

Execution of Guarantee Confiscation by Islamic Financial Institutions without Litigation Process: A Case Study in Magelang

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ABSTRACT

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This study attempts to analyze the execution of guarantee confiscation of objects carried out by the Islamic Financial Institutions (LKS) in Magelang. This study uses a statutory approach (statue approach) which is descriptive qualitative by collecting data using the depth interview method. The results of this study indicate that the Islamic Financial Institutions in Magelang in the process of executing collateral do not use litigation, but non-litigation processes. Non-litigation processes used by Islamic Financial Institutions in Magelang is negotiation (consensus) amicably to execute the guarantee. The main reasons for using non-litigation processes, because it is cheap, simple, does not take time, and is friendly. From the findings of this study, the principle of kinship in negotition is still very important and useful for alternative dispute resolution (ADS) which ends in an agreement for the execution of guarantees.

Keywords: Non Litigation, Mortgage, Fiduciary, Execution, ADR

PRELIMINARY

In terms of quantity, there are very few Islamic economics cases that have been submitted to the Magelang Religious Court, which is only 12 cases. And of these cases, in the middle of the court process, many of the parties in the case were revoked Data from the Magelang Religious Court, from 2014 to 2020, shows that many Islamic economics claims were revoked by the Islamic Financial Institutions.

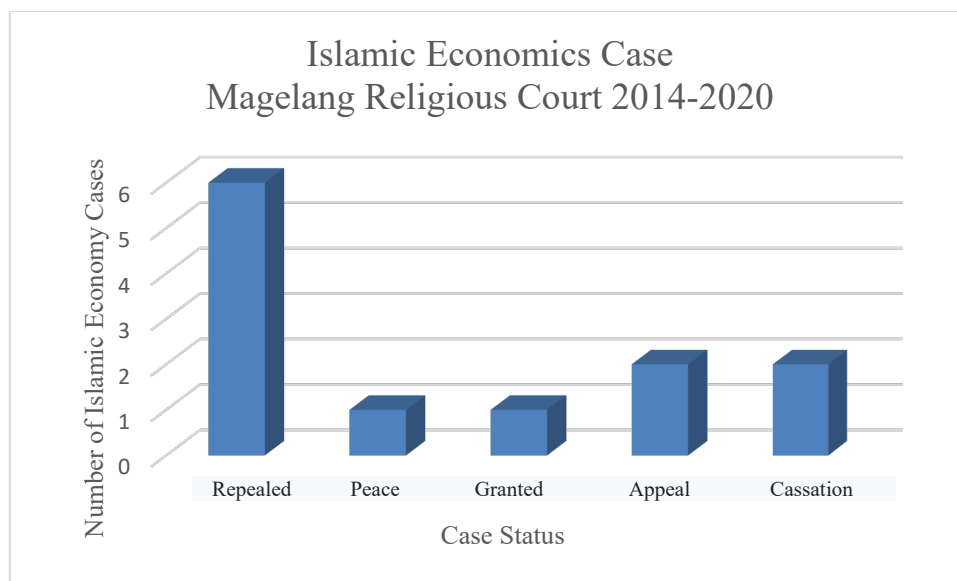


Table 1: Islamic Economics Case at the Magelang Religious Court
 The data is processed from the Case Tracing Information System (SIPP) Magelang Religious Court

From the table above, it shows that from 2014 to 2020, there were 12 Islamic economics lawsuits entered, 6 of which were withdrawn (50%), 1 reconciliation (8.33%), 2 appeal decisions (16, 67%), 2 cassations (16.67%), and 1 were granted through the decision of the Magelang Religious Court (8,33%). In addition, based on existing data, that the Islamic economics cases that go to court are actually relatively small compared to other civil cases, such as divorce or inheritance (Pengadilan Agama Magelang, 2016).

