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Analysis of Alternative Dispute Resolution in non-litigation dispute resolution on Islamic Mortgage: at the Ombudsman Institution Yogyakarta

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Abstract

Limited information, experience, and very low economic conditions are the background of business dispute cases, especially in Islamic mortgages. Business dispute cases, including Islamic mortgage, have so far been resolved using non-litigation settlements using Alternative Dispute Resolution (ADR), it is considered easier, does not incur expensive costs, is familial, and achieves the goal of dispute resolution, namely win-win solutions. Settlement of disputes using this method has been regulated in Law Number 30 of 1999 concerning arbitration and alternative dispute resolution. In this case, the Yogyakarta Ombudsman as one of the non-litigation institutions also takes part in resolving disputes non-litigation. This study aims to analyze the method used, namely alternative dispute resolution in resolving disputes over sharia mortgage loans. Finally, this research finds that in the process of resolving disputes over sharia mortgages with alternative dispute resolution, the method of consultation, negotiation,

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mediation, and expert judgment is used. The alternative dispute resolution method prioritizes peace and a win-win solution or conditions that are favorable to the parties, but in this case, the non-litigation dispute resolution method does not succeed in bringing about peace or a win-win solution.

Keywords: Business disputes, non-litigation resolution, alternative dispute resolution, Islamic mortgage.

Abstrak

Keterbatasan informasi, pengalaman dan kondisi ekonomi yang sangat rendah melatarbelakangi adanya kasus sengketa bisnis khususnya di kredit pemilikan rumah syariah. Kasus persengketaan bisnis termasuk pada sengketa kredit pemilikan rumah syariah selama ini diselesaikan menggunakan penyelesaian non-litigasi dengan menggunakan Alternative Dispute Resolution (ADR), hal itu dianggap lebih mudah, tidak mengeluarkan cost yang mahal, bersifat kekeluargaan, dan tercapainya tujuan dari penyelesaian sengketa yaitu win-win solution. Penyelesaian sengketa dengan menggunakan cara tersebut telah diatur dalam Undang-undang Nomor 30 tahun 1999 tentang arbitrase dan alternative penyelesaian sengketa. Dalam hal ini lembaga Ombudsman Yogyakarta sebagai salah satu lembaga non-litigasi juga turut andil dalam menyelesaikan persengketaan secara non-litigasi. Penelitian ini bertujuan untuk menganalisa metode yang digunakan yaitu alternative dispute resolution dalam menyelesaikan sengketa kredit pemilikan rumah syariah. Akhirnya penelitian ini mendapati bahwa dalam proses penyelesaian sengketa kredit pemilikan rumah syariah dengan alternative dispute resolution ini menggunakan metode konsultasi, negosiasi, mediasi, dan penilaian ahli. Metode alternative dispute resolution mengedepankan perdamaian dan win-win solution atau keadaan yang menguntungkan untuk para pihak, namun dalam kasus ini metode penyelesaian sengketa non-litigasi tidak berhasil membawa perdamaian atau win-win solution.

Kata Kunci: Sengketa bisnis, Penyelesaian non-litigasi, Alternative dispute resolution, Kredit pemilikan rumah syariah.

Introduction

Based on the 2015-2019 Government Development Plans of Indonesia set at 172,650 houses in 2015, now it is adjusted to 1 million housing units each year, with details of 603,516 houses for Low-Income Communities (MBR) and 396,484 houses for Middle-Upper Communities (Non-MBR).¹ The scheme used for the Housing Development Program for low-income people is the Housing Financing Liquidity Facility Scheme (FLPP), which is in the form of down payment assistance or subsidies for public mortgage.² In 2016 to 2020, ²⁷ the Central Bureau of Statistics (BPS) reported that during the past 5 years, nationally there have been fluctuating changes in the indicators of ownership houses. While in 2016 to 2020 mortgage increased to 0.79, this is can be a great opportunity for any product development of Islamic banks. Homeownership indicators, especially in the field of sharia, relate to the growth ¹² in the number of Islamic banking institutions operating in Indonesia.³

The mortgage is a credit facility provided by banks to individual customers who are going to buy or repair houses.⁴ A Mortgage is a form of credit facility provided by banks to the public or customers who wish to buy a new or used house and the payment is made in installments.⁵ Mortgages are a type of consumptive loan, namely loans that are used to finance goods and services aimed to making it easier for people to build houses, renovate, buy or expand land with payments that can be paid in installments every month.⁶

In the scheme of financing, Mortgage is divided into two 1) Mortgage subsidies are credits allocated to Low-income Communities. 2) Mortgage Non-subsidy or Commercial are mortgages that are intended for the entire community.⁷

¹ Pembangunan Perumahan, ²² Biro Analisa Anggaran dan Pelaksanaan APBN-SETJEN DPR-RI., 1

² *Ibid.* 2

³ Badan Pusat Statistik, "indicator perumahan", [Badan Pusat Statistik \(bps.go.id\)](http://Badan Pusat Statistik (bps.go.id)), downloaded at February 3, 2021. 18.01 WIB.

⁴ Sari, "Analisis Perbandingan Perhitungan pembiayaan Kepemilikan Rumah Di Bank Konvensional Dan Syariah (Studi Kasus Pada Bank Mandiri Dan Bri Syari'ah)," 86.

⁵ Muhtarom, "Implementasi Akad Murabahah Pada Produk Pembiayaan Kredit Pemilikan Rumah (KPR) Di Bank Syariah Mandiri KC Bojonegoro Menurut Hukum Ekonomi Syariah," 2-3.

