Jurnal Ilmiah PPI-UKM
Scientific Journal of PPI-UKM
Persatuan Pelajar Indonesia
Universiti Kebangsaan Malaysia
Selangor, Malaysia
www.ppiukm.org

Scientific Journal of PPI-UKM

Social Sciences and Economics

Vol. 5 (2018) No. 1
ISSN No. 2356 - 2536

Recovery Process and Its Governing Legal Framework for Islamic Banking in Malaysia and Indonesia: A Comparative Study

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Abstract

This paper works towards recovery process of financing facilities and its governing legal framework for Islamic banking by mean of perspectival comparative of two different countries which are Malaysia and Indonesia. The recovery process under the Islamic banking of both states quite similar to each other. However, their regulatory authority governing the Islamic banking as well as recovery process have some differences specifically concerning foreclosure mechanisms and issue on 'choice-of-forums'. Moreover, whilst litigation process of the recovery in Malaysia and Indonesia are resolved by civil court and religion court respectively, the Shariah Advisory Council (SAC) of BNM shall be chief reference either by the civil court or arbitration in resolving unsettlement of arrears of financing facility but then not for the fatwa of National Shari'ah Board-Indonesia Ulema Council (DSN-MUI) which is neither legally binding before the religion court nor arbitral practice. This paper finds the roots of end-to-end recovery process between Malaysian and Indonesian Islamic Banking system to gain full recognition of the enactment of the recovery.

Keywords: Recovery, Rescheduling, Reconditioning, Restructuring, Foreclosure, Litigation

Received: 12 March 2018; Accepted: 2 June 2018

1. Introduction

The recovery process is one of the crucial elements in Islamic banking (IB) because it mitigates the potential credit risk that may be faced by Islamic banks. To ensure the sustainability of the Islamic banking, execution of recovery process must be efficient and effective. Besides, the fair and justice of this process must be ensured in order to protect the benefits of all parties involved Islamic bank, customer or third party. Other than credit risk, insolvency risk is also a concern that makes recovery process important to be studied and assessed. Increasing amount of provided financing may lead to bigger exposure of insolvency risk when those financing becomes the default and not effectively recovered.

The banking in every country may have different process or approach for financing recovery. Having different legal system and structure as well as regulatory authority that is governing them may be among the reasons that differentiate the process implemented by Islamic banks in any specific country. Assessment of the process implemented and making a comparison between one and another could result in a new perspective for further improvement. This study focuses on the comparison of the recovery process between Malaysian and Indonesian Islamic banking system perspective by referring legal system practiced in both countries[2].The finding of this study may be beneficial to the practitioners and academicians regarding the differences and similarities of end-to-end recovery process between Malaysian and Indonesian Islamic Banking system. Since there are many different characteristics between two systems, therefore both Bank Negara Malaysia (BNM) and *Otoritas Jasa Keuangan* (OJK or Financial Service Authority) as the key regulator in each nation establish and augment multifarious regulations specifically on Islamic treatment of recovery undertaking.

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DOI: 10.27512/sjppi-ukm/ses/a02062018

[2] It is commonly known that both Malaysia and Indonesia had different history of colonialism. The history displays as well that Colonial cringe is shown by the colonization of the British and the Dutch in which later exert influence predominately on the practice of legal system in Malaysia and Indonesia, viz., British Common Law and Dutch Civil Law. See more at *The Legal Islamic System in Malaysia; Pacific Rim Law & Policy* and *Implikasi Pengaruh Politik Hukum Kolonial Belanda Terhadap Badan Peradilan Agama di Indonesia* for the picture of the both states.

2. Regulatory Review

The divine nature of Islamic commercial banking is first and foremost in a way to transfer entrusted fund from shareholders and depositors to customers that have need of financing facility for fulfilling the function of *maslahah* for different stakeholders. The Islamic banking however has supplementary objectives that make it differ from other profit-oriented institutions. As its front-name, IB conveys noble holy grail and nurtures long-term socio-economic goals, not solely to the exclusion of Muslim society but also embracing non-muslim community. In terms of IB proceeding, it is primarily obvious that IB should assist burdensome customer of both group by removing various financial hardship to meet their liabilities. It should bear in mind however that the moral imperative is derived from customer as well to help the IB increasing its performing financing since the given-money is not from the bank but from public at large.

In legal perspective, it is crystal clear that contributions of government (related regulators) are to assist Islamic banking reducing its non-performing financing as well, on condition that the regulator accords to effectual and efficient law-making (legislation) along with law-proceedings (litigation) as well. In addition, the existing rules and regulations would be ascertaining the enactment itself and be giving an assurance either in public to use IB products in general or the shareholders in specific. Alaudin et.al. highlighted that "If indeed non-performing loans are a key performance indicator for this Islamic bank, the challenge for this Islamic bank is to identify key processes to manage customer recovery"[3]. On that account, this section would exhibit legal framework of Islamic Banking in terms of regulatory laws.

2.1 Legal Framework Governing IB in Malaysia

Malaysia currently has three main acts governing the functioning of Islamic banking viz.: i) Central Bank of Malaysia Act 2009 (CBMA); ii) Islamic Financial Service Act 2013 (IFSA); iii) Development Financial Institutions Act 2002 (DFIA).