The phenomenon of Islamic economics dispute revocation shows that many parties do not complete the dispute process through the litigation process. With the withdrawal of the case and no decision regarding the execution of guarantee confiscation from the court, it will certainly make it difficult for Islamic Financial Institutions to carry out the execution of the confiscated guarantees. Because based on the applicable law, the execution of guarantee confiscation carried out by Islamic Financial Institutions must be based on Article 24 of the *Indonesian Reglemen*, Article 258 *Rechtsreglement Buitengewesten*, and Articles 18, 19 of *Staatsblad* 1908-542. Execution is carried out through sale by means of an auction on the basis of a court decision. (Sutedi, 2012) While the execution of collateral confiscation by means of another auction can be carried out with the assistance of the Auction Office in accordance with Article 1178 subsection (2) of the Civil Code. Even if the auction office is executed, the auction office will still auction it using a decision from the court. Because this is considered to have legal force so that it is easy to execute (Sutedi, 2012).

Normatively, execution of guarantee confiscation through a court decision process should be carried out by the Islamic Financial Institutions, because the confiscated guarantee

has a legal force that is executorial in nature. A court decision that is binding (to both parties) allows Islamic Financial Institutions to carry out the execution of guarantee confiscation without being resisted by the customer when carrying out the execution (Harahap, 2007). And a guarantee confiscation that has executorial power can actually provide guarantees and minimize the risk of Islamic Financial Institutions loss in the event of default. This is as stipulated in Law No. 21 of 2008 concerning Sharia Banking (Menteri Sekretaris Negara Republik Indonesia, 2008) and The decision of the National Sharia Board of the Religious Scholars Indonesian Council No. 4 of 2000 on the *Murabahah* Agreement (Dewan Syariah Nasional – Majelis Ulama Indonesia (DSN MUI), 2000).

And one of the interesting cases regarding the execution of guarantee confiscation at the Magelang Religious Court, namely the Islamic economics dispute Number 185/Pdt.G/2016/Pa.Mgl. The plaintiff withdrew this confiscated guarantee case before the panel of judges decided. This lawsuit case concerns the execution of collateral confiscation previously agreed between the Islamic Financial Institutions and its customers in the event of a default. However, the plaintiff, in this case, comes from Islamic Financial Institutions which is not located in Magelang. The Magelang Religious Court only accepted the lawsuit because the object of collateral was in the Magelang area.

This research analyzes the method or procedure for executing guarantee confiscation used by Islamic Financial Institutions in Magelang without going through the decision of the Religious Court. This research also reveals the factors behind Islamic Financial Institutions in Magelang in choosing non-litigation procedures in executing of guarantee confiscation.

Specifically, the aim of this research is to reveal the alternative dispute resolution in the execution of guarantee confiscation (Alternative Dispute Resolution) which is simpler than through the litigation process (Pramudya, 2018) (Noviyanti, 2017). Research on alternative case resolution in the context of Islamic economics is still very little researched by experts. Therefore, information on alternative case resolutions is very limited, and it is necessary to continue to conduct studies and research. Moreover, the context of the Islamic economics is a relatively new phenomenon, which requires various models of solutions that bring benefits and goodness to society.

APPROACH AND METHOD

This study uses sociology of law approach and a statute approach. The sociology of law approach is an approach that wants to “examine law in a social context” (Bachtiar, 2018). In

the social context, this research specifically explores the problem of non-litigative confiscated the guarantee carried out by the Islamic Financial Institutions in Magelang. While the statue approach is “examining and analyzing all laws and regulations related to the legal issue being handled” (Bachtiar, 2018). In the context of this statue approach, this study explores the execution of non-litigative guarantees that exist in existing laws. Therefore, this study combines literature review and field data.

The method used in this research is descriptive qualitative analysis. For data collection, researchers used the depth interview method with Islamic Financial Institutions managers and judges, both the Religious Courts and the District Courts. Meanwhile, the Islamic Financial Institutions which is the object of this research consists of two Islamic banks, namely *Mandiri Syariah* and *BRI Syariah*, and one Islamic Financial Services Cooperative, namely BMT (*Baitul Mal wa Tamwil*) Bima. And all these institutions are located in Magelang.

RESULT AND DISCUSSION

1. Development of Islamic Financial Institutions in Magelang

Islamic Financial Institutions in Magelang have shown their existence amid the proliferation of conventional financial institutions. In Magelang which consists of three sub-districts, Islamic Financial Institutions can be well received by the community and has a significant contribution in the development of an alternative financial model for the people of this city. Historically, the existence of Islamic Financial Institutions in Magelang began in the 90s, with the establishment of various *Baitul Mal wa Tamwil* at that time. Along with the issuance of the Sharia Banking Law, Islamic Financial Institutions is not limited to *Baitul Mal wa Tamwil* and sharia cooperatives but provides opportunities for the establishment of sharia banks that initially struggled with conventional patterns.

