

## **RECOGNITION AND ENFORCEMENT OF INDONESIAN SHARIA ARBITRATION AWARDS IN FOREIGN COUNTRIES: CHALLENGES AND OPPORTUNITIES**

Abdul Jamil\*,

Farid Sufian bin Shuaib\*\*

Dodik Setiawan Nur Heriyanto\*\*\*

### **ABSTRACT**

The Sharia Arbitration Board (Basyarnas) in Indonesia was formed to resolve disputes arising from agreements that are based on Islamic law. The existence of this body is essential in Indonesia, considering that the majority of the Indonesian Moslem community has begun to develop and utilize a Sharia-based economic system. During the current economic globalization, it is possible that foreign elements come into play in economic relationships. Thus, in the event of a dispute, the prevailing party must be able to use a Basyarnas arbitration award for enforcement and execution in the country where the losing party's assets are stored. By using a normative legal research method, this paper examines the efficacy of Basyarnas arbitration awards recognition and enforcement, particularly in countries with common law systems. Under the New York Convention on the Enforcement of Foreign Arbitral Awards, Basyarnas arbitration awards should not only be recognized and enforced in the court of the country of origin but also in jurisdictions where the losing parties' assets located. This study concludes that Basyarnas arbitration awards should also be recognized

---

\* Senior Lecturer, Department of Private Law, Faculty of Law, Universitas Islam Indonesia, Kaliurang Street Km 14,5 Ngemplak, Sleman, Yogyakarta, 55584. Email: [abdul.jamil@uii.ac.id](mailto:abdul.jamil@uii.ac.id) (Corresponding Author)

\*\* Professor, Ahmad Ibrahim Kulliyah of Law, Islamic International University of Malaysia. Email: [farid@iiu.edu.my](mailto:farid@iiu.edu.my).

\*\*\* Lecturer, Department of International Law, Faculty of Law, Universitas Islam Indonesia, Kaliurang Street Km 14,5 Ngemplak, Sleman, Yogyakarta, 55584. Email: [dodiksetiawan@uii.ac.id](mailto:dodiksetiawan@uii.ac.id).

and enforced in the countries with common law systems, because Sharia law is contrary to public policy in domestic law in the enforcing state. Hence, Basyarnas arbitration awards can be recognized in other countries if the award does not conflict with public policy in the enforcing state.

**Keywords:** Basyarnas; Sharia Economic Dispute Resolution; Public Policy Exception.

## **PENGIKTIRAFAN DAN PENGUATKUASAAN DI LUAR NEGARA ANUGERAH LEMBAGA TIMBANG TARA SYARIAH INDONESIA: CABARAN DAN PELUANG**

### **ABSTRAK**

Badan Arbitrasi Syariah (Basyarnas) di Indonesia dibentuk untuk menyelesaikan perselisihan yang timbul daripada perjanjian yang berlandaskan syariat Islam. Kewujudan badan ini amat diperlukan di Indonesia, memandangkan majoriti masyarakat Islam Indonesia sudah mula membangun dan memanfaatkan sistem ekonomi berlandaskan Syariah. Pada zaman globalisasi ekonomi sekarang, ada kemungkinan unsur-unsur asing terlibat dalam hubungan ekonomi. Oleh itu, sekiranya berlaku perselisihan, pihak yang berkuasa boleh menggunakan anugerah timbang tara Basyarnas untuk penguatkuasaan dan pelaksanaan di negara yang di mana aset pihak yang kalah disimpan. Dengan menggunakan kaedah penyelidikan undang-undang normatif, kertas kerja ini mengkaji keberkesanan pengiktirafan dan penguatkuasaan anugerah timbang tara Basyarnas, khususnya di negara yang menggunakan sistem common law. Di bawah Konvensyen New York mengenai Penguatkuasaan Pengawadan Arbitrasi Asing, anugerah timbang tara Basyarnas bukan sahaja harus diiktiraf dan dikuatkuasakan di mahkamah negara asal tetapi juga dalam bidang kuasa yang di mana aset pihak yang kalah berada. Kajian ini merumuskan bahawa anugerah timbang tara Basyarnas juga perlu diiktiraf dan dikuatkuasakan di negara-negara yang mempunyai sistem common law, kerana undang-undang syariah bertentangan dengan dasar awam dalam undang-undang domestik di negara penguatkuasa tersebut. Oleh itu, anugerah timbang tara Basyarnas boleh diiktiraf di negara lain sekiranya ia tidak bercanggah dengan dasar awam di negara penguatkuasa.

**Kata Kunci:** Basyarnas; Penyelesaian Pertikaian Ekonomi Syariah; Pengecualian Dasar Awam.

## INTRODUCTION

Globalization has encouraged economic progress in many countries<sup>1</sup>, including Indonesia. The growing development of cross-border trade and economic practices has also ‘turned over the new leaf’ on the economy of Indonesia.<sup>2</sup> This ultimately encourages cross-border business and economic practices in Indonesia. Sharia-based transactions are no exception.<sup>3</sup>

Currently, it is very possible that the Sharia-based transaction may contain foreign elements, either because one or more of the parties is a foreign national or domestic parties have assets located in foreign jurisdictions. Additionally, there may be differences in the choice of law or the agreed-upon forum for dispute resolution.<sup>4</sup> According to international private law, the factors that may influence these foreign elements can come from personal (*in personem*) or territorial (*in rem*) factors.<sup>5</sup>

Cross-border Sharia business transactions have also been catalyzed by the existence of Islamic banking institutions.<sup>6</sup> Islamic

---

<sup>1</sup> Agus Suprijanto, “Dampak Globalisasi Ekonomi Terhadap Perekonomian Indonesia,” *Jurnal Ilmiah CIVIS* 1, no. 2 (2011): 100, <https://doi.org/10.26877/civis.v1i2/Juli.592>.

<sup>2</sup> Sinyo Gamma Timisela, “Dampak Perdagangan Lintas Batas Terhadap Perekonomian Masyarakat Lokal (Studi Kasus: Wilayah Perbatasan RI-PNG Di Distrik Muara Tami),” *Jurnal Ekonomi Dan Studi Pembangunan* 7, no. 2 (2015).

