

## The Use of Hybrid Contract in the Innovation of Islamic Banking Product

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### ABSTRACT

ASEAN Banking Integration Framework (ABIF) provides market access and operational flexibility for Quality ASEAN Banks (QAB) in ASEAN countries. Indonesian sharia banking is faced with various challenges in fulfilling QAB qualification within this ABIF framework, one of which is the need for product innovations that can meet the needs of community transactions. One of the innovation is through hybrid contract. This study aims to analyze the validity of the use of contract hybrid in the innovation of Sharia banking products in order to encounter ABIF including its legal consequences under the prevailing laws and regulations in Indonesia. This paper was a normative juridical research with analytical descriptive approach. The validity of the use of hybrid contract in the innovation of Islamic banking products in Indonesia in order to encounter ABIF is based on the provisions of the DSN-MUI Fatwa which regulates the covenants used in the innovation of Islamic banking products, so that sharia banking that will make product innovation in Indonesia must ask Fatwa on the terms of contract which will be used in product innovation. The legal consequences of hybrid contract in the innovation of sharia banking products in Indonesia in order to face ABIF are subject to the provisions of Financial Services Authority Regulation (POJK) of Products and Activities of Sharia Banks and Sharia Business Units, so banks are required to apply the Sharia Principles in issuing their product innovation supported by the National Sharia Council Fatwa of the Indonesian Ulama Council which become the basis for the issuance of product innovation and accompanied by the Sharia Supervisory Board's opinion on the Product's innovation.

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### 1. Introduction

In 1991 established the first Sharia Bank in Indonesia named Bank Muamalat Indonesia which began operating in 1992. The establishment of the first sharia bank in Indonesia is the result of the work of MUI Banking Team which was formed based on the result of the MUI national Congress in 1990, which was implemented as a follow-up to the MUI

workshop result on bank interest and banking. The establishment of the first sharia bank in Indonesia aims to accommodate the needs of people who want banking practices without elements of usury. Conventional banking practices in applying interest systems in lending do not meet the needs of Muslim communities who avoid interest-based transactions because they consider violations against Islamic economic principles.

There is no regulation that specifically regulates sharia banking when the establishment of the first Islamic Bank in Indonesia. The establishment of sharia banking at that time was only accommodated by one of the paragraph in Article 6 of Law No. 7 Year 1992 About Banking which states that one of the activities that can be performed by banking/commercial banks is to conduct business activities with "profit sharing system", there is no provision in detail regulating the activities of its business and its legal basis in sharia. In 1998 there were revisions to Law No. 7 of 1998 on banking through Law No. 10 of 1998 on amendment to the Law No. 7 of 1992 on Banking. The law explicitly states that the banking system in Indonesia is conducted with dual banking system namely conventional banking system and sharia banking system.

The presence of these provisions was warmly welcomed by businessmen with the establishment of several other Islamic banks namely Bank Syariah Mandiri (BSM), Bank Niaga Syariah, Bank Tabungan Negara Syariah (BTN Syariah), Bank Rakyat Indonesia Syariah (BRI Syariah) and others. Sharia banking in Indonesia newly obtain the legal basis, especially in 2008 after the promulgation of Law no. 21 of 2008 concerning Sharia Banking (Islamic Banking Law). The increasing of Indonesian people needs towards sharia banking services has become one of the basic considerations for the establishment of the law.

In 2015, an ASEAN Economic Community (AEC) was formed which aims to establish economic integration for ASEAN countries, AEC is an agenda of international economic integration of the member countries of ASEAN (Indonesia, Malaysia, Singapore, Brunei Darussalam, Philippines, Thailand, Laos, Myanmar and Vietnam), which aims to reduce obstacles to the Southeast Asian regional trade in goods and services as well as foreign investment.<sup>1</sup> The AEC Blueprint 2025 is an instrument which is established to achieve that goal. The AEC Blueprint 2025, adopted by the ASEAN Leaders at the 27<sup>th</sup> ASEAN Summit on 22 November 2015 in Kuala Lumpur, Malaysia, provides broad direction through strategic measures for the AEC from 2016 to 2025.<sup>2</sup>

The AEC Blueprint 2025 is aimed towards achieving the vision of having an AEC by 2025 that is highly integrated and cohesive, competitive, innovative and dynamic, with enhanced connectivity and sectorial cooperation, and a more resilient, inclusive, and people-oriented, people-centered community, integrated with the global economy. The new Blueprint will not only ensure that 10 ASEAN Member States are economically integrated, but are also sustainably and gainfully integrated in the global economy, thus contributing to the goal of shared prosperity.<sup>3</sup> Therefore, one of the directions of banking policy issued by the Financial Services Authority (OJK) as the regulatory authority and supervisor of financial services system in Indonesia in 2016 is to encourage financial services industry to increase its contribution in national economic growth and improve competitiveness, especially in encounter the era of ASEAN Economic Community (AEC), including in the field of banking.