Table: Distribution KSP/KSPPS

South Magelang	KSP/KSPPS
North Tidar	0
South Tidar Selatan	0
South Jurangombo	2
Magersari	4
North Jurangombo	4
South Rejowinangun	5
Total	15
North Magelang	KSP/KSPPS
Wates	3

Potrobangsari	1
Kedungsari	4
North Kramat	2
South Kramat	4
Total	14
Central Magelang	KSP/KSPPS
Kemirirejo	6
Cacaban	3
North Rejowinangun	0
Magelang	0
Panjang	2
Gelangan	1
Total	12

According to data published by the Central Statistics Agency of Magelang, the number of cooperatives in Magelang is 41, both *Saving and Loan Cooperative* and *Savings and Loans and Sharia Financing Cooperatives* (Dinas Komunikasi Informatika dan Statistik Kota Magelang, 2020). Meanwhile, the *Saving and Loan Cooperative/Savings and Loans and Sharia Financing Cooperatives* membership until 2019 amounted to 57,558 people with 369 employees. Whereas for *Sharia Financial Services Cooperative/Sharia Financial Services Unit* there are 14 with 84 employees, while the number of members is 25,041 people (Dinas Komunikasi Informatika dan Statistik Kota Magelang, 2019). This data shows that the total membership of sharia cooperatives equals conventional cooperatives, although in terms of the number of institutions it is still a third of existing cooperatives. Meanwhile, based on data from the Central Statistics Agency for Magelang in 2020, there are 5 Sharia Banking in Magelang (Badan Pusat Statistik Kota Magelang, 2020).

2. Objects Guarantee Concept

The transaction process within the Islamic Financial Institutions is carried out as is also applicable in non-Islamic Financial Institutions, namely, there is a guarantee from the debtor (borrower). Collateral for objects in the form of land or movable objects by the debtor (borrower) to ensure and convince the creditor that the debtor will fulfill the transaction obligations in accordance with the agreed terms. When the debtor has fulfilled its obligations, the creditor will return the guarantee given. However, when the debtor is unable to fulfill his obligations or doing a default, the creditor has the right to sell or control the guarantees

provided by the debtor through a legal process.

By law, there are two types of collateral objects by the debtor to the creditor, namely land mortgage and fiduciary rights. **First**, mortgage rights over land. Land Mortgage Rights are regulated in Law Number 4 of 1996. The definition of mortgage rights according to this law is security rights imposed on land rights as referred to Law Number 5 of 1960 concerning Basic Agrarian Principles, as well as other objects which are an integral part of the land for the settlement of certain debts, which give priority to certain creditors over other creditors (Adrian, 2014).

The creditor is guaranteed the mortgage with a Certificate of Mortgage issued by the Land Agency. With the certificate, the creditor is actually allowed to directly control the object of the guarantee, because the Certificate of Mortgage has execution power. In other words, forced attempts to take over these assets are protected by law. Efforts to force take over the assets were carried out because the debtor did not want to give up the collateral, so the creditor had to undertake an attempt to forcefully vacate the assets and this attempt could only be carried out by the court. The court process will take a long time and cost a lot, so creditors are forced to pay twice as much (Suyatno, 2014).

Second, Fiduciary Guarantee. *Fidusia* comes from the Rowawi language, which is *fides* which means belief. The term fiduciary is known in the Indonesian legal system, taken from the Dutch language, *Fiduciare Eigendom Overdracht*, which means the transfer of property rights based on trust (Fiduciary Transfer of Ownership). Meanwhile, based on Law Number 42 of 1999, that the Fiduciary Guarantee is the transfer of ownership rights to an object based on trust, provided that the object whose ownership rights are transferred remains under the control of the owner of the object.

Law Number 42 of 1999 concerning Fiduciary Guarantee, there are parties called Fiduciary Giver and Fiduciary Recipient. In fiduciary practice, the owner of the goods (Fiduciary Giver) only transfers ownership to another party (Fiduciary Recipient), but the control remains in the hands of the owner of the goods. A fiduciary Guarantee is a guaranteed right for movable objects, both tangible and intangible, and immovable objects, especially buildings that cannot be encumbered with mortgages.