<sup>3</sup> Iwan Fahri Cahyadi, “Analisis Prospek Bank Syariah Dan Lembaga Keuangan Islam Dalam Memasuki Pasar Negara Inggris,” *MALIA: Journal of Islamic Banking and Finance* 2, no. 2 (December 2018), <https://doi.org/10.21043/malia.v2i2.4944>.

<sup>4</sup> Ida Bagus Wyasa Putra et al., *Buku Ajar Hukum Perdata Internasional* (Denpasar: Fakultas Hukum Universitas Udayana, 2016), 16–17.

<sup>5</sup> Ari Purwadi, *Dasar-Dasar Hukum Perdata Internasional* (Surabaya: Pusat Pengkajian Hukum dan Pembangunan (PPHP) Fakultas Hukum Universitas Wijaya Kusuma, 2016).

<sup>6</sup> Abul Bashar Bhuiyan et al., “The Issues and Challenges of Shariah Harmonization of the Cross Border Transactions: Conceptual Review of Islamic Banking Industries,” *International Journal of Shari’ah and Corporate Governance Research* 3, no. 2 (2020).

banking institutions began to develop at the end of the 20th century.<sup>7</sup> Such Islamic banking institutions have become ‘the main gear’ for the business community that conducts business based on sharia or *muamalah*.<sup>8</sup> With the current development of technology, it can be used as a means to enter into Sharia contracts carried out by business people from different countries. Hence, cross-border Sharia business practices are now increasingly common and are carried out in various forms by the business community.<sup>9</sup>

The rapid development of the Sharia business community has led to the need for efficient dispute resolution. It is a common perception that litigation of disputes through the courts is too laborious and expensive. The business community prefers to use alternative dispute resolution. Frank and Etna Elkoury, arbitration provides a simple process chosen by the parties,<sup>10</sup> as well as by the Sharia-based business community. In this regard, the late Tan Sri Harun Hashim, who was a prominent Malaysia’s Supreme Court judge provided a strong view relating to the need for an alternative dispute resolution. Harun Hashim argued that the unfair practices in the judiciary can lead to the un-independence judicial results and caused the decrease of trust for citizens (including business actor) to render their case before formal court.<sup>11</sup> Apart from that, Harun Hashim also agreed that formal litigation is less favored by business people as an option for resolving business disputes because it tends to

---

<sup>7</sup> Maria Bhatti, *Islamic Law and International Commercial Arbitration* (New York: Routledge, 2019), <https://doi.org/9780367496982>.

<sup>8</sup> Zulkifli Rusby, *Manajemen Perbankan Syariah*, ed. Nurman (Pekanbaru: Pusat Kajian Pendidikan Islam UIR, 2017).

<sup>9</sup> Rifqi Muhammad and Rima Lanaula, “Challenges of Islamic Supervisory in The Islamic Financial Technology Industry,” *Economica: Jurnal Ekonomi Islam* 10, no. 2 (2019): 311, <https://doi.org/10.21580/economica.2019.10.2.3400>.

<sup>10</sup> A nik Entriani, “Arbitrase Dalam Sistem Hukum Di Indonesia,” *An-Nisbah* 3, no. 2 (2017): 280, <https://doi.org/10.21274/an.2017.3.3.277-293>.

<sup>11</sup> Harun Mahmud Hashim, *The Benchmark* (Kuala Lumpur: Peninsula Digital, 2001).

easily engage in corrupt practices or actions that harm justice which occur in many Asian Countries.<sup>12</sup>

Indonesia, as the country with the largest Moslem population, recognizes the existence of Islamic law as the foundation of society for Moslems (*muamalah*). Through private relationships, Islamic law has been practiced as a source and basis for many business transactions. This is especially true for Islamic banking, wherein common Sharia business transactions ensure compliance with Islamic values.

As a means to ensuring legal certainty for the parties, contracts often include a dispute resolution clause. If a dispute between the parties arises, the parties have the freedom to resolve it through court proceedings or alternative means, as specified in the contract. Arbitration is an alternative option for the parties to resolve disputes, given its fast and inexpensive nature.<sup>13</sup> This efficiency relates to the processes and procedures of the arbitration which tend to be simpler than court proceedings.

The Sharia Arbitration Board in Indonesia (Basyarnas) was established with the aim of being an alternative dispute resolution forum chosen by the parties based on their Sharia-based agreements (*akad*). The nature of the Basyarnas arbitration awards is the same as the common arbitral awards, which is final and binding. Final denotes that the decision made by the arbitrators is final and cannot be contested. An arbitral award cannot be appealed or subject to judicial review on any grounds. A binding award means that it can only be annulled by a court with very limited grounds.

Along with the development of modern economic relations today, transactions between and among individuals or legal entities have been expanded in scope. They may contain foreign or transnational elements. It is not surprising, therefore, that Basyarnas

---

<sup>12</sup> Ibid

<sup>13</sup> D.S.N. Heriyanto, "Strengthening Indonesian Judges' Understanding of the Refusal and Annulment Grounds of Foreign Arbitral Awards," *Acta Juridica Hungarica* 56, no. 2-3 (2015), <https://doi.org/10.1556/026.2015.56.2-3.6>.

will encompass disputes that contain foreign elements. This forms the foundation for Basyarnas arbitration awards' need for recognition and enforcement in countries where the assets of judgment debtors lie.

In common law countries, there is a tendency to refuse arbitration awards based on Sharia law. In these countries, there is a stigma that Sharia law does not conform with the prevailing laws.<sup>14</sup> The United Kingdom's (UK's) domestic court, for example, refused to consider accepting pressure from the internal community to use religious law.<sup>15</sup> In addition, courts in the UK are also aware that they do not sufficiently understand or have the sensitivity and/or willingness to apply religious law in court disputes.<sup>16</sup>

In some cases, courts in common law countries have not recognize the choice of law clauses designating for the Sharia law. In the case of *Habibi-Fahnrich v. Fahnrich*,<sup>17</sup> the UK court did not want to recognize the agreement related to the giving of the dowry. In another case between *Shamil Bank of Bahrain EC v. Beximco Pharmaceuticals Ltd.*, the UK court mentioned that Sharia law cannot be accepted as the applicable law in contracts, even where the choice of law is agreed upon by the parties. These two cases illustrate the uphill battle for Basyarnas awards to be recognized abroad, especially in secular countries.