CBMA 2009 comes on the scene of IB to heighten the justification of BNM as financial regulator chiefly insecureness of monetary and fiscal for economic sustainability. While Malaysia still practices dual financial system[4], BNM has role to promote Malaysia as International Islamic Financial Centre[5]. Additionally, other significant parts of CBMA are eight sequential sections (51-58) unfold strategic position of Shari'ah Advisory Council (SAC) to bind Islamic financial institutions in terms of ascertainment of Islamic law (Shari'ah). Significantly, pursuant to Section 58 of the CBMA, it reveals that where there is different in terms of ruling between a shari'ah committee and the SAC, the judgment of the SAC prevails.

Prior to the enactment of the IFSA, licensing for full-fledged Islamic banking was under Islamic Banking Act 1983. But at the present time, IFSA 2013 governs each and every banking and financial institutions either full-fledged IBFIs or conventional financial institutions that obtain approval by FSA 2013[6] to conduct Islamic financial operations, business transactions, and activities which comply with specified Shari'ah standard by SAC. Moreover, as regard DFIA 2002, the act governs Islamic banking industries which established by the government of Malaysia to provide and promote extra special allegiances[7].

2.2 Legal Framework Governing IB in Indonesia

In the same way as Malaysia, Indonesia implements dual-banking system as well. Islamic banking in Indonesia falls under Law of the Republic of Indonesia No. 21 of 2008 concerning Shari'ah Banking[8]. The Law governs operations of the shari'ah commercial bank, shari'ah rural bank, and shari'ah business unit. The law also indicates that IB and Shari'ah Supervisory Board (DPS) should go harmonizing with National Shari'ah Board- Indonesia *Ulema* Council (DSN-MUI) in terms of shari'ah compliance[9]. However, *fatwa* of the MUI would not go legal-binding at once as common regulations since it should be finalized by 'Shari'ah Banking Committee[10].

Since the beginning of 2014, the function of key regulatory and supervisory over banking and other financial sectors, either conventional or shari'ah in Indonesia has been shifted to OJK (*Otoritas Jasa Keuangan* or Financial Service Authority)[11]. As consequences, it is undeniable fact that IB in Indonesia is governed predominantly by OJK-made-law since then. At least there is a couple of legal code

[3] Ahmadasri Alaudin, Paul Shantapriyan, & Ralph Adler, "Beliefs and Accountability in An Islamic Bank. Risk Governance & Control: Financial Markets & Institutions", 2015

[4] Central Bank of Malaysia Act 2009, Section 27.

[5] Ibid. Section 60.

[6] Financial Service Act 2013 Section 14. See Section 8 as well to get light of authorized business.

[7] For example, small and medium enterprises (SME), international trading (export and import), and agriculture.

[8] Indonesia adopts 'shari'ah or syariah' as an attachment of banking that operate Islamic banking. This is far-reaching since it would help non-Indonesian to search wide-ranging data or information pertaining to IB in Indonesia.

[9] Significant roles of MUI pursuant to this Law could be verified on Article 26 and 32.

[10] Its members are shari'ah experts from Bank Indonesia (BI), Religion Department of the Ministry of Religion, and representative of society Other than that, the Law also pronounce that its number exceed not eleven members. See more on Article 26 par.4 of the Law.

[11] It is a mandate of the Law no. 21 of 2011 concerning OJK. Momentous assignations are on Article 55, whereby BI successfully shifted its function on regulating and supervising over banking sectors to OJK on 31st Dec. 2013. Moreover, prior to that on 31st Dec. 2012, OJK also took control over Ministry of Finance and Bapepam-LK (Capital Market and Financial Institution Supervisory Agency) as regard functions of regulating and supervising Financial Institution viz. capital market, FIs, and other financial service institutions as the mandatory of the Law as well.

provided by OJK to regulate IB in Indonesia. First law is OJK Act no. 8/POJK.03/2014 Rules the IB to conduct self-assessment in respect of chiefly in four terms of risk-based namely: risk profile, Good Corporate Governance, earnings (rentability), and capital. A second law is Act no.24/POJK.03/2015 Regarding product and activity of IB. In addition, the act presides over shari'ah bank namely commercial bank, business unit, and rural bank in terms of manufacturing of a product. For more detail, pursuant to the acts as well OJK has sovereignty on the legality of a product commence from the screening process, the reporting mechanism until in the extreme condition, OJK could freeze the product and business activity of IB as well.

3. Recovery Process of Islamic Banking

This section sifts constitutional documentation between Malaysia and Indonesia to foster an illuminating discussion pertaining to recovery procedures.

3.1 Malaysia

3.1.1 Guideline/Act Governing Recovery Process

Islamic banking and matters are bound by existing laws in Malaysia. According to Lee[12], Rules of Court 2012 is the one that bounds the Islamic banking recovery situations. One of the acts that related to recovery process is National Land Code (NLC) in the case of Peninsular Malaysia and Sabah Land Ordinance or Sarawak Land Ordinance for Sabah Sarawak. This land code is referred in the time of the foreclosure process initiated by the Islamic bank. Other than that, Resolution of Shariah Advisory Council (SAC) of BNM also plays the roles to guide on recovery process executed by the Islamic bank. In Section 51(1) of Central Bank of Malaysia Act 2009 (CBMA 2009), the SAC has been established as the authority for the ascertainment of Islamic law for the purposes of Islamic financial business. Section 56 and 57 of CBMA 2009 really emphasize the authority of SAC where the court ought to consider the ruling made by SAC before coming up with legal judgment.

