Legal Review Of Collective Investment Contracts In Issuance Of Sharia Mutual Fund Instruments According To Islamic Law (Case Study In Indonesia)

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Abstract- According to the Capital Market Law in Indonesia, namely Law no. 8 years 1995 concerning the Capital Market, Mutual fund management can be in the form of a Limited Liability Company and can also be in the form of a Collective Investment Contract (KIK). This article will explore the legal form of KIK on Sharia Mutual Funds in Indonesia in the perspective of Islamic Contract Law. Based on to the Fatwa of Indonesian Ulema Council Number 20/DSN-MUI/IV/2001 concerning Investment Implementation Guidelines for Sharia Mutual Funds, the mechanism of its activities uses a wakalah contract and the Mudharabah agreement as a hybrid contract between the Investment Manager and the Investment User. The main isues are: what makes the concept of Sharia Mutual funds different from Conventional Mutual funds? is there other alternative contracts which is more suitable for sharia compliance of Sharia Mutual Funds? This research uses doctrinal law study approach. The authors found that there is an eclectic relationship that supports one another in the point of fund management and also there are alternative contracts that can be applied in sharia mutual funds by means of Waqf based Mutual funds.

Keywords- Aqad; Collective Investment Contract; Sharia Mutual Funds

I. INTRODUCTION

At present, the capital market is one of the integral parts of a nation's economy. In fact, the capital market has become a financial nerve-center. In Indonesia, the existence of the capital market is one of the most important factors in the development of the nation's economy. It is considered to play a particularly important role since the capital market has two functions, which are economic and financial function. The economic function allows the capital market to be a place that facilitates the trade between the investors, who have excess funds available, and those who have a shortage of available funds. The financial function provides the fund owners with the possibility and opportunity to earn the dividends from the investment they made. Capital market is an activity that deals with public offering and securities trading, public companies which are related to the securities they issue, as well as institutions and professions that are related to the securities.[1]

The idea of establishing a Sharia capital market in Indonesia began with the emergence of a capital market instrument that applied Sharia principles, known as the Sharia mutual funds. Sharia mutual fund is a mutual fund that operates in accordance to the terms and principles of Islamic sharia.[2] Globally, Sharia mutual fund was first introduced in 1995 by the National Commercial Bank in Saudi Arabia under the name of Global Trude Equity, with a capitalization of US$ 150 million. In Indonesia, Sharia mutual fund was pioneered in 1998 by Danareksa Investment Management Co.Ltd. who at the time issued a mutual fund product, which was developed based on the Sharia principles, in the form of a mixed mutual fund called *Danareksa Syariah Berimbang*.[3] Sharia mutual fund was the first Sharia capital market instruments in Indonesia predating the launch of the Sharia Capital Market in Indonesia in mid-March 2003.[4]

Mutual funds are derived from the word "mutual" which means guard or maintain and the word "fund" which means money. So, mutual funds can be interpreted as a maintained pool of money. Mutual funds are generally defined as a place used to raise funds from the investors which are then invested into securities portfolios. According to (Article 1 point 27) Capital Market Law No. 8 of 1995, mutual funds are one of the platforms used to

raise funds from the investor to be invested in securities portfolios by an Investment Manager who has obtained the permit from the Capital Market Supervisory Agency.[5]

In mutual funds, the investors do not directly invest their money to purchase securities on the capital market, but rather they buy mutual fund products managed by an Investment Manager.[6] The Investment Manager will manage the funds contributed by the public (investors) to purchase the securities that are considered profitable. Later, when the investment made by the investment manager brings a profit, the profit will be returned to the investors in accordance with the agreement.[7]

Mutual fund is an alternative investment, particularly for small investors and the investors who do not have much time and the expertise to calculate the risk of their investment. Mutual fund is designed as a mean to collect money from the public (investors) in Indonesia to make investment in the capital market in Indonesia. The funds that are collected in mutual funds are the pool of money from the investors, while the Investment Manager is the party entrusted to manage the fund.[8]

According to Iwwan P. Pantjawinoto, mutual fund is a collection of funds from investors who have joint investment objectives. Therefore, investors must analyze the objectives and investment policies of mutual fund structured in the prospectus,[9] a document containing information that is considered significant from an issuer's public offering that is bound to occur. This document will be employed by the issuers and underwriters to allure the investors of the securities offering. Sharia Mutual Fund as a Mutual Fund is a platform for the public to invest their funds which later once the fund was accumulated will be invested by the Mutual Fund manager (Investment Manager) into a securities portfolio consisting of various types of securities in accordance with the investment policies that has been previously established at the time it was offered to the investorors The objective of the investment policy consists of various types of securities such as stocks, bonds, short-term money market instruments or a combination of these securities.

