

# Arbitrator Neutrality in Alternative Sharia Banking Dispute Resolution: Instruments for Consumer Protection

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## **Abstrak,**

Penelitian ini bertujuan untuk mengetahui bentuk perlindungan hukum konsumen yang sedang bersengketa dengan lembaga perbankan syariah melalui forum arbitrase. Implementasi Peraturan Otoritas Jasa Keuangan Nomor 61/POJK.07/2020 yaitu dibentuknya Lembaga Alternatif Penyelesaian Sengketa Sektor Jasa Keuangan (LAPS JK) yang salah satu mekanisme penyelesaian sengketa melalui arbitrase. Arbiter yang berada pada LAPS JK berasal dari prosedur internal yang dilakukan oleh lembaga tersebut. Sehingga terdapat potensi ketidaknetralan arbiter dalam memeriksa perkara yang berpengaruh pada perlindungan bagi konsumen perbankan syariah. Jenis penelitian yang digunakan yaitu penelitian kualitatif dengan pendekatan normatif. Pengumpulan data melalui proses *desk-review*, sedangkan proses analisis dilakukan melalui reduksi data, penyajian data, dan penarikan kesimpulan. Hasil penelitian menunjukkan bahwa meskipun arbiter yang memeriksa perkara antara konsumen dengan lembaga perbankan syariah berasal Lembaga Alternatif Penyelesaian Sengketa yang salah satunya beranggotakan dari Asosiasi Bank Syariah Indonesia (ASBISINDO), namun netralitas arbiter tersebut telah diawasi dengan adanya kode etik yang telah ditetapkan oleh lembaga. Apabila arbiter terbukti tidak netral dalam memeriksa sebuah kasus, maka terdapat mekanisme penegakan kode etik. Sehingga potensi terjadinya konflik kepentingan dalam penyelesaian sengketa alternatif melalui arbitrase antara lembaga perbankan syariah dan konsumennya dapat dihindari.

**Kata Kunci:** netralitas, arbiter, kode etik, perlindungan konsumen, perbankan syariah

## **Abstract,**

This study aims to determine the form of legal protection for consumers who are in dispute with Islamic banking institutions through arbitration forums. Implementation of Financial Services Authority Regulation Number 61/POJK.07/2020, namely the establishment of an Alternative Institution for Financial Services Sector Dispute Resolution (LAPS JK), one of the dispute resolution mechanisms through arbitration. The appointed arbitrator is obtained from the internal procedures carried out by the institution. So that there is potential for arbitrators to be non-neutral in examining cases that affect the protection of Islamic banking consumers. The type of research used is qualitative research with a normative approach. Data collection was carried out through a desk-review process, while the analysis process was carried out through data reduction, data presentation, and drawing conclusions. The results of the study show that even though the arbiters who examine cases between consumers and Islamic banking institutions come from Alternative Dispute Resolution Institutions, one of which is the Association of Indonesian Sharia Banks (ASBISINDO), the neutrality of these arbiters has been supervised by the existence of a code of ethics that has been established by the institution. If the arbiter is proven not to be neutral in examining a case, then there is a mechanism for enforcing the code of ethics. So that the potential for conflicts of interest in alternative dispute resolution through arbitration between Islamic banking institutions and their consumers can be avoided.

**Keywords:** neutrality, arbiter, code of ethics, consumer protection, sharia banking;

## **INTRODUCTION**

Consumers in the financial services sector are one of the parties that have an important role in promoting and supporting economic development in a country. (Syukron, 2022) For this reason, as a party that has this role, it is necessary to establish a consumer protection system in order to maintain and even increase trust in various financial service sectors. (Utama & Murti, 2021) The consumer protection system in question can be in the form of a consumer service mechanism, a complaint system for poor service, as well as a dispute resolution mechanism in the event of a dispute between a consumer of financial services and a financial institution (Fadilla, 2019).

The number of sharia disputes in Indonesia in 2019 was 308 cases that were examined through the judiciary (Anwar, 2020). Not to mention the number of cases examined through other forums. So with that number of cases, it indicates that the potential for disputes between Islamic financial institutions including Islamic banking is quite high (Cahyadi, 2011). With the high potential for disputes, an ideal mechanism is also needed, including parties who have the authority to decide disputes in the field of Islamic banking (Lutfi, 2020).

