyowati, Muhdiyin	Relationship between the Choice of Forum Concept and the Principle of Freedom of Contract in Making Islamic Banking Contracts	The results of his research show that the provisions regarding the choice of forum in Western civil law and Islamic civil law basically offer freedom for the parties to determine the forum they consider suitable for resolving their contract disputes. This freedom includes the freedom of the parties to exercise their choice.
4.	Muhammad Sjaiful	Characteristics of the Principle of Freedom of Contract in Sharia-Based Agreements	The results of the study reveal that the characteristics of the principle of freedom of contract in Sharia-based agreements have a fundamental paradigm rooted in a divine or revelation-based philosophical framework. This means that the principle of a Sharia agreement, based on the freedom of contract, is not an absolute freedom but rather freedom within the bounds of Sharia values. These characteristics endow the principle of freedom of contract in Sharia agreements with the function of ensuring the parties are bound to fulfill the contents of the agreement. From an Islamic perspective, freedom of contract represents a form of agreement between the parties, serving as a crucial mechanism to encourage adherence to the terms of the agreement.
5.	Edi Hudiata	The Principle of Legal Certainty and the Principle of Freedom of Contract as the Main Consideration in Settlement of Sharia Banking Disputes (Juridical Review of MK Decision No. 93/PUU-X/2012)	The research presented in the journal highlights that the judge's considerations during the judicial review of Article 55, paragraphs (2) and (3), centered on the issue of legal uncertainty arising from the selection of dispute resolution forums and the presence of a non-specific freedom of choice outlined in statutory regulations. It's essential to clarify that the choice of law isn't merely about contractual freedom but should be exercised when an individual has willingly subjected themselves to specific requirements, rooted in Sharia principles. Even non-Muslims, if they willingly adhere to a Sharia-based choice of law, should be governed by Sharia law. Therefore, Constitutional Court Decision No. 93/PUU-X/2012 doesn't infringe upon the principle of freedom of contract. Contracts will be enforced when they fulfill the criteria of having "a lawful cause," which implies that they aren't valid if the cause is prohibited by law or contradicts accepted standards of decency and public order. In essence, the Constitutional Court's decision aligns with the principles of freedom of contract.

Conversely, the other study combines an analysis of the relationship between these two aspects following the issuance of Constitutional Court Decision No. 93/PUU-X/2012. Thus, the research object is more concentrated on a legal issue frequently encountered within the realm of procedural law. Furthermore, the difference in research focus is evident. The former concentrates on examining the principle of freedom of contract within Sharia agreements in general. In contrast, the latter, in addition to scrutinizing the freedom of contract principles in Sharia, also investigates the Religious Courts' authority in resolving Sharia banking disputes and employs actual cases as foundational material for the study.

The findings of this study shed light on significant issues surrounding the selection of dispute resolution forums within the framework of the principle of freedom of contract, particularly in the aftermath of Constitutional Court Decision 93/PUU-X/2012. This decision has far-reaching legal implications for the landscape of dispute resolution within Islamic banking. The research delves into the complexities and ramifications of this decision, examining how it shapes the dynamics of dispute resolution forums in the context of Islamic banking practices. It underscores the critical importance of understanding the interplay between the principle of freedom of contract and the legal consequences stemming from this constitutional ruling, which has a profound impact on the resolution of disputes in the Islamic banking sector.

3.2 Forum Selection in Constitutional Court Decision 93/PUU-X/2012

Legal principles serve as the foundation for providing direction and the objectives of fundamental assessments, encompassing values and ethical guidelines. These principles transform legal norms, aligning them with an aesthetic order that corresponds to societal values. Understanding the existence of a norm and its legal rationale can be traced, and often, comprehending the legal norms themselves requires knowledge of the underlying legal principles. While legal principles differ from legal norms, they are integral components of legal regulations, encompassing definitions, concepts, standards, and principles. The rule of law can be interpreted as a norm that provides clear consequences as a result of a specific action, thus solidifying its significance within the legal framework (Ichsan, 1967).