Based on the description above, there are 3 (three) things related to the definition of mutual funds, which are: (1) The availability of funds from public investors, (2) The funds are invested in the form of securities portfolios, and (3) the funds are maintained by the Investment Manager.[10] Therefore, the funds in mutual funds are the pool of money from the investors, as for the Investment Manager is the trusted party who managed the fund. Since the funds used to make investment in mutual funds are combined from many investors, the existing contract is called a Collective Investment Contract (KIK).

Principally, sharia mutual fund is a form of Islamization of conventional mutual funds and is an alternative to the ambivalence manner on Muslims, who on the one hand wish to invest their capital in mutual fund and on the other hand also have a fear of violating the terms stated in Sharia law.[11] considering that Sharia mutual funds implements Sharia principles in their operations. According to the DSN-MUI Fatwa No. 20 / DSN-MUI / IX / 2001, Sharia mutual fund is defined as the mutual fund that operates by following the terms and principles of Islamic sharia law, both in the form of a contract between the investor, as the owner of the property *(Shohibul Mal)*, and the Investment Manager as *Shohibul Mal's* representative; or between the Investment Manager, as representative of *Shohibul Mal*, with investment users.[12] Hence, Sharia mutual fund is a mutual fund in which the management and investment policies are based on Islamic Sharia Law.

Sharia mutual funds will not invest their funds in companies which management or products contradicts Islamic sharia, such as alcoholic beverage factories, pig farming industries, financial services that allows usury in their business operations, and businesses that practice immoral activities. The main objective of Sharia mutual funds is not merely to make profit, but also to have a social responsibility to the environment, a commitment to religious values without neglecting the interests of the investors. [13]

Theoretical Foundation of Sharia Contracts

The decent development of current Islamic mutual funds in Indonesia is related to the regulations that comply with sharia principles. In order for muamalah activities, primarily the mutual funds, are managed in accordance with Sharia principles, the National Sharia Council-Indonesian Ulama Council (MUI) deems it necessary to

establish a fatwa on Sharia mutual funds to serve as the implementation guidelines, keeping in mind the Word of Allah SWT, which stated:

وَأَحَلَّ اللَّهُ الْبَيْعَ وَحَرَّمَ الرِّبَا... البقرة :٢٧

Translation: "But Allah SWT has permitted trade and has forbidden interest…." (Qs. Al-Baqarah [2]: 275)

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَأْكُلُوا أَمْوَالَكُمْ بَيْنَكُمْ بِالْبَاطِلِ إِلَّا أَنْ تَكُونَ تِجَارَةً عَنْ تَرَاضٍ مِنْكُمْ

Translation: "O you who have believed, do not consume one another's wealth unjustly but only [in lawful] business by mutual consent." (Qs. An-Nisa [2]: 29)

يَا أَيُّهَا الَّذِينَ آمَنُوا أَوْفُوا بِالْعُقُودِ

Translation: "O you who have believed, fulfill [all] contracts." (Qs. Al-Maidah [5]: 1).

Hadith of the Prophet Muhammad SAW, stated:

"Muslims are free to act at will to put conditions in their agreements except that which prohibits something which is permissible or permits something which is prohibited (HR. Tirmizi dari 'Amr bin 'Auf)."

Usul al-fiqh:

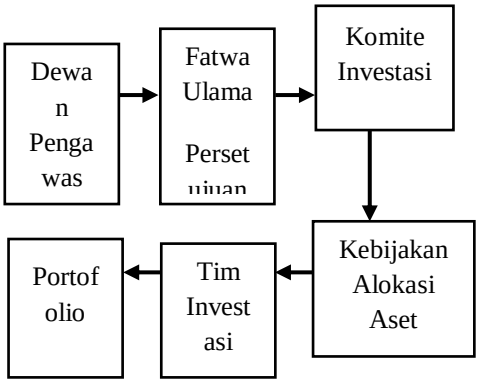
اْلأَصْلُ فِي الشُّرُوْطِ فِي الْمُعَامَلاَتِ الْحِلُّ وَالْإِبَاحَةُ إِلاَّ بِدَلِيْلٍ

Translation: "The status of all matters other than rituals is permissible until evidence is given that a certain matter is prohibited."

