

Islamic Financing Instrument Under Indonesia Positive Law

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ABSTRACT

Islam governs all aspects of human life. It is not regulate the human relation to Allah only but also between human each other, among other economy like financing comply with shari'ah. The issues are: (1) how is the regulation of financing comply with shari'ah regulated ini positive law in Indonesia; and (2) handicap faced in its application in Indonesia. The purposes of this research are to know: (1) its regulation on positive law, and (2) its handicap in its application Indonesia. This study is a normative study, that is analyzed rules and principles regarding Islamic financing as stipulated in Indonesia positive law. Approach in this study is statute approach and conceptual approach. Its results are: (1) Islamic financing in Indonesia is regulated in various rules and regulation and their implementation strengthening its existing in positive law in Indonesia as Act No.7/1992 on Banking (amended by Act No. 10/1998), Act No. 23/ 1998 on Indonesia Bank (amended by Act No. 3/2004), and Act No. 21/ 2008 on Islamic banking, particular to Shari'ah Capital Market its regulation is regulated by OJK Decision and DSN-MUI Fatwas; (2) murabahah based financing) dominating all financing of Indonesian banking industry is considered as the cause of Islamic Banking avoided to use Mudharabah and Musharakah is their higher risk.

Keywords : *Islamic law, financing instrument, Indonesian law*

INTRODUCTION

In this recent decade has arisen Islamic Banks in some include Indonesia. The appearance of these are supported by the willing from some Muslim communities to reformulate and manage their social, economy activities, particularly in interest-free financing in accordance with the Allah prohibition on usury (interest).

The increasing of this need is indicated by functioning of the Islamic Banking System without interest-rate mechanism of the financial sector operation.¹ Islamic system based on the norms originating from al-Qur'an and Sunnah has its paradigm itself on economic relation. Shari'ah, among other, states that rules related to the human resources, ownership, production, consumption, distribution income and wealth,² in which their core are the mechanism of allocation of the financial resources.³

In the international level Islamic finance has achieved the rapid growth with the very quick growth of financial segment in GCC countries, Malaysia, Africa countries like South Africa, Nigeria, Kenya, and Ivory Coast, in Asia like Singapura and Indonesia; and in the other regions namely Luxembourg, United Kingdom and German.⁴ The Islamic finance assets has growth at two digit levels during the past. The finance Shari'ah bertumbuh pada tingkatan dua digit during the last decade, approximately US\$200 billion in 2003, predicted till about US\$1.8 trillion in the end of 2013 (Ernst & Young 2014; IFSB 2014; and Oliver Wyman 2009).⁵ The Islamic finance market are in approximately \$1.81 trillion in the 2014 disclosed assets by the (fully comply with Shari'ah as well as the assets with Shari'ah windows) including commercial bank, funds, sukuk, takaful, and the other segments namely: \$1,346 billion for commercial banks, \$33.4 billion for takafuls (Islamic insurance), \$295 billion for main Sukuk (receivables (bonds)), \$56 billion in funds (financing) (*funds*), and \$84 billion for the other financial activities. Islamic financing Industry has been undergone extremely growth during the last years and recorded multiplicity annual growth level, from 17.3% between 2009 and 2014. (IFSB Stability Report, 2015). Total assets of Islamic Banking are predicted to \$2,610 billion in 2020.⁶

In Indonesia this development are accommodated by inducing the *dual banking system* in Indonesia, 1986, namely a system permitting conventional and Islamic Banks operating side by side. In the same time was founded the first Islamic Banks, namely "Bank Muamalat Indonesia (BMI)". This Dual Banking System Sistem has been applied actually since 1998 when the Banking Act 11992 was amended by the Act No.10/1998. This act both give the

¹ Saad Abdul Sattar Alharran.(1996). *Islamic Finance, Partnership Financing*, Publications, Malaysia: Pelanduk, p.1

² Iqbal Z dan A. Mirakhor.(1987). 'Islamic Banking' At Tawhid, *A Quarterly Journal of Islamic Thught and Cultre*, as quoted by Sattar, *ibid.*,p. 91

³ Sattar *Op. Cit.*, p. 1-2.

⁴ Mufti Ismail Ebrahim Desai, *Islamic Finance – Opportunities and Challenges*, *Journal of Islamcn Banking and Finance*. Volume 33 Jan-Mar. 2016 No. 1, <http://islamicbanking.asia/wp-content/uploads/2016/04/Jan-March-PDF.pdf>, accessed on February 25th 2017 p. 86

⁵ *Ibid.*,p. 86.