Making Fiduciary Certificates is one of the important things to do in terms of Fiduciary guarantees. For the manufacture of this certificate, the parties only need to go to the Fiduciary registration office to register the Fiduciary Guarantee and it is formalized by a Notary. This certificate will regulate the transfer of ownership rights to the object on the basis of trust between the creditor and the debtor. The Fiduciary Certificate gives the power of executorial

rights to revoke the fiduciary object without going through a Court Decision if the debtor commits a violation of the agreement.

Based on the provisions in Article 29 subsection (1) of Law no. 42 of 1999 concerning Fiduciary Guarantee (Menteri Sekretaris Negara Republik Indonesia, 1999), it can be seen that if a debtor or fiduciary fails, the execution of the object which is the object of fiduciary guarantee can be carried out in the following manner: a. Execution based on the fiduciary guarantee certificate *grosse* or in other words containing the executorial title (*fiat execution*) contained in the fiduciary Guarantee Certificate, carried out by the fiduciary recipient; b. Execution based on the execution of the *parate* of execution through a public auction by a fiduciary recipient; c. Sales execution under the hands of the creditor the fiduciary recipient himself (Salamiah, Riswandie, & Aini, 2017).

3. Execution of Guarantee Confiscation: Between Litigation and Non-litigation

Normatively, the execution of confiscated collateral for objects, whether in the form of a mortgage or fiduciary guarantee, can be carried out by Islamic Financial Institutions in two ways, namely litigation and non-litigation. By litigation, the disputing parties must register their case with the Religious Court. The results of the interview with the Judge at the Magelang Religious Court said that the execution of guarantee confiscation would be carried out if there was a request for a guarantee execution lawsuit to go to the Religious Court. The application can be filed when registering a default, or after receiving a decision regarding the application for default, then submits a request for execution. For guarantees that can be submitted as the execution of guarantee confiscation is a guarantee which is indeed the result of the contract agreed upon by the plaintiff and defendant. The guarantee will be processed, whether or not you have a Mortgage Deed. Because the Mortgage Deed according to Mortgage Law (Law No. 4/1996) has the same position as the decision of the Religious Court judge. After that, the Religious Court will process it, either through mediation or a trial which will later produce a decision.

From interviews conducted with Islamic Financial Institutions managers, that in general, the Islamic Financial Institutions in Magelang do not use court litigation in handling Islamic economics disputes they face, both Religious Courts and Ristrict Courts. execution of guarantee confiscatio

Based on an interview with one of the employees of *Bank Syariah Mandiri* Magelang Branch office, it was revealed that their office had submitted financing problems to the Head Office located in Yogyakarta. *Bank Syariah Mandiri* Magelang Branch office initially had a

risk and recovery section that was tasked with solving problematic financing problems, but now everything is handled by the head office. To confiscate the guarantee, *Bank Syariah Mandiri* Magelang Branch office uses the State Assets and Auction Service Office to solve the problem. While the process is being carried out, they register the case of confiscated the guarantee by auction at the State Assets and Auction Service Office in Semarang. Then the auction news from the State Assets and Auction Service Office will be brought to the Magelang branch office to be reported on the announcement board owned by Bank Syariah Mandiri Magelang Branch office.

And Islamic Financial Institutions in Magelang, so far, have also not used the District Court as a settlement when there are defaults or disputes for their Islamic economics cases. In investigating cases at the Magelang District Court, no Islamic economics cases were found that were being filed or had been resolved. In general, civil economic lawsuit cases that are registered or resolved by the District Court are non Islamic economics civil cases (Pengadilan Negeri Magelang, n.d.). These findings indicate that Islamic economics cases, which are resolved through litigation, are all handled and resolved through Religious Courts.

And real Islamic economics cases, apart from going through litigation, can also be resolved through non-litigation. Magelang Religious Court judges, when interviewed, stated that the settlement of defaults in addition to being brought to the Religious Court, can also be brought to the auction office or privately made, if the guarantee is accompanied by a certificate which is equivalent to the judge's decision. This is also the reason why Islamic economics cases brought to the religious court are relatively low (few). This is because, in general, Islamic Financial Institutions and their customers can resolve their dispute problems with family deliberations.