⁶ Islami, "Analisis Pemberian Kredit Pemilikan Rumah (KPR) Untuk Mengurangi NPL (Studi Kasus BTN Cabang Bogor)," 1.

⁷ Hudyati et al., "Kajian Perlindungan Konsumen Sektor Jasa Keuangan : Kredit Pemilikan Rumah (KPR)," 9.

Than for avoid the receipt and payment of interest (*riba*), the Islamic banking to resort to providing some product of financing (*financing*).⁸ The increasing demand and need for residential housing makes the mortgage facility a soaring business opportunity.⁹ Because of several parties, the problems of mortgage related to the property industry and banking institutions during the last 3 years have always been recorded as the highest dispute.¹⁰

During 2019, in the Indonesian Consumers Foundation recorded a 81 cases or 14.4% of which were complaints related to the housing sector. From the housing property sector, 26.1% include construction, 23.8% *refunds*, 9.5% documents, 9.5% building specifications and 5.9% transaction systems. Meanwhile, the National Consumer Protection Agency stated that from January to March 2019, 154 complaints were received and it was estimated that this would continue to increase.¹¹

The chairman of the Ombudsman Institution Yogyakarta, Suryawan Raharjo said that total public complaints reached 459 cases in 2019. This case is dominated by the property sector which is focused on the subsidized housing program, the complaint in this case is 68.3%, with the number of complaints in the property sector as many as 149 complaints.¹² Many case complaints indicate a large number of disputes. In this case, it is very possible to have a dispute.¹³ The occurrence of disputes is due to several reasons.¹⁴ Generally, disputes occur due to fraud or broken promises, the contents of the agreement or agreement.¹⁵

This occurs due to actions that the agreements made, the existence of default on an agreement, unfair competition, betrayal,

⁸ Arifin, *Dasar-Dasar Manajemen Bank Syariah*, 217.

⁹ <https://responsibank.id/banks/studi-kasus/kpr-dan-konsumen/> accessed, Sunday, 5 July 2020 at 20.56 WIB

¹⁰ <https://ekonomi.bisnis.com/read/20200204/47/1197166/ykki-pengaduan-konsumen-properti-pada-2019-masuk-tiga-besar> accessed, Sunday 5 July 2020 at 21.02 WIB

¹¹ <https://www.cnbcindonesia.com/news/20190408134507-4-65182/kuartal-i-2019-konsumen-paling-banyak-keluhkan-perumahan> accessed, Sunday, 5 July 2020 at 22.38 WIB

¹² <https://jogjapolitan.harianjogja.com/read/2020/01/06/510/1028708/ditipu-pengembang-perumahan-kasus-properti-paling-banyak-diadukan-warga-ke-ombudsman-diy-> accessed, tuesday, 7 July 2020 pukul 09.07 WIB

¹³ Lathif and Habibaty, "Disparatis Penyelesaian Sengketa Jalur Litigasi Pada Polis Asuransi Syariah Dan Putusan Pengadilan," 77.

¹⁴ Kapindha, M, and Febrina, "Efektivitas Dan Efisiensi Alternative Dispute Resolution (ADR) Sebagai Salah Satu Penyelesaian Sengketa Bisnis Di Indonesia," 2.

¹⁵ Hervina, "Kewenangan Penyelesaian Sengketa Ekonomi Syariah Pada Perbankan Syariah Di Samarinda," 266.

fraud, forgery, different interpretations of the rule of law and so on.¹⁶ The dispute settlement institutions is consist¹⁶ of two, namely litigation dispute resolution institutions and non-litigation dispute resolution institutions.¹⁷ Meanwhile, non-litigation dispute resolution has alternative options, divided into 2 (two), namely Arbitration and Alternative Dispute Resolution.¹⁸

In this discussion, the Ombudsman Institution Yogyakarta can become a facilitator between business actors and consumers in the event of gaps in order. This authority was strengthened by the issuance of the Yogyakarta Governor's Regulation No. 69/2014, concerning the Organization and Governance of the DIY LO, the Private Ombudsman Institution and the Regional Ombudsman Institution merged into one starting from the 2015-2018 membership period.¹⁹

The ombudsman institution receives approximately 200 consultations and complaints a year. Detailed data of complaints for the period 2019 resulted in 106 final products. Whereas in 2020 the details of the consultation and complaints that were submitted 24 cases of complaints and 247 consultations, in 2020 it's counted 165 final products.²⁰ That indicates a non-litigation dispute resolution institution that is trusted by the public.

The Ombudsman Institutions Yogyakarta as a mediator and a facilitator for the peace of the disputing parties. That by the Islamic law prespective, the mediation step is very influential because it is an important part of resolving disputes. The resolution of the non-litigation model is considered to be more able to coordinate the weaknesses of the litigation model as producing a win-win solution agreement and obtaining social justice. From the discussion and explanation of the matters above, the author feels and need to examine further and in depth the matters on Islamic mortgage. Thus it is needed to study, research and analyze problems regarding "*Analysis of Alternative Dispute Resolution in non-litigation dispute resolution on Islamic Mortgage: at the Ombudsman Institution Yogyakarta.*"

¹⁶ Cahyadi, "Penyelesaian Sengketa Perbankan Syariah," 18.

¹⁷ Mukarromah and Wage, "Penyelesaian Sengketa Ekonomi Syari'ah Di Lembaga Keuangan Syari'ah Kabupaten Banyumas," 71.

¹⁸ Muthia Sakti and Yuliana Yuli Wahyuningsih, "Tanggung Jawab Badan Arbitrase Syariah Nasional (Basyarnas) Dalam Penyelesaian Sengketa Perbankan Syariah," *Jurnal Yuridis* 4, no. 1 (2017): 78.