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<sup>1</sup> Gunadi, A. (2016). "ASEAN Economic Community Impact for Indonesia". *Jurnal Opini Juris*, 19 (1): 8-30

<sup>2</sup> Available online at: <http://ASEAN.org/ASEAN-economic-community/>, accessed on April 19<sup>th</sup>, 2017.

<sup>3</sup> *Ibid*

One of the initiatives in banking within the framework of the ASEAN Economic Community (AEC) is the ASEAN Banking Integration Framework (ABIF). ABIF was created to accelerate liberalization of ASEAN banking through an ASEAN banking integration framework. ABIF is part of the ASEAN Framework Contract on Services (AFAS)/Financial Services Liberalization (FS) that provides a broader framework. The main objective of ABIF is to provide market access and operational flexibility for Qualified ASEAN Banks (QAB) in ASEAN Member Countries which are ASEAN banks that meet certain requirements that have been agreed by ASEAN.<sup>4</sup> The requirements of a bank to become a candidate for QAB are, among others, ASEAN's strong capital banks, highly endurance and well-managed, and compliance with prudential regulations in accordance with applicable international standards.<sup>5</sup>

The renewal of Indonesian banking law plays an important role in maintaining the stability of the national financial system, which is influenced by the global financial and banking conditions, in order to prepare the resilience of the national banking against crisis and competition, especially encounter of ABIF's conception that will prevail in 2020.<sup>6</sup> Islamic banking in Indonesia is confronted with various challenges in facing of enforcement of the ABIF. In addition to the need for strengthening the capital structure, sharia banking must also be able to make innovations in its products in order to be able to meet the needs of the growing community transactions. One of the ways that is done in the innovation of Islamic banking products is through a hybrid contract (*Multiakad/al-'uqud al-Murakkabah*). However, the term of combination of contracts is the Arabic word *al-'uqud al-Murakkabah* that means two or more designated contracts in one single transaction.<sup>7</sup> *Al-'uqud al-murakkabah* (*Murakkabah*) etymologically means *al-jam'u*, which means combination or compile, the word *al-jam'u* shows the combination of something.<sup>8</sup> Combination of contract is an contract between the two parties or more to carry out a contract that contains two or more contract (such as lease and purchase contract, *hibah* and *wakalah*, *qardh*, *muzara'ah*, *sharf*, *musharakah*, *mudharabah*, and so on) with different features and legal consequences to achieve a desired viable transaction. All legal effects and consequences from of the hybrid contract, as well as all rights and obligation thereof is seen as an integral and undivided, as the legal effect of a contract.<sup>9</sup>

Simply hybrid contract is the merger of two or more contracts in one transaction. The practice of Islamic banking in Indonesia is more use of the single contract in the manufacture of its products, whereas products that only use single contract in practice is considered less meet the needs of transactions that occur, especially at this time when ABIF has started running sharia banking-Indonesia must be able to compete with other ASEAN country banks. Sharia banking is required to be able to innovate in the manufacture of products, one of them is by using a hybrid contract so that it can attract interest and meet the needs of public transactions.

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<sup>4</sup> Press Release of Bank Indonesia Communication Department 16/103/DKom, Indonesia Agreed to support the integration of ASEAN Banking, 2014 [Accessed 1 April 2017]

<sup>5</sup> *Ibid*

<sup>6</sup> Handayani, T., and Abubakar, L. (2016). "Implikasi Kesepakatan ASEAN Banking Integration Framework (ABIF) Terhadap Pembaruan Hukum Perbankan Indonesia". *Rechtidee*, 11 (2): 136-149

<sup>7</sup> Al-Tahanawi, Muhammad Ali, Kasysyaf Ishthilahat al-Funun, Vol. 2. Beirut: Dar Shadir and Dar al-Kutub al-Ilmiyyah, as cited in Mihajat, M.I.S. (2015) "Hybrid Contract in Islamic Banking and Finance: A Proposed Shariah Principles and Parameters for Product Development." *EJBM- Special Issue: Islamic Management and Business*, 7(16) (special Issue): 90.

<sup>8</sup> *Ibid*.

<sup>9</sup> *Ibid*

However, in Indonesia, there is no provision that specifically regulates the hybrid contract and is still a debate about its validity. It is interesting to examine the validity of the use of hybrid contracts in the innovation of Islamic banking products in Indonesia as well as the legal consequences, especially in relation to the provisions of sharia banking legislation in order to encounter the ABIF at this time.