This study examines the recognition and enforcement of Basyarnas arbitration awards abroad. In addition, this study also analyses how other countries practice in recognizing and enforcing Arbitration Awards based on Sharia law. It is hoped that this study paints a comprehensive picture of the opportunities and challenges regarding the recognition and enforcement of the Basyarnas arbitration awards abroad. Most importantly, the result of this study

---

<sup>14</sup> Maurits S. Berger, "Understanding Sharia in the West," *Journal of Law, Religion and State* 6, no. 2–3 (2018): 236–273, <https://doi.org/10.1163/22124810-00602005>.

<sup>15</sup> Joel A. Nichols, "Religion, Marriage, and Pluralism," *Emory International Law Review* 25 (2011): 967,971.

<sup>16</sup> Caryn Litt Wolfe, "Faith-Based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and Their Interaction with Secular Courts," *Fordham Law Review* 75 (2006): 427.

<sup>17</sup> "Court Decision No. 46186/93, 1995 WL 507388" (1995).

hopefully contributes to upholding the SDG 16: promote just, peaceful, and inclusive societies.<sup>18</sup> Basyarnas has become an alternative dispute resolution institution that is trusted by the Indonesian people and indirectly contributes to the country's development.<sup>19</sup> Recognizing Basyarnas arbitration awards in other countries is very important to create convenience in the accessibility of the parties to justice.<sup>20</sup>

## RESEARCH METHODOLOGY

This research is based on normative legal research, which attempts to harmonize legal norms and/or legal regulations that apply to legal norms and/or other legal regulations. Thus, it can provide a conceptualization of legal norms in solving legal problems in practice in the field. This research employs two approaches, namely legislation and conceptual. The legislative approach is used to analyze legal norms and regulations relating to the Recognition and Enforcement of Foreign Arbitral Awards based on Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution, Law No. 3 of 2006 on Amendments to Law No. 7 of 1989 on Islamic economics, as well as regulations related to Islamic economics in Indonesia. Meanwhile, a conceptual approach is used to analyze the right legal concepts to provide solutions to the possibility of recognition and enforcement of Basyarnas arbitral awards. All the legal materials were obtained from literature studies and were processed and analyzed qualitatively and comprehensively to answer legal issues

---

<sup>18</sup> Michael Jandl, "Towards the Monitoring of Goal 16 of the United Nations' Sustainable Development Goals (SDGs) A Study of the Selection, Rationale and Validity of Indicators with Suggestions for Further Improvements UN Sabbatical Leave Research Report," UN, 2017.

<sup>19</sup> Rachel Jacob Tharakan and Kanika Lahoti, "Conquest of Sustainable Development through Reformative Mechanisms of ADR," *European Journal of Sustainable Development* 8, no. 5 (October 1, 2019), <https://doi.org/10.14207/EJSD.2019.V8N5P254>.

<sup>20</sup> Rachel Jacob Tharakan and Kanika Lahoti, "Conquest of Sustainable Development through Reformative Mechanisms of ADR," *European Journal of Sustainable Development* 8, no. 5 (October 2019), <https://doi.org/10.14207/EJSD.2019.V8N5P254>.

related to the recognition and enforcement of Basyarnas arbitration awards abroad.

## RESEARCH FINDINGS AND DISCUSSION

### IMPETUS FOR THE BASYARNAS IN INDONESIA

Through a national working group meeting, the Indonesian Ulema Council or *Majelis Ulama Indonesia* (MUI) established an Islamic arbitration body called the Indonesian Ulema Council Arbitration Board (BAMUI) through the Decree Number Kep. 392/MUI/V/1992.<sup>21</sup> The establishment of this arbitration body was a follow-up to the establishment of the first Islamic bank in Indonesia, Bank Muamalat, and the establishment of Law No. 7 of 1992 on Banking. The purpose of the establishment of BAMUI at that time was to resolve disputes between customers and Bank Muamalat.

Ever since the passing of these laws which laid the framework for Islamic banking, numerous Islamic banks started to be established in Indonesia. In 2003, the MUI changed the name of BAMUI to the National Sharia Arbitration Board (Basyarnas).<sup>22</sup> Based on this decree, Basyarnas was designated as a permanent and independent Islamic arbitration body mandating resolving *muamalah* disputes arising in trade relations, the financial industry, services and other Sharia business units among Moslems. The enforcement of Basyarnas as a dispute resolution body outside the judiciary gained legitimacy in Indonesia through Law Number 14 of 1970 on the Judiciary System. The explanation of Article III paragraph (2) of Law Number 14 of 1970 states that the settlement of cases outside the court is allowed on the basis of resolution or through referees/arbitrators.<sup>23</sup>

---

<sup>21</sup> “Decision of Majelis Ulama Indonesia Number No. Kep. 392/MUI/V/1992” (1992).

<sup>22</sup> “Decree of the Indonesian Ulema Council (SK MUI) Number: Kep-09/MUI/XII/2003 Concerning the Change of BAMUI to BASYARNAS” (2003).

<sup>23</sup> “Law Number 14 of 1970 on Judiciary System” (1970).

The establishment of Basyarnas is also founded by the Quran which is the main source of Islamic law. There are at least two verses in the Quran referring to arbitral mechanism. The Quran surah al-Hujurat verse 9 states that if there is a dispute between Moslems, it is expected that peaceful efforts be made in a just and equitable manner. Additionally, in Surah An-Nisa' verse 35, it is states that:

“If you fear a divergence between the two (husband and wife), then appoint an arbiter from his family and an arbiter from her family. If they both (husband and wife) wish for reconciliation, Allah will make them successful in their reconciliation. Surely, Allah is All-Knowing, Well-Acquainted with all things.”