¹⁹ Brosur Lembaga Ombudsman Daerah Istimewa Yogyakarta, *Mitra Masyarakat, Pelaku Usaha dan Masyarakat*. Hlm. 1

²⁰ <https://ombudsman.jogjaprov.go.id/> diakses Ahad, 12 Juli 2020. Time 22.46 WIB

Methodology

This research uses qualitative methods that are descriptive-analytical in nature. Qualitative research analyzes data using a qualitative approach. The data is not in the form of numbers but verbal words.²¹ Object of research at the Ombudsman Institution Yogyakarta. Source of data will use primary data by interviews (with Mrs. Evi Nur Akhidhah, S. Sos, serving as a case manager and assistant in the field of socialization, cooperation, and network strengthening and Mrs. Yusticia Eka Noor Ida, S.T, is the commissioner and vice chairman of Research, Development, and Institutional Relations) discussion, and observation unstructure and secondary data which is a collection of journals, laws and regulations, books, papers, websites, and others. The data collection tools used study of document²², Interview²³ and observation. The data analysis technique used Deductive Method using theorization generally ends with discussions of the theory which are accepted, doubted and criticized, revised or denied, even supported and strengthened²⁴ and the Descriptive Method have been obtained from interviews and document collection are processed properly and with deep thought so that they can be narrated in written form properly and perfectly.²⁵

Literature Review

Mardani discussed the settlement of sharia business disputes using the Alternative Dispute Resolution method. The results of his research stated that the dispute resolution method was chosen by the disputing parties for several reasons, including volunteerism in the process, fast procedures, confidentiality, saving time, cost-saving, non-judicial decisions, flexibility in designing provisions, dispute resolution, win-win solution, maintain good relations between disputing parties.²⁶

Another research from Erie Hariyanto discussed the resolution of Indonesian sharia economic disputes, which states that disputes or

²¹ Suteki and Taufani, *Metodologi Penelitian Hukum : (Filsafat, Teori Dan Praktik)*, 139.

²² Mulyana, *Metodologi Penelitian Kualitatif*, 241.

²⁶ Widi Winarni, *Teori Dan Praktik Penelitian Kuantitatif Kualitatif*, 164.

²⁴ Bungin, *Penelitian Kualitatif*, 27.

²⁵ Bungin, 136.

²⁶ Mardani, "Penyelesaian Sengketa Bisnis Syariah," *Mimbar Hukum* 22, no. 2 (2010): 299, <https://doi.org/10.31219/osf.io/m98vd>.

⁶ Differences of opinion in the Islamic civil sector can be resolved by the parties through Alternative Dispute Resolution based on good faith by ruling out litigation resolution. The results from the research state sharia economic dispute resolution is directed at the non-litigation path either through Deliberation-Consensus or Alternative Dispute Resolution.²⁷

Hervina's research discusses about the authority for sharia economic dispute resolution in Islamic banking. The results from the research state that dispute resolution using arbitration or mediation, she also states that non-litigation resolution using the mediation method is in demand because dispute resolution through mediation is straightforward, fast, settlement is amicable, and confidentiality is more guaranteed.²⁸

Parman Komarudin also discussed the settlement of sharia economic disputes through non-litigation channels. The results of his research in resolving the disputes it faces, Islamic banking are more likely to choose mediation institutions. This is because mediation is more efficient, both in terms of time and cost, and is more confidential so that the public's credibility is maintained, because in the business world, "trust" is one of "goodwill" or a sufficiently calculated asset.²⁹

Muaidi discussed Dispute Resolution in Sharia Economic Law. The result states that alternative dispute resolution is one of the methods of settlement. The solution to sharia economic problems in Indonesian positive law also adopts the Sulh method ³¹ which is popularly known as the Alternative Dispute Resolution (ADR). ⁷ Peace has been supported by its existence in positive law, Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. Apart from "sulh", dispute resolution also uses Arbitration. Usually, in a business contract, it has been agreed in a contract that is made to resolve disputes that occur in the future between them.³⁰

Sulistyowati discusses the resolution of disputes between Sharia Banks and problem customers through the National Arbitration Board

²⁷ Erie Hariyanto, "Penyelesaian Sengketa Ekonomi Syariah Di Indonesia," *Iqtishadiah: Jurnal Ekonomi & Perbankan Syariah*, 2014, 57, <https://doi.org/10.19105/iqtishadiah.v1i1.365>.

²⁸ Hervina, "Kewenangan Penyelesaian Sengketa Ekonomi Syariah Pada Perbankan Syariah Di Samarinda," 274.

²⁹ Parman Komarudin, "Penyelesaian Sengketa Ekonomi Syariah Melalui Jalur Non Litigasi," *Jurnal Ekonomi Syariah Dan Hukum Ekonomi Syariah* 1, no. 1 (2014): 87-103. <https://ojs.uniska-bjm.ac.id/index.php/IQT/article/view/138>.