⁶ *Ibid.*, p. 87-88.

firm legal basis for Islamic Banking as a part of national banking system,⁷ also give the broad opportunity for investors to found the new Islamic and Conventional Bank to open Islamic venture unit.⁸

This act was followed by some implementing rules through the Decision of Indonesia Bank Administration dated 6 May 1999 on General Bank (General Bank) based on Islamic Principle, People Rura Bank (*The Rural Bank* (BPR), and BPR based Islamic Principle (BPRS). Under this Decision, conventional banks may carry out Islamic Banking transaction through opening the branch of Islamic banks or converting conventional banks into Islamic banks.⁹ And, by enacting Act Number 21 Year 2008 on Islamic Banking (*Perbakan Syar'ah*), the legal basis for the operation of this banking more and more strong in national banking system, then the legal basis for banking operation in Indonesia increasingly strong in national banking system. Following of this Act was issued several rules and regulation in Islamic banking and financing.

In its operation, Islamic Banking has products, namely: (1) product on collecting fund, (2) product on distributing fund, and (3) product on services. Product on collecting fund consist of wadli'ah, and mudharabah; product on distributing fund consist of murabahah, salam, istishna, ijarah and ijarah muntahabit tamlik, musyarakah, musyarakah investment, mudharabah investment, qardh loan, and others, including: Financial Market for Inter Islamic Bank (Pasar Uang Antar Bank Syariah), Sovereign Sukuk and Bond of Central Bank (Sertifikasi Bank of Indonesia Shari'ah dan Obligasi Shari'ah); and product of services including wakalah, kafalah, sharf, hawalah, rahn, and the shari'ah principle on service namely Islamic Letter of Credit (Letter of Credit Shari'ah) and Card (Kartu Payment).¹⁰

The Islamic finance forms a part of Islamic bank product, namely fund distributing by Islamic Banking. Parallel to the increasing of spirit in several economic activities whether in real or financial sectors side by side with global development of Islamic Economy, today Islamic Finance as a part of it to be a day to day issues in the world economic life.¹¹ Indonesia with Most Moslems population (12,7% of World Moslems population), promulgated five years strategy for Islamic finance strategy. Indonesia Authority want Indonesia Islamic Bank to dominate at least 15 percent at 2023. Islamic Banks in Indonesia Banks involve 12 fully

⁷ Zainul Arifin. (2009). *Fundamentals of Syari'ah (Islamic) Banking*, revision ed., Azkia, p. 10

⁸ Ascarya Diana Yumanita. (2005). *Islamic Bank, General Description, Center for Education and Centralizing Bank (PPSK) Bank of Indonesia*, Jakarta, p. v

⁹ Arifin, *Op.Cit.*, p. 10.

¹⁰ See Wiroso. (2009). *Product of Syariah Bank*, LPFE Usakti.

¹¹ Religion Ministry of Republic of Indonesia. (2013). *Direktor General for Islamic Community Guidance, Pocket Book on Syari'ah Banking*, Religion Department of Republic of Indonesia, Direktor General for Islamic Community Guidance, Directorate of Islamic Religion Affairs and Syati'ah Guidance, p. i.

fledged Islamic banks and 22 Islamic banking windows. In addition, there are 316 shares for 45 Islamic insurance (takaful) institutions in this country. Furthermore, there are 316 share comply shari'ah, namely 60% share in Indonesia. Market of Indonesia Shari'ah share is the second largest in the South-East Asia. Government has issued its first retail sukuk in February 2009 \$144.4 million, and sovereign Sukuk based on Ijarah principle in August 2008 with selling 7-years (IFR0001) 10-years (IFR0002), Shari'ah Bond, and allocated 6.94 trillion IDR to Infrastructure project through issuing Sovereign Sukuk.¹²

METHOD

This study is a normative study, that is analyzed rules and principles regarding Islamic financing as stipulated in Indonesia positive law. Approach in this study is statute approach and conceptual approach.

ANALYSIS AND DISCUSSION

The issues risen in this article are related to the regulation of Islamic Finance including the Islamic Finance Instruments, and its handicap in their implementation.

In this article is discussed the regulations on Islamic finance in positive law and its handicap in its implementation in Indonesia.

The rules and regulations regulating or having close relation to the Islamic finance industry includes:

1. Act Number Act Number 24 Year 2008 7 Year 1992 on Banking;
2. Act Number Act Number 24 Year 2008 Year 1998 on Indonesia Bank;
3. Act Number 24 Year 2008 on Saving Security Institution;
4. Act Number 21 Year 2008 on Islamic Banking;
5. Act Number 19 Year 2008 on State Islamic Securities;
6. Act Number 40 Year 2014 on Insurance;
7. Act Number 8 Year 1995 on Stock Exchange.