In Indonesia, the Financial Services Authority is here with the task of formulating rules and supervising financial service activities in the banking sector, capital markets, and financial service activities in the insurance sector, pension funds, financial institutions, and other financial service institutions. (Sari, 2018) The form of implementation as a regulatory function, the Financial Services Authority stipulates several regulations regarding consumer protection in the financial services sector. (Amir, 2020) Such as the Financial Services Authority Regulation Number 1/POJK.07/2013 concerning Consumer Protection in the Financial Services Sector which was later replaced by the Financial Services Authority Regulation Number 6/POJK.07/2022 concerning Consumer and Public Protection in the Financial Services Sector. This regulation can be categorized as a material regulation, so it is necessary to regulate the procedures for implementing it (Ngutra, 2016).

Consumer protection is not enough if it is only regulated in material provisions, but is also regulated in formal regulations. This formal regulation can be implemented in regulations regarding procedures for resolving disputes between financial service institutions and their consumers, including dispute resolution in Islamic banking. (Huda, 2017) So that the Financial Services Authority also issued Financial Services Authority Regulation Number 61/POJK.07/2020 concerning Alternative Institutions for Settlement of Financial Services Sector Disputes which replaces Financial Services Authority Regulation Number 1/POJK.07/2014. The efforts of the Financial Services Authority are carried out to take action to prevent losses for consumers of financial services who are in dispute.

One of the requirements of the Financial Services Authority Regulation Number 61/POJK.07/2020 is that an alternative dispute resolution institution is established by a financial services institution coordinated by its association. Financial Services Authority Regulation Number 61/POJK.07/2020 requires financial service institutions to become members of Alternative Dispute Resolution Institutions. The institution carries out the function of a self-regulatory organization (SRO) or in other words, the institution is given the authority to make its own rules regarding the implementation of consumer dispute resolution for financial service institutions. (Diyanto & Sudiyana, 2021)

The Alternative Dispute Resolution Institution formed by this association of financial service institutions is required to at least have dispute resolution services in the form of mediation, adjudication and arbitration. Arbitration is an alternative out-of-court dispute resolution mechanism involving arbitrators as parties with the authority to make decisions. However, the determination of the arbitration mechanism is determined in advance by the parties when drafting the agreement and including this arbitration clause in it. (Entriari, 2017; Muskibah, 2018)

The problem that then arises is that the representation of consumers in the Alternative Dispute Resolution Institution does not exist, even though in principle this institution is obliged to carry out the principles of independence and fairness. In the dispute resolution process, the parties facing each other are consumers and business actors in the financial services sector. Then, the party that will resolve it is the mediator, adjudicator, or arbitrator who is known to be from the Alternative Dispute Resolution Institution formed by the association of financial services sector business actors. Conflicts of interest will be very vulnerable to occur in this process which will ultimately have an impact on consumer protection in the financial services sector. It is not impossible that it will cause injustice to consumers in disputes.

Seeing the potential problems that will arise in the regulation of consumer dispute resolution for financial services institutions through Regulation Number 61/POJK.07/2020 concerning Alternative Dispute Resolution Institutions which will have an impact on consumer protection in the financial services sector mentioned above, it is necessary to further analyze the Regulation Financial Services Authority relating to dispute resolution mechanisms.

## ***LITERATURE REVIEW***

Research that examines and analyzes alternative dispute resolution for financial institutions has been carried out from a variety of perspectives. First, regarding the role of

arbitration in Islamic banks in resolving disputes, Ulfa Hasanah explained that the activities of Islamic banks must be in accordance with the fatwas of the National Sharia Council of the Indonesian Ulema Council, the same is true of dispute resolution in Islamic banks. The National Sharia Arbitration Board has procedural regulations in accordance with the provisions of Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. (Hasanah, 2021) Second, Nurul Ichsan from a broader point of view, namely regarding the settlement of Islamic banking disputes in Indonesia. In his analysis, Ichsan revealed that a sharia banking case before being brought to court, can be resolved by way of deliberation or peace (*ishlah*), or through arbitration. (Ichsan, 2015) There is another study which is almost similar to the study above, namely regarding the general mechanism of dispute resolution between financial institutions, especially Islamic banks and their consumers. (Marpaung, 2017)

Unlike previous research, this research focuses on protecting consumers who choose alternative settlement mechanisms. This focus on consumer protection was chosen because in the arbitration mechanism, the arbitrators appointed to alternative dispute resolution institutions come from the auspices of institutions formed by associations of financial institutions, including Islamic banking associations. With conditions like this, there is the potential for a conflict of interest to arise between the arbitrator and the litigants, so it is important to study the neutrality of the arbitrator. This includes how to guarantee the neutrality of the arbitrators.