## 2. Method

This research was a normative juridical with analytical descriptive approach. As a normative legal research, then a research on secondary data in the form of primary legal materials, secondary legal materials and tertiary legal materials was conducted<sup>10</sup>. In this research will be examined about the legal aspects of hybrid contract usage in sharia banking practices in Indonesia, especially regarding the identified legal issues. In this study will be conducted research on legal aspects of hybrid contract usage in sharia banking practices in Indonesia, especially regarding the identified legal issues. The specification of this research is analytical descriptive, which is making a systematic depiction of the facts<sup>11</sup> including describe the applicable regulations.<sup>12</sup>

## 3. The Validity of the Use of Hybrid Contracts in Innovation of Sharia Banking Products in Indonesia

Banking as a financial intermediary institution plays a very important role in the economic system, with its intermediary function, the bank is able to connect the parties experiencing lack of funds with the people who experience surplus of fund. The opening of greater market access within the framework of ABIF encourages Indonesian national banks to compete with banks in other ASEAN countries, one of which is to meet the Qualified ASEAN Banks (QAB) standard. There are five general criteria of banks that fall into the QAB category. Which are well managed, well capitalized, recommended by authorities, pass the Basel provisions, and as an important bank in its country<sup>13</sup>. Indonesian sharia banking faces many challenges in order to run the ABIF, apart from capital aspect to fulfill QAB, Indonesian sharia banking must also be able to make innovations in its products so as to be able to accommodate the needs of society in economic activity. By having diversified products, it is expected that sharia banks can compete and develop well.

Indonesia runs its banking system with two window systems in which conventional banking and sharia banking are run with separate management and buildings. This is different from Malaysia which runs its banking system with one window system where sharia banking and conventional banking are run with the same management and building. Both conventional and sharia banks in Indonesia base their business activities based on prudential principles and economic democracy, but in sharia banking the principle is supplemented by sharia principles, so that the application of sharia principles is the difference between conventional banking and sharia banking. This is in line with the definition of a Sharia bank as stipulated in Article 1 Number 7 of the Islamic

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<sup>10</sup> Soekanto, S., and Mamudji, S. (2006) *Penelitian Hukum Normatif Suatu Tinjauan Singkat*. Jakarta: Rajawali, p. 13-14.

<sup>11</sup> Soemitro, R.H. (1990). *Metodologi Penelitian Hukum dan Jurimetri*. Jakarta: Ghalia Indonesia, p 22

<sup>12</sup> Sumadi. (1988). *Metode Penelitian*. Jakarta: CV Rajawali, p 19

<sup>13</sup> Alamsyah, Halim. 2014, Ada lima Kriteria Qualified ASEAN Bank, Apa Saja? Available online at: <http://finansial.bisnis.com/read/20140718/90/244401/ada-5-kriteriaqualified-ASEAN-bank-apa-saja>. (accessed on October, 27<sup>th</sup>,2016).

Banking Law that a Sharia Bank is a Bank conducting its business activities based on sharia principles, and by it types it consisting of Sharia Commercial Bank and Sharia Rural Bank.

Article 1 Number 12 on Sharia Banking Law provides a definition of sharia principles, namely the principle of Islamic law in banking activities based on fatwa (advice) issued by institutions that have authority in the establishment of fatwa in the field of sharia. The institution authorized to issue a fatwa in the field of sharia is the National Sharia Council-Indonesian Ulama Council (DSN-MUI). This is as defined in Article 26 Paragraph (2) of the Law on Sharia Banking which states that Sharia principles as referred to in paragraph (1) advised (fatwa) by the Indonesian Ulama Council (MUI). DSN-MUI is an institution that is structurally under MUI. DSN-MUI is based on Decree No. Kep-754/MUI/II/1999 dated February 10, 1999 concerning the Establishment of the National Sharia Board of MUI issued by the Board of Directors of the MUI. DSN-MUI was formed in order to realize the aspirations of the Islamic community on economic issues and encourage the application of Islam in the field of economy/finance that is implemented in accordance with the guidance of Islamic law.