The law of agreements encompasses various legal principles related to the formation, content, execution, and legal consequences of agreements, all of which reflect the intentions of the parties in achieving the objectives of the agreement. These principles, as described by Mertokusumo (1999), include the personnel principle, which determines that an individual enters into an agreement solely for their own benefit, as expressed in Article 1315 and Article 1340 paragraph (1) of the Civil Code. There is also the principle of consensus, which asserts that agreements and fundamental commitments become effective from the moment consensus or agreement is reached, without additional required formalities, based on Article 1320 of the Civil Code. Furthermore, the principle of freedom of contract, regulated in Article 1338 paragraph (1) of the Civil Code, grants freedom to the parties to create and regulate the content of their agreements, as long as it complies with legal requirements and is carried out in good faith.

The principle of trust is also an essential aspect, emphasizing the importance of trust between parties involved in an agreement due to the legal consequences it entails regarding the fulfillment of future obligations. Moreover, the principle of binding strength, which states that meeting the

legal requirements of an agreement makes it binding for the parties involved, resulting in legal violations if breached, in accordance with Article 1338 paragraph (1) of the Civil Code. The principle of good faith is also emphasized in Article 1338 paragraph (3) of the Civil Code, requiring agreements to be executed in good faith. Meanwhile, the principle of balance requires both parties to fulfill and execute the agreement, granting one party the right to demand fulfillment or payment from the other. Finally, the principle of decency and custom, regulated in Article 1339 of the Civil Code, makes agreements binding not only on explicitly regulated matters but also on matters required by decency, custom, or law.

The principle of freedom of contract that has developed to date is influenced by various legal systems that are also developing in the world, this is because this principle is universal. This is the same as in Indonesia, which still adopts the BW version of the treaty law from the Dutch colonial heritage, which has recognized the placement of the principle of freedom of contract crystallized in Article 1320 of the Civil Code which states that the conditions for a valid agreement are agreed for those who are bound. In addition to this article, freedom to contract is contained in Article 1338 paragraph

(1) of the Civil Code which states that all contracts made legally apply as laws to those who make them (Syaifuddin, 2012).

In the context of making contracts in Islamic banking in Indonesia, these contracts are governed by rules derived from both Western civil law and Islamic civil law. The principle of freedom of contract, a significant financial principle, plays a crucial role in their formation, necessitating that Islamic banking contracts adhere to the principles of freedom of contract as stipulated in both civil and Islamic law. In summary, the scope of the principle of freedom of contract in civil law and Islamic law encompasses features such as being free unless there is an argument prohibiting it (haram), the freedom to make or not make agreements, to choose contracting parties, causes, objects, and forms of agreements, as well as the freedom to accept or deviate from optional provisions of the law (El Qudsie & Muhyidin, 2019).

The scope of the principle of freedom of contract is not absolute but relative, subject to limitations imposed outside this scope, summarized as follows in both Western civil law and Islamic law, as outlined by El Qudsie & Muhyidin (2019): it must not violate the law, morals, public order, propriety, customs, should be carried out voluntarily and willingly, involve a sacred and lawful subject, have no element of fraud or harm to other parties, particularly narrowing the circulation of the community's economy, and aim according to what is justified in sharia.

The Constitutional Court, in Decision No. 93/PUU-X/2012, provided legal considerations summarized in several points as its concerns. These points include: First, disputes in Islamic banking often arise due to one party feeling dissatisfied or disadvantaged. When such a problem occurs, Article 55, paragraphs (1), (2), and (3) of Law No. 21 of 2008 regarding Islamic Banking assigns duties and authority to courts within the Religious Courts, as also clearly regulated in Article 49, letter (i) of Law No. 3 of 2006 concerning Religious Courts. Second, the Constitutional Court emphasizes that, for the systematic resolution of Sharia banking disputes, the primary choice should be the Religious Courts, followed by resolution according to the contract. Third, the contract must explicitly state the provisions related to dispute resolution. Parties may choose a legal forum for resolving disputes if they do not wish to use the Religious Courts. However,

problems may arise if the contract does not clearly specify the chosen legal forum. Regarding dispute resolution according to the contract, the Panel of Judges has the following opinion:

> *"As stipulated in Article 1338 of the Civil Code, a contract (agreement) is a law for those who make it, but a contract may not conflict with the law, especially the law which has established absolute power for a judicial body which is binding on parties for those who do the contract (agreement). Therefore, clarity in the preparation of the agreement is a must. The parties should clearly state which legal forum they choose in the event of a dispute."*