According to Ida Bagus Rahmadi Suprananca quoted by Kuniawaty, it is stated that there are factors that affect economic activity, one of which is effective dispute resolution. The mechanism referred to includes the neutrality and professionalism of decision makers such as judges, arbitrators or third parties involved. (Kurniawaty, 2017) Neutrality is an attitude of taking action because of one's authority without being influenced by the interests of any party. In this case, the arbitrator as the party carrying out the adjudication function in the arbitration process does not make a decision due to the influence of any party. Decision making is based on objectivity during the course of the dispute examination.

## ***METHODS***

This article uses a qualitative method (Fadli, 2021) by describing alternative dispute resolution mechanisms between Islamic banking institutions and their consumers. The dispute resolution mechanism chosen in this study is arbitration because in imposing a dispute decision it can be handed down by an arbitrator. The decision handed down by the arbitrator has binding legal force for the parties. Unlike the case with other dispute resolution

alternatives such as mediation and negotiation, there is no party that has the authority to make a decision in resolving disputes outside the court.

This study uses a normative approach that focuses on exploring laws and regulations (Sonata, 2014) related to consumer protection and alternative dispute resolution for Islamic banking institutions. In terms of data collection, data was collected through a desk-reviews process, namely conducting a search of scientific literature in the form of laws and regulations, journals, books, policy briefs, and various forms of published academic studies. (Maulida, 2020) This step is a process to collect through search performance data sources from various available platforms. After all the data was collected, the researcher then carried out the data analysis process. In this process, the researcher describes the data through several stages. First, display, second, reduction, and third, conclusion.

## ***RESULTS AND DISCUSSION***

### **Alternative Dispute Resolution Institutions for the Financial Services Sector: Basis for Formation and Functions**

Those in the business community who need legal certainty and security in investment and trading activities when disputes arise concerning their business are very worried about the condition of the judiciary which is considered to have been chaotic like that. (Kusmanto, 2016) Against the background of such conditions, there is a desire from the business community in particular to then turn away and choose another model in dispute resolution. (Albar, 2019) Even though the form of settlement chosen is classified as the same as the mechanism in the judiciary, the other forum chosen is considered to be able to provide alternatives and space for parties to decide on the resolution of their business disputes. (Astiti & Tarantang, 2018)

Today the method of resolving disputes through the courts has received sharp criticism, both from practitioners and legal theorists. The role and function of the judiciary is considered to be too heavy, slow and a waste of time, expensive and unresponsive to the public interest. (Sutiyoso, 2006)

In more detail, several factors are the cause of the dislike of dispute resolution through the courts, namely, (Khairandy, 1999) *First*, The length of the proceedings in the trial for the settlement of civil cases. *Second*, the length of time for dispute resolution can also be caused by the lengthy stages of dispute resolution, namely the proceedings at the court of first instance, then it can still be submitted to the court of appeal, and cassation to the Supreme Court. Even the process can still be longer if a review is submitted. *Third*, the length and length of the dispute resolution process through the court certainly has consequences related to the

high costs required. *Fourth*, trials through the District Court are conducted openly, even though on the other hand confidentiality is something that is prioritized in business activities. *Fifth*, often judges handling or resolving business cases lack mastery over the legal substance of the dispute in question or in other words judges are considered to be unprofessional. *Sixth*, there is an unfavorable image of the world of Indonesian justice.

Due to the lack of acceptance of the dispute resolution model through the courts, the public and business people will prefer and utilize alternative dispute resolution. Alternative dispute resolution when viewed based on the word "alternative" shows that, alternative means that the parties to the dispute are free through a mutual agreement to choose what form and procedure is contained in the alternative dispute resolution and will be applied to the dispute resolution.

One solution to the various problems related to consumer protection in the financial services sector, Financial Services Authority Regulation Number 61/POJK.07/2020 basically regulates the settlement of disputes between consumers and financial service institutions, including Islamic banking institutions. This regulation is expected to be able to provide justice for all parties in the settlement of disputes in the field of Islamic banking. However, discussions about justice are considered quite difficult because of its very broad and varied meanings. (Harun, 2013)

Provisions for consumer protection in the Financial Services Authority Regulation begin with the obligations of financial service business actors, consumer complaint facilities and complaint settlement by the Financial Services Authority, internal control, oversight of financial service consumer protection, and sanctions. (Maulidiana, 2014) The essence of the substance of the obligations of business actors in the Financial Services Authority Regulation actually has relevance to the protection of consumer rights in the Consumer Protection Act, both rights before the transaction (right to information and education) rights at the time of the transaction (a balanced agreement and fair), as well as post-transaction consumer rights such as the obligation to pay compensation or facilitate the settlement of consumer complaints in financial services. (Meirinaldi & Sudijo, 2015)