Types of Contracts

The types of contracts stated in Sharia mutual funds according to the Financial Services Authority Regulation Number 53 / POJK.04 / 2015 Concerning the Contracts Used in the Issuance of Sharia Securities in the Capital Market, are:

1. *Ijarah* is an agreement (contract) between the lessor, or financial service provider *(mu'jir)*, and the lessee, or service user *(musta'jir)*, to transfer the rights title (benefit) of an object of Ijarah in the form of benefit from the usage of goods and / or services within a certain time with payment of rent and / or wages *(ujrah)* without transferring the ownership of the object of Ijarah itself.
2. *Istishna* is an agreement (contract) between the consumer or buyer *(mustashni')* and the creator or seller *(shani')* to create an *Istishna* object which has been purchased by the consumer or buyer *(mustashni')* based on the criteria, requirements and specifications agreed by both parties.
3. *Kafalah* is an agreement (contract) between the guarantor *(kafiil)* and the party that is guaranteed *(makfuul 'anhu/ashiil/debtor)* to guarantee the obligation of the guaranteed party to another party (*makfuul lahu*/person who owes it).
4. *Mudharabah (qiradh)* is a cooperation agreement (contract) between the owner of the capital *(shahib al-mal)* and the business manager *(mudharib)* where the capital owner *(shahib al-mal)* provides the financial needs for a business while the business manager *(mudharib)* manages the funds.
5. *Musyarakah* is a cooperation agreement (contract) between two or more parties *(syarik)* by collecting business capital in the form of funds or other assets to carry out a business.
6. *Wakalah* is an agreement (contract) between the authorizer *(muwakkil)* and the attorney (representative) by shifting the power from the authorizer *(muwakkil)* to the attorney (representative) to take certain actions or deeds.



Contracts of Sharia Mutual Funds

Contracts are a tangible form of human activities in making transactions for their livelihood. All kinds of human activities in the business world are arranged in various types of contracts and deeds in accordance with the needs of the intended legal relations. In Fiqh books, the legal relations of daily life transactions is called *muamalah*[14] which is related to the transactions upon the rights regarding objects and services

between individuals or referred to as *muamalah maliyah*. In *muamalah maliyah*, a Muslim is obliged to understand how he acts in accordance to *muamalat* as a form of obedience to Allah's Shariah. If a muslim does not understand this *muamalah maliyah*, then he may do something that is forbidden or *shubhat* unintentionally. Therefore, having a good understanding on the contract as part of *muamalah* law between fellow human beings is very important.

In current practice, the contract used in Sharia mutual funds between investors and Investment Managers is a *wakalah* contract, since substantially the investor represents his assets to Investment Managers to be invested. Meanwhile, the contract between investment managers and Custodian Bank is *mudharabah*, in line with the investors who invest their assets. This arrangement is in accordance with the DSN-MUI Fatwa No. 20 of 2001 concerning the guidelines for implementing Sharia mutual funds.

Securities portfolio management by Investment Managers must go through a Custodian Bank so that both parties have the authority to carry out custodial and investment administration. Article 25 paragraph (1) of the Capital Market Law states that all assets from Mutual Fund must be kept at a Custodian Bank so that the Investment Manager does not personally hold the assets. The Custodian Bank has the responsibility in terms of storing, safeguarding and administering the assets, both in recording and payment or resale. Another thing to know is that The Custodian Bank is prohibited from being affiliated with Investment Managers in order to avoid conflicts of interest in the management of mutual fund assets.[15]

Based off of the transaction scheme, the Investment Manager in Sharia mutual funds acts as the investor's representative for the interests and on behalf of the investor. Meanwhile, the Investment Managers will act as *mudharib* in the *mudharabah* contract who maintain the joint property of the investors who act as *shaibul-maal*. Afterwards, The Sharia mutual funds will put these funds back into issuer's activities by purchasing capital market instruments that comply with Sharia law.[16]