The principle of freedom of contract in an Islamic banking agreement may be validly applied, but what needs to be known is that freedom of contract must comply and must not violate the provisions of laws and regulations, including provisions related to dispute resolution. Fourth, the choice of legal forum as stipulated in the elucidation of Article 55 paragraph (2) of Law no. 21 of 2008 concerning Islamic Banking, in concrete cases it has opened up opportunities for a choice of settlement forums and has given rise to issues of constitutionality. In the end it can raise legal uncertainty which can cause losses not only for customers but also for Islamic banks (Rasyid & Putri, 2019).

The legal basis for the principle of freedom of contract is regulated in Article 1338 of the Civil Code which reads *"all agreements made legally apply as laws for those who make them."* The principle of contractual freedom grants parties the freedom to make or not make an agreement, enter into an agreement with anyone, determine the contents, implementation, and terms of the agreement, as well as choose the form of the agreement, whether written or oral.

After the Constitutional Court Decision No. 93/PUU-X/2012 caused problems for some parties. Through the Constitutional Court Decision, the substance of which stated that the elucidation of Article 55 (2) of Law No. 21 of 2008 concerning Sharia Banking had violated the principle of freedom of contract in contract law. When observing the opinions of the Constitutional Court Judges, there are differences of opinion, namely concurring opinion and dissenting opinion. In the opinion of the concurring opinion, it states that regarding civil rights disputes it is possible to be resolved outside the district court, either through arbitration or through alternative dispute resolution (Hudiata, 2018).

An agreement regarding dispute resolution can be made if the parties wish to be included in the contract/agreement both before the dispute occurs (*pactum de compromittendo*) and after the intended dispute occurs (compromise deed) in accordance with the principle *of pacta sunt servanda*. The contract is legally binding for the parties who bind themselves to the contract (vide Article 1338 of the Civil Code). However, the contract must meet the conditions determined by law (vide Article 1320 of the Civil Code) (Hudiata, 2018).

An agreement that fulfills the requirements of *"a lawful cause",* then the reason for the nature of the *akda* (agreement) must be in accordance with the provisions of Article 1337 of the Civil Code which states *that "a cause is prohibited, if it is prohibited by law, or if it is against good decency or good order." public",* then the contract (agreement) does not meet the requirements and becomes null and void by law. so that the opinion of the Constitutional Court Judge explains that if the agreement or contract includes the settlement of a sharia banking dispute through a court within the general court environment as stipulated in the elucidation of Article 55 paragraph (2) letter d of Law no. 21 of 2008 concerning Islamic Banking is contrary to the constitution.

The consideration is that it is contrary to the principle of absolute separation of powers which has been regulated by the constitution (Article 24 paragraph (2) of the 1945 Constitution of the Republic of Indonesia) which is further emphasized in Article 25 paragraph (1), paragraph (2), paragraph (3), paragraph (4).), and paragraph (5) of Law no. 48 of 2009 concerning Judicial Power also in Article 49 letter I Law no. 3 of 2006 concerning Amendments to Law no. 7 of 1989 concerning the Religious Courts.

3.3 Legal Consequences of Constitutional Court's Decision on Islamic Banking Disputes

After the issuance of the Constitutional Court decision No. 93/PUU-X/2012 which explained that the elucidation of Article 55 paragraph (2) of Law No. 21 of 2008 concerning Islamic Banking was declared contrary to the 1945 Constitution and did not have binding legal force, so the parties, both Islamic banks and customers, no longer have to follow the explanation of Article 55 paragraph (2) and choose to resolve disputes in a non-litigation manner, even though deliberations still remains the main alternative choice for sharia banking dispute resolution before proceeding to the next level (Suparji & Roni, 2021).

Deliberation is the initial option for sharia banking dispute resolution because deliberation is a two-way communication designed to reach an agreement when both parties have the same interests even though they are different. Deliberation is a means for the disputing parties to discuss their settlement without the involvement of a third party as an arbitrator, both those who are not authorized to make decisions or those who are authorized to make decisions (Suparji & Roni, 2021).