Act Number 7 Year 1992 on Banking (amended by Act Number 10 Year 1998)

Act Number 7 Year 1992 on Banking implicitly recognizes the existence of banking organizing activities based on Shari'ah by allowing operation of banking with profit sharing

¹²Mufti Ismail Ebrahim Desai, "Islamic Finance – Opportunities and Challenges", p. 88

system.¹³ It has the important role in facilitating of creating Islamic Banking in Indonesia, namely Indonesia Muamalat Bank (Bank Mamalat Indonesia).

This act is amended by Act Number 10 1998 on the amendment of the Act Number 7 Year 1998 on Banking, regulating relatively enough and detail of the Islamic Banking and implicitly recognizing the existence of Islamic Banking through Article 1 paragraph 3 and 4. Article 1 paragraph 3 states that General Bank is a bank performing work activities conventionally and/or based on Shari'ah Principle giving services in payment traffic. And, Article 1 paragraph 4 states that the Rural Bank (Bank Perkreditan Rakyat) is a bank performing its venture activities conventionally or based on Shari'ah Principle and its activities is not gives services in payment traffic.

This act states also that the kinds of venture that can be done by General Bank may be supplying financing and/or performing other activities comply with Shari'ah Principle, performing venture activities participation of capital while solve consequences of credit or the financing failure comply with Shari'ah Principle (Article 6(1)), provided that it must draw out its participation must fulfil provision stated by Bank of Indonesia (Article 7 point c); in giving credit or the finance comply with Shari'ah Principle, General Bank shall be has conviction based on the depth analysis of conviction and capability as well as capability of debtor customers to pay their debt or turn back the finance in accordance with their agreement (Article 8 (1)), and shall has applied the crediet and finance guidance comply with Shari'ah Principle, in accordance with provision stated by Bank of Indonesia (Article 8 (2)).

In relation to the ventures of The Rural Bank, Article 13 point c. states that the Rural Bank supplying financing and putting fund comply with Shari'ah Principle, in accordance with provision stated by Bank of Indonesia.

Act Number 23 Year 1998 on Bank of Indonesia (Amended by Act Number 3 Year 2004)

Provision of Act Number 23 Year 1998 on Bank of Indonesia related to the Islamic finance is stated in Article 10 and Article 11. Article 10 states that determination of policy and control apply also to the bank applying Shari'ah Principle (Article 10 (2)), which implementation is determined by The Regulation of Bank of Indonesia.

Act Number 3 Year 2004 on the Amendment of Act Number 23 Year 1999 on Bank of Indonesia amend provision Article 10 (1) by eliminating phrase in point a stating that "lays

¹³ Muhammad Syafii Antonio. (2001). *Syari'ah (Islamic) Bank From Theory to Practic*, Jakarta: Gema Insani, p.26

down monetary targets by paying attention target inflation rate that it has stated”, so Article 10 (1) states:

In determining and implementing monetary policy stated in Article 8 point a, Bank of Indonesia may: (a) lays down monetary targets by paying attention target of inflation rate.

Next, it is stated also that: Bank of Indonesia may give credit or finance comply with Shari’ah Principle for maximal 90 (ninety) days to the Bank to solve the short-term of such Bank (Article 11 (1)); the implementation the or this finance must be assured by the acceptance bank with high quality guarantee and easy to be liquefied with the value same as the amount of its credit or the accepted finance (Article 11 (2)); the implementation of provision in paragraph (1) and paragraph (2) are determined by the Regulation of Bank of Indonesia ((Article 11 (3)).

Act of Republic of Indonesia Number 24 Year 2004 On Saving Bailsman Institution

This act obligate to every bank performing venture activities in the territory of Republic of Indonesia to be participant of The Avalist (Article 8 (1), except Village Credit Board (Badan Kredit Desa) (Article 8 (2). Certainly the obligation to be participant of the Avalist include Islamic Bank, for it is not excepted by Article 8 as laid down to the Village Credit Board.

Act of Republic of Indonesia Number 21 Year 2008 on The Islamic Banking

This act differentiates banks venture activities comply with Shari’ah Principle to be three kinds, General Islamic Bank, Islamic Credit Bank, and Islamic Ventures Unit.

The venture activities that can be done by Shari’ah General Bank includes: (a) to collect fund in the Saving form as Demand Deposit, Saving, or the other forms similar to it based on Wadi’ah akad or the other akad not contradict to the Shari’ah Principle; (b) to collect fund in the form of investment including deposit, saving, or the other forms similar to them based on Mudharabah akad or the other akad not contradict to Shari’ah Principle; (c) to distribute the profit sharing financing based on mudharabah, akad musyarakah, or the other akad not contradict to the Shari’ah Principle; (d) to distribute financing based on murabahah akad, Salam akad, Istishna akad’, or the other akad not contradict to Shari’ah Principle; (e) to distribute financing based on qardh or the other akad not contradict to Shari’ah Principle; (f) to distribute financing of the hiring moveable or immovable goods to the customers based on Ijarah akad and/or hire purchase in the form of ijarah muntahiya bittamlik or the other akad