³⁰ Muaidi, "Penyelesaian Sengketa Dalam Hukum Ekonomi Syariah," *AFAQQUH: Jurnal Hukum Ekonomi Syariah Dan Ahwal as Syakhsiyah* 2, no. 2 (2017): 22.

according to Law of Republic of Indonesia No.30 of 1999. The results of her research revealed that in practice the National Arbitration Board has proven in resolving cases filed and has decided cases that meet the parties' sense of justice. So, there is no need for appeal, cessation, and reconsideration.³¹

From several previous studies as a whole discusses non-litigation dispute resolution in the sharia aspect using alternative dispute resolution methods but have not yet discussed the application of alternative methods of dispute resolution in Islamic mortgage at the ombudsman institution Yogyakarta. Several previous studies have discussed sharia business disputes, but have not discussed in dispute resolution, especially Islamic mortgage disputes at the Ombudsman Institution Yogyakarta which incidentally is not a sharia resolution institution. This research wants to complement the previous research by analyzing alternative dispute resolution in the settlement of sharia mortgage disputes in non-litigation institutions, namely the Ombudsman Institution Yogyakarta.

Definition of Business Dispute

Good economic growth can improve the performance of cooperation between various parties which also leads to an increase in the potential for disputes that occur between the parties. This will continue to develop when the party who feels aggrieved has expressed dissatisfaction.³² The main factor in the occurrence of disputes is the failure to fulfill the contract agreed upon or the non-compliance with the agreed principles.³³ If the existing disputes are not resolved quickly and effectively, it will become a separate obstacle for operational sustainability.³⁴

A dispute is a conflict that occurs between two or more parties relating to rights of value, money or goods.³⁵ The dispute is

³¹ Sulistyowati, "Penyelesaian Sengketa Antara Bank Syariah Dengan Nasabah Bermasalah Melalui Badan Arbitrase Shari'ah Nasional (BASARNAS) Menurut UU No.30 Tahun 1999," *ISLAMICA* 9, no. September 2014 (2014): 193–222.

³² Idik Saeful Bahri, "Efisiensi Jalur Mediasi Dalam Penyelesaian Sengketa Bisnis Di Indonesia," no. February (2020): 7.

³³ Hasanuddin Muhammad, "Implementasi Penyelesaian Sengketa Perbankan Syariah Di Pengadilan Agama" (Universitas Islam Indonesia, 2015), 40.

³⁴ Abdul Hamid, "Aplikasi Teori Mashlahah (Maslahat) Najm Al-Din Al-Thufi Dalam Penyelesaian Sengketa Perjanjian Bisnis Di Bank Syariah," *AL-'ADALAH* 12, no. 4 (2015): 739.

³⁵ Amran Suadi, *Penyelesaian Sengketa Ekonomi Syariah; Teori Dan Praktik*, 2nd ed. (Depok: Kencana, 2017), 30.

a continuation of the conflict, which has surfaced; there is already action and reaction; the parties can be identified. In business, conflicts between parties are involved in various kinds of business activities such as trading³⁶ banking, investment, corporate and industrial which arises and develops into a dispute is called a business dispute. Business activities¹³ in the financial services sector are one example of business activities, if there is a difference of opinion between consumers and financial service institutions until a dispute occurs, it can also be categorized as a business dispute.³⁷

In general, disputes cannot be avoided in all activities, especially financial and commercial transactions for various reasons,³⁸ especially because of a conflict of interest between the parties,³⁹ Such as fraud or broken promises by the parties or one of the parties promised not to do what was promised or agreed to do,³ the parties or one of the parties have carried out what was agreed upon but not exactly as agreed but it was too late, and the parties or one of the parties do something that according to the agreement can not do so that these actions cause a dispute.

Alternative Dispute Resolution

Alternative Dispute Resolution is¹⁹ the settlement of problems outside the court channels, generally using different methods from dispute resolution through courts.⁴⁰ The processes are often differentiated from one another based on the degree of control that a neutral third party has over the process, substance, and formality of the trial.⁴¹ Alternative Dispute Resolution is needed because court

³⁶ Kapindha, M, and Febrina, "Efektivitas Dan Efisiensi Alternative Dispute Resolution (ADR) Sebagai Salah Satu Penyelesaian Sengketa Bisnis Di Indonesia," 2.

³⁷ Bustanul Arifien Rusydi, "Perlindungan Konsumen Sektor Jasa Keuangan Melalui Lembaga Alternatif Penyelesaian Sengketa" (Universitas Islam Indonesia, 2015), 54.

³⁸ Umar, A. Oseni, "Dispute Resolution in the Islamic Finance Industry in Nigeria," *European Journal of Law and Economics* 40, no. 3 (2015): 546, <https://doi.org/10.1007/s10657-012-9371-y>.

³⁹ Kapindha, M, and Febrina, "Efektivitas Dan Efisiensi Alternative Dispute Resolution (ADR) Sebagai Salah Satu Penyelesaian Sengketa Bisnis Di Indonesia," 2; Rusydi, "Perlindungan Konsumen Sektor Jasa Keuangan Melalui Lembaga Alternatif Penyelesaian Sengketa," 5.

⁴⁰ Idris Talib, "Bentuk Putusan Penyelesaian Sengketa Berdasarkan Mediasi," *Lex et Societatis* I, no. 1 (2013): 19.

⁴¹ Carrie J. Menkel-Meadow, "Mediation, Arbitration, and Alternative Dispute Resolution (ADR)," *International Encyclopedia of the Social & Behavioral Sciences: Second Edition*, Elsevier Ltd. (Irvine, CA, USA: UC Irvine School of Law Research Paper, 2015), 2.

processes as the main means of dispute resolution are expensive and irrational. Litigation costs are very large in terms of both direct and indirect costs.⁴²

In principle, Alternative Dispute Resolution aims to create an efficient, long-term, win-win solution,⁴³ reduce the existence of disputes for the disputing parties. Whatever be the case, Alternative Dispute Resolution is an alternative to formal court litigation. When disputes are channeled through the formal court system, the parties tend to be farther from each other after the judgment because the judgment of the court leads to a win-lose situation where one of the parties gloat while the other party wallow in anguish.⁴⁴ Non-litigation dispute resolution is an attempt to bargain for a mutually beneficial ending. Dispute resolution through Alternative Dispute Resolution has gained legitimacy in the laws and regulations through Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution.⁴⁵ Settlement of disputes through peace mechanisms or Alternative Dispute Resolution and Arbitration.

