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THE LEGAL PROTECTION FOR APPLYING ISLAMIC CONTRACT LAW IN BANKING REGULATION IN INDONESIA AND TURKEY

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Abstract

This article discusses about the extent of readiness of the government regulation to meet the need of Islamic investment in the field of banking in Indonesia and Turkey, especially how legal protection to the banks and the customers in implementing sharia investment in both countries. This article is based on normative legal research, descriptive comparative through analysis the literature and regulatory provisions in force in the two countries. It is concluded that both Indonesia and Turkey have an arrangements of legislation and procedures in which guarantees the legal protection for every parties to apply islamic contract law through its secular legislation system. Depending on the customers would need to seek an appropriate mechanism in sharia based on freedom of contract. The difference is that in the legal systems being used also has differences, in which Indonesia has such a specific sources of law in which regulating the syariah principles. On the other hand Turkey does not.

Keywords: *islamic contract law, Islamic banking, legal protection, Indonesia law, Turkish law*

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I. INTRODUCTION

The existence of Banking institutions are important because of their function as the collectors of investment funds is very influential to support the economic growth of a nation. The Classical problems for Muslims who want to invest in the banking institutions is not of the function owned by banking institutions, but rather to the suitability of the financial institutions activities with the Islamic teaching. That is why nowadays has been created the Islamic banking system in the banking business. The purpose of the research is to find how the regulation of the two countries could maintain the preventif legal protection to the customers of Islamic banks on their religious rights of Islamic law compliances in the investments. Also to find the repressive legal protection on Islamic banking practices through the disputes settlements in both countries. This paper aims to explain the comparison in the mechanism of legal protection and regulation for the muslim customers

of Islamic banking in order to achieve maximum protection of the use of Islamic law of contract, both preventive and repressive.

II. BANKING REGULATION IN INDONESIA AND IN TURKEY AS LEGAL BASIS FOR SHARIA-COMPLIANT IN ISLAMIC BANKING OPERATIONS.

A. THE APPLICATION IN INDONESIA.

The issuance of Law No. 7 of 1992 is the first legal existence of Islamic banking in Indonesia. Through the practice of law in the Islamic investment banking activities are to begin implementation. Although by law the term “sharia” is not known, but the concept of “dual banking system” has been started by introducing the term “Bank dengan Prinsip Bagi Hasil” (Bank with Profit Sharing Principles) in addition to the conventional banks. The purpose of the Regulations is initially only as an effort to mobilize the “idle” funds which are restrained from investments as a form of the Muslim community resistance against system of interest which is considered contrary to the sharia. But then, with the monetary crisis in the country, the Islamic banking system even be the correct solution to overcome the problems of the crisis due to the uncertain impact of the interest rate as a fluctuative exchange rate (cost push inflation).¹

In the early 90s has established several rural banks in Indonesia by leveraging moment issuance of Government Policy Package October 27, 1988 (PAKTO 88), which is the starting point that provides ease of banking liberalization establishment of new banks. After passing through the first 2 years, Bank Muamalat Indonesia (BMI) which is the first Islamic commercial bank in Indonesia has been able to switch the status of a foreign bank, because it already has an adequate level of health. Under the umbrella of Law Act. No.7 of 1992, the regulations implementing, PP 70, 71 and 72, 1992, Islamic banking activities

¹ See: Gemala Dewi, *Aspek-aspek Hukum Dalam Perbankan dan Perasuransian Syariah di Indonesia*, 4th ed. (Jakarta:Kencana Prenada Media, 2007), at 192, Fathurrahman Djamil, “Urgensi Undang-Undang Perbankan Syariah di Indonesia”, *Jurnal Hukum Bisnis* (Vol.20, 2002), at 39, Wirdyaningsih, et.al. *Bank dan Asuransi Islam di Indonesia*, 3rd. ed. (Jakarta: Kencana Prenada Media, 2007), at 51.

should only be carried out by banks with Islamic principles alone. In other words, the conventional banks at that time cannot run Islamic investment.²

Then the switch in Law no. 7 of 1992 was by Act No. 10 of 1998 on the Amendment Law no 7 of 1992, conventional banks can participate to operate Islamic system by opening a branch office of sharia or sharia units (Unit Usaha Syariah/UUS). The procedure for the establishment or conversion to Islamic banks operation has been set up, initially by PBI No.4/1/PBI/2000 and then be further regulated by PBI No.8/3/PBI/2006 About The Change of Operations of the Conventional Banks Became the Banks which Implementing Business Based on Sharia Principles and Implementing Office Opening Bank Business Based on Sharia Principles by Conventional banks. Even with the release of PBI. 8/3/PBI/2006³ the Conventional Bank has been able to do “office channeling” to implement sharia services in conventional bank branches. This suggests substantial opportunities for people to invest through both sharia Islamic Banks and Conventional Banks to open the account in the Branch Office.