not contradict to Shari'ah Principle; (g) to perform debt transferring based on Hawalah akad or the other akad not contradict to Shari'ah Principle; (h) to perform the debt card venture and/or financing card comply with Shari'ah Principle; (i) to buy, sale, or secure with it risk it self securities for the third party issued based on the real transactions comply with Shari'ah Principle, among other, Ijarah, musyarakah, mudharabah, murabahah, kafalah, or hawalah akad; (j) to buy securities comply with Shari'ah Principle issued and/or Bank of Indonesia; (k) accept payment of claims for securities and to perform calculation with the third party or inter of the third parties comply with Shari'ah Principle; (l) to perform deposit on behalf of the other parties based on an akad comply with Shari'ah Principle; (m) to make available places to save goods and securities comply with Shari'ah Principle; (n) to transfer money, whether on own behalf of or on behalf of customer comply with Shari'ah Principle; (o) to perform function as Trustee based on Wakalah akad; (p) give facilities letter of credit or guarantee bank comply with Shari'ah Principle; and (q) performing other activities are normally performed in the banking field and in the social not contradict to Shari'ah Principle and in accordance with provision of the Rules and regulations (under Article 19 (1)). In addition to, Shari'ah General Bank may perform activities: (a) foreign currency comply with Shari'ah Principle; (b) participation of capital to Shari'ah General Bank or financial institutions performing venture activities comply with Shari'ah Principle; (c) participation of capital sementara to solve consequences of failing of the financing comply with Shari'ah Principle, provided it must draw out its participation; (d) acting as the founder and management of the pension fund comply with Shari'ah Principle; (e) in capital market as far not contradict to Shari'ah Principle and provisions the rules and regulations in ; (f) the running of venture activities or product of bank comply with Shari'ah Principle by using electric devices; (g) issuing, offering, and trading short-term securities comply with Shari'ah Principle, whether directly or indirectly through money market; (h) issuing, offering, and trading securities long-term comply with Shari'ah Principle, whether directly or indirectly through capital market; and (i) to make available product or to perform other venture activities of the Shari'ah General Bank comply with Shari'ah Principle (Article 20 (1)).

For UUS venture activities which may be performed includes: (a) to collect fund in the Saving form including Demand Deposit, Saving, or the other forms similar to them based on Wadi'ah or the other akad not contradict to the Shari'ah Principle; (b) to collect fund in the form of investment including Deposit, the Saving, or the other forms similar to them based on Mudharabah akad or the other akad not contradict to Shari'ah Principle; (c) to distribute financing of profit sharing based on Mudharabah, musyarakah akad, or akad not contradict

to Shari'ah Principle; (d) to distribute financing based on murabahah, Salam, Istishna akad', or The other akad not contradict to Shari'ah Principle; (e) to distribute financing based on akad qardh or the other akad not contradict to Shari'ah Principle; (f) to distribute financing of the hiring moveable or immoveable goods to customers based on Ijarah akad and/or hire purchase in the form of ijarah muntahiya bittamlik or the other akad not contradict to Shari'ah Principle; (g) to perform debt transferring based on Hawalah akad or the other akad not contradict to Shari'ah Principle; h. to perform the debt card venture and/or financing card comply with Shari'ah Principle; (i) to buy and sale securities for the third party issued based on the real transactions comply with Shari'ah Principle, among other, Ijarah, musyarakah, mudharabah, murabahah, kafalah, or hawalah akad; (j) to buy securities comply with Shari'ah Principle issued by Government and/or Bank of Indonesia; (k) to accept payment of claim for securities and to perform calculation with the third party or of the third parties each other comply with Shari'ah Principle; (l) to make available places to save goods and securities comply with Shari'ah Principle; m. to transfer money, whether on own behalf of or on behalf of customer comply with Shari'ah Principle; n. give facilities letter of credit or guarantee bank comply with Shari'ah Principle; and o. performing other activities normally performed in the banking field and in the social field not contradict to Shari'ah Principle and in accordance with provision of the rules and regulations (Under Article 19 (2)). UUS may also perform venture activities (a) foreign currency comply with Shari'ah Principle; b. in capital market as far as not contradict to Shari'ah Principle and provisions of the rules and regulations in the capital market field; (c) temporary capital participation to solve the consequences of the financing failure comply with Shari'ah Principle, provided it must draw out its participation; (d) the running venture activities or product of bank comply with Shari'ah Principle by using electric devices; (e) issuing, offering, and trading short-term securities comply with Shari'ah Principle whether directly or indirectly through money market; and (f) to make available product or to perform the other venture activities of the Shari'ah General Bank comply with Shari'ah Principle. (3) venture activities as intended in paragraph (1) and paragraph (2) must fulfil provision stated by Bank of Indonesia and provisions of the rules and regulations (Article 20 (2)).