The form of settlement out of court through this Alternative Dispute Resolution institution can be done by way of consultation, negotiation, mediation, conciliation, or expert judgment.⁴⁶ Although certain methods of alternative dispute resolution differ from one another, they share the feature that a third party is involved in offering opinions or communicating information about the dispute to the disputing parties,⁴⁷ and although conflicts and disputes are universal, people's perceptions of the phenomena and preferences of the best way to handle them differ from one socio-cultural context to another, and commercial disputes are no exception.⁴⁸

⁴² David H. Sloan and B. Sonny Bal, "Medical Malpractice Reform: The Role of Alternative Dispute Resolution," *Clinical Orthopaedics and Related Research* 470, no. 5 (2012): 1371,

⁴³ R. Lestari, "Perbandingan Hukum Penyelesaian Sengketa Secara Mediasi Di Pengadilan Dan Di Luar Pengadilan Di Indonesia," *Jurnal Ilmu Hukum Riau* 3, no. 2 (2013): 218.

⁴⁴ Umar A Oseni and Alim Umar Faruq Ahmad, "Dispute Resolution in Islamic Finance: A Case Analysis of Malaysia," *14th International Conference on Islamic Economics and Finance DISPUTE, 2011*, 2.

⁴⁵ Eko Priadi, "Kedudukan Hukum Advokat Pada Penyelesaian Sengketa Ekonomi Syariah Secara Nonlitigasi Dalam Sistem Peraturan Perundang-Undangan Di Indonesia," *Jurnal Hukum*, 2015, 2.

⁴⁶ Sidiartama, Setyowati, and Muhyidin, "Choice of Forum Penyelesaian Sengketa Dalam Klausula Akad Perbankan Syariah," Priadi, *Penyelesaian Sengketa Ekonomi Syariah; Teori Dan Praktik*.

⁴⁷ Steven Savell, "Alternative Dispute Resolution: An Economic Analysis," *The Journal of Legal Studies* 24, no. 1 (1995): 1.

⁴⁸ Haytham Besaiso, Peter Fenn, and Margaret Emsley, "Alternative Dispute Resolution

The disputing parties choose alternative dispute resolution for several reasons, including; volunteerism in the process, fast, confidential procedures, time-saving, cost-effective, non-judicial decisions, flexibility in designing the terms of dispute resolution, win-win solutions, maintaining good relations between the disputing parties. This process has proven effective in avoiding the burdens of litigation.⁴⁹ However, this method is only used to resolve disputes in the civil sector⁵⁰:

1. Consultation

There are no legal rules that give the meaning or meaning of consultation, also in Law Number 30 of 1999 concerning arbitration and alternative dispute resolution, it does not provide detailed definitions and procedures for the implementation of consultations. In the Black Law Dictionary the meaning of the word Consultation is "...a conference between the counsels engaged in a case, to discuss its questions or arrange the method of conducting it..."⁵¹. Settlement of disputes through conciliation is personal between the party called the client and the conciliation institution called the consultant.⁵² The consultant's role in resolving existing disputes or disputes is not at all dominant, consultants only provide legal opinions⁵³ if this method provides a peace agreement, then the consultant can assist the parties to formulate and make a peace agreement in writing signed by both parties.

2. Negotiation

In carrying out daily life, everyone actually has made negotiations, such as between the seller and the buyer. Negotiation is the basic of means of getting what the other person wants.⁵⁴ A

in Palestine: The Myth and Dilemma of Construction Mediation, *International Journal of Law in the Built Environment* 8, no. 3 (2016): 273.

⁴⁹ Umar A., Oseni Sodiq O., and Moola, "Prospects of an Online Dispute Resolution Framework for Islamic Banks in Malaysia : An Empirical Legal Analysis," *Journal of Financial Regulation and Compliance* 25, no. 1 (2017): 3.

⁵⁰ I Gede Tor Kaesar Nero, Siti Hamidah Amir, and I Gusti Ayu Puspawati, "Wanprestasi Dan Penyelesaiannya Dalam Perjanjian Kredit Pemilikan Rumah (KPR) Pada Bank BTN Cabang Singaraja Bali," *Kumpulan Jurnal Mahasiswa Fakultas Hukum* 1, no. 1 (2014): 11.

⁵¹ <https://thelawdictionary.org/consultation/>

⁵² Amran Suadi, *Penyelesaian Sengketa Ekonomi Syariah (Teori Dan Praktik)* (Depok: PT Balebat Dedikasi Prima, 2017), 20.

⁵³ Muchamad Taufiq, *Aspek Hukum Dalam Ekonomi*, 1st ed. (Malang: Tim MNC Publishing, 2017), 37.

⁵⁴ Dyah Probondari, "Analisis Penyelesaian Sengketa Perbankan Melalui Lembaga Mediasi Di Indonesia (Studi Kasus Bank X Dengan PT Y Dan Bank ABC Dengan Nasabah Z)" (Universitas Indonesia, 2012), 15.

survey on dispute resolution methods reported that more than 70% of disputes are resolved through negotiation.⁵⁵ Negotiation is a way to seek dispute resolution through direct discussion between the disputing parties whose results are accepted by the parties.