The establishment of DSN-MUI is a step in the efficiency and coordination of the Ulamas in encounter the issues related to economic/financial issues. The task and function of the DSN-MUI is to issue a fatwa on sharia economy to be used as a guide for practitioners and regulators, issuing recommendations, certification and sharia approval for sharia financial institutions and business, supervising sharia aspects of products/services in sharia financial institutions/businesses through Sharia Supervisory Board.<sup>14</sup> While the authority of DSN-MUI is to issue a fatwa binding Sharia Supervisory Board in each Islamic financial institution and became the basis of legal action related parties, issued a fatwa which became the basis for the provisions/regulations issued by the authorized institution, such as the Ministry of Finance and Bank Indonesia, provide recommendations and/or revoke the recommendation of names that will sit as Sharia Supervisory Board (DPS) in a financial institution and sharia business, Invites experts to explain a problem that is needed in the discussion of sharia economy, including the monetary authority/financial institutions at home and abroad, giving warning to sharia financial institution to cease deviation from fatwa which has been issued by National Sharia Council, and propose to the competent authority to take action if the warning is ignored.

For this reason, Fatwa can be interpreted as explanation of sharia law on certain issues so that the method of taking fatwa is not unlike the method of exploring the laws of sharia from the propositions of sharia (ijtihad).<sup>15</sup> The fatwa occupies a prominent position in Islamic law, because the fatwa is an opinion expressed by Islamic jurists (*fuqaha*) about the legal position of a new problem in society. When a new problem arises and there is no legal provision explicitly, either in al-quran, as-sunnah and ijma or previous *fuqaha*'s opinions, the fatwa is one of the normative institutions competent in answering or establishing the legal status of the matter.<sup>16</sup> Enactment of the DSN Fatwa formally in the provisions of Indonesian legislation has a binding legal power, especially in the field of sharia banking law.

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<sup>14</sup> Source: <http://www.dsnmui.or.id/index.php?page=sekilas>, accessed on April, 22<sup>nd</sup>,2017, at 4am Western Indonesia Time

<sup>15</sup> Sainul and Afrelian, M.I. (2015) "Aspek Hukum Fatwa DSN-MUI in Operasional Lembaga Keuangan Syariah". *Jurnal Hukum dan Ekonomi Syariah*, 3(2) : 183

<sup>16</sup> *Ibid*



Prior to the enactment of the Law on Sharia Banking, the strength of the DSN-MUI Fatwa is based on the Decree of the Board of Directors of Bank Indonesia. No. 32/34/1999, where Article 31 of the provisions stipulates that in order to carry out its business activities, sharia banks are obliged to pay attention to the DSN-MUI fatwa, then in the decree it is stated that in the case of a bank conducting business activities, if the intended business has not been filed (fatwa) by the DSN, the bank shall seek DSN approval before executing such business activities. With the enactment of the Sharia Banking law, particularly the provisions of Article 26, Fatwa DSN-MUI has the power of formally applicable in every sharia banking activity in Indonesia. The fatwa of DSN-MUI is binding on sharia banking in carrying out its business activities so as not to contain elements of usury, *maisir*, *gharar*, *haram*, and *zalim* as explained in the explanation of Article 2 of the Islamic Banking Act. The provision of the article explains that business activities based on Sharia Principles, among others, are business activities that do not contain elements of usury, *maisir*, *gharar*, *haram*, and *zalim*.

Not only binding for sharia banking in running its business activities, Fatwa DSN-MUI is also binding for sharia banking regulator that is Bank Indonesia which has now been transferred to the Financial Services Authority (OJK). OJK as a regulator has an obligation to guarantee the material contained in the MUI Fatwa can be absorbed and transformed in formulating the principles of sharia into legislation that has the power of law and general binding. Therefore, OJK cannot make a regulation related to sharia banking that is contradictory to the principles of sharia that is specified in the Fatwa DSN-MUI, besides only DSN-MUI Fatwa which can be used as guidance in making OJK Regulation, meaning OJK should not refer to fatwas issued by other institutions even though the institution issuing the fatwa is a competent institution. Based on the results of research conducted on sharia banking institutions, it is found that sharia banking institutions have attachment to the fatwa issued by DSN-MUI.<sup>17</sup> The attachment to the DSN-MUI fatwa is due to legislation requiring sharia banking institutions to comply with DSN-MUI, in addition to that the DSN-MUI fatwa is the most fundamental requirement in the manufacture and development of new products issued by sharia banking institutions and operations of sharia banking activities.<sup>18</sup>

Islamic banking products are closely related to the intermediary function and social function of sharia banking. In the intermediation function, sharia banking requires products that can accommodate the needs of the community in the process of saving and channeling of funds. There are three types of customers in sharia banking: depositors, investors and recipient customers. Depositors are customers who place their funds in a Sharia Bank and/or Sharia Business Unit in the form of Deposit based on the contract between Sharia Bank or Sharia Business Unit and the respective customer. Investors are customers who place their funds in Sharia Bank and/or Sharia Business Unit in the form of an investment based on the Contract between Sharia Bank or Sharia Business Unit and the respective customer. The Facility Receiving Customer is a Customer who obtains a fund or equivalent facility, based on sharia principles. Based on these definitions, the legal relationship between sharia banking and its customers (Depositors, Investor and Receiving Facilities Customer) arises from the contracts they have agreed upon, so that the rights and obligations of each party depends on the contract they agree on.