The early 2000s is a period of purification begun all Islamic investment. At the beginning of 2000 the introduction of the Interbank Money Market based on Sharia principles (Pasar Uang Antarbank Syariah/PUAS) by issuing PBI. 2/8/PBI/2000 dated February 23, 2000 jo. PBI. 7/26/PBI/2005 dated August 8, 2005 on the Amendment PBI. 2/8/PBI/2000 About PUAS. In 2002 services were held completion banking network released with PBI 4/1/PBI/2002 Jo. PBI. 8/3/PBI/2006 About the Change of Business Activity from Conventional Bank (BUK) becomes a Sharia Bank (BUS) and Office Opening by BUK. While in the year 2003 began Introduction to Islamic Capital Market.⁴

In 2005 an attempt on purification of sharia is equipped with provisions of Regulation No. 7/46/PBI/2005 concerning the collection

² Zaenul Arifin, *Memahami Bank Syariah: Lingkup, Peluang, Tantangan dan Prospek*, (Jakarta: Alvabet, 2000), at17.

³ PBI (Peraturan Bank Indonesia) or Bank Indonesia Regulation is the legal provisions stipulated by Bank Indonesia and binds any person or entity, and published in the State Gazette of the Republic of Indonesia. (Article 1 Point 8 of Law No. 23 of 1999 concerning Bank Indonesia).

⁴ Gemala Dewi, *Supra*. at110.

and Disbursement Agreement for Commercial Banks Conducting Business Based on Sharia Principles. This regulation provides guidance on boundary limits must be adhered to in carrying out banking transactions using Islamic principles, especially in the collection and distribution of funds. PBI is very relevant in order to prepare for the legal protection of the Islamic parties in the transaction and also provide legal certainty to invest in Shariah. With several changes in this enhanced PBI, PBI was originally revoked by PBI. 9/19/PBI/2007 on Sharia Implementation in fund-raising activities and Disbursement Services and Islamic Banking Services, which regulates the provision of Islamic banking covenant agreement-both in terms of raising funds and grants from the PBI jo. 10/16/PBI/2008 on Amendment PBI. 9/19/PBI/2007.

Concerning about contract the Central Bank also introduce The Codification of Islamic Banking Products attached on the Circular Letter issued by Bank Indonesia (SEBI) No. 10/31 DPbS Jakarta, dated October 7, 2008 regarding Islamic Banking products and Sharia Unit. And to accomodate the progress of future types of banking products the govenrment also issued PBI. 10/17/PBI/2008 Date of 25 September 2008 concerning Islamic Banking products and Sharia. To better accommodate the purity of Islamic banking in Indonesia, as a legal umbrella and then in the House of Representatives of the Republic of Indonesia (DPR RI), made the Draft of Law on Islamic Banking (Islamic Banking bill or IB bill). In connection with this IB bill, since it was first proposed around 2003, there was some IB bill proposed by various groups in the country, namely by Bank Indonesia (BI), the Association of Indonesian Islamic Banking (Asbisindo), the Association of Indonesian Muslim Intellectuals (ICMI) and the proposal of the House of Representatives their own initiative. The bill proposed Islamic Banking initiative DPR-RI is then based on the Letter of the President of Republic of. R 08/Pres/2/2007 discussed with the Parliament, the Minister of Finance, Minister of Religious Affairs, Ministry of Law and Human Rights, in particular regarding:

- a. Institutions authorized to issue decrees and or opinions on the suitability of products and services according to Shariah;
- b. Establishment of Islamic Banking Committee;

- c. Sharia Supervisory Board at conventional banks having Islamic business units (UUS).

These three things are the most important things to be set in order to achieve the implementation of the Islamic banking operations in accordance with the provisions of Islamic law (sharia compliance). The results later on July 16, 2008 enacted Law *no. 21 year 2008* on Islamic Banking, which is then followed by implementing regulations issued by Bank Indonesia Regulation (PBI) or the Governor of Bank Indonesia Circular Letter (SEBI). In brief evolution of the Indonesian government regulation in banking operations of Islamic banking can be seen in the table below.