3. Mediation

Mediation outside the court is a process of peaceful dispute resolution that is commonly used by the community on a daily basis, mediated by third parties, namely traditional leaders, religious leaders, or other community leaders.⁵⁶ The final result of this mediation method is not determined by the mediator because the mediator does not have the authority to decide or enforce a settlement, because the form of mediation is entirely the desire of the disputing parties. Whereas in Islam it also has a mediation method called *Al-Sulh*. The requirements in *As-Sulh* are that on the subject side or the disputing parties must understand the law and have the authority, on the object side it must be tangible, valuable and useful, on the problem side only in the field of *muamalah*. Sulh is usually conducted in an informal manner, but can be facilitated by an institution. Sulh is also a traditional method of reconciliation in Islam and is mentioned in several verses of the Quran.⁵⁷

4. The main task of the arbitrator is to examine and deliver an arbitration award within a predetermined period of time (maximum 180 days from the time of appointment or appointment), to be proven independent in carrying out its duties in order to achieve a fair and speedy decision for parties with different opinions, disagreements or those who dispute.⁵⁸

Whereas in Islam the arbitration method is known as *Tahkim*. *Tahkim* is the appointment of one or more persons as a referee or peacemaker by the disputing parties, in order to settle the

⁵⁵ Thomas Haugen and Amarjit Singh, "Dispute Resolution Strategy Selection," *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction*, 2015, 3.

⁵⁶ Bachro and Fariana, *Model Alternatif Mediasi Syariah Dalam Penyelesaian Sengketa Perbankan Syariah*, 47.

⁵⁷ Jonathan Lawrence, Peter Morton, and Hussain Khan, "Dispute Resolution in Islamic Finance," in *Global Islamic Finance*, vol. 53, 2012, 7.

⁵⁸ Sulistyowati, "Penyelesaian Sengketa Antara Bank Syariah Dengan Nasabah Bermasalah Melalui Badan Arbitrase Shari'ah Nasional (BASYARNAS) Menurut UU No.30 Tahun 1999," 205.

case they are disputing about peacefully.⁵⁹ It is also stated that Tahkim is an agreement between the disputing parties to appoint someone who has the ability to resolve their disputes, which is commonly called hakam or muhakkam. There are several advantages to using arbitration, namely finality, confidentiality, speed, cost, and flexibility.⁶⁰ This makes the arbitration process more attractive as a reasonable dispute resolution mechanism for Islamic financial transactions as it allows parties to selectively incorporate Sharia principles into governing clauses.

Discussion

The Ombudsman is an independent agency or officer in charge of accommodating complaints from the public regarding improper behavior of civil servants, such as abuse of authority, delays in completing tasks in the field of work, also regarding issues in consumer protection, civil rights, taxation, the environment, prisons and others. The Ombudsman is neither a judicial institution nor an administrative out court process (*administratief quasi rechtspraak*), because the results of the Ombudsman's examination are in the form of recommendations.⁶¹

The Ombudsman Institution Yogyakarta is based on *Pancasila* (The Indonesian State Ideology), and has principles on the following; Independent, Impartial, Justice, Non-discrimination, Equation, Transparency, Accountability. The mission of the Ombudsman Institution Yogyakarta states that the ideals of this institution are, among others:

- a. Serving and resolving public complaints about administrative irregularities in government administration and law enforcement without discrimination.
- b. Cultivate, develop and institutionalize a culture of community service that is honest and fair, open, responsible and anti-KKN (Corruption, Collusion and Nepotism) in government administration and law enforcement.
- c. Helping to create and develop conducive situations and con-

⁵⁹ Reny Hidayati, "Eksistensi Klausul Arbitrase Dalam Penentuan Penyelesaian Sengketa Syariah," *Azahib: Jurnal Pemikiran Hukum Islam* 14, no. 2 (2015): 170-71.

⁶⁰ Maida Maita, "Arbitration of Islamic Financial Disputes," *Annual Survey of International & Comparative Law* 20, no. 1 (2014): 52-53.

⁶¹ Radjab, "Kekuatan Mengikat Putusan Ajudikasi Ombudsman Dalam Proses Penyelesaian Sengketa Pelayanan Publik," 451.

ditions for the implementation of good and clean government, and free from KKN (Corruption, Collusion and Nepotism).

- d. Prioritizing services that are more sensitive to the demands and needs of the community, by providing optimal services and fostering good coordination and cooperation with all parties (government institutions, universities, non-governmental organizations, experts, practitioners, professional organizations, etc.)

Every dispute that exists always has a cause that gives rise to a dispute, this is not easy to avoid, especially in financial and commercial transactions.⁶² One of the causes of dispute is default⁶³ or the non-fulfillment of the contract agreement made by both parties.⁶⁴ Related to this case, the default occurred because the developer did not carry out the construction of the house according to the contract that was agreed upon and there was falsification of information provided to consumers or the reported party,⁶⁵ So that consumer complaints about this matter to the Ombudsman Yogyakarta to be investigated and resolved.

From 150 reporting parties, there are only 6 reporting parties whose contracts have been received by the Islamic bank in collaboration with the developer as the reported party, all of whom use the *Murābahah* contract, while the others are waiting for certainty of receipt of the financing contract from the Islamic bank. The application of *Murābahah* in Islamic financial institutions is when a customer in Islamic banking applies for the purchase of an item,⁶⁶ a bank that provides funds in order to provide goods related to *Murābahah* transactions with customers as the buyer of the goods.⁶⁷ Islamic mortgage with a *Murābahah* (sale and purchase) contract, the implementation system is carried out in various ways, namely in the form of cash after receiving the goods, it can also be deferred with installments (installments) after the process

⁶² Oseni, "Dispute Resolution in the Islamic Finance Industry in Nigeria," 547.