Under Article 21 the venture activities of the Islamic Rural Bank includes: a. to collect fund from people in the form: (1) the Saving including the deposit or similar to them based on Wadi'ah akad or the other akad not contradict to Shari'ah Principle; dan (2) Investment including Deposit or the Saving or the other forms similar to them based on Mudharabah

akad or the other akad not contradict to Shari'ah Principle; b. to distribute fund to people in the form: 1. The loss sharing finance based on Mudharabah akad or musyarakah; 2. The finance based on murabahah akad, salam, or istishna'; 3. The finance based on akad qardh; 4. The finance the hiring moveable or immovable goods to customers based on Ijarah akad or hire purchase in the form of ijarah muntahiya bittamlik; and 5. debt transferring based on Hawalah akad; c. to put the fund in the other Islamic Bank in the form of deposit based on Wadi'ah akad or investment based on Mudharabah akad and/or the other akad not contradict to Shari'ah Principle; d. to transfer money, whether on own behalf or on behalf of customer through bank account the Islamic Rural Finance existing in Shari'ah General Bank, Conventional General Bank, and UUS; and e. to make available product to perform venture activities of the other Islamic Bank existing in accordance with Shari'ah Principle based on approval of Bank of Indonesia. and in Article 22 is stated that every to perform venture activities to collect fund in the Saving form or Investment comply with Shari'ah Principle without permit prior to from Bank of Indonesia, except regulated in the other act.

Act of Republic of Indonesia Number 19 Year 2008 on Sovereign Islamic Sukuk (Surat Berharga Syari'ah Negara)

Under this act Sovereign Sukuk - *Surat Berharga Syari'ah Negara*, hereafter refer to SBSN, or may be called as Sovereign Sukuk, is state securities issued comply with Shari'ah Principle, as an evidence for participation to SBSN asset, whether in rupiah or foreign currency (Article 1.1). SBSN may be issued in the form of warkat or without warkat (Article 2 (1), and may be traded or not to be traded in secondary market (Article 2 (2)).

SBSN may including: a. SBSN Ijarah, issued based on Ijarah akad; b. SBSN Mudharabah, issued based on akad Mudharabah; c. SBSN Musyarakah, issued based on musyarakah akad; d. SBSN Istishna', issued based on Istishna akad'; e. SBSN issued based on the other akad not contradict to Shari'ah Principle; and f. SBSN issued based on kombinasi dari dua or lebih dari akad as intended pada point a sampai with point e. (Article 3), and be issued with the purpose to fund the State Budget include to fund project of development (Article 4). The competency to issue SBSN is held by Government (Article 5 (1)), and implemented by Minister (Article 5 (2)).

The issuance of SBSN may be implemented directly by Government or through the venturesan Penerbit SBSN (Article 6 (1)), includes all kinds SBSN as stated in Article 3 (Article 6 (2)). The issuance of SBSN conducted through the company of the issuer of SBSN laid down by Minister (Article 6 (3)). The issuance of SBSN to the purpose as stated in

Article 4, Minister prior to coordinate with Bank of Indonesia (Article 7 (1)), dan issuance of SBSN in the finance project, Minister coordinate with minister in the planning field of national development (Article 7 (2)).

Act of Republic of Indonesia Number 40 Year 2014 On Insurances

Beside of regulating conventional insurance, this act regulates Islamic Insurance (Insurance Syariah) too. Under this act Islamic Insurance is a set of agreements between Islamic Insurance Company and the policy holders, in managing the contribution comply with Shari'ah Principle to help and protect each other by: a. giving compensation to the parties or holders for losses, damages, or the costs may arising, or or the losses of profit, legal responsibility to the third party might be suffered by the parties or policy holders for the event; or b. give payment based on the death of the parties as well as or payment based on the life of the parties with the benefit with the rate as provided and/or based on the result of fund management (Article 1 point 2). *Shari'ah Principle* as syari'ah insurance basis formulated as Islamic legal principle in the venture activities of insurances based on fatwa issued by the institution having the authority in providing fatwa in the Syari'ah field (Article 1 butir 4). In addition to this act regulates various matters related to the ventures of insurance.

The most important of them are:

Under Article 3 (1) this act the general insurance enterprises may run: a. the ventures of Syariah general insurance, including the ventures of the health insurance field comply with Shari'ah Principle and the ventures of the accident insurance field comply with Shari'ah Principle; and b. The ventures of Syariah Reinsurance for risk of the other Syari'ah general insurance enterprises. Next, paragraph (2) states that the enterprise of Syari'ah life insurance may operate the ventures of Syari'ah life insurance include field the ventures anuitas comply with Shari'ah Principle only, the ventures of the health insurance field comply with Shari'ah Principle, and the ventures of the accident insurance field comply with Shari'ah Principle, dan the enterprise of reIslamic Insurance hanya may the running The ventures Syariah Reinsurance (a paragraph (3)).