Table 1.
**Indonesian Banking Regulatory Development Pertaining
The Shariah Banking System**

Year	Development
1982 (introduction of Islamic banking system through cooperative)	<ol style="list-style-type: none"> 1. Law <i>No. 14 of 1967</i> does not provide the opportunity for banks to invest in Shariah 2. The establishment of “<i>Baitut-Tamwil</i>” business with legal basis of Cooperative with Islamic investing products.
1990 (Workshop <i>MUI</i>)	<ol style="list-style-type: none"> 1. The concensus to establish Islamic banks 2. The establishment of Sharia Rural Banks (BPRS) in Indonesia after PAKTO 1988.
1992 (Introduction to Dual Banking System)	<ol style="list-style-type: none"> 1. Law <i>no. 7 of 1992</i> About Banking (introducing “<i>Bank dengan Prinsip Bagi Hasil</i>”/bank with Profit Sharing Principles) 2. The establishment of Islamic Banks (Bank Muamalat)
1998 (Introduction Dual System of Banking)	<ol style="list-style-type: none"> 1. <i>Act 10 of 1998</i>, the Central Bank acknowledged the existence of Conventional Banks and Islamic Banking 2. Conventional Bank opens Sharia branch office 3. The establishment of a second Islamic Bank 4. The opening of the first Sharia Unit of Conventional Banks
2000 (Introduction to Islamic Money Market)	<ol style="list-style-type: none"> 1. Compilation of Islamic banking regulations by BI 2. Introduction to Islamic money market instruments
2002 (Completion of Office Network)	<p>PBI No.4/1/PBI/2002 jo. PBI. 8/3/PBI/2006:</p> <ol style="list-style-type: none"> 1. Conversion of Conventional Commercial Banks to Commercial Islamic Banks 2. Conversion to Islamic branches of conventional bank 3. Office of sharia in conventional branches (Capem) 4. Sharia Unit Branch in conventional office 5. Allows “Office channeling” in the office and branches of Conventional bank to Islamic services.

2003 (Introduction to Islamic Capital Markets)	<ol style="list-style-type: none"> 1. for Sharia Banks to Go Public 2. for public investment in Islamic bonds.
2005-2007 (affirmation of the concept of sharia contract)	<p>PBI. 7/46/PBI/2005 jo. PBI. 9/19/PBI./2007 jo PBI 10/18/PBI/2008:</p> <ol style="list-style-type: none"> 1. Giving legal limit for contract- sharia contracts 2. Provides penalties for violations of the provisions of the contract in the field of Islamic banking 3. Provide guidance for the resolution of disputes.
2007 (Introduction to Rating System for Islamic Banks)	<ol style="list-style-type: none"> 1. PBI. 9/1/PBI/2007 2. Affirmation of Principles “Prudencial Banking” for Islamic banking 3. Emphasis on the principle of “Good Corporate Governance” for Islamic Banking and Conventional banks UUS.
2008 – today	The Enactment of Law <i>no. 21 of 2008</i> concerning Islamic Banking as a legal umbrella for improvement of investment in Islamic banking

Based on the explanation above, we can see that Indonesian Muslims still have limited legal protection, particularly regarding operational technical compliance with the provisions of Sharia (Islamic compliance). The legal basis of sharia law on technical banking operations in Indonesia are still rooted in the provisions of the fatwa of the National Syariah Board of Indonesian Ulema Council (DSN-MUI).⁵ However, specific to the contract mobilization and channeling of funds, the banks have found the setting in the Central Bank Regulation (PBI) No. 9/19/PBI/2007 jo. PBI. 10/16/PBI/2008 and manufacturing standards are codified in Islamic banking products through the Central Bank Circular Letter No. SEBI. No. 10/31 /DPbS, dated October 7, 2008 regarding Islamic Banking Products and Syariah units accompanied by attachment in Codification of Islamic Banking Products that describes several types of Islamic banking products that are standardized.

B. THE APPLICATION IN TURKEY.

Islamic banking in Turkey have found a footing where it has emerged that some financial institutions referred to (Special finance house) or in Turkish (Zel Finans Kurumu) to provide Islamic banking services in 1980. In 2001, the year the financial crisis in Turkey instead a milestone in the history of the Islamic banking industry which since the Islamic banking institutions or in Turkey called (bank trust or participation

⁵ Muhammad Syafi’i Antonio, *Bank Syariah dari Teori ke Praktek*, (Jakarta: Gema Insani, 2001), at 234.