Mutual Funds are used to pool money from public investor to be subsequently reinvested in the form of securities portfolios by the Investment Manager.[17] In order to maintain the funds in accordance to Sharia principles, the process of managing Sharia mutual fund investments can be illustrated as follows:

As a guideline in implementing the Mutual Funds in accordance to Sharia law, Fatwa DSN-MUI Number 20 / DSN-MUI / IV / 2001 concerning Investment Implementation Guidelines for Sharia Mutual Funds and DSN Fatwa Number 40 / DSN-MUI / X / 2003 concerning Capital Market and General Guidelines for The application of Sharia Principles in the Capital Market Sector is the basis for carrying out Sharia Mutual Fund activities. Both fatwas adequately represent other fatwas that are related to the capital market.

The underlying consideration in issuing this fatwa is based on the needs of the country and general public for the capital market. Furthermore, the ongoing capital market does not comply with the terms of Sharia law, so a separate fatwa on the capital market is needed to serve as a guide for Islamic economic agents in the capital market sector.

The type of a contract for ownership of capital assets in Islamic law are either in the form of *mudharabah* or *musyarakah*. In modern fiqh, securities are seen as an inclusion in a *mudharabah musyarakah* (partnership) which reflects the ownership of the company, instead of private partnership stocks. Fiqh salaf views that the *mudharabah* and *musyarakah* contracts are established based on the agreement of the investors and the companies as managers *(mudharib)* for a certain period of time to avoid any *gharar*. Meanwhile, the stocks can be sold at any time on the secondary market without requiring the approval from the company that issued the shares, so that the two contracts are often considered liquid.

Most of the mutual funds are in the form of Collective Investment Contracts (KIK), a contract which raises the funds by issuing mutual fund units. Mutual fund unit is a unit of measure that shows the share of interest of each mutual fund unit holder in the collective investment portfolio. Thus, mutual fund units are proof of ownership of the mutual fund unit holder in the mutual fund.

The mutual fund assets managed by the investment manager must be deposited in a custodian bank that has no affiliation with the investment manager, where the custodian bank will

act as a collective depository and administrator. Sharia mutual fund is a platform to pool money from the public investor as the owner of securities portfolios, with the investment managers as representatives of shabib al-mal governed by the terms and principles of Islamic Sharia. National Sharia Council Fatwa (DSN) No. 20 / DSN-MUI / IV / 2001, stated that Sharia mutual fund is a mutual fund that abide by the terms and principles of Islamic Sharia, in the form of a contract between investors and investment managers (representatives of investors), or between investment managers with the investment users. The fundamental difference between Sharia and conventional mutual funds lies only in the way they are managed and the principles of applied investment policies. Sharia mutual fund investment policies are based on investment instruments with halal management methods.

II. PROBLEMS

First, There is a relationship between rights and obligations between the Investor, the Investment Manager, and the Custodian Bank. For this condition, what makes the concept of Sharia Mutual funds different from Conventional Mutual funds? Second, From the point of view of Islamic contract law, what are the legal relationships between the parties in the Collective Investment Contract (KIK)? And the third, is there other alternative contracts which is more suitable for sharia compliance of Sharia Mutual Funds?

III. RESEARCH METHOD

Research or study is a scientific activity that is systematic, directed and purposeful. So the data or information collected in this study must be relevant to the problems at hand, which means the data collected is related, effective, and accurate.[18] This study employed a descriptive analytical research method through a literature study approach. The data collection was carried out by literature study and document study as well as interviews with experts and figures in the field of Islamic capital markets. The collected data were then analyzed qualitatively. The results obtained are in the form of an alternative.

IV. DISCUSSION

Sharia Mutual Funds Differ From Conventional Mutual Funds

Principally, sharia mutual fund is a form of Islamization of conventional mutual funds and is an alternative to the ambivalence manner on Muslims, who on the one hand wish to invest their capital in mutual fund and on the other hand also have a fear of violating the terms stated in Sharia law. In Sharia mutual funds, the securities that are purchased as portfolios are the ones that do not stray away from Sharia principles applied in the capital market, such as Sharia stocks, sukuk, and other Sharia securities.