The establishment of Basyarnas is essential, considering that the economic power of the Moslems is growing very rapidly. Given the increasing share of the economy based on Sharia agreements, Basyarnas as an arbitral body has many advantages, including but not limited to:

1. Arbitration proceedings are closed and confidential. The parties entrust the arbitral body with resolving disputes through a process that has been agreed upon, under the blanket of confidentiality.<sup>24</sup> In the trial process, it is very likely that the proprietary information of the parties will be revealed or offered as evidence.<sup>25</sup> Thus, with a closed process, the parties benefit greatly because the confidentiality of their business will not be revealed to the public and most importantly their business reputation is preserved.
2. When compared to court proceedings, the arbitration process is faster and cheaper.<sup>26</sup> An arbitral award is final and binding. Arbitration does not recognize any further legal efforts, such as appeals and cassation. The proceedings in court from the first level to

---

<sup>24</sup> Leon E. Trakman, “Confidentiality in International Commercial Arbitration,” *Arbitration International* 18, no. 1 (March 1, 2002): 1–18, <https://doi.org/10.1023/A:1014277907158>.

<sup>25</sup> Kyriaki Noussia, *Confidentiality in International Commercial Arbitration* (Hamburg: Springer, 2010).

<sup>26</sup> William W. Park, “Arbitrators and Accuracy,” *Journal of International Dispute Settlement* 1, no. 1 (February 1, 2010): 25–53, <https://doi.org/10.1093/jnlids/idp004>.

cassation in practice take a very long time. Moreover, Arbitration is also considered less costly, taking into consideration the time taken with the professionalism of the arbitrator in resolving the dispute.

3. Arbitrators are selected based on their expertise. Parties can have confidence in the arbitrators to resolve disputes. Arbitrators will professionally decide the parties' disputes in accordance with their area of expertise. In Sharia disputes, the parties can choose arbitrators in accordance with their areas of expertise such as Islamic banking law, Sharia contracts, and Sharia capital markets.

4. In arbitration proceedings there is no precedent system. Each panel is unbound by previous arbitral awards.<sup>27</sup> In the common law system, precedent is very important and decisive in the judicial process. However, arbitration panels are not required to follow previous arbitral awards. Thus, in materially similar cases, arbitral awards may differ.

5. Arbitral awards are generally easier to enforce than court decisions because arbitral awards are final and binding.

Basyarnas as an alternative dispute resolution body has many advantages, including indirectly improving the nation's economy. The Sharia economy in Indonesia is developing very rapidly and is experiencing growth every year. In 2021, Islamic financial assets experienced a growth of 13.82% with total assets of 2,050.44 trillion IDR (139 million USD) controlled by 471 Islamic financial institutions.<sup>28</sup> The size of this asset requires legal certainty, especially to ensure that any risks/disputes that occur can be resolved properly and fairly. For this reason, the Government of Indonesia provides a

---

<sup>27</sup> W C Mark Weidenmaier, "Judging-Lite: How Arbitrators Use and Create Precedent, 90 N.C.," *North Carolina Law Review* 90 (2012): 1146.

<sup>28</sup> Otoritas Jasa Keuangan, "Laporan Perkembangan Keuangan Syariah Indonesia: Menjaga Ketahanan Keuangan Syariah Dalam Momentum Pemulihan Ekonomi," accessed May 3, 2023, [https://www.ojk.go.id/id/kanal/syariah/data-dan-statistik/laporan-perkembangan-keuangan-syariah-indonesia/Documents/Laporan Perkembangan Keuangan Syariah Indonesia %28LPKSI%29 2021.pdf](https://www.ojk.go.id/id/kanal/syariah/data-dan-statistik/laporan-perkembangan-keuangan-syariah-indonesia/Documents/Laporan%20Perkembangan%20Keuangan%20Syariah%20Indonesia%20LPKSI%202021.pdf).

space for alternative dispute resolution, especially through arbitration institutions. Apart from Basyarnas, there are also other arbitration institutions such as the Financial Services Sector of Alternative Dispute Resolution Institution (LAPS SJK) formed by the Financial Services Authority.<sup>29</sup> This institution has developed by granting authority to handle disputes in the field of fintech.

The Constitutional Court also ensures that the resolution of Sharia disputes can be carried out in litigation handled by the Religious Courts, while non-litigation is handled by arbitration and other alternative dispute resolutions. Arbitration in this case is the National Sharia Arbitration Board (Basyarnas) while other alternative dispute resolutions are resolved through a dispute resolution consent based on good faith principle.<sup>30</sup> This guideline was given by the Constitutional Court when it decided on a judicial review of the existence of Article 55 paragraphs (2) and (3) which gave absolute authority to the Religious Courts contrary to the 1945 Constitution.<sup>31</sup>

Most importantly, Basyarnas could be the best priority of settlement dispute references among the Indonesians whose majority are Moslem. In general, Moslems in Indonesia place a strong trust in the Islamic finance industry. Generally, the dispute resolution that will be their main reference is Basyarnas. The dispute resolution clause in Sharia contracts generally refers to Basyarnas. Without making promotions and consistent outreach, Basyarnas has become part of the guarantee of legal protection for the parties to the business practices that they carry out on a daily basis.

## **FOREIGN ELEMENTS RELATED TO FOREIGN ARBITRAL AWARDS**

Private international law provides a set of rules, principles, and/or national legal frameworks created to govern legal events or relationships involving foreign or extraterritorial elements. To

---

<sup>29</sup> “Regulation of Financial Services Authority No. 61/POJK.07/2020 on the Establishment of Alternative Dispute Resolution Institution in the Sector of Financial Services” (n.d.).

<sup>30</sup> Constitutional Court Decision No. 93/PUU-X/2012 (n.d.).