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<sup>17</sup> Gayo, A.A., and Taufik,A.I. (2012). "Kedudukan Fatwa Dewan Syariah nasional Majelis Ulama Indonesia dalam Mendorong Perkembangan Bisnis Perbankan Syariah (Perspektif Hukum Perbankan Syariah)." *Jurnal Rechtsvinding*, 1(2): 268

<sup>18</sup> *Ibid*

Elucidation of Article 19 Paragraph (1) of the Sharia Banking Law only explains the definition of each of these contracts, without providing detailed arrangements. Thus detailed provisions regarding each of these contracts should refer to the DSN-MUI Fatwa which outlined in the Bank Indonesia Regulation (currently Financial Services Authority Regulation) as defined in Article 26 of the Sharia Banking Act. Not least of *fatwa* that issued by DSN-MUI adopted the concept of contract (*akad*) that serve as the basis of the transaction (underlying transaction) so its validity is legitimate.

Contracts that have been regulated in the legislation are implemented in the form of products made and marketed by sharia banking. For example, Bank Syariah Mandiri issued Griya BSM Financing product which is a short, medium, or long-term financing to finance the purchase of a house, either new home or not within the developer environment by using *murabahah* contract. Another example is Bank Muamalat has a product of KPR iB Muamalat which is a financing product to finance the ownership of houses, flats, apartments and condotel including renovation and development as well as the financing/takeover of other banks with two choices of contract namely *murabahah* or *musharakah mutanaqishah*.

Every sharia bank seeks to implement these contracts into the products they create in order to meet the needs of the transaction and attract the public interest. Islamic banking is required to always innovate of their products in order to meet the demands of transactions and growing needs, one of which is to use a hybrid contract. There is no definition as such for the combination of contracts in fiqh literature.<sup>19</sup> However, the combination of contracts (*ijtima al-uqud*) may be defined as an agreement between two or more parties to put together two or more contracts with different features and legal consequences to achieve a desired viable transaction. In this case, all obligation and legal consequences arising from the combined contracts are to be realized as one single obligation.<sup>20</sup>

For instance, DSN-MUI currently has issued about 109 Fatwa in the field of Islamic economics. However, some of them are purely the results of law excavation (*ijtihad istinbath*) and some who adopt the principles of the contract which contained in *fiqh muamalah*. The adoption of the contracts into the DSN-MUI fatwa is in order to apply the principles of the contract (*ijtihad thatbiqi*) to the sharia financial/business institution. The adoption of agreements muamalah into the fatwa DSN-MUI some has singular character (*al-'aqd al-fardiyyah*) and some multi-contract, namely the combination of contract with each other with due regard to the provisions of the limits (*hudud wa dlawabith*) which has been established by sharia.<sup>21</sup> Multi contract that has natural character is allowed, for example the relationship between principal deeds (*al'aqd al-ashli*) such as *al-qardl* with derived nature (*al'aqd al-tabi'i*), such as *al-rahn* and *al-hiwalah*. Natural multi contracts occur because of the nature of the contract that is interconnected. Modification of the contract is part of *ijtihad* so that the contracts contained in fiqh can be applied to modern transactions. To modify the contract, it is necessary to enact two or more contracts. Multi contract that resulted from modification is part of *mu'amalah* in general. The origin of law of muamalah is *mubah* as long as there is no proposition that shows its prohibition (*al-ashl fi al-mu'amalat al-ibahah illa an yadulla al-dalil 'ala tahrimiha*).<sup>22</sup> Of the total contracts

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<sup>19</sup> Arbouna, M.B. (2007). "The Combination of Contracts in Sharia: A Possible Mechanism for Product Development in Islamic Banking and Finance", *Thunderbird International Business Review*, 49(3): 341-369.

<sup>20</sup> *Ibid*.