3.1.2 Option/Method used for recovery

In the case of Malaysia, the general process being practiced by the Islamic banking can be divided into three main elements which are pre-action, foreclosure and lastly civil action.

3.1.2.1 Pre-action

In the event of default payment by the customer, usually Islamic bank will not directly start the recovery action. This is because there will be a time given by the bank towards their customer to rectify this situation. If only rectification still not possible then the bank may terminate and recall the facility. In terms of duration for rectification, every Islamic bank may have its own practice. The industry or legal framework does not have any provision relation of this issue. In current practice, it can vary from a week to one month. However, the legal documentation executed at the beginning of a contract before facility is drawdown do mention about the duration agreed between bank and customer[13].

Restructuring and Rescheduling

Restructuring and rescheduling is a common method adopted by the bank as part of rectification effort. Based on Liquidity Framework under Prudential Financial Policy issued by BNM on 6 April 2015, BNM has classified a rescheduling and restructuring of a financing facility as a situation whenever any modification or variation is made to original payment terms and conditions of financing facility following an increase in the credit risk of the customer. According to BNM, a rescheduled facility is one whose payment tenure have been modified but the principal terms and conditions of the contract have not changed significantly while a restructured credit facility is one which the terms and conditions have been modified principally, including changing the type or structure of facilities or other facility terms mainly to assist projects or business that still viable.

3.1.2.2 Foreclosure

Once the rectification process is unsuccessful, then bank may commence foreclosure process. This process is an actual action taken by the bank to dispose the securities that were pleaded as collateral for cash. In Malaysia practice, the common assets being used for collateral used under Islamic facility is real estate properties. Disposing the real estate properties can be divided into three forms depending on the availability of the titles. For those properties with titles, foreclosure can be through order of High Court or sanctioned by the land office. On the other hand, private auction will be the option taken for properties without title. In short, the process could be interpreted by following figure .

[12] Mohd Johan Lee, "Islamic Finance Recovery, Rescheduling and Restructuring of Islamic Financing Facilities"

[13] Ibid.

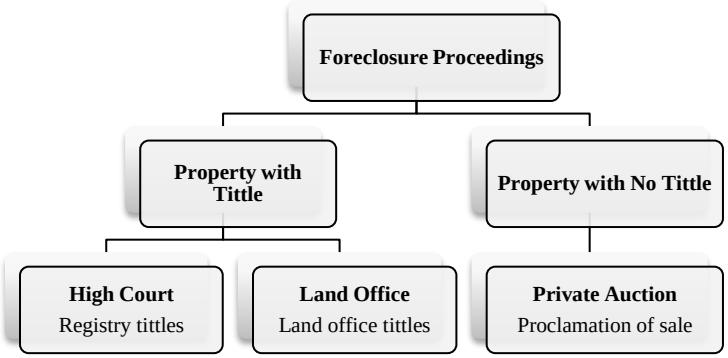

Figure 1 Foreclosure Proceedings in Malaysia, Source: Proceed by the Authors

3.1.2.3 Non-Litigation Strategy

As to the recovery via legal avenue, IB should consider some subjects before obtaining a judgment against non-performing customer. In detail, one of the most significant upcoming issues is concerning where should settle avenue of legal action and when should it be heard alongside other issues, inter alia, public observation, prospect of recovery, cost, and documentation[14]. On that account, unless the IB comes down in favour of court, so that IB in Malaysia would deal with third-party motion outside of the court.

FMB (Financial Mediation Bureau)

FMB is a mediation body which established by Central Bank of Malaysia to provide assistance for IBFIs' customer. As a starting and affordable institution in terms of expenses, FMB which is regulated under Mediation Act 2012 stipulates the claim of contestable party not more than RM 100,000.

Kuala Lumpur Regional Centre for Arbitration (KLRCA)

KLRCA is an international arbitration and a reliable provider for resolving dispute resolution globally and locally which has enforcement jurisdiction for nearly 150 countries. Moreover, it has been instituting for around forty-years in Malaysia[15]. As a leading non-government organization in providing resolution upon disputes in Islamic banking and financial institution matter, it is undeniably that IB and most of other financial institutions as well in Malaysia are advised to go through arbitration facilities under KLRCA[16]. Other than rules above, KLRCA implements some significant rules, inter alia, UNICITRAL Rules, KLRCA i-Arbitration Rules, KLRCA Fast Track Rules, and KLRCA Mediation and Conciliation Rules[17].

3.1.2.4 Civil Court Action

In the case where the proceeds from foreclosure process is not able to fully recover the outstanding balances of the financing defaulted by the customer, then the Islamic bank may go for civil action. In Malaysia case, it is a fortunate that Islamic banking matters can be brought to court jurisdiction. This means legal protection is there for both parties either the bank or customer.