bank) recorded a growth that has never been achieved before. Assets increased by 40 percent and by 53 percent financing, as well as a deposit of 40 percent (according to data from the association bank trust Turkey). However, history is important in the era of the banking industry is the enactment of the Law Bank Law No. 5411 on November 1, 2005 by supervisory authorities, where the law comes in line with the rules of Islamic law that regulates the performance of the bank to open a checking account with no interest with the name “Special current account.” As permitted for bank unions to accept deposits in accordance with the mudaraba contract as the profit and loss participation accounts, while the murabaha financing could be through the scheme, Ijara ended with ownership and musyarokah.⁶

Turkey to boost the growth of the Islamic banking sector in order to accommodate the flow of capital from Islamic countries. Market participants and economists welcomed the move, others worried about the wave of Islamization. The breathe of sharia banks increasingly popular in Turkey. Statistical data collected association of Islamic banks Turkey (TKBB) shows, the growth of the Islamic banking sector soared by 25 to 30 percent per year since the beginning of 2006. Turkey only has four major Islamic banks with 800 branches, now the number has reached 900. Three of the four largest banks are from the Gulf. Islamic bank currently holds a 5% share of the national banking market. From the view of regulation the development and the growth of Islamic banking system in Turkey, is based on development through the regulations. Turkey has made the first legal policies that comply with Islamic banking, which is regulated by single integrated regulatory framework that applies to both Islamic banks and conventional banks namely Banking Law No. 5411. Similar to Indonesia, the Islamic banks in Turkey are under supervision of state central bank.

⁶ [...], “ايكثرت يف ذيمال سال ا قفري صل”, available at <http://archive.aawsat.com/details.asp?section=58&article=494371&issueno=10941#.VWVMAAtKqqko>, accessed on 28 Mei 2015.

II. LEGAL PROTECTION FOR CUSTOMERS IN INVESTING IN ISLAMIC BANKING IN INDONESIA AND TURKEY.

Although investment in Islamic banking, including investment risk, is quite low when compared with the risk of investing in the stock market, but prudence in investing remains to be done. To minimize the risk as small as possible to invest in Islamic banking, and that problems will arise in practice in Shariah banking could be solved well, then we need to know the extent of the protection of law, both preventive and repressive in both countries. In the section below will be explain how the legal system of Indonesian and Turkish Government take action in preparing the legal protection to the muslim customers in the operational of Islamic banking business.

A. PREVENTIVE LEGAL PROTECTION.

1. Preventive legal protection in Indonesia.

Preventively, the customers who want to invest in Islamic banking in Indonesia has been protected by the provisions of the legislation that provides the full responsibility for the legal needs of banking institutions in carrying out banking operations activities, including Islamic banking institutions as described in Point II of this article. Legislation governing Islamic Banking reinforced by the provisions of Government policy by means of Central Bank Rules (PBI) and the informal legal opinion of the National Syariah Board of Indonesian Ulema Council (*DSN-MUI*). Both of these rules and the fatwa compliance governing the business activities in these institutions are preventive legal protection for parties who want to run sharia investments in Islamic banking.

If any provision of these regulations have been adhered in both institutional and operational during the making of contracts in the sharia banks, the interests of clients in investing in sharia can be protected. For that the parties involved should seek preventative legal protection, by applying the provisions of the regulation of Islamic banking in the design of contracts they make. A working knowledge of the parties involved is a major supporter for the success of these investments will be, either from the bank, the investor clients, notaries as registrar agreement, as well as the sharia law consultants that makes standard contracts that

will be used in the operations of the Islamic banking.⁷ Before we look at the overall position of the parties in the investment activities of Islamic banks as well as how the legal protection they can get, we can see the first customer in a position to invest in Islamic banks. As funders party, clients can invest in two ways, namely by the Mudharabah system and the Wadhiah system. Mudaraba system can be applied in the form of savings and deposits. While Wadhiah system applied in opening a checking account at the bank shariah. Investment in Mudharabah system, on the intake of funds in Islamic banks done with the opening of deposit or savings by using Mudharaba contract. In principle, the lenders customers who want to invest their funds in Islamic banks with this scheme is to have a goal to take back these funds in the future are generally quite long (over 1 year).⁸ While the scheme Wadhi'ah, customers can take back the funds placed at any time if needed.⁹ Both customer investment scheme has been contained setting in DSN-MUI fatwa. For the mudharaba principle set forth in the DSN-MUI Fatwa No.02/DSN-MUI/IV/2000 on Saving for a deposit Mudharaba and set the DSN-MUI Fatwa No.03/DSN-MUI/IV/2000. As for the gyro wadhi'ah set in the DSN-MUI Fatwa No. 01/DSN-MUI/IV/2000. Both investment schemes set out in the DSN-MUI fatwa, has now formally set out legally in the form of Bank Indonesia's regulation, the PBI. No.10/17/PBI/2008 about Islamic Banking products and Sharia Unite which were ratified on 25 September 2008.