Described in the table below are the differences between conventional and Sharia mutual funds:

	Sharia Mutual Funds	**Conventional Mutual Funds**
Managements	Managed by abiding Sharia principles	Managed without following Sharia principles
The securities chosen as investments portfolio	The investments are made on the securities that are listed in the Sharia Securities List (DES)	Investments are made on any permitted securities
Purification of Non-Halal Income Mechanism	There is a Purification of Non-Halal Income Mechanism	Not available
The availability of Sharia Supervisory Board	Available	Not available
Agreement (Contract)	Sharia Contract	Not available

Referring to the explanation above, the authors conclude explicitly that the differences between conventional mutual funds and sharia mutual funds are; Sharia mutual fund is an Islamization of conventional mutual funds, where Islamic mutual funds invest their capital in issuers whose types of

business do not operate on the contrary to the principles of Islamic Sharia law; there is a purifying mechanism of income obtained from activities that are not in accordance with sharia regulations; as well as the availability of additional institutions that offer sharia principles in Sharia Mutual Fund. The additional supervisory institution is known as the Sharia Supervisory Board (DPS). In carrying out its functions and business, Shariah mutual funds, apart from being guided by the regulations of the Financial Services Authority (OJK), is also abide by the Fatwa of the National Sharia board-Indonesian Ulama Council (DSN-MUI), as independent institutions that are assigned to select halal and haram issuers, in investing their capital, as well as issuing a fatwa on a new product and problems that arise. Whereas in conventional mutual fund, the investment activities are carried out with the aims to obtain maximum profit by investing customer's capital into the instruments that have a high rate of profit with proportional risks. In addition, conventional mutual fund runs their functions and businesses by abiding the Financial Services Authority Regulation (POJK) along with other implementing rules and regulations.

Legal Relations Between The Parties In Collective Investment Contracts (KIK)

Basically, the relationships occurred in Sharia mutual fund are relationship of trust (fiduciary relation) and relationship of prudence (prudential relation). The main element of Sharia mutual fund as a "trust" institution is the transfer of trust from investors to investment managers and custodian banks. This transfer is done by transferring the authorization to manage and store investors' funds based on good faith. In relation to their capacity as the representatives of investors, investment managers are obligated to carry out their management activities optimally and not to deviate from sharia values while also taking guide from the principle of prudence.

As referred to in Article 18 section (1) of the Capital Market Law, a Mutual Fund can be established in the form of a Company or a Collective Investment Contract. This research was determined to be focusing on the implementation of mutual fund transactions with collective investment contracts. Collective investment contract is a contract between the investment manager and the custodian bank that binds the mutual fund unit holder where the investment manager is authorized to maintain the collective investment portfolio, and the custodian bank is authorized to administer the Collective Custody. Mutual Funds in the form of collective investment contracts pools the money by issuing mutual fund Units to the public investor to be invested in various types of securities traded on the capital and money market.

Mutual funds are capital market products which in their management involve several related parties. Investors who intend to develop their funds by making investments through mutual funds will build relations with the following parties, directly or indirectly. The collected funds from the investors will be managed by the Investment Manager and the Custodian Bank where both institutions will be in direct and constant contact with mutual fund investors. In addition to involving investment managers and custodian banks, mutual funds also include the Financial Services Authority (OJK) and the capital market or money market.[19]

Collective Investment Contract (KIK) is a contract between the Investment Manager and the Custodian Bank that binds the mutual fund unit holder where the Investment Manager is given the authority to handle the collective investment portfolio and the Custodian Bank is authorized to carry out collective custody. Mutual funds in the form of Collective Investment Contract (KIK) contracts raise their funds by issuing mutual fund units to the public investor which then are invested in various types of securities traded on the capital market and money market. This Collective Investment Contract (KIK) mutual fund does not issue shares aside from mutual fund units up to the amount set out in the articles of association.

Collective Investment Contract Mutual Funds are formed between the investment manager and the custodian bank. The Investment Manager is in charge of and responsible for managing the mutual fund portfolio. Meanwhile, the Custodian Bank is in charge of and responsible for administering and storing mutual fund assets. After obtaining permission from Bapepam, the investment manager can make a public offering to the investors. As a proof of investment, the investor receive mutual fund unit. The price for each mutual fund unit is based on the net asset value per mutual fund unit.

The mutual fund company is obliged to buy back the mutual fund units that are being resold by the investors at any time. The funds raised by the investment manager are later utilized to form a portfolio of securities, both the capital market and the money market.