<sup>21</sup> Susanto, B. (2016). "Tingkat Penggunaan Multi Akad Dalam Fatwa Dewan Syariah Nasional-Majelis Ulama Indonesia (DSN-MUI)", *Al-Ihkam*, 11(1): 204

<sup>22</sup> *Ibid*, p. 211

adopted in the Fatwa DSN-MUI, there are approximately 60.68% using single contract and the remaining 39.31% through multi-contract approach to be applied in modern transactions.<sup>23</sup>

#### 4. Legal Consequences of Hybrid Contracts Usage in Innovation of Islamic Banking Products in Indonesia: Encountering ABIF

The main objective of ABIF is to provide market access and operational flexibility in ASEAN Member States for Qualified ASEAN Banks (QAB), namely ASEAN banks that meet certain requirements as agreed by ASEAN among others, ASEAN's strong capital banks, highly endurance and well-managed, and compliance with prudential regulations in accordance with applicable international standards. Adhering to the prevailing rules is one of the applications of prudential principles in banking operations, especially sharia banking that must operate in accordance with the principles of sharia. ABIF's positive impact for Indonesia is the opportunity and potential for Indonesian banks and business players to expand into the ASEAN market.

With the emphasis on reciprocal principles and the approval of mechanisms to reduce gaps in market access and operational flexibility in ASEAN's banking integration process, it will open greater opportunities for Indonesian banks to gain market access and wider business activities in the ASEAN region where QAB from Indonesia will receive equal treatment with local banks. The reciprocal principle is one of ABIF's key principles in which market access and operational flexibility must be mutually beneficial and acceptable to the State in concert. The use of hybrid contract in sharia banking operational activities, especially in product innovations, must be supported by human resources who master and understand the Islamic economic system so that the operational activities of sharia banking in practice can be in accordance with what has been arranged previously.

The use of hybrid contracts in the innovation of banking products is indispensable for Indonesian sharia banking products to compete with sharia banking products in other ASEAN regions, considering the open market access, with ABIF must be able to be utilized as much as possible. Hybrid contract is interpreted as a contract that is formed by a variety of contracts.<sup>24</sup> Meanwhile, according to the term *fiqh*, the word *multiakad* is a translation of the Arabic word *al-uqud al-murakkabah*, which means double contract (duplicate).<sup>25</sup>

General regulatory arrangements in Indonesia are regulated in detail in Supreme Court Regulation No. 2/2008 concerning the Compilation of Islamic Economic Law (KHES). This provision is made as a guide for judges on economic law according to sharia principles. Under this provision, sharia economy is a business or activity undertaken by individuals, groups of people, legal entities or non-legal entities in terms of to fulfill the commercial and non-commercial needs under the sharia principles. KHES "book two" is sets out the contract. Article 20 Paragraph 1 of this provision provides a definition of a contract which is deal in an agreement between two or more parties to perform and or not to commit certain legal acts. The contract must be based on voluntary principles, *amanah* (keep promises), *ikhtiyati* (prudence), *luzum* (unchanged), mutual benefit, *taswiyah* (equality), transparency, ability, *taisir* (amenity), good will, and halal.

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<sup>23</sup> *Ibid*, p. 201

<sup>24</sup> Isfandiar, A.A. (2013). "Analisis Fiqh Muamalah Tentang Hybrid Contract Model dan Penerapannya Pada Lembaga Keuangan Syariah", *Jurnal Penelitian*, 10 (2): 213

<sup>25</sup> *Ibid*



Accordingly, based on Article 27, this regulation determines that the contract law is divided into three categories: legitimate contract, *fasad* contract/ can be canceled, and the contract is canceled or canceled by law. A legitimate contract is a contract that is fulfilled in harmony and conditions. The *fasad* contract is a contract which is fulfilled in requirement and the conditions, but there are aspects or other things that damage the contract because of consideration of unfavorable. A canceled contract is a less requirement (*rukun*) and terms contract. *Akad* is not valid if it is contrary to Sharia of Islam, regulation, public order and/or morality. The provision of Article 29, this rule determines that a legitimate contract and in accordance with the Islamic Sharia is a contract agreed upon in the agreement, not containing *ghalath* or mistaken elements, carried out under pledge or coercion, *taghrir* or deception, and *ghubn* or disguise.

A mistaken does not result in the cancellation of a contract unless it occurs concerning the nature of the agreement under article 30 of KHES. Coercion is encouraging someone to do something he/she does not like and is not his/her free choice. Coercion may result in the cancellation of the contract if the coercive will immediately carry out what he threatened if he disobeyed the order of the coercive, the threatened is strongly suppressed the person being threatened. It depends on the individual, the threat will be implemented immediately, and coercion is unlawful. Fraud is affecting the other party with the deception to form a contract, based on that contract this is for his good, but in reality, the opposite happened. Fraud is affecting the other with the deceit to form a contract, based on the contract that it is for his good, but in reality, the opposite is not.