Following the enactment of PBI. 10/17/PBI/2008, the Circular Letter issued by Bank Indonesia (SEBI) No. 10/31 / DPbS Jakarta, dated October 7, 2008 regarding Islamic Banking products and Sharia Unit. One of the interesting information on it is SEBI Circular is accompanied by attachment of Codification of Islamic Banking Products that describes several types of Islamic banking products that are standardized. Through the standardization of Islamic products, each Islamic bank that was about to release a new product is required to report

⁷ See: M.Umer Chapra and Tariqullah Khan, Regulation and Supervision of Islamic Banks. (Islamic Development Bank, 2000), at 23.

⁸ Abdullah Saeed, Islamic Banking and Interest, A Study of Riba and Its Contemporary Interpretation, (New York, E.J.Brill, 1996), at 83-88.

⁹ Sutan Remi Sjahdeini, Perbankan Islam dan Kedudukannya dalam Tata hukum Perbankan Indonesia, (Jakarta: Grafiti, 1999), at 56.

to the BI new product if the product is in accordance with the standards codification of Islamic Banking products. But if the products are not included in the product referred to in paragraph (2), the Bank is required to obtain approval from Bank Indonesia. The provision is contained in PBI. 10/17/PBI/2008 Date of 25 September 2008 concerning Islamic Banking products and Sharia. And if there is a product that execution was contrary to Islamic Sharia principles, banks should stop these products under the provisions of Article 7 of the PBI. This provision, is a guarantee of legal protection for customers Muslims on Islamic banking product conformity with Islamic principles.

On the other hand, the entrepreneurs running the investment or the disbursement customers, implement sharia bank placements are referred to as “financing”, either by using skim of *Mudharaba* and *Musharaka*. *Mudharaba* set in *DSN-MUI Fatwa No.04/DSN-MUI/IV/2000* about *Mudharabah*, whereas in using *Musharaka* financing schemes set in *DSN-MUI Fatwa No.08/DSN-MUI/IV/2000*. Though at the Islamic Bank financing can also run financing in a principle of “buying and selling”, such as by using skim *Murabaha* (mark-up sale), *Bai ‘as Salam* (the buying and selling indent) and also in *Bai’ al Istisna* (buy-sell in advanced). Similarly to execute financing with skim *Ijarah* (lease) and *Ijarah muntahiya bit-Tamlik* (hire purchase), but for the discussion in this article only emphasizes the financing scheme alone, because the emphasis is on the discussion of the legal protection of clients in the collection of funds from the customer as an investor depositor funds, not as a fund manager.

In terms of *Mudharaba*, as the application of the two tiers *Mudharaba*, Islamic banks as a fund manager known as the “*mudharib*”, while the customer as the owner of the funds called “*shahibul maal*”. In this case, the bank as “*mudharib*” in principle has promised to return the funds to the same value (whole) at a given time and will provide additional (profit sharing) as a result of the use of funds in time. For the Bank on the one hand must have a risk management policy to prevent a decline in the value of fund. In this case, the bank acts as the investment manager, who must seek placements customer after coupled with some funding from other owners alike.¹⁰

¹⁰ Wirdyaningsih, et.al. *supre*. pp.115-116.

As an application of the precautionary principle required by Indonesian Bank in order to obtain an adequate level of health assessment as defined in Regulation No. 9/1/PBI/2007, before placing the funds into the customer fund users (employers / project) the bank must formerly on the principle of 5 C + 1 S (Character, capacity, condition, capital and colateral and safety), which in Islamic banking is termed as the 5 K + 1 S (trust, honesty, decency, openness, fairness and solidarity). On the other hand, the Bank also must have a “Good Corporate Governace” in carrying out investigations in the case of institutional clients as well as in recruiting Analyst Officer, determines the Monitoring Committee on finance and the financing order to keep the financing runs smoothly. All of these things need to be considered by the Islamic banks to prevent problems in later days and to minimize the risk of loss to the bank which then must also be as implications for investor clients as the funds depositor in the Islamic banks.¹¹

2. Preventive legal protection in Turkey

The modern era of Turkish national law system was started in 1923 as Turkey became a republic after its war of independence against British, French, Italian, and Greek that lasted for four years.¹² Under the new regime, civil law tradition of continental Europe was introduced.¹³ As a result, Turkish legal system is a codified legal systems in which its formal sources of law such as its constitution, laws and regulations are compiled in codes and written forms.¹⁴

To put it into further details, following are Turkish laws that were modeled after various European countries:¹⁵

¹¹ Rachmadi Usman, *Aspek Hukum Perbankan Syariah di Indonesia*. (Jakarta:Sinar Grafika, 2012), at 292.