Meanwhile, the process of executing collateral seizure without going through litigation can be done in several ways. From the data obtained, Islamic Financial Institutions in Magelang use the auction route and sale of assets based on privately made. For Islamic Financial institutions that use the auction method, they usually come directly to the State Assets and Auction Service Office in their area, and for the Magelang region through the State Assets and Auction Service Office hall in Semarang. They will start registering for confiscated the guarantee in the form of an auction, on the condition that Mortgage Deed exists for land or building. Furthermore, State Assets and Auction Service Office will provide an official report to the Islamic Financial Institution and each of it will display the auction minutes in front of their respective offices until the auction items are sold.

Islamic Financial Institutions that use the privately made deed as the basis for making

sales without going through a third party, such as auction institutions or courts. They will carry out confiscate the guarantee according to their respective rules and methods based on the agreement deed. Islamic Financial Institutions make persuasive efforts by taking a familial approach and negotiating (deliberation) to find the best way. After the negotiation is carried out, the customer usually gives up the collateral assets given to the Islamic Financial Institution to be auctioned. This negotiation process is often referred to as another way (Alternative Dispute Resolution) in the community in an effort to resolve disputes, especially in business disputes, with settlement patterns that do not involve other parties either formally or informally (Miswardi, 2020). This negotiation process is like that carried out by The *Baitul Maal wa Tamwil* BIMA Cooperative for Savings and Loans and Sharia Financing, which confiscates collateral with self-made rules after negotiating with the customer. The confiscated goods are then sold directly to familiar people or by auctioning off collateral on the existing bulletin boards. Based on Musyfikah Ilyas' research, Deliberation is an effective instrument for solving cases (Ilyas, 2018). And according to Noviyanti's perspective, that deliberation is a tradition of *al-turats al-Islam* (Islamic classical heritage) which is still relevant for the settlement of solutions (Noviyanti, 2017).

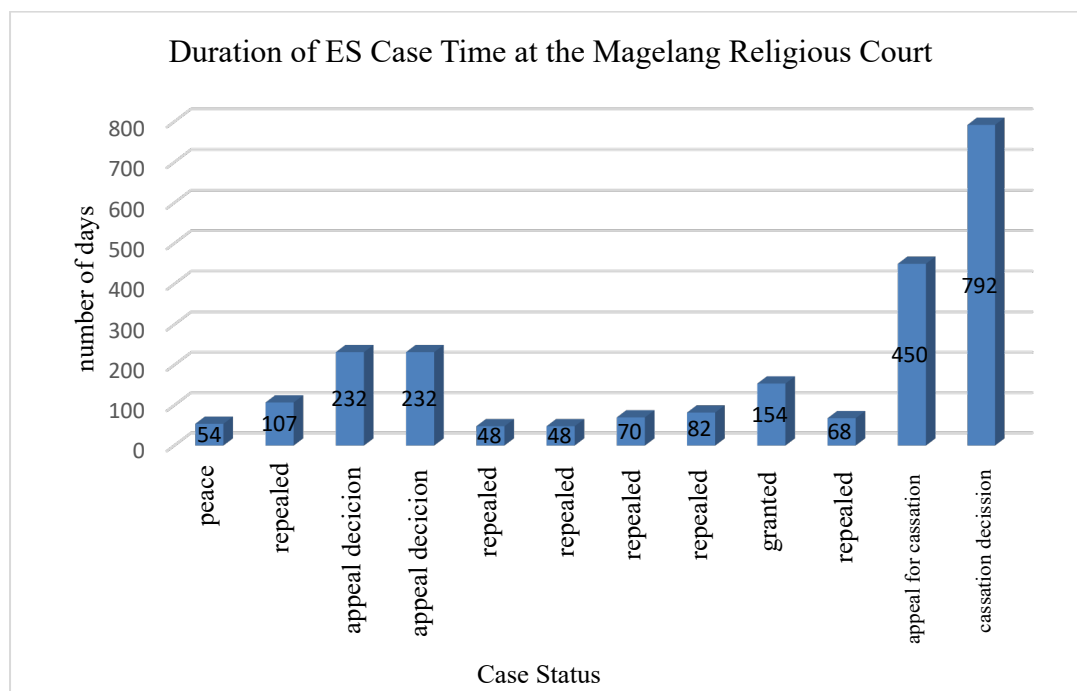
4. Islamic Financial Institutions Factors Choosing a Non-Litigation Process