⁶³ Maulidizen, "Penyelesaian Wanprestasi Dalam Kredit Kepemilikan Rumah (KPR) Dengan Akad Murābahah Studi Kasus Di Bank Tabungan Negara Syariah Surabaya," 58.

⁶⁴ Sari and Hasnita, *Penyelesaian Sengketa Perbankan Syariah Melalui Lembaga Arbitrase*, 27.

⁶⁵ Interview with Ms. Yusticia Eka Noor Ida, S.T, is the commissioner and vice chairman of Research, Development, and Institutional Relations, Ombudsman Institution Yogyakarta.

⁶⁶ Maulidizen, "Penyelesaian Wanprestasi Dalam Kredit Kepemilikan Rumah (KPR) Dengan Akad Murābahah Studi Kasus Di Bank Tabungan Negara Syariah Surabaya," 61.

⁶⁷ Bank Indonesia, *Liabilitas Dan Modal Liabilitas Dan Modal*, 7.

of receiving the goods.⁶⁸

The Financial Services Authority of Indonesia says the *Murābahah* contract is structured in such a way that the provider buys the house on behalf of the customer based on the agreement that the customer will buy the house back from the provider at a price that includes a pre-arranged profit premium above the original cost of the house. The customer then pays this mark-up price in installments during the financing term.⁶⁹

However, the implementation of the Islamic mortgage financing contract is not in accordance with the existing mechanisms and procedures. Before entering into a financing contract with the bank, the reporting party has entered into an agreement with the developer and provided a number of funds for down payment.⁷⁰ Then, the party requesting financing is from the developer, not from the reporting party as consumers or customers of Islamic banks. This is one of the reasons housing construction does not run smoothly, because Islamic banks do not immediately trust the attitude of the developer and there has been an agreement before the contract with the bank.

This Islamic mortgage is one of the toughest disputes to be resolved. This dispute involves many parties, is related to a lot of funds and a long time. So it is said to be a quite complicated dispute because the dispute resolution process requires a lot of time, effort and thought. After seeing the efforts and also the process of settling disputes over Islamic Mortgage disputes, almost all of them apply the Alternative Dispute Resolution method.

Alternative Dispute Resolution Methods generally use a different method from the method of dispute resolution in court,⁷¹ as stated in the law of republic Indonesia number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution⁷² namely through

⁶⁸ Andriani, "Implementasi Akad Murabahah Dan Musyarakah Mutanaqishah Dalam Pembiayaan Pemilikan Rumah Pada Perbankan Syariah," 98.

⁶⁹ Otoritas Jasa Keuangan, *Standar Produk Perbankan Syariah Murabahah*, 7.

⁷⁰ Interview with Mrs. Evi Nur Akhidhah, S. Sos, serving as a case manager and assistant in the field of socialization, cooperation, and network strengthening, Ombudsman Institution Yogyakarta.

⁷¹ Talib, "Bentuk Putusan Penyelesaian Sengketa Berdasarkan Mediasi," 20.

⁷² Undang-Undang Nomor 30 Tahun 1999 Tentang Arbitrase dan Alternatif Penyelesaian Sengketa.

consultation,⁷³ negotiation,⁷⁴ mediation,⁷⁵ conciliation,⁷⁶ and expert judgment.⁷⁷ It begins with a complaint report which is also a media for consultation with the reporting parties with the implementing agency for non-litigation dispute resolution. Consultation, namely the existence of personal talks between the two parties,⁷⁸ The consultation method carried out at the Yogyakarta ombudsman institution, does not consider the term consultant or facilitator because all case resolution activities are carried out by the commissioner and assistant of the the ombudsman institution yogyakarta,⁷⁹ however, in accordance with the role of a consultant to provide a legal opinion,⁸⁰ the ombudsman institution also plays a role the same one.

Consultation and receipt of reports at the Yogyakarta ombudsman institution can be carried out by various media such as telephone or via email but in complicated cases, the reporting parties are advised to come directly to the ombudsman institution Yogyakarta office.⁸¹ Follow-up of consultations and receipt of reports on case resolution was carried out by listening to the Reporting Party's chronology and continued with clarifying the Reported Party. From the chronology and clarification of the two parties, a follow-up was developed by coordinating with the relevant agencies, namely the Sharia Bank.

Alternative non-litigation dispute resolution that promotes mutually beneficial results⁸² for the parties, it is necessary to clarify and coordinate with the parties prior to the holding of mediation. Mediation

⁷³ Taufiq, *Aspek Hukum Dalam Ekonomi*, 37–38.

⁷⁴ Soemartono, "Cara Penyelesaian Sengketa Dan Alternatif Penyelesaian Sengketa," 18.

⁷⁵ Bachro and Fariana, *Model Alternatif Mediasi Syariah Dalam Penyelesaian Sengketa Perbankan Syariah*, 48.

⁷⁶ Kapindha, M, and Febrina, "Efektivitas Dan Efisiensi Alternative Dispute Resolution (ADR) Sebagai Salah Satu Penyelesaian Sengketa Bisnis Di Indonesia," 9.