The Financial Services Authority Regulation regulates several important substances, starting from the notion of consumer protection which is defined as the protection of consumers with the scope of behavior of financial service business actors. (Yustianti, 2017) The Financial Services Authority Regulation regulates several important substances, starting from the notion of consumer protection which is defined as the protection of consumers with the scope of behavior of financial service business actors. (Samsul, 2013)

The Alternative Institution for Settlement of Disputes in the Financial Services Sector which was formed based on the Financial Services Authority Regulation Number

61/POJK.07/2020 is given the authority to regulate its own dispute resolution services. Starting from the dispute resolution procedure, costs, settlement period, conflict of interest provisions and affiliations for mediators, adjudicators and arbitrators as well as a code of ethics for mediators, adjudicators and arbitrators. Unilateral regulation without the role of the consumer and the community in establishing a settlement mechanism regulated by the Alternative Dispute Resolution Institution has an impact on the lack of guarantees that consumers will be protected. The regulations that are made can also be convoluted or even other provisions are made more profitable for the disputing financial service institutions.

As an implementation of Financial Services Authority Regulation Number 61/POJK.07/2020, in 2021 an Alternative Financial Services Sector Dispute Resolution Institution was formed. Based on the operational permit approval granted by the Financial Services Authority, the scope of authority or competence of the Financial Services Sector Alternative Dispute Resolution Institution includes disputes between: consumers of the financial services sector and financial service business actors; financial service business actors with other financial service business actors; any parties that have an agreement in the field of financial services or related to financial services; and regarding civil disputes in conventional and sharia banking, conventional and sharia capital markets, conventional and sharia insurance, convention and sharia pension funds, conventional and sharia pawnshops, conventional and sharia financing, conventional and sharia venture capital, conventional and sharia guarantees, fintech conventional and sharia; and, other transactions in/related to the financial sector. However, on condition that the parties have a written agreement to resolve their dispute through the Financial Services Sector Alternative Dispute Resolution Institution and submit an application for registration of arbitration.

The implementation of arbitration of sharia banking dispute cases at the Financial Services Sector Alternative Dispute Resolution Institution also uses the procedural law that applies to cases of other conventional financial institutions. The arrangements are regulated in the Financial Services Sector Alternative Dispute Resolution Agency Regulation Number 02 concerning Arbitration Rules and Procedures. In general, the implementation of Islamic banking disputes can be pursued by arbitration if the parties agree to choose the forum. In the regulations, an arbitration agreement can be made before or after an Islamic banking dispute arises. The parties include the arbitration clause in the agreement they made.

In accordance with its principles, dispute resolution through arbitration at the Financial Services Sector Alternative Dispute Resolution Institution is carried out by the parties on the basis of good faith and dignity, in a cooperative and non-confrontational manner and excludes dispute resolution through courts. The Parties undergoing Arbitration are carried out in a polite, respectful and orderly manner. The peace agreement that may be

reached in arbitration is the freedom of the parties themselves, without any element of coercion in any form.

### **Arbitrators in Alternative Dispute Resolution Institutions in the Financial Services Sector: Arrangement of Duties and Functions**

Arrangements regarding the appointment of arbitrators in Alternative Institutions for Settlement of Disputes in the Financial Services Sector refer to Regulation of Alternative Institutions for Settlement of Disputes in the Financial Services Sector Number 4 concerning Mediators and Arbitrators. In that regulation, a person who can be appointed as an arbitrator in an arbitration is a person or more who have been appointed as permanent arbitrators and are recorded in the Register of Arbitrators for Alternative Dispute Resolution Institutions in the Financial Services Sector. However, for certain very limited reasons, the parties may propose to the management that a person outside the list may be appointed as an ad hoc arbitrator.

With regard to the neutrality of arbitrators to hear disputes, certain conditions are required to register as arbitrators at the Financial Services Sector Alternative Dispute Resolution Institution, namely not being in a position as a commissioner, director or employee of a Self Regulatory Organization in the financial services sector.

Settlement of consumer disputes in the financial services sector will result in agreements for all parties. (Dewi, 2022) As it is known that the agreement made must be fair and balanced. (Sinaga, 2015) But do not rule out that the agreement contained nuances of misuse of circumstances. (Yunus, 2019) In addition, psychological communication is one of the crucial dimensions in implementing alternative dispute resolution. (Asnawi, 2017) Mediators, adjudicators, and arbiters must have basic knowledge of psychology, because this is the basis for understanding the psychological character of the parties so that they can position themselves as intermediaries who truly understand the needs of the parties. Mediators, adjudicators and arbitrators are required not only to know the problems faced by the parties, but also to translate the needs of the parties.