The form of a Collective Investment Contract means that there is a contract agreed upon between the Investment Manager and the Custodian Bank which binds the Mutual Fund Unit Holder (investor). The Investment Manager is given the authority to handle the collective investment portfolio, while the Custodian Bank has the authority to execute the collective custody, carry out administrative and transfer agent functions.[20]

Nevertheless, how is the implementation of sharia mutual funds, especially in the legal relations between investment managers, custodian banks, Collective Investment Contract (KIK) mutual fund unit holders and investment fund users. The relations is a mechanism, initiated from the investors by entrusting their funds to the investment manager and entering into a Collective Investment Contract (KIK) mutual fund statement contract where the owner of the capital transfer the mandate / authority to the investment manager to handle investments for the benefit of the capital owner. Later, the investment manager maintain the funds collected from investors to be invested in various capital market investment instruments using the Collective Investment Contract (KIK) scheme together with the custodian bank, then the users of investment funds make use of the funds from investors with a profit sharing between the owners of capital represented by the investment manager and investment users.

From the description of the scheme above, in the relations between the investment manager and the custodian bank along with the mutual fund unit holder there is an agreement of authorization. As regulated in Article 1792 KUHPer *"is an agreement whereby someone gives the authorization to another person, who accepts it, to carry out an affair on his behalf"*. In another sense, the same as what has been used so far using the *Wakalah* contract where the owner of the capital is *(Al-Muwakkil)* and the investment manager is (Al-Representative) while the authorized capital or affairs is *(Muwakkal Fih)*[21]

There is also a legal agreement relation in the scheme above between an investment manager, a custodian bank, and a user of investment funds. Article 1314 of the Civil Code *"... an aggravating agreement is an agreement that requires each party to give something, do something or not do something"*. In this agreement, each party has a burden so that there is a principal on both parties.[22] In other words, it is the agreement that has been used so far, called *Mudharabah* contract where the investment manager has the authority over the investor, as *(Shahibul Mal)*, and the user of investment funds, as *(Mudharib)*.

Hence, is there a legal relation between users of investment funds and owners of capital? Juridically, as it can be seen from the sharia mutual fund mechanism scheme, the relationship between investors and users of investment funds has no direct relationship due to the purchase made by the investment manager of the original shares which are then used by investment fund users, whereas the owner of the capital only has a mutual fund unit.

Alternative Contract For Sharia Mutual Fund

The transaction scheme in the KIK Sharia Mutual Fund needs to get a deeper scientific study guided by the concept of Sharia economic transactions, especially in the legal relation between investors and Investment Managers. The relationships contained in Sharia mutual funds, which is a fiduciary relationship and a prudential relationship, are the initial foundation for the need of an in-depth study of the transaction scheme that occurs. The main element of Sharia mutual funds as a *trust* institution is the transfer of trust from investors to investment managers and custodian banks. The process happened since the main motivation for investing through Sharia Mutual Funds is not solely due to the "entry barrier" into the Capital Market on the stock exchange for individual investors, but rather due to investors' ignorance or inability to analyze the market to find out which effects are more beneficial.

Mutual Funds that serve as a form of service provision established to assist investors who wish to participate in the capital market without being directly involved in procedures, administration and analysis in a capital market.[23]

In the above statement, it can be concluded that the investor is the owner of the mutual fund unit in

the business run by the mutual fund. Thus, the investor has the same role as the shareholder of a company. Therefore, the legal relation between the investor and the Investment Manager (MI) of the Mutual Fund is not as a representative, but of a partner (partner).

For this reason, it is inappropriate to view Investment Managers as the investor's representative, because Investment Managers is acting on behalf of the Mutual Fund, but on a cooperation level, it is included as a mandate or trust based on fudiciary principles. Likewise, on the other hand, the Custodian Bank as the investment managers business partner in Collective Investment Contract (KIK), also does not act as a representative per se to investors, but has a broader function as a trustee since in taking legal action, the funds circulated on the stock exchange are listed under the name of the Custodian Bank, and not the investor. This happens because the custodian function in collective custody acts as a Trustee. As previously explained, there are two types of ownership in trust which are physical ownership (legal title) on the trustee and beneficial ownership (on the beneficiary).