<sup>31</sup> Constitutional Court Decision No. 93/PUU-X/2012.

determine a legal relationship, whether containing foreign elements in private international law can be used primary connecting factors. A primary connecting factor is that which gives rise a private international law relationship.<sup>32</sup> These factors can be divided into two factors, personal and/or territorial.<sup>33</sup>

The first factor is the personal factor, sometimes referred to as *in personam* jurisdiction, which can be established through the domicile, nationality, or citizenship of the parties.<sup>34</sup> For example, a customer who is a Malaysian citizen makes an investment on the basis of a *musyarakah* (a form of financing with a revenue sharing scheme) agreement with Bank Syariah Indonesia (BSI), which is a company engaged in banking and established under Indonesian law. The personal factor in the legal relationship is characterized by differences in the domicile of the parties.

For legal entities, the determination of nationality can be determined based on several parameters such as an incorporation test, domiciliary test, control test, and a grandfather rule.<sup>35</sup> According to Harahap, the basis for determining the nationality of a legal entity depends on the law or regulation that is used as the basis for the establishment of the company, otherwise referred to as the incorporation test.<sup>36</sup> Thus, the legal system or laws of which country is the basis for the establishment and endorsement of the company, then the company is considered to follow the “nationality” of the country.

---

<sup>32</sup> Sudargo Gautama, *Pengantar Hukum Perdata Internasional* (Bandung: Bina Cipta, 1987).

<sup>33</sup> Bayu Seto Hardjowahono, *Dasar-Dasar Hukum Perdata Internasional* (Bandung: Citra Aditya Bakti, 2006).

<sup>34</sup> Jürgen Basedow et al., *Encyclopedia of Private International Law* (Cheltenham: Edward Elgar Publishing, 2017), <https://doi.org/10.4337/9781782547235>.

<sup>35</sup> Thomas C. Drucker, “Companies in Private International Law,” *The International and Comparative Law Quarterly* 17, no. 1 (1968), <https://doi.org/10.1093/iclqaj/17.1.28>.

<sup>36</sup> Yahya Harahap, *Hukum Perseroan Terbatas* (Jakarta: Sinar Grafika, 2016).

Determination of the nationality of a legal entity can also be established through the original domicile of the parent company. If a company has many subsidiaries, the determination of the nationality of the company can be determined through the domicile/origin of the parent company (domiciliary test). In other words, the nationality of the company is determined by the principal place of business of the corporation.

A control test is also used in determining the nationality of a legal entity, looking at the nationality of the majority shareholders of a company. For example, if Company A, a Filipino company, is the majority shareholder of Company X, then by using a control test, Company X is considered a Filipino national for jurisdictional purposes. Differing little from the control test, the grandfather rule is intended to look at the nationality of individuals who ultimately own and control a company's shares.<sup>37</sup> This grandfather rule was adopted by the legal system in the Philippines.

The second factor in identifying the parties that contain foreign elements is the territorial factor, or *in rem* jurisdiction.<sup>38</sup> This factor identifies foreign elements by referring to the place or locus of occurrences or implementation of the legal relationship of the parties. This can be illustrated by for example, if Bank Muamalat enters into a *mudharabah* agreement with a customer who is an Indonesian citizen, to fund his restaurant business in Singapore. If the contract was signed and executed in Singapore, the signing and implementation of the *mudharabah* contract in Singapore by the parties, both of whom are domiciled in Indonesia, contains foreign elements due to territorial factors.

With the development of the Islamic banking industry in Indonesia, it is possible for Islamic banks to seek investors from abroad. Thus, the legal relationship that occurs certainly contains foreign elements, whether due to personal and/or territorial factors.

---

<sup>37</sup> "Grandfather Rule; a Supplement to the Control Test," accessed September 20, 2020, <https://www.pwc.com/ph/en/taxwise-or-otherwise/2015/grandfather-rule.html>.

<sup>38</sup> Ridwan Khairandy, *Pengantar Hukum Perdata Internasional, Pertama* (Yogyakarta: FH UII Press, 2007).

Hence, it is very possible that the dispute that occurs will also contain foreign elements which result in the Basyarnas arbitration award needing to be recognised and enforced abroad.<sup>39</sup>

The rapid growth of Sharia banking in Indonesia<sup>40</sup> has attracted the attention of investors, including customers from abroad.<sup>41</sup> Many foreign banking companies have started to open Islamic branches in Indonesia, including Bank Maybank Indonesia Finance, which has an affiliation with May Bank Islamic from Malaysia<sup>42</sup>, PT. Bank Panin Dubai Syariah Tbk., which is affiliated with Dubai Islamic Bank of the United Arab Emirates<sup>43</sup>, and CIMB Niaga Syariah, which is affiliated with CIMB Islamic Bank of Malaysia<sup>44</sup>.

In addition, Islamic banking in Indonesia has branch offices or corporate offices operating overseas. For example, Bank Muamalat Indonesia which opened office services in Kuala Lumpur<sup>45</sup>, and PT. May Bank Indonesia Tbk., which opened a branch office in Mumbai, India<sup>46</sup>. The opening of these branch offices shows the trust given by the international community in Indonesia to Islamic banking abroad. Thus, of course, Islamic banking stakeholders of Islamic banks in Indonesia are not only Indonesians but also foreign nationals for jurisdictional purposes.

---

<sup>39</sup> Umami Uzma, "Pelaksanaan Atau Eksekusi Putusan Badan Arbitrase Syariah Nasional (BASYARNAS) Sebagai Kewenangan Pengadilan Agama," *Jurnal Hukum Dan Pembangunan* 44, no. 3 (2014), <https://doi.org/10.21143/jhp.vol44.no3.28>.

<sup>40</sup> M. Dliyauf Muflihah, "Perkembangan Bank Syariah Di Indonesia: Sebuah Kajian Historis," *JES (Jurnal Ekonomi Syariah)* 4, no. 1 (March 2019), <https://doi.org/10.30736/jesa.v4i1.58>.

<sup>41</sup> Monica Wareza, "Ajib! Merger Belum Usai, Bank Syariah Indonesia Dilirik Asing," *CNBC Indonesia*, 2021.