In 2015, OJK has stipulated the Financial Services Authority Regulation No. 24/POJK.03/2015 on Products and Activities of Sharia Banks and Sharia Business Units (POJK Products and Activities of Sharia Banks and Sharia Business Units) enacted on 8 December 2015. This provision revokes the previous provisions of Bank Indonesia Regulation No. 10/17 / PBI / 2008 About Products of Sharia Bank and Sharia Business Unit, so that provision is no longer valid. In addition, OJK has also issued Circular Letter on Product Codification and standard activities of Sharia Commercial Bank and sharia business unit.

The POJK of Products and Activities of Sharia Banks and Sharia Business Units are determined with the consideration that the development and innovation of sharia bank products and business units is increasingly complex and varied, thus increasing the risk exposure of sharia banks and sharia business units. To mitigate risks related to the development and innovation of sharia bank products and activities and sharia business units, it is necessary to balance with licensing and products and activities reporting mechanism that are more suited to the development of sharia banks and sharia business units. The development and innovation of sharia bank products and activities and sharia business units must continue to apply sharia principles, prudential principles, and the principle of customer protection. Article 1 Number 8, this regulation provides definitions concerning Bank Products, namely financial instruments issued by Sharia Commercial Bank and Sharia Rural Bank based on a contract in accordance with sharia principles. Sharia principles are sharia principles as defined in the Sharia Banking Act, which refers to the provisions of the DSN-MUI fatwa.

The Bank in its business activities may issue products and/or implement new activities by implementing Sharia Principles, prudential principles and the principle of customer protection. The new products and/or activities must meet the criteria not previously published or implemented by the bank concerned or have been previously issued or executed by the bank but carried out the development of features or characteristics. The

plan for the issuance of the product and/or the implementation of the new activity shall be implied by the bank in the business plan of the bank. The plan for issuing new products and/or executing activities is included in the bank's business plan for the same year as the product issuance plan and / or the implementation of new activities; it refers to the provisions governing the business plan and work plan of the bank namely the Financial Services Authority Regulation No. 5/POJK.03/2016 about Bank Business Plan (POJK About Bank Business Plan). Article 1 Point 2, the provision provides a definition of a business plan that is a written document describing a short-term (one-year) and medium-term (three year) business plan of a bank, including a plan to improve business performance and a strategy for realizing the plan according to the target and time set, with due regard to compliance with prudential regulations and implementation of risk management.

The bank's business plan must be formulated realistically and annually by the Board of Directors and approved by the Board of Commissioners with due regard to external and internal factors that may affect the continuity of the bank's business, prudential principles, the application of risk management, and well banking principles. External factors include economic conditions, social and political developments, and technology, while those of other internal factors include the financial, management and other infrastructure capabilities. The enactment of ABIF can influence the preparation of bank business plan both from external factors and internal factors because besides affecting economic factors will also affect the operational readiness and infrastructure of the bank. The plan to issue new products and / or implementation of activities becomes one of the scopes in the preparation of the business plan, so that the innovations of products to be undertaken by sharia banks, especially in order to face the ABIF must be listed also in the business plan of the bank.

The Bank may make changes to the bank's business plan regarding the issue of the product and/or the implementation of certain activities in the event of certain conditions. What is meant by "certain conditions" is the follow-up of policies established by OJK or other authorities (Bank Indonesia, Ministry of Finance, Ministry of Religious Affairs, etc.) and/or implementation of the new fatwa issued by DSN-MUI. Banks are required to obtain OJK approval to issue products and/or implement new activities if new products and/or activities are not listed in the codification of bank products and activities. The Bank may only issue products and/or implement new activities without OJK approval in the event that new products and/or activities have met the requirements contained in the Product codification and bank activities, contained in the bank's business plan, in accordance with the classification of Commercial Banks by Business Activities and supported with adequate operational readiness.

The compliance of Sharia principles in sharia banking activities is particularly internally supervised by the Sharia Supervisory Board, including in the evaluation of Sharia principles compliance with policies and procedures established by banks to manage the risks inherent in new products and/or activities of banks. Under the provisions of Article 32 of the Law on Sharia Banking, the Sharia Supervisory Board (DPS) shall be established in sharia banks and conventional banks that have sharia business units. DPS is appointed by the Shareholders General Meeting on the recommendation of MUI. In terms of competence, Sharia Supervisory Board must have high skills, especially in the field of Islamic law and sharia banking.<sup>26</sup>

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<sup>26</sup> Qori, D.E. (2014) "Mekanisme Pengawasan Dewan Pengawas Syariah Terhadap Bank Pembangunan Daerah (BPD) Daerah Istimewa Yogyakarta," *Maraji: Jurnal Studi Keislaman*, 1 (1): 290