⁷⁷ Arman Komarudin, "Penyelesaian Sengketa Ekonomi Syariah Melalui Jalur Non Litigasi," *Jurnal Ekonomi Syariah Dan Hukum Ekonomi Syariah* 1, no. 1 (2014): 104.
⁷⁸ Amran Suadi, *Penyelesaian Sengketa Ekonomi Syariah (Teori Dan Praktik)* (Depok: PT Balebat Dedikasi Prima, 2017), 21–22

⁷⁹ Interview with Ms. Yusticia Eka Noor Ida, S.T, is the commissioner and vice chairman of Research, Development, and Institutional Relations, Ombudsman Institution Yogyakarta.

⁸⁰ Taufiq, *Aspek Hukum Dalam Ekonomi*, 38.

⁸¹ Interview with Ms. Yusticia Eka Noor Ida, S.T, is the commissioner and vice chairman of Research, Development, and Institutional Relations, Ombudsman Institution Yogyakarta.

⁸² Lestari, "Perbandingan Hukum Penyelesaian Sengketa Secara Mediasi Di Pengadilan Dan Di Luar Pengadilan Di Indonesia," 219.

is a process that seeks to facilitate the parties to communicate with each other,⁸³ So in every mediation carried out in this case, it really invited both parties, the reported party and the reporting parties to carry out the mediation, although not always in every first, second or third mediation, ethics was always carried out by the reported party, because at the beginning of the efforts dispute in this case, the reported party is difficult to contact or meet.⁸⁴ The form of mediation is fully in accordance with the wishes of the disputing parties.⁸⁵ However, for mediation in the ombudsman institution Yogyakarta, there is a mandatory code of conduct with the aim of keeping the atmosphere conducive and the deliberation process in line with expectations, this too must be approved by the parties.⁸⁶

²⁸ On the other hand, alternative non-litigation dispute resolution has an expert assessment method, namely the form of opinions from several experts that are understood and accepted by the parties.⁸⁷ The expert assessment at The Ombudsman Institution Yogyakarta is quite unique because it was carried out at the time of the case title which was part of the follow-up report. The case title, in this case, invited various parties who were more or less involved in its implementation, not only the reported party and the reporting parties but also almost all stakeholders and subsidized housing shareholders were invited to the case title at that time.⁸⁸

Each problem has a different strategy. So the efforts are different. Especially for this case, almost all the patterns in the Alternative Dispute Resolution were applied. For a consultation, it is used at the beginning of the complaint. In accordance with the standard of business ethics, if it falls under the authority of the ombudsman, it will become a complaint. Then clarification was carried out besides that there was also conciliation. Then the expert opinion, in this case by

⁸³ Markom and Yaakub, "Litigation as Dispute Resolution Mechanism in Islamic Finance: Malaysian Experience," 568.

⁸⁴ Interview with Mrs. Evi Nur Akhidhah, S. Sos, serving as a case manager and assistant in the field of socialization, cooperation, and network strengthening, Ombudsman Institution Yogyakarta.

⁸⁵ Bachro and Fariana, *Model Alternatif Mediasi Syariah Dalam Penyelesaian Sengketa Perbankan Syariah*, 58.

⁸⁶ *Pedoman Tata Kelola Usaha Beretika Lembaga Ombudsman Yogyakarta*, 54.

⁸⁷ Talib, "Bentuk Putusan Penyelesaian Sengketa Berdasarkan Mediasi," 24.

⁸⁸ Interview with Mrs. Evi Nur Akhidhah, S. Sos, serving as a case manager and assistant in the field of socialization, cooperation, and network strengthening, Ombudsman Institution Yogyakarta.

holding a case title, then mediation up to 3 times. However, arbitration is not included in the pattern of handling this case.⁸⁹

In addition to the arbitration method, such as the law of republic Indonesia Number 3 of 1999 concerning Arbitration and Alternative Dispute Resolution:⁹⁰ "An arbitration agreement is an agreement in the form of an arbitration clause that arises in a written agreement made by the parties before the dispute or an arbitration agreement made by the parties after the dispute arises." The Ombudsman institution Yogyakarta, especially in this case, did not use the arbitration method as a non-litigation deliberate settlement,⁹¹ On the other hand, because the disputing parties did not succeed in the arbitration clause in a written agreement.

Conclusion

In terms of dispute resolution methods, the performance and efforts made are considered very good because they have carried out warm coordination with stakeholders and parties such as the consumer (the reporting party), the Islamic bank and the developer (the reported party), on the other hand they have also facilitated the complainant to disclose the request for his rights to the reported party. Although the Yogyakarta ombudsman has its own rules, namely following the Yogyakarta local government regulations, indirectly this case is also handled using alternative dispute resolution methods, consultation, mediation and expert opinion.

The Yogyakarta ombudsman institution is quite good at following up disputes on sharia home mortgage products by conducting consultations, clarifications, coordination, case titles, policy briefs to mediation which took place 3 times. However, in reality, the efforts made by non-litigation dispute resolution institutions are not always successful, this also proves that not all cases resolved by alternative dispute resolution methods will end in amicable or win-win solutions.

⁸⁹ Interview with Mrs. Evi Nur Akhidhah, S. Sos, serving as a case manager and assistant in the field of socialization, cooperation, and network strengthening, Ombudsman Institution Yogyakarta

⁹⁰ Undang-Undang Nomor 30 Tahun 1999 Tentang Arbitrase dan Alternatif Penyelesaian Sengketa.

⁹¹ Interview with Mrs. Evi Nur Akhidhah, S. Sos, serving as a case manager and assistant in the field of socialization, cooperation, and network strengthening, Ombudsman Institution Yogyakarta.

For this case of Islamic mortgage, the Yogyakarta ombudsman has tried to reach a plenary session and because no bright spot has been found, the follow-up to the case will be brought to the litigation agency.[]

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