¹² Av Ozgur Metin, and Av. Onur Gelbai, “The Path to Modern Turkish Law”, <http://www.ankarabarusu.org.tr/siteiler/AnkaraBarReview/tekmakale/2008-2/13.pdf>, accessed on 8 Agustus 2015, at 123.

¹³ Id.

¹⁴ Murat Sen, “The Historical Development of Turkish Law”, *HUFS Global Law Review*, (Vol. 6 No. 2, August 2014), at 75.

¹⁵ Summarized independently by the authors from Murat Sen, “The Historical Development of Turkish Law”.

Table 1 General Overview of Turkish Laws

No.	Law field	Model law	Notes
1.	Administrative law.	French legal system.	The highest court in administrative jurisdiction is the Council of State.
2.	Criminal law.	a. Italian Penal Code of 1889; b. German Penal Code.	The former Turkish Penal Code that was enacted in 1926 was inspired entirely by the Italian Penal Code. However, since the Penal Code was found insufficient, new Penal Code was made and it was adopted from German Penal Code.
3.	Civil law.	a. Swiss Civil Code; b. German, French, and Italian Civil Codes.	The first Turkish Civil Code was formulated by making small changes in Swiss Civil Code. But, in 2002, new Turkish Civil Code was enacted by taking into consideration of German, French, and Italian Civil Codes.
4.	Law of obligation.	The 1911 Swiss Code of Obligations.	The earlier Turkish Law of Obligation was directly transcribed from the 1911 Swiss Code of Obligations. Nonetheless, the law did not cover several issues like road traffic, real estate, and consumer protection in which later be added in more comprehensive Turkish Code of Obligation of 2011.
5.	Tax law.	Western Europe tax system particularly Federal German tax law.	The Ottoman tax system was completely erased after the Republic of Turkey was formed. Changes were made and the fundamental one occurred in 1949 where the basis of the Turkish tax law came from the Federal Republic of Germany, Income Tax Law and the Corporate Income Tax Law.
6.	Commercial law.	a. Italian Trade Commission Act of 1882; b. German and French laws.	Turkish Trade Act of 1926 general provisions were taken from Italian Trade Commission Act of 1882, while the specific part related to partnerships was modeled after German and French laws.
7.	Labour law and social security law.	-	At first, labour law was part of the law of obligation. Then, in 1936, independent Labor Law was published.
8.	Law of Civil Procedures.	a. Civil Procedure Law of 1925 of the canton of Neuchatel, Switzerland; b. German and French Procedure Codes.	The first law was enacted in 1927 which later amended many times and the newest is Code of Civil Procedure, Law No. 6100 which came into public in 2011.

Based on table above, it is clear that European influence to Turkish laws is abundant. Furthermore, many laws are amended in order to fulfill what society needs in Turkey.

The amendment or revocation of law itself is part of The Grand

National Assembly (TGNA) of Turkey functions as legislative branch.¹⁶
Other functions of TGNA namely:¹⁷

- a. adopts of draft laws;
- b. supervises the Council of Ministers and Ministers;
- c. authorizes the Council of Ministers to issue governmental decree having the force of law on certain matters;
- d. debates and approves the budget draft and the draft law of final accounts;
- e. makes decisions on printing the state currency;
- f. declares war, martial laws or emergency rules;
- g. ratifies international agreements; and
- h. takes decision on proclamation of amnesties and pardons inline with the Constitution.

The Regulation on banking sector in Turkey also part of the many laws which are amended in order to fulfill what society needs in Turkey. The Banking Regulation and Supervision Agency (BRSA) is the sole authority to carry out the Supervision of banking sector in Turkey, including participation (Islamic banks). So in The secular system of Turkey there is no special agency to supervise the Islamic banking sector. Especially in syariah compliance by the government. The presence of Islamic banking in which according to the Banking Law published in issue 5411 of the Official Gazette dated 01/11/2005, the name of special finance institution was changed into the “Participation Banks”. The Participation Banks only has one association which is called Participation Banks Association of Turkey (PBAT) or *Turkiye Katilim Banklari Birliđi* (TKBB), which operated since year 2001 with its old name as The Special Finance Institution Association. The Association currently has 4 (four) members.