<sup>42</sup> Maybank Indonesia, "Profil PT Bank Maybank Indonesia Tbk," 2021.

<sup>43</sup> Panin Bank Syariah, "Komposisi Kepemilikan Saham per 31 Juli 2021," 2021.

<sup>44</sup> CIMB ISLAMIC, "CIMB Islamic," CIMB NIAGA Syariah, 2021.

<sup>45</sup> Indonesian Financial Services Authority, "Daftar Jaringan Kantor Bank Umum Dan Syariah Indonesia Di Luar Negeri," 2017.

<sup>46</sup> Indonesian Financial Services Authority.

Considering the rapid development of Islamic banking, Basyarnas needs to be prepared for the possibility of foreign interests, either due to personal or territorial factors. Most importantly, legal consultants who represent the parties in a Basyarnas dispute must also be prepared for a Basyarnas arbitration award, which has foreign elements that needs recognition and enforcement in countries where the assets of the losing party in the arbitration process are stored.

### **BASYARNAS ARBITRATION AWARDS AS FOREIGN ARBITRATION AWARDS**

An arbitration award is final and binding. Final means that the arbitration award is a final decision. There is no possibility of further legal action, either through appeal, cassation, or review. Binding means that the arbitration award is legally enforceable on both parties to the dispute.<sup>47</sup>

Generally, the party against which an arbitration award is enforced voluntarily complies with the terms of the award. However, if the losing party does not fulfil its obligations under the arbitration award, the prevailing party can seek legal remedies to enforce the arbitration award. In such a case, the prevailing party of the arbitration may apply for the recognition and enforcement of the arbitration award to an enforcing court.

In the context of the legal relationship between the parties that contain foreign interests, it is very possible that the prevailing party will bring the Basyarnas arbitration award to be enforced and executed upon in another country where the assets of the judgment debtor lie. In such a case, the Basyarnas arbitration award can be categorized as a Foreign Arbitration Award in another country. According to the UNCITRAL Model Law<sup>48</sup> an Arbitration Award issued by Basyarnas may contain foreign elements if they meet the following criteria:

---

<sup>47</sup> Priyatna Abdurrasyid, *Arbitrase Dan Alternatif Penyelesaian Sengketa* (Jakarta: PT. Fikahati Aneska, 2002).

<sup>48</sup> United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985 With Amendments as Adopted in 2006*. (Vienna: United Nation, 2008).

1. At the time of signing the subject contract, the parties had their places of business in different countries;
2. If the situs of arbitration according to the contract is in a jurisdiction foreign to the place of business of the parties (in different countries);
3. If the performance of most of the obligations under the contract is in jurisdiction foreign to the place of business of the parties, or the subject of the dispute is closely related to a jurisdiction outside the place of business of the parties (in different countries); or
4. The parties have expressly agreed that the subject matter of the arbitration contract relates to more than one country.

It is possible for a Basyarnas arbitration award to be enforced abroad. The prevailing party in the case can enforce the Basyarnas arbitration award in a jurisdiction where the losing party's assets lie. For example, if there is a party who is a company incorporated under Malaysian law, enters a *mudharabah* agreement with the Central Jakarta branch of Bank Muamalat Indonesia, such jurisdiction comes into play. Based on such cases, the legal relationship between the two contains foreign elements. The Basyarnas arbitration award would state that the customer governed by Malaysian law lost in the dispute and was obliged to pay compensation. However, because the customer did not voluntarily satisfy the Basyarnas arbitration award, the prevailing party (Bank Muamalat Indonesia) inevitably had to take legal action to enforce and execute the Basyarnas arbitration award in Malaysia to satisfy the award.

## **THE RECOGNITION AND ENFORCEMENT OF BASYARNAS ARBITRATION AWARD ABROAD**

The legal basis for granting recognition and enforcement of the foreign arbitral awards is based on the 1958 New York Convention on Enforcement of Foreign Arbitral Awards (the New York Convention). This treaty has been ratified by 168, including Indonesia.<sup>49</sup> The

---

<sup>49</sup> “President Decree Number 34 of 1981 on Convention on the

number of state parties who ratified the New York Convention indicates that arbitration awards are commonly recognized and enforceable abroad in accordance with the procedures established according to the domestic laws of each country. Under Indonesian law, procedures for recognizing and enforcing foreign arbitration awards are specifically regulated by Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution.

The New York Convention obliges all state parties thereto to provide recognition and enforcement of foreign arbitration awards.<sup>50</sup> Arbitration awards are final and binding. Such awards can legally be executed immediately after the decision is rendered.<sup>51</sup> The process of executing on an arbitration award of course must follow the provisions as stipulated in the laws and regulations of the country where the arbitration award is sought to be enforced.

In Indonesia, the institution authorized to recognize and enforce foreign arbitration awards is the Central Jakarta District Court.<sup>52</sup> Article 66 of the Law Number 30 of 1999 states that foreign arbitration awards are only recognized and enforceable in the territory of Indonesia if they meet the following requirements:

1. Submitted by an arbitrator or arbitral tribunal in a country with which Indonesia is bound by an agreement, either bilaterally or multilaterally, regarding the recognition and enforcement of arbitration awards;
2. The subject arbitration award falls within the scope of trade law;

---

Recognition and Enforcement of Foreign Arbitral Awards” (1981).

<sup>50</sup> The United Nations, “Convention on the Recognition and Enforcement of Foreign Arbitral Awards” (1958).

<sup>51</sup> Suleman Batubara, Orinton Purba, and Andriansyah, *Arbitrase Internasional Penyelesaian Sengketa Investasi Asing Melalui ICSID, UNCITRAL Dan SIAC* (Jakarta: Raih Asa Sukses, 2013).

<sup>52</sup> “Law Number 30 of 1999 on Arbitration and Alternative Dispute Resolution” (1999).

3. The subject arbitration award does not conflict with public policy;
4. Exequatur from the Head of the Central Jakarta District Court; and,
5. If Indonesia has become one of the parties in an agreement either bilateral or multilateral, the award must obtain exequatur from the Supreme Court and subsequently delegated to the Central Jakarta District Court.