Under the civil court, the plaintiff who in the case of recovery is the bank will have to decide the court to file summon. A formal summon together with statement of claim is required to be filed in court in order to initiate for civil action. In banking matters, the determination of court normally based on the amount of claim made by plaintiff (Lee, 2016). Three main court based on hierarchy of civil court that involved in recovery process are Magistrate, Sessions Courts and High Court. Specifically, pursuant to Sections 78 and 79 Subordinate Courts Act 1948, for Magistrate Court that deals with minor offenses has further supplementary classification, namely First Class Magistrates Court and Second Class Magistrates Court. However, the Magistrate Court is governed by Rules of Court 2012 in terms of civil litigation[18]. The following diagram explains the hierarchy of the civil court for Islamic Banking in Malaysia to take in hand.

[14] Amirullah Haji Abdullah and Razli Ramli, 2011, "Islamic Banking Recovery Process" p.6.

[15] KLRCA was established in 1978 under the patronage of the Asian-African Legal Consultative Organisation (AALCO). See more at https://www.christopherleeong.com/media/2612/clo-doing-business-in-malaysia-guide-november-2016.pdf

[16] Nonetheless KLRCA is non-government agency, it has forceful standing before arbitration proceeding in Malaysia (See more at Malaysia Arbitration Act 2005, specifically at Section 13). Aside from explicit suggestion to appoint KLRCA as an accredited arbitral institution, the act also affirms that there would be no appeal against the resolution from the legal opinion of KLRCA's Director (Subsection 9 of Section 13).

[17] Christopher and Lee Ong, 2016, "Doing Business in Malaysia".

[18] Hizri Hasshan, "Islamic Finance Litigation: Problems within the Malaysian Civil Courts Structure". See more at http://www.ukm.my/juum/JUUM%202016/Artkl%2033-42%202016.pdf

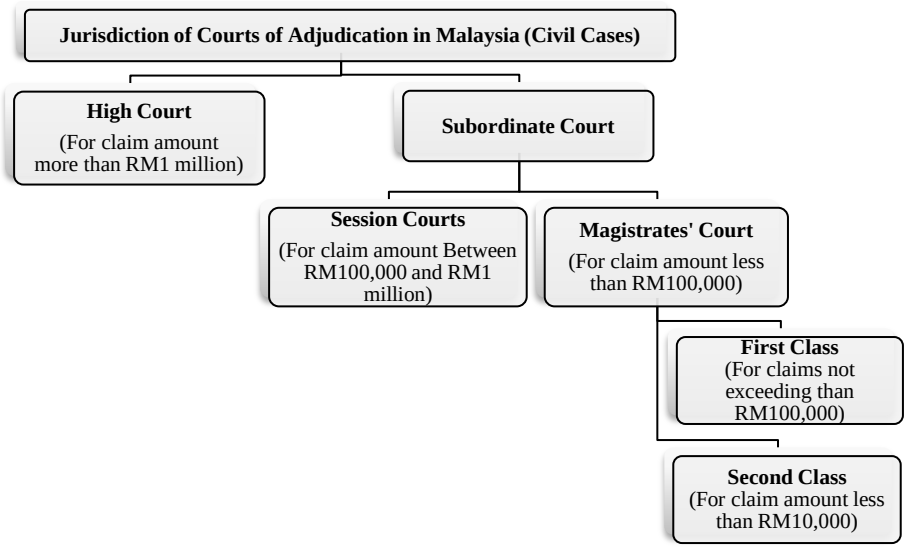

Figure 2 Hierarchy of Court Jurisdiction in Malaysia[19]

Over and above that, the players on IB should be mindful of SAC rulings before suing the customer in the judicial proceedings as mentioned in section 56 of CBMA 2009 states that:

"(1) Where in any proceedings relating to Islamic financial business before any court or arbitrator any question arises concerning a Shariah matter, the court or arbitrator, as the case may be, shall-

(a) take into consideration any published rulings of the Shariah Advisory Council; or

(b) refer such question to the Shariah Advisory Council for its ruling."

Enforcement of Judgment

Once the bank has won over the claim in the civil court, then there will be enforcement of judgment against the defaulters by the bank. "*The term enforcement of judgment refers to the manner in which a party to suit can compel the other party to follow the judgment held by the court*" (Lee, 2016). The judgment is valid as long as the defaulters yet to settle in full the amount of claim. The bank may take enforcement of a monetary judgment against an individual defaulter based on following six methods or options: i) Writ of Execution; ii) Garnishee proceedings; iii) Committal proceedings; iv) Judgment Debtors Summons; v) Charging and Prohibitory Orders; vi) Bankruptcy proceedings.

3.2 Indonesia

3.2.1 Guideline/Act Governing Recovery Process

Regarding to recovery process, since the arrival of OJK Act no.16/POJK.03/2014, two major Bank Indonesia (BI) acts namely BI Act no. 10/18/PBI/2008 and BI Act no. 13/9/PBI/2011 which prior gave a fundamental guideline to deal with the restructuring in Shari'ah banking Indonesia were legally not applicable. Therefore, to deal with collectability in which IB experience the customer who meets onerous on liability, the OJK Act no.16/POJK.03/2014 And OJK Circular Letter No 08/SEOJK.03/2015 concerning valuing asset quality in shari'ah commercial bank (BUS) and shari'ah business unit (UUS) are two paramount laws for Islamic banker, practitioner, academician, a researcher who has a concern with legal-point of the recovery process of Islamic banking in Indonesia. Additionally, the OJK circular alone is a comprehensive and specific guideline for IB to implement that is written on the OJK Act.