Consumers who are in dispute with an Islamic banking institution and choose settlement through an Alternative Dispute Resolution Institution will ultimately be confronted indirectly with the financial service institution concerned. If the arbitrator examines the dispute further, information will be found that he came from the financial services institution itself. As a result, there is a potential unequal position between consumers and Islamic banking institutions. (Aisha, 2021) This was due to a conflict of interest between the intermediary, in this case the arbitrator, who was known to come from the association of financial service sector business actors and the financial service institution itself. However, in order to provide and



guarantee public trust, especially consumers who are involved in a dispute with an Islamic banking institution, an instrument has been established to maintain the neutrality of the arbiter.

The implementation of the arbitrator profession as a profession in the field of law will be bound by professional ethics. Ethics in this profession has a purpose as a corridor or guide how to act in carrying out their duties and authorities. (Burhanudin, 2018) In every profession there is dignity that must be guarded by each of those professions. (Sinaga, 2020) Ethics is formed as a collective agreement, so that professional actors are required to run it. (Sidharta, 2015) As an instrument or guide in carrying out duties, professional ethics are of course no longer merely in the form of habits that have not been codified.

In the contemporary era, all professional codes of ethics have been codified so that the regulations become firm and clear. The regulation is not only on the aspect of material rules, but also on the formal aspect, namely the regulation regarding the mechanism for enforcing violations of the code of ethics. The material aspect can be in the form of actions that can even be carried out and also actions that are prohibited. Meanwhile, in the formal aspect, it is in the form of arrangements regarding enforcement mechanisms, who has the authority to examine and impose sanctions, as well as arrangements regarding the types of sanctions that can be imposed on violators of the code of ethics.

The implementation of the duties and authorities of arbitrators in the Financial Services Sector Alternative Dispute Resolution Institution is also supervised by the existence of a code of ethics. Provisions regarding the code of ethics are regulated in the Regulation of the Alternative Dispute Resolution Institution for the Financial Services Sector Number 5 concerning the Code of Ethics. As previously explained, the arbitrator's code of ethics also regulates actions that are prohibited while carrying out their duties. Some of these prohibitions include that arbitrators may not abuse their authority for personal or group interests and may not accept assistance or gifts in any form, directly or indirectly, that are intended or suspected to or may influence the outcome of the arbitration.

Arbitrators who are proven to have taken actions that are not neutral during the arbitration process can be qualified as violating the provisions of the Regulation of Alternative Institutions for Settlement of Financial Services Sector Number 5 regarding the Code of Ethics. As a result, ethics enforcement can be carried out by an ethics committee. The reported party is proven guilty of violating the code of ethics, the ethics hearing held by the commission provides a recommendation to the management to impose a sanction on the reported party in accordance with the types of sanctions stipulated in the Regulation of Alternative Dispute Settlement Institutions for the Financial Services Sector Number 4 concerning Mediators and Arbitrators according to the degree of violation on a case by case basis the Ethics Committee

is tasked with supervising the arbitrator's behavior so that there is no violation of the established code of ethics. However, currently the Alternative Dispute Resolution Institution for the Financial Services Sector is still in the process of appointing members of the Ethics Committee.

Efforts to maintain the neutrality of arbitrators have in fact been carried out to provide protection for consumers who are in dispute with Islamic banking institutions. The instruments that have been built will certainly be effective if all parties involved in the implementation of alternative dispute resolution are actively involved in building mutual trust in one another. So that the goals of national economic development can be realized.

## **CONCLUSION**

Settlement of disputes between Islamic banking institutions and their consumers can be reached in several forums. First, through litigation forums at the Religious Courts and second, through non-litigation forums. The non-litigation forum in this case is divided into several mechanisms, namely through the Basyarnas-MUI and also through the Alternative Financial Institution Dispute Resolution Institution. The Alternative Institution for Financial Services Sector Dispute Resolution (LAPS SJK) which was formed in 2021 is an implementation of the Financial Services Authority Regulation Number 61/POJK.07/2020. One form of dispute resolution that can be used is through arbitration. Arbitrators registered with the LAPS SJK are arbitrators selected through a certain internal process carried out by the LAPS SJK. In carrying out their duties, the arbitrator is bound by a code of ethics as stipulated in the Regulation of Alternative Institutions for Settlement of Disputes in the Financial Services Sector Number 05 concerning the Code of Ethics. So that the potential for actions that are not neutral in making arbitration decisions on Islamic banking disputes can be avoided. If the arbiter is resolving a sharia banking dispute and a violation of the code of ethics is found, such as not being neutral in making a decision, then there is a mechanism for imposing ethical sanctions as stipulated in the regulations regarding the code of ethics.

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