Based on interviews with one of the employees of each Islamic Financial Institution in Magelang, it was found that in general Islamic Financial Institutions resolve customer default problems by executing of guarantee confiscation using non-litigation processes or resolving without involving the court in it. Non-litigation settlement is taken by Islamic Financial Institutions because it is simpler and cheaper. In the perspective of Eko Sulistiyono, Head of *Bank BRI Syariah* Magelang (interviewed on April 20, 2019), and Khotib Ansori, Manager of the Institutional and Marketing Division at The *Baitul Maal wa Tamwil* BIMA Cooperative for Savings and Loans and Sharia Financing, (interviewed on May 24, 2019), revealed several reasons for the choice of settlement through non-litigation, namely:

- 1) The mediation process at the Religious Courts took a long time to decide on the lawsuit filed, as a result, it made the Bank feeling loss.
- 2) Understanding of the governing law, namely that the settlement of Islamic economics disputes does not have to be carried out at the Religious Court, but there are other ways that can be taken, such as family deliberations and the sale of guaranteed assets through an auction hall.
- 3) The high cost of the case for the dispute resolution process in court.

- 4) Takes a long time to get approval for confiscated the guarantee.
- 5) There is no sense of trust in human resources in the Religious Courts.

Based on data taken from the case tracing information system in the Magelang city court, it shows that of the 12 cases submitted to the religious court, it took at least 48 days, in which case this case was withdrawn. For this case until the cassation decision takes 792 days (2 years, 62 days). Meanwhile, the Islamic economics case which is decided by the Religious Court itself takes 154 days.



Tabel 2: Time of Case at the Magelang Religious Court
 Processed Data from the Case Tracing Information System Magelang Religious Court

From the data above, it is clear that both Islamic banks and *Baitul Maal wa Tamwil* are of the opinion that the dispute resolution process at the religious court takes a long time. Thus, the execution of guarantee confiscation is not carried out through a litigation process with a ruling by the Religious Court. And they are looking for other possible paths to be taken in order to settle Islamic economics disputes, such as deliberation and selling the guaranteed assets through an auction hall. In addition, the cost of cases that are not cheap in court proceedings is another reason for *Baitul Maal wa Tamwil* not to settle Islamic economics disputes through the courts. And another reason for Islamic Financial Institutions is that they do not fully believe in the competence of judges in deciding cases of Islamic economics. In terms of time, the handling of cases of Islamic economics disputes in Religious Courts is relatively new, so that the image and assumptions of the community about Religious Courts still revolve around family law, such as divorce cases, not economic

dispute.

In addition, the results of interviews with Magelang Religious Court Judges, the factor that causes Islamic Financial Institution in Magelang not to confiscate many of its guarantees at the Magelang Religious Court, is the small area of Magelang, only three sub-districts in it. Because of the cases that have been submitted to the Magelang Religious Court, most of them come from outside Magelang, such as from Magelang Regency and its surroundings. Another factor, due to the existence of a certificate that is the same as the decision of the Religious Court, which makes Islamic Financial Institution not register its claim of default at the Magelang Religious Court.

5. Legal Analysis

The negotiation efforts in executing collateral confiscation carried out by Islamic Financial Institution in Magelang are actually correct based on the applicable law. The 1945 Constitution which is imbued with Pancasila as the basis for the philosophy of life in Indonesian society has indicated that the principle of dispute resolution through deliberation for consensus is prioritized. Negotiation is a way of executing guarantee confiscation is a persuasive way that is cheap, fast, and pleasing to both parties. Because negotiations use the principle of a win-win solution in resolving disputes between the parties. Where these negotiations are informal and unstructured and the time is unlimited, the efficiency and effectiveness of this negotiation process depends on the good faith of the disputing parties. The use of this negotiation process will provide many benefits for each of the disputing parties.