As alluded earlier, the recovery might reach a stalemate sooner or later. Hence, the next significant rulings which cover process of securing arrears of financing in Islamic banking especially are firstly the Law of the Republic of Indonesia no. 30 of 1999 about Arbitration and secondly OJK Act no. 1/POJK.07/2013 about Alternative Dispute Resolution. In addition, the three uppermost statutes are: i) Law of the Republic of Indonesia no. 21 of 2008 about Shari'ah banking, ii) the law of the Republic of Indonesia

[19] Mohd Johan Lee, "Islamic Finance Recovery, Rescheduling and Restructuring of Islamic Financing Facilities" as well as Hizri Hasshan, "Islamic Finance Litigation: Problems within the Malaysian Civil Courts Structure".

no.4 of 1996 about encumbrance-right over land and land-related objects as well as iii) the Law of the Republic of Indonesia no. 42 of 1999 about fiduciary assurance would play their role in terms of execution enforcement. Not forgetting the laws from ministry of finance regarding auction guideline i.e. Ministry of Finance Act no. 27/PMK.06/2016.

3.2.2 Option/Method used for recovery

In situation of Indonesia, recovery process for Shari'ah banking generally can be divided into three recovery approaches. It consists of straightforward collectability where the process to recover of a financing conducted within the administration of the bank. Afterward, while there is no settlement among related parties, accomplishment of non-litigation could be an alternate way, and lastly enforcement judgment of court come as the last resort for each contestable party.

Nevertheless, the very beginning of recovery step in Indonesia IB is essentially an assessment of collectability. It is conducted to evaluate and analyze time-to-time of an attainment of customer in order to obtain a quality of a financing facility. The quality then is weighed based on three component explicitly business outlook, performance, and payment capability[20]. Afterward, result of the prior analysis would be defined sharply into five classes: Current, Special-Mention, Sub-standard, Doubtful, and Lost that subsequently would be communicated to the customer[21]. Thereupon whether to proceed with restructuring options or other mechanisms would be decided and agreed after the grading of assessment is disclosed to the customer.

3.2.2.1 Straightforward-Collectability Approach

Restructuring Proceedings

In accordance with OJK Act, OJK defined the restructuring as assistance of IB to its customers to meet their liabilities in every agreed financing facility[22].The restructuring of financing is applied chiefly to the customer who meet difficulties on payment of the financing and has also willingness plus potential payment after restructured[23]. Additionally, the significant component is the IB has an obligation to arrange both policy and Standard Operating Procedures (SOP) in black-and-white regarding practising of the restructuring of financing facility[24]. For instance, IB is required to set up special task force of the restructuring that is separated from and has higher position than financing department[25]. In spite of the entitlement, the OJK put IB under obligation by reporting periodically a whole of financing restructuring[26].

Furthermore, options of the restructuring for IB in Indonesia, inter alia, by means of rescheduling, reconditioning, and restructuring. As can be seen, there are two akin vocables i.e. "the restructuring". The foremost comes to explain the general term and the other to give specific term in its peculiar categorization. On purpose to gain clear light below the explication of the three terms:

a. Rescheduling means amending plan for the payment of liability or its time-period. One and the same, the rescheduling is restricted to change of tenor solely[27].

b. Reconditioning presents with option to alter partial or entire conditions of the financing facility without extra payment to principal[28].

c. Meanwhile, restructuring has the broadest application in the three midsts whereby it is not limited to provision(s) of the rescheduling nor the reconditioning. Thus, it is workable that both IB and customer think fit for changing condition(s) of an old-agreement[29].

Foreclosure of Liquid Asset

Pursuant to OJK Act no.16/POJK.03/2014 Article 30 and 34, the IB could execute the pledged asset of the customer while the customer is declared as *wanprestasi* (event of default) to settle financing of a customer with the classification of lost[30]. Over and above that, the following subsection (2) of the law even put under an obligation that IB ought to claim upon the collateral by seven days at the latest. It should be noted however that the pledge must be liquid asset such as securities, deposit, saving, and sort of gold. Thus, by conducting these mechanisms would help IB to address non-performing financing.

Offsetting

[20] Section II. Financing Quality Circular Letter of OJK 8/SEOJK.03/2015 pertaining to valuation of asset quality of syariah commercial bank and syariah business unit. The circular letter also amplifies that Islamic banking business should be environmentally friendly (Law of the Republic of Indonesia no 32 of 2009 and Ministry Environment Laws no 05 of 2012).

[21] Ibid.

[22] OJK Act no. 16/POJK.03/2014, Article 1 Number (37).

[23] Ibid. Article 55.

[24] Ibid. Article 58.

[25] ibid. Article 59.

[26] ibid. Article 67.

[27] Article 55, Letter (a).

[28] Article 55, Letter (b).

[29] Article 55, Letter (c).