In Turkey, the presence of the association that will lead in product development and setting-up of new business models, which requires deep study and research, and represents participation banks is very important. When the organizational structure of the current association

¹⁶ Ministry of Investment Support and Promotion Agency of the Republic of Turkey, “Legal and Political Structure”, <http://www.invest.gov.tr/en-US/turkey/factsandfigures/Pages/LegalAndPoliticalStructure.aspx>, accessed on 8th August 2015.

¹⁷ Id.

is observed, in term of functional competencies necessary for the realization of these works, various areas of development are available. For this reason, as a first step towards the diversification of product structures of the participation banking system, it is necessary that a permanent and independent regulatory and legal function is established in the PBAT.

However, associated with setting contract law in Turkey they do not have specific legislation relating to contract law of Islam. There recognizes freedom of contract and the parties are free to choose the agreement that they make. The element of contract could be refered to Law no. 6098 on Commercial and Obligation year 2012. In order the shariah transaction to be valid and acceptable, the provisions of sharia contract should follow the opinion of spesific scholar from the Istambul SabghattinUniversity name Khairuddin Karaman. His opinions then became a reference in the practices of Islamic banking and financial law in Turkey. ¹⁸ In this case, for the parties which involved in Islamic banking business should seek preventative legal protection, by applying the provisions of the regulation of Islamic banking in the design of contracts they make. The knowledge of the parties involved in Turkish secular system of law is a major supporter for the success of these investments. So they need to compose the stipulation into the clausules of the contract which should be according to Islamic principles in which also allowed in the Turkish secular law. The hard work is needed either from the bank, the investor clients, notaries or other agreement registrar, as well as the sharia law consultants that makes standard contracts that will be used in the operations of the Islamic banking in the country.

B. REPRESSIVE LEGAL PROTECTION

1. Repressive legal protection in Indonesia

Protection of new repressive laws required if there has been a dispute between the parties that transact shariah. There are various remedies that can be done by the parties to the non-formal to formal legal action. Non formal legal remedy is for things to do in resolving disputes before coming to court institution, which usually involve issues arising from the weakness caused by lack of knowledge of the parties in making the

¹⁸ Based on interview to BRSA executive in Ankara office, .on October 20th, 2015.

contract, or the use of standardization burdensome contract customers. However, in practice several problems often arise between customers and banks and other financial institutions Shariah, the original can not be predicted at the time of making of the contract. if it is based on the Indonesian Ulama Council Decree No. Kep. 09/MUI/XII/2003, dated December 24, 2003 about the name change BAMUI a National Sharia Arbitration Board (BASYARNAS), the settlement of problems that arise in sharia banking and financial institutions can be resolved through non BASYARNAS. BASYARNAS is a special institution that will resolve business disputes in Shari'a economics, in accordance with the Islamic principles of contract.¹⁹ It can be done, especially if the defaulting party acting in good faith to seek a peaceful solution.²⁰

On the other hand, if the customer bad faith then the formallah are more reliable in Islamic investment dispute resolution, namely to institute religious court, in accordance with the provisions of the amendment of Article 49 in the Grain to 37 Act. no. 3 of 2006 on the Amendment of Act. No. 7 Year 1989 concerning the Religious Court.²¹ However, the dispute financing in Islamic banks, in the event of default of the user client funds before execution executed sequestration in the formal institutions of the agreement, the bank should seek rescue financing problematic actions first. Customer defaults but still acting in good faith should be given intensive approach by issuing warning letters 3 times (SP1, SP2, and SP3). When well-meaning customers are still seeking financial returns, then it can be held negotiations (meetings) to take action in the form of rescue 3R (Reschedulling, Reconditioning, and Restructuring) or when necessary to convert the contract. Approach to dispute resolution through the concept of 3 R is guaranteed implementation in PBI. 10/18/Pbi/2008 About Restructuring Financing for Commercial Sharia and Sharia.

¹⁹ Al Fitri, Badan Arbitrase Syariah Nasional Dan Eksistensinya <http://www.badilag.net/data/ARTIKEL/BADAN%20ARBITRASE%20SYARIAH%20NASIONAL.pdf> accessed on 21 Juli 2015.

²⁰ Look at the command of God to make peace in Quran Surah. an Nisa (4): 128 of disension in the household, Quran Surah an Nisa (4): 114 on the suggestion made peace among human beings, as well as QS al Mumtahanah (60): 7-9 about the relationship between Muslims and Pagans are not hostile to Islam.