Legally, negotiations (deliberation) are regulated in Law no. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. In article 6 subsection 2, Law no. 30 of 1999, states as follows:

Negotiation is the settlement of disputes or differences of opinion through alternative dispute resolution as referred to in subsection (1) shall be resolved in a direct meeting by the parties within a maximum period of 14 (fourteen) days and the results are stated in a written agreement which states that basically the parties can and have the right to resolve disputes that arise between them on their own. The agreement regarding the settlement must then be stated in a written form agreed by the parties.

In the article above, it is stated that the negotiation process can be carried out for 14 days. And the results of the negotiations are stated in the form of a written agreement which is then agreed by both parties. So that before carrying out the execution, the execution of

guarantee confiscation and the customer must conduct a deliberation where the results of the deliberation are written in a memorandum of understanding signed by both parties. From this memorandum of understanding, execution of guarantee confiscation can execute collateral for existing objects.

In other laws, the familial and negotiation approach carried out by the Islamic Financial Institution in carrying out the execution of guarantee confiscation is also regulated in the Civil Code articles 1851 to 1864. The provisions in Articles 1851 to 1864 of the Civil Code are related to the peace efforts of both parties. This means that both parties choose the path of peace by negotiating (deliberation) in a friendly manner. Peace is an agreement between the parties to a dispute either by submitting or detaining an object of dispute or by ending a case to prevent other cases from arising. Where the agreement must be made in writing and agreed upon and signed by both parties (Ahsan & Santoso, 2019).

In the Civil Code in Article 1851 peace has the following elements:

- 1) There is agreement between the parties. The agreement of the parties must be considered valid if it fulfills the elements of the agreement stipulated in Article 1320 of the Civil Code, while the agreement must be in accordance with the provisions of Article 1321 of the Civil Code which states that there is no legal agreement or agreement given if because: 1). Oversight; 2) Coercion; dan 3). Fraud. Furthermore, Article 1859 of the Civil Code states, however, that a peace can be canceled if there has been an error regarding the person or regarding the subject of the dispute. It can cancel in all cases where fraud or coercion has been committed.
- 2) The contents of the agreement are an agreement to do something. Article 1851 of the Civil Code limits what legal actions are allowed, which includes 1). Deliver an item; 2). Deliver something of the goods; and 3). Hold an item.
- 3) Both parties agree to end the dispute. Article 1851 of the Civil Code states that reconciliation can be made on existing cases, both those that are currently in court and those that will be submitted to court. The dispute is currently being examined or to prevent a case or dispute from arising (Palupi, 2008).

From interviews conducted with Islamic Financial Institution, that Islamic Financial Institution in Magelang when conducting peace efforts in order to confiscate guarantees made points as stipulated in the Civil Code, namely by deliberation to find solutions related to assets to be sold by Islamic Financial Institution, including parties. whether the Islamic Financial Institution or the customer will sell it. The agreement on peace (negotiation) was stated in a letter of agreement signed by both parties.

CONCLUSION

The settlement of Islamic economics cases of Islamic economic institutions in Magelang uses court litigation and non-litigation processes, it's just that the non-litigation process is chosen as an alternative to dispute resolution. There are several factors that influence Islamic Financial Institution not to choose the litigation process at the Religious Courts, namely the problem of a long time, high costs, and the assumption of a lack of human resources for competent Religious Court judges in solving sharia economic problems. Judging from the process and time, litigation through the Religious Court, starting from filing a lawsuit, mediation, court, then a Judge's decision takes at least one month for simple cases, while for ordinary cases it can take months.

Islamic Financial institutions in Magelang generally use non-litigation process, an alternative way of resolving disputes to execute customer guarantees. And the non-litigation process in solving the issue of execution of guarantee confiscation is carried out through the auction and underhand sales offices. The use of the auction office was chosen by the banking Islamic Financial Institution, while the non-bank Islamic Financial Institution such as Baitul Maal wa Tamwil chose the way of selling under the hand through a negotiation process (deliberation). Non-Bank Islamic Financial Institutions in Magelang generally choose alternative dispute resolution by a negotiation process (deliberation) in a friendly manner, which in the end the agreement occurs for the sale of collateral.

Recommendation: Further research needs to be carried out to see about the competence of judges in the Religious Court in dealing with Islamic economic problems because in this study the assumptions and judgments of the Islamic Financial Institution are found related to the lack of competence of judges handling Islamic economic cases.

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