The Sharia Supervisory Board has the duty, authority and responsibilities, among others, to ensure and monitor the suitability of the bank's operational activities against the fatwas issued by DSN-MUI, assessing aspects of sharia against operational guidelines and products issued by banks, providing opinions from the aspect of sharia against the implementation of bank operations as a whole in the bank's publication report, reviewing new products and services that have not yet issued a fatwa and requested a DSN fatwa, and submitting a report on the results of sharia supervision. Sharia supervisory boards in carrying out their duties are guided by the Guidelines for Sharia Supervision and Reporting Procedures of Sharia Supervision for Sharia Supervisory Board

Banks are required to issue new products and/or activities no later than six months from the date of approval given by OJK, and if within that period the bank has not issued the product and/or executed the new activity then the OJK approval has been void and becomes invalid. OJK is authorized to instruct the bank to discontinue products and/or activities in the case of products and activities of banks that have not obtained OJK approval, not in accordance with the product issuance plan and/or implementation of activities approved by OJK, not in accordance with the realization report of product and/or implementation of activities, not in accordance with Sharia Principles and/or not in accordance with the laws and regulations. Compliance with sharia principles refers to the Fatwa of DSN-MUI and the provisions governing the implementation of sharia principles in the business of sharia bank and sharia business unit.

In addition, OJK is authorized to instruct the bank to discontinue the product and/or activity, if based on OJK evaluation, Issuance of the product and/or execution of the activity is assessed or has the potential to cause material and/or significant loss to the financial condition of the bank and/or increase the legal risk or reputation of the bank significantly due to any complaints or claims from the customer, banks do not implement adequate risk management and there are other considerations such as general economic conditions. The termination of such products and/or activities may be temporary or permanent based on OJK judgment. Issuance of new products in the terms of innovation in sharia banking is closely related to legal risk, reputation risk and market risk because sharia banking products are a tool direct to the customers, where the element of public trust in general and customers in particular becomes a major factor in banking operations, so compliance with sharia principles should be the main thing that is considered by the Islamic banking in innovating its products.

In 2016, OJK has established bilateral cooperation with Bank Negara Malaysia as part of ABIF implementation. The agreement aims to reduce inequality in market access and banking activities of both States through the presence of Qualified ASEAN Bank (QAB) in their respective jurisdictions based on a balanced reciprocal principle.<sup>27</sup> The coverage of market access and banking activities provided in this agreement is related to the QAB licensing process, which are:<sup>28</sup>

- a) Malaysia will allow the establishment of three groups of Indonesian banking institutions in Malaysia;
- b) Indonesia will allow the establishment of three groups of Malaysian banking institutions in Indonesia including existing Malaysian banking institution group in Indonesia;

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<sup>27</sup> Press Release OJK Establish Bilateral Cooperation with Bank Negara Malaysia, Apply ASEAN Banking Integration Framework, SP 71/DKNS/OJK/8/2016. [Accessed 1 April 2017].

<sup>28</sup> *Ibid*

- c) The agreement covers provisions for establishment of branch offices and ATMs, QAB access to electronic payment systems, types of banks business activities, capital and guarantee of customer funds

This bilateral agreement is a follow-up to the signing of Heads of Agreement (HoA) between BNM, Bank Indonesia and OJK in the framework of ABIF as of December 31, 2014, which later became part of the commitments of both countries to the sixth ASEAN Framework Agreement on Services-Financial Services Liberalization (AFAS\_FSL), which is currently in the process of ratification in Indonesia. Above all, the innovations of Islamic banking products in Indonesia become a very important thing for sharia banking can place itself as part of the national banking system that can give a significant influence in the national financial system and to be able to meet QAB qualifications in order to encounter ABIF.

## 5. Conclusion

The validity of the use of hybrid contract in the innovation of Islamic banking products in Indonesia in order to face ABIF is based on the provisions of the DSN-MUI Fatwa which regulates the covenants used in the innovation of Islamic banking products. Sharia banking that will make product innovation in Indonesia must ask Fatwa on the terms of contract which will be used in product innovation, if the contract is not yet regulated in DSN-MUI fatwa. The legal consequences of hybrid contract in the innovation of sharia banking products in Indonesia in order to face ABIF are subject to the provisions of POJK of Products and Activities of Syria Banks and Sharia Business Units, so banks are required to apply the Sharia Principles in issuing their product innovation supported by the National Sharia Council Fatwa of the Indonesian Ulama Council which is the basis for the issuance of product innovation and accompanied by the Sharia Supervisory Board's opinion on the Product's innovation.

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