The venture the general insurance Syariah dan the ventures Syari'ah life insurance may be extended in accordance with the community need (Article 5 (1), and may including the increasing of benefit with the rate based on the result of fund management (Article 5 (2)).

Act Number 8 Year 1995 on Capital Market (UUPM)

Capital Market is a very important segment in Shari'ah financial market in Indonesia to promote. Capital market may help to give capital for helping Government budget in building infrastructure or the development of the enterprises in extending their ventures.¹⁴

Market Shari'ah Capital in Indonesia develop gradually in this last decades to be the larger part of the domestic financial system.¹⁵ Contrast to the conventional market capital, Shari'ah market capital is eminent to the conventional capital market, namely the conventional investors only who may invest to the conventional market capital, on the contrary in Syariah market capital both the conventional investors and who have Syari'ah profession may do it. As a consequence, the scope of investors in Syariah market capital more extend than the investors in conventional market capital.¹⁶

Market Shari'ah Capital is not regulated yet as an it self standing institution in Indonesian positive law. Capital market regulated in the Act Number 8 Year 1995 on Capital Market (UUPM) is Conventional Capital Market. The Operation of Syari'ah Capital Market based on the Regulation Financial Service Authority (OJK) and fatwas Syari'ah Board - Indonesian Ulama Assembly (MUI).

This Regulations from Financial Service Authority (OJK) and fatwas of Syari'ah Board - Indonesian Ulama Assembly (MUI) to be the operational basis for Shari'ah market capital, and has been followed by the entrepreneurs performing venture activities with Shari'ah Principle in capital market. Thus, Shari'ah market capital having positive legal basis through customary law. Furthermore these regulations are strengthened by implied recognition in Indonesian legal order through the Act Number 19 Year 2008 on the issuance of Sovereign Sukuk (SBSN). This implied recognition may be found also in the Act Number 21 Year 2008 on Shari'ah Banking. Article 19 paragraph (1) point (h), this Act states that Shari'ah General Bank may perform venture activities in issuing, offering, and trading securities long-term comply with Shari'ah Principle, whether directly or indirectly through capital market. And, paragraph (3) states that UUS beside of performing venture activities as stated in Article 19 paragraph (2), it may also perform venture activities in: (a) foreign

¹⁴ Standing Committee for Economic and Commercial Cooperation of the Organization of Islamic Organization, (Comcec), Diversification of Islamic Financial Instruments, *op. cit.*, p. 55.

¹⁵ (Standing Committee for Economic and Commercial Cooperation of the Organization of Islamic Organization, (Comcec), Diversification of Islamic Financial Instruments, *op. cit.*, p. 56

¹⁶ OJK, INDUSTRI JASA FINANCIAL SYARIAH, http://www.ojk.go.id/id/kanal/banking/data-dan-statistik/booklet-banking-indonesia/Documents/booklet_2014_opt_1395931938.pdf, download 14 November 2017 at 5.45 WITA., p. 75.

currency comply with Shari'ah Principle; b. capital market as far not contradict to Shari'ah Principle and provisions of the rules and regulations in the capital market field.

Fatwa on capital market, indeed, is completely enough, even it has been issued since Year 2001.¹⁷ The most complete Fatwa on Syariah market capital is fatwa DSN-MUI Number 80 on the Implementation of Shari'ah Principle in the Mechanism of Securities Trading with Equities character in The Regular Market of Stock Exchange. The core of this fatwa among other are:¹⁸

1. Transactions of share in capital market in accordance with Shari'ah Principle if fulfil two conditions, namely: a. perform transactions of share belong to Syari'ah Securities List (DES); dan b. do not perform transactions contrary to Shari'ah Principle.
2. Qabdh Hukmi in transactions of share. There is an error impression if transactions use T+3 system or the process of settlement of securities transaction in Stock Exchange may be completed after three days may cause the syar'i character to be achieved. For this error the fatwa states that when an investor has bought the share and its transaction has been stated complete, he may resale it although before three days, the share he has bought is complete, and its ownership has been transferred although administratively does not achieve T+3 yet, it is a legally ownership concept (*qabdh hukmi*).
3. Transactions System of Continuous Auction in accordance with this Bai al Musawammah Fatwa clarifies that the trade system in Stock Exchange Indonesia using Continuous Auction or the continuous auction in accordance with Shari'ah Principle. The use of this system to avoid misunderstanding of the parties related to the compatibility with Shari'ah Principle. This Fatwa answers that this transaction belong to Bai Al Musawammah or transactions at aiming to find the effective price and no obligation to inform the seller on this price. In implementation Shari'ah Principle in capital market, the parties involved in Syariah market capital (include Stock Exchange Indonesia) not only use the fatwa as the only reference as fatwa has no binding legal effect. The involved remains must refer to the positive legal basis namely UUPM and The Regulations of OJK.