[30] On subsection (1) of the rule mentioned the details of *wanprestasi* conditions viz.,:

a. During 90days there are arrears of principal and (or) of margin/ profit sharing/ ujrah/ or other claims

b. There are no principal payments and (or) margin/ profit sharing/ ujrah and/or other invoices when the Earning Asset is due; or

c. The customer fails to meet other requirements.

Meanwhile, there is still one mechanism which could resolve a deadlocked-payment without outsider involvement i.e. offsetting.Offsetting is a foreclosure method which allows the customer voluntarily to sell its physical collateral or mortgage directly to the financier behind closed doors[31]. This policy is expected so that the both parties would obtain higher price, minimize the cost, and be stressless rather than bring it to third party either voluntarily or forcefully due to legal execution-enforcement. The laws which regulate the mechanism are bolstered by three Laws of the Republic of Indonesia plus one OJK act all at once[32].

It should be borne in mind that BI and OJK on the laws above respectively enhance that this approach is limited to a financing with lost-classification and prohibit IB to keep the collateral pledged more than one year into the bargain. In other words, it must be sold sooner before twelve-month period. Consequently, the liquidity-level of IB would be maintained at robust standing.

3.2.2.2 Accomplishment of Non-Litigation

Disputes of shari'ah banking in Indonesia are well-known and classified into two stages namely litigation and non-litigation. Beside as a device of dispute resolution, one of chief reasons mechanism of non-litigation such as arbitration comes into the picture of recovery since the arbitrator is expected to find a solution in respect of breach of contract or the infringement of agreement[33]. Moreover, in the non-litigation, the situation could be neither customer is not satisfied the proposed-restructuring of the bank nor the bank which is not satisfied after the customers fail to meet their liability by the restructuring proceedings, yet the parties avoid demanding court enforcement. In most cases, the customer as well as the bank habitually turn-aside of the court-line as consideration of effort, time, cost, and public scrutiny. Therefore, the non-litigation accommodates the both party to resolve their issues inter alia trusted third party.

Asbisindo

Indonesia has practically an act that govern the existing arbitration and other alternative dispute resolution i.e. the Law of the Republic of Indonesia no. 30 of 1999. Yet, in many cases to go through an arbitration way requires a large amount of money. For that reason, the OJK Act no. 1/POJK.07/2013 Comes to the picture to provide accessible, low-cost, confidential, and objective body of dispute resolution which is established from the environment of IB itself i.e. Asbisindo(Indonesia Association of Shari'ah Bank)[34] for customer of financial institutions that has a different opinion with the IB. Moreover, the Act also indicates that every Shari'ah banking in Indonesia should be the member of the association in the way of obtaining this provisioning[35].

Basyarnas

In Indonesia, particularly in shari'ah banking, Basyarnas (National Shari'ah Board of Arbitration) is an arbitration which deals with the matter of shari'ah business in Indonesia. MUI initiates it in 1993 which formerly known as BAMUI (Indonesia Muamalat Board of Arbitration). The Basyarnas in whatever way is not the only arbitration which has justification to deal with the shari'ah disputation. Pursuant to elucidation of the Act of the Republic of Indonesia no. 21 of 2008 article 55 par. (2), other conventional arbitration has the same opportunity when parties of *aqad* have an agreement concerning the mediator of the disputes.

3.2.2.3 Striding an Enforcement through Litigation

Parate Executie via KPKNL (State Assets and Auction Service Office)

Parate Executie has been coming into a scene of financing in Indonesia originally since 90's. This execution is regulated under the Law of the Republic of Indonesia no.4 of 1996 about encumbrance-right over land and land-related objects on article 6 and the Law of the Republic of Indonesia no. 42 of 1999 about fiduciary assurance on article 29 par. (1). The consideration of *Parate Executie* refer to a judgment that allow the financier to execute the pledge without notifying its customer when the customer is proved to commit a tort or *wanprestasi* (event of default). However, the characteristic of the pledge according the aforesaid laws is plain to see that are tangible assets such as land, land-related object, and sort of other claimable assets not limited to physical goods. According to Marnita,execution of foreclosure via KPKNL could be more efficient and effective options since it is chosen for some reasons[36]:

i. it takes less time than proceed to take legal action in the court,

[31] See more at "Foreclosure as An Effort to Resolve the Mortgage Payment Problems (A Study on PT Bank Muamalat Indonesia Branch Lampung" (Marnita, 2016).

[32] They are the law no.21 of 2008 about Shari'ah banking on article 40. Secondly, the law no.4 of 1996 about encumbrance-right over land and land-related objects, on article 20 par. (2) and (3) and the Law of the Republic of Indonesia no. 42 of 1999 about fiduciary assurance, article 29 par. (1) letter (c). Lastly, the OJK Act no.16/POJK.03/2014 article 36 par. (1).

[33]Thalis Noor Cahyadi, "Penyelesaian Sengketa Perbankan Syariah (Kritik atas 'Contradictio in Terminis' Pasal 55 Undang-undang no. 21 Tahun 2008 Tentang Perbankan Syariah)", 2011.

[34] Elucidation of Article 10 Article 1 of the Act.

[35] As mandatory of the Act on Article 4 Letter (a), the provisioning should cover no less than Mediation, Adjudication, and Arbitration.