In addition to settlement by deliberation, there is an alternative forum through banking mediation. The legal basis for banking mediation is PBI No. 10/1/PBI/2008 dated 30 January 2008 concerning changes to PBI No. 8/5/PBI/2006 concerning Banking Mediation. Through this regulation, Bank Indonesia does not provide decisions and/or recommendations for dispute resolution to customers and banks. Mediation in the banking sector is carried out by an independent banking mediation institution formed by a banking association. The mediation process can be carried out at the nearest Bank Indonesia office to the customer's domicile. Bank Indonesia will temporarily carry out the banking mediation function until the establishment of an independent banking mediation institution by a banking association.

Constitutional Court Decision No. 93/PUU-X/2012 does not affect the strength of banking mediation. Banking mediation is still an alternative option if the parties agree not to bring the dispute to the Religious Courts but must state it clearly in the contract. Likewise, regarding the existence of the National Sharia Arbitration Board (*Badan Arbitrase Syariah Nasional* or Basyarnas) as an alternative forum for resolving sharia banking disputes, Constitutional Court Decision No. 93/PUU-X/2012 does not offend or belittle the authority of Basyarnas, but only reiterates that if the parties want to agree that they want to bring Islamic banking disputes to a non-litigation settlement forum, then this must be clearly stated in the financing agreement made before a Notary.

The decision of the Constitutional Court which is final, and binding has its own legal implication that the authority to resolve sharia banking disputes is the authority of the Religious Courts. The Religious Courts are the only litigation institution authorized to resolve sharia banking disputes. so that the authority of the court within the general court environment (District

Court) has been expressly decided by the Constitutional Court through Decision No. 93/PUU-X/2012 which explains that courts within the general court environment are required to refuse to handle sharia banking cases, because they contradict Article 25 of Law no. 48 of 2009 concerning Judicial Power. Competently, the District Court does not have the authority to examine whether to adjudicate sharia economic disputes.

After legal consequences ensued in the dispute, exemplified by Decision No. 1156/Pdt.G/2017/PA.Kds, involving the parties M. Khoirul Umam and Bank Sharia Mandiri's Kudus branch, they entered into Musyarakah Financing Agreement No. 128 dated August 2, 2015. This agreement was collateralized by SHM certificate No. 01553, covering an area of 1593 m^2 registered to H.M Sadjad in Gajahmati, Pati, Indonesia. However, over time, M. Khoirul Umam failed to fulfill his payment obligations for multiple installments, leading Bank Sharia Mandiri to issue three warning letters. Despite these warnings, M. Khoirul Umam did not act in good faith, prompting Bank Sharia Mandiri' to initiate proper legal procedures through a summons.

Subsequently, after M. Khoirul Umam failed to comply with the warning issued by Bank Sharia Mandiri an auction for the collateral was initiated for Musyarakah Agreement No. 128 of 2015. This action was taken due to Brother M. Khoirul Umam's non-compliance with his obligations. Furthermore, Article 14 of Law no. 4 of 1996 concerning Mortgage Rights provides a legal basis for this action.

> *"The Mortgage certificate as referred to in paragraph (2) has the same executorial power as a court decision that has obtained permanent legal force and is valid as a substitute grosse acte mortgage as long as it recognizes land rights."*

In accordance with this article, Bank Sharia Mandiri has initiated an auction for the execution of the mortgage, based on the Mortgage Certificate. This certificate includes the phrase 'For the sake of Justice Based on Belief in the One and Only God.' Such a certificate holds the same executive power as a court decision that has obtained permanent legal status and is valid as a substitute for a notarized mortgage deed (grosse act). However, the argument presented in the Plaintiff's lawsuit regarding the request to cancel the execution of the mortgage auction through the clerk of the Holy Religious Court has been found to be incorrect. According to Article 15 of the Musyarakah Financing Agreement No. 01, dated May 24, 2012, executed before Haji Paiman, SH., a Notary in Kudus, this article states:

> "If efforts to resolve differences of opinion or disputes through deliberations for consensus do not result in a decision agreed *upon by both parties, then the customer and the bank agree to appoint and determine and authorize the District Court in Kudus to render its decision, according to the procedures and procedures determined by and in effect in that Court."*