The Regulation of Financial Service Authority Number 15/Pojk.04/2015 on the Implementation of Shari'ah Principle in capital market give references on the way must be

¹⁷ *Ibid.*, p. 77.

¹⁸ *Ibid.*, p. 77.

fulfilled by Shari'ah market capital in performing the Shari'ah venture activities. These references include: the terms of Shari'ah ventures in Capital market, prohibitions related to the Shari'ah venture activities in Capital market, the parties who may perform the ventures in Capital market.

Supervision Board, Pelaporan, dan sanksi.

The Regulation defines in capital market as Syari'ah venture activities in capital market is venture activities related to the general offering in Syariah securities, sale Syariah securities, management of Syari'ah investment in Capital market, and Emiten or public enterprise related to Syariah securities it issued (Article 1 butir 4).

In performing venture activities Shari'ah itu Shari'ah market capital in accordance with provision Article 2 prohibits to perform: (1) venture activities and the types the ventures contrary to Shari'ah Principle in Capital market; (2) transactions contrary to Shari'ah Principle in Capital market. Next is stated that the parties may perform the Syariah venture activities. In capital market: a. The party stating its venture activities and the types of the ventures, and/or how to manage it, and/or service he given comply with Shari'ah Principle in Capital market. b. The party do not stating its venture activities and the types of ventures, and/or and the way to manage it, and/or services he given comply with Shari'ah Principle in Capital market, yet the parties: 1. have unit of Syari'ah ventures; 2. are the Investment Manager performing venture activities management of syari'ah investment; 3. are the Custodian of syari'ah investment; 4. A part of activities operational from the parties ventures are performed comply with Shari'ah Principle in Capital market; and/or 5. give the other Syari'ah services. c. the parties do not stating the venture activities and the types of ventures, and/or the way they manage it, and/or services they given comply with Shari'ah Principle in Capital market, yet issuing Syariah securities and/or have the role in helping the issuance of Syariah securities in capital market (Article 4).

In addition to every party performing Syari'ah venture activities in capital market is obligated to comply with Shari'ah Principle in capital market as provided in this Regulation of Financial Service Authority and the Rules and regulations laid in the capital market sector (Article 6). Likewise every party performing Syariah venture activities in capital market as stated in Article 4 point a must: a. states in statute or similar document that its venture activities to be performed comply with Shari'ah Principle in Capital market; and b. have Syari'ah Controlling Board (Article 7), and every party performing Syariah venture activities in capital market as stated in Article 4 point b must: a. have Syari'ah Controlling Board, untuk

Investment Manager performing the venture activities management of syari'ah Investment; or b. have Syari'ah Controlling Board or at least 1 (one) director or the person who responsible for the venture activities given the mandate by the management having enough knowledge and/or experience in the field of Syari'ah financing, for the parties performing venture activities other than the Investment Manager managing syari'ah investment (Article 8).

Supervision Board as stated in Article 7 point a and b, and Article 8 point a consist of 1 (one) member or more appointed by the Genral Meeting of share holders, the other mechanism equivalent to the Genral Meeting of share holders, or appointed by the management (Article 9 (1)), . This Syari'ah Controlling Board Member must be individual or the venture entity having ASPM liscence from the Financial Service Authority (Article 9 (2))

The barriers faced in Implementing the Shari'ah financing di Indonesia

The barriers faced the Shari'ah financing in its Implementation cannot be separated from the weaknesses had by the Shari'ah banking. Many product offered by the Shari'ah (Islamic) banking are equal to the conventional banking. It is not good, therefore, the 100% Islamic Bank need to be made, without copying products of conventional banks by introducing the products that wholly differ with the products of the conventional banking and in accordance with hukum Islam.¹⁹ As one of financial institutions (financial institution) entering global market Shari'ah Banking, certainly facing various challenges including: (a) fully integrated to the global financial market as the important element of architecture and infrastructure in the Shari'ah financing by defending its character and the uniqueness of its services; (b) supporting guarantee and conformity equal to the depositors and investors given by the conventional banking; (c) discrepancy of human resources; (d) the integration of important element of architecture and infrastructure in the Shari'ah financing into global perspective.²⁰

The need for integration of the Syari'ah Banking industry into global market are motivated by its speedy growth, and begin to develop beyond the Moslem Countries (*Muslim dominated countries*). Therefore, to be importance to integrate it fully in to the global financial

¹⁹ Syed Farhan Shah Muhammad Wajid Raza Malik Rizwan Khurshid, ISLAMIC BANKING CONTROVERSIES AND CHALLENGES, INTERDISCIPLINARY JOURNAL OF CONTEMPORARY RESEARCH IN BUSINESS COPY RIGHT © 2012 Institute of Interdisciplinary Business Research FEBRUARY 2012 VOL 3, NO 10, <http://journal-archives15.webs.com/1018-1026.pdf>, download 6 November 2017 at 6.27 WITA., ps. 1018- 1019.