[36] Marnita, "Foreclosure as An Effort to Resolve the Mortgage Payment Problems (A Study on PT Bank Muamalat Indonesia Branch Lampung", 2016.

ii. it could resolve not only in the matter of a customer who fail to meet the liability but also undertake the customer who have offensive intention upon agreed financing,

iii. like the Religion Court, KPKNL could give permanent final judgment (*inkracht van gewijsde*).

Religion Court

Litigation process via Religion Court comes to the picture on condition that the Court as the last resort for each of contestable party is expected to give final and binding judgment to enforce other party. Into the bargain, the court is expected would produce a sentence to execute the collateral pledged or the arrears of a financing. In a way to be intelligible, since the Constitutional Court announced the verdict No. 93/PUU-X/2012 to withdraw the explanation article 55 par. 2 the Law of the Republic of Indonesia no. 21 of 2008 to the public, thus all disputes relating shari'ah economic matter (include shari'ah banking) reverse to the Religion Court[37].

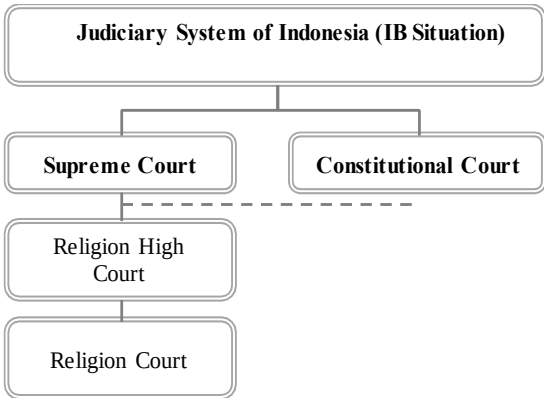

Figure 3 Judiciary System of Indonesia for IB cases[38]

As the Constitutional-Court circular no. 93/PUU-X/2012 nullifies the explanation of sub-section (2) and (3), therefore the legitimacy of resolving disputes shari'ah economic especially shari'ah banking by court mechanism would reverse to the Religion Court[39]. Thus, Shari'ah banking in Indonesia need to deal with the Religion Court, instead of Civil Court unless there is settlement to recover the money that is still owed and should have been paid by its customer. However, in condition there is dispute on the collateral pledged or in other words the bank would execute, acquired, and liquidate the asset pledged due to the event of default (*wanprestasi*), the Court will cooperate with KPKNL to make an auction before the bank could get the ready money. (Ministry of Finance Act no.27/PMK.06/2016, article 14 par.3)

4. Comparative Analysis in Brief

Regulatory Authorization

The foremost function of regulatory and supervisory over shari'ah banking in Indonesia has been shifted from BI slowly but surely to OJK. While in Malaysia, central bank i.e. BNM is the sole regulatory authority that governs Islamic banking industries.

Full Recognition of Execution

As a full regulatory system on different jurisdiction of countries, either Indonesia or Malaysia in the case of further recovery execution, the players should still take into consideration and be knowledgeable about other laws/ acts which accompany the principal laws by the regulators.

Power of Shari'ah Board

The ascertainment of Islamic law in Malaysia falls under the authority of SAC. The SAC rulings have legal-binding that would be highest reference concerning shari'ah affairs in judicial proceeding namely court and arbitrator. By contrast, the fatwa of DSN-MUI is a mere fatwa since it should be finalized by Shari'ah Banking Committee before transforming into a legal regulation.

Foreclosure

Indonesia has straightforward mechanism to take possession of pledged collateral without involving third-party and even by means of single-handed foreclosure for liquid assets. Meanwhile, whatsoever form of collateral in Malaysia situating should be administered in judicial auction in order to get legal enforcement over the ownership of a security.

[37] In Indonesia, prior to Constitutional Court promulgated its circular no. 93/PUU-X/2012, issue on dualism of court began at the arrival of the elucidation for article 55 the law of the Republic of Indonesia no.21 of 2008 that unveil contentious to previous Law of the Republic of Indonesia no. 6 of 2006. The law of 2006 specifies evidently that the authorities of Religion Court are not limited to Islamic matter in person, but also get in touch with personal or institutional whose dealing with shari'ah in general and specifically in shari'ah economic which includes banking and other most of shari'ah businesses. As consequences, at the range 2008 to 2012, the both acts made waves in Indonesia environment of litigation whereby IB needs to decide the forum to proceed its recovery whether bring it to religion court or civil court.
On top of that, the Constitutional Court is a highest court beside Supreme Court which have judicial power in Indonesia. Clear distinction between the two is the Constitutional Court (Mahkamah Konstitusi) dealing with conformity of existing laws to constitutional matter of the country i.e. the 1945 Constitution of the Republic of Indonesia (UUD 1945), while the Supreme Court (Mahkamah Agung) comes into the picture of judiciary system of Indonesia as the final court of appeal and disputes between other courts. See more at Marhamah Saleh "Metode Penyelesaian Sengketa Ekonomi Syariah dalam Perpektif Hukum Islam dan Indonesia", 2016.