The basis for Article 15 of the Musyarakah Financing Agreement is based on Article 1338 of the Civil Code that *"an agreement made legally applies as a law for the parties who make it."* Therefore, in accordance with the agreement clause in the musyarakah financing agreement, it is stated that the dispute will be resolved at the Kudus District Court, so that according to Bank Syariah Mandiri, this problem should be resolved at the District Court. This statement from Bank Syariah Mandiri clearly raises issues regarding the principle of freedom of contract regarding the

choice of forum. Does the mention of the place of settlement of the dispute state that dispute resolution is the authority of the judiciary that has been agreed upon by the parties? Even though Article 1338 of the Civil Code states that this is explained above, it does not necessarily mean that dispute resolution must be carried out in a judicial institution that has been agreed upon and appointed by the parties. Article 1337 of the Civil Code states that in carrying out the principle of freedom of contract there are things that limit the implementation of a contract, so that an agreement fulfills the requirements of *"a lawful cause"*, then the reason for making the contract or agreement must be in accordance with the statement *"a cause is prohibited, if prohibited by law, or if contrary to good decency or public order."* This statement is part of Article 1337 of the Civil Code. What should be known before carrying out a contract or agreement is that the contents of an agreement do not conflict with statutory regulations. If the contents of the contract or agreement are contradictory, then in accordance with Article 1320 of the Civil Code, the contract or agreement is null and void.

Therefore, contracts or agreements that include sharia banking dispute resolution through courts within the general court environment as stipulated in the elucidation of Article 55 paragraph (2) letter d of Law No. 21 of 2008 concerning Sharia Banking are contrary to the constitution. This consideration was raised because it contradicts the principle of absolute separation of powers determined by the constitution (Article 24 paragraph (2) of the 1945 Constitution of the Republic of Indonesia) which is further emphasized in Article 25 paragraph (1), paragraph (2), paragraph (3), paragraph (4).), and paragraph (5) of Law No. 48 of 2009 concerning Judicial Powers also in Article 49 letter i of Law No. 3 of 2006 concerning Amendments to Law No. 7 of 1989 concerning Religious Courts.

Therefore, the exception statement from Bank Syariah Mandiri which states that the authority of the judiciary which has the authority to resolve sharia banking disputes at the Kudus District Court cannot be justified. The principle of freedom of contact does not merely provide broad freedom for the parties to make content and agree on it, it is necessary to know the applicable legal rules as a general provision for making the contents of a contract or agreement.

The absolute authority of the Religious Courts is based on Article 49 letter (i) of Law No. 3 of 2006, of which the articles and contents have not been changed in the form of Law No. 50 of 2009 concerning Second Amendment to Law No. 7 of 1989 concerning Religious Courts, then the party -Parties who carry out akas based on sharia principles are closed to making legal choices through courts outside the Religious Courts. More specifically, it is stated in the General Elucidation of Law No. 3 of 2006, second paragraph, that the choice of law has been declared abolished. Very broad opportunities given to the environment of the Religious Courts (Sugiannur et al., 2020).

There has been a norm conflict between Article 49 of Law No. 3 of 2006 and Law No. 50 of 2009 concerning the First and Second Amendments to Law No. 7 of 1989 concerning Religious Courts and Article 55 paragraph (2) of Law No. 21 2008 concerning Sharia Banking. according to Abdul Gani Abdullah, the principle of lex posteriori derogat legi priori cannot be applied to Law No. 3 of 2006. Because Law No. 21 of 2008 which provides an opportunity for the General Court to resolve sharia economic disputes in accordance with the contents of the contract, is not in a position the same one. The Religious Courts are placed in a litigation position, while the general courts are placed in a non-litigation position (Sugiannur et al., 2020).

According to normative law, the purpose of law focuses on legal certainty so as to be able to maintain order. Thus, legal guarantees in the formulation of legislation must be realized as a condition for every rule. According to Bagir Manan, there are four types of certainty, namely: regulatory certainty, institutional certainty, time certainty, and predictive certainty. This description means that the principle of Islamic personality in resolving sharia economic disputes is a certainty, therefore the position of choice of law in this case is unfounded, which then this paradigm is strengthened by the Constitutional Court Decision No. 93/PUU-X/2012 (Sugiannur et al., 2020).