²¹ Muh.Nasikhin, Perbankan Syariah dan Sistem Penyelesaian Sengketanya, (Semarang:Fatawa Publishing, 2010), at141.

However, if the customer is not also able to improve its performance in order to overcome the failure of the business, then both parties may enter into mediation or conciliation to the National Sharia Arbitration Board (BASYARNAS) as an institution appropriate choice of dispute settlement provisions of *Law no. 30 of 1999* concerning Arbitration and Alternative Dispute Resolution. It is also a way out which is recommended in the PBI. But if it does not also meet the agreement, then the matter may be referred to the religious, to seize the collateral as an act of completion of the financing agreement. Dispute Resolution in the Religious This is the right thing, because now the case of Islamic finance has become the Religious Institutions Authority, based on the *Article 49 of the Law no. 3 of 2006* on the Amendment of *Act No. 7 of 1989* on Religious Courts that have passed the House since the date of February 21, 2006. Although the *Law no. 21 of 2008* concerning Islamic Banking in banking operations is still possible to submit the dispute resolution or arbitration institution or Court General public through the mechanism of choice of law in the contract, but the Islamic financial disputes that are better suited to the Sunnah of Prophet Muhammad SAW and his companions atsar is with the deliberation shariah compliance or arbitration.

2. Repressive Legal Protection in Turkey.

Legal reform in Turkey began in the days of the Ottoman Empire penetrated the opening of special courts like the trade court in 1864. Following the European model, the courts have a panel of judges was introduced by the judicial court Appellate Court was established at that time. The Ministry of Justice was established in 1868 as the only institution with the authority in the field of administration of justice. Although the purpose of the establishment of this ministry is to standardize and centralize the administration of justice under a single institution, but in reality the various types of courts have even more to grow and develop. As a result, in addition to the Shariah Court, those courts for non-Muslims (*cemaat mahkemereli*), a special court, the court panel (*nizamiye mahkemereli*) and the consular courts run by foreign powers under the capitulation agreement. There are some efforts being made to unify the courts, for example by closing the consular court

that appear to weaken the sovereignty of the Ottoman dynasty, negating different courts for non-Muslims and bestow personal civil matters to the jurisdiction of the courts syaria'h. However, these efforts face considerable challenges both from outside and from within.

In general, the settlement of disputes in Turkey based on applicable laws are not different from those prevailing in Indonesia, namely through:

1. Litigation;
2. Alternative Dispute Resolution (ADR).

The meaning of Arbitration in the Procedure Code No.1086 Turkey, is mentioned as "Arbitration is a process by the which a dispute between two or more parties as to Reviews their mutual legal rights and liabilities is Referred to and determined judicially and with binding effect by the application of law by one or more persons (the arbitral tribunal) instead of by court of law."

As is regulated in the Law, Arbitration is a process of dispute between two or more parties to obtain their legal rights and obligations referred to, and determined by law with binding effect to the application of the law by one person or more (arbitral tribunal) not by a court of law. The Alternatif Dispute Resolution for consumers in the Turkish financial market includes:

1. General Rule on consumer protections;
2. Consumer Bank;
3. Policy holders;
4. Investor capital markets.

The Alternative Dispute Resolution for Consumers in Financial Markets has several forms; The first is the general rule on the protection of consumers, in which the Arbitration Committee for Consumer Problems and disputes stipulated in the Consumer Protection *Act No.4077* (Mandatory for consumer disputes under 938 TL (for 2010).

As for the need of the consumers, will be settled by the Bank of the Turkish Banks Association who handles the disputes between member associations and their clients. As stated in the Bank Act No. 5411 section Nine, that between duty and authority association is to organize the board of arbitrators according to the principles and procedures that

must be prepared and approved by the Board. In order to evaluate and resolve disputes between members and their clients, The Board should act with their rights for the application of law in accordance with Law No. 4077 on the Protection of Consumer Rights and other laws.

Looking at it from the existing sources the authors saw that dispute settlement of Sharia transactions in Turkey today are not separated by a conventional dispute settlement transactions. When there is a dispute, the settlement was not directly to the court, but through institutions, such as in banking case, through Banking Regulation And Supervision Agency (BRSA).

IV. CONCLUSION

From the explanation above, it can be concluded that both Indonesia and Turkey have an arrangements of legislation and procedures in which guarantees the legal protection for every parties to apply islamic contract law through its secular legislation system. Depending on the customers would need to seek an appropriate mechanism in sharia based on freedom of contract. The difference is that in the legal systems being used also has differences, in which Indonesia has such a specific sources of law in which regulating the syariah principles. On the other hand Turkey does not.

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