[38] Ibid

[39] See more at *The Norm Reconstruction of Verdict Execution of The National Sharia Arbitration Board to Sharia Economic Dispute in Indonesia*. Yasin et. al. (2016). Could be accessed on http://jurnal.arraniry.ac.id/index.php/dustur/article/download/1173/877

Table 1
Comparative Overview of Recovery Process Between Malaysia And Indonesia

Indonesia			**Malaysia**		
Subject to	**Modus Operandi**	**Considered Act/ Law**	**Subject to**	**Modus Operandi**	**Considered Act/ Law**
Moderate Approach	Rescheduling Reconditioning Restructuring	OJK Act no. 16/POJK.03/2014 OJK Cir. Letter No. 08/SEOJK.03/2015	Persuasive Approach	Rescheduling Restructuring	Liquidity Framework of Prudential Financial Policy issued by BNM of 2015
Foreclosure	Foreclosure of Liquid Asset Offsetting	OJK Act no.16/P OJK.03/2014 Article 30 Law of the Republic of Indonesia: Law of the Republic of Indonesia: No.21 of 2008, article 40 No.4 of 1996, article 20 par. (2) and (3) No. 42 of 1999, article 29 par. (3) OJK Act no.16/POJK.03/2014 article 36 par. (1)	Foreclosure	Sale by private auction **Judicial Auction** Land Office Auction Order Sale by High Court	- Sabah Land Ordinance Sarawak Land Code National Land Code (NLC) Section 254
Non-Litigation	ASBISINDO Basyarnas	Law of the Republic of Indonesia no. 30 of 1999 OJK Act no. 1/POJK.07/2013	Non-Litigation	FMB KLRCA	Mediation Act 2012 UNICITRAL Rules KLRCA i-Arbitration Rules KLRCA Fast Track Rules KLRCA Mediation and Conciliation Rules
Litigation Approach	*Parate Executie* via KPKNL	Law of the Republic of Indonesia: No.21 of 2008, article 40 No.4 of 1996, article 6 No. 42 of 1999, article 29 par. (1) Ministry of Finance Act no. 27/PMK.06/2016	Litigation Approach	Magistrates Court • Second Class • First Class Session Court	Rules of Court 2012 CBMA section 56-57 (SAC Resolution) Subordinate Courts Act 1948 (SCA), Section 92 and 90
	Religion Court	Law of the Republic of Indonesia: No. 6 of 2006 No. 21 of 2008, article 55 par. (1) Constitutional-Court circular no. 93/PUU-X/2012 Ministry of Finance Act Article 14 par. 3		High Court	Rules of Court 2012 CBMA section 56-57 (SAC Resolution) Courts of Judicature Act 1964 (CJA)
DSN-MUI	*Fatwa*	Law of the Republic of Indonesia no. 21 of 2008 article 26 par. 1-5. The *fatwa* shall be finalized by Shari'ah Banking Committee	SAC	Rulings	CBMA Section 51-58 The rulings bind to IB at once

Source: Processed by Authors

Moderate Approach

Indonesia has three manners of the moderate approach, whereas Malaysia has two-terms to deal with customers whose difficult situation on the facility. The most important fact to be concerned however is its several substances. What IB of Malaysia interprets to all intents and purpose as the rescheduling is homogenous as the reconditioning in case of Indonesia since the Indonesian rescheduling is restricted to sole tenor. Last, but by no means least, there would be no wrangle over terms of the restructuring.

Decision-Making of Avenue

Although the comprehensive avenue exists in both countries, in the event of Indonesia occurs the unconstrained 'choice-of-forums'. The rationality behind this issue is owing to the non-specific instruction of the related laws/ acts in a way to go to the right-forum by a direct route. Conversely, Malaysia provides clear-cut administration for management of IB and its customers as well to fix on proper-institution based on the amount of allegation.

Alternative Dispute Resolution

Both countries have Alternative Dispute Resolution that could be other legal-binding avenues aside from court. The peculiar concept is to the case of Indonesia whereby the establishment of the ADR agency emanates from the association of IB itself.

Court Action

One clear difference on the litigation proceeding under the recovery process where in the case of Indonesia, the dispute will be resolved under the Religion Court (in Malaysia regarded as Shari'ah Court) while Civil Court is the place where recovery proceeding can be judged to take legal action. Move into detail. Malaysia's court in which to deal with the recovery process is separated based on three ladders of hierarchy that practices claim-amount basis.

5. Conclusions

This The paper shows in whatever way, both the Government of Malaysia and Indonesia have their own best-practice to strategize and advance the recovery process in IB industries. It is primarily momentous as well that both IB and its customer bear moral imperative to assist to meet liability and help to perform financing respectively. Thus, it is mindful for whosoever party that take part in the recovery to be aware of and knowledgeable about related laws/ acts. Regardless of closeness between Malaysia and Indonesia, their legal frameworks governing the Islamic banking as well as recovery process have some differences. Whilst litigation process of the recovery in Malaysia and Indonesia are resolved by civil court and religion court respectively, the SAC of BNM shall be chief reference either by the civil court or arbitration in resolving unsettlement of arrears of financing facility but then not for the fatwa of DSN-MUI which is neither legally binding before the religion court nor arbitral practice. Henceforward, the paper calls varied forthcoming research to conduct in others frame of reference in recovery proceedings namely legal documentation, adherence to shari'ah compliance and interconnected to existing laws, and above that conducting as well as effectiveness manners upon end-to-end procedures which are accepted by major stakeholders conclusively as a robust course of action.

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