Likewise, enforcement of Arbitral Indonesian arbitral awards is subject to the law of the jurisdiction in which a prevailing party is attempting to enforce the award. The enforcement of a Basyarnas arbitration award as a foreign arbitration award can be refused by a competent court in another country if it is contrary to the provisions of Article V of the New York Convention. Article V regulates the grounds for refusing to recognize the foreign arbitration award, including, the agreement being invalid, there being no proper notice of the appointment of the arbitrator, the award was not in accordance with the terms of the submission to arbitration, the composition or appointment of the arbitrator was not in accordance with the agreement promised by the parties, or the award was not yet binding on the parties.<sup>53</sup>

In practice, it is not easy for an arbitration award rendered by referring Islamic law to be recognized and enforced in other countries, especially in developed countries in which Islam is a minority religion. Meanwhile, if an award is applied in countries where the majority of the population is Moslem, it proves very easy and there will be no obstacles considering that the judges in those jurisdictions already know the nature of Islamic Law. The non-recognition of this arbitration award poses a challenge for entrepreneurs. This is because the New York Convention of 1958 stipulates that a foreign arbitration award can be refused if the agreement executed is declared invalid or contrary to public policy. Thus, it is possible that Basyarnas arbitration awards can be

---

<sup>53</sup> The United Nations, Convention on the Recognition and enforcement of Foreign Arbitral Awards.

refused because they are based Sharia law, often seen as unclear and seen only as a religious law,<sup>54</sup> and do not have the same position as a legal norm, especially in common law countries.

For example, in the case of Shamil Bank,<sup>55</sup> a pharmaceutical company from Bangladesh called Beximco entered into a *murabaha* agreement with Shamil Bank of Bahrain (*murabaha* is a sale and purchase agreement between a bank and a customer based on Sharia law). The choice of law clause states that: “*subject to the principles of the glorious Syariah Law, this agreement shall be governed by and construed in accordance with the laws of England.*”<sup>56</sup> Beximco as the customer then defaulted on its obligation to make payments to Shamil Bank in accordance with the agreement. Beximco argued that the agreement was invalid because it used a hidden usury system. The Appellate Court held that the use of Sharia law as a legal option was considered invalid<sup>57</sup> because based on the Rome Convention it is stated that there is only one legal system that can govern treaties and the law chosen must be the law that designates the legal system of a particular country.<sup>58</sup> Sharia law is not easy to identify because it is not subject to the laws of one particular country and in this case, it is considered very abstract by the Appellate Court.

The common law legal system at least provides hope where their judges generally will use a narrow approach in examining whether an arbitration award based on Sharia law will be recognized or refused. In the case of *Parsons & Whittemore Overseas Co. v. Societe Generale de L’Industrie du Papier* interprets the word “public policy exception” with a very narrow approach<sup>59</sup> and the use of the

---

<sup>54</sup> Tibor Várady et al., *International Commercial Arbitration - A Transnational Perspective*, 7th Editio (Minnesota: West Academic Publishing, 2019).

<sup>55</sup> *Shamil Bank of Bahrain EC v. Beximco Pharm. Ltd.*, [2004] EWCA (Civ) 19, [1], [2004] 1 W.L.R. 1784. (n.d.).

<sup>56</sup> *Shamil Bank of Bahrain EC v. Beximco Pharm. Ltd.*, [2004] EWCA (Civ) 19, [1], [2004] 1 W.L.R. 1784.

<sup>57</sup> *Shamil Bank of Bahrain EC v. Beximco Pharm. Ltd.*, [2004] EWCA (Civ) 19, [1], [2004] 1 W.L.R. 1784.

<sup>58</sup> “The Convention on the Law Applicable to Contractual Obligations” (1980).

<sup>59</sup> *Parsons & Whittemore Overseas Co. v. Societe Generale de L’Industrie*

public policy exception should not be used solely to protect national interests.<sup>60</sup> Thus, judges in common law countries cannot immediately refuse to enforce an arbitration award solely on the ground of being based on Sharia law with the argument that Sharia law is contrary to the morals and justice of society.

Sharia economic law stipulates that the parties in a business transaction do not charge interest (*riba*) or undertake excessive risk (*gharrar*).<sup>61</sup> This provision is in no way conflicts with moral values, justice, or public policy especially in the United States. For this reason, Basyarnas arbitration awards should be recognized and enforced in other countries without any significant challenges because especially in countries with common law legal systems they will use a very narrow and thorough approach.

### **AUTHORITY TO SET ASIDE BASYARNAS ARBITRATION AWARDS**

The New York Convention of 1958 uses the term ‘country of origin’ to determine which court has the authority to set aside a Foreign Arbitration Award (*Lex Arbitri*). The term of the country of origin can be interpreted as the country in which a foreign arbitration is legally ‘rooted’.<sup>62</sup> The country of origin is important in determining which judicial institutions play a role in providing supervision over the arbitration. The court of this country of origin is a court located in a country where an arbitration process has been carried out until the issuance of an arbitration award (the place of arbitration).

The court of this country of origin has exclusive authority and is the first court of original jurisdiction in which a lawsuit to set aside or override an arbitration award can be filed. The authority of courts

---

du Papier (RAKTA), 508 F.2d 969, 974 (2d Cir. 1974). (n.d.).

<sup>60</sup> Richard A Cole, “The Public Policy Exception to the New York Convention on the Recognition and Enforcement of Arbitral Awards,” *Journal on Dispute Resolution* 1, no. 2 (1986): 355–83.

<sup>61</sup> Sabur Mollah et al., “The Governance, Risk-Taking, and Performance of Islamic Banks,” *Journal of Financial Services Research* 51, no. 2 (April 1, 2017): 195–219, <https://doi.org/10.1007/s10693-016-0245-2>.