The issuance of the Constitutional Court Decision No. 93/PUU-X/2012 raises several new norms and also guarantees legal certainty as referred to in Article 28 paragraph (1) of the 1945 Constitution of the Republic of Indonesia, especially in terms of sharia banking dispute resolution itself, the choice of dispute resolution forum opened by the elucidation of Article 55 paragraph (2) Law No. 21 of 2008 concerning Islamic Banking. Observing a number of cases has clearly created legal uncertainty that is detrimental not only to customers but also to the bank which will ultimately lead to overlapping authorities to adjudicate because there are two courts that are given the authority to resolve sharia banking disputes whereas in Law No. 3 of 2006 Regarding the Religious Courts, it has been expressly stated that the Religious Courts are given the authority to resolve sharia economic disputes, which include sharia banking. Even though the existence of this law should have included providing certainty for customers and banks in resolving sharia banking disputes as mandated in Article 28 paragraph (1) of the 1945 NKRI Constitution.

The settlement of sharia banking disputes is the absolute authority of the Religious Courts as mandated in Article 49 letter (i) of Law No. 3 of 2006 concerning Amendments to Law No. 7 of 1989 concerning Religious Courts and Article 55 paragraph (1) of the Law No. 21 of 2008 concerning Islamic Banking. The parties who enter into contracts in Islamic banking activities, namely Islamic banks and customers, can make a choice of legal forum if the parties do not agree to resolve their dispute in the Religious Courts, but this must be clearly stated in the contract (agreement), the parties must clearly mentioning the legal forum to be chosen in the event of a dispute.

Through the Constitutional Court Decision No. 93/PUU-X/2012 which states an explanation of Article 55 paragraph (2) of Law No. 21 of 2008 concerning Sharia Banking, the parties are no longer fixated on resolving their disputes in a non-litigation manner at deliberations, banking mediation , arbitration through the Basyarnas or other arbitration institutions, but may also pursue other non-litigation processes such as consultations, negotiations (negotiations), conciliation, banking non-mediation mediation, and expert opinion or judgment.

4. Conclusion

Based on the entire discussion and with reference to the key points of the problem formulation, it can be concluded that the selection of the sharia banking dispute resolution forum based on the principle of freedom of contract, as stipulated in the Constitutional Court Decision No. 93/PUU-X/2012, is appropriate. This appropriateness is evident in several elements within the requirements of the principle of freedom of contract. If the parties in an agreement mutually agree to resolve sharia banking disputes outside the religious court, it must be clearly documented in the agreement. The terms of dispute resolution as per the contract are binding and cannot be

violated, as they are grounded in both sharia provisions and the applicable law (Article 1320 of the Civil Code). Moreover, the legal consequences of sharia banking dispute resolution following the Constitutional Court Decision No. 93/PUU-X/2012 indicate that the choice of a resolution forum for Islamic banking disputes can be implemented alternatively. This alternative resolution includes options such as deliberations, banking mediation, Basyarnas, as well as other non-litigation settlement forums that can be utilized as long as they are agreed upon by the parties. These forums encompass consultations, negotiations, conciliation, expert opinions, and more. Consequently, the authority of the District Court in adjudicating sharia banking disputes is no longer applicable in accordance with the provisions of the relevant laws and regulations.

It is advisable to categorize laws and regulations based on the principles outlined in the legal framework with greater legal authority. Despite the existence of the Constitutional Court Decision No. 93/PUU-X/2012, which serves as a final and binding legal product, many experts and parties may not be aware of the limitations within the principle of freedom of contract within agreements, particularly concerning the selection of dispute resolution forums in Islamic banking financing contracts. In light of this, the author suggests that parties opting for non-litigation dispute resolution forums or alternative dispute resolutions should refrain from choosing settlement through the general court, as it contradicts Article 25 of Law No. 48 of 2009 regarding Judicial Power. However, this doesn't imply that the Religious Courts are the sole option for resolving sharia banking disputes, as there are various methods available, including consultation, negotiation, conciliation, banking mediation, expert opinions, or arbitration, which offer quicker processes and lower fees compared to litigation forums.

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