In this case, the party appointed as the trustee (fiduciary) has a responsibility (fiduciary responsibility) to regulate or manage trust assets and income for the economic benefits of all beneficiaries. The purpose or usage of this trust institution is to separate management from money or an asset for its use by transferring the assets into the custody of professional or semi-professional managers so that these assets can be managed and provide maximum results for the benefit of the beneficiaries of the assets or money. According to Islamic law, this practice is not prohibited, because what is meant by ownership according to the Malikiyyah group, can be defined as the possession of the substance of the goods and described as beneficial ownership as well.[24]

Therefore, the formation of a *Trust* institution for the benefit of the Sharia Mutual Funds business is possible, in the sense of returning the function of the contract to its original position. Since Sharia Mutual Fund institution is a new formation formed in accordance to the current development, there is no need to forcefully looking for its equivalent in Islamic law as long as there are no syar'i prohibitions that are violated. Similar to the legal proposition of *mu'amalah* law which is "open" which allows the evolution in muamalah transactions practice. Islamic law can accept a "trust" institution in the form of a mutual fund *"unit" trust* because it has been practiced for years in Muslim countries.

Tracing back to the original legal system, the contract that may be involved in the establishment of Sharia Mutual Fund is a trust contract between investors and the Custodian Bank as well as the Investment Manager in the *mudharabah* system, while the legal relation between Investment Manager and fund users (Issuers) may vary depending on the contract used in the issuance of the securities according to the predetermined investment policy. If it is enforced to abide by Fatwa's requirements on the relationship between investment managers and users using the *Mudharabah* system, it will cause confusion as to who will become *shahibul maal* and who will become *mudharib*.

If we look closely, the definition of *Mudharabah* as it was defined by Nabil al Saleh is:

> *"Nearly all school of law have understood mudaraba in the following sense: "A contract between at least two parties whereby one party, called the investor (rabb al-mal) entrusts money to the other party called the agent-manager (mudarib) who is to trade with it in an agreed manner and then return to the investor the principal and a pre-agreed share of the profits and keep for himself what remains of such profits". The division of profits between the two parties must necessarily be on a proportional basis and cannot be a lump sum or a guaranteed return"* [25]

Based on the definition above, it appears that there are two parties who commit to cooperate with a proportionate share of the results which cannot be in the form of a lump sum or in the form of a return that has been promised in advance. In this context, *mudharabah* relationship is described as the relationship that occurs when the Collective Investment Contract (KIK) is drawn up between the Custodian Bank as a trustee (fiduciary) for investors and the Investment Manager Company. Schematically, the *mudharabah* in the operations of

this Sharia Mutual Fund can be seen in the diagram below.

However, for the legal relationship between investment managers and Issuer who utilize the funds, it is possible to use other contracts depending on the type of securities purchased based on the previously agreed investment policy. In this modern era, there are many things that can be done by people who do not have the expertise to invest but they have the capital to make a profit or increase their earning by partnering to buy securities offered on the Stock Exchange. Moreover, there are many brokerage services and investment brokerage services offered so that, in practice, the *mudharabah* contract mechanism will vary by employing a stock broker because the system established to invest in the Stock Exchange requires investment, such as by investment institutions listed on the Stock Exchange.

From the redaction of the article, it seems that the *Wakalah* is part of a person's rights, which is nonbinding in the sense that it may or may not be done, for basically the *wakalah* giver can complete the work that is being represented, but for one reason or another there are obstacles for him to do the work regardless of whether it is his right or he was obliged with a certain responsibility. Similarly, as described in the previous chapter, the *wakalah* contract also has weaknesses in the termination of the contract. In this contract, the parties involved, especially the authorizer *(muwakkil)* can at any time end the contract without having to notify the representative party. So, in a sharia business practice, the *wakalah* contract is not chosen as the main business contract, but as a complementary tool instead. Therefore, using the *wakalah* contract as an example, it may be necessary to reconsider and find another contract that is tijarah in nature, or to seek profit. In terms of carrying out the work, the parties involved under a legal relation in Mutual Funds can employ a *Ji'alah* contract (reward contract) or a pure Ijarah contract.