<sup>62</sup> Gautama, *Pengantar Hukum Perdata Internasional*.

from the country of origin generally can also be categorized as primary jurisdiction or main jurisdiction. Courts outside of this country of origin do not have the authority or jurisdiction to override or set aside an arbitration award that has permanent legal force. The court in the case of *International Standard Electric Corp. v. Bidas Sociedad Anonima Petrolera, Industrial y Commercial* held that:<sup>63</sup>

The competent authority for entertaining the action of setting aside the award is virtually always the court of the country in which the award was made. The phrase “or under the law of which” the award was made refers to the theoretical case that based on an agreement of the parties the award is governed by an arbitration law which is different from the arbitration law of the country in which the award was made.

The terms “annulment” and “non-recognition” of foreign arbitral awards must be distinguished because they have different legal consequences. The annulment of the foreign arbitration award results in the denial of the award as if it had never been handed down. It is necessary in case of annulment to conduct an arbitration trial from the start. Meanwhile, if the arbitration award is refused, the award is still considered valid even though legally this refusal also results in the arbitration award being unable to be enforced in the jurisdiction of the court that refuses it.

Indonesia is the country of origin for all Basyarnas arbitration awards. This is because the whole process of the arbitration conducted by Basyarnas takes place in Indonesia. The party who applies for the annulment of the Basyarnas arbitration award can be made based on legal provisions in Indonesia.<sup>64</sup>

Article 13 Paragraph (2) of the Regulation of the Supreme Court Number 14 of 2016 stipulates that the enforcement of a

---

<sup>63</sup> *International Standard Electric Corp. v. Bidas Sociedad Anonima Petrolera, Industrial y Commercial*, 745 F. Supp. 172, at 177 (S.D.N.Y. 1990) (n.d.).

<sup>64</sup> “Supreme Court Regulation Number 14 of 2016 on Procedures of Economic Sharia Dispute Settlement” (2016); Law Number 30 of 1999 on Arbitration and Alternative Dispute Resolution.

Basyarnas arbitration award and/or its annulment shall be carried out by the court within the Religious Courts system. Therefore, based on the description above, the religious courts have exclusive jurisdiction to set aside Basyarnas arbitration awards.

The procedure for requesting the annulment of an arbitration award is set forth in Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. If we trace the legal norms in the two articles of these laws (Articles 70 and 72), it is unclear whether the annulment of the decision also applies to both domestic and foreign arbitration awards. However, some scholars stated that the annulment of the arbitration award as regulated in Articles 70 and 72 also includes the annulment of a foreign arbitration award.<sup>65</sup> This is because the previous article also regulates the mechanism for recognizing and enforcing international arbitral awards.

The application for an annulment of an arbitration award must be made in writing within a maximum of 30 days from the day of submission and registration of the decision to the Registrar of the Religious Courts.<sup>66</sup> This means that an arbitration award that can be subject to annulment is an arbitration award that has been registered to the Religious Court of the Republic of Indonesia. Based on Article 70 of Law Number 30 of 1999, the parties to an arbitration award may apply for annulment if the subject arbitration award is suspected of containing the following:

1. The document submitted in the examination, after the Arbitration Award is rendered, is admitted as being false or declared false;
2. After the award is made, material documents are found that were hidden by the opposing party; or
3. The award is decided from the results of deception carried out by one of the parties in the examination of the dispute.

---

<sup>65</sup> Heriyanto, "Strengthening Indonesian Judges' Understanding of the Refusal and Annulment Grounds of Foreign Arbitral Awards."

<sup>66</sup> Supreme Court Regulation Number 14 of 2016 on Procedures of Economic Sharia Dispute Settlement.

4. The reasons for the request for annulment as referred to in Article 70 of Law Number 30 of 1999 must be established by a court decision. If the competent court declares that the reasons are proven or not proven, then this court decision can be used as a basis for consideration for the judge to grant or refuse the application for annulment.

## CONCLUSION

Basyarnas plays a role in providing a sense of security for the economic activities carried out by the Islamic community, especially to the Indonesian Moslem community. In its development, it is very possible that the Sharia-based economic relations between the parties may contain foreign elements. Hence, it is very likely that a Basyarnas arbitration award will be used by the prevailing party to do an application for the recognition and enforcement of the arbitral award in the country's court where the assets of the losing party lie.

In addition, the party who opposes a Basyarnas arbitration award can also take legal action to set it aside. In accordance with Supreme Court Regulation Number 14 of 2016, the Religious Court has the exclusive jurisdiction to set aside Basyarnas arbitration awards. However, this regulation is still subject to Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution related to the mechanism for requesting the annulment of an arbitral award. It is stated that the request for the annulment of the arbitral award must be made in writing within a maximum of 30 days from the day of submission and registration of the award to the Registrar of the Religious Court.

There is a concern that Basyarnas arbitration awards will be refused for enforcement in foreign jurisdictions. This concern is based on an argument that the Basyarnas arbitration award can be stated contrary to public policy or other grounds for refusal, as stipulated in Article V of the New York Convention of 1958. Although there were refusals made by courts in common law countries against the implementation of arbitral awards with Sharia law based. However, this study presents that the Basyarnas arbitration award could be implemented in an enforcing court because basically economic Sharia

law does not conflict with domestic law, especially in countries with a common law legal system.

## **RECOMMENDATION**

From this study, the research provides recommendations on the need to strengthen understanding of the recognition and the enforcement of Basyarnas arbitration awards abroad, especially for legal practitioners. This can be done by inserting explanatory materials related to recognition and enforcement arbitration awards abroad in the curriculum of both the undergraduate study program in law and Sharia law in Indonesia. In addition, intensive and in-depth training is needed for legal practitioners to understand the possibility of recognizing and implementing Basyarnas award abroad.

## **ACKNOWLEDGEMENT**

This study was made possible with the generous funding from Faculty of Law Universitas Islam Indonesia and Ahmad Ibrahim Kulliyah of Laws, International Islamic University of Malaysia under research collaboration agreement which initially agreed on the 1<sup>st</sup> of October 2020. Special mention to the resource person Drs. Agus Triyanta, M.A., M.H., Ph.D, the Head of Basyarnas of the Yogyakarta Special Region who generously provided substantial information to support this research.