²⁰ (Standing Committee for Economic and Commercial Cooperation of the Organization of Islamic Organization, (Comcec), Diversification of Islamic Financial Instruments, <http://www.kalkinma.gov.tr/Lists/Yaynlar/Attachments/777/Diversification%20of%20Islamic%20Financial%20Instruments.pdf> accessed on November 2nd 2017 at 18.42 WITA, p. 24)

market by defending its characteristic and uniqueness of its services. Need be placed fully in the banking threshold and supervised intensively as to be done to the other financial institutions.

Dhani Gunawan Idhat, Direktor of Syari'ah (Islamic Banking), OJK, states that there are seven issues faced by national syri'ah so as to be developed speedily namely: (1) its mission is not compatible yet and the lack of coordination between government and OJK in developing Syariah banking; (2) many Syari'ah banking has no capital adequately; (3) funding structure of Syari'ah banking remain relay on the financing from the the expensive fund; (4) their products are not diversified and their services are not compatibe yet with the expectation of they community as may be seen in the faecture of Syari'ah bank are not complete as the similar produst of the convensional bank; (5) number and quality of human resouces (SDM) and the information technology lack support the development of products as well as services; (6) the community understanding and consciousness remain low to the Syari'ah bank; (7) the arrangement and controlling is remain optimal yet,"²¹

Generally the Indonesian Shari'ah banking on the financing is not representative yet of the profit sharing spirit. The services domination of the Shari'ah banking having the consumptive finance including the *debt financing products* based on *Murabahah, Istishna, Ijarah* and *Salam* contracts dominate capital financing (*the equity-financing*) in the Shari'ah banking instruments (based on *Mudharabah* dan *Musharakah*), the financing based on *Murabahah (murabahah based financing)*, dominate the whole of the banking financing industry. Indonsdian Banking does not chooses to use *Mudharabah and Musharakah* for it risk higher than the other,²²

CONCLUSION

1. The instrumen instrument of Shari'ah financing in Indonesia regulated in various rules and regulations. The Rules and regulations itu is :
 - a. Act Number 7 Year 1992 onPerbakan (amended by Act No. 10 tahan 1998)
 - b. Act Number 23 Year 1998 onBank of Indonesia (amended by Act Number 3 Year 2004)
 - c. Act of Republic of Indonesia Number 24 Year 2004 OnSaving Bailsman Institution
 - d. Act Number 21 Year 2008 onShari'ah Banking .

²¹ Detik Finance, 7 Barrer Making Syari'ah Banking to be Late to Develove in RI, <https://finance.detik.com/moneter/3076959/7-hambatan-yang-buat-bank-syariah-lambat-berkembang-di-ri>, accessed on November 8th 2017 at 5.55 WITA.

²² *Ibid.*,p. 56.

- e. Act of Republic of Indonesia Number.19 Year 2008 on Sovereign Sukuk .
- f. Act of Republic of Indonesia Number 40 Year 2014 On Insurances.
- g. Act Number 8 Year 1995 on Capital Market Act regulating Conventional Capital Market. Operational basis of Shari'ah market capital based on the Regulation Financial Service Authority Number 15/Pojk.04/2015 on Implementation Shari'ah Principle in capital market and Fatwa fatwa Dewan Shari'ah Nasional – Indonesian Ulama Assembly (MUI). Financial Service Authority Decision and Fatwas of Dewan Shari'ah Nasional to be guidance followed in the implementation of Shari'ah basis venture activities and may be seen as customary law in the field of Market Shari'ah Capital. This means that Shari'ah capital market have positive legal basis in Indonesia through customary law.

2. The barriers faced Implementation of the Shari'ah financing

Generally the Indonesian Shari'ah banking on the financing is not representative yet of the profit sharing spirit. The services domination of the Shari'ah banking with the consumptive finance character including the *debt financing products* based on *Murabahah, Istishna, Ijarah* and *Salam* contracts dominate capital financing (*the equity-financing*) in the Shari'ah banking instruments (based on *Mudarabah* dan *Musharakah*), the financing based on *Murabahah (murabahah based financing)*, dominate the whole of the banking financing industry. Indonesian Banking does not chooses to use *Mudharabah and Musharakah* for it risk higher than the other.

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