In practice, the contract *Ju'alah* is also used during the transaction of securities issued by Bank Indonesia, one of which is the Bank Indonesia Syariah Certificate (SBIS). Bank Indonesia Syariah Certificates (SBIS) are short-term securities guided by Sharia principles in the rupiah currency issued by Bank Indonesia. Bank Indonesia Syariah Certificates (SBIS) are issued as an instrument of Open Market Operations in order to implement monetary control based on Sharia principles. SBIS is issued using the Ju'alah agreement. *Ju'alah* contract is a promise or commitment *(iltizam)* to give a certain reward *('iwadh / ju'l)* for the achievement of the results *(natijah)* determined from a job. BI has determined and rewarded the issued SBIS, which is paid on its due date. The institutions that are permitted to buy SBIS are Sharia Commercial Banks (BUS) and Sharia Business Units (UUS). The objective of the issuance of this Bank Indonesia regulation concerning Bank Indonesia Sharia Certificates is intended as one of the open market operating instruments for monetary control which is issued complying to Sharia principles.[26] In SBIS Ju'alah, Bank Indonesia acts as ja'il (job provider); Islamic banks act as maj'ullah (recipients of jobs); and the object / underlying *Ju'alah (mahall al-'aqd)* is the participation of a Islamic Bank to assist the task of Bank Indonesia in monetary control by absorbing liquidity from the public and placing it at Bank Indonesia for a certain amount and period of time.

In carrying out their duties, through Collective Investment Contract (KIK), both Investment Managers and custodian bank have determined their respective duties and part of the *ujrah* (wages). From here on, it can be seen that there is an agreement to do certain work with payment of wages *(ujrah)*, so it is obvious that there are elements of the Ijarah contract in the agreement. In this case, the contracts that are applied in the agreement between investment managers and custodian bank contain the elements of several types of contracts, which are the *wadiah yaddhamanah* (deposit) contract, *wakalah* (representative), and ijarah (service) and trustee. When funds are deposited, the *wadiah* contract applies. When investment managers gives instructions for the transaction, the *wakalah* contract applies to the transacted funds. *Wakalah* contract can be implemented as custodian bank represents investment managers in making investment transactions. The *ijarah* contract is enforced because custodian bank also performs services related to administrative tasks in the form of calculations and reporting for investment managers. Fiduciary responsibility also required for

the contract stated "Contracts for the Interest of Mutual Funds Unit Holders".

V. CONCLUSION

1. The difference between the concept of Sharia Mutual Funds and Conventional Mutual Funds can be seen in the process of capital investment transactions for issuers whose types of business abide by the principles of Islamic law. In carrying out its functions and business, Sharia mutual fund, apart from being guided by the regulations of the Financial Services Authority (OJK), is also complied to the Fatwa of the National Sharia Board-Indonesian Ulema Council (DSN-MUI).
2. Currently, the scheme in the legal relation between Sharia mutual funds apply the *Mudharabah* contract where the investment manager as the authorized owner of the capital as *(Shahibul Mal)* and the user of the investment fund as *(Mudharib)*. Islamic law allows the concept of Collective Investment Contract (KIK) Sharia Mutual Fund which is not signed directly by investors in the making as a *wakalah* contract mechanism. This is possible because the requirements of the *Wakalah* contract in Islamic law do not require a specific form in the *Ijab-qabul*. The approval from investors who come afterward to commit themselves into the Collective Investment Contract (KIK) made by the Invesment Managers and Custodian Bank can be considered as an *ijab*.
3. Even though the contract which is currently implemented in Collective Investment Contract (KIK) Mutual Funds is *mudharabah*, it is possible that there is a suitable contract concept for each contract has different characteristics and legal consequences between the two parties. Based on the results of the analysis above, there is a contract that can be used as an alternative to the *mudharabah* contract. Based on the *wakalah* contract, in Collective Investment Contract (KIK) Mutual Fund transaction process, it is necessary to reconsider the use another contract that is *tijarah* in nature, or to make a profit. In terms of carrying out the work, the parties involved in a legal relationship of Mutual Funds can employ a *Ji'alah* contract (reward contract) or a pure Ijarah contract. In practice, the contract is also used in the transaction of securities issued by Bank Indonesia, one of which is the Bank Indonesia Syariah Certificate (SBIS). J*u'alah* contract, which is a promise or commitment *(iltizam)* to give certain rewards *('iwadh / ju'l)* for the achievement of the results *(natijah)*, is determined from a job. Adopting the concept of a contract does not rule out the possibility that it is applicable as well in Sharia Mutual Fund Collective Investment Contract (KIK) transactions.

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